THE DIGEST

OF

ONTARIO CASE LAW

BEING

THE REPORTED CASES

DETERMINED IN THE COURTS OF THE NOW

PROVINCE OF ONTARIO

FROM

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

TOGETHER WITH

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

COMPILED BY ORDER OF THE LAW SOCIETY OF UPPER CANADA

BY

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BARRISTERS-AT-LAW.

VOL. III

CONTAINING THE TITLES

NAME TO TRUSTS AND TRUSTEES.

TORONTO:
THE CARSWELL COMPANY, LIMITED
1903

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ENTERED according to the Act of the Parliament of Canada, in the year of our Lord one thousand nine hundred and three, by THE LAW SOCIETY OF UPPER CANADA, in the office of the Minister of Agriculture.

TABLE OF ABBREVIATIONS

OF THE PRINCIPAL CANADIAN REFERENCES.

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

TABLE OF ABBREVIATIONS.

(Imp.).....Imperial Statute.
L. C. Jur.....Lower Canada Jurist.
L. C. G. .....Local Courts Gazette (Upper Canada Law Journal).
L. J. .....Upper Canada Law Journal.
(M.) or Man.....Province of Manitoba.
Man. L. R. .....Manitoba Law Reports.
(M. C.) .....Municipal Code (Quebec).
M. T. .....Michaelmas Term.
N. B. Rep. .....New Brunswick Reports.
N. S. Rep. .....Nova Scotia Reports.
N. W. T. Rep. .....North-West Territories Reports.
(O.) .....Province of Ontario.
O. J. Act .....Ontario Judicature Act.
O. R. .....Ontario Reports.
O. S. .....Old Series of King's and Queen's Bench Reports (Ontario).
P. E. I. .....Prince Edward Island.
Pr.....Practice Reports (Ontario).
Pugs.....Pugsley's Reports (New Brunswick, 14, 15, 16).
Pugs & Burb. .....Pugsley & Burbidge Reports (New Brunswick, 17-20).
Q. B. D. .....Queen's Bench Division.
Q. L. R. .....Quebec Law Reports.
Q. R. Q. B. .....Quebec Reports, Queen's Bench.
R.....The Reports (England), 1893-1895.
R. G. .....Regulæ Generales (Ontario).
R. & H. Dig. .....Robinson & Harrison's Digest (Ontario)
R. & J. Dig.....Robinson & Joseph's Digest (Ontario).
R. S. C. .....Revised Statutes of Canada, 1886.
R. S. O. 1877.....Revised Statutes of Ontario, 1877.
R. S. O. 1887.....Revised Statutes of Ontario, 1887.
R. S. O. 1897.....Revised Statutes of Ontario, 1897.
R. S. Q.....Revised Statutes of Quebec.
R. S. N. S. 4th ser....Revised Statutes of Nova Scotia, 4th series.
R. S. N. S. 5th ser....Revised Statutes of Nova Scotia, 5th series.
Rev. Leg. .....Revue Légale (Quebec).
Russ. Eq. Reps.....Russells' Equity Decisions (Nova Scotia).
Russ. & Ches.....Russell & Chesley's Reports (N. S. R. 10-12).
Russ. & Geld.....Russell & Geldert's Reports (N. S. R. 13 to 32).
S. C. R.....Supreme Court of Canada Reports.
Stephens' Dig. .....Quebec Law Digest by Stephens.
Stevens' Dig. .....Stevens' Digest, (New Brunswick).
Tay. .....Taylor's Reports (Ontario).
T. T. .....Trinity Term.
U. C. R. .....Queen's Bench Reports (Ontario).
U. S. R.....United States Supreme Court Reports.

The Digest

OF

ONTARIO CASE LAW.

NAME.

See COMPANY, I.—MISNOMER.

NATURALIZATION.

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

NAVIGABLE WATERS.

See CONSTITUTIONAL LAW, II. 21—WATER AND WATERCOURSES, XI.

NAVIGATION, HARBOURS, AND FISHERIES.

See CONSTITUTIONAL LAW, II. 21.

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See ARMY, NAVY, AND MILITIA.

NE EXEAT PROVINCIA.

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I. GENERALLY.

Cause of Action—*Contravention of Canal Regulations.*]—The declaration set out certain regulations for the proper use of the Welland canal, and alleged that defendant's vessel wrongfully, and in violation of the regulations, endeavoured to enter the lock, whereby it was driven against the plaintiffs' boat, which was forced against the side of the lock and injured:—Held, bad, for the contravention of the regulations formed no cause of action, and no negligence on defendant's part was alleged. *Jacques* v. *Nicholl*, 25 U. C. R. 402.

Imperial Statute—*Protection from Liability.*]—The statute 14 Geo. III. c. 78, s. 86, which is an extension of 6 Anne c. 31, ss. 6, 7, is in force in the Province of Ontario as part of the law of England, introduced by the Constitutional Act, 31 Geo. III. c. 31, but has no application to protect a party from legal liability as a consequence of negligence. *Canada Southern R. W. Co.* v. *Phelps*, 14 S. C. R. 132.

Joint Duty—*Non-performance.*]—Semble, that when the tort alleged is the non-performance of a joint duty, if that joint duty be not proved the plaintiff must fail in toto. *Woods* v. *Municipality of Wentworth and Corporation of Hamilton*, 6 C. P. 101.

Lawful Act—*Consequences.*]—Where the unavoidable consequence of a lawful act done by a person on his own land (such as the erection of a mill dam) is to injure his neighbour,

an action lies for such injury; but not if such act per se would not be necessarily or probably injurious, but becomes so from a cause not under the control of either party. Negligence must then be proved to render a defendant liable. *Peters* v. *Devinney*, 6 C. P. 389.

——— *Statute Permitting — Consequences of.*]—In an action for damages caused by overflowage, it appeared that the defendants' boom in a river broke by reason of the heavy floods, whereupon they constructed another boom lower down near to a certain bridge, which also broke, and the logs became massed against the bridge, which the jury found, with the excess of rain, caused the injury complained of. They did not find negligence on the part of the defendants, but that they were guilty of a wrongful act in throwing the boom across the river:—Held, that the defendants were entitled to judgment. The use of the boom being lawful by R. S. O. 1887 c. 121, s. 5, and no negligence in its construction being pretended, it was impossible to say that what was thus expressly legalized, could be made the ground of an action of tort. *Langstaff* v. *McRae*, 22 O. R. 78.

Time of Negligent Act—*Setting out Fire.*]—In the month of August the defendant set out fire on his own land for the purpose of clearing it. This fire continued to burn till October, when, in consequence of a very high wind, sparks were carried to the plaintiff's land, and set fire to some ties and posts stored thereon:—Held, that the question of the defendant's liability for negligence should be determined having regard to the circumstances existing in October, and not to those existing in August. *Beaton* v. *Springer*, 24 A. R. 297.

II. Abatement of Action.

Revivor—*Suggestion of Death.*]—Action against a conductor of a railway train for injuries received in attempting to board a train, and alleged to be caused by the negligence of the conductor in not bringing the train to a stand still. There was a nonsuit, which was set aside and a new trial ordered. Between the verdict and the judgment ordering a new trial, the plaintiff died, and a suggestion of his death was entered on the record:—Held, that under Lord Campbell's Act, or the equivalent statute in New Brunswick (C. S. N. B. c. 86), an entirely new cause of action arose on the death, and the original action was entirely gone, and could not be revived. There being no cause before the supreme court, the appeal was quashed without costs. *White* v. *Parker*, 16 S. C. R. 699.

An action for injury to the person now survives to the executor of the plaintiff, who can, in case of his death pendente lite, on entering a suggestion of the death, and obtaining an order of revivor, continue the action. *Mason* v. *Town of Peterborough*, 20 A. R. 683.

After the commencement of an action for injury occasioned by negligence and improper conduct of defendant in the management of a vessel, defendant died:—Held, that the action could not be revived against his executor. *Cameron* v. *Milloy*, 22 C. P. 331.

III. Contributory Negligence.

Absence of Ordinary Care — *Findings of Jury.*] — Action against defendants as owners of a macadamized road, which it was alleged they allowed to get out of repair at its point of intersection with another road, whereby the plaintiff was thrown out of his waggon, and broke his leg, &c. It appeared that the plaintiff was driving a high load of empty barrels, in a rack unfastened to the waggon, and that on coming to this spot, where the road was lower on one side than the other by 18 inches, so as to carry on the incline of a cross road, and which had deeper ruts on the lower side than on the higher, the plaintiff got on the high side of the load to steady it; the load upset, and the plaintiff was thrown down and broke his leg. The jury, in answer to the questions submitted, found: (3) that it was not prudent for the plaintiff to have driven over the spot in question on the top of the load; (4) that the plaintiff, sitting as he did, contributed to the cause of the accident; (5) that it was imprudent not to fasten the rack, and the omission to do so contributed to the accident:—Held, that the answers to the third and fourth questions, though shewing some negligence on the plaintiff's part, did not amount to a finding of contributory negligence, so as to prevent his recovery; but that the answer to the fifth question was a finding of contributory negligence, which would bar the action. *Bradley* v. *Brown*, 32 U. C. R. 463.

——— *Warning.*]—In an action for negligence against the owners of a steamboat, for injuries sustained by the plaintiff in consequence of one of the fenders having broken loose from the steamboat while leaving a wharf, and striking and injuring the plaintiff, who was standing on the wharf, where it appeared that the plaintiff had received warning to stand clear of the fenders, and that a person with ordinary care might have escaped, the court set aside a verdict for plaintiff, and granted a new trial on payment of costs. *Grieve* v. *Ontario Steamboat Co.*, 4 C. P. 387.

Accident Assurance Company — *Liability of.*]—See *Neill* v. *Travellers' Ins. Co.*, 31 C. P. 394, 7 A. R. 570, 12 S. C. R. 55.

Collision — *Bridge.*] — The persons in charge of a vessel are bound when approaching at night a drawbridge, lawfully erected, to keep the vessel under complete control, and are not entitled to assume that the draw of the bridge is open or will be opened in time to let the vessel through. Therefore, if a vessel is allowed to approach so close to the bridge that collision with it cannot be avoided when the draw is found to be closed, damages are not recoverable from the bridge owners. *Gilmour* v. *Bay of Quinte Bridge Co.*, 20 A. R. 281.

Drunkenness.]—When a waggon is left standing in the highway, the owner cannot defend himself by shewing that the person injured thereby was drunk. *Ridley* v. *Lamb*, 10 U. C. R. 354.

——— *Jury — Perverse Verdict — New Trial.*]—In an action against a railway company for killing the plaintiff's horses by collision at a crossing, the weight of evidence went strongly to shew that the plaintiff was intoxicated, and the accident caused by his

own negligence and bad driving. The jury, however, found in his favour. The Judge who tried the case being dissatisfied with the verdict, and there being reason to believe that it arose from mistaken sympathy on the part of the jury for a poor man as against a railway company, the court granted a new trial with costs to abide the event. *McGunigal* v. *Grand Trunk R. W. Co.*, 33 U. C. R. 194.

Entry on Dangerous Premises — *Infant—Pleading.*]—Declaration by the plaintiff, as administratrix of J. M., that defendant was possessed of a certain lot on the highway, on which there was a cellar, which he negligently and wrongfully suffered to remain open, whereby said J. M., being an infant under twelve years, and owing to his youth incapable of exercising and not responsible for the want of ordinary care and caution, and ignorant of the risk, went upon the beams across said cellar, fell in, and was killed. Plea, that the said J. M. improperly and unlawfully went upon said premises, and by his own unlawful conduct and negligence, and not through any default of defendant, slipped and fell in:—Held, on demurrer to the plea, declaration good, shewing sufficiently that the cellar was upon the highway; plea bad, as not denying the youth of J. M., or its alleged effect. *McIntyre* v. *Buchanan*, 14 U. C. R. 581.

——— *Reversal of Finding—Damages.*]—The part of defendants' office devoted to the public was some sixteen and a half feet long from south to north, the entrance door being at the south, and the width was five feet seven inches. About four feet nine inches from the south, and on the east wall, was a desk or counter for writing messages, seven feet six inches long, and one foot seven inches wide. About five inches north of the counter, and in the centre of the apartment, there was a trap door leading to the cellar about two feet nine inches square. On the west side of the apartment was a partition about six feet high, separating the public office from the operator's department, the entrance to which was at the north end of the partition. In this partition there was an opening with a desk in it, where also messages were written and delivered to the operator. D. came in quickly to send a message, spoke to the operator at this opening, and then went behind the counter as if to go into the operator's room, when, the trap door being open, he fell through into the cellar, and received injuries of which he died. There was evidence given to shew that deceased said it was his own fault, and that he ought not to have been where he was; that the office was a very light one, and that there was no difficulty in seeing the trap; but it also appeared that other persons on other occasions had nearly fallen into it. The Judge, who tried the case without a jury, and viewed the premises, found that the deceased was guilty of contributory negligence, which precluded the plaintiff, his administratrix, from recovering:—Held, that defendants were liable; that the evidence of the open trap door in the part appropriated to the public was negligence for which defendants were chargeable; and that there was no evidence of contributory negligence on the part of the deceased. *Denny* v. *Montreal Telegraph Co.*, 42 U. C. R. 577.

On appeal the court, without deciding that it would have disturbed the finding at the trial, held that no sufficient reason was shewn for reversing the decision below, which was the immediate subject of the appeal; but held, also, that the court should have assessed the damages, and entered the verdict which, in its opinion, should have been entered at the trial; and they accordingly assessed the damages, and varied the rule by directing a verdict to be entered for the amount. *S. C.*, 3 A. R. 628.

Evidence—*Onus—Jury.*]—In an action to recover damages for negligence, tried with a jury, where contributory negligence is set up as a defence, the onus of proof of the two issues is respectively upon the plaintiff and the defendant, and though the Judge may rule negatively that there is no evidence to go to the jury on either issue, he cannot declare affirmatively that either is proved. The question of proof is for the jury. Weir v. Canadian Pacific R. W. Co., 16 A. R. 100, was a non-jury case, and laid down no rule for the disposition of a case tried with a jury. *Morrow* v. *Canadian Pacific R. W. Co.*, 21 A. R. 149.

——— *Findings of Jury.*]—On the trial of an action against a street railway company for damages in consequence of injuries received through the negligence of the company's servants, the jury answered four questions in a way that would justify a verdict for the plaintiff. To the fifth question, "Could Rowan by the exercise of reasonable care and diligence have avoided the accident?" the answer was, "We believe that it could have been possible:"—Held, that this answer did not amount to a finding of negligence on the part of the plaintiff as a proximate cause of the accident which would disentitle him to a verdict. Held, further, that, as the other findings established negligence in the defendants which caused the accident, which amounted to a denial of contributory negligence, as there was no evidence of negligence on plaintiff's part in the record, and as the court had before it all the materials for finally determining the questions in dispute, a new trial was not necessary. *Rowan* v. *Toronto R. W. Co.*, 29 S. C. R. 717.

——— *Machinery — Knowledge—Carelessness.*]—In an action for damages by an employee for injuries sustained while operating an embossing and stamping press, it appeared that when the accident causing the injury occurred, the whole of the employee's hand was under the press, which was unnecessary, as only the hand as far as the second knuckle needed to be inserted for the purpose of the operation in which he was engaged. It was alleged that the press was working at undue speed, but it was proved that the speed had been increased to such extent at the instance of the employee himself, who was a skilled workman:—Held, that the injury occurred by a mere accident not due to any negligence of the employer, but solely to the heedlessness and thoughtlessness of the injured man himself, and the employer was not liable. *Burland* v. *Lee*, 28 S. C. R. 348.

Infant.]—Semble, that the doctrine of contributory negligence is not applicable to a child of tender years. Gardner v. Grace, 1 F. & F. 359, approved of. *Sangster* v. *T. Eaton Co.*, 25 O. R. 78. See *S. C.*, 21 A. R. 624, 24 S. C. R. 708.

The doctrine of contributory negligence does not apply to an infant of tender age. Gardner v. Grace, 1 F. & F. 359, followed. *Merritt* v. *Hepenstal*, 25 S. C. R. 150.

Knowledge.]—Knowledge is not per se contributory negligence. *Gordon* v. *City of Belleville*, 15 O. R. 26.

Negligence of Driver of Carriage— *Injury to Occupant.*]—The doctrine that the occupant of a carriage is not identified as to negligence with the driver applies only where the occupant is a mere passenger having no control over the management of the carriage. Where, therefore, the hirer of a carriage allows one of his friends to drive and an accident results from the latter's negligence, the former cannot recover. *Flood* v. *Village of London West*, 23 A. R. 530.

Nonsuit—*Undisputed Facts—Inference.*]—In actions for negligence the power of the Judge to nonsuit on the ground of contributory negligence is restricted to cases where it is plain and indisputable that the injury of which the plaintiff complains would not have occurred but for his own want of proper care. Where the facts, or the proper inference from the facts, are in dispute, the case must go to the jury. And where the defendants negligently left a hole in the floor of a room unguarded, and the plaintiff, going into the room, saw the danger and at first avoided it, but, on turning to go out again, lost sight of it, stepped into the hole, and was injured:—Held, these facts being undisputed, that it was properly left to the jury to say whether she was negligent or not. *Scriver* v. *Lowe*, 32 O. R. 290.

Submitting Questions of Contributory Negligence to Jury.]—See *Bennett* v. *Grand Trunk R. W. Co.*, 7 A. R. 470; *Mawe* v. *Townships of King and Albion*, 8 A. R. 248; *Edgar* v. *Northern R. W. Co.*, 4 O. R. 201; *Blackmore* v. *Toronto Street R. W. Co.*, 38 U. C. R. 172; *Devlin* v. *Bain*, 11 C. P. 523; *Humphrey* v. *Wait*, 22 C. P. 580; *Township of Stafford* v. *Bell*, 6 A. R. 273; *Bliss* v. *Boeckh*, 8 O. R. 451; *Müller* v. *Reid*, 10 O. R. 419; *Copeland* v. *Village of Blenheim*, 9 O. R. 19; *Town of Portland* v. *Griffiths*, 11 S. C. R. 333; *City of St. John* v. *Macdonald*, 14 S. C. R. 1; *Follet* v. *Toronto Street R. W. Co.*, 15 A. R. 346; *Doan* v. *Michigan Central R. W. Co.*, 17 A. R. 481; *Lawson* v. *Alliston*, 19 O. R. 655; *Makins* v. *Pigott*, 29 S. C. R. 188; *George Matthews Co.* v. *Bouchard*, 28 S. C. R. 580; *Clark* v. *Grand Trunk R. W. Co.*, 20 U. C. R. 136; *Meshane* v. *Toronto, Hamilton, and Buffalo R. W. Co.*, 31 O. R. 185.

Trespasser — *Warning—Imprudence.*]—A cow-boy aboard a ship on the eve of departure from the port of Montreal was injured by the falling of a derrick then in use which had been insecurely fastened. He was not at the time engaged in the performance of any duty, and, although he had been warned to "stand from under," he had not moved away from the dangerous position he was occupying:—Held, that the boy's imprudence was not merely contributory negligence, but constituted the principal and immediate cause of the accident, and that, under the circumstances, neither the master nor the owners of the ship could be held responsible for damages on account of the injuries he received. *Roberts* v. *Hawkins*, 29 S. C. R. 218.

Volunteer — *Common Fault—Division of Damages.*]—P. was proprietor of certain lumber mills and a bridge leading to them across the river Batiscan. The bridge being threatened with destruction by the spring floods, the mill foreman called for volunteers to attempt to save it by undertaking manifestly dangerous work in loading one of the piers with stone. While the work was in progress the bridge was carried away by the force of the waters and one of the volunteers was drowned. In an action by the widow for damages:—Held, that the maxim "volenti non fit injuria" did not apply, as the case was one in which both the mill owner and deceased were to blame, and that, being a case of common fault, the damages should be divided according to the jurisprudence of the Province of Quebec. *Price* v. *Roy*, 29 S. C. R. 494.

IV. Damages.

1. *Actions by Representatives of Persons Killed by Negligence.*

Loss of Services—*Care of Children.*]—Held, affirming the decision in 11 A. R. 1, which reversed the decision in 1 O. R. 545, that, although on the death of a wife, caused by negligence of a railway company, the husband cannot recover damages of a sentimental character, yet the loss of household services accustomed to be performed by his wife, which would have to be replaced by hired services, is a substantial loss for which damages may be recovered, as is also the loss to the children of the care and moral training of their mother. *St. Lawrence and Ottawa R. W. Co.* v. *Lett*, 16 S. C. R. 422.

Quantum of Damages.]—In actions under 10 & 11 Vict. c. 6 (C. S. C. c. 78) the court will interfere if the damages are clearly excessive; but it was held, under the circumstances of this case, that £3,000 was not exorbitant for the widow and three children of deceased. Semble, that the mother in this case could have no claim. *Secord* v. *Great Western R. W. Co.*, 15 U. C. R. 631.

New trial granted, where the jury gave £5,000, to be distributed £500 to the widow, and the rest in unequal sums among five infant children, the deceased having been a blacksmith, 35 years of age, the patentee of an invention for an improved plough, and of careful, industrious habits, &c. *Morley* v. *Great Western R. W. Co.*, 16 U. C. R. 504.

Right to Deduct Insurance Moneys.]—The deceased had effected a policy of insurance on his life, which was in force at the time of his death. At the trial the jury was directed to deduct the amount of the policy from the verdict, which amount was afterwards added by a divisional court (8 O. R. 601). An appeal, the court being equally divided in opinion on this branch of the case, was dismissed with costs. Hicks v. Newport, &c., R. W. Co., 4 B. & S. 403 n., commented on. *Beckett* v. *Grand Trunk R. W. Co.*, 13 A. R. 174, 16 S. C. R. 713.

The right conferred by Lord Campbell's Act, adopted by R. S. O. 1887 c. 135, ss. 2 and 3, to recover damages in respect of death occasioned by wrongful act, neglect or default, is

restricted to the actual pecuniary loss sustained by the plaintiff. Where the widow of deceased is plaintiff, and her husband had made provision for her by a policy on his own life in her favour, the amount of such policy is not to be deducted from the amount of damages previously assessed irrespective of such consideration. She is benefited only by the accelerated receipt of the amount of the policy, and that benefit, being represented by the interest of the money during the period of acceleration, may be compensated by deducting future premiums from the estimated future earnings of the deceased. Hicks v. Newport, &c., R. W. Co., 4 B. & S. 403 n., approved. Judgment in 15 A. R. 477 affirmed. *Grand Trunk R. W. Co. of Canada* v. *Jennings*, 13 App. Cas. 800.

Solatium for Bereavement.] — In an action for damages brought for the death of a person by the consort and relations under art. 1056, C. C., which is a re-enactment and reproduction of C. S. L. C. c. 78, damages by way of solatium for the bereavement suffered cannot be recovered. *Canadian Pacific R. W. Co.* v. *Robinson*, 14 S. C. R. 105.

See post V.

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2. *Other Cases.*

Assessment by Court of Appeal.]—See *Denny* v. *Montreal Telegraph Co.*, 42 U. C. R. 577.

Division of Damages—*Common Fault—Quebec Law.*]—See *Price* v. *Roy*, 29 S. C. R. 494.

Inappreciable Effect of Negligence—*Findings of Jury—New Trial.*]—See *Kerry* v. *England*, [1898] A. C. 742.

Measure of Damages — *Carriers—Delivery of Goods—Fall in Market Price.*]—See *Monteith* v. *Merchants Despatch Co.*, 1 O. R. 47, 9 A. R. 282.

——— *Carriers—Freight.*]—The plaintiffs had undertaken to carry a cargo of stone in their schooner from C. to P., and had got as far as K., where she was injured by the negligence of defendants' servants in towing her. The stone was forwarded by defendants to P. In an action brought by the plaintiffs for the injury:—Held, that they could not recover as damages any part of the freight, for they might adopt defendants' act, and recover the whole from the consignees. *Stevenson* v. *Calvin*, 25 U. C. R. 102.

——— *Collision—Injury to Vessel—Repair—Wages—Hire of Substitute.*]—In an action for injury to plaintiff's vessel caused by collision with defendants' steamboat:—Held, that the plaintiff was entitled to recover the cost of repairing his vessel, and for the permanent injury done to her, and the wages of his crew necessarily kept over during the repairs; but not the sum expended in the hire of another vessel to take her place, or the profits which he would have earned by her employment. Semble, that in an action of trover for a vessel, the profits lost may be recovered. *Brown* v. *Beatty*, 35 U. C. R. 328.

———*Harbour Company—Loss of Vessel—Attempts to Rescue.*]—In an action against a harbour company, charging that it was their duty to keep a sufficient light upon the end of one of their piers, as they had been in the habit of doing, to enable vessels to enter with safety, and that they had wrongfully removed such light without giving sufficient public notice, by reason of which the plaintiff's vessel while endeavouring to enter the said harbour had been lost:—Held, that in addition to the value of his vessel the plaintiff was entitled to recover a further sum expended by him in good faith, and with a reasonable expectation of success, in attempting to raise the vessel for the purpose of repairing her. *Sweeney* v. *Port Burwell Harbour Co.*, 17 C. P. 574.

Quantum of Damages—*Registrar of Deeds—Mortgage.*]—A registrar, being applied to by the plaintiff for a certificate of the registries on a lot, gave one in which he omitted to mention a mortgage for $600 prior to that which the plaintiff purchased, supposing it from the certificate to be a first incumbrance. The first mortgagee obtained a decree for sale, and the plaintiff purchased the land at less than would satisfy the two mortgages, but he soon afterwards sold at a considerable advance, so that in the end he would receive all that he paid for his mortgage. In an action against the registrar for this omission in his certificate, the jury gave $500 damages:—Held, that the damages were moderate, the plaintiff having in fact sustained loss to the full amount of the first mortgage. *Harrison* v. *Brega*, 20 U. C. R. 324.

Right to Deduct Insurance Moneys.]—In an action by plaintiff to recover damages for the destruction of his dwelling house and a quantity of chattel property caused by sparks emitted from defendant's steam tug through defendant's negligence:—Held, that the defendant was not entitled to deduct from the amount of damages found to have been sustained by the plaintiff, an amount paid to the plaintiff by an insurance company under an insurance on the property. *Brown* v. *McRae*, 17 O. R. 712.

Set-off of Damages — *Action on Contract.*]—In an action by the plaintiff, an architect, on the common counts, for services in preparing plans and superintending the erection of a house for defendant:—Held, that the defendant was entitled to deduct from the amount which the plaintiff could otherwise claim any loss which defendant had sustained through the plaintiff's negligence, in certifying too much for contractors who afterwards failed, in consequence of which defendant was compelled to have the work done by others at a much higher price. *Irving* v. *Morrison*, 27 C. P. 242.

See Badgley v. *Dickson*, 13 A. R. 494, *post* VIII.

Vindictive Damages—*Action against Landlord for Accident Occasioned by Negligence of Persons in Charge of an Elevator.*]—See *Stephens* v. *Chaussé*, 15 S. C. R. 379.

See Collins Bay Rafting and Forwarding Co. v. *Kaine*, 29 S. C. R. 247; *Hesse* v. *St. John R. W. Co.*, 30 S. C. R. 218.

V. Death by Negligence—Actions by Representatives.

Right to Recover—*Loss of Illegitimate Son.*]—The plaintiff, as administratrix, sued the defendants, under 44 Vict. c. 22, s. 7 (O.), for the death of her illegitimate son, a brakesman on the defendants' railway, who was killed by being carried against a bridge not of the height required by that Act, while on one of their trains passing underneath it. The bridge belonged to another railway company, which had the right to cross the defendants' line in that way, and though the time allowed by the statute for raising the bridge had expired, they had not done so. The jury found that the defendants had been guilty of negligence in not raising, or procuring to be raised, the bridge:—Held, that, as the Act was intended to give no greater right to recover than Lord Campbell's Act, the plaintiff's relationship to the deceased was not such as to give her a right to recover. *Gibson* v. *Midland R. W. Co.*, 2 O. R. 658.

——— *Loss of Son.*]—The plaintiff's son, who had just come of age, was killed by accident in the defendant's machine shop, where he had been temporarily employed. For about two years previously he had, while attending school, worked on his father's farm, as farmers' sons usually do, without wages, and it was intended that he should study medicine, at an expense to his father of about $1,000, the course lasting three or four years, and in the vacations, while so engaged in acquiring his intended profession, it was expected that he would work at home as usual. In an action by his father as administrator to recover damages for the death of his son:—Held, that he could have no reasonable expectation of pecuniary or material benefit from the son's life, and a nonsuit was ordered to be entered. *Mason* v. *Bertram*, 18 O. R. 1.

——— *Person Beneficially Entitled.*]—An action for damages by reason of the death of a person can be maintained under R. S. O. 1887 c. 135, s. 7, by the person beneficially entitled, though brought within six calendar months from the death, unless there be at the time an executor or administrator of the deceased. *Lampman* v. *Township of Gainsborough*, 17 O. R. 191.

——— *Quebec Code—Lord Campbell's Act—Master and Servant — Contract — Exoneration—Crown.*]—Article 1056, C. C., embodies the action previously given by a statute of the Province of Canada re-enacting Lord Campbell's Act. Robinson v. Canadian Pacific R. W. Co., [1892] A. C. 481, distinguished. A workman may so contract with his employer as to exonerate the latter from liability for negligence, and such renunciation would be an answer to an action under Lord Campbell's Act. Griffiths v. Earl Dudley, 9 Q. B. D. 357, followed. In s. 50 of the Government Railways Act, R. S. C. c. 38, providing that "Her Majesty shall not be relieved from liability by any notice, condition, or declaration in the event of any damage arising from any negligence, omission, or default of any officer, employee, or servant of the minister," the words "notice, condition, or declaration" do not include a contract or agreement by which an employee has renounced his right to claim damages from the Crown for injury from negligence of his fellow servants. Grand Trunk R. W. Co v. Vogel, 11 S. C. R. 612, disapproved. An employee on the Intercolonial Railway became a member of the Intercolonial Railway Relief and Assurance Association, to the funds of which the government contributed annually $6,000. In consequence of such contribution a rule of the association provided that the members renounced all claims against the Crown arising from injury or death in the course of their employment. The employee having been killed in discharge of his duty by negligence of a fellow-servant:—Held, reversing the judgment in 6 Ex. C. R. 276, that the rule of the association was an answer to an action by his widow under art. 1056, C. C., to recover compensation for his death. *The Queen* v. *Grenier*, 30 S. C. R. 42.

Ship—*Collision—Maritime Court — Jurisdiction—Loss of Son.*]—The appellant's child, a minor, was killed in a collision between two vessels by the negligence of the officers in charge of one of them ("The Garland"). Petition against "The Garland"—libelled under the Maritime Court Act at the port of Windsor—on behalf of the appellant claiming $2,000 damages suffered by her, owing to the death of her son and servant, caused by the negligence of the officers in charge of the said "Garland." The respondent intervened, and demurred on the ground that the petition did not set forth a cause of action against "The Garland" within the jurisdiction of the court:—Held, that the maritime court of Ontario has no jurisdiction apart from R. S. O. 1877 c. 128 (re-enacting in this Province Lord Campbell's Act, 9 & 10 Vict. c. 93), in an action for personal injury resulting in death, and therefore the appellant had no locus standi, not having brought her action as the personal representative of the child. Held, also, that vice-admiralty courts in British possessions and the maritime court of Ontario, have whatever jurisdiction the high court of admiralty has over "any claim for damages done by any ship, whether to person or to property." *In re "The Garland," Monaghan* v. *Horn*, 7 S. C. R. 409.

See ante IV. (1).

See Ferrie v. *Great Western R. W. Co.*, 15 U. C. R. 513; *Hutton* v. *Town of Windsor*, 34 U. C. R. 487.

VI. In Care and Construction of Buildings.

Cornice Falling from Roof.]—The owner of a building, from which a cornice overhanging the sidewalk falls, because the nails fastening it to the building have become loosened by ordinary decay, and injures a passer-by, is liable in damages without proof of knowledge on his part of the dangerous condition of the cornice, the defect being one that could have been ascertained by him by reasonable inspection. *Roberts* v. *Mitchell*, 21 A. R. 433.

Lodging House—*Dangerous Passage—Knowledge of Danger.*]—Defendant, the owner of a house, leased to plaintiff a room in it, the only mode of access to which, and to the other rooms in the same storey, was by a certain passage, in which there was an uncovered stovepipe hole. The plaintiff, having agreed with defendant to change into an adjoining room, was in the act of moving her

furniture, when she slipped into this hole and was injured:—Held, that defendant was not liable, for in the absence of express contract he was under no legal obligation to keep the premises in repair. The plaintiff was aware of the existence of this hole when she took the room. Quære, whether such knowledge, and her omission to cover it, was not evidence of contributory negligence which would have prevented her recovery. *Humphrey* v. *Wait*, 22 C. P. 580.

Snow Falling from Roof.]—There is no duty at common law upon owners or occupiers of houses to remove snow from the roof, and no liability for accidents caused by its falling. Defendants, owning land in a city, leased it to H. upon certain conditions as to building, and he erected a house upon it under the directions of their architect. The lower storey was occupied by one S. as lessee of H., and the upper storey and garret by defendants. There was no evidence of any faulty or negligent construction of the house or roof, nor of any by-law passed by defendants to regulate the removal of snow. The plaintiff having been injured while passing along the street by snow falling from the roof:—Held, that defendants were not liable. *Lazarus* v. *City of Toronto*, 19 U. C. R. 9.

In an action for damages sustained by the plaintiff by reason of ice and snow falling from the roof of defendant's house and injuring him while he was walking on the highway, evidence was given to shew that about half an hour before the accident happened the defendant was notified of the dangerous character of the roof, but took no precaution to guard against accidents, and a by-law of the municipality was proved requiring the citizens to keep their roofs clear of ice and snow:—Held, that there was evidence to go to the jury of negligence in the defendant. A nonsuit entered at the trial, was therefore set aside, and a new trial granted. Lazarus v. City of Toronto, 19 U. C. R. 9, commented on and distinguished. *Landreville* v. *Gouin*, 6 O. R. 455.

Steam—*Escape of—Injury to Adjacent Building—Notice.*]—The pipe from a condenser attached to a steam engine used in the manufacture of electricity passed through the floor of the premises and discharged the steam into a dock below, some twenty feet from an adjoining warehouse, into which the steam entered and damaged the contents. Notice was given to the electric company, but the injury continued, and an action was brought by the owners of the warehouse for damages:—Held, that the act causing the injury violated the rule of law which does not permit one, even on his own land, to do anything, lawful in itself, which necessarily injures another, and the persons injured are entitled to damages therefor, more especially as the injury continued after notice to the company. *Chandler Electric Co.* v. *Fuller*, 21 S. C. R. 337.

Wall—*Dangerous Condition—Injury to Adjacent Building—Vis Major.*]—Where a fire destroyed the defendant's house, leaving one of the walls standing in a dangerous condition, and the defendant, knowing the fact, neglected to secure or support the wall or take it down, and some days after the fire it was blown down by a high wind and damaged the plaintiff's house:—Held, that the defendant could not shield himself under the plea of vis major, and was liable for the damages caused. *Nordheimer* v. *Alexander*, 19 S. C. R. 248.

Warehouse for Goods—*Defect in Foundation.*]—A person sending goods to be warehoused has a right to expect that the building in which they are placed shall be reasonably fit for the purpose, but he has no right to expect more than ordinary and average care in that respect, and it is only in the absence of such care on the warehouseman's part that he will be liable. The fact of the building having fallen from a defect in the foundation is not conclusive evidence against the warehouseman, for that might happen without any negligence on his part. *Wilmot* v. *Jarvis*, 12 U. C. R. 641.

Water Falling from Roof—*Formation of Ice on Sidewalk.*]—The defendants were the owners of a building on the street. A pipe, connected with the eave troughs, conducted the water from the roof down the side of the building, and by means of a spout discharged it upon the sidewalk, where in the winter it was formed into a ridge of ice, upon which the female plaintiff slipped and fell while walking on the street, and injured herself. The jury found that the defendants did not know of the accumulation of ice, and that they ought not reasonably to have known it:—Held, that the defendants were not liable. *Skelton* v. *Thompson*, 3 O. R. 11.

Window Falling — *Trustees — Executors.*]—The owner of property abutting on a highway is under a positive duty to keep it from being a cause of danger to the public by reason of any defect, either in structure, repair, or use and management, which reasonable care can guard against. Dame A. T. sued J. F. and M. W. F. personally as well as in their quality of testamentary executors and trustees of the will of the late J. F., claiming $4,000 damages for the death of her husband, who was killed by a window falling on him from the third storey of a building which formed part of the general estate of the late J. F., but which had been specifically bequeathed to one G. F., and his children, for whom the said J. F. and M. W. F. were also trustees. The judgments of the courts below held the appellants liable in their capacity of executors of the general estate and trustees under the will:—Held, that the appellants were responsible for the damages resulting from their negligence in not keeping the building in repair as well personally as in their quality of trustees (d'héritiers fiduciaires) for the benefit of G. F.'s children; but were not liable as executors of the general estate. Where parties are before the court quâ executors, and the same parties should also be summoned quâ trustees, an amendment to that effect is sufficient, and a new writ of summons is not necessary. *Ferrier* v. *Trépannier*, 24 S. C. R. 86.

VII. In Driving Horses.

Facts for Jury.]—In an action for damages for injury to a verandah on a street by runaway horses, the question of negligence is for the jury, but what facts may by them be considered is a question of law. *Sandilands* v. *Bathgate*, 9 L. J. 328.

Finding of Jury—*Conflicting Evidence—New Trial.*]—Action for negligence in driving a sleigh and horses against the plaintiff. It appeared that the driver, to get better sleighing, had turned off the road to follow a track along the ditch at one side; and that in coming up again the sleigh upset, and the horses running away overtook and ran against the plaintiff. The passengers in the sleigh which was upset acquitted the driver of any negligence; but another witness, who was near at the time, said he thought if more care had been used in coming up, the accident would not have happened. The jury having found for the plaintiff, a new trial was granted. *Robinson* v. *Bletcher*, 15 U. C. R. 159.

——— *New Trial.*]—In an action for negligent driving, when the fact of negligence goes fully to the jury and they find for defendant, and no misdirection is complained of, the court, unless it appear that the evidence is conclusive in favour of the plaintiff, will not grant a new trial. *Kenny* v. *Cook*, 4 U. C. R. 268.

Ordinary Care—*Warning to Pedestrian—Nonsuit.*] — Defendant's horse being balky, defendant struck it with a whip to start it, his servant boy being on it. The horse started off, and knocked down and injured the plaintiff in a lane along which the horse ran. The boy tried to stop the horse and called to the plaintiff. The plaintiff was nonsuited:—Held, that the nonsuit was right. *Brown* v. *Heather*, 8 C. L. J. 86.

Passing Vehicle on Highway—*Statutory Requirements—Question for Jury.*]—In an action for damages occasioned by the defendant driving against the plaintiff's sleigh, which he had overtaken and was endeavouring to pass on the highway:—Held, that under ss. 2 and 3 of C. S. U. C. c. 56, it should be left to the jury to decide whether the damage was occasioned by the misconduct of defendant, or partly by the default of the plaintiff, as he, in this case, not being able to turn out, did not stop as required by the statute. *Devlin* v. *Bain*, 11 C. P. 523.

What Constitutes Negligence—*Dropping Reins.*]—It is not negligence per se for the driver of a horse of a quiet disposition, standing in the street, to let go the reins while he alights from the vehicle to fasten a head-weight, there being at the time little traffic and no noise or disturbance to frighten the animal; and the owner of the horse is not responsible for damages caused by the horse in running away when frightened by a sudden noise just after the driver has alighted. *Sullivan* v. *McWilliam*, 20 A. R. 627.

See Ridley v. *Lamb*, 10 U. C. R. 354; *Flood* v. *Village of London West*, 23 A. R. 530.

VIII. Of Particular Persons or Corporations.

Architect—*Liability to Employer.*]—Although an architect, employed by the owner for reward to superintend the construction of a house, may, as between the latter and the contractor, by the terms of their own agreement, be in the position of an arbitrator, and his decision as between them unimpeachable except for fraud or dishonesty, yet as between himself and his employer he is answerable for either negligence or unskilfulness in the performance of his duty as architect. Irving v. Morrison, 27 C. P. 242, approved. *Badgley* v. *Dickson*, 13 A. R. 494.

Bailee—*Agistment—Reasonable Care.*]—The plaintiff's mare, while in charge of the defendant under a contract of summer agistment, was killed by falling through the plank covering of a well in the defendant's yard, the existence of which was known to the defendant but not to the plaintiff, and to which yard the mare, with other horses of the defendant, had access from a field in which they were at pasture:—Held, that the plaintiff had, on proof of these facts, given sufficient primâ facie evidence of negligence to cast the onus on the defendant of shewing that reasonable care which an agister is bound to exercise; and a nonsuit was set aside. The test in such cases is not necessarily the care which the agister may exercise as to his own animals. It is, in general, not what any particular man does, but what men as a class would do with similar property as a class. *Pearce* v. *Sheppard*, 24 O. R. 167.

Bank—*Not Giving Notice to Indorser.*]—See *Steinhoff* v. *Merchants Bank*, 46 U. C. R. 25.

Bridge Company — *Draw-bridge—Open Gates—Liability.*]—Defendants were incorporated to build a draw-bridge over a river, and authorized to take tolls; and their charter empowered them to let and farm the tolls. They leased the tolls accordingly, and the lessee covenanted to open and close the draw-bridge, and cause it to be properly attended to. The plaintiff's horses, while going down a hill, ran away and threw out the driver, and then ran on to the bridge. The draw had just been opened to let a vessel pass, and there being no bar or gate to close the bridge, the horses went over the opening into the water and were drowned. There had been gates there to close the bridge while the draw was open, but they had been broken about two months previously, and the new gates which had been made were not up. The jury found that gates would have prevented the accident, and that there was no negligence on the driver's part:—Held, that the plaintiff's right of action, if any, was against the lessee, and that defendants were not liable. *Price* v. *Cataraqui Bridge Co.*, 35 U. C. R. 314.

Charterers of Tug — *Fire—Reasonable Precautions—Acts of Owner.*]—The plaintiff, owner of a scow, had, without authority, moored it permanently to the shore of a basin artificially created by the excavation of land adjacent to a navigable river, which formed the boundary at that point between Canada and the United States. The soil of the shore and basin had been patented to certain persons, the usual rights of access to the shore and of navigation being reserved. The defendants, licensees of the owners of the shore, with authority to take, and for the purpose of taking, sand from the shore by means of their own scow and a hired tug, of which the master was the owner, placed the tug and scow alongside the plaintiff's scow, by order of the foreman of the defendants' scow, to whose orders the master of the tug was bound to conform. The plaintiff's scow caught fire

from sparks emanating from the smoke-stack of the tug, and was destroyed:—Held, affirming the decision in 24 O. R. 500, that the defendants were bound to omit no reasonable precautions to avoid injuring the plaintiff's property; and that they were liable for the negligence of the master of the tug in so placing it as to communicate fire to the plaintiff's scow, as in so doing he was obeying the orders of the defendants' foreman, and was under his direct and personal control. *Cram* v. *Ryan*, 25 O. R. 524.

Clerk of Municipality Omitting Names from Collector's Roll—*Non-averment of Negligence.*]—See *Town of Peterborough* v. *Edwards*, 31 C. P. 231.

Contractor — *Supplying Machine—Defect.*]—A contractor who, pursuant to the terms of a sub-contract, supplies to a sub-contractor a machine for use in the work, is not liable in damages to one of the sub-contractor's workmen for injuries sustained by reason of a patent defect in the machine, which has been accepted and used by the sub-contractor without objection. *Smith* v. *Onderdonk*, 25 A. R. 171.

Crown — *Negligence of Servants.*]—See CROWN.

Deputy Clerk of Crown.]—Quære, as to the liability of a deputy clerk of the Crown for damages arising from neglect of his duties. *Moore* v. *Simons*, 1 C. L. J. 183.

Druggist—*Making up Prescription—Physician.*]—A physician wrote a prescription for the plaintiff and directed that it should be charged to him by the druggist who compounded it, which was done. His fee, including the charge for making up the prescription, was paid by the plaintiff. The druggist's clerk by mistake put prussic acid in the mixture, and the plaintiff in consequence suffered injury:—Held, that the druggist was liable to the plaintiff for negligence but the physician was not. Under the circumstances of the case no costs were awarded to or against any of the parties. *Stretton* v. *Holmes*, 19 O. R. 286.

Executors.]—See *Ferrier* v. *Trépannier*, 24 S. C. R. 86.

Harbour Company—*Wreck of Vessel—Sand Bar—Notice.*]—Action against a harbour company, the plaintiff's vessel having been wrecked upon a sand bar about 200 feet outside of the piers, and the cargo lost. It appeared that this sand bar was of a shifting nature, disappearing and forming at different times, but defendants, who had commenced to receive tolls, some weeks before the accident had begun to remove it, and had not gone on with the work. The jury having found that the loss was caused by defendants' negligence:—Held, that defendants were liable, and a verdict for the value of plaintiff's cargo was upheld. *Webb* v. *Port Bruce Harbour Co.*, 19 U. C. R. 615, 623.

——— *Obstruction in Harbour.*] — Remarks as to the duty of harbour companies to keep the harbour free from obstructions, and their liability for neglect. *Berryman* v. *Port Burwell Harbour Co.*, 24 U. C. R. 34.

Husband and Wife.]—See *Shaw* v. *McCreary*, 19 O. R. 39.

Innkeeper — *Accident to Guest.*] — The plaintiff went, as a customer, into the defendant's hotel, where he had been several times before. In passing through the building to go to the urinal he fell through an open trap door, which had been left unguarded, and received injuries:—Held, that he was entitled to damages from the defendant. *Hasson* v. *Wood*, 22 O. R. 66.

——— *Neglect to Warn Guest of Fire in Building.*]—See *Hare* v. *Henderson*, 43 U. C. R. 571.

Judgment Creditor—*Securities Given up by Judgment Debtor for Collection—Pleading—Liability.*]—See *Hall* v. *Moss*, 25 U. C. R. 263.

Lessees of Wharf — *Accident—Invitation.*]—A company, owing a steamboat making weekly trips between Boston and Halifax, occupied a wharf in the latter city, leased to their agent. For the purpose of getting to and from the steamer there was a plank sidewalk on one side, part way down the wharf, and persons using it usually turned at the end and passed to the middle of the wharf. Y. and his wife went to meet a passenger expected to arrive by the steamer between seven and eight o'clock one evening in November. They went down the plank sidewalk, and instead of turning off at the end, there being no lights and the night being dark, they continued straight down the wharf, which narrowed after some distance and formed a jog, on reaching which Y.'s wife tripped, and, as her husband tried to catch her, they both fell into the water. Forty-four days after Mrs. Y. died. The deceased had not had regular and continual medical treatment after the accident, and the doctors who gave evidence differed as to whether or not the immersion was the proximate cause of her death. The jury, when asked whether the deceased would have recovered, notwithstanding the accident, if she had had regular and continual attendance, replied, "very doubtful." A verdict was found for the plaintiff with $1,500 damages:—Held, that Y. and his wife were lawfully upon the wharf at the time of the accident; that, in view of the established practice, they had a right to assume that they were invited by the company to go on the wharf and assist their friends in disembarking from the steamer; and that they had a right to expect that the means of approach to the steamer were safe for persons using ordinary care, and the company were under an obligation to see that they were safe. Held, further, that it having been proved that the wharf was only rented to the agent because the landlord preferred to deal with him personally, and that it was rented for the use of the company, whose officers had sole control of it, the company were in possession of it at the time of the accident. Held, also, that the evidence and finding of the jury having left it in doubt that the accident was the proximate cause of Mrs. Y.'s death, the jury having not been properly instructed as to the liability of the company under the circumstances, and the damages being excessive under the evidence, the order for a new trial should be affirmed. *York* v. *Canada Atlantic S. S. Co.*, 22 S. C. R. 167.

Mercantile Agency—*Inquiries as to Solvency and Standing of Merchant—Action for Giving a False Report in Consequence.*] —See *McLean* v. *Dun*, 1 A. R. 153.

Niagara Falls Park Commissioners—*Fences — Highways — Visitors — Crown.*]—There is no liability on the part of the commissioners for the park to the public using the highways in the Queen Victoria Niagara Falls Park by reason of the absence or insufficiency of a fence, railing, or barrier on the edge of the cliff, there being no statutory obligation in that behalf imposed on them. Gibson v. Mayor of Preston, L. R. 5 Q. B. 218, Sanitary Commissioners of Gibraltar v. Orfila, 15 App. Cas. 400, Cowley v. Newmarket Local Board, [1892] A. C. 345, Municipality of Pictou v. Geldert, [1893] A. C. 524, Municipal Council of Sydney v. Bourke, [1895] A. C. 433, followed. Nor are the commissioners liable for an accident happening under the above circumstances to a person while resorting to the park, who, paying nothing for the privilege, is in the position of a bare licensee, to whom no duty would be owing, unless the accident occurred by reason of some unusual danger known to the commissioners, and unknown to the person injured. Southcote v. Stanley, 1 H. & N. 247, Ivay v. Hedges, 9 Q. B. D. 80, Schmidt v. Town of Berlin, 26 O. R. 54, and Moore v. City of Toronto, ib. 59 n., followed. The commissioners, under the provisions of the statutes in that behalf, under any circumstances, act in the discharge of their various duties as "an emanation from the Crown" or as agent of the Crown, which is not liable for the acts of the subordinate servants of the commissioners. *Graham* v. *Commissioners for Queen Victoria Niagara Falls Park*, 28 O. R. 1.

Owner of Turkey — *Highway.*]—The owner of a turkeycock, which without negligence strays upon the highway contrary to a by-law of the municipality, is not liable for damages resulting from a horse taking fright and running away at the sight of the bird acting as turkeycocks usually do. *Zumstein* v. *Shrumm*, 22 A. R. 263.

Postmaster—*Not Sending Letter.*]—An action will lie against a postmaster for not sending a letter, but the plaintiff in his declaration must aver that the letter was his. *Campbell* v. *McPherson*, 6 O. S. 34.

A postmaster is liable to the party injured for loss caused by his negligence in the transmission of letters. *Carey* v. *Lawless*, 13 U. C. R. 285.

Stevedore—*Injury to Servant of Another—Precautions.*]—When two stevedores are independently engaged in loading the same steamer, and, owing to the negligence of the employes of the one, an employee of the other is injured, the former stevedore is liable in damages for such injury. The failure to observe a precaution usually taken in and about such work is evidence of negligence. *Brown* v. *Leclerc*, 22 S. C. R. 53.

Surveyor — *Contract—Reasonable Skill.*]—A surveyor in making a survey is under no statutory obligation to perform the duty, but undertakes it as a matter of contract and is only liable for want of reasonable skill or gross negligence. *Township of Stafford* v. *Bell*, 6 A. R. 273.

Treasurer of Township — *Keeping Moneys in House instead of Bank—Loss by Fire.*]—See *Corporation of Houghton* v. *Freeland*, 26 Gr. 500.

Trustees.]—See *Ferrier* v. *Trépannier*, 24 S. C. R. 86.

Valuator—*Agent of Loan Company—Excessive Valuation — Fraud—Costs.*]—In order to render the paid valuator of a loan company answerable for a loss caused by excessive valuation of property, it is not necessary to shew that such valuation is made fraudulently. The court below dismissed a bill filed to enforce a claim for damages sustained by an excessive valuation of land by the brother and partner of the paid valuator duly appointed by the plaintiffs, on the ground that it was not shewn that the valuation was made fraudulently. The court of appeal, while differing from such view, declined to reverse the decree and ordered a new trial, at which the evidence of one of the defendants already taken might be used, in the event of his then being out of the jurisdiction, but ordered the defendants to pay the costs of the appeal; the new trial to be without costs in the court below. *Canada Landed Credit Co.* v. *Thompson*, 8 A. R. 696.

——— *Agent of Loan Company—False Report—Payment.*]—The paid agent of a loan society, who professed to be skilled, and had a knowledge in the valuing of lands, was held liable to the society for a loss sustained by them by reason of a false report of such agent. Silverthorn v. Hunter, 5 A. R. 157, distinguished. *Hamilton Provident and Loan Society* v. *Bell*, 29 Gr. 263.

——— *Good Faith — Inspection.*] — The defendant, a paid valuator, estimated the value of a certain property at $4,980, stating in the certificate of value that he held himself "responsible to you" (the plaintiffs) "for the correctness of this report and valuation," which was enclosed in a letter stating "the houses are unfinished, and my valuation of $4,980 is on the supposition that they will be finished in a manner similar to those adjoining. A final inspection should, I think, be made." The houses never were finished similarly to those adjoining, nor was the defendant ever called upon to make any final or other inspection, and at a subsequent sale the property, which had been taken possession of by the mortgagees and allowed to become greatly out of repair, realized only $1,800:—Held, under these circumstances, there being no mala fides imputable to the appraiser, that he was not answerable for the loss sustained by the lender. *Scottish American Investment Co.* v. *Hope*, 26 Gr. 430.

——— *Overvaluation—Fraud of Employer's Agent—Costs.*]—A paid valuator is not liable to make good any loss sustained by the person employing him, by reason of his overvaluing the property, where he has been led into making such over-estimate by the improper conduct of the agent of the employer. On a balance of evidence, the court refused to order a paid valuator to make good a loss sustained by a party advancing money upon his certificate of valuation, the valuator swearing that he intended to certify the value at $2,000, whereas, by the fraud of the lender's agent, he was induced to certify at $3,000, notwithstanding the alleged agent denied the charge, and the plaintiff, who advanced the money, swore that but for such certificate, he would not have done so. But the court, in consequence of the negligent manner in which the valuator had discharged

his duty, on dismissing the bill refused him his costs. *Silverthorn* v. *Hunter*, 26 Gr. 390.

Held, affirming the judgment in 26 Gr. 390, that the defendant was not liable for any loss sustained by the plaintiff. Held, also, that the circumstances of this case would not justify the court in reversing the finding of the Judge of first instance, that the valuation was made without fraud or intention to deceive. *Silverthorn* v. *Hunter*, 5 A. R. 157.

——— *Professional Valuator — Excessive Valuation — Evidence—Misdirection.*]—The defendant L., who was a professional valuator, was employed by plaintiff to personally investigate the security offered for a loan on real estate, and to check the valuation of a local valuator. The defendant visited the property and reported, in effect agreeing with the local valuator, that the property was worth considerably more than the amount proposed to be lent, and that the loan could be safely made for the sum proposed, for which report he charged and was paid a fee. The loan was effected, and default having occurred in its repayment, the property was offered for sale, when it was found impossible to sell for anything like the mortgage money. In an action for negligence in valuing the property the jury found for the plaintiff. The Judge at the trial directed the jury that the fact that the defendant did not obtain the opinion of other persons as to the value of land in the neighbourhood was evidence of negligence:—Held, that this was misdirection. It appeared from the evidence that the mortgagor had endeavoured to procure a loan for a similar amount on the same property from a company in which the defendant L. was a director, and that the loan was not effected, having been abandoned by the mortgagor. The Judge at the trial, although he directed the jury that there was no evidence that the defendant had acted with intentional dishonesty, pressed upon their notice, with other observations, the inquiry; "Why was not the original transaction carried out?":—Held, that these observations tended to create a prejudice in the minds of the jury which was not warranted by the facts. The court of appeal held that there was no misdirection, but, for other reasons, refused to interfere with the order of the court below for a new trial. The supreme court of Canada quashed a further appeal. *O'Sullivan* v. *Lake*, 15 O. R. 544, 15 A. R. 711, 16 S. C. R. 636.

——— *Unpaid Services—Absence of Fraud —Untrue Certificate.*]—The defendant, by a certificate signed by him as reeve of the township, stated he had personal knowledge of property belonging to one A. M., and occupied by him, which the defendant believed to be worth $2,000, and would readily sell at a forced cash sale for $1,000; that about fifteen acres were cleared and ready for and under cultivation, &c., setting forth further favourable particulars as to buildings on the land and the nature of the soil, all of which proved to be erroneous. In fact, the defendant had not any personal knowledge of the premises, which were almost worthless; and the particulars as given had been communicated to him by A. M. himself. The defendant was aware that the plaintiffs were about to advance money by way of loan on the security of this property, and had called for his certificate, by which they said they would be guided in making such advance:—Held, that the defendant was answerable for the loss sustained by the plaintiffs in consequence of having acted on his certificate, although no fraud was attributable to him, and his services were gratuitous. *Gowan* v. *Paton*, 27 Gr. 48.

——— *Unpaid Services — Misrepresentation as to Value—Gross Negligence.*]—In order to a party recovering damages against one who has been guilty of deceit, it is not necessary to shew that the person practising it has benefited thereby; but no action will lie for a false representation, unless the person making it knows it to be untrue, and makes it with the intention of inducing the party to whom it is made to act upon it and he does act upon it and sustains damage in consequence. In order to facilitate an intending borrower obtaining a loan of money the defendant, who was well known to the plaintiff, the proposed lender, gave a certificate in the following words: "I beg to state that I know the farm belonging to Mr. James Wheelen, of Brudenell, situate opposite the church and in a thriving settlement. I consider it worth at least $1,200; and have reason to believe that it has cost him a much larger sum, and I am sure the investment of $400 will prove a safe one." At this time the property was not worth more than $400 or $500, and on a sale under execution at the suit of the plaintiff it realized only $130:—Held, that in the absence of mala fides the defendant, being an unpaid valuator, was not liable to make good the loss sustained by the plaintiff by reason of this erroneous valuation. *French* v. *Skead*, 24 Gr. 179.

See Moberly v. *Brooks*, 27 Gr. 270; *Agricultural Investment Co.* v. *Federal Bank*, 45 U. C. R. 214, 6 A. R. 192.

IX. Persons Entitled to Sue.

Ratepayer—*Action against Contractor—Privity.*]—A contractor with a corporation to supply hydrants at certain points with water for public use, in the event of fires, is not liable for damages occasioned to the property of an individual ratepayer of the city by fire, owing to there not being a sufficient supply of water; there being no sufficient privity between such ratepayer and contractor. *Cunningham* v. *Furniss*, 4 C. P. 514.

Trespasser—*Dangerous Machine—Injury to Child—Allurement—Knowledge of Defendant.*]—Plaintiff, a child of five years of age, was injured by a horse-power used by the defendant to hoist grain into his warehouse. The machine was on a lot unfenced on one side, leased by him, adjoining his warehouse, about thirty feet from the highway, and was in charge of a man who was temporarily absent for a few minutes at the time of the accident. There was no evidence that the machine was being worked in such proximity to the highway as to endanger the safety of persons using the highway, or that it was so situated as to attract or allure children, nor was there any evidence of any knowledge in the defendant that children were in the habit of frequenting the place or of any intention on his part to injure:—Held, that as the plaintiff had no right to be where

he received the injury he could not recover. Held, also, that the omission of the defendant to comply with the provisions of the Act requiring threshing and certain other machines to be guarded (R. S. O. 1887 c. 211) did not give a cause of action to the plaintiff.. Finlay v. Miscampbell, 29 O. R. 29, followed. *Smith* v. *Hayes*, 29 O. R. 283.

Volunteer—*Dangerous Machine—Injury to Child.*]—The plaintiff, a boy of eight, came upon the defendant's land, where the latter was mowing hay, and the defendant permitted him to get upon the mowing machine alone, and to drive the horses. By reason of one of the wheels striking into a furrow, the plaintiff was thrown out of his seat, and, falling on the knives of the machine, was injured. The trial Judge told the jury that if the defendant was not using reasonable care in allowing the plaintiff to be upon the machine, he was guilty of negligence:—Held, a proper direction; and a verdict for the plaintiff was allowed to stand. The question whether the plaintiff was a trespasser or volunteer or licensee was not material. *Carroll* v. *Freeman*, 23 O. R. 283.

——— *Newsboy—Railway—Agreement as to Injuries—Employers of Newsboy.*]—Declaration, under C. S. U. C. c. 78, by the administrator of A., alleging that A. was lawfully on the platform at a station on defendants' railway, and defendants so negligently managed and drove an engine and carriages, loaded with timber, along the line near said station, that a piece of timber projecting from said carriage struck and killed the said A. Plea, that A. was a newsboy in the employ of C. & Co., vending papers on defendants' trains, under an agreement between C. & Co. and defendants, which agreement provided that defendants should carry C. & Co., their newsboys and agents, on their trains, and should not be liable for any injury to the persons or property of said C. & Co., their newsboys or agents, whether occasioned by defendants' negligence or otherwise:—Held, plea good, without alleging that A. was a party to or aware of the agreement. *Alexander* v. *Toronto and Nipissing R. W. Co.*, 33 U. C. R. 474, 35 U. C. R. 453.

——— *Newsboy—Street Railway.*]—The deceased, a boy selling newspapers, got on a street railway car at the rear end, and passed through the car to the front platform, where the driver was standing. He stepped to one side behind the driver, and fell off or disappeared from the car, there being no step on that side, and was killed by the car running over him. He had said just before that he was going on some distance further in the car, and the conductor at the trial stated that he had reported the want of a step to the owners of the railway, but it had not been attended to. There was plenty of room in the car, but it was proved that passengers were always allowed to stand on the platform. It was not shewn that the deceased had either paid or been asked for his fare, but it appeared that the newsboys were allowed to enter the cars to sell newspapers without being charged:—Held, that the deceased was lawfully on the car, and being so was entitled to be carried safely, whether he was a passenger for reward or not. Held, also, that there was evidence for the jury of negligence on the part of defendants in the absence of the step, and no such contributory negligence on the part of deceased as should, as a matter of law, prevent the plaintiff's recovery. A nonsuit was therefore set aside. Upon appeal this decision was reversed, on the ground that unless the deceased was upon the cars as a passenger, on a contract of carriage express or implied, and not as a mere licensee or volunteer, he had no right of action against the defendants for the absence of the step, which was no breach of duty to him, but must take the car as he found it; and that on the evidence he must be taken to have been a licensee only. *Blackmore* v. *Toronto Street R. W. Co.*, 38 U. C. R. 172.

——— *Unsafe Premises.*]—An employee of a company which had contracted to deliver coal at a school building went voluntarily to inspect the place where the coal was to be put on the evening preceding the day upon which arrangements had been made for the delivery, and was accidentally injured by falling into a furnace pit in the basement on his way to the coal bins. He did not apply to the school board or the caretaker in charge of the premises before making his visit:—Held, affirming the judgment in 23 A. R. 597, that in thus voluntarily visiting the premises for his own purposes and without notice to the occupants, he assumed all risks of danger from the condition of the premises, and could not recover damages. *Rogers* v. *Toronto Public School Board*, 27 S. C. R. 448.

X. Pleading.

Counterclaim.]—In an action for damages for negligence a counterclaim for libel was excluded. *McLean* v. *Hamilton Street R. W. Co.*, 11 P. R. 193.

Declaration—*Agent—Neglect to Insure.*]—The plaintiff sued defendant, as the agent of an insurance company, alleging that the plaintiff had employed defendant to effect an insurance on his property, according to the rules of the company, but that defendant had so carelessly and negligently effected such insurance, that a loss by fire having occurred, the plaintiff was prevented, by reason of such conduct of defendant in effecting the insurance, from recovering the amount thereof, and was put to trouble and expense in bringing an action therefor. Defendant pleaded an assignment of the policy by plaintiff to one G. before the fire. On demurrer to the plea, defendant took exception to the declaration on the following grounds: 1. The amount and duration of the policy are not shewn. 2. No negligence by defendant is shewn. 3. That no reason is stated why the policy was bad, or that the defect was within defendant's undertaking. 4. No agency between plaintiff and defendant shewn, the latter being agent for the company, nor any reward or consideration averred for the undertaking. 5. That the breach is larger than the promise:—Held, that the plea was clearly bad, for plaintiff, notwithstanding the assignment, was the proper person to sue. 2. That the declaration (set out above), being for a misfeasance, did not require an allegation of a consideration or reward to support the action; but the defendant, having undertaken to do, and having done an act gratuitously, was liable for his

misfeasance in the performance of his undertaking. 3. That the defendant, after pleading over, could not object to the want of an allegation of the amount or duration of the insurance; and lastly, that defendant was entitled to judgment for the insufficiency of the count, because negligence generally, which was charged, is different from negligence to insure according to the rules of the company, which was what defendant was employed to do. *Johnston* v. *Graham*, 14 C. P. 9.

——— *Joint Tort Feasors—Recovery against Some—Evidence.*]—In an action against four, the declaration stated that the defendants were proprietors of a common stage coach for carrying passengers from T. to B.; that they received the plaintiff as a passenger for certain reward in that behalf; and by reason thereof it became and was the defendants' duty to use due care and diligence in conveying the plaintiff; yet they, not regarding their duty, did not use due diligence, &c., but by reason of the carelessness and improper conduct of defendants by their servant, in conveyance of the plaintiff, he was thrown off of the said coach and injured, &c.:—Held, that upon this declaration a verdict might be given against three of the defendants, and for the other. Held, also, that negligence and improper conduct were sufficiently shewn by the evidence. *Gunn* v. *Dickson*, 10 U. C. R. 461.

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

See Town of Peterborough v. *Edwards*, 31 C. P. 231.

Defence — "*Not Guilty by Statute*"—*Contributory Negligence.*] — Held, reversing the judgment in 18 O. R. 482, that evidence of contributory negligence is properly admissible under the defence of "not guilty by statute" without any special plea of contributory negligence. *Doan* v. *Michigan Central R. W. Co.*, 17 A. R. 481.

Plea — *Not Guilty — Accident — Non-repair.*]—In an action under 10 & 11 Vict. c. 6, by an administratrix for negligently causing the death of her husband, the declaration stated that the defendant was possessed of a close, and one A. was possessed of another close adjoining defendant's; that upon defendant's close a wall was standing, which was, to defendant's knowledge, in a dilapidated and dangerous state, and leaning toward the close of A., by reason whereof it became the duty of defendant to take reasonable precautions to prevent the wall from falling; but that he wrongfully permitted the wall to remain in that state, and that afterwards, by reason of such neglect, the wall fell upon the close of A., and in falling killed deceased, who was then lawfully in said close. Defendant pleaded not guilty:—Held, that the declaration disclosed a legal liability in defendant, and that the evidence warranted a verdict for the plaintiff. Semble, that under this issue defendant was at liberty to shew that the accident was caused either wholly or in part by the negligence of deceased, or of others for whom defendant was not responsible, and that a reasonable time for repairing the wall had not elapsed before the occurrence; and that supposing the state of the wall as alleged to be admitted in the pleadings, yet defendant might, in evidence, shew its actual condition as bearing upon the question of negligence. *Kinney* v. *Morley*, 2 C. P. 226.

——— *Not Guilty—Duty.*] — Semble, the plea of not guilty puts in issue the negligence only, and not the duty alleged. *Sweeney* v. *Port Burwell Harbour Co.*, 17 C. P. 574.

——— *Not Guilty—Railway—Property of Defendants.*]—Where, in the inducement of the declaration, it was alleged that defendants were proprietors of the railway, not saying at the time of the negligence complained of:—Held, that under plea of not guilty defendants might shew that at such time it was not their property. *Van Natter* v. *Buffalo and Lake Huron R. W. Co.*, 27 U. C. R. 581.

——— *Not Guilty — Special Contract.*]—Under a plea of not guilty, in an action against a bailiff, by the sheriff, for allowing a negligent escape, defendant can only prove that he was not guilty of negligence; he cannot give in evidence any special contract for service. *Rultan* v. *Shea*, 5 U. C. R. 210.

——— *Not Guilty — Wrongful Act.*]—A declaration stated that the plaintiffs were in possession of a certain warehouse, and that defendant so carelessly and unskilfully dug an excavation or cellar on the adjoining close that said warehouse became injured, and the wall of it sunk, and fell in, by reason whereof plaintiff's goods were destroyed, &c.:—Held, that the plea of not guilty merely puts in issue the wrongful act alleged, which in substance was the excavating so near the plaintiff's close without using proper precautions that thereby the plaintiff's wall fell down; and that if defendant meant to assert a right to excavate up to the division line between the two closes he should have pleaded it specially. *Mitchell* v. *Harper*, 4 C. P. 147.

XI. Proof of Negligence.

Absence of Direct Proof—*Accident—Unexplained Cause — Nonsuit.*] — Plaintiff, while standing on the platform at one of defendants' stations, had his eye injured by the explosion of a fog signal, which had been placed on the track. The only evidence given was, that certain servants of defendants had these fog signals in their possession for lawful purposes, but that no one to the knowledge of several of the defendants' employees who were called as witnesses for the plaintiff, placed this one on the track, and that it was wholly unnecessary for defendants' purposes; and it appeared not impossible that it might have been obtained from defendants' servants by some third party, or might have been put there by a servant of defendants for a frolic:—Held, that a nonsuit was properly directed.

Jones v. *Grand Trunk R. W. Co.*, 45 U. C. R. 193.

——— *Cause of Accident — Concurrent Findings of Courts Appealed from.*]—In an action by an employee to recover damages for injuries sustained, there was some evidence of neglect on the part of the employers which, in the opinion of both courts below, might have been the cause of the accident through which the injuries were sustained, and both courts found that the accident was due to the fault of the defendants either in neglecting to cover a dangerous part of a revolving shaft temporarily with boards or to disconnect the shaft or stop the whole machinery while the plaintiff was required to work over or near the shaft:—Held, that, although the evidence on which the courts below based their findings of fact might appear weak, and there might be room for the inference that the primary cause of the injuries might have been the plaintiff's own imprudence, the supreme court of Canada would not, on appeal, reverse such concurrent findings of fact. *George Matthews Co.* v. *Bouchard*, 28 S. C. R. 580.

In an action against a railway company for damages in consequence of plaintiff's property being destroyed by fire alleged to be caused by sparks from an engine of the company the jury found, though there was no direct evidence of how the fire occurred, that the company negligently permitted an accumulation of grass or rubbish on their road opposite plaintiff's property which, in case of emission of sparks or cinders, would be dangerous; that the fire originated from or by reason of a spark or cinder from an engine; and that the fire was communicated by the spark or cinder falling on the company's premises, and spreading to plaintiffs' property. A verdict against the company was sustained by the court of appeal:—Held, affirming the judgment of the latter court, 25 A. R. 242, and following Sénésac v. Central Vermont R. W. Co., 26 S. C. R. 641, and George Matthews Co. v. Bouchard, 28 S. C. R. 580, that the jury having found that the accumulation of rubbish along the railway property caused the damage, of which there was some evidence, and the finding having been affirmed by the trial court and court of appeal, it should not be disturbed by a second appellate court. *Grand Trunk R. W. Co.* v. *Rainville*, 29 S. C. R. 201.

——— *Cause of Accident—Conjecture.*]—The plaintiff's husband was accidentally killed whilst employed as engineer in charge of the defendants' engine and machinery. In an action by the widow for damages the evidence was altogether circumstantial and left the manner in which the accident occurred a matter of conjecture:—Held, that, in order to maintain the action, it was necessary to prove by direct evidence, or by weighty, precise, and consistent presumptions arising from the facts proved, that the accident was actually caused by the positive fault, imprudence, or neglect of the person sought to be charged with responsibility, and such proof being entirely wanting the action must be dismissed. *Montreal Rolling Mills Co.* v. *Corcoran*, 26 S. C. R. 595.

Where it appeared in an action for damages by the personal representative of a deceased workman in a factory for making detonating cartridges, whose death was caused by an explosion of a highly dangerous composition, caused as alleged by the negligence of the defendants, that the cause of the accident was either unknown or else that it could fairly be presumed to have been caused by the negligence of the person injured:—Held, that the defendants were not liable. *Dominion Cartridge Co.* v. *Cairns*, 28 S. C. R. 361.

See Cobban v. *Canadian Pacific R. W. Co.*, 26 O. R. 732, 23 A. R. 115.

——— *Cause of Accident—Onus.*]—In an action to recover damages for death caused by alleged negligence, the onus is on the plaintiff to prove not only that the defendant was guilty of actionable negligence, but also, either directly or by reasonable inference, that such negligence was the cause of the death. Where, therefore, a man employed on the defendants' tug was drowned, and it was shewn that wood was piled upon the tug's deck in such a way as to make it dangerous to pass along the deck, but it was also shewn that there was a safe passageway on a scow lashed to the tug, and there was no evidence whatever as to the cause of the accident, the action was dismissed. *Young* v. *Owen Sound Dredge Co.*, 27 A. R. 649.

——— *Cause of Accident — Statutable Duty.*]—A workman in a cotton mill was killed by being caught in a revolving shaft and dashed against a beam. No one saw the accident, and it could not be ascertained how it occurred. The negligence charged was the absence of a fence or guard, required by the Workmen's Compensation Act:—Held, reversing the decisions in 28 O. R. 73 and 25 A. R. 36, that, whether the omission of such statutable duty could or could not form the basis of an action at common law, the plaintiffs, the widow and children of the deceased, could not recover in the absence of evidence that the negligence charged was the cause of the accident. *Canadian Coloured Cotton Co.* v. *Kervin*, 29 S. C. R. 478.

——— *Cause of Accident—Use of Dangerous Materials.*]—To permit an unnecessary quantity of dynamite to accumulate in dangerous proximity to employees of a mining company, in a situation where opportunity for damage might occur either from the nature of the substance or through carelessness or otherwise, is such negligence on the part of a mining company as will render it liable in damages for the death of an employee from an explosion of the dynamite, though the direct cause of such explosion may be unknown. *Asbestos and Asbestic Co.* v. *Durand*, 30 S. C. R. 285.

——— *Probable Cause of Accident.*]—Evidence which merely supports a theory propounded as to the probable cause of injuries received through an unexplained accident is insufficient to support a verdict for damages where there is no direct fault or negligence proved against the defendant and the actual cause of the accident is purely a matter of speculation or conjecture. *Canada Paint Co.* v. *Trainor*, 28 S. C. R. 352.

Absence of Negligence—*Finding of Jury—Setting aside.*]—While a car of defendants in charge of another servant of the company, the driver having temporarily gone to the rear of the car, was proceeding westerly at a slow rate along a street in the city of T., on which they had the right of way, the

plaintiff, whose carriage was waiting at the kerb stone, without observing the near approach of the car, got into and drove her carriage for a short distance in the same direction as the car, when she suddenly turned north, intending to cross, but in such close proximity to the car that, but for the prompt action of the driver in charge in turning his horse off the track, the horse would have collided with the plaintiff's carriage; as it was, notwithstanding that the brake was applied to the car the whiffletree struck the wheel of the carriage, which was upset, and the plaintiff thrown to the ground, and her leg fractured. In an action for damages the jury found in favour of the plaintiff, which verdict a divisional court refused to disturb. The court of appeal, being of opinion that there was no evidence of negligence on the part of the defendants, reversed the judgment of the court below, and dismissed the action with costs. *Follet* v. *Toronto Street R. W. Co.*, 15 A. R. 346.

——— *Finding of Jury — Refusal to Set aside.*]—W. was working on a vessel in port when a boom had to be taken out of the crutch in which it rested, and he pointed out to the master that this could not be done until the rigging supporting it, which had been removed, was replaced, which the master undertook to do. When the boom was taken out it fell on the deck and W. was injured. In an action against the owners for damages the jury found that the fall of the boom was owing to the rigging not being secured, but that this was not occasioned by the negligence of the owners or their servants:—Held, affirming the judgment in 30 N. S. Reps. 548, that the first part of the finding did not necessarily mean that the rigging had never been secured, or that if secured originally it had become insecure by negligence of defendants, and the jury having negatived negligence their finding should not be ignored. *Williams* v. *Bartling*, 29 S. C. R. 548.

Admissibility of Evidence.]—Action against the defendants for negligence in the construction and management of their steamboat, by which sparks escaped from the funnel at a wharf, and the plaintiffs' lumber and mills there were burned. The alleged negligence consisted in leaving the screens of the steamer open; and on the part of the plaintiffs evidence was received, though objected to, that on other occasions, at different times and places, the screens were open and cinders had escaped. The engineer and firemen on the boat, being afterwards called for the defendants, swore that the screens were closed, and had never on any occasion been left open. The Judge ruled, at the close of the case, that the evidence objected to was admissible, particularly as touching the credit of defendants' witnesses:—Held, that such evidence was inadmissible either to support the plaintiffs' case when it was tendered and received, or for the purpose for which it was afterwards admitted; and the jury having found for the plaintiffs, a new trial was granted without costs. *Edwards* v. *Ottawa River Navigation Co.*, 39 U. C. R. 264.

——— *Letter—Misdirection.*]—After one trial, on which the jury had failed to agree, defendants' solicitor wrote to the plaintiff's solicitor to make him a proposition, "of course without prejudice, further than I will state in this letter." The defendants, he said, believed that the plaintiff was not injured at all; but if he would put himself under the charge of three medical men named, at Montreal, for six months, of which they would pay all expenses, and if these gentlemen, or any two of them, would say he was hurt, defendants would waive every other defence, although they thought they had good grounds for further defence, and would settle with him on such terms as might be agreed upon, or as the three medical men would name. This offer, he added, was made by defendants intending to use it, if refused, to shew their sincerity and the plaintiff's reluctance to submit to a fair test. This was declined, but a few days later, and after a jury had been sworn in the case, an agreement was entered into of substantially the same character. By it the plaintiff, at defendants' expense, was to be placed for six months at Toronto under four medical men; and the defendants agreed that if they, or a majority of them, should agree that the plaintiff was injured at the time, by the means and in the manner alleged by him, they would pay damages to be estimated as provided for. The medical men, however, failed to agree, and the case was again brought to trial. The defence was that the injury was either simulated or caused by the plaintiff's own negligence. The letter and agreement were admitted in evidence for the plaintiff, and the jury were told that if in doubt as to the plaintiff having contributed to his own injury, they might consider the letter as evidence against defendants on that point. They found for the plaintiff, saying that they did not think him guilty of any neglect:—Held, that the letter and agreement were admissible, to shew, on the plaintiff's part, that he was claiming in good faith as he had proved by submitting to the test proposed; and that the defendants might have used them to shew under what circumstances and at whose expense the plaintiff had been under treatment. Held, also, that it was no objection to their admission that they were matters arising since the action. Held, also, that though the letter was expressed in the beginning to be without prejudice, yet, as the defendants afterwards declared it to be their intention to use it as evidence to shew the plaintiff's want of good faith, the plaintiff was entitled to shew it and the subsequent agreement to repel any such imputation. Held, however, that the direction as to the effect of the letter was wrong, and was equivalent to admitting it as evidence of defendants' negligence; and that the verdict must therefore be set aside. *Clark* v. *Grand Trunk R. W. Co.*, 29 U. C. R. 136.

Conflict of Evidence—*Nonsuit.*]—The deceased was a passenger by defendants' railway for W. station, and was, as the conductor said, "pretty drunk" when he got on the train. He went out of the car door at that station, and next morning was found about a hundred yards beyond it, about four feet from the rail, with his legs cut through at the knee-joints and his left foot crushed, of which injuries he died that afternoon. There was contradictory evidence as to whether the train stopped long enough at the station, for which there were only two passengers, to enable persons to alight; but the other passenger said he got off leisurely, and the person to whom deceased had been talking on the car said he thought deceased had left the train, and that he told the conductor so after the train started. The con-

ductor and baggage-master also got off there to see the station-master and returned to the cars. There was no further proof of the manner in which deceased met with the accident:—Held, that there was no evidence of negligence on defendants' part to go to the jury, and a nonsuit was ordered. *Giles* v. *Great Western R. W. Co.*, 36 U. C. R. 360.

Dangerous Material — *Infant.*]—Plaintiff, a boy of twelve years of age, passing along the highway entered upon defendants' property, which adjoined it, and taking a fog signal out of a box on a hand car standing there, struck the fog signal with a stone, when it exploded injuring him:—Held, that the defendants were not liable. *McShane* v. *Toronto, Hamilton, and Buffalo R. W. Co.*, 31 O. R. 185.

——— *Infant — Evidence—Trespass.*]—Work on the construction of a railway was going on near the unused part of a public cemetery in connection with which were used detonating caps containing fulminate. M., a boy of fifteen years of age, in passing through the cemetery with some companions, found some of these caps lying about on the bank above the works, in front of a tool box used by one of the gangs of workmen, and put them in his pocket. Later on the same day he was scratching the fulminate end of one of them with a stick, when it exploded and injured his hand. On the trial of an action against the contractors for damages, there was no direct evidence as to how the caps came to be where they were found, but it was proved that when a blast was about to take place the workmen would hurriedly place any explosives they might have in their possession under their tool box, and then run away. It also was proved that caps of the same kind were kept in the tool box near which those in question were found by M., and were taken out and put back by the workmen as occasion might require:—Held, that, in the absence of evidence of circumstances leading to a different conclusion, the act of placing the caps where they were found could fairly be attributed to the workmen, who alone were shewn to have had the right to handle them; that it was incumbent on defendants to exercise a high degree of caution to prevent them falling into the hands of strangers; that the act of M. in exploding the cap as he did, did not necessarily import want of due caution, and if his negligence contributed to the accident the jury should have so found; and that whether or not M. was a trespasser, was also a question for the jury, who did not pass upon it. *Makins* v. *Piggott*, 29 S. C. R. 188.

——— *Precaution.*]—Persons dealing with dangerous material are obliged to take the utmost care to prevent injuries being caused through their use, by adopting all known devices to that end; and where there is evidence that there was a precaution which might have been taken by a company making use of electrical currents to prevent live wires causing accidents, and that this precaution was not adopted, the company were held responsible for damages. *Citizens' Light and Power Co.* v. *Lepitre*, 29 S. C. R. 1.

Defect in Engine—*Want of Spark Arrester.*]—On the trial of an action for damages for the destruction of a barn and its contents by fire, alleged to have been caused by negligence of the defendants in working a steam-engine used in running a hay press in front of the barn, the main issue was as to the sufficiency of a spark arrester on the engine, and the Judge directed the jury that "if there was no spark arrester in the engine, that in itself would be negligence for which the defendants would be liable;"—Held, that the Judge misdirected the jury in telling them that the want of a spark arrester was, in point of law, negligence, and such direction may have influenced them in giving their verdict; therefore an order for a new trial after a verdict for the plaintiff should not be interfered with. *Peers* v. *Elliott*, 21 S. C. R. 19.

Evidence Equally Balanced — *Nonsuit.*]—In an action for negligence, where the evidence is as consistent with the absence as with the existence of negligence, the case should not be left to the jury. *Jackson* v. *Hyde*, 28 U. C. R. 294. See, also, *Deverill* v. *Grand Trunk R. W. Co.*, 25 U. C. R. 517; *Storey* v. *Veach*, 22 C. P. 164; *Blackmore* v. *Toronto Street R. W. Co.*, 38 U. C. R. 172.

Obstruction in Highway—*Nuisance.*]—A township council appointed by resolution two of the defendants, who were members of the council, a committee to rebuild a culvert under a highway within the municipality. These two defendants employed another defendant as overseer of the work and two other defendants to draw drain tiles, which were required for the work, to the place in question. The work was done by the day, and while it was being done the tiles in question, which were of a large size and of a light gray colour, were piled on the highway near the culvert. The plaintiffs' horse shied when passing the tiles and upset the vehicle, and the plaintiffs were injured:—Held, per Burton, J.A., that the act in which the defendants were engaged being in itself lawful they could be regarded only as servants of the council, and that the maximum respondeat superior applied. Held, per Maclennan, J.A., that leaving the tiles at the side of the highway was not negligence and did not constitute a nuisance, and that no action lay. In the result the judgment below was reversed. *McDonald* v. *Dickenson*, 24 A. R. 31.

——— *Time — Nuisance.*] — Allowing a broken down waggon to remain on the highway, clear of the track of a street railway, for nearly two hours, is not in itself sufficient evidence of negligence to support an action by a person who strikes against the waggon while passing in a street car. Such a broken down waggon does not become a nuisance or obstruction to the highway, until, having regard to the difficulty of removing it, it has been allowed to remain thereon for an unreasonable time. *Howden* v. *Lake Simcoe Ice Co.*, 21 A. R. 414.

Opinion Evidence—*Question for Jury.*]—The defendant, having charge of the plaintiff's colt, took it to a blacksmith's shop to be shod for the first time, and having tied it there went out. The colt, pulling back, threw itself, and received injuries of which it died. The plaintiff sued defendant for negligence in so tying the colt instead of having it held while being shod; and several witnesses were of opinion that what defendant had done was improper, while others thought he had adopted the proper plan:—Held, not a case in

which there should be a nonsuit, on the ground that the evidence was consistent either with the existence or non-existence of negligence; but that the question was for the jury. Cotton v. Wood, 8 C. B. N. S. 568, and Jackson v. Hyde, 28 U. C. R. 294, distinguished. *Henderson* v. *Barnes*, 32 U. C. R. 176.

Positive Proof—*Crown—Public Work.*]—In an action by the Crown for damages arising out of an accident alleged to be due to the negligence of a contractor in the performance of his contract for the construction of a public work, before a contractor can be held liable the evidence must shew beyond reasonable doubt that the accident was the result of his negligence. *The Queen* v. *Poupore*, 6 Ex. C. R. 4.

A suppliant seeking relief under clause (c) of s. 16 of the Exchequer Court Act must establish that the injury complained of resulted from something negligently done or negligently omitted to be done on a public work by an officer or servant of the Crown while acting within the scope of his duties or employment. *Alliance Assurance Co.* v. *The Queen*, 6 Ex. C. R. 76.

——— *Noise—Highway.*]—The mere fact that a horse, while being driven along the highway, has been frightened by the whistle of a steam engine, used by the defendants for the purpose of their lawfully operated waterworks, is not sufficient to make them responsible for damages resulting from the horse having run away. Some positive evidence of negligence in the use of the whistle must be given, or at least some evidence that its use might be expected to cause such an accident, so as to cause it to be a nuisance to the highway. *Roe* v. *Village of Lucknow*, 21 A. R. 1.

——— *Particular Act—Pleading.*]—In an action to recover damages for injuries alleged to have been caused by negligence, the plaintiff must allege and make affirmative proof of facts sufficient to shew the breach of a duty owed him by, and inconsistent with due diligence on the part of the defendant, and that the injuries were thereby occasioned; and where in such an action the jury have failed to find the defendants guilty of the particular act of negligence charged in the declaration as constituting the cause of the injuries, a verdict for the plaintiff cannot be sustained, and a new trial should be granted. *Cowans* v. *Marshall*, 28 S. C. R. 161.

Prima Facie Proof—*Fall of Mirror—Injury to Child — Reasonable Care.*] — A woman went with her child, two and a-half years old, to the defendants' shop to buy clothing for both. While there a mirror fixed to the wall, and in front of which the child was, fell and injured him:—Held, by the Queen's bench division, that it was a question for the jury whether the mirror fell without any active interference on the child's part; if so, that in itself was evidence of negligence; but if not, the question for the jury would be whether the defendants were negligent in having the mirror so insecurely placed that it could be overturned by a child; and if that question were answered in the affirmative, the child, having come upon the defendants' premises by their invitation and for their benefit would not be debarred from recovering by reason of his having directly brought the injury upon himself.

Hughes v. Macfie, 2 H. & C. 744, Mangan v. Atterton, 4 H. & C. 388, and Bailey v. Neal, 5 Times L. R. 20, commented on and distinguished. Semble, that the doctrine of contributory negligence is not applicable to a child of tender years. Gardner v. Grace, 1 F. & F. 359, approved of. Semble, also, that if the mother was not taking reasonably proper care of the child at the time of the accident, her negligence in this respect would not prevent the recovery by the child. Held, by the court of appeal, that the fact that a child of tender years, while in a shop with its mother, by the invitation and for the benefit of the proprietors, is injured by an unfastened mirror, standing against the wall, falling upon it, the cause of the fall being unknown, is, in itself, sufficient evidence of negligence to justify the case being submitted to a jury. *Sangster* v. *T. Eaton Co.*, 25 O. R. 78, 21 A. R. 424. Affirmed by the supreme court of Canada, 24 S. C. R. 708.

———*Hire of Tug—Injury to—Presumption of Fault.*]—See *Collins Bay Rafting and Forwarding Co.* v. *Kaine*, 29 S. C. R. 247.

——— *Res Ipsa Loquitur.*]—In an action against the owners of a steamboat for damage done to the plaintiffs' bridge, it appeared that the steamer was found drifting against the bridge one morning after a storm, and that the injury complained of was thus caused:—Held, sufficient primâ facie proof of negligence, and that it lay upon defendants to account for the accident. *Cataraqui Bridge Co.* v. *Holcomb*, 21 U. C. R. 273.

See, also, *Wilmot* v. *Jarvis*, 12 U. C. R. 641.

The plaintiff, while walking on a sidewalk, was knocked down and injured by a runaway horse of the defendant. At the time of the accident the horse was harnessed to a sleigh, but no person or driver was in the sleigh, and all that was proved was that the horse was seen running away; that the sleigh upset, the occupants were thrown out, and that the horse ran on the sidewalk and the accident occurred:—Held, that this was sufficient to make out a primâ facie case of negligence, and that the onus of disproving that case and explaining the cause of the runaway lay upon the defendant. Manzoni v. Douglas, 6 Q. B. D. 145, discussed. *Crawford* v. *Upper*, 16 A. R. 440.

——— *Unguarded Machinery—Cause of Accident.*]—See *Kervin* v. *Canadian Coloured Cotton Mills Co.*, 28 O. R. 73, 25 A. R. 36, 29 S. C. R. 478.

Specific Findings of Jury—*Setting aside—New Trial.*]—Where the jury find negligence and then define the negligence to consist in doing certain acts, the court, if there is some evidence of negligence in other respects, may in their discretion order a new trial, although there is no evidence to support the specific findings. Judgment in 26 O. R. 732 affirmed. *Cobban* v. *Canadian Pacific R. W. Co.*, 23 A. R. 115.

See Zumstein v. *Shrumm*, 22 A. R. 263; *Klock* v. *Lindsay*, 28 S. C. R. 453

XII. PROXIMATE CAUSE OF INJURY.

Accident — *Bodily Injury — Subsequent Neglect.*]—The plaintiff's wife died forty-four days after falling into the water from

the defendants' wharf. She had not had regular and continual medical treatment after the accident, and the physicians who gave evidence at the trial differed as to whether or not the immersion was the cause of her death. The jury, when asked whether she would have recovered if she had had regular and continual attendance, answered "very doubtful." A verdict was found for the plaintiff for $1,500 damages, which the supreme court of Nova Scotia set aside, and ordered a new trial:—Held, that the evidence and finding of the jury having left it in doubt that the accident was the proximate cause of the death, the jury not having been properly instructed as to the liability of the company under the circumstances, and the damages being excessive, the order for a new trial should be affirmed. *York* v. *Canada Atlantic S. S. Co.*, 22 S. C. R. 167.

Danger Voluntarily Incurred.]—C., having driven his horses into a lumber yard adjoining a street on which blasting operations were being carried on, left them in charge of the owner of another team while he spoke to the proprietor of the yard. Shortly afterwards a blast went off, and stones thrown by the explosion fell on the roof of a shed in which C. was standing and frightened the horses, which began to run. C. at once ran out in front of them and endeavoured to stop them, but could not, and in trying to get away he was injured. He brought an action against the municipality conducting the blasting operations to recover damages for such injury:—Held, by the court of appeal, that where a man, acting as a reasonable man would ordinarily do under the circumstances, voluntarily places himself in a position of danger in the hope of saving his property from probable injury to the life or property of others, and sustains hurt, the person whose negligent act has brought about the dangerous situation is responsible in damages. Anderson v. Northern R. W. Co., 25 C. P. 301, distinguished and questioned. Held, affirming the decision of the court of appeal, that the negligent manner in which the blast was set off was the proximate and first cause of the injury to C.; that such negligent act immediately produced in him the state of mind which instinctively impelled him to attempt to stop the horses; and that he did no more than any reasonable man would have done under the circumstances. *Connell* v. *Town of Prescott*, 20 A. R. 49, 22 S. C. R. 147.

Drainage Award — *Non-performance — Injury to Land—Township Engineer.*]—After the time fixed by an award under the Ditches and Watercourses Act, 1883 (46 Vict. c. 27), for the completion of certain drainage work by neighbouring landowners, the plaintiff, who was one of the parties interested in the award, in writing required the defendant, as township engineer, to inspect the work, with the object of having it completed according to the award, but, as the plaintiff alleged, the defendant neglected to inspect the work or cause it to be completed according to the award, and thereby the provisions of the award were not carried out, and the plaintiff in consequence suffered damage by reason of water remaining on his land:—Held, that the provision of s. 13 of the above Act as to the inspection by the engineer is imperative, and an action will lie for breach of his duty; but, even if the evidence had shewn such a breach, the damages claimed were not the proximate, necessary, or natural result thereof. The other provisions of s. 13 are merely permissive, and no action will lie for their non-performance; nor, were it otherwise, could it be held that the damages claimed were the proximate result of such non-performance. Those who, by the terms of the award, ought to have done the work, were the persons proximately responsible for the damages. *O'Byrne* v. *Campbell*, 15 O. R. 339.

See Cram v. *Ryan*, 24 O. R. 500, 25 O. R. 524; *Rowan* v. *Toronto R. W. Co.*, 29 S. C. R. 717; *Roberts* v. *Hawkins*, *ib.* 218.

XIII. Miscellaneous Cases.

Bailment—*Liability for Negligence in Use of Hired Chattels.*]—See *Reynolds* v. *Roxburgh*, 10 O. R. 649.

Executions against Mortgagor—*Neglect to Search for.*]—See *Brown* v. *McLean*, 18 O. R. 533.

"Gross Negligence"—*Meaning of—Remarks upon.*]—See *Fitzgerald* v. *Grand Trunk R. W. Co.*, 4 A. R. 601.

Investing Money.] — See *Carter* v. *Hatch*, 31 C. P. 293; *Thompson* v. *Robinson*, 15 O. R. 662, 16 A. R. 175.

Landlord and Tenant—*Loss by Fire—Culpable Negligence of Tenant.*]—See *Klock* v. *Lindsay*, 28 S. C. R. 453.

Machinery — *Using on Highways.*]—See *Lawson* v. *Alliston*, 19 O. R. 655.

Obstructing Highway — *Proximate Cause — Contributory Negligence—Dedication of Highway.*]—The defendants' premises abutted on a street in a city. The defendants placed a beam at the height of nine and a-half feet from the ground along the north limit of the street, which was twenty-nine feet in width, and hung a gate therefrom, and put up another gate across said street about twenty feet further south, the two gates not being exactly opposite to each other, nor of the same width. A lane ran north from the street. There was an accumulation of rubbish with ice and snow under the beam, which raised up the front wheels, and the plaintiff, while driving along the street, was injured by being crushed between the beam and the load upon which he was seated. He said he knew of the beam, having driven there often, but that his attention was called from it by having to steer his way carefully between the two gates. This street had not been adopted as a highway by by-law:—Held, that, although by 46 Vict. c. 18, s. 545 (O.), the council is prohibited from laying out a road or street of less than sixty-six feet in width, they may consent to the owner of lands laying one out less in width, and that, prior to the Act of 1873, the owner was not prohibited from laying out a road of any particular width; and that, as the street had been laid out and used as a public street for many years, having several large business establishments fronting upon it, or with a rear access to it, and public conveyances had used it for

business purposes in all respects as a highway, it might in an action of this kind, between a person using it in the way of business, as it had so long been used, and one who was charged with obstructing it, be found to be a public highway. Held, also, that the beam was the proximate cause of the injury, not the ice and snow only, and that defendants were liable though the person who allowed the rubbish to thus accumulate might be liable also. Held, also, that there was no contributory negligence on the part of the plaintiff. *Bliss* v. *Boeckh*, 8 O. R. 451.

Partnership — *Action in Warranty — Joint Speculation.*] — See *Archibald* v. *De Lisle*, 25 S. C. R. 1.

Promissory Note—*Alteration of—Negligence of Maker.*]—See *Swaisland* v. *Davidson*, 3 O. R. 320.

Removing Lateral Support from Buildings.]—See BUILDINGS.

Sale of Shares by Pledgee—*Neglect to Enforce Contract.*]—The defendant, who was mortgagee of certain shares in a company, sold them by auction. The plaintiff, who was entitled to the shares subject to the defendant's claim, knew of and ratified the sale. The purchaser refused upon various grounds to carry out the sale, and no attempt was made by the defendant to compel completion of the contract. Subsequently the shares fell very much in value:—Held, that there was no duty cast upon the defendant to take proceedings against the purchaser to compel completion, and that he was not liable to account for the shares at the price that would have been realized had the sale been completed. The plaintiff could have paid the defendant's claim and then have herself taken proceedings against the purchaser, and not having done so, was not entitled to complain. *Daniels* v. *Noxon*, 17 A. R. 206.

Trap-door—*Negligence in Leaving Open in Telegraph Office—Action for Death Caused thereby.*]—See *Denny* v. *Montreal Telegraph Co.*, 3 A. R. 628; *S. C.*, 42 U. C. R. 577.

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Criminal Code, 1892.]—New trial directed, upon an appeal under s. 744 of the criminal code. *Regina* v. *Brennan*, 27 O. R. 659.

Indictments for Misdemeanours — *Convictions.*]—An indictment cannot be removed from the assize after judgment pronounced, for the purpose of applying for a new trial. *Regina* v. *Smith*, 10 U. C. R. 99; *Regina* v. *Crabbe*, 11 U. C. R. 447.

After an acquittal for nuisance in obstructing a highway, the court refused a certiorari to remove the indictment with a view of applying for a new trial, or to stay the entry of judgment, so that a new indictment might be preferred and tried without prejudice. *Regina* v. *Whittier*, 12 U. C. R. 214.

After acquittal for nuisance a motion was made for a certiorari to remove the indictment, with a view to a new trial, no ground being shewn by affidavit; and the new trial was moved for on the same day, being the fourth day of term:—Held, that the certiorari, after the acquittal, could not issue as of course; but that, if it could, it would have been unnecessary to move for a new trial within the first four days of term. *Regina* v. *Gzowski*, 14 U. C. R. 591.

Defendant was convicted of an assault at the quarter sessions and fined, but during the same sessions he obtained a new trial on his own affidavit, and was acquitted at the following sessions:—Held, that the quarter sessions had authority to grant such new trial, and that this court could not interfere. *Regina* v. *Fitzgerald*, 20 U. C. R. 546.

Defendant was convicted at the recorder's court, on contradictory evidence, for obstructing a highway, the result of the verdict being to shew that he and several others, whose houses and greenhouses had been standing for sixty years, were encroaching upon the street. A new trial having been refused, on appeal only the evidence was returned to the court of Queen's bench, with a copy of the rule nisi. The court, under these circumstances, considering the importance of the case, and that the grounds of the judgment below were not given to them, directed a new trial, contrary to the usual rule, which was affirmed, that such appeals will not be entertained upon the question of evidence. *Regina* v. *McLean*, 22 U. C. R. 443.

Defendant in a criminal case obtained a rule nisi for a new trial, but his term of imprisonment expired before judgment could be given after the argument, and the decision therefore became immaterial. *Regina* v. *Patterson*, 27 U. C. R. 142.

Where a conviction has been affirmed by a jury on an appeal to the quarter sessions, that court has no authority to grant a new trial. *Re Yearke and Bingleman*, 28 U. C. R. 551.

In no case of misdemeanour, after verdict of acquittal, will a new trial be granted, on the ground that the verdict is against evidence or the weight of evidence. In cases of non-feasance, such as non-repair of a highway, a new trial may be ordered on the ground of misdirection, improper reception or rejection of evidence; but in cases of misfeasance, such as obstruction of a highway, it is doubtful if a new trial should be granted in any case. *Regina* v. *Port Perry and Port Whitby R. W. Co.*, 38 U. C. R. 431.

II. Damages.

1. *Excessive Damages.*

(a) *Actions of Contract.*

Accounts.] — Where plaintiff and defendant have had open accounts for a long period, and have taken no pains to come to an understanding in regard to the terms of their dealing, or to preserve the means of proving the

necessary facts, and the jury find more or less upon conjecture what the court may think excessive damages, for the plaintiff—the court will very rarely on that ground grant a new trial. *Corner* v. *McKinnon*, 4 U. C. R. 350.

Where the amount is mere matter of computation and the verdict excessive, the court will direct a verdict for the plaintiff for the correct amount, or a new trial on payment of costs. *Stephenson* v. *Ranney*, 2 C. P. 196.

Bond to Convey Land.]—Action on a bond to convey land. The damages appearing to be excessive, and defendant being willing and able to make a deed to the plaintiff, who had so far not suffered from the want of it, and the delay not having been wholly the fault of defendant, a new trial was granted on payment of costs. Sikes v. Wyld, 1 B. & S. 587, commented upon. *Scott* v. *Reikie*, 15 C. P. 260.

Breach of Promise of Marriage.]—The jury gave $4,500, and the court refused to interfere. *Woodman* v. *Blair*, 30 C. P. 452.

Contract for Deed of Land.]—A new trial granted for excessive damages in an action for the non-execution and delivery of a deed, which was delivered four days after the trial, the verdict being founded on the value of the estate. *Muirhead* v. *McDougall*, 5 O. S. 642.

Covenant for Title.] — Semble, that where heavy damages are given in an action of covenant for good title, though the plaintiff knew the state of defendant's title, the court will grant a new trial. *Emery* v. *Miller*, Tay. 336.

In an action on defendants' covenant that he owned certain timber limits, and for a fraudulent representation of ownership, &c., which latter charge was not proved, the jury found a general verdict for $1,000, which upon the evidence was excessive; and on this ground a new trial was granted. *Link* v. *Hunter*, 27 U. C. R. 187.

Covenant to Repair.]—In an action by a lessor against the assignee of the lessee for not repairing, the plaintiff proved that the damages to the reversion by reason of defendants' neglect to repair were $651, this estimate covering all injury up to the time of the trial. The jury gave $400. A new trial was refused. *Perry* v. *Bank of Upper Canada*, 16 C. P. 404.

Goods Furnished.]—The defendant, being employed by the plaintiffs as their locomotive and car superintendent, made use of their materials and men in doing work for a sewing machine manufactory in which he was a partner, and untruly entered such time and materials as employed in the plaintiffs' service. The plaintiffs sued him on the common counts, claiming in their particulars for goods furnished, but not for work and labour. The articles thus furnished were charged by the plaintiffs at $500, which the jury gave, and allowed a doubtful credit of $180, though such goods could have been obtained at an establishment for the purpose for about $180; but much time had been expended in experiments and in making tools for the work, not required in the plaintiffs' business:—Held, that the damages were not excessive. *Northern R. W. Co. of Canada* v. *Lister*, 27 U. C. R. 57.

Hiring — *Wrongful Dismissal.*] — See *Guilford* v. *Anglo-French Steamship Co.*, 9 S. C. R. 303.

Insurance Policy.]—The damages, in an action on a fire policy, being, under the evidence stated in this case, excessive to the extent of $60, a new trial was ordered unless the plaintiff would reduce his verdict by that sum. *Chaplin* v. *Provincial Ins. Co.*, 23 C. P. 278.

Warranty.]—Defendant sold plaintiff a stallion, warranting him to be a good coverer and foal-getter. The horse turned out worthless as a foal-getter, and the jury gave £150 damages. The court, although considering the damages too high, refused a new trial. *Natrass* v. *Nightingale*, 7 C. P. 266.

Warranty on Sale of Piano—*Breach.*] —See *McMullen* v. *Williams*, 5 A. R. 518.

Work and Labour.]—Action for work and labour. New trial granted on payment of costs on the ground of excessive damages. *Stock* v. *Great Western R. W. Co.*, 7 C. P. 526.

In an action for work and labour, the second trial being before a special jury struck by defendants, and the verdict being larger than before, the court declined to interfere for excessive damages. *Stock* v. *Great Western R. W. Co.*, 9 C. P. 134.

See Shaver v. *Great Western R. W. Co.*, 6 C. P. 321.

(b) *Actions of Tort.*

Diverting Stream.]—Action for injury to plaintiff by diverting the course of a stream. The trial Judge thought the damages excessive, and the court discharged the rule on the plaintiff consenting to reduce the verdict to $300. *McLean* v. *Crosson*, 33 U. C. R. 448.

Ejecting Passenger.]—Verdict for £50 against a railway company for putting the plaintiff off a train, though the inconvenience occasioned to him was trifling, and the conductor acted bonâ fide, under an impression that the plaintiff had not paid his fare, and without harshness or violence. New trial granted for excessive damages. *Huntsman* v. *Great Western R. W. Co.*, 20 U. C. R. 24.

Although $300 damages to a passenger who was turned off a train was considered excessive—it being the second verdict, the court would not interfere. *Curtis* v. *Grand Trunk R. W. Co.*, 12 C. P. 89.

False Imprisonment.]—New trial granted for excessive damages in an action for false imprisonment. *Armour* v. *Boswell*, 6 O. S. 153.

Action for false imprisonment of a child on an unfounded charge of stealing fruit from plaintiff's garden. Verdict £62 10s. New trial refused. *McDonald* v. *Cameron*, 4. U. C. R. 1.

A verdict of £1,000, in an action for false imprisonment, though in the opinion of the court excessive, was not set aside on that ground. *Robertson* v. *Meyers*, 7 U. C. R. 423.

In trespass against a magistrate evidence was given that the plaintiff had been guilty of the offence charged, but such evidence was offered and received only in mitigation of damages; 16 Vict. c. 180, s. 12, which in such a case limits the damages to 2d., and deprives the plaintiff of costs, was overlooked, and the plaintiff obtained a verdict for full damages: —Held, that there must be a new trial, without costs. *Bross* v. *Huber*, 15 U. C. R. 625.

In an action against two justices for imprisonment, charged in one count as a trespass, and in another as done maliciously, the jury found $800 against one defendant, and $400 against the other. One of the defendants having used insulting expressions to the plaintiff during the examination:—Held, no misdirection to tell the jury that they were at liberty to give exemplary or vindictive damages; and that the verdict was not excessive. *Clissold* v. *Machell*, 25 U. C. R. 80; *S. C.*, in appeal, 26 U. C. R. 422.

Action for false imprisonment. The plaintiff, when arrested, was bailed to appear next morning, and the case was then dropped. The jury having given $500, the court refused to interfere. *Campbell* v. *McDonell*, 27 U. C. R. 343.

Flooding Land.] — Action for penning back water. Verdict for $400. New trial refused, though only about four acres were rendered worthless, and the damage extended over only a year, defendants' conduct having been unreasonable and the Judge not being dissatisfied with the verdict. *Breathour* v. *Bolster*, 23 U. C. R. 217.

Where in an action for overflowing land, the plaintiff was entitled to recover, though not to the extent of the verdict, the court named a sum ($100), on payment and acceptance of which the rule for a new trial should be discharged without costs. *McGillivray* v. *Great Western R. W. Co.*, 25 U. C. R. 69.

Malicious Procedure.]—A writ of replevin having been issued by defendant against plaintiff, under which certain books of account were seized and given to defendant, the plaintiff some time afterwards brought an action for damages, contending that defendant had maliciously sued out the writ to injure him, claiming large damages. The jury found for the plaintiff £80:—Semble, that the verdict, under the circumstances, would have been set aside for excessive damages, if not otherwise. *Crawford* v. *McLaren*, 9 C. P. 215.

Where the damages are large, and to a great extent sentimental, this may well be considered in deciding whether there has been a substantial wrong caused by a clear misdirection. *Winfield* v. *Kean*, 1 O. R. 193.

Negligence.] — Where in an action for damages against a railway company for negligence, one of the parties to whom damages were awarded, who was an infant, died after verdict and before judgment, and the verdict was now moved against, on the ground of excessive damages:—Held, that the court to prevent injustice had power to grant a new trial, which was ordered unless the damages given to the deceased child were reduced to a sum commensurate with the expense caused to the mother's estate by its illness and maintenance. *Sibbald* v. *Grand Trunk R. W. Co.*, *Tremayne* v. *Grand Trunk R. W. Co.*, 19 O. R. 164.

——— *Evidence.*] — See *York* v. *Canada Atlantic S. S. Co.*, 22 S. C. R. 167; *Sornberger* v. *Canadian Pacific R. W. Co.*, 24 A. 263.

Trespass.]—In an action of trespass q. c. f., the court will interfere when the damages are manifestly excessive. The verdict here was for £75. The court was equally divided as to granting a new trial. *Jeffers* v. *Markland*, 5 O. S. 677.

In trespass, for entry under colour of distress, the jury gave £75 damages, and, although they seemed excessive, a new trial was refused. *Chase* v. *Scripture*, 14 U. C. R. 598.

In an action against a division court bailiff and two execution creditors for seizing goods, the court refused to interfere, on the ground of excessive damages, the excess being only $50. *Lough* v. *Coleman*, 29 U. C. R. 367.

In trespass for taking timber, the court refused to disturb the verdict on the ground that the damages were beyond the value of the logs taken. *Flint* v. *Bird*, 11 U. C. R. 444.

Where the trespass to plaintiff's land had been wilful and after full notice, the court refused to grant a third trial, though they considered the verdict for $563 much too high. *Nicholson* v. *Page*, 27 U. C. R. 505.

The court will not ordinarily interfere with the verdict unless the damages are manifestly extravagant, or unless some wrong element has been admitted in the computation of them, or there is reason to attribute partiality or other improper motive to the jury; and in case of such interference the court will impose equitable conditions on a defendant seeking relief. A new trial was granted when the verdict was for £400, in trespass for taking goods of much less value. *Barclay* v. *Adair*, 7 C. P. 157. See also *McDonald* v. *Cameron*, 4 U. C. R. 1.

In joint trespasses each defendant is liable for the damage occasioned to the plaintiff by the joint act, and the court will not interfere because as regards one the verdict may be excessive. *Grantham* v. *Severs*, 25 U. C. R. 469.

Where, in trespass against a sheriff for taking goods, the jury gave the full value of all seized, although the plaintiff had expressly claimed only a portion, declaring that the rest were not his, a new trial was granted. *Roblin* v. *Moodie*, 15 U. C. R. 185.

Where the damage consisted in cutting down some ten or twelve ornamental and shade trees growing on the highway opposite to the plaintiff's land, for which he was awarded $150:—Held, not excessive. *Douglas* v. *Fox*, 31 C. P. 140.

In an action of trespass to a certain lot of land and expulsion of the plaintiff therefrom, the plaintiff claimed $500, the jury assessed the damages at $1,500, and the trial Judge

amended the statement of claim accordingly:—Held, that the damages were excessive, and a new trial was granted. *Robinson* v. *Hall*, 1 O. R. 266.

Trover.]—M. having sold produce, and received notes in payment, refused to give up the property. In trover, the jury gave £25 damages over the actual value of the property, which they at the same time estimated too high:—Held, that defendant was not entitled to a new trial for the excess of value allowed, but it was granted, on the ground of the £25 damages, on payment of costs. *Gowland* v. *Meade*, 6 C. P. 353.

In trover, damages being laid in the declaration at $8,000, and the jury having found a verdict for $10,548:—Held, that this did not necessarily entitle defendant to a new trial for excessive damages, and that the plaintiff must get rid of the difficulty occasioned by the verdict exceeding the amount laid in the declaration. *Wilde* v. *Crow*, 10 C. P. 406.

Trover for plaintiffs' grain destroyed by fire in defendants' elevator:—Held, under the circumstances stated in the report, that this was a case in which no more than the actual damages sustained should have been assessed; and the jury having awarded excessive damages, the court granted a new trial on payment of costs, unless the plaintiff would reduce the verdict to a sum named. *Moffatt* v. *Grand Trunk R. W. Co.*, 15 C. P. 392.

In trover and trespass for goods taken under an illegal distress, the value of the goods seized was proved to be about $450, but the jury gave a verdict for $700:—Held, that, upon the facts stated in the report of the case, the damages were not excessive. *Walcott* v. *Stolicker*, 16 C. P. 555.

See, also, *post* IX.

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2. *Inadequate or Trifling Damages.*

The court refused to set aside an assessment of damages, upon the ground that the verdict was too low from a misapprehension of the jury. *Perkins* v. *Scott*, Tay. 405.

Damages assessed at a less sum than the evidence appeared to warrant. New assessment ordered. *Leonard* v. *Pawling*, 3 O. S. 17.

New trial refused for smallness of damages, on an affidavit that a material witness was absent from the Province at the time of trial. *Hodgkinson* v. *Brown*, 3 U. C. R. 461.

The court will not grant a new trial at the instance of the plaintiff on account of the smallness of the damages, except in very clear cases and under very peculiar circumstances. In this case, an action on a bond to convey land, it was refused. *McDonald* v. *McDonald*, 4 U. C. R. 133.

In an action on the case, the damages are generally in the discretion of the jury, and the bare fact of the verdict appearing small, or not easily to be reconciled with any particular hypothesis of calculation, is not ground for a new trial. *Hyde* v. *Gooderham*, 6 C. P. 539.

Where a disputed item, forming one distinct head of the plaintiff's demand, has been improperly disallowed by the jury, the principle upon which the court refuses a new trial to the plaintiff for smallness of damages does not apply. *Maddock* v. *Glass*, 5 U. C. R. 229.

18 Eliz. c. 5 prohibits the compromise of a qui tam action without leave of the court. Where therefore a plaintiff agreed to discontinue such an action upon being paid his costs, and in a subsequent action for those costs recovered much less than he thought the jury should have given him, and applied to the court for a new trial, the court, from the nature of the transaction, refused any relief. *Blecker* v. *Meyers*, 6 U. C. R. 134.

Where the damages given were complained of as being too small, a new trial was granted with costs to abide the event, viz., the event of the plaintiffs recovering more than the amount of the first verdict. *Jones* v. *McDowell*, 12 U. C. R. 214; *Craig* v. *Corcoran*, 24 U. C. R. 406.

T. contracted to do certain work for plaintiffs at a price below its value, and did what at the contract price would come to £2,690, allowing certain deductions which the plaintiffs claimed to make for imperfect work. He then abandoned it and left the Province, having received from the plaintiffs £2,295. The plaintiffs contracted with others to finish the work at about £980 more than they would have had to pay T., and brought an action against T. and his sureties for breach of the agreement, claiming to recover this £980. The jury gave only £50, and the court refused a new trial. *Union Road Co.* v. *Talbot*, 15 U. C. R. 106.

Slander of the plaintiff as a physician with respect to his treatment of one H., deceased; verdict for 1s.:—Held, that the improper reception of evidence would be no ground for a new trial, for the plaintiff had, notwithstanding, obtained a verdict, and he did not move for smallness of damages. *Rogers* v. *Munns*, 25 U. C. R. 153.

Held, that, although a new trial would not have been granted for smallness of damages on the first two counts, yet, as there must be a new trial on the last two counts, and as no additional expense would be incurred thereby, justice would be done by granting a new trial on the whole record, without costs. *Anderson* v. *Matthews*, 30 C. P. 166.

Although it is unusual to interfere with a verdict of a jury in an action of tort on the ground of inadequacy of the damages found, still such verdicts are subject to the supervision of the court, and if the amount awarded be so small that it is evident the jury must have overlooked some material element of damage in the plaintiff's case, a new trial will be granted. A practising physician, who had been badly if not permanently injured through the negligence of the defendants, and whose professional business had suffered to a considerable extent, was awarded $700 by the jury:—Held, that there must be a new trial on the ground of inadequacy of the damages. *Church* v. *City of Ottawa*, 25 O. R. 298. Affirmed, 22 A. R. 348.

See post IX.

3. *Nominal or Trifling Damages.*

Where a verdict would be conclusive as to the parties' rights, smallness of damages is no objection to setting it aside. *Soper* v. *Marsh*, 5 O. S. 68.

New trial refused to enable plaintiff to add to his verdict a trifling sum allowed as a set-off. *Playter* v. *Taylor*, 1 U. C. R. 159.

In an action of tort, when defendant has a verdict, and the damages suffered are but small, the court will only grant a new trial, where, as in this case, the ordinary rights of property seem to have been lost sight of. *Sherwood* v. *Gibson*, 5 U. C. R. 205.

In trespass q. c. f. the court refused to disturb a verdict for defendant, though the plaintiff was strictly entitled to nominal damages. *Curtis* v. *Jarvis*, 10 U. C. R. 466.

Where, on the evidence, nominal damages only would have been sufficient, the court refused to interfere with a verdict for defendants. *Eaton* v. *Gore Bank*, 27 U. C. R. 490.

The plaintiff declared that he was entitled to the water of a certain stream for working his mill, and complained that defendant, owning a mill higher up, had unlawfully deposited sawdust, bark, &c., in the stream, which was carried down, and choked up the plaintiff's mill pond and races, &c. Defendant, by his second plea, denied the plaintiff's right to the water, which the plaintiff sufficiently proved, but, there being no appreciable damage, the jury found a general verdict for defendant:—Held, that there must be a new trial, for the right being established, the sawdust, &c., was an injury to it, for which the plaintiff was entitled to a verdict. *Mitchell* v. *Barry*, 26 U. C. R. 416.

To an action on an agreement for the sale of land, defendants pleaded, on equitable grounds, that the plaintiffs contracted with them only as agents for the owner of the land, and not as principals; and semble, that the evidence set out in the report of the case shewed that the plaintiffs knew they were acting only as agents. The jury, however, found against defendants, on this question, and the verdict being for $10 only, the court refused to interfere on motion for a nonsuit. *Campbell* v. *Dennistoun*, 23 C. P. 339.

The plaintiff contracted to sell land to A., who agreed to build a house upon it. A. put up the house, but plaintiff refused to open certain streets, as he had agreed to do, and the lot was in consequence inaccessible. A. then assigned to defendant, who moved the house to another lot, which he also had agreed to purchase from the plaintiff, and after such removal the plaintiff conveyed to defendant the latter lot, with all the buildings thereon:—Held, notwithstanding the deed, that plaintiff might maintain trover for the house so removed; but the jury having given only nominal damages, the court under the circumstances refused to interfere. *Cleaver* v. *Culloden*, 15 U. C. R. 582.

Action was brought for the price of timber supplied; defended on the ground that the timber was not of the quality contracted for. The plaintiff having obtained a verdict, the defendant moved for a new trial, which was granted unless the plaintiff should consent to his verdict being reduced. Such consent being filed, judgment was entered for the plaintiff for a reduced amount. A cross-action was brought for damages in not supplying timber up to the standard required by the contract. A verdict having been given for the defendant in that action, the plaintiff moved for a new trial, upon the ground that he was entitled to nominal damages at least. The court held that he was entitled to nominal damages, but refused a new trial:—Held, affirming the judgment in 31 N. B. Reps. 250, 265, that the objections to the verdicts for improper reception and rejection of evidence were properly overruled by the court below, and the new trial to recover nominal damages was properly refused. *Scammell* v. *Clarke*, 23 S. C. R. 307.

Trespass to land. The defendants denied the plaintiff's title. At the trial the plaintiff gave no evidence of actual damage, but urged that an action was necessary to protect his title. The Judge charged the jury strongly against the plaintiff, and a verdict for the defendants was given:—Held, that there was no misdirection; and, as the plaintiff could at a new trial obtain no more than nominal damages, it was properly refused. *Simonds* v. *Chesley*, 20 S. C. R. 174.

See post IX.

See, also, *McLeod* v. *Boulton*, 2 U. C. R. 44; *Kerry* v. *England*, [1898] A. C. 742.

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4. *Verdict under £20.*

Smallness of damages is no objection to a new trial, when the verdict is manifestly contrary to the evidence and the Judge's opinion. *Brookfield* v. *Sigur*, Tay. 200.

Nor when one distinct head of the plaintiff's demand has been improperly disallowed. *Maddock* v. *Glass*, 5 U. C. R. 229.

An injury to a watercourse is considered as an injury to a permanent right, and in such a case the court will grant the plaintiff a new trial, although the probable amount to be recovered by a verdict may not be large. *Appelgarth* v. *Rhymal*, Tay. 427.

In trespass q. c f. defendant pleaded liberum tenementum, and on the trial the jury gave £5 damages for plaintiff, against the Judge's charge. The verdict being contrary to law:—Held, that the smallness of damages was no reason against a new trial, because the verdict if it stood would be conclusive on the parties as to their rights. *Soper* v. *Marsh*, 5 O. S. 68.

Where in trover the court thought the jury should have treated the transaction as being on the plaintiff's own shewing ipso facto fraudulent, they granted a new trial, though the verdict was only for £11 10s., with costs to abide the event. *Knowlson* v. *Conger*, 7 U. C. R. 455.

In an action for maliciously suing out an attachment in the division court, it appeared that the defendant, when he made the affidavit, was aware that the plaintiff was then actually in prison. For the defence it was

shewn that the goods attached were eventually sold under executions against the plaintiff, and therefore no substantial damage was suffered. The court, however, refused a new trial on this ground, the verdict being for only £18. *Owens* v. *Purcell*, 11 U. C. R. 390.

When a verdict is under £20, and no permanent right is bound by it, the court will not be disposed to interfere unless it appear to be clearly perverse, or the trial Judge reports that he is dissatisfied. *Phillips* v. *Hutchinson*, 13 U. C. R. 136.

The court refused to disturb a verdict for $20 for trespass to land, as the pleadings would have to be amended, and a new trial could only be granted on payment of costs. *Munn* v. *Galbraith*, 13 C. P. 75.

A new trial ordered notwithstanding that the amount recovered was less than £20, a public right being involved. *Prouse* v. *Glenny*, 13 C. P. 560.

Trespass to land, and destroying fences, trees, and buildings. Pleas, not guilty, and that the fences and buildings were not the plaintiff's. The question being whether the plaintiff could maintain the action before actual entry:—Held, that as to the land itself and the trees he could recover, the defendants not having denied his property therein, and the damages being only $80 a new trial was refused. *Jowett* v. *Haacke*, 14 C. P. 447.

Held, that the uncertainty as to the amount of defendant's liability in an action for an interference with a water privilege, it being impossible to ascertain how much of the obstruction was caused by him and how much by others, formed no ground for disturbing a verdict, which was for $40. *Austin* v. *Snyder*, 21 U. C. R. 299.

The rule that a new trial will not be granted where the verdict is under £20, though against evidence, refers to the amount of the verdict, independent of any sum paid into court. Where, therefore, the verdict was for $84, exclusive of $100 paid into court, and a new trial could have been granted only on payment of costs, the court refused to interfere. *Grimm* v. *Fischer*, 25 U. C. R. 383.

III. Discharging Rule or Order for Non-payment of Costs.

[*See* R. G. of T. T. 1856, No. 45; Con. Rule (1897) 638.]

Where a new trial was granted on payment of costs by plaintiff, who served three appointments on defendant for taxation, and the costs were at last taxed without disbursements, which defendant would not receive, and plaintiff proceeded again to trial and obtained a verdict, the court refused to set it aside. *Thompson* v. *Sewell*, 4 O. S. 16.

Where a new trial was granted on payment of costs, and the costs were not paid, the rule to discharge the rule for a new trial and to enter judgment was absolute in the first instance. *Drean* v. *Smith*, T. T. 1 & 2 Vict.

Where the costs were taxed and demanded, but not paid, the court in the same term ordered a rule absolute for discharging the rule for a new trial, if the costs were not paid in a fortnight. *Wynn* v. *Palmer*, E. T. 3 Vict.

Where plaintiff obtained a rule to enter judgment for non-payment, the court, under special circumstances, gave defendant a week's further time. *Reeves* v. *Myers*, T. T. 4 & 5 Vict.

Where a new trial is granted on payment of costs, the party to whom the indulgence is granted must attend promptly at the taxation and payment of costs; and if he suffer so long a time to elapse that plaintiff cannot proceed to trial at the next assizes without embarrassment, the court will not, after plaintiff has obtained a rule to enter judgment, discharge the rule and allow defendant the benefit of his rule for a new trial. *Johnson* v. *Sparrow*, 1 U. C. R. 396.

Where a new trial is granted on payment of costs, the party obtaining it should proceed with the taxation and payment so as to enable the case to be tried on the next opportunity; but the omission to do so will not necessarily deprive him of the benefit of his rule; and in this case it was held that sufficient excuse was shewn. *Grantham* v. *Powell*, 1 P. R. 256.

Defendant obtained a new trial on payment of costs, and his attorney immediately afterwards wrote to the plaintiff's attorney begging to know what the costs were, that he might pay them. Plaintiff's attorney took no notice of this, but after some months moved in term to discharge the rule for a new trial, on an affidavit that the costs were unpaid; and, without giving any notice to defendant's attorney to attend taxation, on the same day entered judgment and took out a hab. fac., which was executed. The court, on application of the defendant's attorney, set aside the judgment and writ without costs, and directed the defendant to be restored to possession. *Doe d. Arnold* v. *Auldjo*, 6 U. C. R. 21.

Where the costs, having been taxed, were tendered, but refused, as there was not then sufficient time to give the proper notice for the next assizes, which, however, defendant offered to waive:—Held, that the plaintiff was not entitled to have the rule for a new trial rescinded; but, owing to defendant's delay, the application for that purpose was refused only on payment of costs. *Rabidon* v. *Harkin*, 2 P. R. 129.

Where a new trial is granted to a plaintiff on payment of costs, the payment is a condition precedent to the right to give notice of trial. In this case, where they were not so paid, the court set aside the verdict, but, under the circumstances, without costs. The attorney who is to receive the costs should, if requested, deliver his bill and receive payment without insisting on an official taxation. *Stock* v. *Shewan*, 8 C. P. 185.

A rule for a new trial on payment of costs was obtained by defendants in Hilary term. On the 23rd March the costs were taxed and an allocatur served on the agent of defendant's attorney, but the costs were not paid, and the plaintiff, in consequence, was thrown over the assizes, which took place on the 23rd April. On motion to rescind the rule,

it appeared that defendant lived some distance from his attorney, who wrote to him three letters, none of which he received, though he attended the post twice a week until the 21st April. On that day he paid the costs to his attorney, who did not see the plaintiff's attorney till the 28th May, and the latter then declined to receive them. The action was brought to try a question of boundary. Under these circumstances the court refused to rescind the rule, and gave defendant a month to pay the costs taxed and the costs of this application. *VanEvery* v. *Drake*, 3 P. R. 84.

When a plaintiff obtains a new trial on payment of costs he is not bound to pay them before the next assizes, because, even had the costs been paid, the plaintiff could not be compelled to go to trial at such assizes; but he must be always ready to pay the costs taxed to defendant. On 19th June the judgment for new trial was given, and on 19th August the rule was served, and on 30th September the costs were tendered:—Held, that the tender was within a reasonable time. A rule to rescind a rule for a new trial was therefore discharged, but, as the costs taxed were not paid into court when this rule nisi was served, without costs. *Stacey* v. *McIntyre*, 5 P. R. 205.

Defendant had obtained a rule a year previously for a new trial on payment of costs. He neglected to pay, and the plaintiff obtained a rule nisi to rescind the rule:—Held, that if defendant should pay the costs of the trial, as provided by the original rule, and of this application, within ten days, the rule nisi should be discharged, otherwise that the rule for new trial should be rescinded. *Pacaud* v. *McEwan*, 6 P. R. 20.

IV. Evidence.

See, also, *post* XVII.

1. *Discovery of New Evidence.*

Application—*What must be Shewn—Grounds for Granting.*]—It must appear that the fresh evidence could not have been produced at the former trial. *Haren* v. *Lyon*, Tay. 370.

The court will not grant a new trial for the discovery of new evidence, unless in clear cases and where the grounds are strong and specific. It must be stated what evidence the newly discovered witness can give, and generally the witness himself must shew the court, on affidavit, what facts he can prove. *Robinson* v. *Rapalje*, 4 U. C. R. 289.

See, also, *White* v. *Brown*, 12 U. C. R. 477; *Bates* v. *Chisholm*, 7 C. P. 46; *Corporation of Longueuil* v. *Cushman*, 24 U. C. R. 602.

Action against the acceptor of a bill. Plea, that it was accepted for plaintiff's accommodation. Verdict for defendant. New trial refused on affidavits of new evidence discovered since the trial—the affidavits not having been filed until the second term after the rule nisi had been moved, and leaving it very doubtful whether the new evidence would certainly avail the plaintiff. *Morton* v. *Thompson*, 2 U. C. R. 196.

A new trial will not be granted if the evidence was known before, though too late to make use of it at the trial, and though every reasonable effort was made to produce it after it was so discovered. *Rowe* v. *Grand Trunk R. W. Co.*, 16 C. P. 500.

The discovery of evidence to impeach the testimony of a witness examined at the trial is not a ground for a new trial. *Regina* v. *Hamilton*, 16 C. P. 340.

The intention to produce a witness in person whose evidence was taken under a commission and read to a jury is not a ground for a new trial. *McDermott* v. *Ireson*, 38 U. C. R. 4.

In ejectment a new trial was refused on the ground of the discovery of new evidence, when it was not shewn that the evidence could not have been procured before the trial; and when such evidence went to prove, not that defendant had any title, which was in no way shewn, but that a third person, with whom he had no privity, was entitled to a moiety of the land. *White* v. *McKay*, 43 U. C. R. 226.

Corroborative Evidence.]—The discovery of new corroborative evidence is no ground for a new trial. *Fawcett* v. *Mothersell*, 14 C. P. 104; *Hooper* v. *Christoe*, 14 C. P. 117; *Regina* v. *Mellroy*, 15 C. P. 116; *McDermott* v. *Ireson*, 38 U. C. R. 1.

Held, that the discovery of new evidence which was merely corroborative of evidence given at the former trial was no ground for a new trial. *Miller* v. *Confederation Life Ins. Co.*, 14 A. R. 218, 11 O. R. 120.

New trial on the ground of surprise and discovery of new evidence, refused, where the evidence was merely in corroboration. *Howarth* v. *McGugan*, 25 O. R. 396.

Allowing a new trial on the ground of the discovery of new evidence is a matter of legal discretion, and where the subject-matter of the action was of a trifling nature, and a divisional court ordered a new trial on affidavits shewing merely the discovery of further evidence corroborative of the evidence at the trial the order was set aside. Murray v. Canada Central R. W. Co., 7 A. R. 646, followed. *Trumble* v. *Hortin*, 22 A. R. 51.

Criminal Cause—*Foundation for Evidence.*]—The chief witness for the Crown on an indictment for murder, swore that on the night when the crime was committed he heard cries, and afterwards saw the prisoner and his two sons coming from the direction of such cries. At the coroner's inquest, held six months before, this witness had declared himself unable to identify the persons seen by him. In affidavits filed on moving for a new trial, after conviction, it was alleged that this witness stated at the inquest, as the reason for being unable to identify the persons, that the night was dark and a wood pile intervened:—Held, that this formed no ground for interference; for, if true, the prisoner must have heard the statement made, so that it was no new evidence; and, as neither the witness nor the coroner was examined as to such statement at the trial, the proper foundation for evidence of it had not been laid. *Regina* v. *Hamilton*, 16 C. P. 340.

Diligence—*Entries in Books.*]—A cause had been carried down to trial in 1879, when it was postponed at the instance of defendants, and a trial took place in 1880, when a verdict was rendered in favour of the plaintiffs, which the court refused to set aside. The defendants thereupon appealed to this court, and when the appeal came on to be heard (in 1882) an application was made by the defendants to be allowed to adduce evidence alleged to have been recently discovered, tending to relieve the defendants from liability, which evidence, it appeared, consisted mainly of entries in the books of the defendants. The court, being of opinion that proper diligence had not been used by the defendants, as in such case they must have discovered the evidence at a much earlier date, refused the application with costs. *Murray* v. *Canada Central R. W. Co.*, 7 A. R. 646.

Instances in which New Trial Granted.]—A verdict having been rendered for plaintiff against defendant (a sheriff) for an amount exceeding his indemnity, correct on the evidence, but it appearing that the defence had been neglected by the nominal defendant, and affidavits having been filed impeaching the evidence at the trial, and of the discovery since the trial of evidence in the defendant's favour, the court granted a new trial upon payment of costs. *Townsend* v. *Hamilton*, 4 C. P. 444. See *S. C.*, 5 C. P. 230.

The defendant, in dower, pleaded ne unques seizie que dower, and, after trial and verdict against him, remembered that a bond had been executed by himself and the demandant several years before, providing for the release of the dower in question, which bond had remained in the hands of a third party and had not been produced at the trial. The court granted a new trial on payment of costs, with leave to add a plea. *Germain* v. *Shuert*, 7 C. P. 86.

In an action for collision between two sailing vessels owned by the plaintiffs and defendant respectively, it appeared that both vessels were running to windward close-hauled, the plaintiff's vessel on the starboard, and the defendant's vessel on the port tack. Defendant's vessel, it was admitted, did what was best as soon as the plaintiffs' lights were seen, but the complaint was, that he should have seen them sooner. This he explained by alleging that there was a haze on the water, which the plaintiffs' witnesses denied. The jury having found for the defendant, a new trial was granted, on affidavits shewing the discovery of new evidence to prove that there was no haze at the time. *Downey* v. *Patterson*, 38 U. C. R. 513.

See post 4; IX.

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2. *Examination of Witnesses and Rejection or Reception of Evidence—Rulings as to.*

Close of Case—*Defect in Evidence—Refusal to Reopen.*]—Except in case of fraud the court will seldom interfere with the discretion of the Judge at nisi prius, in holding a plaintiff to the case which he has proved, after defects in his evidence have been pointed out. *Armour* v. *Phillips*, 4 U. C. R. 152.

——— *Opening to Supply Fact.*]—It is no ground for a new trial that the Judge refused to allow plaintiff, after he had closed his case, to supply the evidence of a fact he had omitted to prove. *Benedict* v. *Boulton*, 4 U. C. R. 96.

In ejectment brought on a mortgage, defendant objected to the want of registry, but closed his case without having proved that the title was a registered one when defendant got his deed. The Judge would not allow the defence to be reopened; and, as it appeared that the defendant was setting up a dishonest defence, the court refused to interfere. *Blakely* v. *Garrett*, 16 U. C. R. 261.

Contradicting Witness—*Reception of Evidence—Corroboration.*] — The court will not review the discretion of the Judge at the trial in receiving evidence to contradict a party's own witnesses as being adverse, nor in receiving evidence on the part of the defence after the close of the plaintiff's case, even though for the purpose of corroborating the defence. *Herbert* v. *Mercantile Fire Ins. Co.*, 43 U. C. R. 384.

Omission to Call Witnesses.] — The fact of counsel having yielded to the advice of others and omitted to call witnesses is no ground for a new trial. *Brown* v. *Sheppard*, 13 U. C. R. 178.

Where a defendant abstains from calling evidence, but rests his defence on what appears from the plaintiff's evidence, such evidence being legally sufficient, the court will not interfere. *Young* v. *Moodie*, 6 C. P. 244.

Where the defendants having a witness in court did not call him, relying upon the weakness of the plaintiffs' evidence and desiring to have the last word to the jury, the court refused to set aside a verdict for the plaintiffs, though dissatisfied with it. *Hurrell* v. *Simpson*, 22 U. C. R. 65.

——— *Ruling of Judge.*]—A party who, relying upon the Judge ruling in his favour, forbears to call witnesses in his defence, is not on that ground alone entitled to a new trial in case of an adverse verdict, but must also abide the result of the judgment of the court on that ruling. In this case, however, the Judge having reported his dissatisfaction with the evidence of the plaintiff's agent, and that defendants did not call their witnesses solely in deference to his opinion, and plaintiff having asserted that he could give stronger evidence, the court, considering it desirable on a further investigation, granted a new trial, but only on payment of costs. *Davis* v. *Scottish Provincial Ins. Co.*, 16 C. P. 176.

Omission to Cross-examine.]—Held, under the facts stated in the report, that defendants, having abstained from cross-questioning the witness on the trial as to the position of the note sued upon and the facts of the case, were not entitled to a new trial for that purpose. *Adams* v. *Toland*, 12 C. P. 119.

Recall of Witness.]—At the trial the Judge having declined to allow a witness twice called in the progress of the suit to be recalled, or to wait for the possible arrival of another witness, the court refused to review the exercise of his discretion in so doing. *Gleason* v. *Williams*, 27 C. P. 93.

Refusal to Allow Questions.]—The erroneous exercise of discretion in refusing to allow questions on cross-examination, which are irrelevant to the issue, would be no ground for a new trial. *Hickey* v. *Fitzgerald*, 41 U. C. R. 303.

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3. *False or Mistaken Evidence.*

When a witness, a surveyor, founded his evidence upon the assumption of a certain monument as the correct point to start from in running a line, and the jury gave their verdict accordingly, and such witness afterwards discovered he was in error as to the correctness of that boundary, and made affidavit of his mistake, the court granted a new trial. *Doe d. Case* v. *McGill*, 5 O. S. 56.

Slander. Verdict for plaintiff for £150. New trial refused on the ground that one of the principal witnesses for the plaintiff was, shortly after the trial, convicted at the same assizes for forgery, and sentenced to banishment. *Eakins* v. *Evans*, 3 O. S. 383.

New trial granted, on payment of costs, where the evidence for plaintiff was not very satisfactory, and would have entirely failed but for one witness, who, it was sworn, was a man of bad character, and had stated after the trial that he had been hired to give evidence; defendant also swearing that all this witness had stated was false. *Talbot* v. *McDougall*, 3 O. S. 644.

The plaintiff having recovered a verdict for $200 for malicious prosecution, a new trial was moved for on affidavits shewing that the plaintiff and a person called by him, and whose evidence was material, had committed perjury in swearing that this witness was a married sister supported by him, while in fact she lived with him as his wife, and was known as such. The affidavit, however, did not shew that these facts were not known at the trial, and the evidence fully proved the plaintiff's case. The court refused to interfere. The practice of indicting parties or witnesses for alleged perjury in a civil suit, while proceedings are still pending, disapproved of. *Chadd* v. *Meagher*, 24 C. P. 54.

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4. *Further Evidence—Production of.*

County Court—*Nonsuit—Setting aside—Leave to Defendants to Give Evidence.*]—At the trial of a case with a jury, the Judge of the county court, at the conclusion of the plaintiff's evidence, and without hearing any evidence on the part of the defendants, nonsuited the plaintiff. In the following term the Judge set the nonsuit aside and entered judgment for the plaintiff, claiming a right under the circumstances to do so. On appeal, the court, while satisfied with the ruling of the Judge on the legal liability of the defendants, set the nonsuit aside and ordered a new trial upon the facts, so as to afford the defendants an opportunity of adducing evidence; but, under the circumstances, refused them any costs of the appeal. Rules 311, 312, 319, and 321, O. J. Act, discussed. *Baker* v. *Grand Trunk R. W. Co.*, 11 A. R. 68.

Forged Indorsement—*Expert Evidence.*]—An action against the indorser of promissory notes, who alleged that his indorsement had been forged, was tried twice. On the first trial the jury disagreed, and on the second they found for the plaintiff. No expert evidence was offered at either trial, though the defence intended was fully known. The court refused a new trial, moved for on affidavits of an expert giving his opinion founded on a comparison and critical analysis of the defendant's handwriting, with the indorsements. *Moser* v. *Snarr*, 45 U. C. R. 428.

Possession of Land—*Caretaker.*]—Held, that T. L., having in his pleadings set up that J. L. had been in possession for twenty-two years as his tenant, could not obtain a new trial on the ground that he could shew by evidence that she had been in as a caretaker for him. *Hickey* v. *Stover*, 11 O. R. 106.

See ante 1.

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5. *Improper Admission of Evidence.*

[By 37 Viet. c. 7, s. 34, A. J. Act, 1874, con. rule (1897) 785, a new trial shall not be granted on the ground of misdirection, or of the improper admission or rejection of evidence, unless, in the opinion of the court to which application is made, some substantial wrong or miscarriage has been thereby occasioned in the trial of the action; and if it appear to such court that such wrong or miscarriage affects part only of the matter in controversy the court may give final judgment as to part thereof, and direct a new trial as to the other part only.]

Contradicting Irrelevant Evidence—*Substantial Injury.*]—I., the maker, and F., the indorser, of a promissory note were sued upon it, and F. denied his indorsement. At the trial an indenture of conveyance of land from I. to F. was put in without objection, and I. testified that it was given to secure F. against his indorsement of certain notes of which the one sued on was a renewal. There was nothing in the indenture to shew that it was given for anything but the expressed consideration of $1,500, and it was not pretended that such consideration was paid:—Held, that it was competent for F. to shew what the indenture was given for, that it was not given to secure him against such indorsement; and therefore evidence of the existence of an indebtedness from I. to F. upon an open account was receivable to support the proof that it was given to secure such indebtedness. I. was asked whether F. did not say to him when he asked him to indorse one of the series of notes of which the one in question was a renewal, that he, F., never "backed anybody's notes:"—Held, that the question was irrelevant, and I.'s answer to it conclusive; and evidence contradicting such answer was inadmissible. Held, also, that having regard to the whole case and the charge of the trial Judge adverting to the evidence so improperly received and to its importance, substantial injury and miscarriage were thereby occasioned, and there was sufficient ground for granting a new trial. *Bank of Hamilton* v. *Isaacs*, 16 O. R. 450.

Covenant—*Breach — Special Damage—Pressing on Jury—Costs.*]—In an action for

breach of covenant by delaying the completion of a railway crossing which afforded the best road to the plaintiff's saw mill:—Held, that evidence of special damage was not admissible, none being alleged in the declaration, and the plaintiff not having notified the defendants at the time of the fact of his suffering the loss of profit constituting the alleged damage. The plaintiff's counsel having persisted in pressing such evidence on the jury, against the opinion of the presiding Judge, the court granted a new trial without costs. *Shaver* v. *Great Western R. W. Co.*, 6 C. P. 321.

Declaration — *Repetition of Evidence—Interference.*]—Held, in an action for collision, that evidence of declarations made by the captain of defendants' vessel, as to the cause of the accident, on the day after it had happened, were inadmissible; but that the verdict should not be interfered with for their reception, as they appeared to have been only repetitions of what was said by him at the time of the accident. *Shaw* v. *DeSalaberry Navigation Co. of Montreal*, 18 U. C. R. 541.

Defamation — *Pleading — Justification —Rebuttal.*] — In an action for a libel contained in a newspaper article respecting certain legislation, the innuendo alleged by the plaintiff, who was the attorney-general for the Province at the time when such legislation was enacted, was that the article charged him with personal dishonesty. The defendants pleaded "not guilty," and that the article was a fair comment on a public matter. The defendants put in evidence, the plaintiff's counsel objecting, to prove the charge of personal dishonesty, and evidence in rebuttal was tendered by the plaintiff and rejected. Certain questions were put to the jury requiring them to find whether or not the words bore the construction claimed by the innuendo or were fair comment on the subject-matter of the article; the jury found generally for the defendants, and in answer to the trial Judge, who asked if they found that the publication bore the meaning ascribed to it by the plaintiff, the foreman said: "We did not consider that at all." On appeal from an order for a new trial:—Held, that the defendants not having pleaded the truth of the charge in justification, the evidence given to establish it should not have been received, but it having been received, evidence in rebuttal was improperly rejected; the general finding for the defendants was not sufficient in view of the fact that the jury stated that they had not considered the material question, namely, the charge of personal dishonesty. For these reasons a new trial was properly granted. *Manitoba Free Press Co.* v. *Martin*, 21 S. C. R. 518.

Effect on Jury—*Illegal Evidence.*]—Semble, that the supreme court is bound to uphold a verdict if there is sufficient legal evidence to sustain it independently of evidence improperly received, and cannot take into consideration the effect on the jury of such illegal evidence. *Confederation Life Association* v. *O'Donnell*, 13 S. C. R. 218.

——— *Judge's Charge.*]—In an action on a bill of costs the question was, whether an agreement had been made by an attorney, the plaintiff, that the costs should not exceed a certain amount, which had been paid. The jury found the agreement to have been made, and gave a verdict for the defendant. A new trial was moved for on the ground that evidence had been received and a discussion allowed to take place at the trial as to the magnitude of the bill, and of the large amount of costs paid by defendant in the same suit to other attorneys, which influenced the jury in their finding:—Held, that this was not a sufficient ground for interference, the jury having been expressly told that the fact of the making of this agreement was the only question for their decision. *O'Connor* v. *McNamee*, 2 C. P. 237.

——— *Sufficiency of Other Evidence.*]—Where improper evidence is received the court will grant a new trial, although there be other evidence of the same nature, unless they see that the improper evidence so received did not influence the jury. *McBride* v. *Bailey*, 6 C. P. 9.

But not where there clearly appears to be sufficient evidence to support the verdict independently of the evidence improperly admitted. *Appleton* v. *Lepper*, 20 C. P. 138; *Kyle* v. *Buffalo and Lake Huron R. W. Co.*, 16 C. P. 76; *Dundas* v. *Johnston*, 24 U. C. R. 547.

Exception not Taken at Trial.]—No exception having been taken to the evidence at the trial:—Held, that it could not subsequently be urged in moving for a new trial. *Campbell* v. *Beamish*, 8 U. C. R. 526.

Incompetent Witness.]—It is no ground that an incompetent witness has been examined, unless he was objected to at the trial. *Doe d. Sullivan* v. *Read*, 3 U. C. R. 293.

Letters Written without Prejudice.]—Semble, that certain letters in this case should not have been received, even for the purpose of proving the identity of defendant, having been written without prejudice; but, as the other testimony was sufficient to warrant the verdict, the court refused to interfere. *Burns* v. *Kerr*, 13 U. C. R. 468.

Negligence—*Evidence of Previous Similar Acts.*] — Action against defendants for negligence in the construction and management of their steamboat, by which sparks escaped from the funnel at a wharf, and the plaintiff's lumber and mills there were burned. The alleged negligence consisted in leaving the screens of the steamer open; and on the part of the plaintiffs evidence was received, though objected to, that on other occasions, at different time and places, the screens were open, and cinders had escaped. The engineer and firemen on the boat, being afterwards called for defendants, swore that the screens were closed, and had never on any occasion been left open. The Judge ruled, at the close of the case, that the evidence objected to was admissible, particularly as touching the credit of the defendants' witnesses:—Held, that such evidence was inadmissible either to support the plaintiffs' case when it was tendered and received, or for the purpose for which it was afterwards admitted; and the jury having found for the plaintiffs, a new trial was granted without costs. *Edwards* v. *Ottawa River Navigation Co.*, 39 U. C. R. 264.

Parol Evidence — *Consent at Trial.*]—Where defendant at the trial, disclaiming any

wish to succeed against the justice of the case, assents to the reception of parol evidence to prove the understanding on which a note was given, he cannot be allowed afterwards to argue in banc. the technical objection he has waived. *Davis* v. *McSherry*, 7 U. C. R. 490.

——— *Misdirection.*] — The improper reception of evidence to explain a written contract is ground for a new trial only when it leads to misdirection. *Spring* v. *Cockburn*, 19 C. P. 63.

Pleadings in Chancery — *Evidence of Payment.*]—C., in an answer in a suit in chancery, having stated the sum paid by him and the facts:—Semble, that the pleadings in the suit, having been put in by defendants, were some evidence as against them of such payment: but, as a new trial would not have been granted for the reception of such evidence, even if inadmissible, the point was not determined. *Cooley* v. *Smith*, 40 U. C. R. 543.

Seduction.]—See *Ferguson* v. *Veitch*, 45 U. C. R. 160; *Udy* v. *Stewart* 10 O. R. 591.

Statement of Deceased — *Admissibility —Increasing Verdict.*]—Slander of the plaintiff as a physician, with respect to his treatment of one H., deceased, whom he had attended after her confinement. Plea, not guilty. Evidence of statements made by H. to the same effect as the words charged was received, though objected to, as shewing that defendant did not originate the alleged slander; and the plaintiff had a verdict for 1s.: —Quære, whether such evidence was admissible. Held, that its improper reception would be no ground for a new trial, for the plaintiff had, notwithstanding, obtained a verdict, and he did not move for smallness of damages. *Rogers* v. *Munns*, 25 U. C. R. 153.

——— *No Substantial Injury.*] — The plaintiff claimed to recover against the defendant, as administrator of his deceased brother W. G., two sums, one of $800, which she alleged W. G. received for her from another brother, S. G., also deceased; and the other of $1,500, which she alleged W. G. promised to leave her in consideration of her remaining with him, taking care of and managing his house as long as he lived. It was objected that evidence was admitted of statements made by S. G. of the amount he intended leaving the plaintiff. The objection was first taken during the examination of a witness, C., after the plaintiff had been examined and cross-examined as to such statements without objection:—Held, that no substantial wrong or miscarriage was occasioned by the admission of C.'s evidence; and therefore under the O. J. Act, rule 311, it was not a ground for a new trial. *Cook* v. *Grant*, 32 C. P. 511.

See Scammell v. *Clarke*, 23 S. C. R. 307; *Hesse* v. *St. John R. W. Co.*, 30 S. C. R. 218.

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6. *Improper Rejection of Evidence.*

[*See* note to sub-head 5.]

Chose in Action — *Assignment—Action by Assignee—Set-off.*]—Held, that to an action by an assignee of an account for the price of lumber and staves delivered by the assignor to the defendant under two certain contracts therefor, the defendant, under R. S. O. 1877 c. 116, ss. 7, 10, and the Judicature Act, ss. 12, 16, and rule 127, can set up as a defence a claim for damage for the non-delivery by the assignor to the defendant of certain other timber and staves specified in the contracts, and for the inferior quality of those delivered. In this case the Judge having refused to receive evidence as to the non-delivery, a new trial was ordered. *Exchange Bank* v. *Stinson*, 32 C. P. 158.

Counsel at Trial — *Witness—No Substantial Injury.*]—The senior counsel for the plaintiff at the trial, a partner of the attorney, offered himself as a witness for the plaintiff, to corroborate the evidence of his partner, but was rejected, the Judge saying that he must choose between the positions of advocate and witness, and must cease to act as counsel if he desired to give evidence:—Held, that he was a competent witness, and could not properly be rejected; but a new trial was refused upon this ground, under 37 Vict. c. 7, s. 34, the court being of opinion that no substantial wrong or miscarriage had been occasioned thereby. Remarks upon the impropriety of such evidence, though strictly admissible. *Davis* v. *Canada Farmers Mutual Ins. Co.*, 39 U. C. R. 452.

Depositions of Deceased Witness— *Effect of Rejection—Refusal of New Trial.*] —The testimony of a witness, since deceased, taken on a former trial, was rejected by the Judge at the trial herein:—Held, that it was improperly rejected, but other evidence to the same effect having been received, it could not be said that the result would have been varied by the admission, and a new trial was accordingly refused. *Copeland* v. *Village of Blenheim*, 9 O. R. 19.

Effect of Evidence — *Refusal of New Trial.*]—Held, in an action for assault, that libellous and abusive articles reflecting on the defendants, published on the day of, and preceding, the assault, in a newspaper of which the plaintiff was the proprietor, were admissible in evidence in mitigation of damages. But where the verdict was for $50 only, and though such evidence was rejected the jury were fully informed by defendants' counsel that the assault was committed in consequence of these articles, and the court saw no reason to believe that defendants had been prejudiced by the ruling, a new trial was refused, but, under the circumstances, without costs in term to either party. *Percy* v. *Glasco.*, 22 C. P. 521. Followed in *Stirton* v. *Gummer*, 31 O. R. 227, *ante* DEFAMATION.

Semble, that the evidence rejected in this case would not have affected the result, and that the better course, therefore, would have been, even if the court thought it admissible, to have refused a new trial for the rejection, under s. 34 of the A. J. Act, 1874. *O'Connor* v. *Dunn*, 2 A. R. 247.

Fraud—*Evidence of Collateral Fraud.*]—In an action on a bond against two sureties, the defendant R. set up the defence and gave evidence that his signature to the bond had been obtained by fraud. The evidence of his co-defendant C. was tendered for the purpose of shewing that C.'s signature to the bond had also been so obtained, which was rejected as

inadmissible:—Held, that the evidence of C. was admissible as shewing a fraud practised on him, with respect to the same instrument by the same person, and at or about the same time as the alleged fraud on R., and because it was confirmatory of R.'s evidence; and a new trial was ordered. *Waterloo Mutual Ins. Co.* v. *Robinson*, 4 O. R. 295.

Insurance Policy — *Condition—Unreasonableness — Objection — Refusal of New Trial.*]—Held, that under 36 Vict. c. 44, s. 33 (O.), the plaintiff might insist that a condition in an insurance policy was unjust or unreasonable without specially pleading it; but that the condition in this case was clearly not unjust or unreasonable; and the court, under the A. J. Act, 1874, s. 34, refused a new trial on the ground that the objection was not allowed at the trial. *Morrow* v. *Waterloo County Mutual Fire Ins. Co.*, 39 U. C. R. 441.

Misapprehension—*Notes of Evidence.*]—Where the Judge's notes at the trial did not shew the rejection, and he did not recollect it, a new trial was granted on the ground of misapprehension, on payment of costs. *Proudfoot* v. *Trotter*, M. T. 6 Vict.

Seduction — *Character Evidence—Prejudice—Costs.*] — In an action for seduction witnesses called for the defence testified to having had connection with the girl. The jury were told that these witnesses had a right to refuse to answer such questions:—Held, a misdirection. Held, also, that evidence of the girl's general bad character for chastity was improperly rejected. The defendant being called wholly denied the charge, and the jury having found for the plaintiff, though the verdict was not large, a new trial was granted without costs, on the ground that the defendant might have been prejudiced by the misdirection and rejection of evidence. *McCreary* v. *Grundy*, 39 U. C. R. 316.

Title to Land—*Evidence of Possession.*]—Trespass q. c. f. Pleas, that one E. W. was the owner of the locus in quo, and justifying by his authority and command. Upon the trial, the Judge having refused to admit evidence that E. W. had been in possession of the premises over twenty years, and that defendant had obtained title through him, a new trial was ordered without costs. *McMillan* v. *McMillan*, 12 C. P. 158.

Witnesses Ordered out of Court—*Evidence of.*]—See *Mahoney* v. *Macdonell*, 9 O. R. 137; *Black* v. *Besse*, 12 O. R. 522.

See Manitoba Free Press Co. v. *Martin*, 21 S. C. R. 518, *ante* 5; *Scammell* v. *Clarke*, 23 S. C. R. 307.

V. JUDGE'S CHARGE.

1. *Misdirection.*

See note to IV. 5.

(a) *Generally — When New Trial Granted for.*

New trials will not be granted as of course upon the extreme right of the party applying, even for misdirection. *Brown* v. *Street*, 1 U. C. R. 124.

The court will not necessarily grant a new trial for misdirection, if satisfied that justice has been done notwithstanding. *Connell* v. *Chaney*, 1 U. C. R. 397.

It is no misdirection that the Judge, in charging the jury, did not advance a particular argument, which the counsel thinks would have influenced the jury in his client's favour. *Annable* v. *McDonell*, 8 U. C. R. 382.

It is no ground for a new trial that the Judge expressed his opinion strongly upon the evidence in favour of either side. *Dougherty* v. *Williams*, 32 U. C. R. 215.

Where the court differed with the ruling at nisi prius on one point, but considered the verdict for defendant well found on other grounds, they granted a new trial at the option of the plaintiff, on his paying the costs by a certain day. *Doe d. Prince* v. *Girty*, 9 U. C. R. 41.

Where the charge of the Judge is calculated to make an impression on the jury prejudicial to a party, which the evidence and circumstances do not entirely warrant, the court will grant a new trial without costs, on the ground of misdirection. *White* v. *Crawford*, 2 C. P. 352.

In ejectment, the court refused to disturb the verdict for misdirection upon points not urged at the trial. *Eades* v. *McGregor*, 8 C. P. 260.

Where a party allows a verdict to be taken against him by suggestion of the Judge without insisting that the case should go to the jury, he cannot afterwards take exception for misdirection. *Chisholm* v. *Morse*, 11 C. P. 589.

A new trial for misdirection as to the measure of damages, was refused where the misdirection affected only a few dollars. Haine v. Davey, 4 A. & E. 892, distinguished. *Young* v. *Laidlaw*, 12 C. P. 612.

Where both sides have addressed the jury on the equities of the case, it is no ground for a new trial that the Judge refused to withhold these equities from the jury. *Bank of Toronto* v. *McDougall*, 15 C. P. 475.

An objection taken by either party to the case of the other, or to any part of the proceedings, and ruled upon, it is not to be deemed an objection to that ruling, so as to entitle the party to move for misdirection; for to enable him to do this he ought at the time expressly to object to the ruling in question, and request the Judge to note his objection thereto, and the terms to which it is subject, i. e., whether leave is reserved to move, &c. *Cousins* v. *Merrill*, 16 C. P. 114.

Misdirection can only be upon a point of law, not on a matter of fact. Where the law is clear it is no misdirection to leave the facts simply to the jury, for they are the judges of the evidence. *Regina* v. *Fick*, 16 C. P. 379.

In replevin for timber:—Held, that, even if there was misdirection, which the court did not think there was, as it did not appear that any substantial wrong or miscarriage was thereby occasioned, it would, under s. 34 of the A. J. Act, 1874, form no ground for a new trial. *Reid* v. *McDonald*, 26 C. P. 147.

Observations on the duty of counsel when dissatisfied with the ruling of the Judge at nisi prius. *Parsons* v. *Queen Ins. Co.*, 43 U. C. R. 271.

Remarks as to what is misdirection on the part of a Judge at the trial. *Lucas* v. *Township of Moore*, 43 U. C. R. 334, 3 A. R. 602.

In considering an objection for misdirection, the question is not whether every expression in a charge is perfectly accurate, but whether there is any reason to believe that a verdict, which is warranted by the evidence, has been caused or induced by an erroneous enunciation of the law by the court. *Wells* v. *Lindop*, 15 A. R. 695.

When no objection is made at the trial to the Judge's charge, the ground of misdirection is untenable on a motion for a new trial. *Wills* v. *Carman*, 17 O. R. 223.

(b) *Particular Instances.*

Breach of Promise—*Damages.*]—In an action for breach of promise of marriage:—Held, that misdirection as to damages would form no evidence for a new trial, the jury having found against the cause of action. *Morrison* v. *Shaw*, 40 U. C. R. 463.

Fraud—*Observations on Matter not in Issue.*]—In an action for the winding-up of a partnership in the gold-mining business, the defence pleaded was that there never was a partnership formed between the plaintiff and the defendants, or if there was, that it had been put an end to by an oral agreement between the parties. The case was tried by a jury, and the result depended on the credibility to be attached to the respective witnesses on each side who gave evidence as to the agreement that had been entered into. No issue of fraud was raised by the defendants, but the trial Judge, in charging the jury, made strong observations in respect to fraudulent concealment of facts from the plaintiff, and submitted questions to the jury calling for findings in relation to such fraud. The plaintiff having obtained a verdict, which was sustained by the court in banc.:—Held, that there should be a new trial. Held, also, that the case was essentially an equity case and one in which a jury could advantageously have been dispensed with. *Hardman* v. *Putnam*, 18 S. C. R. 714.

——— *Refusal to Charge — Accounts.*]—W., a trader, being in financial difficulties, assigned all his property to B., who undertook to arrange with W.'s creditors. W. subsequently assigned his property in trust for the benefit of his creditors, and the assignee and some of the creditors brought an action to have the transfer to B. set aside. On the trial, after the evidence on both sides was concluded, the plaintiffs' counsel asked the Judge to instruct the jury as to what constituted fraud under the Statute of Elizabeth, and he also urged that an account should be taken of the dealings between W. and B. The Judge refused to define fraud to the jury as requested, and the jury stated that they were unable to deal with the accounts:—Held, that the refusal of the Judge to charge the jury as requested amounted to misdirection, and there should be a new trial; that the case could not be properly decided without taking the accounts; and that it could be more properly dealt with as an equity case. *Griffiths* v. *Boscowitz*, 18 S. C. R. 718.

Justice of the Peace—*Property Qualification — Opinion.*] — In a qui tam action against defendant for acting as a justice of the peace without the necessary property qualification required by R. S. O. 1877 c. 71, s. 7, the defendant was called as a witness on his own behalf, and gave evidence as to the value of the property on which he qualified, and the Judge in charging the jury told them that, generally speaking, the owner of property had the best opinion of its value:—Held, that there was no misdirection; for the jury were not told that they were to be guided by such opinion, or that it was most likely to be correct. *Crandell q. t.* v. *Nott*, 30 C. P. 63.

Libel — *Criminal Information—Justification—Observations on Evidence.*]—The rule requiring any objections to the charge to be taken at the trial, applies in criminal as well as civil proceedings. The Judge at the trial of a criminal information for libel, told the jury that the defendant must prove all the charges which he had justified, that the evidence fell far short of doing so, and that in his opinion they should find the pleas of justification against the defendant:—Held, that this was not so much a direction on the law as a strong observation on the evidence, and therefore not open to the objection of misdirection. But if so open, there was no misdirection, for the defendant was bound to such proof, and the observation was justified by the evidence. *Regina* v. *Wilkinson*, 42 U. C. R. 492.

———*Refusal of Party to Answer — Inference.*]—In an action for libel it was alleged that the defendant had, as a correspondent at T. of a newspaper, furnished several items which included one reflecting on the plaintiff. In his examination for discovery the defendant, while admitting that he was a correspondent at T., could not say whether he was the only one; and alleged that he did not remember sending any of the items; but might possibly have sent some of them; but he did not think he had sent the one complained of; that he had had since the publication an interview with the editor with reference thereto, but he refused to answer whether he had discussed the item complained of, for fear, as he said, of incriminating himself. At the trial he stated that he had since ascertained that there were other correspondents at T., and, on being pressed as to the item complained of, after some hesitation, said he did not furnish it. No other evidence was given connecting the defendant with the publication:—Held, that this did not constitute any evidence of publication to go to the jury. The trial Judge in his charge, after referring to the defendant's refusal to answer on his examination for discovery, and to his reason for refusing, told the jury that they might draw the inference as to what the true answer would have been:—Held, misdirection, and that no inference adverse to the defendant should have been drawn from his refusal to answer. *Nunn* v. *Brandon*, 24 O. R. 375.

Negligence — *Street Railway—Financial Strength — Amount of Damages.*] — By 60 Vict. c. 24, s. 370 (N.B.), "a new trial is not to be granted on the ground of misdirection,

or of the improper admission or rejection of evidence, unless in the opinion of the court some substantial wrong or miscarriage has been thereby occasioned in the trial of the action." On the trial of an action against a street railway company for damages on account of personal injuries, the vice-president of the company, called on the plaintiff's behalf, was asked on direct examination the amount of bonds issued by the company, the counsel in opening to the jury having stated that the company was making large sums of money out of the road. On cross-examination the witness was questioned as to the disposition of the proceeds of debentures, and on re-examination the plaintiff's counsel interrogated him at length as to the selling price of the stock on the Montreal exchange, and proved that they sold at about 50 per cent. premium. The Judge in charging the jury directed them to assess the damages as "upon the extent of the injury plaintiff received independent of what these people may be, or whether they are rich or poor." The plaintiff obtained a verdict with heavy damages:—Held, that on cross-examination of the witness by defendants' counsel the door was not open for re-examination as to the selling price of the stock; that in view of the amount of the verdict it was quite likely that the general observation of the Judge in his charge did not remove the effect on the jury of the evidence bearing on the financial ability of the company to respond well in damages. The injury for which the plaintiff sued was the crushing of his foot, and on the day of the accident the medical staff of the hospital where he had been taken held a consultation and were divided as to the necessity for amputation. Dr. W., who thought the limb might be saved, was, four days later, appointed by the company, at the suggestion of the plaintiff's attorney, to co-operate with the plaintiff's physician. Eventually the foot was amputated and the plaintiff made a good recovery. On the trial the plaintiff's physician swore to a conversation with Dr. W. four days after the first consultation, and three days before the amputation, when Dr. W. stated that if he could induce plaintiff's attorney to view it from a surgeon's standpoint, and not use it to work on the sympathies of the jury, he might consider more fully the question of amputation. The Judge in his charge referred to this conversation and told the jury that it seemed to him very important if Dr. W. was using his position as one of the hospital staff to keep the limb on when it should have been taken off, and that he thought it very reprehensible:—Held, that, as Dr. W. did not represent the company at the first consultation when he opposed amputation; as others of the staff took the same view, and there was no proof that amputation was delayed through his instrumentality; and as the jury would certainly consider the Judge's remarks as bearing on the contention made on the plaintiff's behalf that amputation should have taken place on the very day of the accident—it must have affected the amount of the verdict. To tell a jury to ask themselves "If I were plaintiff how much ought I to be paid if the company did me an injury?" is not a proper direction. *Hesse* v. *St. John R. W. Co.*, 30 S. C. R. 218.

——— *Valuator—Duty in Valuing Land.*]—The defendant L., who was a professional valuator, was employed by plaintiff to personally investigate the security offered for a loan on real estate, and to check the valuation of a local valuator. The said defendant visited the property and reported, in effect agreeing with the local valuator, that the property was worth considerably more than the amount proposed to be lent, and that the loan could be safely made for the sum proposed, for which report he charged and was paid a fee. The loan was effected, and default having occurred in its repayment, the property was offered for sale, when it was found impossible to sell for anything like the mortgage money. In an action for negligence in valuing the property the jury found for the plaintiff. The Judge at the trial directed the jury that the fact that the defendant did not obtain the opinion of other persons as to the value of land in the neighbourhood was evidence of negligence:—Held, that this was misdirection. It appeared from the evidence that the mortgagor had endeavoured to procure a loan for a similar amount on the same property from a company in which the defendant L. was a director, and that the loan was not effected, having been abandoned by the mortgagor. The Judge at the trial, although he directed the jury that there was no evidence that the defendant had acted with intentional dishonesty, pressed upon their notice, with other observations, the inquiry: "Why was not the original transaction carried out?":—Held, that these observations tended to create a prejudice in the mind of the jury which was not warranted by the facts. A new trial was therefore directed. *O'Sullivan* v. *Lake*, 15 O. R. 544.

On appeal the court of appeal held that there was no misdirection in the charge of the trial Judge, but, under peculiar circumstances, refused to interfere with the order of the court below for a new trial. *S. C.*, 15 A. R. 711.

The supreme court quashed an appeal on the ground that the new trial had been granted as a matter of discretion. *S. C.*, 16 S. C. R. 656.

——— *Want of Spark Arrester.*]—On the trial of an action for damages for the destruction of a barn and its contents by fire, alleged to have been caused by negligence of the defendants in working a steam engine used in running a hay press in front of said barn, the main issue was as to the sufficiency of a spark arrester on said engine, and the learned Judge directed the jury that "if there was no spark arrester in the engine, that in itself would be negligence for which the defendants would be liable:"—Held, that the Judge misdirected the jury in telling them that the want of a spark arrester was, in point of law, negligence, and such direction may have influenced them in giving their verdict for the plaintiff; therefore, an order for a new trial should not be interfered with. *Peers* v. *Elliott*, 21 S. C. R. 19.

Notice of Action—*True Copy.*]—Where a witness, who proved the notice of action required by the statute to be given to a justice of the peace before action, had in his examination in chief sworn that he had served a true copy of the notice produced, but upon his cross-examination said it might differ a word or two, and the Judge had in consequence directed a verdict for defendant, the court granted a new trial. *Gardner* v. *Burwell*, Tay. 54.

Obstruction of River — *Indictment—Observations on Evidence.*]—Where defend-

ants were indicted for obstructing a navigable river by the erection of a wharf, and there was no evidence that the part covered by the wharf had ever been navigated by vessels of any size, but it was shewn only that the prosecutor was prevented by it from landing there with his skiff, and the wharf was proved not to interfere with navigation:—Held, that the jury was rightly directed that on this evidence the only verdict which could be rendered was not guilty. Such a direction is not so much a direction on the law as a strong observation on the evidence, which may properly be made in a proper case without being open to the charge of misdirection. *Regina* v. *Port Perry and Port Whitby R. W. Co.*, 38 U. C. R. 431.

Partnership—*Dissolution—Balance Due—Assumpsit.*]—When on a dissolution of partnership one partner has admitted a balance due his co-partner, assumpsit will lie although there be no promise to pay; and where the balance did not appear conclusively, and the Judge left it to the jury more unfavourably for the plaintiff than he might have done, and there was a verdict for defendant, a new trial was granted on payment of costs. *McNicol* v. *McEwen*, 3 O. S. 485.

Promissory Note — *Indorsement—Proof of Signature—Authority.*]—Where in an action against the indorser of a note, there was strong evidence that defendant had admitted the indorsement to be his, or made by his authority, whether the signature was genuine or not, and it was doubtful whether the jury had not been led to believe that the sole question for them was, whether the signature was defendant's or not, and they found for defendant, a new trial was granted on payment of costs. *Bank of Upper Canada* v. *Rogers*, 1 U. C. R. 23.

Replevin — *Change of Possession — No Substantial Wrong.*] — In replevin, it was proved that the goods were purchased by the plaintiff from B. and M., and it was left to the jury to say whether there had been an actual and continued change of possession from them to plaintiff; but the Judge refused to leave it to them to say whether there had been a "visible" change of possession, there being no such word in the statute, and it being, in his opinion, likely under the circumstances to mislead the jury:—Held, that even if there was misdirection, which the court did not think there was, as it did not appear that any substantial wrong or miscarriage was thereby occasioned, it would, under s. 34 of A. J. Act, 1874, form no ground for a new trial. *Reid* v. *McDonald*, 26 C. P. 147.

Slander—*Privilege—Malice.*]—In an action for slander where the defence was that if the defendant had spoken the words (which he denied), the occasion was a privileged one, there had been two trials, each resulting in a verdict for the plaintiff. The defendant moved for a new trial for misdirection by the Judge in (among other respects) not fully explaining to the jury that unless the plaintiff proved that the words were spoken with actual malice, he was not entitled to recover:—Held, affirming the judgment in 14 O. R. 275, that taking the charge as a whole, and without laying undue stress upon isolated expressions, the jury had substantially been told that the occasion was privileged; and that, unless they were satisfied that the defendant had abused the privilege and availed himself of it to make the statement maliciously, they should find for the defendant. *Wells* v. *Lindop*, 15 A. R. 695.

Trespass to Goods—*Setting aside Attachment—Substantial Justice.*]—On the second count, in trespass for seizing plaintiff's goods, the jury were told that if the attachment had been set aside, the plaintiff was entitled to a verdict; and the plaintiff objected that as the setting aside had been proved, it should not have been left as if open to doubt. The jury having found for defendants:—Held, that the charge was unobjectionable; and as on the evidence nominal damages only would have been sufficient, the court refused to interfere. *Eaton* v. *Gore Bank*, 27 U. C. R. 490.

——— *Several Counts—Mixed Verdict—Substantial Justice.*]—The fifth count was in trespass to plaintiff's goods. The sixth count was for illegal distress. To the fifth count defendant pleaded, not guilty, that the goods were not plaintiff's, and that he seized and sold them to satisfy arrears of rent; and to the sixth count, the general issue by statute 11 Geo. II. c. 19, s. 2. At the trial the plaintiff's evidence shewed that the seizure and sale referred to was for a distress for rent. Defendant's counsel contended that as only one seizure had been made the plaintiff must elect on which count he would go to the jury. The Judge refused to compel plaintiff to elect, but said he would direct the jury that the evidence applied more to the sixth count than to the fifth, after which the plaintiff's counsel, in addressing the jury, withdrew the sixth count from their consideration. The Judge charged that the evidence given applied to the sixth count, and that they should find for defendant on the fifth count, charging them as if both counts were before them for consideration. The jury found for plaintiff on the sixth count for $100, and a verdict for defendant on the fifth:—Held, that the plaintiff could not withdraw a particular count or issue from the consideration of the jury, without the consent of the defendant, so as to prevent them giving a verdict on such count, and the jury in this case should have been directed to find for defendant on the sixth count, and the case left to them on the evidence on the fifth count. But, as substantial justice was done by the finding, a rule for a new trial was refused on that ground, but granted to defendant, as he might have been misled by the ruling. *Ruthven* v. *Stinson*, 14 C. P. 181.

Trespass to Land—*Nominal Damages—Refusal of New Trial.*]—In an action for trespass to land, the jury found for plaintiff, with only 1s. damages. The verdict was moved against for misdirection and smallness of damages, but the court, without deciding upon the correctness of the charge, held that if it had been unexceptionable and the verdict the same they would not have interfered; and, under s. 34 of the A. J. Act, 1874, they refused a new trial. *Smith* v. *Murphy*, 35 U. C. R. 569.

——— *Title—Admissions—Proof of Deed.*]—Where in trespass q. c. f. plaintiff proved admissions of defendant as to the title of the land, which should have been left to the jury, but the case rested upon the want of sufficient evidence to admit the testimony of the

handwriting of the subscribing witnesses to the deed under which plaintiff claimed, which the court decided against him—a new trial was granted, with costs to abide the event. *Tylden* v. *Bullen*, 3 U. C. R. 10.

Trover—*Title to Goods — Execution—Judgment.*]—In an action of trover or conversion against appellant, high sheriff of the county of Cumberland, N. S., to recover damages for an alleged conversion by the appellant of certain personal property found in the possession of the execution debtor, but claimed by the respondent, the pleas were a denial of the conversion, no property in plaintiff, no possession or right of possession in plaintiff, and justification under a writ of execution against the execution debtor. The Judge at the trial told the jury that he "thought it was incumbent on the defendant to have gone further than merely producing and proving his execution, and that if a transfer had taken place to the plaintiff, and the articles taken and sold, defendant should have shewn the judgment on which the execution issued to enable him to justify the taking and enable him to sustain his defence:"—Held, that the sheriff was entitled under his pleas to have it left to the jury to say whether the plaintiff had shewn title or right of possession to the goods in question, and therefore there was misdirection. *McLean* v. *Hannon*, 3 S. C. R. 706.

Watercourse—*Definition.*]—In an action for diversion of an alleged watercourse, the defendants disputed that any water ran along the depression in question, except melted snow and rain water flowing over the surface merely:—Held, per Street, J., that, as the attention of the jury was not expressly called to the difference in effect between the occasional flow of surface water and the steady flow from a source, and as a passage read to the jury from the judgment in Beer v. Stroud, 19 O. R. 10, divorced from its context, might have misled the jury, there should be a new trial. Per Armour, C.J., that what the Judge told the jury could not be held to be a misdirection without reversing the decision in Beer v. Stroud; and the objection to the charge was too vague and indefinite. *Arthur* v. *Grand Trunk R. W. Co.*, 25 O. R. 37. Affirmed by the court of appeal, 22 A. R. 89.

See post VIII., IX.

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2. *Nondirection.*

Comment — *Absence of Prejudice.*] — Where the Judge consents with reluctance, from his connection with the plaintiff, to try a cause, and from a feeling of delicacy merely gives the case to the jury without comment, the court, though the evidence may be very conflicting, if they see that the plaintiff has been probably prejudiced by the case not having been left to the jury in as full a manner as it would otherwise have been, will grant a new trial. *Boulton* v. *Cooper*, 4 U. C. R. 278.

See Regina v. *Fick*, 16 C. P. 379.

Construction of Contract—*Leaving to Jury.*]—It is the duty of the Judge to construe a written contract, and of the jury to decide upon surrounding facts and circumstances, if any, to vary it. A new trial was ordered without costs, on the ground that the construction of the contract had been left too much to the jury. *Ireson* v. *Mason*, 12 C. P. 475.

Explanation of "Usury"—*Failure to give.*]—On the trial of an action on a promissory note, brought by a bank, and to which defendants pleaded usury, consisting in the plaintiff's making the note payable at a distance from the place of discount, and thereby securing an illegal rate of interest as commission:—Held, that the jury not having been directed that the note sued on, being the last of a series which had always been made payable as this one was, was not tainted with usury, because made payable at a distance from P., was not misdirection, but nondirection at most. *Bank of Montreal* v. *Scott*, 17 C. P. 358.

Failure to Distinguish.]—Action on a marine policy. Recovery as for a total loss, the facts shewing only a partial loss, which, however, was not so distinctly left to the jury. New trial granted without costs. *Davis* v. *St. Lawrence Inland Marine Assurance Co.*, 3 U. C. R. 18.

Grounds—*Evidence.*]—Want of direction is no ground for a new trial, unless the verdict is against evidence. *Spence* v. *Hector*, 24 U. C. R. 277; *Regina* v. *Fick*, 16 C. P. 379; *Spring* v. *Cockburn*, 19 C. P. 63.

Notice of Motion for Nondirection—*Grounds — Particularity — Amendment.*]—A notice of motion to a divisional court against the verdict and judgment at the trial, on the ground of nondirection, should shew how and in what matter there was nondirection. The court may allow an amendment of the notice in a proper case; but it declined to assist the defendant by doing so where the nondirection was not material in view of other facts and findings, and the rule of law invoked by the defendant would have operated against a meritorious claim of the plaintiff. Pfeiffer v. Midland R. W. Co., 18 Q. B. D. 243, followed. *Furlong* v. *Reid*, 12 P. R. 201.

Omission from Charge—*General Verdict.*]—In an action under the Workmen's Compensation Act and at common law for damages for injuries sustained by the plaintiff while engaged in digging a drain upon the defendant's farm, it did not appear that the plaintiff engaged with the defendant to do any particular work, but that he was first put by the defendant at mason work, and then at digging the drain:—Held, that it was a question for the jury whether the hiring of the plaintiff was as a servant in husbandry within the meaning of 56 Vict. c. 26 (O.), and whether the work he was engaged in was in the usual course of his employment as such, and also whether the danger was known to the defendant and unknown to the plaintiff or the converse. The jury were asked certain questions, one being whether the hiring was as a servant in husbandry, but they were told that they might give a general verdict, and they gave one for the plaintiff, answering none of the questions. The trial Judge in his charge gave them no instruction on this point and no direction as to what the law was:—Held, that they were not competent to find a general verdict, and there should be a new trial. *Reid* v. *Barnes*, 25 O. R. 223.

Refusal to Submit Questions.]—It is no ground for a new trial that the Judge refused to submit any particular question to the jury, but if the Judge refuses to charge the jury in respect to the subject-matter of any question which counsel desire to have submitted, it may be made the subject of a motion for a new trial for nondirection. *Turner* v. *Burns*, 24 O. R. 28.

Unfavourable Charge.] — Held, if the Judge did not charge as strongly in defendants' favour as he ought to have done, that the proper objection would have been for nondirection. *Spring* v. *Cockburn*, 19 C. P. 63.

See Annable v. *McDonell*, 8 U. C. R. 382.

VI. JURY.

1. *Improper Constitution or Selection.*

Bias of Juror.]—The fact that one of the jurors, before the trial, had expressed an opinion against the defendant, which the defendant was aware of, is no ground for a new trial. *Brown* v. *Sheppard*, 13 U. C. R. 178.

——— *Neglect to Challenge.*] — In an action against an insurance company, the fact that one of the jurors is a shareholder in the company, is no ground for a new trial. The plaintiff should exercise his right of challenge if he objects to the juror's presence. *Richardson* v. *Canada West Farmers' Ins. Co.*, 17 C. P. 341.

Challenge — *Cause — Right to Trial — Waiver—Bias of Jurors—Venue.*] — At the trial of an action the defendant's counsel challenged a juryman for cause. On the trial Judge stating that he did not think any cause was shewn, and that the counsel had better challenge peremptorily, the counsel did not claim the right to try the sufficiency of any cause against the impartiality of the juryman, but accepted the opinion of the Judge, and the juryman remained on the jury:—Held, that on a motion for a new trial an objection to the juryman could not be entertained. The action was tried at Brantford, and a new trial was moved for at a place other than Brantford, because the jury there were biassed against defendant:—Held, that this formed no ground for a new trial. *Wood* v. *McPherson*, 17 O. R. 163.

——— *Evasion — Waiver of Objection.*] —New trial refused where it was discovered on the second day of the trial that one of the jury peculiarly obnoxious to the plaintiff, and whom he intended to challenge, had been sworn by answering to another name; but the plaintiff chose to go on notwithstanding. *Ham* v. *Lasher*, 24 U. C. R. 533, note.

——— *Peremptory Challenges—Number of —Mistrial—Proceeding with Trial.*]—The defendants, having delivered separate defences and being separately represented at the trial, claimed to be entitled under the Jurors' Act, R. S. O. 1887 c. 52, s. 110, to four peremptory challenges each, which though objected to by the plaintiff, was conceded by the Judge, and the defendants challenged six jurors between them, and the trial proceeded, resulting in a verdict for the defendants:—Held, upon motion by the plaintiff, that there had been mistrial, and the plaintiff was entitled to a new trial. Under the above section the defendants were only entitled to four peremptory challenges between them, and, inasmuch as the plaintiff took the objection at the time, he had not waived his right to complain by proceeding with the trial. *Empey* v. *Carscallen*, 24 O. R. 658.

Juror not Sworn.] — The court will not grant a new trial because one of the jurors has not been sworn, where no injustice is done thereby. *Goose* v. *Grand Trunk R. W. Co.*, 17 O. R. 721.

Sheriff—*Action against—Return of Jury —Coroner.*] — The court refused to set aside a verdict against a sheriff upon the ground that the coroner's jury who tried the cause was the same as that returned by the sheriff. *Payne* v. *McLean*, Tay. 325.

It is no objection, on the part of a sheriff in an action against him, that the jury have been summoned by himself, and not by the coroner. *Ainslie* v. *Rapelje*, 3 U. C. R. 275.

Special Jury — *Improper Striking — Waiver.*]—Where a special jury was improperly struck, but defendant's attorney was present and made no objection:—Held, no ground for a new trial. *Shipman* v. *Bermingham*, 5 O. S. 442.

——— *Neglect to Summon — Irregularity —Waiver.*]—Where, on a venire to a coroner, a special jury was struck, but the coroner neglected to summon them, and the cause was tried by a common jury, the defendant objecting, but afterwards entering into his defence, and the plaintiff obtained a verdict:—Held, that the verdict was irregular, and that the defence made under protest did not operate as a waiver. *McMartin* v. *Powell*, E. T. 3 Vict.

——— *Notice—Insufficiency.*] — Defendant made no defence, because the Judge would not try the cause by a special jury, the notice for striking such jury being insufficient, and the verdict exceeded £300. The court granted a new trial, defendant having made a strong affidavit of merits, and the amount of the verdict being ordered to be paid into court, to stand as a security for the plaintiff. *Bell* v. *Flintoft*, 3 U. C. R. 122.

Summoning Jury—*Relative of Party.*]—The court will not grant a new trial upon an objection to the jury having been summoned by a relative of either party, when the objection was known before the trial to the opposite party and waived. *Power* v. *Ruttan*, 5 O. S. 132.

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2. *Improper Influence.*

Address of Counsel — *Assertions not Supported by Evidence.*]—Where a party expecting that a cause would be referred was unprepared with proper evidence at the trial, the court, without expressly recognizing this as a ground, granted a new trial, as they considered that the case had not gone fairly to the jury, and that the latter had been influenced by the assertions of counsel not sus-

tained in evidence. *Gott* v. *Ferris*, 15 C. P. 295.

——— *Disregard of Charge.*]—On a trial of a case in which the verdict had been twice set aside as against the weight of evidence, the jury were urged by counsel to take the same course that former juries had done, and, in effect, to disregard the Judge's charge. A similar verdict having been again rendered, the chief justice concurred in directing a new trial on account of this appeal made to the jury, although he would otherwise have felt disposed to let the verdict stand. *Case* v. *Benway*, 18 U. C. R. 476.

——— *Inflammatory Language — Absence of Objection at Trial.*] — See *Sornberger* v. *Canadian Pacific R. W. Co.*, 24 A. R. 263.

——— *Reference to Former Verdict.*]—It is no ground for setting aside a verdict that the counsel merely referred to the verdict on a former trial, expressing a hope that the jury would give the same verdict as had been given before, but desisting when the allusion was objected to, unless the Judge who tried the cause is satisfied that the matter was pressed unfairly and with the view of exercising an improper influence on the jury. *Moore* v. *Boyd*, 15 C. P. 574.

Communication with Jury Room—*Refreshments.*]—Where, after a verdict for the plaintiff, it was shewn that after the jury retired to consider their verdict communications had been made to them by persons out of the jury room; that they had been furnished with provisions and spirituous liquors by persons who were known to be friendly to the plaintiff, and that there was reason to believe that they had received an improper bias, a new trial was granted, with costs to abide the event. *Armour* v. *Boswell*, 6 O. S. 352.

Conversation with Juror.]—The defendant, in conversation with one of the jury panel, but not one of the jury called to try the case, said he hoped the jury would give the defendant the benefit of any doubt:—Held, not sufficient to justify the court in interfering with the verdict. *Vanmere* v. *Farewell*, 12 O. R. 285.

Exposure of Body to Jury—*Evidence—Surgeon.*] — See *Sornberger* v. *Canadian Pacific R. W. Co.*, 24 A. R. 263.

——— *Misconduct of Juror.*] — In an action to recover damages for alleged malpractice the plaintiff is not entitled to shew to the jury the part of the body in question for the purpose of enabling them to judge as to its condition. Sornberger v. Canadian Pacific R. W. Co., 24 A. R. 263, approved and distinguished. Attempting to dissuade a witness from giving evidence is such misconduct on the part of a juror as would justify the granting of a new trial. *Laughlin* v. *Harvey*, 24 A. R. 438.

Interrupting Judge's Charge.] — The defendants objected that by reason of frequent interruptions and reading of text books by plaintiff's counsel during the delivery of the Judge's charge injustice was done defendants, and the jury improperly influenced thereby:—Held, that this was a matter for the Judge at the trial, and it would have to be a very strong case for the court to interfere, the Judge having made no complaint. *McDonald* v. *Murray*, 5 O. R. 559.

Newspaper Comment—*Proceeding with Trial.*]—During the trial of an action for libel the defendants published in their newspaper a sensational article with reference thereto. The plaintiffs' solicitor was aware that the article had come to the hands of one or more of the jury, but did not bring the matter to the notice of the court, or take any action with respect to it, and proceeded with the trial to its close, when the jury brought in verdicts for the defendants. Upon a motion for a new trial upon the ground of improper conduct towards and undue influence upon the jury:—Held, that the objection was too late. *Tiffany* v. *McNee*, *Metcalf* v. *McNee*, 24 O. R. 551.

Offer Made at Trial—*Refusal to Sanction.*]—Where an offer was made by defendants' counsel at the trial, which it was said was to be carried into effect without reference to the verdict, and the jury being influenced by the statement gave less damages than they might otherwise have done; the court, upon the refusal of defendants to sanction that offer, set aside the verdict, but with costs to abide the event, as no wilful intention to mislead the jury was imputed to the statement. *Watson* v. *Gas Light Co.*, 5 U. C. R. 244.

Refreshments—*Conversations.*] —Where the plaintiff during the trial had conversation with members of the jury upon the subject of his case, and his brother and also his solicitor had treated some of them to "drinks" during the recess of the court, the verdict in the plaintiff's favour was set aside, and a new trial ordered. *Stewart* v. *Woolman*, 26 O. R. 714.

View—*Misconduct of Parties.*]—See *Simonds* v. *Chesley*, 20 S. C. R. 174.

——— *Refreshments — Waiver of Objection.*]—The day before the trial defendants applied to the Judge at nisi prius to order a view of the land in question, which was refused, as it lay in another county. Several of the special jury summoned to try the cause were then, on the same day, taken by defendants in a special train to view the land. Notice that they would be so taken had been given by defendants, who offered to take any one representing the plaintiff, but the plaintiff declined to take any part in the proceeding. The jury were provided by defendants with refreshments, and accompanied by M., the defendants' arbitrator, who, however, said he had no discussion of the case with them. The plaintiff's counsel, before the trial began, called this fact to the attention of the Judge, and protested, reserving his right to object:—Held, that the proceeding was improper and irregular, but that the plaintiff having submitted his case to the jury with full knowledge of it was precluded from objecting. *Widder* v. *Buffalo and Lake Huron R. W. Co.*, 24 U. C. R. 520.

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3. *Improper or Mistaken Verdict.*

Affidavits.] — The affidavits of jurymen cannot be received to shew that there was a mistake in their verdict, unless the mistake

also appear in the Judge's notes. *Malloch* v. *Morris*, T. T. 1 & 2 Vict.

The court will not act upon affidavits stating conversations with one of the jury, after the trial, respecting the grounds of their verdict. *Jones* v. *Duff*, 5 U. C. R. 143.

Affidavits of jurors, as to what passed in the jury room, will not be heard. *Doe d. Hagerman* v. *Strong*, 8 U. C. R. 291.

Upon motion for a new trial upon an information for conspiracy tried at nisi prius upon a record from the Queen's bench:—Held, that affidavits made by some of the jurors that the jury were not unanimous, but believed that the verdict of the majority was sufficient, could not be received as ground for a new trial. *Regina* v. *Fellowes*, 19 U. C. R. 48.

In an action for overflowing land, where a verdict had ben found for plaintiff, the court refused a rule nisi for a new trial, upon the affidavit of two jurors that they had examined the premises since the trial, and were satisfied that the verdict was incorrect. *Purdon* v. *Playfair*, 20 U. C. R. 282.

See Jamieson v. *Harker*, 18 U. C. R. 390; *Morse* v. *Thompson*, 19 C. P. 94; *Farquhar* v. *Robertson*, 13 P. R. 156; *United States Express Co.* v. *Donahue*, *ib.*, *note*.

Sealed Verdict — *Assent to* — *Costs.*]—The trial of an action for slander having been concluded, the court adjourned at 6 p.m., both parties agreeing to a sealed verdict. A sealed envelope was left with the sheriff's officer for the Judge, with a paper enclosed, signed by all the jurors, directing that the defendant should "pay the sum of $1 damages and the costs of the suit:"—Held, that on this being opened in court by the Judge next morning, the jury should have been called together, as the plaintiff's counsel required, to assent to the verdict, and have it recorded; and it having been simply indorsed on the record as written, a new trial was ordered without costs. Held, also, that the jury had no power to give costs by their verdict. *Campbell* v. *Linton*, 27 U. C. R. 563.

——— *Dissent as to Amount.*]—On the trial of a cause in a county court it was agreed that a sealed verdict should be handed by the jury to the constable in charge of them, and that they should disperse to meet at the opening of the court the following morning. When the court opened, all the jurors answered to their names; the sealed verdict was then opened and read to them, "Verdict for the plaintiff, $120," and being asked if they confirmed it, they said they did so, one answering. The verdict was then recorded, and upon reading it as recorded, one juror said he had only agreed to $100:—Held, that, as the verdict must be unanimously delivered and recorded in open court, the juror dissenting before such recording rendered the verdict informal. *Donaldson* v. *Haley*, 13 C. P. 87.

——— *Mistake as to Parties.*]—The jury, having agreed to render a sealed verdict, handed a letter under seal to the constable for the Judge, to whom it was taken at his residence. Upon opening and reading the enclosure, the Judge sent back a written memorandum that it would not do, and that they must find for either plaintiff or defendant. The jury then asked the constable which of the parties was plaintiff, and upon the sheriff being communicated with by the constable, he wrote upon a piece of paper that T., the defendant, was plaintiff, and one W. defendant. This paper he took to the jury, and at the same time told them that T. was plaintiff, when a number of them said they would find for T. Shortly afterwards a sealed letter was handed to the constable for the Judge, stating that they found for the plaintiff. The constable swore that he believed they intended to give a verdict for T., and the latter's attorney also swore, and was uncontradicted, that the first sealed letter stated that the deeds, upon which the plaintiff (M.) rested his claim, were void:—Held, that the verdict could not stand, and a new trial was, therefore, ordered. Quære, whether affidavits by the jurors as to their mistake ought to have been received in the court below. *Morse* v. *Thompson*, 19 C. P. 94.

Separation of Jurors.]—At the trial of an action for overflowing land, the jury were allowed to separate at the end of the first day, before the case was closed. After they had retired to consider their verdict next day, one juror was allowed to go out in charge of a constable, and on his return met the people coming out of the court house, who told him that the court was over and the jury dismissed for that day. He then went home, but was brought back by the constable in less than an hour, and came in with the rest of the jury in a short time to deliver the verdict for the defendants. He swore that during his absence he had had no conversation about the suit, and no misconduct was imputed to defendants in the matter. The court refused to disturb the verdict. *O'Mullin* v. *Bishop*, 20 U. C. R. 275.

——— *Consent.*]—At the trial it appeared that the counsel for P. had left the court before the Judge's charge, having authorized F., counsel for two other defendants, to take on his behalf any objections he might think proper to the charge. The jury, after hearing the Judge's charge, were allowed to separate and be at large from Saturday till Monday, before giving their verdict, which was against the defendants P. and R.:—Held, reversing the decision in 7 O. R. 355, that such a proceeding could not be upheld except upon clear affirmative evidence of consent expressly and knowingly given; and therefore, where counsel for the defendant P. had left the court before the Judge's charge, and it did not appear that he had authorized any one to represent him or his client, or that any one had consented or assumed to consent on behalf of P. to the jury separating, a new trial as to P. was directed. Semble, that, had F. assumed to represent the counsel for P. in assenting to a separation of the jury, P. would have been bound to the same extent as if his own counsel had taken a similar course, contrary to instructions. *Stillwell* v. *Rennie*, 11 A. R. 724.

See Coleman v. *City of Toronto*, 23 O. R. 345.

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4. *Unsatisfactory Verdict.*

Alteration of Verdict — *Inconsistency.*]—Where a jury found a verdict for

the plaintiff and £5 damages, with a condition that each party should pay his own costs, and on the court having refused to receive this, they altered it to a verdict for defendant with the same condition, and subsequently, on that verdict being refused also, to an unconditional verdict for defendant, a new trial was granted without costs. *McKay* v. *Lyons*, 6 O. S. 507.

General Finding — *Specific Finding — Evidence.*]—Where the jury find negligence and then define the negligence to consist in doing certain acts, the court, if there is some evidence of negligence in other respects, may in their discretion order a new trial, although there is no evidence to support the specific findings. Judgment in 26 O. R. 732 affirmed. *Cobban* v. *Canadian Pacific R. W. Co.*, 23 A. R. 115.

Inconsistency with Concurrent Verdict.]—Different verdicts having been rendered in two cases on the same evidence, the court granted a new trial, with costs to abide the event, in the case in which they considered the finding to be least supported. *Wilson* v. *McNamara*, 12 U. C. R. 446.

In an action for injuries caused by collision of steamers, the court had set aside a former verdict given for the plaintiff, as being against law and evidence. On a second trial the jury found again for the plaintiff; and at the same assizes the defendant obtained a verdict in a cross-action for the damage done to his steamer upon the same occasion. The court, under these circumstances, granted a second new trial in the first case, with costs to abide the event. *Gildersleeve* v. *Bonter*, 13 U. C. R. 492.

See Wilson v. *Hill*, 5 O. S. 56.

Inconsistency with Former Verdict.]—Where a verdict in one action establishes a conclusion directly inconsistent with the result of a former action, yet where the evidence is conflicting, the court have no right to insist on the verdict being found in the second as in the first action. *Doe d. Burr* v. *Denison*, 8 U. C. R. 610.

Where in ejectment by a purchaser at sheriff's sale the jury had found that the debtor was living when the fi. fa. bore teste, and therefore sustained the plaintiff's claim; and, in a subsequent action by the debtor's widow for dower, damages were given for detention, on the ground that the husband died seised, the court refused, on account of this inconsistency, to set aside the verdict, which was not clearly against evidence. *Cadman* v. *Strong*, 10 U. C. R. 591.

Inconsistent Findings.] — See *McQuay* v. *Eastwood*, 12 O. R. 402.

——— *Inappreciable Damages.*] — See *Kerry* v. *England*, [1898] A. C. 742.

Insufficient Findings.] — Held, that the evidence and the finding of the jury having left it in doubt whether the accident to the plaintiff's wife was the proximate cause of her death, and the jury not having been properly instructed as to the liability of the defendants under the circumstances, and the damages being, upon the evidence, excessive, the order of the court below for a new trial should be affirmed. *York* v. *Canada Atlantic S. S. Co.*, 22 S. C. R. 167.

New trial on the ground that the jury had not properly answered some of the questions submitted. In other respects judgment in 27 N. S. Reps. 498 affirmed. *Pudsey* v. *Dominion Atlantic R. W. Co.*, 25 S. C. R. 691.

See Clarke v. *Rama Timber Transport Co.*, 9 O. R. 68; *Manitoba Free Press Co.* v. *Martin*, 21 S. C. R. 518; *Canadian Pacific R. W. Co.* v. *Cobban Mfg. Co.*, 22 S. C. R. 132; *Stevens* v. *Grout*, 16 P. R. 210; *McDermott* v. *Grout*, *ib.* 215.

Misapprehension.]—Where a case has been properly submitted to the jury, and their findings upon the facts are such as might be the conclusions of reasonable men, a new trial will not be granted on the ground that the jury misapprehended or misunderstood the evidence, notwithstanding that the trial Judge was dissatisfied with the verdict. *Fraser* v. *Drew*, 30 S. C. R. 241.

See post IX.

VII. Motion For.

1. *Affidavits.*

Denial of Service or Retainer — *Knowledge of Suit.*]—In moving for a new trial, an affidavit by one of two defendants that he never was served with process or other paper in the cause, nor did any such writ or paper ever come to his knowledge; that he never, directly or indirectly, retained, employed, or authorized the attorney who appeared for both defendants to do so, is not sufficient. He should also have denied knowledge that such a suit was going on. *Vaughan* v. *Ross*, 8 U. C. R. 506.

How Sworn.]—A new trial was moved for by defendants on an affidavit sworn before the partner of defendants' attorney:—Held, that the rule must on that ground be discharged. *White* v. *Petch*, 6 U. C. R. 13.

Impeaching Veracity.]—Affidavits impeaching the character for veracity of a deponent, whose affidavit had been filed on moving the rule, were rejected. *Clark* v. *Chipman*, 26 U. C. R. 170.

Possible Witnesses — *Costs.*]—Semble, that on motion for a new trial affidavits of persons who might have been called as witnesses on the trial are inadmissible, and will not be allowed on taxation of costs. *Anderson* v. *Anderson*, 1 C. P. 344.

Supplying Evidence not Noted.]—The Judge omitted to note the evidence of an important fact, which he charged the jury was proved, and upon which their verdict was founded. Upon affidavit that such fact was true, the court refused a new trial. *Winchester* v. *Cornell*, Dra. 60.

Verdict—*Mistake.*]—Affidavits shewing a mistake in recording a verdict will be received as ground for a new trial. *Jamieson* v. *Harker*, 18 U. C. R. 590.

Wife of Party.]—An affidavit of the wife of a party to a cause could not be read on motion for a new trial. *Henderson* v. *Wallace*, E. T. 2 Vict.

See ante VI. 3.

2. *Appeals.*

See COUNTY COURTS, IV. 2.

Effect of Appeal—*Reopening Motion.*]—In an action for negligence in not keeping a road in repair, the jury found for the plaintiff. A rule nisi having been subsequently obtained to enter a nonsuit, or for a new trial, the court made it absolute to enter a nonsuit. On appeal this judgment was reversed (6 A. R. 181), but the court of appeal made no order as to that portion of the rule nisi in which a new trial was asked, leaving it to be disposed of by the court below:—Held, that the rule nisi was completely and finally disposed of, so far as this court was concerned, by the rule to enter a nonsuit, which the defendants, by taking it without asking for any reservation so far as regarded the new trial, had acquiesced in. Held, also, that the court of appeal have no power, under s. 23 of the Court of Appeal Act, R. S. O. 1877 c. 38, to direct the court below to reopen the rule or reconsider the question whether, in their discretion, a new trial should be granted. *Walton* v. *County of York*, 32 C. P. 35.

Effect of Decision on Motion.]—If the judgment of a divisional court directing a new trial is not appealed against, the questions determined by it cannot be reopened upon an appeal from the judgment at the second trial. *Journal Printing Co.* v. *MacLean*, 23 A. R. 324.

Final Disposition of Action.]—Under rule 321, O. J. Act, the court may, upon motion for judgment or for a new trial, if satisfied that it has before it all the materials necessary for final determining the question in dispute . . . give judgment accordingly; but that power must be most sparingly and cautiously exercised. *Stewart* v. *Rounds*, 7 A. R. 515.

In an action for damages for negligence by a servant of a street railway company who was injured by a car striking him while he was at work upon the track, the jury assessed the plaintiff's damages at $500, but the trial Judge dismissed the action upon the ground that the plaintiff was the cause of his own misfortune. This judgment was affirmed by a divisional court, but reversed by the court of appeal, which ordered a new trial. The supreme court of Canada affirmed the decision of the court of appeal, but, on counsel for the defendants stating that a new trial was not desired, ordered judgment to be entered for the plaintiff for $500. *Hamilton Street R. W. Co.* v. *Moran*, 24 S. C. R. 717.

See Hardman v. *Putnam*, 18 S. C. R. 714.

The court of appeal, having held one of the defendants, a sheriff, liable for the act of his officer, a co-defendant, instead of ordering a new trial to assess the damages against the sheriff, directed judgment to be entered against the sheriff for the nominal amount already assessed against his officer. *Gordon* v. *Rumble*, 19 A. R. 440.

In an action brought to recover damages for the loss of glass delivered to the defendants for carriage, the Judge left to the jury the question of negligence only, reserving any other questions to be decided subsequently by himself. On the question submitted the jury disagreed. The defendants then moved in a divisional court for judgment, but pending such motion the plaintiffs applied for and obtained an order of the court allowing them to amend the statement of claim by charging other grounds of negligence. The defendants submitted to such order, and pleaded to such amendments, and new and material issues were thereby raised for determination. The action as so amended was entered for trial, but had not been tried when the divisional court pronounced judgment on the motion, dismissing the plaintiffs' action. On appeal to the court of appeal from this judgment of the divisional court, it was reversed and a new trial ordered. On appeal to the supreme court:—Held, affirming the judgment of the court of appeal, that the action having been disposed of before the issues involved in the case, whether under the original or amended pleadings, had ever been passed upon or considered by the trial Judge or the jury, a new trial should be ordered, and that this was not a case for invoking the power of the court, under rule 799, to finally put an end to the action. Held, also, that the judgment of the court of appeal ordering a new trial in this case was not a final judgment, nor did it come within any of the provisions of the Supreme Court Act authorizing an appeal from judgments not final. *Canadian Pacific R. W. Co.* v. *Cobban Mfg. Co.*, 22 S. C. R. 132.

Interference.] — Where a new trial has been ordered to try certain questions of fact arising in an action, the order should not be interfered with by an appellate court. *Scott* v. *Bank of New Brunswick*, 21 S. C. R. 30.

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

Order for New Trial—*Discretion.*]—*See Trumble* v. *Hortin*, 22 A. R. 51.

3. *Forum.*

Divisional Court.] — Where there has been a trial by jury in an interpleader issue directed by the chancery division, an application for a new trial must be made to a divisional court, and not to a single Judge. *Cole* v. *Campbell*, 9 P. R. 498.

Judge in Court.] — A petition by the plaintiffs for leave to produce newly discovered evidence, and to reopen the case for its admission after the judgment of the court of chancery in favour of the defendants had been affirmed by the court of appeal and the supreme court of Canada, was brought on for hearing before a single Judge in court:—Held, that, as the application might before the O. J. Act have been made to a single Judge, and as there is no provision in that Act specially applicable to the subject, the original practice of the court remains, and the application was properly made to a single Judge. *Synod* v. *DeBlaquiere*, 10 P. R. 11.

Trial Judge.] — An application to open the case and put in further evidence, and for a new trial upon fresh evidence, or for leave to bring a new action upon a part of the original claim founded upon such evidence, is properly made to the Judge who heard the original cause. *Bank of British North America* v. *Western Assurance Co.*, 11 P. R. 434.

——— *Persona Designata.*]—53 Vict. c. 4, s. 85 (N.B.), relating to proceedings in equity, provides that in an equity suit "either party may apply for a new trial to the Judge before whom the trial was held:"—Held, that such application need not be made before the individual before whom the trial was had, but could be made to a Judge exercising the same jurisdiction. Therefore, where the Judge in equity who had tried a case resigned his office, an application for a new trial could be made to his successor. Footner v. Figes, 2 Sim. 319, followed. *Bradshaw* v. *Baptist Foreign Mission Board*, 24 S. C. R. 351.

See Norton v. *McCabe*, 12 P. R. 506.

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4. Rule Nisi or Notice of Motion.

Statement of Grounds.] — The words "on the ground of misdirection," in a rule nisi for a new trial, do not comply with the C. L. P. Act of 1856. *Montgomery* v. *Dean*, 7 C. P. 513.

Several objections to the plaintiff's claim under a chattel mortgage were taken at the trial and overruled. A rule nisi was afterwards obtained for a new trial, on the ground that the mortgage, "together with the several renewals thereof, and the statements, papers, and affidavits to the same respectively attached, and all proceedings had and taken thereunder, are informal and irregular, and not according to the Consolidated Statutes of Upper Canada:"—Held, that the grounds of objection were insufficiently stated. *Strange* v. *Dillon*, 22 U. C. R. 223.

It is a sufficient statement of the grounds to say that the verdict is against law and evidence, without stating in what manner it is contrary to the evidence. *Cameron* v. *Milloy*, 14 C. P. 340.

It is insufficient in a rule nisi to ask for a new trial for misdirection and nondirection, and on the ground of improper rejection of evidence and improper admission of evidence. The objections must be more specifically stated. *McDermott* v. *Ireson*, 38 U. C. R. 1.

Semble, on motion for a new trial after argument the court will allow a new ground to be taken by the party moving if the justice of the case require it. *Vary* v. *Muirhead*, 2 O. S. 321.

In a rule nisi for a new trial for the admission of improper evidence, it is not sufficient to state merely that improper evidence has been admitted, but the evidence objected to should be specified, and the objection should be taken at the trial. *Crandell q. t.* v. *Nott*, 30 C. P. 63.

In moving against the ruling of the Judge at the trial with respect to the reception or rejection of evidence, or on the ground that he has misdirected the jury, it is still necessary to state the grounds in the notice of motion or rule. *Scott* v. *Crerar*, 11 O. R. 541.

See Furlong v. *Reid*, 12 P. R. 201.

Taking out and Serving Rule—*Delay.*] —See *Mulholland* v. *County of Grey*, 23 U. C. R. 517; *Lyman* v. *Smarr*, 3 P. R. 86; *Campbell* v. *Kempt*, 2 C. L. J. 131; *Smith* v. *Commercial Union Ins. Co.*, 33 U. C. R. 529.

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5. Several Defendants.

In trespass a verdict against four was allowed to stand in favour of three, and a new trial granted in favour of the fourth. *Davis* v. *Moore*, 2 U. C. R. 180.

The plaintiffs sued A., B., and C. on a joint contract: B. allowed judgment to go by default. Plaintiffs, failing to prove a joint contract, accepted a nonsuit as to B. and C., and took a verdict against A. A moved in term to set the verdict aside. B. and C. were not made parties to the rule, which the court made absolute. The order was not served on B. and C., nor did they adopt nor act upon it. B. and C. afterwards entered judgment on the nonsuit:—Held, that B. and C., not being parties to the rule nisi, were not bound by the order made thereon, unless they could be shewn to have been served with it, or to have adopted or acted upon it. *Commercial Bank* v. *Hughes*, 4 U. C. R. 167.

Where in trespass a verdict has been found against one defendant and for the others, the court will not grant the former alone a new trial. *Davis* v. *Lennon*, 8 U. C. R. 599.

The application must be for a new trial against all, and the consent of those acquitted must be obtained or the rule nisi served upon them. *Ward* v. *Murphy*, 11 U. C. R. 445.

Only one defendant in trover having pleaded, and the other having suffered judgment by default, the court ordered a new trial, where it appeared that, although the rule was moved as on behalf of one defendant only, the other assented to the application. *Kerr* v. *Gordon*, 9 U. C. R. 249.

In an action against makers and indorsers of a note, it is not necessary that all defendants should concur in an application for a new trial. *Maulson* v. *Arrol*, 11 U. C. R. 81.

In such action a new trial was granted as to one defendant, leaving the verdict to stand as to the other. *Hanscome* v. *Cotton*, 15 U. C. R. 42.

Where several defendants were convicted upon an information charging them with conspiracy, a new trial if granted must be to all. *Regina* v. *Fellowes*, 19 U. C. R. 48.

In trespass and trover against five defendants, for taking and converting a steam boiler, it appeared that one defendant, P., had nothing to do with the original taking, but that it had been placed in his yard by the others, or by some of them, not acting in concert with him, and that he had afterwards refused to give it up to the plaintiff. At the trial the plaintiff's counsel declined to elect, but went

to the jury against all the defendants, claiming exemplary damages, and a general verdict was rendered. The court ordered a new trial without costs, and refused to allow the verdict to stand against P. alone. *Menton* v. *Lee*, 30 U. C. R. 281.

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6. *Several Issues or Counts.*

Where plaintiff has a general verdict, to which on the merits as proved he is clearly entitled, the court will not grant a new trial merely because defendant is entitled on technical grounds on some issues, not involving the whole cause of action. *Helliwell* v. *Eastwood*, 5 O. S. 104.

Where upon some issues the jury found no verdict, a new trial was granted without costs. *Lynett* v. *Parkinson*, 1 C. P. 144.

Where there are several issues and a general verdict for the plaintiffs, which does not dispose of them, the court will grant a new trial. *McMartin* v. *Graham*, 2 U. C. R. 505.

Where defendant has a verdict against him on some issues, and in his favour on others, the court will not on his application grant a new trial on the former only. *Elwood* v. *Cameron*, 17 U. C. R. 528.

Where there were several counts, on which the jury gave separate damages, but the verdict was entered generally for the whole amount assessed, the court confirmed the finding as to the counts on which plaintiff was entitled to recover, and directed a new trial as to the others. *Ainslie* v. *Ray*, 21 C. P. 152.

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7. *Time for Making Motion.*

The following cases refer to the necessity for moving within the first four days of term, and are now obsolete.—*Orser* v. *Stickler*, Tay. 42; *Bank of Montreal* v. *Bethune*, 4 O. S. 303; *White* v. *Church*, 4 U. C. R. 23; *Bens* v. *Stover*, 12 U. C. R. 623; *Kitchin* v. *McIntyre*, 16 C. P. 484; *Hood* v. *Harbour Commissioners of City of Toronto*, 33 U. C. R. 148; *Rooney* v. *Rooney*, 29 C. P. 347, 4 A. R. 255; *Mitchell* v. *Mulholland*, 14 C. L. J. 55.

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8. *Other Cases.*

Cause List.]—Semble, that the court may direct Crown cases to stand in the new trial paper for argument, with ordinary suits between party and party. *Regina* v. *Sinnott*, 27 U. C. R. 539.

Death of Plaintiff between Verdict and Judgment on Application for New Trial.]—See *White* v. *Parker*, 16 S. C. R. 699.

VIII. Objections Not Taken at the Trial.

In What Cases New Trial Granted—Waiver.]—Objections not taken at nisi prius will not in general be entertained on motion for a new trial. *Hall* v. *Shannon*, E. T. 2 Vict., R. & J. 2577; *McMahon* v. *Campbell*, 2 U. C. R. 158; *Manners* v. *Boulton*, 6 O. S. 663; *Doe d. Marrough* v. *Maybee*, 2 U. C. R. 389; *Stephens* v. *Allan*, 2 U. C. R. 282; *Corner* v. *McKinnon*, 4 U. C. R. 350; *Jones* v. *Duff*, 5 U. C. R. 143; *Kennedy* v. *Freeth*, 23 U. C. R. 92.

Where, in trespass for assault and battery, defendant pleaded molliter manus imposuit in defence of possession, and the plaintiff replied de injuriâ:—Held, on a motion for a new trial, that the plaintiff was at liberty to shew that defendant's justification was not proved, although he had made no objection to it at the trial: and that he might abandon the ground which he had taken there, and retain his verdict for want of proof of justification. *Roddy* v. *Moffatt*, E. T. 2 Vict.

Where the objection was not made when the plaintiff closed his case, but merely by way of an objection to an observation of the Judge when charging the jury, the court will not admit the objection in term. *Turley* v. *Grafton Road Co.*, 8 U. C. R. 579.

The point suggested in the argument not having been taken at the trial, a new trial was granted, with costs to abide the event. *Merner* v. *Klein*, 17 C. P. 287; *Paton* v. *Currie*, 19 U. C. R. 388. And on payment of costs. *Griffiths* v. *Welland Canal Co.*, M. T. 2 Vict.

The court will not raise an objection against the merits, not taken by defendant's counsel. *McGregor* v. *Daly*, 5 C. P. 126.

The objection that no notice of action was necessary not having been taken at the trial:—Held, that it could not be raised in term. *Armstrong* v. *Bowes*, 12 C. P. 539.

The rule is the same in criminal as in civil cases, at any rate where the prisoner is defended by counsel, that any objection to the charge of the presiding Judge, either for non-direction or for misdirection, must be taken at the trial, and if not then taken it cannot be afterwards raised, especially where the evidence fully sustains the verdict. *Regina* v. *Fick*, 16 C. P. 379.

Where the point suggested on the argument that S., being an infant, could not be primarily liable, and defendant must be, was not taken at the trial, the court granted a new trial; costs to abide the event. *Merner* v. *Klein*, 17 C. P. 287.

A new trial was refused, when the ruling of the Judge at the trial was not objected to, or his attention called to the distinction insisted on between replevin and trespass under the plea. *Fitzpatrick* v. *Casselman*, 29 U. C. R. 5.

At a trial of an action for obstructing a public way, the defendant must shew some substantial damage peculiar to himself, beyond that suffered by the rest of the public who use the way. The plaintiff proved no such damage beyond being obliged in common with every one else who attempted to use the way to pursue his journey by a less direct road. Defendant raised no objection on the ground that the plaintiff had shewn no damage peculiar to himself, but denied the existence of the alleged highway, and the jury found in his favour:—Held, that he might nevertheless

support his verdict on this ground, it being admissible under "not guilty." *Baird* v. *Wilson*, 22 C. P. 491.

F. was added as plaintiff at a trial of ejectment, defendant objecting that this could not be done in his absence, and without his consent in writing, but F. was afterwards examined as a witness, and no question asked as to his consent:—Held, that the objection could not be entertained in term. *Henderson* v. *White*, 23 C. P. 78.

A new trial granted on payment of costs to enable defendant to raise objections to a tax sale, not sufficiently taken at the trial, the sale having been supported against the only objection properly taken. *Austin* v. *Armstrong*, 28 C. P. 47.

The action at the trial was treated as one for malicious arrest, and in that view a nonsuit was entered. In term it was argued that the action was really one of trespass, and that the whole case should have been left to the jury as such, but the court held that it was too late to urge this. *Donnelly* v. *Bawden*, 40 U. C. R. 611.

Remarks as to objections taken in the rule, but not appearing in the Judge's notes. *Regina* v. *Desjardins Canal Co.*, 27 U. C. R. 374.

In a penal action against defendant for acting as a justice without sufficient property qualification it was urged in term that the jury in their finding had treated the defendant as the sole owner of a certain part of the property, whereas it was owned by himself and son as tenants in common, and that his moiety was not of sufficient value. At the trial the deed to the father and son was simply produced, without the point as to the tenancy in common being taken, and it was proved that the son had afterwards joined with the father in a mortgage of the land:—Held, that the objection could not be entertained, for if taken at the trial such an explanation might have been given as would have shewn that there was no foundation for it; but, even if such ownership did exist, the question of value being for the jury, it could not be assumed that in estimating such value they had disregarded the point. *Crandell q. t.* v. *Nott*, 30 C. P. 63.

Waiver of Objections to the Jury.]—See *ante* VI.

IX. Particular Actions.

1. *Defamation.*

Libel—*Excessive Damages.*]—In an action for libel, the imputations being of a very slanderous character, and a justification pleaded which was not attempted to be proved, the verdict being for £200, the court refused a new trial for excessive damages, though they would have been much better satisfied with a smaller verdict. *Gfroerer* v. *Hoffman*, 15 U. C. R. 441.

The jury assessed the damages in a libel suit at $4,000, but the court, being of opinion that, under the circumstances, the damages were excessive, directed a new trial unless the plaintiffs would consent to reduce the verdict to $1,000. *Ontario Copper Lightning Rod Co.* v. *Hewitt*, 30 C. P. 172.

——— *Weight of Evidence.*]—In an action for a libel published in a newspaper against the plaintiff in his professional capacity as town engineer, &c., a verdict for defendant on evidence preponderating greatly in plaintiff's favour, was set aside on payment of costs. *Peters* v. *Wallace*, 5 C. P. 238.

In actions of libel new trials are not granted merely on the ground that the verdict is against evidence and the weight of evidence. It is for the jury to say whether alleged defamatory matter published is a libel or not, and the widest latitude is given to them in dealing with it. *Wills* v. *Carman*, 15 A. R. 695.

Slander — *Excessive Damages.*] — The charge had been that the plaintiff took medicine to procure abortion:—Held, that the damages (£100) though large, were not, under the circumstances, excessive. *Miller* v. *Houghton*, 10 U. C. R. 348.

The plaintiff sued his stepmother for slander, in having said of him that when his father was ill, he and his sister went into his bedroom and gave him a drug, after which he went into a doze and never recovered, and that the plaintiff and his sister had killed him. There was another count for charging the plaintiff with having robbed defendant. It appeared that the plaintiff and defendant were not on friendly terms, arising out of the defendant's marriage with the plaintiff's father: that the defendant was a garrulous old lady, prone to talk of the family difficulties; and that the words alleged were spoken when the plaintiff's brother-in-law and another person went to see her to get her to sign a release of dower. The defendant denied having charged any criminal offence, and it appeared that the plaintiff, who was a medical student, had administered some medicine to his father shortly before his death. There was no proof of any actual damage; but the jury gave $500:—Held, that the verdict was excessive; and, the trial Judge being dissatisfied with it on this ground, a new trial was ordered unless the plaintiff would reduce it to $100. *Cook* v. *Cook*, 36 U. C. R. 553.

———*Excessive Damages—Evidence.*]—Slander for accusing the plaintiff of larceny; verdict for £150. The court refused a new trial either on the ground of excessive damages or that one of the principal witnesses for the plaintiff was shortly after the trial convicted of forgery and sentenced to banishment. *Eakins* v. *Evans*, 3 O. S. 383.

——— *Excessive Damages—Innuendo.*]—The words charged were spoken at an election with reference to plaintiff's qualification, a matter in which defendant had an interest, and on which it is of consequence to encourage freedom of discussion. The evidence was doubtful as to the sense in which they were used, and the damages large, £150. The court granted a new trial on payment of costs. *Swan* v. *Clelland*, 13 U. C. R. 335.

——— *Inadequate Damages.*]—New trial refused in slander, where damages were complained of as too small. *Atkins* v. *Thornton*, Dra. 239; *Doe d. Proctor* v. *Allen*, T. T. 2 & 3 Vict.

——— *Weight of Evidence.*]—Where in slander charging theft, the verdict was for the plaintiff for £5, and the court considered the evidence was properly left to the jury, although they would have been better satisfied with a verdict for defendant, a new trial was refused. *Nolan* v. *Tipping*, 7 C. P. 524.

——— *Words not Actionable—Nominal Damages—Arrest of Judgment.*]—Words imputing to the plaintiff the having taken a false oath, but not in any judicial proceedings, or on any occasion where it would be an offence in law, are not actionable; but where the jury on such a charge gave £2 10s. damages, the court refused a new trial in order to give defendant his costs, but arrested the judgment. *Hogle* v. *Hogle*, 16 U. C. R. 518.

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2. *Ejectment.*

Evidence—*Deed—Date of.*]—A new trial granted in ejectment with costs to abide the event, where there was reason to doubt upon the evidence whether the deed under which plaintiff claimed was not executed after the issuing of the writ. *Bartels* v. *Benson*, 21 U. C. R. 143.

——— *Secondary—Laches.*]—The plaintiff, in an action of ejectment, having slept upon his rights for nearly twenty years, and the jury having found for the defendant upon secondary evidence of deeds and papers, the court refused to interfere. *Heany* v. *Parker*, 27 U. C. R. 509.

——— *Suspicious Circumstances.*] — In ejectment, where plaintiff had been out of possession more than forty years, and had asserted no right, but declared that he owned no land in the township, and the deed under which he claimed had a suspicious appearance, the jury having found in his favour, a new trial was granted. *Ketchum* v. *Mighton*, 14 U. C. R. 99.

Forfeiture to Crown — *Affidavits — Costs.*]—It was shewn by affidavits, in moving for a new trial in ejectment, that the plaintiff had in fact been attainted for treason, and the land in question forfeited to the Crown, and on this ground the court granted the defendant a new trial on payment of costs. *Butler* v. *Donaldson*, 12 U. C. R. 255.

Inconclusiveness — *Affidavits.*]—A new trial refused in ejectment, the affidavits not being sufficiently explicit, and the court stating that the defendant could bring an action to recover back possession. *Doe d. Brown* v. *Fraser*, 4 O. S. 371.

——— *Merits.*]—The court will not necessarily grant a new trial in ejectment on the merits, the verdict not being conclusive upon the parties. *Doe d. Stansfield* v. *Whitney*, Tay. 130.

Mortgage—*Usury.*]—The court will not grant a new trial to enable a mortgagor, plaintiff in ejectment, to shew his own deed void for usury, and thus eject a stranger who sets up as a defence a mortgage to a third party. *Doe d. McBernie* v. *Lundy*, 1 U. C. R. 186.

Part of Lot—*General Verdict—Injunction.*]—The jury having found a general verdict for the plaintiff in ejectment, though the defendant was in fact entitled to the part he had cleared:—Held, not ground for a new trial, but for an application to restrain the plaintiff from taking possession of such part. *Ferrier* v. *Moodie*, 12 U. C. R. 379.

——— *New Trial as to — Discretion.*] — The court has power to grant a new trial as to half of a lot of land, allowing a verdict to stand as to the other half, when the granting of such new trial is in the discretion of the court; and this in ejectment. When the new trial is ordered ex debito justitiæ, the whole record is thrown open; and this will be done in ejectment, unless defendant consents to a verdict standing for such portion of the land as the plaintiff has failed to prove title to. *McNab* v. *Stewart*, 15 C. P. 189.

Possession—*Evidence of — Conflict.*]—In ejectment defendant claimed by length of possession by herself and ancestor. The evidence as to her possession being continuous was conflicting, and for part of the time it appeared to have been by such acts as keeping the key of the house, and leaving upon the premises one or two trifling articles, with an occasional return to the place. The whole case was left to the jury on the evidence, the Judge charging that he could not say there had not been a keeping of possession shewn. It appeared that, in any event, the most the defendant could recover would be a very inconsiderable portion of the land in question, and there had been already two verdicts against her. The court refused a second new trial. *Lewis* v. *Kelly*, 17 C. P. 250.

Third New Trial.]—A third new trial in ejectment refused, though the court thought the evidence strongly preponderated against the verdict. *Doe d. Harris* v. *Benson*, 3 U. C. R. 164.

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3. *Interpleader.*

Absence of Counsel — *Affidavit—Merits—Costs.*]—In an interpleader issue, the verdict having been taken in the absence of defendants' counsel and attorney, the court granted a new trial, without requiring the usual affidavit disclosing fully the merits, holding that there was not the same necessity for such affidavit in an interpleader as in other cases. The attorney, who was also counsel in the case, not having satisfactorily excused his absence, the relief was granted only on payment of costs by him within a month. *Vidal* v. *Bank of Upper Canada*, 24 U. C. R. 430; *S. C.*, 15 C. P. 421.

See Dougall v. *Wilson*, 24 U. C. R. 433.

Absence of Defendant—*Affidavit—Explanation—Merits—Belief.*]—A verdict having been taken in an interpleader suit in the absence of defendant, upon a clear primâ facie case, defendant, upon a motion for a new trial, swore that he had not information of the trial coming on in time to be present, and his attorney swore that from information obtained from the plaintiff's brother he verily believed the defendant had a good defence on the merits:—Held, not sufficient, without shewing facts upon which his belief was founded; and sufficient cause for his absence not being shewn, a new trial was refused. *Proudfoot* v. *Harley*, 11 C. P. 389.

Division Court—*Perjury at New Trial—Illegality.*]—The clerk of a division court, acting under 13 & 14 Vict. c. 53, s. 102, issued an interpleader summons of his own authority, without the bailiff's request. Both parties attended before a barrister appointed by the Judge of the court, who was ill, and an order was made. The Judge afterwards ordered a new trial, which took place. Defendant was convicted for perjury committed upon that occasion:—Held, that, both parties having appeared, the proceedings in the first instance could not be considered void for want of a previous application by the bailiff; but that it was not competent for the Judge to order such new trial, the first order being made final by the statute; and that the conviction was therefore illegal. *Regina* v. *Doty*, 13 U. C. R. 398.

Evidence—*Weight of—Trifling Amount.*]—Where on an interpleader issue the amount in dispute was $60.40 only, and a verdict was given for the claimant, which the Judge of the county court who tried the issue was satisfied with, the court refused a new trial, although they thought that if the case had originally come before them for trial on the same evidence, their opinion might have been against the claimant. *Gourley* v. *Ingram*, 2 Ch. Ch. 309.

Feigned Issue—*Jurisdiction—Forum.*]—A common law Judge has no power, unless when given him by a statute, to direct a feigned issue to be tried by a jury; the most he can do is to refer the parties to the full court for the required relief, or perhaps to grant a summons returnable in court. As he cannot grant a new trial in such issue himself, so he cannot, by creating a proceeding of the kind, confer this jurisdiction upon the court, which will therefore refuse to interfere. *McLaughlin* v. *McLaughlin*, 15 C. P. 182.

See Cole v. *Campbell*, 9 P. R. 498, *ante* VII. 3.

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4. *Malicious Arrest or Prosecution.*

Damages—*Evidence—Trifling Amount.*]—In an action for maliciously suing out an attachment in the division court, it appeared that the defendant, when he made the affidavit, was aware that the plaintiff was then actually in prison. For the defence it was shewn that the goods attached were eventually sold under executions against the plaintiff, and therefore no substantial damage was suffered. The court, however, refused a new trial on this ground, the verdict being small. *Owens* v. *Purcell*, 11 U. C. R. 390.

Evidence—*Question for Jury.*]—In an action for malicious arrest, the jury found for the plaintiff £75. The court, although not altogether satisfied with the verdict, refused a new trial, there being evidence sufficient to uphold it, the question being one entirely within their province. *Knox* v. *Cleveland*, 8 C. P. 176.

——— *Weight of—Judge's Charge.*]—Upon an action brought for malicious arrest, where the jury, notwithstanding strong evidence for defendant, and the Judge's charge in his favour, found for the plaintiff, the court set aside the verdict and granted a new trial without costs. *Scanlon* v. *McDonagh*, 8 C. P. 82.

———*Weight of—Judge's Charge—Costs.*]—In an action for malicious arrest on a criminal charge, though the Judge charged strongly for the plaintiff, and the evidence appeared to be strongly in his favour, the court refused to interfere with a verdict for defendant, but would not give defendant the costs of the application. *Miller* v. *Ball*, 19 C. P. 447.

Excessive Damages.]—The damages, in an action for maliciously suing out an attachment, being, in the opinion of the court, excessive, a new trial was ordered unless the plaintiff would consent to reduce the verdict to a sum specified. *Hood* v. *Cronkite*, 29 U. C. R. 98.

Action for malicious prosecution. $1,000 damages. New trial refused. *Appleton* v. *Lepper*, 20 C. P. 138.

——— *Amendment—Costs.*] — Action for malicious prosecution; verdict for $1,000. The court, considering the damages excessive, allowed the insertion of a count in trespass in lieu of that in case, if the plaintiff would consent to reduce the verdict to $300; and if not, granted a new trial on payment of costs, with leave to the plaintiff to amend. *Munroe* v. *Abbott*, 39 U. C. R. 78.

——— *Reduction — Terms.*] — The court was of opinion that the damages given, $3,000, in an action for malicious prosecution, were excessive, and directed, subject to the plaintiff's acceptance, that they be reduced to $1,000, absolutely, and to $500 if such sum and the costs of the action were paid before 1st June; but in the event of the plaintiff refusing to accept the proposed terms, then there should be a new trial on payment of costs by defendant. *Crandall* v. *Crandall*, 30 C. P. 494.

Grounds for Arrest — *Suspicion—Misdirection.*]—Though the court, in an action for a malicious arrest, thought a verdict for the defendant would have been more proper, yet, as no clear ground had been shewn by defendant for the suspicion sworn to, and there was no misdirection, they refused a new trial. *Davis* v. *Fortune*, 6 U. C. R. 281.

Inadequacy of Damages.]—In an action for maliciously causing the arrest of the plaintiff as a lunatic, the jury found that the defendant acted maliciously and without any reasonable or probable cause, but they gave a verdict for only one shilling. A new trial was granted for smallness of damages. *Dobbyn* v. *Decow*, 25 C. P. 18.

Malice—*Absence of—Nominal Damages.*]—In an action for a malicious arrest under a ca. re., the plaintiff gave general evidence of his solvency, &c.; no malice was proved on the part of the defendant; the defendant, however, gave no evidence to shew upon what ground he had arrested, and the jury found nominal damages of 16s. for the plaintiff. A rule obtained for a new trial on the evidence, was, under the circumstances, discharged. *Lyons* v. *Kelly*, 6 U. C. R. 278.

Several Trials—*Wrong Verdict—Special Jury.*] — The court refused to set aside a

fourth verdict for plaintiff for malicious arrest, although wrong, alleging as one reason that defendant should at least have obtained a special jury. *Smith* v. *McKay*, 11 U. C. R. 111.

Want of Probable Cause — *Judge's Charge.*]—Where in an action for a malicious arrest on a ca. re., the Judge was of opinion that want of probable cause had not been shewn, and charged the jury strongly to that effect, but still did not peremptorily direct them to find for defendant, the court granted a new trial without costs. *Tyler* v. *Babington*, 4 U. C. R. 202.

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5. *Negligence.*

Evidence — *Failure of — Solicitors.*] — Plaintiff obtained a verdict against attorneys for negligence in not having procured the attendance of witnesses stated to be material at a trial between plaintiff and another, in which plaintiff failed. It did not appear, however, that the evidence of such witnesses would have procured a different result, and defendants' leading counsel at the trial in question had decided upon proceeding without such evidence. On these grounds a new trial was granted. *Wade* v. *Ball*, 20 C. P. 302.

——— *Fire — Origin—Unsatisfactory Verdict.*]—In an action against defendants for negligently allowing combustible matter, brush, &c., to be on their track, whereby a fire was caused upon it from defendants' engines and spread to the plaintiff's land, &c., the evidence shewed that the track was in such a state, but it did not clearly appear how the fire originated, or that the state of the track caused the injury to plaintiff's land. The jury having found for the plaintiff, and the Judge who tried the case being dissatisfied with the verdict, a new trial was granted with costs to abide the event. *Jaffrey* v. *Toronto, Grey, and Bruce R. W. Co.*, 23 C. P. 553.

——— *Weight of.*]—Action by plaintiff, a passenger in defendant's steamer, for refusing to stop at a wharf in the ordinary way, whereby plaintiff was injured in jumping ashore. Verdict for defendant against the weight of evidence. New trial granted. *Cameron* v. *Milloy*, 14 C. P. 340.

Action for negligence in driving a sleigh and horses against the plaintiff. It appeared that the driver to get better sleighing had turned off the road to follow a track along the ditch at one side, and that in coming up again the sleigh upset, and the horses running away overtook and ran against the plaintiff. The passengers in the sleigh which was upset acquitted the driver of any negligence; but another witness, who was near at the time, said that he thought, if more care had been used in coming up, the accident would not have happened. The jury having found for the plaintiff, a new trial was granted. *Robinson* v. *Bletcher*, 15 U. C. R. 159.

———*Weight of — Collision — Statutory Lights.*]—Case for injury caused by collision of steamboats at night. Verdict for plaintiff: —Held, that sufficient weight had not been given to the fact that plaintiff's boat was without the lights required by statute, and a new trial was granted to determine whether the accident was attributable to such default, in which case the plaintiff could not recover. *Gildersleeve* v. *Bonter*, 12 U. C. R. 489.

——— *Weight of—Expert Testimony.*]—Action against a railway company for negligence in the construction of their line, owing to which an embankment gave way. Verdict for plaintiff, though several of the most eminent engineers were of opinion that the embankment was properly and skilfully constructed, and the jury were cautioned against valuing such evidence lightly. Rule for a new trial on the weight of evidence discharged. *Braid* v. *Great Western R. W. Co.*, 10 C. P. 137; *Great Western R. W. Co. of Canada* v. *Braid*, 1 Moo. P. C. N. S. 101, 9 Jur. N. S. 339.

——— *Weight of — Question for Jury.*]—Action for injury received by plaintiff, a passenger in defendant's stage, through negligent driving and overloading. The fact of negligence was left fully to the jury, and they found for defendant, who had offered after action brought to pay £25 and costs, which was reasonable compensation. The court, though they would have been better satisfied with a verdict for plaintiff, refused to interfere. *Kenny* v. *Cook*, 4 U. C. R. 268.

Action on marine policy. Issue as to the negligence of captain and crew in navigating the vessel, by which the loss was alleged to have been caused. Verdict for defendant. New trial refused on the evidence. *Gillespie* v. *British North America Fire and Life Assurance Co.*, 7 U. C. R. 108.

Action for injury to plaintiff, a passenger in defendants' cars, caused by an axle breaking. Verdict for plaintiff. New trial refused. *Thatcher* v. *Great Western R. W. Co.*, 4 C. P. 543.

Excessive Damages — *Bodily Injury.*]—Action for injury to plaintiff, a deck hand on a vessel, by defendants allowing their wharf to be out of repair. The plaintiff's leg was broken, he was for five months disabled, and suffered much pain; and it seemed that the leg would never be as serviceable as before. The jury gave £250, the full amount laid in the declaration. New trial refused. *Johnson* v. *Port Dover Harbour Co.*, 17 U. C. R. 151.

Action by husband and wife for injury alleged to be caused to the wife by defendants' neglect to have a railing or guard along an embankment on a leading highway. Verdict for $2,500. New trial granted on payment of costs, unless the plaintiffs would reduce the verdict to $1,250. *Toms* v. *Township of Whitby*, 35 U. C. R. 195.

——— *Costs.*] — Action for bodily injury caused to plaintiff by defendants' negligence in carrying plaintiff. Damages assessed at £6,178. New trial granted for excessive damages, on the ground that the jury had not exercised a sound discretion, on payment of costs, and on payment of £500 into court, with leave to plaintiff to accept without prejudice. *Batchelor* v. *Buffalo and Brantford R. W. Co.*, 5 C. P. 127.

——— *Injury to Property.*] — $325 damages:—Held, not excessive in an action against a municipal corporation for improper construction of a drain, by which plaintiff's

cellar had been overflowed, putting him to much inconvenience for several months. *Reeves* v. *City of Toronto*, 21 U. C. R. 157.

——— *Medical Evidence.*]—The jury having given $2,000 damages in an action by plaintiff for injuries sustained by him when a passenger on defendants' railway, the evidence as to the injury being very loose, and no medical evidence having been called, the court granted a new trial on payment of costs. *Watson* v. *Northern R. W. Co.*, 24 U. C. R. 98.

——— *Solicitors—Omission.*] — Plaintiff, being about to invest some money, employed defendants as his solicitors to take security upon two lots of land, one of which they omitted from the mortgage. The value of the lot omitted was not more than $800, while the verdict was $2,000. A new trial was granted. *Phelps* v. *Wilson*, 13 C. P. 38.

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6. *Penal Actions.*

Absence of Witness—*Nonsuit.*]—A new trial was refused where plaintiff had been nonsuited owing to the absence of a material witness, the action being of a penal character against a magistrate. *Stinson* v. *Scollick*, 2 O. S. 217.

Documents — *Non-production — Subsequent Discovery.*]—Where, in a qui tam action for usury, the plaintiff was nonsuited for not producing certain promissory notes in the negotiation of which the usury had taken place, the only evidence offered to account for their non-production having been a letter that they were not to be found in the office of the Judge's clerk, where it was sworn they had been filed —the court refused to set aside the nonsuit, upon affidavit that they had been found since the trial. *Root q. t.* v. *Woodward*, 1 U. C. R. 311.

Evidence — *Weight of—Overvaluation of Property.*]—In a penal action, where the jury find for defendant, a new trial will not be granted merely because the verdict may be deemed to be against the evidence or weight of evidence; but it is otherwise where the verdict is in contravention of the law, arising either from the misdirection of the Judge, or from a misapprehension of the law by the jury, or from a desire on their part to take the law into their own hands. Where, therefore, in a qui tam action against a justice of the peace for acting without the necessary qualification, which is looked upon as a penal action, the jury, though greatly overvaluing the property, found for the defendant, but none of the above considerations arose, a new trial was refused. *Crandell q. t.* v. *Nolt*, 30 C. P. 63.

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7. *Seduction.*

Defendant's Means.] — A defendant in seduction is not to be prejudiced in an application for a new trial because his counsel has examined him as to his means, after having endeavoured to exclude such evidence. *Ferguson* v. *Veitch*, 45 U. C. R. 160.

See Adair v. *Wade*, 9 O. R. 15; *Udy* v. *Stewart*, 10 O. R. 591.

See also title SEDUCTION.

8. *Other Actions and Matters.*

Absconding Debtor—*Collusion—Attack by Attaching Creditor — Abandonment of New Trial — Costs.*] — In an action under the Absconding Debtors' Act, upon a motion by an attaching creditor, upon affidavits which shewed fraud and collusion between the plaintiff and defendant to the prejudice of the other creditors of the defendant, a new trial was granted. One M., an attaching creditor of defendants, applied for a new trial of this cause, which was granted on payment of costs. The rule was taken out, but never served, and subsequently M. gave plaintiff notice that he had abandoned it. On application by plaintiff, on notice to M., to shew cause why said rule should not be discharged, with costs to be paid by M.:—Held, that the application by M. was in the nature of a collateral proceeding, and though he might, when voluntarily seeking the aid of the court, have been ordered to pay the costs of opposing the rule which he had obtained, he could not now be ordered to pay the same when brought before the court by compulsion, and not being a party to the record. *Lavis* v. *Baker*, 13 C. P. 506, 14 C. P. 336.

——— *Return.*]—An absconding debtor returning to the Province after verdict and before judgment, is entitled to a rehearing by the granting of a new trial. *Robertson* v. *Burk*, 5 O. S. 75.

Cause Cognizable in Inferior Court.] —Where actions are brought in the inferior jurisdiction of the superior courts for trifling amounts, which might have been recovered at much less expense in the inferior courts, the courts will not favour such actions by granting new trials in cases which rest in their discretion. It must be clearly shewn that the direction of a presiding Judge has been wrong, or that the verdict has been against evidence. *Comstock* v. *Moore*, 6 C. P. 434.

Controverted Elections.] — See *Peel Election (Ont.)*, *Hurst v. Chisholm*, H. E. C. 485.

County Court — *Jurisdiction.*] — A plea was pleaded bringing title to land in question, and after a verdict for the plaintiff a new trial was granted, on the ground that the court had no jurisdiction. On appeal, the judgment was reversed, as the court, having no jurisdiction, could not grant a new trial. *Campbell* v. *Davidson*, 19 U. C. R. 222.

See COUNTY COURTS.

Division Court.]—See DIVISION COURTS.

Issue as to Fraudulent Conveyance.] —Issue directed to try whether a conveyance of land was fraudulent, under R. S. O. 1877 c. 49, s. 12. Quære, as to the granting of a new trial, or reviewing the verdict on such an issue. *Merchants Bank* v. *Brooker*, 8 P. R. 133.

Overholding Tenant — *Disagreement of Jury.*] — Where, upon a commission issued against the overholding tenant under C. S. U. C. c. 27, the first jury summoned could not agree and were discharged:—Held, that another jury might be summoned, and an effectual inquisition held. *In re Woodbury and Marshall*, 19 U. C. R. 597.

X. Pleadings—New Trial to Amend.

When Granted — *Particular Circumstances.*]—In a very hard case a new trial was granted to enable an executor to plead plene administravit. *McMartin* v. *Traveller*, 5 O. S. 155.

But in this case it was refused, there being no satisfactory answer given why the plea had not been pleaded before. *McDonald* v. *DeTuyle*, 6 O. S. 335.

Where there were several counts varying the same cause of action, to which defendants pleaded distinct pleas, and the plaintiff, having demurred to some and replied to the others, after judgment against him on the demurrer, recovered a verdict on the other pleas, no defence having been made at the trial:—Held, that, upon the pleadings, the plaintiff's recovery was barred, but, under the circumstances, a new trial granted, with leave to amend. *Watson* v. *Hamilton*, 6 O. S. 312.

The plaintiff, before the argument of the demurrers to his pleas, went to trial, and assessed his damages at £17 10s., and the demurrers were afterwards admitted to be against him. The court refused to allow him to set aside his verdict and amend his pleadings. *Tyrrel* v. *Myers*, 6 O. S. 433.

The court, the pleadings having been before them on demurrer, refused a new trial with a view to an amendment. *McKechnie* v. *McKeyes*, 10 U. C. R. 37.

Trespass against a sheriff's bailiff for seizing goods. General issue only pleaded. Verdict for plaintiff. New trial granted on payment of costs, on affidavit that defendant had instructed his attorney to defend under writs of execution, and the attorney had considered that the defence might be urged under the general issue. *Williams* v. *Knapp*, H. T. 4 Vict.

Where a sheriff, in an action of trespass, had omitted to justify specially, and a verdict was found against him, the court granted a new trial on payment of costs, with leave to amend. *Lee* v. *Rapelje*, 2 U. C. R. 368.

Where the evidence does not strictly support any one count, but a verdict has been given for the plaintiff, in accordance with justice, the court may grant a new trial, allowing the plaintiff to amend. *Elliott* v. *Croker*, 8 U. C. R. 156.

When the merits have been tried under informal pleadings, and the verdict would be sustained on amendment, the court will refuse a new trial. *Deady* v. *Goodenough*, 5 C. P. 163.

Action on a guarantee. New trial refused to allow defendant to put in a plea of discharge by extension of time given to the principals. *Higby* v. *Cummings*, 10 U. C. R. 222.

Where the plaintiff was entitled to recover back $200 claimed, but could not recover on the common counts for money had and received, the court, instead of entering a verdict for plaintiff, as moved, pursuant to leave, granted a new trial with liberty to plaintiff to amend his declaration. *Carscaden* v. *Shore*, 17 C. P. 493.

Action in county court. Declaration on a covenant to pay rent. Plea, misdescription of the property, so that defendants had not what they bargained for. Verdict for defendants. On appeal, the plea was held bad on demurrer, and the verdict therefore falling to the ground, this court ordered a new trial with leave to plead de novo. *Talbot* v. *Rossin*, 23 U. C. R. 170.

An insurer with a mutual insurance company is not liable for assessments made before his insurance was effected, or premium note given. At the trial the Judge so ruled, and refused to allow defendants to plead a subsequent assessment made after the policy. The court would not grant a new trial on the ground of such refusal, no affidavit of such assessment being filed. *Green* v. *Beaver and Toronto Mutual Fire Ins. Co.*, 34 U. C. R. 78.

The court, under the circumstances of this case, refused to amend and enter a verdict for the plaintiff; but granted a new trial on payment of costs, to enable the plaintiff to amend, and to have the question as to an alleged waiver of a condition in the agreement sued upon, properly tried. *Aitcheson* v. *Cook*, 37 U. C. R. 490. See *Hatton* v. *Beacon Ins. Co.*, 16 U. C. R. 316.

Action for work and labour. Plea, work not done by the time agreed on; and that defendant, under the agreement, was entitled to deduct a sum specified for the delay. Issue:—Held, that under this issue, plaintiff could not shew that the delay was caused by defendant or his workmen; but a new trial was granted with leave to amend. *Hamilton* v. *Moore*, 33 U. C. R. 100.

A part of the claim in this case extended beyond six years, but no application was made at the trial for leave to plead the Statute of Limitations as to this. The court, under the circumstances, refused to grant a new trial to enable this defence to be set up. *Cook* v. *Grant*, 32 C. P. 511.

The plaintiff consigned goods to persons in England, and shipped them by defendant companies on bills of lading, describing them as shipped by the plaintiff to be delivered to——, order, or his assigns, he or they paying freight. The plaintiff indorsed the bills of lading to various persons in England to whom he had sold the goods; the consignees paid the drafts drawn upon them for the price, and, the goods having been seriously damaged in transit, they made claim upon the plaintiff for the loss. The plaintiff now sued for the damages and was nonsuited on the ground that he had not sufficient interest, or was not the proper person to sue. The court, without deciding as to the plaintiff having no right of action, or the effect of R. S. O. 1877 c. 116, s. 5, set aside the nonsuit and directed a new trial, with leave to the plaintiffs to add as co-plaintiffs any or all of the consignees, or indorsees of the bills of lading, the evidence already given to stand, with any additions the parties might desire, reserving all costs. The validity of R. S. O. 1877 c. 116, s. 5, was disputed on the ground that it was ultra vires as interfering with trade and commerce, but the court refused to decide the point without notice to the attorney-general and minister of justice under 46 Vic. c. 6, s. 6 (O.), which would involve great delay, and adopted the above course as being the speediest and least expensive.

Hately v. *Merchants Despatch Co.*, 2 O. R. 385.

A new trial was granted in this case, there being circumstances requiring further consideration, with leave to so amend the pleadings and add such parties as might be necessary. *Ward* v. *Hughes*, 8 O. R. 138.

XI. Ruling as to Right to Begin.

A new trial will not be granted for a misdirection as to the right to begin, unless it appear that injustice may have been occasioned by it. *McDonald* v. *McHugh*, 12 U. C. R. 506. See also *Neville* v. *Fox*, 28 U. C. R. 231.

See Miller v. *Confederation Life Assurance Co.*, 11 O. R. 120.

XII. Substitution of New Trial for Nonsuit.

Where a defendant obtains a rule for a nonsuit as on leave reserved, and it afterwards appears that no such leave was reserved, the court will not allow him to change his rule into a rule for a new trial. *Doe d. Gilkison* v. *Shorey*, 2 U. C. R. 183.

Where a verdict had been given for the plaintiff, with leave to defendant to move for a nonsuit, the court declined nonsulting, but gave a new trial on payment of costs. *Doe d. Burnham* v. *Simmons*, 7 U. C. R. 196.

New trial granted on payment of costs, to enable plaintiffs to give evidence of a waiver of the condition in a policy as to proof of loss, where a nonsuit would be equivalent to a verdict for defendants, the six months having expired within which the action must be commenced. *Cameron* v. *Monarch Assurance Co.*, 7 C. P. 212.

The condition was, that if there should be any insurance at any other office, notice should be given, and the same indorsed on or stated in the policy, otherwise the first insurance should be void:—Held, that an insurance effected in another office by an interim receipt, was within the condition; but, as there was some evidence of a waiver of the notice required, which defendant could not take advantage of under his replication, the court, instead of ordering a nonsuit on the leave reserved, granted a new trial with leave to amend. *Hatton* v. *Beacon Ins. Co.*, 16 U. C. R. 316.

Where a nonsuit was granted in a county court, which the court of Queen's bench thought could not be sustained, but the right of the plaintiff on the evidence seemed doubtful, the court on appeal ordered a new trial. *O'Rourke* v. *Lee*, 18 U. C. R. 609.

Special count, on defendant's promise to pay the amount of a judgment recovered against himself and M. by plaintiff, on plaintiff assigning it to one H. Neither judgment nor assignment was proved:—Held, that the motion for nonsuit was entitled to prevail, but a new trial was allowed on payment of costs. *Pearman* v. *Hyland*, 22 U. C. R. 202.

In an action on a marine policy the court granted a new trial, though of opinion that defendants were entitled to a nonsuit, suggesting whether, if certain evidence were given, it might not be held to modify the condition as to seaworthiness on which defendants relied. *Coons* v. *Ætna Ins. Co.*, 18 C. P. 305.

XIII. Surprise or Absence.

1. *Absence of Counsel.*

Excuse — *Costs.*]—Where after plea the plaintiff was nonsuited, because no one appeared for defendant to confess lease, entry, and ouster, the court, on affidavit that the defendant's attorney had forwarded title deeds and other documents to counsel, for the purpose of making a defence, which did not arrive in time, and on an affidavit of merits, granted a new trial, on payment of costs. *Doe d. Clarke* v. *McQueen*, 3 O. S. 69.

The absence of defendant's counsel is ground for a new trial only on payment of costs. *Driscoll* v. *Hart*, 5 O. S. 677.

Where plaintiff was nonsuited, his cause having been unexpectedly called on in the absence of his attorney and counsel, several causes before it on the docket having been suddenly disposed of, the court refused to set aside the nonsuit, except on payment of costs. *Doe d. Dunlop* v. *McNab*, H. T. 5 Vict.

Refused on an affidavit that defendant's counsel was absent from illness, no attorney having appeared at the trial to attend to the cause, and no application having been made to put it off. *Gunn* v. *VanAllen*, 5 U. C. R. 513.

Granted, upon conditions as to payment of verdict and costs, plaintiff having recovered against a sheriff during the absence of his counsel. *Martin* v. *Corbett*, 7 U. C. R. 169.

Refused, where it could only be granted on payment of costs, and defendant would not be benefited thereby. *Harnden* v. *Anchor*, 6 C. P. 517.

One of the prisoner's counsel at the trial, while he was addressing the jury at the close of the case, was suddenly seized with a fit, and incapacitated from proceeding any further. No adjournment was, however, applied for, but the other, who was the senior counsel, continued the address to the jury on the prisoner's behalf, without raising any objection that he was placed at a disadvantage by reason of his colleague's disability. It did not, moreover, appear that the prisoner had been prejudiced by the absence of the counsel alluded to:—Held, no ground for a new trial. *Regina* v. *Fick*, 16 C. P. 379.

It is no ground for a new trial that the cause was taken out of its turn on the docket. *Parsons* v. *Ferriby*, 26 U. C. R. 380.

See ante IX. 3.

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2. *Absence of Documentary Evidence.*

Forgotten Bond.]—The defendant in dower pleaded ne unques seizie que dower,

and after trial and verdict against him, remembered that a bond had been executed by himself and the demandant several years before, providing for the release of the dower in question, which bond had remained in the hands of a third party, and had not been produced at the trial. The court granted a new trial on payment of costs, with leave to add a plea. *Germain* v. *Shuert*, 7 C. P. 86.

Mislaid Bond.]—Where the plaintiff was nonsuited in an action upon a bond which had been filed as an exhibit at a previous trial, because he was unable to produce it, a new trial was granted on payment of costs, the bond having been afterwards found. *Muirhead* v. *McDougall*, 5 O. S. 642.

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3. *Absence of Parties.*

Cause List—*Mistake.*]—New trial granted under particular circumstances, where defendant's attorney mistook the place of the cause on the docket. *Dove* v. *Dalby*, 5 U. C. R. 457.

Notice—*Witness—Affidavit.*]—The defendant having failed to attend, on notice, as a witness:—Held, that no attention should be given to his affidavit impeaching the correctness of the verdict. *Manning* v. *Mills*, 12 U. C. R. 515.

Notice of Trial—*Mistake as to.*]—Where the notice of a trial was received by a clerk of defendant's attorney, but the attorney, on inquiring of his clerks, was told that none had been served, and neglected in consequence to prepare for his defence, the merits appearing to be doubtful, a new trial was granted. *Walton* v. *Jarvis*, 13 U. C. R. 616.

——— *Posting up.*]—The defendant in a county court suit appeared in person, but gave no address for the service of papers, as required by ss. 52 and 53 of the C. L. P. Act and C. C. rule of court No. 131. The declaration was served on him personally, and pleas filed. The person who served the pleas for him refused to receive the issue book, notice of trial, &c., and they were stuck up in the office of the clerk of the court. The plaintiff took a verdict on the 20th April, the defendant not appearing, and defendant was informed of it on the 27th. No steps were taken by him to stay proceedings, and final judgment was entered on the 5th May. Defendant in Easter term following moved for a new trial:—Held, that the plaintiff's proceeding was warranted by the rule of court, notwithstanding the declaration had been personally served. Semble, that if it were irregular, defendant, on being aware of the verdict, should have moved to stay the plaintiff's proceedings, and that at all events he should have done so if he wished to move upon the merits. O'Neill v. Everett, 4 P. R. 98, distinguished. *Covert* v. *Robertson*, 31 U. C. R. 256.

Refusal to Postpone—*Affidavit.*]—In an action on a note, in which defendant pleaded that his indorsement had been obtained by fraud, a second postponement of the trial had been refused by the presiding Judge, and no defence having been made, plaintiff obtained a verdict. A motion for a new trial, founded upon defendant's affidavit, uncorroborated, and the allegations in which were met by counter-affidavits, was refused. *Molsons Bank* v. *Bates*, 7 C. P. 312.

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4. *Absence of Witnesses.*

Affidavits — *Conflict.*]—Affidavits, stating surprise and absence of witnesses, being met by affidavits in support of the verdict, a new trial was refused. *Shipman* v. *Stevens*, 6 C. P. 17.

Diligence—*Merits—Costs.*]—In the county court, before the cause was called for trial, defendant moved to put off the trial owing to the absence of witnesses. The Judge refused, as he thought proper steps had not been taken to secure the attendance of absent witnesses. A new trial was granted on payment of costs, there having been, in the opinion of the Judge, a defence which ought to have been heard, and to enable the parties to appeal after a trial of the facts. *Frontenac Division, No. 2, Sons of Temperance* v. *Reedston*, 4 L. J. 211.

——— *Postponement—Taking Chances.*]—The court refused to grant a new trial on the ground of surprise, consisting in the absence of witnesses, where an application to postpone the trial had failed, because it was not shewn that the required witnesses had been subpœnaed, and the applicant had run the risk of going into his case with such evidence as he had. *Kitchen* v. *Murray*, 16 C. P. 69.

Examination on Commission — *Cross-examination.*]—A material witness for plaintiff stated during the assizes that he was obliged to go to the States on business; and a commission was granted and the witness examined. Defendant's counsel objected to the issuing of the commission, and refused to cross-examine, as he could not consult his client, but he attended at the trial and made the best defence he could. It being very important that this witness should be subjected to cross-examination, the court granted a new trial on payment of costs. *Arnold* v. *Higgins*, 11 U. C. R. 191.

Illness.]—Where a defendant and his witnesses were absent owing to his illness, and the damages might, at all events, have been materially lessened by their testimony, the court ordered a new trial on payment of costs. *Farley* v. *Glassford*, 7 C. P. 285.

Notice of Trial—*Late Service—Delay—Merits.*]—Where notice of trial had been served late—and defendant, immediately on being apprised of it, took steps to procure his witnesses, and arrived with them an hour or two after the trial, having been detained on the road by bad weather, the court granted a new trial, it being suggested on affidavit that defendant had merits. *Harrington* v. *O'Lone*, 5 O. S. 78.

Postponement of Trial — *Terms — Costs.*]—Where a trial was put off at the assizes on affidavit of the absence of material witnesses, and on payment of costs of the day, and defendants' attorney declined paying those costs himself, defendants being absent, in consequence of which the trial proceeded, and no defence was made—the court, on affidavits which gave reason to apprehend

that justice had not been done, and considering the large amount of the verdict, granted a new trial on payment of costs. *Oliver* v. *Stephens*, 3 O. S. 21.

Public Duties.]—It is no ground for a new trial that a witness who was subpœnaed did not attend, having been engaged in some public works. *Woodruff* v. *Campbell*, 5 O. S. 305.

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5. *Affidavits Required.*

Statement of Grounds—*Excuse—Merits—Opinion—Information and Belief.*]—In an undefended cause, though no application was made to put off the trial, the court granted a new trial on an affidavit or merits, and special affidavit shewing that defendant and his witnesses were attending a court martial at Quebec. *Lockhart* v. *Milne*, 1 U. C. R. 444.

The court will not grant a new trial on the ground of surprise unless in clear cases, and where the grounds are strong and specific; if the surprise be the discovery of a witness of whom the plaintiff was not aware, it must be stated what evidence that witness can give, and generally the witness himself must shew on affidavit what facts he can prove. *Robinson* v. *Rapalje*, 4 U. C. R. 289.

Where a defendant applies for a new trial on the ground that he was taken by surprise by the cause being taken out of its turn, and was unprepared to enter into his defence, he must not rely on a general affidavit of merits, but shew that he had a defence admissible under the pleadings, which he would have been able to sustain. *Moore* v. *Hicks*, 6 U. C. R. 27.

In an interpleader issue in moving for a new trial for the absence of attorney or parties, it is not necessary to set out the merits, inasmuch as the very issue itself discloses what the defendant's claim is. The proper form of the general affidavit of merits is, that the defendant has "a good defence to the action on the merits." An affidavit by the attorney that in his "opinion the defendants had a sure and certain defence legally and equitably," was held insufficient. Ordinarily, on an application for a new trial, on the ground of merits, the affidavit must disclose what the merits are. *Vidal* v. *Bank of Upper Canada*, 15 C. P. 421.

A defendant applying for a new trial, on the ground that the cause was taken out of its proper order, on the first day of the assizes, and in the absence of his counsel or attorney, must state unequivocally that he has a good and legal defence to the action. *Regina* v. *Baker*, 6 C. P. 68.

See also *Doyle* v. *Fraser*, 5 O. S. 59; *Pardoe* v. *Beatty*, 6 U. C. R. 496.

Defendant, having given no notice to produce, was precluded from giving secondary evidence of a bond, and the plaintiff had a verdict. Considering the nature of the defence set up, the court refused to interfere upon an affidavit by one of the defendants that he was informed and believed the plea could be proved. *Kerr* v. *Boulton*, 25 U. C. R. 282.

6. *Testimony Contrary to Expectation.*

Admission—*Cause of Action—Damages.*]—A verdict was taken for the plaintiff under 14 & 15 Vict. c. 66, pro confesso, for non-attendance of defendant, who had been notified to attend as a witness, and damages assessed at 1s., plaintiff failing to prove an offer to settle by defendant's attorney, as he had expected:—Held, that the admission was only to be taken as to the cause of action, and not the amount of damages; but a new trial was granted on the ground of surprise. *Robertson* v. *Ross*, 2 C. P. 193.

Adverse Witness—*Inquiry.*]—The declaration was such as to inform defendants what they would be obliged to prove; the chief defendant, in fact, admitting this, but alleging that he trusted to the evidence of a witness on whose veracity he placed implicit reliance, and at whose instance, moreover, the distress, out of which the action arose, had been made. The witness, however, disappointed defendant in his testimony; but a witness who was present at the trial, and who, it was admitted by defendants' counsel, would to some extent have contradicted the other, was not called, as it was not considered his contradiction would have established the defence, which had been completely displaced by the evidence of the witness who had proved adverse. But no sufficient inquiry, it appeared, had been made before the trial as to what this witness would state:—Held, not sufficient surprise to warrant the granting a new trial. Semble, that had inquiry been made, and the witness afterwards deposed differently from what he stated he would, there would have been surprise in this. *Walcott* v. *Stolicker*, 16 C. P. 555.

Alteration of Document—*Conflict of Affidavits.*]—In an action by a creditor of a railway company against stockholders for calls, alleging them to have subscribed for 40 shares, the defence was that the figure 40, shewing the number of shares, had been inserted after the subscription by some stranger. The jury found for the defendants, and that the figures were not written by the partner who subscribed, nor anyone authorized by him. On motion for a new trial the plaintiffs' attorney swore that his objection, as to the figures, had taken him by surprise, and that he thought he would be able to meet it by satisfactory evidence on another trial. In answer, the defendant who subscribed confirmed by his affidavit the finding of the jury. The court refused to interfere. *Moore* v. *Gurney*, 22 U. C. R. 209.

Criminal Trial — *Discrepancies in Evidence—Alibi.*]—The prisoner, having been indicted with two others acquitted, was convicted of the murder of one H., whose body was found in a field adjoining a railway on Monday the 10th April, apparently about three days after death, which had clearly been caused by violence. One M., the chief witness for the Crown, swore that on the Friday night previously, he heard cries in this field, a quarter of a mile from his house, and that not long afterwards he saw three persons walk quickly past his house from that direction, whom he recognized as the prisoner and his two sons. He also stated that on the following morning he saw the prisoner walking along the railway and stopping near where the body was afterwards found, his manner

being strange and excited. At the coroner's inquest, held six months before, this witness had declared himself unable to identify the person seen by him, and had not mentioned seeing the prisoner on Saturday. On motion for a new trial, on the ground, among others, of surprise at these discrepancies, the court refused to interfere. The indictment alleged the murder to have taken place on the 6th, while the evidence, both at the trial and the coroner's inquest, pointed to the 7th, and it was stated in the affidavits that the prisoner had thus been misled in directing his evidence of an alibi more particularly to the wrong day:—Held, no ground of surprise. *Regina* v. *Hamilton*, 16 C. P. 340. See *S. C., ante* IV. 1.

——— *Knowledge of Evidence.*]—It is no ground of surprise that a prisoner "had no knowledge of the evidence to be produced against him:" it is sufficient that the party is fully apprised of the case or charge proposed to be proved, which he must prepare himself to repel. *Regina* v. *Slavin*, 17 C. P. 205.

Declarations — *Authentication — Disproof.*]—In assumpsit for work done for defendant in Scotland, the only evidence given by the plaintiff was his own declaration and that of three others, made at Glasgow, under 5 & 6 Wm. IV. c. 62, s. 15, taken before a justice. There was no authentication of the signature of the justice, nor any proof of there being such a person, nor of his holding this office. No notice had been given to defendant of the intention to produce such evidence, and he swore that he believed he would be able to disprove the demand by cross-examining the plaintiff's witness, and adducing evidence. The court granted a new trial on the ground of surprise. *Smith* v. *McGowan*, 11 U. C. R. 399.

Deed—*Genuineness.*]—A new trial was ordered before a jury as to the genuineness of a deed more than thirty years old, produced by one of the parties, when evidence was adduced which was a surprise upon defendants. The court, at their instance, ordered a new trial on terms. *Chamberlain* v. *Torrance*, 14 Gr. 181.

Ejectment — *Title—Proof—Affidavit.*] — A defendant in ejectment, not having offered any evidence of title at the trial, applied for a new trial upon affidavits alleging surprise, but did not state what title he could have shewn. The court discharged his application. *Doe d. Stewart* v. *Yager*, 5 U. C. R. 584.

New trial granted to defendant in ejectment, the plaintiff claiming title by an estoppel, which defendant was not prepared to meet. *Doe d. Yager* v. *Stewart*, 7 U. C. R. 174.

Intention of Opposite Party.]—Held, that the abstaining of a party from proof under the idea that the opposite party has no real intention of putting him to such proof, and being thereby taken by surprise, is not ground for granting a new trial. *Andrew* v. *Stuart*, 6 A. R. 495.

Reliance on Witness—*Proof of Handwriting.*]—Where a defendant denied his indorsement of a note, and a witness who swore on his examination in chief to his having actually seen defendant sign the note, on his cross-examination could not swear to the identity of the paper indorsed; and the plaintiff, having relied on this witness, was not prepared to prove defendant's hand-writing, and had a verdict against him, the court granted a new trial on payment of costs. *Murphy* v. *Fraser*, 4 U. C. R. 194.

Sheriff—*False Return—Judgment Debtor.*]—In an action against a sheriff for a false return, the judgment debtor testified to facts which defendant afterwards said took him by surprise. On motion for a new trial:—Held, that defendant should have gone to trial prepared to shew all transactions with the judgment debtor in relation to the suit, and not having done so, or sworn on this motion to what he could prove, a new trial was refused. *Young* v. *Moderwell*, 14 C. P. 143.

Solicitor—*Client's Interests—Privilege.*]—A solicitor, when questioned as a witness with regard to matters involving his client's interests, should decline to answer unless directed or at least permitted by the court; and where a different course was taken:—Held, that it might be deemed a surprise upon the client, and a new trial was granted, with costs to abide the event. *Livingstone* v. *Gartshore*, 23 U. C. R. 166.

Special Plea—*Unreadiness to Meet—Excuse.*]—The court will not grant a new trial on an affidavit by the plaintiff that he had no idea defendant really intended to give evidence of a special plea, but supposed it was pleaded merely to gain time, and therefore did not prepare to meet it, and likewise of his ability to meet such a defence on another trial. *Prout* v. *Pollard*, 1 U. C. R. 170.

Unfair Evidence—*Amount of Recovery.*]—Where a plaintiff was taken by surprise at a trial, by unfair evidence given by defendant, and in consequence recovered much less than he was entitled to, he was granted a new trial on payment of costs. *Cummings* v. *Hawn*, M. T. 4 Vict.

XIV. Terms on which Granted or Refused.

Costs — *Conditions — Undertakings.*] — New trial refused in an action for seduction, where there was much conflicting testimony, and the verdict was for £100, though the Judge who tried the cause was unfavourable; but the rule for a new trial was discharged without costs, as the plaintiff had improperly written letters to the court on the subject of the suit. *Thorpe* v. *Grier*, 1 U. C. R. 528.

Where after a verdict for plaintiff and cause shewn on affidavits against a rule for a new trial, a person who made one of the affidavits for the plaintiff died, it was made a condition of the rule absolute that his affidavit should be received in evidence at the next trial. *Gass* v. *Colclough*, E. T. 3 Vict.

Where one of the plaintiff's witnesses lived at a distance, it was imposed as a condition that his evidence, given at the last trial, should be read from the Judge's notes. *Conley* v. *Lee*, 12 U. C. R. 456.

Where in an action for use and occupation, the plaintiff proved his case by evidence of admissions of defendant, who on his defence put in a lease under seal from plaintiff, which he contended was for the same premises, but there was no distinct evidence of identity, and the jury found for plaintiff, the court afterwards, on affidavits shewing that these were the only premises demised by plaintiff to defendant, made a rule absolute for a new trial without costs, unless the plaintiff would elect to enter his judgment for the amount of his verdict only. *Boulton* v. *Defries*, 2 U. C. R. 432.

Trespass for mesne profits. Several issues joined. Verdict for defendants, upon one issue clearly against evidence. New trial granted, unless defendants consented to allow a verdict upon that issue for plaintiff. *Anderson* v. *Todd*, 3 U. C. R. 16.

New trial granted, on condition of defendant paying into court or securing the amount of the verdict and costs of former trial by a day named. *Dove* v. *Dalby*, 5 U. C. R. 457.

When the question for trial depends upon established rules of law, and the jury, being properly directed, give a verdict in opposition to the charge, the party injured is entitled to a new trial without costs. *Logan* v. *Ryan*, 10 U. C. R. 15.

The plaintiff having died before the return of the rule nisi, it was made a condition that in the event of a second verdict for plaintiff, judgment should be entered as if such verdict had been rendered at the time of the first trial; and that defendant should undertake not to assign error. *Swan* v. *Clelland*, 13 U. C. R. 335.

In an action for taking goods, the jury having found a general verdict for defendant, the court granted a new trial to the plaintiff on his undertaking to restrict himself at such trial to a certain portion of the property, as to which they thought the weight of evidence in his favour. *Townsend* v. *Hamilton*, 5 C. P. 230.

The evidence of facts necessary to shew the effect of the devise in question not being clear, a new trial was granted with costs to abide the event, on condition that both parties should admit the seisin of one M., to whose title it appeared they both assented, though he claimed through deeds as to which proof of identity was insisted upon. *Nicholson* v. *Burkholder*, 21 U. C. R. 108.

Where the damages given were complained of as being too small, a new trial was granted with costs to abide the event, viz., the event of the plaintiff's recovering more than the amount of the first verdict. *Jones* v. *McDowell*, 12 U. C. R. 214; *Craig* v. *Corcoran*, 24 U. C. R. 406.

Where the evidence was not sufficient to go to the jury, but the attention of the Judge at the trial had not been drawn to the particular question, the costs on granting a new trial were ordered to abide the event. *Shaver* v. *Jamieson*, 25 U. C. R. 156.

To an action on promissory notes amounting to $10,000 defendants, among other defences, pleaded usury, consisting of a charge of a ¼ per cent., made by the plaintiffs on cheques. When the case was called on no one appeared for the defendants, and the plaintiffs had a verdict. The court refused to relieve the defendants on the merits, except on condition of their withdrawing the plea of usury. *Commercial Bank* v. *Harris*, 27 U. C. R. 301.

To an action against a maker and indorser, the latter pleaded a set-off in the common form, for work done by him for the plaintiffs —a plea which had been held bad on demurrer. The plaintiffs, however, did not demur, but took issue, and the jury found the plea proved. The court granted a new trial on the evidence, but on payment of costs by the plaintiffs, as the whole difficulty had been caused by their going to trial on an insufficient plea. *Commercial Bank* v. *Harris*, 27 U. C. R. 526.

When a plaintiff, after argument of a rule nisi to enter a nonsuit, or for a new trial on the ground of excessive damages, elects to reduce his verdict, instead of submitting to a new trial with costs to abide the event, he is not entitled to the costs of opposing the rule nisi. *Florey* v. *Royal Canadian Bank*, 5 P. R. 257.

Rule to enter nonsuit discharged. Judgment affirmed on appeal; but new trial granted on special terms as to costs, in default of a reference to ascertain the sum recoverable. *Great Western R. W. Co.* v. *Commercial Bank*, 2 E. & A. 285.

Verdict for defendant. Rule for new trial unless defendant should consent to a verdict for nominal damages, no reference being made as to costs. The defendant consented and plaintiff asked for costs of the rule:—Held, that the plaintiff was entitled to the costs of the application for new trial and the rule granted thereon. *Lowe* v. *Morrice*, 5 P. R. 36.

An award having been made between the parties, who were partners, the plaintiff afterwards filed a bill to dissolve and wind up the partnership as if no such award had been made, and swore that he was advised and believed the award was invalid:—Held, that this bill was not evidence against him to shew that he had so treated the award, but that he should not have used the award to support his case, and on this ground a new trial was granted without costs. *Doupe* v. *Stewart*, 28 U. C. R. 192.

It was made a condition, on refusing a new trial, that the plaintiff should assign to the sheriff, defendant, his interest in a certain mortgage, so that the sheriff might, if possible, recoup himself. *Paterson* v. *Maughan*, 39 U. C. R. 371.

Where an indictment for obstructing a highway had been removed by certiorari, at the instance of the private prosecutor, into a superior court, and defendant had been acquitted:—Held, that there was no power to impose payment of costs on such prosecutor. The court, however, has power to make payment of costs a condition of any indulgence granted in such a case; such as the postponement of the trial, or a new trial. *Regina* v. *Hart*, 45 U. C. R. 1.

XV. Trial Without a Jury.

Legal and Equitable Issues.]—Quære, whether, when there are legal and equitable issues, the whole case is not properly triable without a jury: but the fact that such a case has been tried by a jury is no ground for a new trial, where the verdict is unobjectionable upon the evidence. Quære, also, whether, in such a case, the Judge may not call a jury to try the legal issues. *Wright* v. *Sun Mutual Ins. Co.*, 29 C. P. 221.

Life Insurance Policy — *Answer by Jury not Supported by Evidence—Verdict for Plaintiffs—Power of Court to Enter Verdict for Defendant instead of Granting New Trial.*] — See *Moore* v. *Connecticut Mutual Life Ins. Co.*, 3 A. R. 230.

Negligence—*Trial before Judge—Verdict for Defendants—Motion for New Trial—Duty of Court to Assess Damages if Plaintiff Entitled to Recover.*]—See *Denny* v. *Montreal Telegraph Co.*, 3 A. R. 628.

Omission of Jury to Answer Questions.]—The mere omission of the jury to answer one of the questions submitted to them is no ground for a new trial; but whether the omission of the jury should have that effect, where the verdict is that of the Judge, must depend on the nature of the question and the character of the evidence bearing upon it, whether the question be an unnecessary one or one going to the foundation of the recovery, and the evidence as to it contradictory. *Parsons* v. *Citizens Ins. Co.*, 43 U. C. R. 261.

See Canada Landed Credit Co. v. *Thompson*, 8 A. R. 696.

XVI. Two or More New Trials.

When Granted.]—Where the jury, in an action for disturbance of plaintiff's ferry, found for defendant perversely, and clearly against law and evidence and the Judge's charge, the court granted a third trial without costs. *Kerby* v. *Lewis*, 1 U. C. R. 66; *S. C.*, 6 O. S. 489.

The court will grant repeated trials where verdicts are rendered contrary to law and evidence, especially in cases affecting continuing rights. *S. C.*, 1 U. C. R. 285.

A second verdict for defendants in replevin set aside without costs, they having no legal right of distress. *Sanderson* v. *Kingston Marine R. W. Co.*, 4 U. C. R. 340.

A third new trial granted, a verdict for money had and received having been thrice found against an officer of the court of chancery on insufficient evidence. *Sutherland* v. *Black*, 10 U. C. R. 515, 11 U. C. R. 243.

A third new trial granted, three verdicts having been perversely rendered for the plaintiff, in an action for malicious arrest. *Smith* v. *McKay*, 10 U. C. R. 412, 613.

In an action upon a policy of insurance, where the questions of unseaworthiness and deviation were involved, the court, thinking that on the plaintiff's own shewing he was not entitled to recover, granted a second new trial. *Haworth* v. *British America Assurance Co.*, 6 C. P. 69; *Coulson* v. *Ontario Fire and Marine Ins. Co.*, 6 C. P. 63.

Where work was to be done (under a special agreement) to the satisfaction of a surveyor, and the jury, notwithstanding that a certificate of the surveyor was not produced, gave a verdict for the plaintiffs, the court twice set the verdict aside. *Coatsworth* v. *City of Toronto*, 7 C. P. 490; *S. C.*, 8 C. P. 364.

It was held by the court of Queen's bench that at a former trial the question of boundary should have been tried in this action of ejectment. The court of common pleas held differently upon the same point in other cases, and the chief justice of that court having at a second trial ruled in accordance with their judgment, a new trial was granted without costs. *Irwin* v. *Sager*, 22 U. C. R. 22.

The court granted a second new trial, with costs to abide the event, where defendant by his refusal to admit copies of documents in evidence had taken undue advantage of an accident. *Murphy* v. *Case*, 21 U. C. R. 470.

The plaintiff, instead of demurring to a bad plea, took issue upon it and the other pleas, and three perverse verdicts had been rendered for defendant in the court below, the last verdict being general, though upon the other issues the plaintiff was clearly entitled to succeed under the evidence. On appeal, the court ordered a new trial. *Vidal* v. *Ford*, 19 U. C. R. 88.

In an action against a railway company for negligence, in setting fire to plaintiff's property by their engine, a second verdict having been found for the plaintiff on insufficient evidence, a new trial was granted. *Jaffrey* v. *Toronto, Grey, and Bruce R. W. Co.*, 24 C. P. 271.

When Refused.]—Where a new trial had been granted to let defendant set up a defence to an action on a note, of which he did not avail himself, the court refused again to interfere. *Ross* v. *McNab*, 3 O. S. 309.

In an action on a note to which defendant denied his signature, a new trial was refused, after two concurring verdicts for the plaintiffs in a case doubtful upon the evidence. *Terriberry* v. *Miller*, 5 O. S. 129.

Verdicts twice found for defendant, second new trial refused. *Burnside* v. *Wilcox*, M. T. 7 Wm. IV.

Where the jury have twice decided against an alleged fraud, and in favour of the plaintiff, the court will not, except in very glaring cases, grant a third new trial. *Hunter* v. *Corbett*, 7 U. C. R. 75; *Power* v. *Ruttan*, 5 O. S. 132.

Where defendant had obtained a new trial on the merits, the court refused to set aside a second verdict for the plaintiff, on a technical objection as to the form of action raised for the first time at the second trial. *Hunter* v. *Corbett*, 7 U. C. R. 75.

Where two new trials have been granted in order to dispose of the question on its merits, the court will not be disposed at the last trial

to consider technical objections taken as grounds of nonsuit. *Wafer* v. *Burns*, 12 U. C. R. 384.

The court refused to set aside a fourth verdict for the plaintiff, for malicious arrest, although wrong—alleging, as one reason, that defendant should at least have obtained a special jury. *Smith* v. *McKay*, 11 U. C. R. 111.

Where the jury had apparently rendered their verdict against the weight of evidence, upon an erroneous desire to restore money actually paid to give colour to a fraudulent transfer, a second new trial was refused. *Wight* v. *Moody*, 6 C. P. 502, 506.

C. and P. CinqMars, carrying on business at Belleville, being indebted to B. & Co. for goods, executed to them a confession of judgment. Other creditors pressing, an execution was issued on this confession, and an arrangement made that the goods should be sold by the sheriff; that the plaintiff, a brother of C. and P. CinqMars, and a minor, should buy them in, and the execution creditors receive credit for the proceeds; and that the business should be carried on by the plaintiff and C. CinqMars, the goods remaining in the plaintiff's name as ostensible owner. P. CinqMars lived in Montreal. Afterwards the plaintiff packed up the goods, and being about to send them to his brother in Montreal, they were seized and sold by B. & Co., as the property of C. CinqMars. For this the plaintiff sued; and the jury having twice found in his favour:—Held, that, although it seemed clear that the plaintiff had never in fact purchased or paid for the goods, but had been set up as a purchaser merely to protect them from other creditors, yet, as B. & Co. had concurred in holding him out in a false character, the court should not interfere. *CinqMars* v. *Moodie*, 15 U. C. R. 601.

Where there is a second verdict for plaintiff, and but little probability of another jury finding differently, it being manifest that the plaintiff would then be a great loser by the inadequacy of price of the work done, the court is justified in refusing to disturb the verdict unless on account of misdirection, or the reception of improper evidence. *Ireson* v. *Mason*, 13 C. P. 323.

A case having been twice tried, and the second jury being a special one struck by defendants, against whom they found the verdict, the court declined to interfere on the ground of excessive damages. *Stock* v. *Great Western R. W. Co.*, 9 C. P. 134.

In ejectment, where it appeared that, in any event, the most the defendant could recover would be a very inconsiderable portion of the land in question, and there had been already two verdicts against her, the court refused a second new trial. *Lewis* v. *Kelly*, 17 C. P. 250.

This case, an action on a fire policy, having been four times tried, the plaintiff having succeeded twice, and the jury having disagreed on the other occasions, and the defence being in the nature of a charge of arson, a new trial was refused. *McCulloch* v. *Gore District Mutual Fire Ins. Co.*, 34 U. C. R. 384.

Where the trespass to land and cutting down trees had been wilful and after full notice, the court refused to grant a third trial, though they considered the verdict for $563 very high, and would have been better satisfied with a much lower amount. *Nicholson* v. *Page*, 27 U. C. R. 505.

XVII. Verdict against Law and Evidence or Judge's Charge.

1. *Crime Charged.*

Arson—*Insurance—Misdirection.*]—In the absence of misdirection, where the jury find in favour of a party on an issue charging him with a criminal offence, the court will rarely grant a new trial. *Gould* v. *British America Assurance Co.*, 27 U. C. R. 473.

——— *Insurance—Other Defences.*]—The defendants, in an action on a fire policy, had refused to accept a new trial on the plea of arson, which the court below offered them upon their consenting to abandon all other defences, and the court of appeal declined to interfere by granting it. *Frey* v. *Wellington Mutual Ins. Co.*, 4 A. R. 293. See *S. C.*, 43 U. C. R. 102.

——— *Insurance—Suspicion.*]—In an action on a fire policy the jury found for plaintiff on a plea of arson, for which she had been prosecuted and acquitted, and the court, notwithstanding very strong circumstances of suspicion, refused a new trial. *Dear* v. *Western Assurance Co.*, 41 U. C. R. 553.

Forgery—*Promissory Note—Evidence.*]—Where in an action on a promissory note the defence was forgery, and a number of witnesses were examined on both sides, and much conflicting testimony given, and the jury found for the plaintiffs, a new trial was refused, although the defendant positively denied the signature on affidavit, and produced numerous affidavits of persons who stated their belief that the signature was not his. *Commercial Bank Midland District* v. *Denison*, 1 U. C. R. 13.

Where, in an action against the maker of a promissory note, the plaintiff produced several witnesses who swore to defendant's signature, which two of them said he had admitted, but the jury found for defendant on his own evidence alone, the court granted a new trial, with costs to abide the event. *Canadian Bank of Commerce* v. *McMillan*, 31 U. C. R. 596.

——— *Promissory Note — Indorser.*] — Where the defence set up by the indorsers of a note was forgery, and the plaintiff recovered, the court refused to grant a new trial. *McLaren* v. *Muirhead*, 3 U. C. R. 59.

A verdict having been given for the defendant on an issue as to the genuineness of his indorsement on a note, the court, upon consideration of the evidence and the affidavits, refused a new trial. *Maclem* v. *Dittrick*, 7 U. C. R. 144.

——— *Promissory Note — Marksman.*]—The evidence in this case was insufficient to shew that defendant was the maker of the note sued on, alleged to have been signed by him as a marksman, and the plaintiff should have been nonsuited. The defendant, however, filed an affidavit that he was not the

maker, and explained his absence on the trial, and on this ground a new trial was granted. *Hand* v. *Agnew*, 32 U. C. R. 559.

——— *Stock Book—Evidence.*] — There being some doubts attempted to be thrown upon the signature of defendant to the stock book, the jury found against the plaintiff. The evidence of the witness to the signature being very clear, and not being impeached, the court granted a new trial. *Ray* v. *Blair*, 12 C. P. 257.

Perjury—*Insurance—Proofs of Loss.*]—Where, in an action on a fire policy, the plaintiff, in his statement of loss, swore that his damage amounted to about twelve times the amount actually proved, and for which he actually obtained a verdict, and the Judge before whom the case was tried was dissatisfied with the finding, the court, notwithstanding the usual practice as to new trials where the defence charges a criminal offence (this being made perjury by 32 & 33 Vict. c. 23, s. 5 (D.)), granted a new trial, costs to abide the event. *McMillan* v. *Gore District Mutual Fire Ins. Co.*, 21 C. P. 123.

Smuggling—*Bill of Exchange—Price of Goods.*]—Where in assumpsit on bills of exchange, and for goods sold, the defence was that the bills had been given for the price of goods bought from the plaintiffs in a foreign country, and which they had assisted the defendant in smuggling into this country, and some evidence was given to that effect, but the jury found for the plaintiffs, the court refused a new trial. *Walbridge* v. *Follett*, 2 U. C. R. 280.

Theft — *Slander — Justification.*] — In an action for slander the evidence in support of one of the pleas of justification of a charge of theft was very strong, sufficient to have warranted a conviction if the plaintiff had been on his trial. The charge, however, was made three years after the alleged offence, for which there had been no prosecution, and defendant had no special interest in the matter. The jury having found for the plaintiff, and $150 damages, the court refused to interfere. *Edgar* v. *Newell*, 24 U. C. R. 215.

Usury—*Bond—Evidence.*]—Debt on bond; defence, usury; and verdict for plaintiff. In ejectment on a mortgage given to secure the same debt, the jury found for defendant on the same evidence. The court refused to set aside the verdict on the bond, which in effect acquitted the plaintiff of the crime, though the Judge who tried the cause thought the evidence strong to establish usury. *Wilson* v. *Hill*, 5 O. S. 56.

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2. *Facts not Fully Elicited.*

Account — *Acknowledgment—Time—Uncertainty.*]—Action on account stated, to recover $102, which defendant was to pay plaintiff for giving up his purchase of land from defendant. It was proved that defendant had acknowledged that he was to pay plaintiff this sum, but there was a nonsuit for want of an agreement in writing:—Held, that if the acknowledgment was made after the agreement had been cancelled and the land resold by defendant, the plaintiff might recover; and this not being clear on the evidence, a new trial was granted to ascertain the fact. *Gross* v. *Bricker*, 18 U. C. R. 410.

Assault—*Mitigation of Damages — Slander.*]—Where in trespass for assault and battery the defendant offered at the trial to prove in mitigation of damages that plaintiff had slandered his wife, and that he had committed the trespass immediately on being informed of such slander, a new trial was granted, that all the circumstances might be elicited. *Short* v. *Lewis*, 3 O. S. 385.

Carriers — *Contract—Notice.*]—In this case a nonsuit was entered for the plaintiffs' omission to give notice in writing of their claim within 24 hours of the delivery of the goods to defendants' freight agent at Halifax, in pursuance of a condition to that effect in the contract on which the goods were carried; but, as the pleas did not set up that there was such an officer there, and the evidence in the case had not been fully given, a new trial was granted, with liberty to amend the pleadings. *Fitzgerald* v. *Grand Trunk R. W. Co.*, 27 C. P. 528.

Covenant—*Sale for Debts—Existence of Debts.*]—Covenant by plaintiffs (administrators) against defendants (executors), &c., on defendants 'covenant with plaintiffs' intestate, for seisin of land conveyed by them. It appeared on the trial that defendants claimed under a clause of their testator's will to dispose of lands, if necessary, for payment of debts; and after verdict for plaintiffs, a new trial was granted on payment of costs, to enable defendants to prove the existence of debts of the testator, a fact material to maintain the sale. *Macdougall* v. *Macdonell*, 5 C. P. 355.

Demurrage—*Hire of Vessel—Terms.*]—P. N. & Co., brokers at Cleveland, shipped a cargo of coal on testator's vessel, consigned to defendant at Toronto, there being no stipulation in the bill of lading as to demurrage. The vessel was detained four and a half days in unloading, for which it was sought to make defendant liable. A verdict having been found for the plaintiff, upon the evidence set out in this case, a new trial was granted, as the facts with regard to defendant having hired the vessel had not been fully brought out. *Burnett* v. *Conger*, 23 C. P. 590.

Ejectment — *Evidence—Uncertainty.*]—In this case it was held, that the evidence rejected at the trial was inadmissible; but, as the nature and character of some parts of it were not known with sufficient certainty, a new trial was granted on payment of costs. *Doe d. Arnold* v. *Auldjo*, 5 U. C. R. 171.

——— *Heir — Death of Ancestor — Time of.*]—In ejectment both plaintiff and defendant claimed by deed from T.'s sister, plaintiff having the first conveyance. It was not distinctly proved whether T. died before or after the 1st January, 1852, when 14 & 15 Vict. c. 6 came into force, this point having escaped attention. If he died before, then the plaintiff would be entitled, as claiming under his sister, who would be his heiress; if after, defendant would be entitled as his mother, in preference to his sister. A new trial was therefore ordered, with costs to abide the event, in order to give the plaintiff an opportunity of establishing his case on this point. *Beckett* v. *Foy*, 12 U. C. R. 361.

——— *Trial without Jury — Motion in Term against Verdict—Leave to Supply Further Evidence in Term.*]—See *Young* v. *Hobson*, 30 C. P. 431.

Fire Insurance — *Second Policy.*] — A policy having been issued by defendants at their head office to the plaintiff, on an application stating that a watchman was kept, the plaintiff applied for a further insurance to defendants' local agent, shewing him this policy, and a second policy was issued on an informal application, sent by this agent, not signed by the plaintiff, and referring to the premises as the same as in the previous policy. The court held that there was not enough to warrant the conclusion that the second policy was issued on statements contained in the application for the first; but a new trial was granted to enable defendants to supply further evidence, with leave to them to plead de novo as suggested. *Whitlaw* v. *Phœnix Ins. Co.*, 28 C. P. 53.

Foreign Law — *Conflict of Evidence.*]—The evidence upon a question of foreign law being conflicting, a new trial was granted to enable further evidence to be adduced. *Turcotte* v. *Dawson*, 30 C. P. 23.

Landlord and Tenant—*Notice to Quit—Authority.*]—Plaintiff leased part of a house from defendant L., at $4 a month, and if L. sold he was to leave if he could get another. L. sold and conveyed it on the 7th August to W., having previously given the plaintiff oral notice to go; and after the conveyance, on the 7th August, he, at the suggestion of W., gave the plaintiff a written notice, which W. saw L. sign. Plaintiff's property was put out by L. and the other defendant on the 9th September:—Held, that if the notice was given by L. by authority of W., it would be sufficient, and a new trial was granted to determine this point. *Matthews* v. *Lloyd*, 36 U. C. R. 381.

Promissory Note—*Fraud.*]—Action on a note given for money alleged to have been obtained by defendant from plaintiffs by fraudulent misrepresentation, and for money paid; plaintiffs held not entitled on the evidence to recover on either count, but to a new trial to enable them to shew the facts more fully. *Canada Farmers' Mutual Ins. Co.* v. *Watson*, 25 C. P. 1.

Replevin—*Verdict for Plaintiff Set aside.*] —See *Canniff* v. *Bogart*, 5 C. P. 341.

Tax Sale — *Validity—Laches.*]—Quære, whether s. 155 of 32 Vict. c. 36 (O.) applies to make good a sale otherwise bad, in favour of a purchaser for taxes who makes no claim for nearly twenty years, leaving the original owner in possession, and in ignorance of the sale. A new trial was granted to enable defendant to raise this and other points not sufficiently taken at the trial. *Austin* v. *Armstrong*, 28 C. P. 47.

Trover — *Merits not Fully Disclosed—Justification as Joint Owner, &c.—Charge Favourable to Defendant—Verdict for Plaintiff—New Trial Refused.*]—See *Anderson* v. *Anderson*, 1 C. P. 344.

Work and Labour — *Hurried Trial.*]—Action for extra labour on an agreement to plaster defendant's house. The court, although not seeing that the verdict was against the law and evidence, granted a new trial, on the ground that the case was taken late at night, the defendant further shewing by affidavits that he had not time to go into his defence as fully as he would if time had permitted. *Gallina* v. *Colton*, 6 C. P. 247.

See Fitch v. *McCrimmon*, 30 C. P. 183; *Nasmith* v. *Manning*, 29 C. P. 34.

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3. *Fraud Charged.*

Assignment—*Evidence.*]—A verdict for defendant manifestly against evidence, and in support of an assignment impeached as fraudulent, set aside on payment of costs. *Doe d. Wilks* v. *Masseear*, 5 U. C. R. 455.

Deed — *Description — Evidence — Creditors.*]—Where, in ejectment, the deed under which plaintiff claimed was in several parts illegible, and contained no sufficient description of the part of the lot intended to be conveyed, and there was strong evidence that the deed was made to defeat creditors, the court set aside a verdict for the plaintiff, rendered in opposition to the Judge's charge, without costs. *Doe d. McDonald* v. *McDonald*, 2 U. C. R. 267.

——— *Procurement—Doubt.*]—When evidence was given to shew that a deed had been procured by fraud, and the jury negatived the fraud, but there seemed great doubts as to the correctness of their finding, a new trial was granted on payment of costs. *Doe d. Neilson* v. *Gilchrist*, 4 O. S. 276.

Interpleader Issue—*Sale under Execution Found to be Collusive—New Trial Refused on Affidavits.*]—See *Servos* v. *Tobin*, 2 U. C. R. 530.

Preference—*Evidence.*]—Where the bona fides of a transaction impeached for fraud was proved solely by the evidence of the trader (the accused) and his brother-in-law, when a disinterested witness might have been called, the court granted a new trial, on the ground that the ends of justice might be furthered by a second investigation. *Fowler* v. *Hendry*, 7 C. P. 350.

Sale of Goods—*Bona Fides.*]—The question being as to the bona fides of a sale of goods under which the plaintiff claimed:—Held, that though a finding for defendant would have been more satisfactory, yet, as the case went fairly to the jury, and the amount involved was small, the verdict should not be disturbed. *Tuer* v. *Harrison*, 14 C. P. 449.

See Molsons Bank v. *Bates*, 7 C. P. 312.

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4. *Negligence or Want of Diligence of Applicant.*

Diligence.] — Where a losing party has been wanting in diligence, the court will not, as a matter of course, relieve him against the verdict, though it may appear contrary to evidence. *Doe d. Wheeler* v. *McWilliams*, 3 U. C. R. 165.

Failure to Give Procurable Evidence.]—The court will not grant a new trial to protect an idle litigation about facts which neither party will take the trouble to make clear, though they have the means of doing so. Where a jury, not thinking it safe to rely on oral evidence of the contents of a lost will, where the party offering it was shewn to be aware of the existence of a written copy which he might have produced, gave a verdict against him, the court would not grant a new trial. *Doe d. Wheeler* v. *McWilliams*, 4 U. C. R. 30.

The court will not grant a new trial in ejectment on the ground of the very unsatisfactory nature of the evidence upon which the jury decided, when it appears clearly to the court that neither the plaintiff nor defendant will take the trouble to offer to the jury such conclusive evidence upon the disputed fact, as is easily within their reach to produce. *Doe d. McWilliams* v. *Wheeler*, 5 U. C. R. 238.

Laches of Attorney—*Merits.*]—Defendants' attorney, having ascertained an error in plaintiff's proceedings, notified plaintiff's attorney that he had a defence, but took no measures to set aside his proceedings. Upon motion to set aside the verdict for plaintiff, defendant having neglected to set aside the proceedings, knowing the plaintiff was going on, and his affidavits not shewing substantial merits of defence, a new trial was refused. *Smith* v. *Roblin*, 13 C. P. 430.

Marriage—*Evidence of Reputation.*]—Where the demandant relied upon evidence of cohabitation and reputation to prove a marriage said to have taken place in the United States, and failed, the court, under the circumstances of this case, refused a new trial. *Street* v. *Dolsen*, 14 U. C. R. 537.

And where the demandant relied upon evidence by reputation of an alleged marriage in Ireland many years previous, and there was a second verdict for the defendant, the court refused to interfere. *Lynch* v. *O'Hara*, 6 C. P. 259.

Omission at Trial—*Trifling Matter.*]—Where the losing party has failed at the trial, from the omission of his attorney to establish some legal right he might have shewn, the court will not grant a new trial when an expensive litigation would be protracted about a trifling matter. *Petrie* v. *Taylor*, 3 U. C. R. 457.

Secondary Evidence—*Search for Document.*]—In ejectment on a sheriff's deed, secondary evidence of the fi. fa. lands was rejected, because search had not been made among the sheriff's papers left in the court house. The plaintiff was nonsuited. Affidavits having been filed that dilligent search had been made in the court house, a new trial was granted on payment of costs. *Soules* v. *Donovan*, 14 C. P. 510.

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5. *Trial without Jury.*

Semble, that notwithstanding 32 Vict. c. 6, s. 18, a Judge's decision on facts is to be regarded differently from the finding of a jury. *Smith* v. *Hamilton*, 29 U. C. R. 394.

Remarks as to the effect of the finding of a Judge upon evidence. *Scott* v. *Dent*, 38 U. C. R. 30.

See Young v. *Hobson*, 30 C. P. 431.

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6. *Verdict Doing Substantial Justice.*

Bank—*Cheque — Evidence.*]—On application for a new trial upon the weight of evidence, where there has been no miscarriage in law, the question is, does the verdict in the opinion of the court do substantial justice; and, if not, is the evidence in their opinion sufficient to warrant interference. In this case, where the verdict rested entirely upon the plaintiff's testimony as opposed to that of two witnesses not interested, the court was of opinion that the verdict did not do substantial justice, and a new trial was granted. *Grieve* v. *Molsons Bank*, 8 O. R. 162.

Ejectment — *Evidence — Special Circumstances.*]—The court is not bound to grant a new trial when there was no misdirection nor any point of law involved, and where it does not appear that the justice of the case requires it, though the verdict may seem to be against the weight of evidence; and, under the peculiar circumstances of this case, the court refused to interfere. *Doe d. McQueen* v. *McQueen*, 9 U. C. R. 576.

See also *McMillan* v. *Fairfield*, 2 O. S. 493; *Brown* v. *Malpus*, 7 C. P. 185.

Goods Ordered — *Specification—Departure from—Acceptance.*]—Where the defendant had ordered the plaintiffs to make for him some iron castings of a specified thickness for a shop front, and the plaintiffs made them much thicker than the order specified, but the defendant, notwithstanding, allowed them to be put up in the building for which they had been made, without objection, and the plaintiffs, at nisi prius, obtained a verdict for their full value, the court refused a new trial. *Good* v. *Harper*, 3 U. C. R. 67.

Goods Sold—*Action for Price—Special Agreement.*]—Where the plaintiff sued for goods sold and delivered, and the Judge directed the jury that the action should have been brought on the special agreement, but they, notwithstanding, found for the plaintiff, the court refused a new trial, as substantial justice had been done. *McMahon* v. *Campbell*, 2 U. C. R. 158.

Sheriff — *Voluntary Escape.*]—Where a sheriff suffers a voluntary escape, he cannot afterwards recover from the debtor the amount which he has had to pay for his escape; but where in such an action the justice of the case was clearly with the sheriff, and the Judge charged the jury in favour of the defendant, but they found for the plaintiff, the court refused a new trial. *Ruttan* v. *Ashford*, 6 O. S. 280.

Title to Land—*Statute of Limitations.*]—A defence under the Statute of Limitations against a clear legal title is not one to be favoured, especially in cases between relations; and where the jury have leaned against such defence in support of the honesty of the case, and there has been no misdirection, the defendant must shew very strong ground to entitle him to a new trial on the evidence.

Hemmingway v. *Hemmingway*, 11 U. C. R. 237.

Trespass—*Identity of Premises.*]—In trespass, if there be any evidence of the identity of the premises, the court will not grant a new trial for want of sufficient evidence when the damages are small and the justice of the case with the plaintiff. *Molloy* v. *Stansfield*, 2 U. C. R. 390.

7. *Verdict Perverse.*

Interest—*Allowance of.*]—The jury having perversely allowed only ten per cent. per annum, although they found that defendant had signed the note or instrument agreeing to pay five per cent. a month, a new trial was granted without costs.. *Young* v. *Fluke*, 15 C. P. 360.

Judge's Charge.]—Semble, that a verdict is not perverse, where a jury find against the charge on a point of law, unless the charge is correct. *Todd* v. *Liverpool and London and Globe Ins. Co.*, 18 C. P. 192.

Small Verdict.] — Plaintiff, a sheriff, sued defendants on a bond, to re-deliver to him goods seized in execution, on a certain day, at a certain inn. The jury were told that the plaintiff ought to have a verdict for 6s., the sum remaining unpaid upon the execution, but they found for defendants. Notwithstanding the smallness of the verdict the plaintiff was granted a new trial without costs. *Moodie* v. *Bradshaw*, 4 U. C. R. 199.

8. *Other Cases.*

Absence of Witnesses — *Taking Chances.*]—Where a plaintiff is disappointed in procuring testimony, he should withdraw his record or take a nonsuit, and a defendant, in the like case, should apply for a postponement. If, instead of so doing, he chooses to go to trial upon weak or insufficient evidence, he will not be relieved from an adverse verdict. *Corporation of Longueuil* v. *Cushman*, 24 U. C. R. 602.

Agreement — *Payment of Money.*] — Where an action was brought to recover money paid on an agreement which was afterwards cancelled, and the jury found for defendant on the ground that it did not appear clearly that any payment had been made, a new trial was granted, costs to abide the event, the plaintiffs swearing to the payment, which was not denied by the defendant. *Cowan* v. *Boyce*, T. T. 3 & 4 Vict.

Action upon a special agreement to pay money to release goods under seizure, &c. Verdict for plaintiff; the court held the finding of the jury not supported by the evidence, nor the declaration by the special finding, and granted a new trial without costs. *Street* v. *Cuthbert*, 6 C. P. 225.

Amount in Question—*Inferior Jurisdiction — Discretion.*] — Where actions are brought in the inferior jurisdiction of the superior courts for trifling amounts, which might have been recovered at much less expense in the inferior courts, the courts will not favour such actions by granting new trials in cases which rest in their discretion. It must be clearly shewn that the direction of the presiding Judge has been wrong, or that the verdict has been against evidence. *Comstock* v. *Moore*, 6 C. P. 434.

Arrest—*Absence of Warrant—Constable—Authority.*]—At the trial it appeared that the plaintiff had committed a gross fraud, in Detroit, in the United States; that the defendant, having received a telegram from a public officer there, arrested the plaintiff in this Province, and took him to the police station in London; and that after three days' detention he was discharged, the offence not being within the Ashburton Treaty. Defendant had been chief of police in London, and afterwards appointed, from year to year, constable for the county. He had acted as such for the year in the course of which he made the arrest, and there was some evidence of his having been sworn in, but his name was not upon the list of the clerk of the peace of those appointed for that year. The jury were told that defendant having no warrant, and not being a peace officer at the time, the arrest was not strictly legal, and the plaintiff, therefore, entitled to recover. They found, however, for the defendant, and the court refused to disturb the verdict. *Rogers* v. *Van Valkenburgh*, 20 U. C. R. 218.

Assault — *Preponderance of Evidence—Judge's Charge.*]—In an action against a public officer for an assault the jury had found a verdict for $100, and a new trial, asked for on the ground that the verdict was against evidence, was refused. The court of appeal granted a new trial, as the evidence strongly preponderated in the defendant's favour, and there was reason to believe that the jury had been misled by the charge. *Campbell* v. *Prince*, 5 A. R. 339.

Assignment — *Security — Cutting down —Unsatisfactory Finding.*]—On the trial of an issue directed to ascertain whether or not a certain assignment had been originally intended to operate as an absolute transfer of the plaintiff's right, or by way of security only, the jury found that it had been intended as a mortgage. The court, although strongly in favour of the plaintiff upon the evidence and verdict of the jury together, directed a new trial of the issue, the trial Judge having certified that he was not satisfied with the finding. *Watson* v. *Munro*, 6 Gr. 385.

Bond — *Signature before Sealing.*]—Defendants, having signed the bond sued on, left in a hurry, without having it properly sealed, which was afterwards done, but it was clear they knew it to be a bond, and it was stated on the face of it to be under seal. The jury having found against this defence, the court refused to interfere, holding it not one to be favoured. *Mutual Fire Ins. Co. of Prescott* v. *Palmer*, 20 U. C. R. 441.

Credit—*To whom given—Conflict.*]—In the conflict of testimony as to which of the parties credit was given to by the plaintiffs in their dealings, the weight of evidence and the collateral circumstances being in favour of a dealing with defendants, and the case not having gone as fully and correctly to the jury as it should have done, a new trial was granted to plaintiffs on payment of costs. *Northern R. W. Co. of Canada* v. *Patton*, 15 C. P. 332.

Demurrer—*Facts Found by Jury.*]—After a demurrer had been decided, which admitted the facts found by the jury on a trial of issues, the court refused a new trial, which was applied for on the ground that the verdict was contrary to evidence. *Ives* v. *Hitchcock*, Dra. 480.

Disturbance of Verdict — *General Rule.*]—The rule in relation to new trials upon the evidence is, that the verdict ought not to be disturbed, unless it is clearly wrong. *Hooper* v. *Christor*, 14 C. P. 117.

Ejectment — *Mortgage — Usury.*] — The court will not grant a new trial to enable a mortgagor, being lessor of the plaintiff in ejectment, to shew his own deed void for usury, and thus eject a stranger who sets up as a defence a mortgage to a third party for the premises in question. *Doe d. McBernie* v. *Laudy*, 1 U. C. R. 186.

Finding of Jury—*Uncontradicted Witness.*]—A new trial will not be granted because the jury find for defendant in the absence of any evidence to contradict the unimpeached witness of the plaintiff. The jury are to form their verdict upon the whole facts and complexion of the case before them. *Lane* v. *Jarvis*, 5 U. C. R. 127.

Fire—*Setting out—Question for Jury.*]—If defendant's neighbour be injured by rashness or inconsiderateness on his part, in setting out fire, he will be liable; but this is always a question for the jury, and the court refused to disturb a verdict for defendant, though the evidence would fully have warranted a different finding. *Wilkins* v. *Row*, 15 C. P. 325.

Goods Sold — *Defence — Smuggling.*]—Where, in an action for goods sold, the defence to which was that the goods were smuggled, it was doubtful (the verdict being general) whether the jury understood that the plaintiff knew that the goods were contraband, the court granted a new trial. *Sewell* v. *Richmond*, Tay. 423.

Interpleader—*Chattels Claimed by Son of Execution Debtor.*] — The father of the plaintiff applied to the defendant company for a loan of $2,500 secured by land valued by the company's appraiser at $3,500. In answer to certain questions put to the applicant, in a printed form of application for loan, he stated himself to be the owner of certain horses, cows, sheep, and other stock. The plaintiff was present with his father at the time of making the application, but swore that he was not aware of the answers given by him as to his personal effects. The defendants sued and obtained execution against the father, under which they seized some of the stock in the possession of the son, who had been residing apart from his father, and from whom, prior to the above application, he had purchased it. In an interpleader issue between the son and the company the jury found in favour of the claim of the former, which verdict the Judge of the county court refused to set aside. On appeal this court, although they considered that a verdict for the defendants would have been more satisfactory, refused to disturb the judgment, the question being one proper for the decision of the jury. *Malcolmson* v. *Hamilton Provident and Loan Society*, 10 A. R. 610.

Joint Liability—*Plea in Abatement.*]—The court will not give a defendant a second chance of obtaining a verdict on a plea in abatement of non-joinder, when the evidence is conflicting, or leaves the fact of joint liability doubtful. But where the verdict for the plaintiff was clearly contrary to law they granted a new trial without costs. *Tossell* v. *Dick*, 4 U. C. R. 486.

Lease—*Covenant—Eviction.*] — Declaration on a bond for the performance by one J. V. of covenants in a lease. The evidence tended to shew an eviction rather than that the lessee never took possession, as pleaded. Verdict for defendant. New trial granted with costs to abide the event, and leave to amend. *Macdonald* v. *Vanwyck*, 12 C. P. 263.

Lien for Wharfage—*Unfounded Claim.*]—The jury having found for defendant against the weight of evidence, on an unfounded claim to retain plaintiff's goods for wharfage, a new trial was ordered. *Provincial Ins. Co.* v. *Maitland*, 7 C. P. 426.

Master and Servant—*Wages.*] — When a person hired by the year departs without consent, he forfeits his wages; and it is important that this law should be enforced. Where the plaintiff had taken such a course, and afterwards sued for his wages, and a verdict was given in his favour for £25, the court granted a new trial without costs, though it appeared that defendant had offered him that sum to settle the suit. *Blake* v. *Shaw*, 10 U. C. R. 180.

Parties as Witnesses.] — Semble, that when the verdict is obtained upon the testimony of either plaintiff or defendant, the rule against granting a new trial on the weight of evidence is less strict than it was before the parties were admissible as witnesses. *Canadian Bank of Commerce* v. *McMillan*, 31 U. C. R. 566.

Powers of Courts—*Supreme Court of Canada — Privy Council — Preponderance of Evidence.*]—Upon a rule nisi calling upon the plaintiff in an action upon a policy of life insurance to shew cause why a verdict obtained by her should not be set aside and a nonsuit or verdict entered for the defendants pursuant to the Law Reform Act, or a new trial had between the parties, said verdict being contrary to law and evidence, and the finding virtually for the defendants; and for misdirection in that the jury had not been directed on the evidence to find for the defendants; the court of Queen's bench, 41 U. C. R. 197, ordered the verdict for the plaintiff to be set aside and a verdict to be entered for the defendants, while the supreme court eventually reversed this order and restored the verdict for the plaintiff, being of opinion that they had no power to direct a new trial on the ground of the verdict being against the weight of evidence:—Held, that, although the court of Queen's bench would have had power to enter this verdict in accordance with what they deemed to be the true construction of the findings, coupled with other facts admitted or beyond controversy, they had no power to set aside the verdict for the plaintiff and direct a verdict to be entered for the defendants in direct opposition to the finding of the jury on a material issue. Under 38 Vict. c. 11 (D.), the supreme court has power to make any order or to give any judgment

which the court below might or ought to have given, and amongst other things to order a new trial on the ground either of misdirection or the verdict being against the weight of evidence; and that power is not taken away by s. 22 in this case, in which the court below did not exercise any discretion as to the question of a new trial, and where the appeal from their judgment did not relate to that subject. Although the Privy Council have the right, if they think fit, to order a new trial on any ground, that power will not be exercised merely where the verdict is not altogether satisfactory, but only where the evidence so strongly preponderates against it as to lead to the conclusion that the jury have either wilfully disregarded the evidence or failed to understand or appreciate it. *Connecticut Mutual Life Ins. Co. of Hartford* v. *Moore*, 6 App. Cas. 644, 6 S. C. R. 654, 3 A. R. 230.

Principal and Agent—*Money Stolen—Nominal Damages.*]—Defendant, having received large sums of money as plaintiffs' agent, deposited the same, mixed with his own and other moneys, in a safe in his office, which was broken into and the money stolen. A verdict having been rendered for defendant, a new trial was granted, with costs to abide the event, as it did not appear with sufficient certainty, on the evidence, that there was enough in the safe to satisfy plaintiffs' claim; and also, because the plaintiffs were entitled to nominal damages, at all events, on the counts for money lent, money paid, &c., to which there was no answer on the record. *Gore Bank* v. *Hodge*, 2 C. P. 359.

Promise to Pay Mortgage Debt.]—The evidence of a promise to pay a debt secured by mortgage containing no covenant to pay, in consideration of forbearing to sell or eject, being unsatisfactory, and the jury having found for plaintiff, a new trial was granted. *Jackson* v. *Yeomans*, 28 U. C. R. 307.

Promissory Note — *Collaterals.*] — New trial granted where the plaintiff did not satisfactorily account for notes received by him collateral to the notes sued on, or for the proceeds of the notes collected by him, and refused to produce his books. *Lowell* v. *Ford*, 15 C. P. 306.

——— *Consideration—Smuggled Goods.*]—Where in an action upon several promissory notes defendant proved that they had been given by him for the price of tea which had been smuggled for him by plaintiff, and the jury were directed to find for the defendant if they believed that such was the consideration given, and they found a verdict for the plaintiff for the amount of only one of the notes, the court refused to grant the defendant a rule nisi for a new trial. *Beebee* v. *Armstrong*, H. T. 6 Vict.

——— *Indorsement — Genuineness — Evidence—Taking Chances.*]—Action on a note; defendant S., the first indorser, let judgment go by default. P., the second indorser, pleaded "did not indorse." The evidence as to the indorsement by P. was conflicting, but a commission upon which witnesses had been examined, and among others the makers of the note, on being opened, was found to be informal and could not be read. The plaintiffs, notwithstanding, preferred going to the jury to taking a nonsuit. Under the circumstances the court refused to set aside a verdict for defendants. *City Bank* v. *Strong*, 7 C. P. 96.

——— *Notice of Dishonour—Proof of Receipt.*]—Upon a plea denying notice of non-payment, it appeared that the notice, though carelessly mailed by the notary on the day of protest to a wrong address, had been received by defendant about a week after, and there was some slight proof of his having applied to plaintiff for further time for payment. The jury was directed that the evidence was insufficient, but they found for plaintiff; and the court, though agreeing with the direction, refused to interfere. *Leith* v. *O'Neil*, 19 U. C. R. 233.

See Commercial Bank v. *Weller*, 5 U. C. R. 543.

Railway Company—*Bias of Jury.*]—Action for killing plaintiff's horse by collision with a train. The trial Judge being dissatisfied with the verdict, and there being reason to believe that it arose from mistaken sympathy on the part of the jury for a poor man as against a railway company, the court granted a new trial with costs to abide the event. *McGunigal* v. *Grand Trunk R. W. Co.*, 33 U. C. R. 194.

Replevin—*Purchase of Chattel—Authority—Ratification.*]—Replevin for a piano delivered to the defendant as alleged by plaintiffs under an agreement that the piano was received by the defendant on hire for six months at $5 a month, with right of purchase at $265, $15 cash, and the balance by instalments, and until purchase money paid the piano to remain the plaintiff's property; that default was made in the payments, and that the plaintiffs were entitled to take possession of the same. The defendant stated that she purchased the piano, no mention being made at the time of the agreement, which was subsequently signed without defendant's authority by her daughter. The defendant was unable to read or write, though of fair business capacity. The evidence, as urged by the plaintiffs, shewed authority from the defendant to sign, and also ratification by her. The jury found for the defendant. The court, not being satisfied with the finding, directed a new trial, with costs to the successful party in the cause. *Heintzman* v. *Graham*, 15 O. R. 137.

——— *Wrong-doer—Trespass.*]—Replevin for staves. The jury were directed to ascertain how many staves had been taken from H.'s land, and that, as defendants claimed only as his vendees, the plaintiff was entitled to a verdict for any others that there might have been. They found, however, for defendants, and the court refused to interfere, holding that the plaintiff having been clearly a wrong-doer in trespassing on H.'s land, was not entitled to consideration. *Sills* v. *Hunt*, 16 U. C. R. 521.

Securities — *Illegality — Notice of.*] — Held, that under 12 Geo. II. c. 28, securities given for the price of lottery tickets are not void in the hands of a bonâ fide holder for value. Where the jury found that the plaintiffs had not notice of the illegality, the court refused a new trial, holding the defence not one to be favoured. *Evans* v. *Morley*, 21 U. C. R. 547; *S. C.*, 20 U. C. R. 236.

Settlement — *Injuries — Inadequacy of Compensation.*]—It is the duty of a party setting up that a settlement of a claim for injuries has been obtained by misrepresentation to establish not only that the settlement has been so obtained, but also that the amount paid is an inadequate compensation for such injuries; and where there was an entire failure of evidence on this latter point, a new trial was granted, on payment of costs. *Rowe* v. *Grand Trunk R. W. Co.*, 16 C. P. 500.

Sheriff—*Absconding Debtors' Act—Rent—Suspicious Circumstances.*]—Action by a sheriff, under the Absconding Debtors' Act, for rent due on a lease to the debtor. Upon motion, after a verdict for defendant, for a new trial:—Held, that ordinarily the court would require a stronger case against the verdict than was made out here, but the plaintiff suing in right of his office, and knowing nothing of the transactions between the defendant and the debtor, and the circumstances appearing somewhat suspicious, a new trial should be ordered on payment of costs. *Reynolds* v. *Pearce*, 14 C. P. 369.

Survey—*Road Allowance.*]—An original survey of part of a township made no mention of roads, and it was apparently the surveyor's intention that the roads should be taken out of the (then wild) land adjacent. The surveyor who afterwards surveyed the adjoining lands treated the road allowance as included within the lines of the original survey, whereby the plaintiff's lot would be diminished one chain in breadth. The jury having found a verdict for defendants, the court ordered a new trial, considering such verdict against the weight of evidence. *Stock* v. *Ward*, 7 C. P. 127.

Trespass — *Division Fence — Recognized Boundary.*]—Trespass q. c. f. The division line between two lots being in dispute, the plaintiff proved that the line he contended for had been run by a surveyor and fenced for about forty rods fifty years before action, and that it had been the recognized boundary between the parties. A short time before action defendant employed a surveyor who ran a different line (probably right, although not done in strict accordance with the statute), and defendant moved his fence in accordance with it. The jury having found for defendant, the plaintiff moved for a new trial on affidavits that the fence moved had been standing more than twenty years. The court granted a new trial on payment of costs, the Chief Justice stating that "compacts and arrangements of old standing, the maintenance of which prevents litigation, should be favourably viewed." *Wideman* v. *Bruel*, 7 C. P. 134.

Trespass—*Form of Action—Tender.*]—In trespass for taking staves, the plaintiff recovered £20. The law on some of the facts which were improperly elicited at the trial was doubtful, but it appeared that the plaintiff was entitled to recover something in that form of action and the residue in another form; and a new trial was refused, although a tender could have been pleaded to the amount of the whole claim if the action had been brought in another form. *Ballard* v. *Ransom*, 2 O. S. 70.

——— *Prior Trial for Felony—Acquittal.*]—Where A., having been tried for feloniously shooting at B. and acquitted, was afterwards sued in trespass for the same act, and the jury found for defendant, though the trespass was proved, the court refused a new trial. *Day* v. *Hageman*, 5 U. C. R. 451.

Trover — *Evidence — Damages.*] — First count, trover for goods; 2. for an injury to the plaintiff's reversionary interest in them. The jury were directed that there was no evidence to sustain the first count, and no substantial damage shewn on the second, but they found a general verdict for the plaintiff, and $100:—Held, that, as defendant had, on account of the ruling, refrained from giving evidence on the first count, a new trial should be granted. *McMurray* v. *Ryan*, 23 U. C. R. 19.

Will—*Proof of—Witness.*]—The will of Z. not having been properly proved by one of the subscribing witnesses, and the objection having been taken, the court could not enter a verdict for defendant on the leave reserved, but granted a new trial on payment of costs. *Woodruff* v. *Mills*, 20 U. C. R. 51.

——— *Testamentary Capacity.*] — The court, though the weight of evidence seemed the other way, refused to set aside a verdict upholding a will made by testator in his last illness, which was disputed on the ground that he was not competent at the time to exercise a disposing power, though his strength of mind when in health was not doubted. Harwood v. Baker, 3 Moo. P. C. 282, commented on. *Brown* v. *Bruce*, 19 U. C. R. 3.

Work and Labour.] — In assumpsit, there was conflicting evidence as to certain work done, absence of evidence as to other portions of the plaintiff's claim, and failure of proof as to large quantities of the work claimed for, and a verdict for a large sum, nearly the whole amount claimed; a new trial was granted on payment of costs. *Hewitt* v. *Gzowski*, 6 C. P. 89.

In the following cases new trials were granted or refused on the law and evidence or Judge's charge. A reference to them only is given, as the decisions appear to be of no general importance.

Granted.]—See *Wethen* v. *Caverley*, 5 O. S. 71; *Stewart* v. *Byrne*, 6 O. S. 146; *Baldwin* v. *McLean*, 6 O. S. 636; *Sutherland* v. *Small*, 2 U. C. R. 393; *Mellish* v. *Wilkes*, 4 C. P. 407; *Moore* v. *Chisholm*, 7 C. P. 131; *McNabb* v. *Howland*, 11 C. P. 434; *Cloy* v. *Jacques*, 27 U. C. R. 88.

Refused.] — See *Doe d. Magher* v. *Chisholm*, Dra. 227; *Doe d. Powell* v. *Craig*, 2 U. C. R. 208; *Vail* v. *Flood*, 2 U. C. R. 133; *Commercial Bank* v. *Weller*, 5 U. C. R. 543; *Stevenson* v. *Rae*, 2 C. P. 406; *Holme* v. *Turner*, 5 C. P. 116; *Bellamy* v. *City of Hamilton*, 4 C. P. 526; *Lizars* v. *Farrell*, 6 C. P. 276; *Adams* v. *Capner*, 6 C. P. 277; *Creighton* v. *Chambers*, 6 C. P. 282; *Wismer* v. *Wismer*, 23 U. C. R. 519; *Lyon* v. *Tiffany*, 16 C. P. 197; *Reed* v. *Mercer*, 16 C. P. 279; *McLean* v. *Dun*, 39 U. C. R. 551.

XVIII. Miscellaneous Cases.

Abandonment of Count at Trial.]—Action on a special parol contract for sale of

goods to defendants. Plaintiffs were allowed to add a count in covenant, but on objections being taken to their right to recover under it, they elected to go to the jury on the original count:—Held, on the evidence, that the plaintiffs could not recover on that count, and should therefore have been nonsuited; and that having abandoned the count in covenant they should not have a new trial on the ground that they were entitled to succeed on it. *Moor* v. *Boyd*, 23 U. C. R. 459.

Counsel — *Misunderstanding — Terms of Verdict.*]—Where there was a misunderstanding between counsel as to the terms upon which a verdict was taken subject to the opinion of the court, a new trial was granted without costs. *McLeod* v. *Boulton*, 2 U. C. R. 44.

New Trial as to Some Counts and Nonsuit as to Others.]—Where there were common counts, on which there was evidence for the jury, but the verdict certainly included some damages upon the special counts, a new trial was granted on the common counts, and a nonsuit as to the others. *Harper* v. *Davies*, 45 U. C. R. 442.

No Damages.]—The jury having found no damages, an order nisi obtained by the plaintiff for a new trial was discharged, without costs. *Lemay* v. *Chamberlain*, 10 O. R. 638.

Nonsuit on Opening—*Setting aside.*]—A conveyance direct from husband to wife is not necessarily void to all intents and purposes; in equity it may be void. Therefore, in this action, in which the plaintiff claimed possession of the lands against J. M., who, in 1884, had conveyed to S. M., his wife, for an expressed consideration of $100, S. M. having, in 1887, conveyed to the plaintiff, and in which J. M. now contended that his deed to S. M. was void, and the Judge at the trial on that ground nonsuited the plaintiff at the opening of the case:—Held, that there must be a new trial, especially as it was stated by counsel that the legal estate was outstanding in a mortgagee, at the time of the conveyance from J. M. to S. M. *Jones* v. *McGrath*, 15 O. R. 189.

See Creighton v. *Chittick*, 7 S. C. R. 348; *Connecticut Mutual Life Ins. Co. of Hartford* v. *Moore*, 6 App. Cas. 644.

Notice of Trial—*Agreement.*]—Notice of trial having been served on defendants too late, and there being contradictory statements as to the agreement to take short notice, the court granted a new trial. *Armstrong* v. *Beacon Life Ins. Co.*, 4 C. P. 547.

Notice to Produce—*Failure to Give—Costs.*]—The court refused a new trial on the ground that, by omitting to give notice to produce, defendant was precluded from going into one branch of his defence, when the facts, if proved, would not have formed a legal bar. *Gates* v. *Crooks*, Dra. 180.

And if granted in such case it would be on payment of costs. *Grey* v. *Dayfoot*, 7 C. P. 156.

Ordering New Trial instead of Determining Whole Case.] — Plaintiff sued for money advanced by him to defendants to purchase wheat for him, alleging that they had not purchased or accounted. Defendants pleaded, in substance, that the money, while kept unmixed with their own as the plaintiff's money, was stolen from them by persons unknown, without any neglect on their part. At the trial a verdict was taken for plaintiff, subject to the opinion of the court whether defendants were liable, with power to draw inferences of fact. The court declined to assume the functions of a jury in determining, upon evidence wholly circumstantial, whether the money had been stolen, and directed a new trial, with costs to abide the event. *Bickle* v. *Mathewson*, 26 U. C. R. 137.

Ordering New Trial instead of Reversing Decree.]—The Court below dismissed a bill filed to enforce a claim for damages sustained by an excessive valuation of land by the brother and partner of the paid valuator duly appointed by the plaintiffs, on the ground that it was not shewn that the valuation was made fraudulently. The court, while differing from such view, declined to reverse the decree, and ordered a new trial, at which the evidence of one of the defendants already taken might be used, in the event of his then being out of the jurisdiction: but ordered the defendants to pay the costs of the appeal: the new trial to be without costs in the court below. *Canada Landed Credit Co.* v. *Thompson*, 8 A. R. 696.

Reference — *Agreement to Submit.*] — Where justice had been done, the court refused a new trial upon the ground that it had been agreed that a third person should have been applied to to settle the matter, he being under no legal liability to do so. *Nevils* v. *Willcocks*, Tay. 265.

——— *Discretion of Trial Judge.*]—The objection that the Judge at the trial should have himself decided the issue as to failure of consideration, instead of directing an inquiry before the master, is not one that the court will entertain. *Featherstone* v. *Van Allen*, 12 A. R. 133.

Removal of Conviction—*Justice of the Peace.*]—Held, that a defendant is not entitled to remove proceedings by certiorari to a superior court from a police magistrate, or a justice of the peace, after conviction or at any time, for the purpose of moving for a new trial for the rejection of evidence, or because the conviction is against evidence, the conviction not being before the court, and no motion made to quash it. *Regina* v. *Richardson*, 8 O. R. 651.

Stay of New Trial Pending Appeal.] —See *McDonald* v. *Murray*, 9 P. R. 464; *Arnold* v. *Toronto R. W. Co.*, 16 P. R. 394; *Heist* v. *Grand Trunk R. W. Co.*, 16 P. R. 448.

See CRIMINAL LAW, VIII. 2 (c)—DIVISION COURTS, XII. — SUPREME COURT OF CANADA, II. 10—TRIAL.

NEWSPAPER.

See DEFAMATION, VIII.

NEXT FRIEND.

See COSTS, VII. 1 (d)—HUSBAND AND WIFE, XI. 1—INFANT, VI. 5—LUNATIC, V.

NOLLE PROSEQUI.

Executors—*Discontinuance as to One.*]—Where a plaintiff sues two or more defendants as executors, a nolle prosequi and discontinuing as to one is not a discontinuance of the action. *Masson* v. *Hill*, 5 U. C. R. 60.

Filing.]—A nolle prosequi filed only with the clerk at the assizes, cannot be recognized. *Wafer* v. *Taylor*, 9 U. C. R. 669. See, also, *Campbell* v. *Kempt*, 2 C. L. J. 131.

——— *Omission — Verdict — Striking out Name.*]—Two defendants, sued on the common counts, joined in a plea of never indebted. After the record had been entered for trial, their attorney told the attorney for the plaintiff that the defendants were not jointly liable, but that one was, and the plaintiff's attorney thereupon entered a nolle prosequi on the record as to one, but omitted to file it. He then took a verdict against the other, upon a written agreement, signed by the attorney after such entry, to admit his liability in a sum named. After the verdict this defendant was arrested, and he then moved to set aside the proceedings:—Held, that the plaintiff, instead of entering a nolle prosequi, should have moved to strike out the defendant's name, but, under the circumstances, this was allowed to be done after the verdict, and the rule was discharged without costs. *Barnard* v. *McPherson*, 2 P. R. 313.

General Verdict—*Money Count—Count in Tort.*]—Plaintiff sued H. and G. for money had and received. G. allowed judgment by default. At the trial a count was added charging them with negligence as brokers. The plaintiff entered a nolle prosequi as to G., and defendants' counsel refused to plead to the new count, objecting to its being allowed. The jury having found a general verdict for the plaintiff:—Held, that the plaintiff having entered a nolle prosequi on both counts as against G., the verdict, being general, could not have been maintained as against H., though the second count was in tort. *Hammond* v. *Heward*, 20 U. C. R. 36.

Irregularity — *Notice—Verdict.*]—In an action of trespass against several, if the plaintiff proceed to trial with notice of an irregularity in his proceedings as to some, and obtain a verdict, he cannot sustain it by entering a nolle prosequi as to those defendants. *Campbell* v. *Bruce*, 5 O. S. 334.

Joint Action—*Tort—New Trial.*]—In a joint action of trespass one party may be acquitted and the other convicted. Judgment by default had been signed against one of two defendants jointly charged, but the evidence established the tort against the other alone; whereupon the plaintiff entered a nolle prosequi as to the former, and took his verdict against the latter only:—Held, that this was the more prudent course, and, therefore, no ground for granting a new trial, which however, was granted on other grounds. *Campbell* v. *Kemp*, 16 C. P. 244.

Judgment.]—A nolle prosequi cannot be entered after judgment. *Roach* v. *Potash*, M. T. 3 Vict.

Misjoinder — *Nonsuit.*] — Held, that in joint actions of assumpsit a misjoinder of defendant cannot be cured either by a nolle prosequi or by a nonsuit as to some of the defendants. *Commercial Bank* v. *Hughes*, 4 U. C. R. 167.

Promissory Note — *Set-off by Maker — Release of Indorser.*]—Action on a note made by M. and indorsed by C. Pleas by M., general issue and set-off; and by C., general issue, set-off, and release. The plaintiffs took issue on M.'s pleas, and entered a nolle prosequi as to C. The court was equally divided as to whether they could do so. *Robertson* v. *Moore*, 6 O. S. 646.

Separate Counts—*Admission — Right of Action.*]—The first count was on a promissory note, the second on an account stated. The defendant demurs to plaintiff's replication to the plea to first count; and the plaintiff, to avoid the risk of the demurrer, enters a simple nolle prosequi to that count:—Held, that the plaintiff might give the note in evidence under the second count, on the account stated; the nolle prosequi not involving an express admission, as it sometimes does, that the plaintiff had no right of action on the note. *Leslie* v. *Davidson*, 3 U. C. R. 459.

——— *Agreement.*]—The plaintiff declared on two counts, each on an agreement dated 16th November, 1853, to deliver timber. Breach, non-delivery. Defendant pleaded non-assumpsit to the whole declaration, and other pleas to the first count, and to that count a nolle prosequi was entered: — Held, that it was sufficient at the trial for the plaintiff to produce one agreement corresponding with that declared on in the second count, and that it was not necessary for him to prove one corresponding with each count. *Usborne* v. *Grover*, 13 U. C. R. 164.

NONDIRECTION.

See NEW TRIAL, V. 2.

NONJOINDER.

See PARTIES, I. 2 (c), (d), (e).

NON OBSTANTE VEREDICTO.

See JUDGMENT, XI.

NON PROS.

See JUDGMENT, XII.

NONREPAIR.

See WAY, VII.

NONSUIT.

I. Generally—When a Plaintiff may be Nonsuited, 4877.

II. Grounds for, 4879.

III. Reservation of Leave to Enter, 4881.

IV. Setting Aside, 4881.

V. Miscellaneous Cases, 4882.

I. Generally—When a Plaintiff May be Nonsuited.

Accepting Nonsuit—*Time.*]—The plaintiff may take a nonsuit at any time before the pronouncing of the verdict by the jury, but not after it is rendered, and before it is recorded. *Van Allen* v. *Wigle*, 7 C. P. 459; *Whethen* v. *Calverley*, 5 O. S. 71.

Counsel for Plaintiff Absent.] — Where a cause is called on for trial, and neither counsel nor attorney appears for plaintiff, a jury may be sworn and a nonsuit ordered. *Falls* v. *Lewis*, Dra. 269.

Counsel for Plaintiff not Ready—*Costs.*]—Where defendants' counsel was ready at the assizes, and the plaintiff's counsel not being prepared, the cause was struck out:—Held, that defendants were not entitled to costs, for not proceeding to trial pursuant to notice, but their proper course was to have insisted upon a nonsuit. *Crofts* v. *McMaster*, 3 P. R. 121.

Defendant Calling Witnesses.] — If a defendant move a nonsuit, and afterwards examine witnesses, the plaintiff is entitled to any benefit which he can obtain from their evidence in support of his case. *Brock* v. *McLean*, Tay. 398.

Determination of Motion to Dispose of Costs.]—After trial of ejectment upon a mortgage, with leave to move for a nonsuit, the suit was settled and the costs paid by an after mortgagee of the property without defendant's authority:—Held, that this could not affect defendant's right to costs in case a nonsuit should be ordered; and, consequently, that it was still necessary to determine the point reserved. *Doe d. Morgan* v. *Boyer*, 9 U. C. R. 318.

Evidence—*Scintilla.*]—Held, that on motion for a nonsuit the court will not consider whether there is a scintilla of evidence, but will make the rule absolute where they would have set the verdict aside on motion as against evidence. *Wright* v. *Skinner*, 17 C. P. 317.

——— *Sufficiency.*]—When leave is reserved to enter a nonsuit on the whole case after evidence given on both sides, a nonsuit will be ordered unless there be evidence on which a rational verdict for plaintiff can be founded, which the court would not be bound to set aside. *Campbell* v. *Hill*, 23 C. P. 473, 22 C. P. 526.

——— *Sufficiency — Direction of Judge — Address to Jury.*]—In an action by husband and wife for negligence of defendants (surgeons) in treatment of the wife, the evidence was of a very weak and unsatisfactory character, amounting in fact to pure conjecture whether there had been any negligence or not; while the evidence offered on behalf of defendants was of the most favourable character to them:—Held, on plaintiffs' counsel declining to take a nonsuit, that the Judge was right in directing the jury to find for defendants, as also in refusing him the right to address the jury on the whole case. *Storey* v. *Veach*, 22 C. P. 164.

Interpleader Issue.]—A plaintiff may be nonsuited on the trial of a feigned issue under the Interpleader Act. *Bryson* v. *Clandinan*, 7 U. C. R. 198.

Issues of Law Undetermined.] — A nonsuit may be ordered where there are issues of law and fact, and the former undetermined. *Bennett* v. *Covert*, 24 U. C. R. 38.

Joint Actions—*Nonsuit as to Some Defendants.*]—In an action of contract a plaintiff may be nonsuited as to some or one of several defendants, though judgment by default has been entered against the others. *Benedict* v. *Boulton*, 4 U. C. R. 96; *McNab* v. *Wagstaff*, 5 U. C. R. 588.

So also in an action of trespass and false imprisonment. *Armstrong* v. *Bowes*, 12 C. P. 539.

Where in an action against the maker and indorser of a note, under 5 Wm. IV. c. 1, one defendant pleaded the general issue, and the other allowed judgment to go by default, and at the trial plaintiff was nonsuited as to both, no one being present in the court on his behalf:—Held, that the nonsuit might have been right as to the one pleading, and it was therefore set aside only on payment of costs. *Small* v. *Powell*, 1 U. C. R. 427.

In an action against several defendants upon a joint contract, a plaintiff cannot have a verdict against one and be nonsuited as to the others. *Commercial Bank* v. *Hughes*, 3 U. C. R. 361.

In a joint action in assumpsit, a misjoinder of defendants cannot be cured, either by a nolle prosequi or by a nonsuit as to some of the defendants; and a nonsuit as to some is a nonsuit as to all, and a verdict returned for some of the defendants is null and void. *S. C.*, 4 U. C. R. 167.

One of Two Counts.]—Quære, as to the correctness of a nonsuit upon one of two counts. *Brace* v. *Union Forwarding Co.*, 32 U. C. R. 43.

Penal Action.]—A plaintiff may be nonsuited on the trial of a penal action. *Stuart* v. *Buller*, E. T. 4 Vict.; *Ranney q. t.* v. *Jones*, 21 U. C. R. 370.

Pleading—*Payment into Court.*]—There may be a nonsuit after payment of money into court, or after a plea of tender. *Oakes* v. *Morgan*, 8 C. L. J. 248.

Powers of Court in Banc.]—At the trial of a case, the jury was directed to find

for plaintiff or defendants, according to their view of certain facts on which the evidence was contradictory, reserving leave to move to enter a verdict for defendants, or a nonsuit, in case they should find for plaintiff: but they could not agree and were discharged:—Held, that the court could not direct a nonsuit under 34 Vict. c. 12, s. 10 (O.), for that can be done only when in their opinion the Judge should have nonsuited at the trial. *Feaver* v. *Montreal Telegraph Co.*, 25 C. P. 161.

——— *Trial without Jury.*]—37 Vict. c. 7, s. 33—the A. J. Act, 1874—does not empower the court to enter a nonsuit or verdict except in cases where before the Act the court would have done so on leave reserved; but it is otherwise where the trial is before a Judge without a jury: 33 Vict. c. 7, s. 6 (O.) *Hughes* v. *Canada Permanent L. and S. Society*, 39 U. C. R. 221.

——— *Verdict—Absence of.*]—The Judge at the trial, under 37 Vict. c. 7, s. 32 (O.), submitted certain questions to the jury, but they left one unanswered, which he deemed so material that he was not able to enter a verdict, and discharged the jury:—Held, that the court could not enter a nonsuit under 34 Vict. c. 12, s. 10 (O.), and that s. 33 of 37 Vict. c. 7 (O.) would not apply, for there was no verdict to move against. The point being new, the rule was discharged without costs. *Armstrong* v. *Stewart*, 28 C. P. 45.

Several Issues—*One Found for Plaintiff.*]—Defendants having proved their plea setting up a condition of the policy, the plaintiff contended that it did not bar the action. Leave was reserved to move for a nonsuit on this ground, and the plaintiff had a verdict, there being another issue on the record. Semble, that a verdict should have been entered for defendants on the plea, and plaintiff left to move for judgment non obstante, for that there cannot be a nonsuit while another issue stands in favour of the plaintiff on the record. *McBride* v. *Gore District Mutual Fire Ins. Co.*, 30 U. C. R. 451.

See Moore v. *Connecticut Mutual Life Ins. Co. of Hartford*, 6 S. C. R. 634, 6 App. Cas. 644, *post* V.

II. Grounds for.

Declaration — *Averment too Large.*] — Case for malicious arrest, in which the declaration stated that the defendant "not being apprehensive that the plaintiff would leave Canada," (instead of Upper Canada) made affidavit, &c. Plea, not guilty. An objection to the averment as being too large was held a good ground of nonsuit. *McBean* v. *Campbell*, 6 O. S. 457.

——— *Misnomer.*]—It is no ground for nonsuit that the plaintiff has declared by a name different from her real name: defendant must apply to make the plaintiff amend the declaration, under 7 Wm. IV. c. 3, s. 8. *Murphy* v. *Bunt*, 2 U. C. R. 284.

Nor is a variance in the name of arbitrators, as stated in the declaration, the agreement, and award. *Bentley* v *West*, 4 U. C. R. 98.

Declaration Proved.]—A plaintiff may be nonsuited although his evidence supports his declaration. *McPherson* v. *Hamilton*, 5 O. S. 490.

When the facts alleged in the declaration are proved, the plaintiff cannot be nonsuited upon the ground that they disclose no cause of action. *Lewis* v. *City of Toronto*, 39 U. C. R. 343. See, also, *Commercial Bank* v. *Harris*, 27 U. C. R. 526; *Darby* v. *Corporation of Crowland*, 38 U. C. R. 338, 342.

——— *Venue—Objection.*]—Where the objection to venue appears on the face of the declaration, defendant should demur; he cannot insist on a nonsuit, nor after verdict can he arrest the judgment, the objection then being cured by the statute. *Ferguson* v. *Township of Howick*, 25 U. C. R. 547.

Evidence—*Plaintiff's Case — Supporting Plea.*]—Action on two policies of insurance. Pleas, that the risk was increased and rendered more hazardous after the insurance was effected. The plaintiff anticipated the defence by evidence, which was contradictory and unsatisfactory. The onus being on defendants to prove the plea, the court refused a nonsuit on the ground that it was substantiated by plaintiff's evidence. *Dale* v. *Gore District Mutual Fire Ins. Co.*, 14 C. P. 502.

Non-joinder.]—Non-joinder of a plaintiff in assumpsit is ground of nonsuit. *Walker* v. *McDonald*, 4 O. S. 12.

Objection not Urged at Previous Trial.]—Where two new trials have been granted in order to dispose of the question on its merits, the court will not be disposed on the last trial to consider technical objections taken as grounds of nonsuit. *Wafer* v. *Burns*, 12 U. C. R. 384.

Objection not Urged at Trial.] — A party moving to enter a nonsuit cannot take an objection which he did not urge at nisi prius. *Hall* v. *Shannon*, E. T. 2 Vict.

The plaintiff in ejectment claimed title by deed from M.; the defendant by length of possession. At the trial the plaintiff failed to prove his paper title, but shewed that defendant went in under him, and it was then objected that a demand of possession was necessary, on which defendant had leave to move for a nonsuit. In term this point was not urged, but defendant objected that the plaintiff could not rely on a different title from that in his notice:—Held, that, as this objection had not been taken at the trial, and defendant's case was not one to be favoured, he should not be allowed to raise it afterwards; and the plaintiff's verdict was upheld. *Kennedy* v. *Freeth*, 23 U. C. R. 92.

The verdict was set aside by the county court, and a nonsuit entered, upon a ground not taken as a defence at the trial or in the rule nisi:—Held, that effect should not have been given to the objection, which, if taken at the trial, would have been met by an amendment. As the evidence shewed that the plaintiff was entitled to succeed upon the merits, the appeal was allowed and the rule in the court below discharged. *Clarke* v. *Barron*, 6 A. R. 309.

Objection to Plaintiffs' Status—*Joint Action.*]—T. having title to land, she and her husband brought trespass, and defendants pleaded that the land was not plaintiffs'. It was objected that there was no joint property to sustain the action:—Held, that the objection was not available as ground for nonsuit. Quære, whether it was ground of demurrer or to arrest judgment. *Tucker* v. *Phillips*, 24 U. C. R. 626.

Undisputed Facts—*Jury.*]—The question of reasonable notice of default by the principal for whom defendants were sureties in this case was one for the jury, but the undisputed facts leaving no doubt what the decision of a jury should be, the court ordered a nonsuit. *Corporation of Chatham* v. *McCrea*, 12 C. P. 352.

III. Reservation of Leave to Enter.

Acquiescence — *Presumption.*] — See *Dacat* v. *Sweeney*, T. T. 2 & 3 Vict., R. & J. Dig. 2600.

Consent.]—See *Suter* v. *McLean*, 8 C. P. 200.

Leave not Reserved—*New Trial.*]—See *Doe d. Gilkison* v. *Shorey*, 2 U. C. R. 183.

Motion—*Consent.*]—See *Hawley* v. *Ham*, Tay. 385; *Brookfield* v. *Sigur*, *ib.* 200.

See, also, *Campbell* v. *Hill*, 22 C. P. 526, 23 C. P. 473, *ante* I.; *Feaver* v. *Montreal Telegraph Co.*, 25 C. P. 161, *ante* I.; *Hughes* v. *Canada Permanent L. and S. Society*, 39 U. C. R. 221, *ante* I.; *McBride* v. *Gore District Mutual Fire Ins. Co.*, 30 U. C. R. 451, *ante* I.; *Kennedy* v. *Freeth*, 23 U. C. R. 92, *ante* II.

IV. Setting aside.

Accepting Nonsuit.]—Where a plaintiff suffers a nonsuit voluntarily, the court will not afterwards set it aside. *Saunders* v. *Playter*, Tay. 40; *Barker* v. *Tabor*, 5 O. S. 570; *Doe d. Marr* v. *Marr*, 3 C. P. 36.

Nor where the plaintiff requests to be nonsuited, rather than go to the jury on an unfavourable charge upon the merits. *Stuart q. t.* v. *Bullen*, 1 U. C. R. 451; *McGrath* v. *Cox*, 3 U. C. R. 332.

Where the plaintiff's attorney consented to a nonsuit, under an apprehension that he would be allowed to move for a new trial, the court allowed the motion, although his consent had not been coupled with the leave of the Judge at nisi prius to move. *Cameron* v. *McLean*, Tay. 298.

Where the plaintiff, in consequence of the Judge's ruling as to the sufficiency of evidence, to which ruling he objects, rather than risk a verdict accepts a nonsuit, he is at liberty in term to move against the nonsuit. *Hatton* v. *Fish*, 8 U. C. R. 177.

Semble, that the plaintiff, having accepted a nonsuit while the Judge was charging the jury adversely, was not entitled to move against it. *Fraser* v. *North Oxford and West Zorra Plank Road Co.*, 15 U. C. R. 291.

Where the plaintiff took a nonsuit in deference to the Judge's opinion, expressed not in favour of a nonsuit but of defendant upon the evidence, and the court thought that a verdict for defendant, if found, would have been sustained, they refused to interfere. *Wood* v. *Bowden*, 23 U. C. R. 466.

Action upon a promissory note. Pleas, fraud and want of consideration. At the end of the charge, in which the Judge had expressed an opinion that there was some evidence in support of the plea, plaintiff's counsel desired him to charge in a particular way, and upon his declining to do so took a nonsuit:—Held, that, having thus elected to take a nonsuit, the plaintiff could not afterwards move against it. *Taylor* v. *Rose*, 24 U. C. R. 446.

The plaintiff having accepted a nonsuit in deference to the Judge's ruling:—Held, that he was not prevented from moving against it. *Burn* v. *Blecher*, 14 C. P. 415.

The demandant, under the facts stated in this case, having been a party to all that occurred, by appearing and accepting a nonsuit, could not afterwards be allowed to object to its regularity. *Miller* v. *City of Hamilton*, 17 C. P. 514.

Consent—*Question of Fact.*]—Held, upon the facts, that the nonsuit, which was upheld, was not shewn to have been against the plaintiff's consent. *Conway* v. *Shibley*, 39 U. C. R. 519.

Judge's Ruling—*Acquiescence.*]—To set aside a nonsuit it must be shewn that the ruling of the Judge was wrong, or that it is ex debito justitiæ that a new trial should be granted. Remarks as to the right to move against a nonsuit when acquiesced in either on a point of law or on the evidence. *Stoker* v. *Welland R. W. Co.*, 13 C. P. 386.

Question of Law—*Authority of Agent—Jury.*]—In an action on a fire policy, a nonsuit having been ordered upon the ground that the condition relied upon by defendants could not be waived by the inspector, or in any way except in writing:—Held, that the nonsuit was right upon the evidence; and the court refused to set it aside. Quære, whether, if the case had been left to the jury, and they had found that the agent had authority to waive the condition, the verdict could have been allowed to stand. *Mason* v. *Hartford Fire Ins. Co.*, 37 U. C. R. 437.

Rule Nisi—*Notice of Motion.*]—Where in a jury case the Judge at the trial enters a nonsuit, a notice of motion, and not an order nisi, is the proper mode of moving against it. *Clarkson* v. *Snider*, 10 O. R. 561.

See Baker v. *Grand Trunk R. W. Co.*, 11 A. R. 68, *post* V.

V. Miscellaneous Cases.

Absence of Witnesses.] — Where a plaintiff is disappointed in procuring testimony, he should withdraw his record or take a nonsuit. *Corporation of Longueuil* v. *Cushman*, 24 U. C. R. 602; *Hooper* v. *Christoe*, 14 C. P. 117.

Costs—*Nonsuit by Judge ex Mero Motu—Appeal.*]—Upon the trial of a county court action, counsel for the defendants, at the close of the plaintiff's case, formally moved for a nonsuit, and stated that he would renew the motion at the close of the defendants' case. Then he called and examined three witnesses, but, when a fourth was sworn, the Judge interposed and said he would take the responsibility of entering a nonsuit. He heard argument from the plaintiff's counsel opposing this course, and the defendants' counsel said he proposed to tender his evidence and go on and complete the case. The Judge refused to hear further evidence, and entered a nonsuit, which in term he refused to set aside, the defendants' counsel neither opposing nor assenting to the motion. The plaintiff successfully appealed to the court of appeal. Upon the argument there, the defendants' counsel took the same position, but urged that the defendants should not be ordered to pay costs:—Held, however, that nothing was shewn to induce the court to depart from the general rule; and the defendants were ordered to pay the costs of the appeal, the lost trial, and the motion in term. The mere fact that the Judge below has ex mero motu made an erroneous adjudication is not a ground for absolving the respondent from the costs of the appeal. *Mills* v. *Hamilton Street R. W. Co.*, 17 P. R. 74.

Declining Nonsuit—*Verdict—Address to Jury.*]—Held, that on plaintiff's counsel declining to take a nonsuit, the Judge was right in directing the jury to find for defendants, as also in refusing him the right to address the jury on the whole case. *Storey* v. *Veach*, 22 C. P. 164.

Demurrer.]—Where a judgment of nonsuit has been entered against a plaintiff, he will not be allowed to set down a demurrer for argument, or take any proceedings in the suit. *Bays* v. *Ruttan*, 5 U. C. R. 634.

Judgment for Plaintiff—*Nonsuit Set aside—New Trial—Costs.*]—At the trial of a case with a jury the Judge of the county court at the conclusion of the plaintiff's evidence, and without hearing any evidence on the part of the defendants, nonsuited the plaintiff. In the following term the Judge set the nonsuit aside and entered judgment for the plaintiff, claiming a right under the circumstances to do so. On appeal the court, while satisfied with the ruling of the Judge on the legal liability of the defendants, set the nonsuit aside and ordered a new trial upon the facts so as to afford the defendants an opportunity of adducing evidence, but under the circumstances refused them any costs of the appeal. Rules 311, 312, 319, and 321, O. J. Act, discussed. *Baker* v. *Grand Trunk R. W. Co.*, 11 A. R. 68.

Law Reform Act—*Evidence—Appeal.*]—In an action on a life policy tried before a Judge and a jury, in accordance with the provisions of 37 Vict. c. 7, s. 32 (O.), the Judge, in place of requiring the jury to render a general verdict, directed them to answer certain questions, and the jury having answered all the questions in favour of the plaintiff, the Judge entered a verdict for the plaintiff. Upon a rule nisi to shew cause why this verdict should not be set aside and a nonsuit or a verdict entered for defendants pursuant to the Law Reform Act, or a new trial had between the parties, said verdict being contrary to law and evidence, and the finding virtually for the defendants, the court of Queen's bench (41 U. C. R. 497) made the rule absolute to enter a verdict for the defendants. The appellant then appealed to the court of appeal for Ontario, and the court being equally divided, the appeal was dismissed (3 A. R. 331):—Semble, that the plaintiff never could have been nonsuited in virtue of 37 Vict. c. 7, s. 33 (O.), as it is only where it can be said that there is not any evidence in support of the plaintiff's case, that a nonsuit can be entered; and that in this case the proper verdict which the law required to be entered upon the answers of the jury was one in favour of the plaintiff. *Moore* v. *Connecticut Mutual Life Ins. Co. of Hartford*, 6 S. C. R. 634. See *S. C.*, 6 App. Cas. 644.

New Trial as to Some Counts and Nonsuit as to Others.]—See NEW TRIAL.

Set-off notwithstanding Nonsuit.]—Semble, that a defendant, though the plaintiff be nonsuited or have a verdict against him on the other issues, may have his set-off found and a verdict entered for it, for he has an independent right to judgment for his claim, which the plaintiff cannot defeat by a nonsuit. *Parsons* v. *Crabb*, 31 U. C. R. 434.

See JUDGMENT, XIII.—NEW TRIAL.

NOTARY.

[*See* 40 Vict. c. 8, s. 26 (O.)]

Affidavit—*Chancery.*]—Affidavits sworn before a notary public in the United States, and "certified under his hand and official seal," can be used on a motion in the court of chancery. *Merchants' Express Co.* v. *Morton*, 15 Gr. 274.

——— *Chattel Mortgage.*]—Held, that a notary public in Quebec had no power to take the affidavit on renewing a chattel mortgage. *Reynolds* v. *Williamson*, 25 C. P. 49.

——— *Seal.*]—An affidavit for use in the court, sworn before a notary public in Ontario, should be authenticated by his official seal. *Boyd* v. *Spriggins*, 17 P. R. 331.

Bill of Exchange—*Notice of Dishonour.*]—It is no part of a notary's duty to send notice from abroad of dishonour of a bill to the drawer here. *Ewing* v. *Cameron*, 6 O. S. 541.

Discipline—*Board of Notaries—Jurisdiction.*]—See *Tremblay* v. *Bernier*, 21 S. C. R. 469.

Execution of Deed—*Explanation.*]—It is the duty of a notary, when executing a deed, to explain to an illiterate grantor the legal and equitable obligations imposed by the deed and consequent on its execution. *Ayotte* v. *Boucher*, 9 S. C. R. 460.

Power of Attorney—*Copy—Certificate.*]—A certified copy of a power of attorney to convey lands, &c., from the deposit of notarial records in Lower Canada, under the corporate seal of the board of notaries of Montreal, is admissible in evidence, it being presumed that such power of attorney, though

not in itself an official document, came officially into the hands of the notary, among whose records it was found. *Grey* v. *McMillan*, 5 C. P. 400.

Promissory Note—*Protest—Seal.*]—The notary who protests a note need not use an official seal, or subscribe himself in writing a notary public; any seal which he declares in the protest to be his official seal is sufficient, and placing his signature before the printed words "notary public," is an adoption of them. *Commercial Bank of Canada* v. *Brega*, 17 C. P. 473.

Protest—*Copy—Seal.*]—A notarial protest from Lower Canada, certified by the notary as a true copy from his notarial book, is sufficient without any notarial seal. *Ross* v. *McKindsay*, 1 U. C. R. 507.

Services—*Charges—Taxation.*]—A solicitor, who is also a notary, and, acting in the latter capacity, obtains for a client the allowance of a pension from the United States Government, is entitled to charge for his services such sum as may be agreed upon, and is not bound by the statutory regulations affecting solicitors' charges, or liable to have his charges taxed. The right to tax a solicitor's bill of charges for conveyancing, in the absence of a special agreement, considered. *Ostrom* v. *Benjamin*, 20 A. R. 336.

Signature — *Contract — Statute of Frauds.*]—An ante-nuptial contract, entered into in the Province of Quebec, was not signed by the parties themselves, but by the notaries in their own names, they having full authority from the parties to so sign:—Held, that this was a sufficient signature within the Statute of Frauds to bind the parties. *Taillifer* v. *Taillifer*, 21 O. R. 337.

See BILLS OF EXCHANGE.

NOTICE.

I. GENERALLY, 4885.

II. PARTICULAR CASES, 4886.

I. GENERALLY.

Actual Notice—*Proof of—Description of Land.*]—W. mortgaged his land to S., and afterwards sold and conveyed the equity of redemption to A.; but by mutual mistake the land was so described in the conveyance to A. as to comprise part only. A. sold and conveyed to S. by the same description. The plaintiff afterwards discovered the omission, procured W. to sell and convey the omitted portion to him, and filed a bill against S. for a conveyance thereof. It was proved that, before the sale to the plaintiff, W. had sold all he purchased to A.:—Held, that this was sufficient proof of that actual notice which is requisite in this class of cases. *Wigle* v. *Setterington*, 19 Gr. 512.

Constructive Notice — *Purchase for Value.*]—The doctrine of constructive notice, and the defence of purchase for value, as applicable to this country, commented upon. *Henderson* v. *Graves*, 2 E. & A. 9.

Knowledge—*Means of.*]—Remarks upon the extent to which the possession of means of knowledge furnishes evidence of actual knowledge. *Sweeney* v. *Port Burwell Harbour Co.*, 17 C. P. 574. See *Re London Election, Pritchard* v. *Walker*, 24 C. P. 434.

Notice to Agent.]—As to when notice to an attorney or agent is notice to the principal. See *Driffill* v. *Goodwin*, 23 Gr. 431; *Commercial Bank of Canada* v. *Cooke*, 9 Gr. 524; *Cameron* v. *Hutchison*, 16 Gr. 526.

Notice to Solicitor—*Notice to Client.*]—See *Brown* v. *Sweet*, 7 A. R. 725; *Real Estate Investment Co.* v. *Metropolitan Building Society*, 3 O. R. 476.

Proof of Notice.]—See *Driffill* v. *Goodwin*, 23 Gr. 431; *Boyd* v. *Muir*, 26 C. P. 21.

Registry Laws—*Priorities—Actual Notice.*]—To postpone a deed which has acquired priority over an earlier conveyance by registration, actual notice, sufficient to make the conduct of the subsequent purchaser in taking and registering his conveyance fraudulent, is indispensable. *New Brunswick R. W. Co.* v. *Kelly*, 26 S. C. R. 341.

II. PARTICULAR CASES.

Accountant of Supreme Court of Judicature—*Notice to.*]—See *Cottingham* v. *Cottingham*, 11 O. R. 294.

Agreement for — *Compliance with.*]—Where A. agreed to accept as notice actually given any which B. should mail, directed to A., it is a compliance with such agreement that a written notice is actually delivered to A., though not put into the post for him. *Morton* v. *Benjamin*, 8 U. C. R. 594.

——— *Compliance with—Construction of Agreement — Purchase of Railway.*]—The Quebec Street Railway Company were authorized under a by-law passed by the corporation of the city of Quebec and an agreement executed in pursuance thereof to construct and operate in certain streets of the city a street railway for a period of forty years, but it was also provided that at the expiration of twenty years (from the 9th February, 1865), the corporation might, after notice of six months to the said company, to be given within the twelve months immediately preceding the expiration of the said twenty years, assume the ownership of said railway, upon payment of its value, to be determined by arbitration, together with ten per cent. additional:—Held, that the company were entitled to a full six months' notice prior to the 9th February, 1885, to be given within the twelve months' preceding the 9th February, 1885, and therefore a notice given in November, 1884, to the company that the corporation would take possession of the railway in six months thereafter, was bad. *Quebec Street R. W. Co.* v. *City of Quebec*, 15 S. C. R. 164.

Carriage of Goods — *Contract—Notice of Loss or Non-delivery.*]—See *Steele* v. *Grand Trunk R. W. Co.*, 31 C. P. 260; *Grand Trunk R. W. Co.* v. *McMillan*, 16 S. C. R. 543.

Chattel Mortgage—*Actual Notice.*]—A purchaser of goods for value, though with actual notice of a mortgage thereon not duly filed:—Held, entitled under the Chattel Mortgage Act, C. S. U. C. c. 45, as against the mortgagee. *Morrow* v. *Rorke*, 39 U. C. R. 500.

Companies Act, 1862 (Imperial)—*Notices under.*]—See *Barned's Banking Co.* v. *Reynolds*, 40 U. C. R. 435.

Company — *Meeting of Directors.*] — See *McLaren* v. *Fisken*, 28 Gr. 352.

Constitutional Questions — *Notice to Attorneys-General.*] — See *Hately* v. *Merchants' Despatch Co.*, 2 O. R. 385; *Goring* v. *London Mutual Ins. Co.*, 11 O. R. 82.

Contract — *Notice of Termination — Laches.*]—Semble, that when a party to a contract (in which time is not of the essence) desires to put an end to the contract in consequence of the laches of the other party thereto, the proper mode of doing so is to give notice that unless completed within a period to be fixed, the contract will be considered at an end. *O'Keefe* v. *Taylor*, 2 Gr. 95.

Expulsion of Members of Corporation.]—See *Cannon* v. *Toronto Corn Exchange*, 27 Gr. 23, 5 A. R. 268; *Marsh* v. *Huron College*, 27 Gr. 605; *L'Union St. Joseph de Montreal* v. *Lapierre*, 4 S. C. R. 164.

Fire Insurance — *Notice of Further Insurance—Mistake—Fraud.*]—In an action on a policy of insurance, the defendants alleged that an additional insurance had been effected in another company without their being notified within a reasonable time, and in a proper manner, and without such notice being acknowledged by them, there being conditions indorsed upon their policy in accordance with these objections. It appeared that the notice of further insurance stated the amount to be larger than it really was, and gave the name of the company in which the further insurance was effected wrongly:—Held, that, inasmuch as the defendants were neither prejudiced nor misled by the mistake, and there did not appear to be, and was not alleged to be, any fraud in so giving the notice, the policy was not thereby vitiated. *Osser* v. *Provincial Ins. Co.*, 12 C. P. 133.

——— *Notice of Further Insurance—Intention—Forfeiture—Time.*]—In this case R., who had insured on the 20th April, 1875, in defendant company, on the 1st May effected an additional insurance in the Stadacona company, and on the 5th July posted a notice to defendants' local agent, informing him of the fact, which was received by the local agent on the 8th, and on the same day forwarded to the head office, where it was received on the 10th; and on the 20th, and after notice of the loss, they notified the insured that they dissented to the additional insurance and had cancelled their policy:—Held, that the notice was within the time allowed, and that the policy was forfeited. The notice also notified defendants of the intention of the insured to effect an additional insurance in the Beaver and Toronto Mutual Insurance Company, and the insured, before the expiration of the fourteen days, and without any further notice to defendants, effected such insurance:—Held, that this also avoided the policy. Quære, as to the effect of a notice of the intention to effect a further insurance. *McCrea* v. *Waterloo County Mutual Fire Ins. Co.*, 26 C. P. 431.

——— *Notice of Incumbrance.*]—Notice of an incumbrance posted to the secretary of an insurance company, without shewing that it reached him:—Held, not a compliance with a condition that subsequent mortgages "must be notified to the secretary in writing forthwith." *McCann* v. *Waterloo County Mutual Fire Ins. Co.*, 34 U. C. R. 376.

Fraud — *Notice of—Onus—Defence.*]—A bill setting forth that one of the defendants procured a conveyance from the plaintiff by fraud, and afterwards mortgaged the property to another defendant, is not demurrable for want of a charge that the latter had notice of the fraud at or before he received his mortgage. It is for defendant in such a case to set up the defence of no notice. *Kitchen* v. *Kitchen*, 16 Gr. 232.

Guarantee—*Employee's Policy—Notice of Claim—Excuse for not Giving.*]—The policy sued on, guaranteeing to the extent of $20,000 the honesty and care of one W. while in the plaintiffs' employment as cashier, contained a condition that it should be void on the neglect of the plaintiffs to make known to the directors of the society in Canada any act or omission of W. discovered by them, giving a claim under it. In declaring on this policy, the plaintiffs alleged that while in their employment a sum exceeding $20,000 was intrusted to W., to be safely kept in the safe at their head office, of which $10,000 was lost, owing to his negligence in regard to its custody; and they alleged as an excuse for not giving the notice, that defendants had ceased to have or appoint directors in Canada. Defendants pleaded that before the alleged neglect of W., they had ceased to carry on business or have directors in Canada, and had appointed one R. to act for them, for the purpose of paying policies already granted, and receiving all notices required, of which the plaintiffs had notice, but that they gave no notice to R., or to the directors of the company in any way:—Held, on demurrer, that the plea was bad, for the defendants had by their own act deprived themselves of the benefit of the condition, and rendered compliance with it impossible; and they could not insist upon notice to R. *Royal Canadian Bank* v. *European Assurance Society*, 29 U. C. R. 579.

——— *Rent—Notice of Default—Time—Jury—Nonsuit.*]—Defendants entered into a bond conditioned that one McK. should pay to the plaintiffs certain rent in equal monthly payments, with a proviso "that the said municipality (the plaintiffs) shall, on default being made by the said McK. in the payment of said amount monthly, give notice thereof to the said obligors:"—Held, that the proviso for notice was a condition precedent to the plaintiffs' right to call upon the defendants as sureties, and that notice of default not having been given within a reasonable time, the defendants were relieved. The question of reasonable notice is one for a jury, but the undisputed facts leaving no doubt what the decision of a jury should be, the court ordered a nonsuit to be entered. *Corporation of Chatham* v. *McCrea*, 12 C. P. 352.

Harbour—*Notice of Closing—Sufficiency.*]—Held, that defendants, a harbour company, had authority, under the circumstances mentioned in the case, to close the harbour and remove the light; that the notice of the closing, by publication as stated in the report, was sufficient; and that the plaintiff was not entitled to actual personal notice of the fact. *Sweeney* v. *Port Burwell Harbour Co.*, 19 C. P. 376.

Illegality—*Want of Notice of—Equity.*]—Courts of equity cannot, any more than courts of law, on the footing of want of notice of the illegality, give effect to proceedings which, on principles of the common law and under statutes, are utterly void. *Gardiner* v. *Jason*, 2 E. & A. 188.

Mortgage—*Possession by Mortgagee—Notice by Solicitor—Authority.*]—Where a mortgage provided that no means should be taken by the mortgagee to obtain possession of the land until he should have given to the mortgagor one calendar month's notice in writing after default made, demanding payment:—Held, in ejectment by the mortgagee, that a notice signed by the plaintiff's attorney, who was also his attorney in a suit brought upon the covenant more than a month before this action, was sufficient, without any proof of authority. *Keyworth* v. *Thompson*, 16 U. C. R. 178.

——— *Foreclosure — Defect — Purchase by Solicitor—Knowledge of Agent.*]—In a foreclosure suit, defendant, after having been arrested for contempt in not answering, employed the agent of the solicitor for the plaintiff to defend the suit; and, after several proceedings by consent, a decree was made directing the money to be paid on the 25th May, 1841. Three days before the time appointed for payment the plaintiff died; and the solicitor, acting in the cause, subsequently obtained an order appointing a new day for payment, and afterwards the final order for foreclosure by consent, without having revived the suit, and without taking any notice of the death of the plaintiff. The representative of the plaintiff afterwards conveyed to the trustee for the creditors of his ancestor, and he sold to a third party, who again sold to the solicitor of the plaintiff, through whose agent all the proceedings had been taken, but who was himself ignorant of the defects existing therein. The defendant in the cause having died, his widow and devisee, about twelve years afterwards, filed a bill to redeem, setting forth the above facts. The court were equally divided as to whether the right to redeem had been foreclosed. *Arkell* v. *Wilson*, 5 Gr. 470.

Held, on appeal, that this was a proper case in which to withhold redemption, under the discretion given to the court, under s. 11 of the Chancery Act; that the purchasers could not reasonably be held to have constructive notice of the defect in the proceedings; and the appeal was dismissed with costs. *S. C.*, 7 Gr. 270.

——— *Foreclosure — Notice of Defect—Purchaser.*] — The plaintiff, being owner of land, after having mortgaged it, emigrated to Australia, and subsequently remitted money to his agents here to pay off the incumbrance; but they applied the money to their own use. Subsequently the assignee of the mortgage proceeded to foreclose, in which suit an answer was put in on behalf of the plaintiff, but without his knowledge or consent, admitting the allegations of the bill, and that the full amount of principal and interest was due; whereupon a final order of foreclosure was, in due course, obtained; and the plaintiff in that suit conveyed to defendant A. for $1,002, the value of the property; and on the same day defendants M. and S., as attorneys of the plaintiff, conveyed the premises to A., who was ignorant of any fraud in the matter. The plaintiff having returned to the country, and ascertained the frauds which had been practised upon him, filed a bill against his agents and the purchaser A.:—Held, that the plaintiff, so far as the purchaser was concerned, was bound by his answer, and was not entitled to relief as against him; and that the fact of the purchaser having heard before his purchase that the plaintiff had remitted money to pay the mortgage was not sufficient to charge him with notice that the foreclosure was wrongful. *McLean* v. *Grant*, 20 Gr. 76.

Municipal Election—*Notice of Resignation.*]—The notice of a party resigning the office of councillor for a village to which he had been elected, stated that he resigned his "seat" in the council:—Held, sufficient; and that the plaintiff was entitled to his costs, although the Municipal Act requires notice of a resignation of the "office" to be given. *Smith* v. *Petersville*, 28 Gr. 599.

Partnership — *Purchase of Interest—Wrongful Appropriation of Moneys — Notice to Original Partners.*]—Three persons, occupying a fiduciary position towards a bank, became partners in a firm, agreeing to pay for their interest a certain sum of money in liquidation of creditors' claims. They did pay this sum, but out of the moneys of the bank wrongfully appropriated by them. Subsequently the firm was formed into a joint stock company, and the assets of the partnership were assigned by the partners to the company. The company soon afterwards failed, and a winding-up order was made, the original assets, upon which the bank claimed a lien, to a considerable extent coming into the possession of the liquidator:—Held, that the original partners were not affected with constructive notice of the means by which the incoming partners obtained the money brought in, and that, no actual notice to them or to the company being shewn, the bank had no lien. *In re Herr Piano Co.*, 17 A. R. 333.

——— *Notice to Partner to Leave Firm.*]—See *O'Keefe* v. *Curran*, 17 S. C. R. 596.

Possession of Land—*Adverse Claimant.*]—Possession by an adverse claimant is no notice of his interest to a party parting with the estate. *Beck* v. *Moffatt*, 17 Gr. 601.

Promissory Note—*Alteration in.*]—See *Swaisland* v. *Davidson*, 3 O. R. 320.

——— *Stamps — Knowledge — Presumption—Agent.*]—Where the holder of a note has reasonable notice of the want of proper stamps, he must repel the presumption of knowledge by reasonable evidence, and notice to or knowledge of his attorney or agent must be considered his. *Waterous* v. *Montgomery*, 36 U. C. R. 1.

——— *Stamps—Notice to Agent—Actual Knowledge.*]—Notice to the attorney or agent of the holder of a note of the want of proper stamps must be considered notice to the holder. And, semble, the knowledge of such want of stamps must be actual knowledge, not constructive notice. *Waterous* v. *Montgomery*, 36 U. C. R. 1. See *Third National Bank of Chicago* v. *Cosby*, 43 U. C. R. 58.

——— *Want of Consideration—Notice to Holders.*] — In answer to a motion by the plaintiffs for summary judgment under rule 739 in an action upon a promissory note made by the defendant in favour of a trading company and indorsed by them to the plaintiffs, whose manager swore that they were the holders thereof in due course for value, the defendant made an affidavit in which he stated that he had never received any consideration for the note; that he made it for the accommodation of the company; that he had heard the local manager of the plaintiffs say that the note was not discounted by them, but was simply left with them; that he believed the local manager was aware when he received the note that it was an accommodation one, and was also aware of the arrangement entered into between the company and the defendant at the time the note was made; and that an accountant placed by the plaintiffs in charge of the books of the company was present when that arrangement was made. He did not state that the local manager had the requisite notice to affect the plaintiffs, nor the grounds of his belief that he had such notice; nor did he state that the accountant referred to had any other notice or knowledge of the agreement referred to, nor did he adduce any hearsay evidence in support of the defence attempted to be set up:—Held, that the defendant had not shewn satisfactorily that he had a good defence on the merits, nor disclosed such facts as should be deemed sufficient to entitle him to defend. *Bank of Toronto* v. *Keilty*, 17 P. R. 250.

Purchase of Land—*Notice of Will Destroyed but not Registered.*]—See *Re Davis*, 27 Gr. 199.

Purchaser for Value — *Assignee with Notice.*]—A purchaser, though he may have had notice, is entitled to the benefit of the position of the party under whom he claims where such a party was a purchaser for value, without notice. *Rogers* v. *Shortis*, 10 Gr. 243.

——— *Charge—Priorities.*]—In the case of a charge upon equitable property where the legal estate is outstanding, the defence of purchase for valuable consideration without notice is, in general, inapplicable, the rule being that all such charges take rank according to priority in point of time. *Utterson Lumber Co.* v. *Rennie*, 21 S. C. R. 218.

——— *Constructive Notice.*] — An unpatented and undeveloped mining property, the value of which was purely speculative and the Government dues on which were unpaid, was conveyed to the plaintiff, the consideration mentioned in the deed being $100, and he, for the expressed, but not actual, consideration of $750, conveyed the property for the purpose of selling it for his own benefit to one of the defendants, who, after holding it for a year, conveyed it to his co-defendant, who had no actual notice of the circumstances, in consideration of the release of a debt of $25:—Held, that the release of the debt was a sufficient consideration for the deed. Held, also, that, taking the circumstances and character of the property into account, the last grantee, who had made no inquiry, was not, by reason of the consideration expressed in the deeds to and from the plaintiff, put upon inquiry so as to affect him with constructive notice of the plaintiff's rights. *Moore* v. *Kane*, 24 O. R. 541.

Ship — *Towage—Public Notice—Government Regulations—Effect of.*] — Declaration, that defendants were owners of a line of towboats on the river St. Lawrence and St. Lawrence canals, and that they received a schooner of plaintiff's to be towed from Lachine to Kingston for reward, &c., and undertook to use due diligence and despatch in towing said schooner. Breach, want of diligence and unreasonable delay, &c. Pleas, 1. Non assumpserunt; 2. that they did use due diligence and despatch, &c. Defendants had entered into a contract with the Government to tow vessels on the river St. Lawrence. A public notice signed by the secretary of the board of works, and containing regulations for towage, &c., also signed by defendants, appeared in a public newspaper at Kingston. One of the defendants, when examined as a witness, proved the contract with the Government. The plaintiff's schooner was taken in tow at Lachine by one of the line, and through the tow boat was several times delayed and detained before reaching the place of destination:—Held, that the contract with the Government was sufficiently proved; that the line of the tow-boats having been established according to the printed notices imported the basis on which future constructive or implied agreements with individual shipowners were to be rested; that the plaintiff's vessel with a fixed and known destination having been taken in tow by a tug of defendants, the inference must be that she was to be towed through to her place of destination with due and reasonable diligence, according to the provisions contained in the public notice; and that without a special agreement on the subject she should not be dropped or deserted at the pleasure of the owner of the tug. *Gaskin* v. *Colvin*, 2 C. P. 527.

Tax Sale—*Purchaser for Value—Defect—Knowledge of Solicitor.*] — One T., being owner of certain land, executed a marriage settlement, under which his wife was entitled to the land for her life. The taxes afterwards fell into arrear, and the land was sold by the sheriff to pay them. By arrangement with the purchasers, T.'s widow became entitled to their interests in the property; and she having sold it to the defendant G., the purchaser at sheriff's sale conveyed to G. In a suit by the assignees of T.'s heirs to set aside this sale, G. claimed to be a purchaser for value without notice. The same solicitor acted for the vendors and the vendee G., in the transaction of the sale to G., and this solicitor knew then, and before, that T. had been the owner, and that he had executed a marriage settlement under which his wife was tenant for life, but he did not know or suspect she was bound to pay the taxes for which the land was sold, and he did not communicate to G. that she was under any such obligation:—Held, that G. was not affected by constructive notice of the liability. *Monro* v. *Rudd*, 20 Gr. 55.

Temperance Act — *Notice under—Proof of Signature.*]—In an action under s. 42 of the Temperance Act of 1864 (27 Vict. c. 18) by a wife against a tavern-keeper for supplying her husband with liquor after service of "a notice in writing signed by her" in accordance with the statute, there was no evidence to shew that she in fact signed the notice served, but merely that she signed a notice a copy of which was served:—Held, insufficient. *Gleason* v. *Williams*, 27 C. P. 93.

Title — *Notice of—Evidence — Conversations.*]—Where a party charged a defendant with notice of his title, and evidence was adduced of several conversations in which notice was distinctly proved to have been given to defendant:—Held, that those conversations were admissible in evidence, although not particularly mentioned in the bill, as the fact of notice, and not any particular conversation, was the point in issue. *Barnhart* v. *Patterson*, 1 Gr. 459.

——— *Notice of — Possession—Purchase for Value without Notice—Crown.*]—Possession is notice of the title of the party having possession without proving notice of such possession by the party charged with notice of such title. *Attorney-General* v. *McNulty*, 11 Gr. 281. Affirmed on rehearing. *Ib.* 581.

A plea of purchase for value without notice, cannot be set up against the Crown. *Ib.* 281.

Trial — *Proof of Will — Notice of Using Probate.*]—A notice under C. S. U. C. c. 32, s. 9, of the intention to use the probate of D.'s will, was served ten days before the actual day of trial, though not before the commission day of the assize: but a similar notice for the preceding assize was admitted to have been served in time:—Semble, that the first named notice was served in time, but that the plaintiff could avail himself of the other notice, for such a notice for one assize need not be repeated. *Dehart* v. *Dehart*, 26 C. P. 489.

Voter and Revising Officer — *Notice to.*]—See *Simmons* v. *Dalton*, 12 O. R. 505.

Way — *Origin of Right.*]—Held, that the defendant in this case, having notice of an actual travelled way across his land, was affected also with notice of the origin as well as the existence of the right. *Dixon* v. *Cross*, 4 O. R. 405.

See APPEAL, IX. 3—ARBITRATION AND AWARD, VII.—ASSESSMENT AND TAXES—CERTIORARI, II. 2—CHOSE IN ACTION—COMPANY, VII. 2—COURT OF APPEAL, II. 4—DISTRESS, III. 4—DIVISION COURTS, XI. 5—EJECTMENT, VI. 11, 12, 13, 14—EVIDENCE, XIV. 1 (b) INSURANCE, II., III.—JUSTICE OF THE PEACE—MASTER AND SERVANT, III. 2—MORTGAGE, VIII. 5 (e)—QUIETING TITLES ACT, VI.—RAILWAY V. 4 (d), XV. 5 (j)—REGISTRY LAWS, I. 2 — SESSIONS, II. 7 — TRUSTS AND TRUSTEES—VENDOR AND PURCHASER—WAY, VII. 13, 14.

NOTICE OF ACTION.

I. CASES IN WHICH IT IS NECESSARY, 4894.

II. FORM AND REQUISITES, 4902.

III. MISCELLANEOUS CASES, 4907.

I. CASES IN WHICH IT IS NECESSARY.

Arbitrator.] — Trespass does not lie against arbitrators if they had jurisdiction in the matter in which they acted. If they took an erroneous view of the merits, and mistook the law, or come to an unsound conclusion upon the evidence, when the matter referred to them was within their jurisdiction, they would be protected as justices would be protected who are authorized by statute to determine differences between masters and servants. *Kennedy* v. *Burness*, 15 U. C. R. at p. 487.

Held, following Kennedy v. Burness, 15 U. C. R. at p. 487, that arbitrators between school trustees and teacher, under the Common School Act, acting within their jurisdiction, are entitled to protection under C. S. U. C. c. 126, as persons fulfilling a public duty. *Hughes* v. *Pake*, 25 U. C. R. 95.

By-law.]—Notice of action for acts done under a by-law. *Carmichael* v. *Slater*, 9 C. P. 423.

Constable.]—The Imperial statute 21 Jac. I. c. 12 does not entitle constables to notice, or limit the period within which they may be sued. *Belch* v. *Arnott*, 9 C. P. 68.

To a chief constable in an action for malicious arrest. *McKay* v. *Cummings*, 6 O. R. 400.

In an action against constable and a justice of the peace for having and concealing a colt. *Howell* v. *Armour*, 7 O. R. 363.

To constable in an action of replevin for impounding cattle. *Ibbottson* v. *Henry*, 8 O. R. 625.

Where in an action against a constable for false arrest it is found by the jury that the defendant acted in the honest belief that he was discharging his duty as a constable, and was not actuated by any improper motive, he is entitled to notice of action, and such notice must state not only the time of the commission of the act complained of, but that it was done maliciously. *Scott* v. *Reburn*, 25 O. R. 450.

The object of the "Act to protect Justices of the Peace and others from Vexatious Actions," R. S. O. 1887 c. 73, is for the protection of those fulfilling a public duty, even though in the performance thereof they may act irregularly or erroneously, and notice of action in such case must allege that the acts were done maliciously and without reasonable and probable cause; but where a person entitled to the benefit of the Act voluntarily does something not imposed on him in the discharge of any public duty, such notice is not required. *Kelly* v. *Barton*, *Kelly* v. *Archibald*, 26 O. R. 608. Affirmed in appeal, 22 A. R. 522.

——— *Arrest without Warrant.*]—Where the defendant, a constable, had had no notice of action, it was left to the jury to say whether a constable who had arrested a man without a warrant acted under a fair and reasonable supposition that he was performing a

public duty:—Held, a proper direction, and a verdict for plaintiff was sustained. *Cottrell* v. *Hueston*, 7 C. P. 277.

A warrant to arrest the plaintiff was directed to one S. and all other peace officers of the county. The defendant was sworn in as a special constable to assist S., and he went alone, not having the warrant with him, and made the arrest. On action brought the jury found that the defendant believed he was acting in the execution of his duty:—Held, that under 14 & 15 Vict. c. 54 he was entitled to notice. *Sage* v. *Duffy*, 11 U. C. R. 30.

——— *Invalid Warrant.*]—A constable executing a warrant in good faith outside of the territorial jurisdiction of the magistrate issuing the same, without procuring the indorsement of a magistrate of the county where the arrest is made, is entitled to notice of action and to the protection of R. S. O. 1887 c. 73. *Alderich* v. *Humphrey*, 29 O. R. 427.

County Crown Attorney.]—The defendant, being county Crown attorney and clerk of the peace, received certain promissory notes belonging to the plaintiffs with the depositions from a magistrate on the committal of certain persons for obtaining such notes by false pretences. At the trial before the county Judge the prisoners were acquitted, the Judge saying that the prosecutors' remedy, if any, was in chancery. The defendant refused to give the notes up to the plaintiffs on demand, saying that he would return them to the committing magistrate, and the plaintiffs thereupon brought trover and detinue. The trial Judge having found that the defendant acted bonâ fide in such refusal:—Held, that he was entitled to notice of action under C. S. U. C. c. 126; that he was an officer fulfilling a public duty within that statute; and that the refusal, though erroneous, was an act done by him in the supposed discharge of such duty. *McDougall* v. *Peterson*, 40 U. C. R. 95.

Division Court Bailiff — *Excessive Levy.*]—A bailiff of a division court was held not entitled to notice, under 13 & 14 Vict. c. 53, s. 107, of an action to recover the excess of money levied under an execution. *Dale* v. *Cool*, 6 C. P. 544.

——— *Execution.*]—The defendant C., a division court bailiff, was employed by the plaintiff to sell certain goods under a chattel mortgage given to the plaintiff by one L. The defendant C. advertised and took possession of them, and afterwards executions came into his hands against L., under which the attorney for the execution creditors told him to seize these goods. The plaintiff claimed them, and obtained judgment in his favour upon an interpleader issue. The defendant C. refused on demand to give up the goods to the plaintiff until he should consult the attorney, who told him to use his own judgment. The plaintiff having brought trespass and trover:—Held, that C. was liable; that he was not entitled to a demand of perusal and copy of the warrants under which he acted, for the action was not brought by reason of any defect in the process; and that the jury was warranted in finding, as they did, that he did not believe that he was discharging his duty as bailiff in refusing to give up the goods after the decision of the interpleader, which finding disentitled him to notice of action. *Stewart* v. *Cowan*, 40 U. C. R. 346.

——— *Execution — Form of Notice.*] — C. S. U. C. c. 126, s. 10, requiring notice of action, does not apply to the case of a division court bailiff acting under an execution which is specially provided for by c. 19, s. 193; and a notice thereof to such bailiff not having indorsed upon it the place of abode of the plaintiff, as required by the former, but not by the latter Act, was held sufficient. *Stephens* v. *Stapleton*, 40 U. C. R. 353. Approved and followed in *McMartin* v. *Hurlburt*, 2 A. R. 146.

——— *Execution Creditor.*]—Want of notice to a bailiff of a division court, acting under 4 & 5 Vict. c. 3, must be pleaded specially. But while a bailiff, seizing goods under an execution, is entitled to notice, the plaintiff in the execution is not, as he is not a "person acting in the execution of the act." *Timon* v. *Stubbs*, 1 U. C. R. 347; *Fowke* v. *Robertson*, 6 O. S. 572.

——— *Indemnity.*]—The statement of a bailiff, that "he believed the cattle to be the plaintiff's," but that he was indemnified and had to sell when he seized them in execution against the person in possession, does not make a notice unnecessary. *Sanderson* v. *Coleman*, 4 U. C. R. 119.

A division court bailiff is entitled, under C. S. U. C. c. 19, s. 193, to notice of action for seizure and sale of goods under execution, although he is indemnified and directed to sell by the execution creditor. *Lough* v. *Coleman*, 29 U. C. R. 367.

See also *McCance* v. *Bateman*, 12 C. P. 469.

——— *Pleading.*]—The bailiff of a division court, acting in the discharge of his duty as such, is entitled to notice; and that objection is open to him under the plea of not guilty by statute. *Dale* v. *Cool*, 4 C. P. 460.

A bailiff is entitled to notice of an action upon the statutory covenant, for execution, seizure, and sacrifice of plaintiff's goods. Such action must be brought within six months; and the defence may be raised under the general issue by statute. *Pearson* v. *Ruttan*, 15 C. P. 79.

——— *Sureties.*]—Quære:—Are the sureties of a division court bailiff, in a joint action against principal and sureties, entitled to notice of action to themselves? 2. Can they plead the want of notice to the bailiff in their own protection? 3. Can they, in an action against themselves, take advantage of the want of notice to the bailiff, or of any other defence that would have been open to the latter? Held, in this case, as the recovery must be against all or none, that the discharge of the principal involved that of the sureties. *Pearson* v. *Ruttan*, 15 C. P. 79.

——— *Unsealed Warrant.*]—Bailiffs of a division court are entitled to notice of action for seizing goods, although acting under a warrant without seal. *Anderson* v. *Grace*, 17 U. C. R. 96.

See Hanna v. *Johnston*, 3 O. R. 100; *Pardee* v. *Glass*, 11 O. R. 275.

Division Court Clerk.]—Action against a division court clerk for money received under a judgment:—Held, following Dale v. Cool, 6 C. P. 544, defendant not entitled to notice. *McLeish* v. *Howard*, 3 A. R. 503.

Execution Creditor.]—Held, that a plaintiff in a division court suit who, on an execution against the goods of A., indemnified the bailiff for seizing and selling the goods of B., was not entitled to notice, or to the protection as to venue. *Dollery* v. *Whaley*, 12 C. P. 305.

Fishery Inspector—*31 Vict. c. 60.*]—See *Venning* v. *Steadman*, 9 S. C. R. 206.

Government Railway Act.]—See *Kearney* v. *Oakes*, 18 S. C. R. 148.

Justice of the Peace.]—In an action for wrongful arrest, though the conviction made by the defendant is void, he is entitled to notice of action if he was acting in his official capacity as a magistrate, and had jurisdiction over the plaintiff in the subject-matter. *Haacke* v. *Adamson*, 14 C. P. 201.

——— *Acting without Information.*]—The magistrate having acted in direct contravention of the statute, in issuing a warrant without the proper information, or even an oral charge against the plaintiff, and there being no evidence of bona fides on his part, the court held that he was not entitled to notice. *Fried* v. *Ferguson*, 15 C. P. 584.

——— *Acting without Jurisdiction.*]—A magistrate is entitled to notice, though he has acted without jurisdiction. Where it was clear that defendant had acted as a justice, and there was no evidence of malice except the want of jurisdiction:—Held, not necessary, to entitle him to notice, to leave it to the jury to say whether he acted in good faith. *Bross* v. *Huber*, 18 U. C. R. 283.

A magistrate having entertained a case under the Master and Servant Act, C. S. U. C. c. 75, as amended by 20 Vict. c. 33, and convicted the plaintiff, notwithstanding that more than a month had elapsed since the termination of the engagement, and although he was told that he had no jurisdiction, and was shewn a professional opinion to that effect and referred to the statute:—Held, that the jury were warranted in finding that he did not bonâ fide believe that he was acting in the execution of his duty in a matter within his jurisdiction; and that he was therefore not entitled to notice. *Cummins* v. *Moore*, 37 U. C. R. 130.

In this case the magistrate having, in the honest belief that he was acting in the execution of his duty as such, issued the warrant of commitment after payment of the costs adjudged, was, though acting without jurisdiction, entitled to notice of action, and no notice having been given, the action failed. *Sinden* v. *Brown*, 17 A. R. 173. Approved and followed in *McGuinness* v. *Dafoe*, 27 O. R. 117, 23 A. R. 704.

——— *Illegal Warrant.*]—Semble, that the fact of a magistrate issuing a warrant without the limits of the county for which he acts, does not necessarily disentitle him to notice. *Fried* v. *Ferguson*, 15 C. P. 584.

——— *Judgment by default.*]—In trespass against a magistrate for false imprisonment and seizing and selling goods and chattels, where he suffers judgment by default, it is unnecessary for the plaintiff to prove that he gave notice of action or commenced his suit within six months. *Mills v. Conger*, 4 O. S. 383.

——— *Jury's Finding as to Bona Fides.*]—If it be doubtful whether defendant was acting in the execution of his duty, it should be left to the jury to say whether they believed he was acting as a magistrate or not; and if they find in his favour on that point notice must be proved. *Carswell* v. *Huffman*, 1 U. C. R. 381.

Where the plaintiff's evidence shews that the defendant sued in trespass was acting bonâ fide as a justice of the peace, and the jury so find, the plaintiff must prove notice of action; and this though defendant has pleaded only the general issue, without adding "by statute," in the margin. *Marsh* v. *Boulton*, 4 U. C. R. 354.

Held, that in this case the evidence fully warranted a finding that defendants were not acting or intending to act as magistrates or peace officers, but as interested parties; and that this was a question properly left to the jury to determine. *Cusick* v. *McRae*, 11 U. C. R. 509.

Where a magistrate acts clearly in excess of or without jurisdiction, he is nevertheless entitled to notice, unless the bona fides of his conduct be disproved; but the plaintiff may require that question to be left to the jury, and if they find that he did not honestly believe he was acting as a magistrate, he has no claim to notice. *Neill* v. *McMillan*, 25 U. C. R. 485.

Held, that in an action against a justice where no notice was given, the plaintiff was entitled to have submitted to the jury the question whether defendant acted bonâ fide, with an honest belief in his right so to act, so as to entitle him to a notice of action under R. S. O. 1877 c. 73. *Neill* v. *McMillan*, 25 U. C. R. 485, followed. *Allen* v. *McQuarrie*, 44 U. C. R. 62.

——— *Not Returning Conviction.*]—In an action against a justice of the peace for not returning a conviction the defendant is not entitled to notice. *Grant q. t.* v. *McFadden*, 11 C. P. 122. See also *Rauney q. t.* v. *Jones*, 21 U. C. R. 370.

——— *Penalty.*]—In an action for a penalty for acting as a justice of the peace without qualification, &c., defendant is not entitled to notice. *Crabb q. t.* v. *Longworth*, 4 C. P. 283. See also *Rauney q. t.* v. *Jones*, 21 U. C. R. 370.

License Commissioners.]—A notice of action is necessary in an action for damages against a board of license commissioners acting under R. S. O. 1887 c. 194. *Leeson* v. *License Commissioners of Dufferin*, 19 O. R. 67.

Mayor.]—The defendant was sued as mayor of a town for refusing to sign an order to enable the plaintiff to obtain a saloon

license:—Held, that, as it must be presumed that the defendant, in refusing to sign the order, intended to act in the discharge of his official duty, he was entitled to notice. *Moran* v. *Palmer*, 13 C. P. 528.

Municipal Corporation.] — Municipal corporations are not within C. S. U. C. c. 126, and therefore are not entitled to notice of action. *Hodgins* v. *United Counties of Huron and Bruce*, 3 E. & A. 169.

The courts of Queen's bench and common pleas had previously differed as to the right of municipal corporations to notice of action; the Queen's bench holding that they were not, the common pleas that they were, entitled to notice. See in the bench: *Brown* v. *Town of Sarnia*, 11 U. C. R. 215; *Snook* v. *Town of Brantford*, 13 U. C. R. 621; *Magrath* v. *Township of Brock*, ib. 629; *Perdue* v. *Township of Chinguacousy*, 25 U. C. R. 61. See in the pleas: *Croft* v. *Town of Peterborough*, 5 C. P. 141; *Reid* v. *Town of Hamilton*, ib. 269; *Barclay* v. *Township of Darlington*, ib. 432; *Allen* v. *City of Toronto*, 6 C. P. 354. See also *Prouse* v. *Glenaig*, 13 C. P. 560; *Harrold* v. *County of Simcoe*, 16 C. P. 43.

A municipal corporation is not entitled to notice of action under the Act to protect justices of the peace and others from vexatious actions, R. S. O. 1887 c. 73. Hodgins v. Counties of Huron and Bruce, 3 E. & A. 169, followed. Defence of want of such notice struck out upon summary application. *McCarthy* v. *Township of Vespra*, 16 P. R. 416.

By 25 Vict. c. 16, s. 84 (N.B.), and amending Acts, relating to highways, the . . . privileges and immunities formerly vested in commissioners of roads are declared to be vested in the council of the town of Portland. By another Act no action could be brought against a commissioner of roads unless notice thereof was given. The town of Portland afterwards became part of the city of St. John, and an action was brought for injuries caused by a broken plank in a sidewalk in what was formerly the town of Portland:—Held, that notice was not necessary; the liability did not depend on s. 84 of 25 Vict. c. 16, but on the statutory duty of the council to keep the streets in repair; the only "privilege or immunity" to the commissioner was exemption from performance of statute labour. *City of St. John* v. *Christie*, 24 S. C. R. 1.

——— *Breach of Contract.*] — Action against a municipal corporation for not providing a proper supply of pure water for the plaintiffs' elevator according to agreement, and for negligently and knowingly allowing the water supplied by them to become impregnated with sand, which greatly damaged the elevator:—Held, that the action was one for breach of contract, and therefore the statutory defences and the defence of want of notice of action, &c., under statutes giving the same protection as that given to justices of the peace in the execution of their duties, were inapplicable. *Scottish Ontario and Manitoba Land Co.* v. *City of Toronto*, 24 A. R. 208.

——— *Non-repair of Highway—Notice of Accident.*]—See WAY.

Municipal Councillors.] — Notice to municipal councillors, in action for defrauding the corporation:—Held, not necessary. *Town of Chatham* v. *Houston*, 27 U. C. R. 550.

——— *Pathmaster.*]—Two of the defendants, members of a township council, were appointed by resolution of the council a committee to rebuild a culvert, and they personally superintended the work, and were paid for doing it, but there was no by-law authorizing their appointment or payment. The other defendants were employed by them and did the work. The plaintiff met with an accident on the highway near the culvert owing, as she alleged, to the negligence of the defendants in obstructing the road with their building materials, and brought this action for damages for her injuries:—Held, that the defendants were not fulfilling a public duty, and were not entitled to notice of action under R. S. O. 1887 c. 73. Held, also, that the statute is applicable only to officers and persons fulfilling a public duty for anything done by them in the performance of it, when it may be properly averred that the act was done maliciously and without reasonable and probable cause, and therefore not to actions for negligence in the doing of the act. Held, lastly, that one of the defendants who was pathmaster for the beat in which the culvert was situated, did not come within the protection of the statute as pathmaster, because he was not employed as such in doing this work, but as a day labourer. *McDonald* v. *Dickinson*, 25 O. R. 45. Affirmed in appeal, 21 A. R. 485.

Non-feasance.]—Notice is unnecessary where the action is for an omission, not an act done. *Harrison* v. *Berga*, 30 U. C. R. 324; *Harrold* v. *Corporation of Simcoe*, 16 C. P. 43.

Official Assignee.]—An official assignee in insolvency sued for trespass in taking and selling goods, is not entitled to notice. *Archibald* v. *Haldan*, 30 U. C. R. 30.

Owner Arresting Thief.]—A person arresting another while engaged in the act of stealing his property is entitled to notice under 4 & 5 Vict. c. 25, s. 67. *McDonald* v. *Cameron*, 2 U. C. R. 406.

Pathmaster.]—The defendant being pathmaster, and assuming to act as such, moved the plaintiff's fences, the effect of which was to take off land from the plaintiff's lot and add it to the defendant's. No notice having been given, it was left to the jury to say whether defendant acted bonâ fide in the execution of his duty, and they having found that he did, the court refused to disturb the verdict. *Helliwell* v. *Taylor*, 16 U. C. R. 279.

A pathmaster is "an officer or person fulfilling a public duty" within the meaning of R. S. O. 1887 c. 73, s. 1, and for anything done by him in the performance of such public duty he is entitled to the protection of the statute; but where, professing to act as a public officer, he seeks to promote his private interest by some act, he disentitles himself to the protection of the statute, and may be proceeded against for such act as if he were a private individual. *Stalker* v. *Township of Dunwich*, 15 O. R. 342.

Person Discharging Public Duty.]—Case for maliciously suing out an attachment in a division court:—Held, that defendant was not entitled to notice, for the statute was intended to protect persons acting under it in the discharge of some duty, not for their own benefit. *Pall* v. *Kenney*, 11 U. C. R. 350.

Post Office Inspector.]—A post office inspector is not entitled to notice of an action to recover damages for defamatory statements made by him. Judgment in 26 O. R. 528 affirmed. *Hance* v. *Burnham*, 23 A. R. 90.

Pound-keeper.]—A pound-keeper, acting as such, is entitled to notice of action under C. S. U. C. c. 126, and it must be averred in the declaration that in discharging his duty he acted maliciously and without reasonable cause. *Davis* v. *Williams*, 13 C. P. 365.

Defendant was in charge of the pound of the city of Toronto as pound-keeper, having so acted for seven or eight years. He had been appointed by the city commissioner at a yearly salary, which had been paid until a short time before the act sued for (the impounding of the plaintiff's pigs), when some question was raised as to the legality of his appointment. It appeared that after the seizure he had offered to release the pigs on payment of the pound charges only; and, according to one witness, he had said he was not pound-keeper. He had not been appointed by by-law, nor given the requisite bond. The Judge of the county court, trying the case without a jury, found that the defendant was acting as pound-keeper in good faith, and believed, on reasonable grounds, that he was such pound-keeper:—Held, that the finding was fully justified, and that the defendant was clearly entitled to notice of action. *Denison* v. *Cunningham*, 35 U. C. R. 383.

Registrar of Deeds—*Action to Recover Fees.*]—See *County of Bruce* v. *McLay*, 11 A. R. 477.

——— *Excessive Fees.*]—A registrar is entitled to notice of an action brought against him to recover back fees charged by him in excess of those allowed by the statute 31 Vic. c. 20 (O.). *Ross* v. *McLay*, 40 U. C. R. 87.

——— *Negligence.*]—Notice of action to registrar for negligent omission in certificate:—Held, unnecessary. *Harrison* v. *Brega*, 20 U. C. R. 324.

——— *Refusal to Give Statement.*]—Held, that a registrar was not entitled to notice of an action against him for neglecting and refusing to furnish a statement in detail of fees charged by him, as required by 38 Vict. c. 17, s. 7 (O.), and claiming a mandamus; such neglect and refusal being an act of omission. *Ross* v. *McLay*, 40 U. C. R. 83.

——— *Wrongfully Registering Documents.*]—See *Ontario Industrial Loan and Investment Co.* v. *Lindsey*, 3 O. R. 66.

Replevin.]—Notice of action is not necessary in replevin. *Folger* v. *Minton*, 10 U. C. R. 423; *Kennedy* v. *Hall*, 7 C. P. 218; *Applegarth* v. *Graham*, 7 C. P. 171; *Lewis* v. *Teale*, 32 U. C. R. 108.

Returning Officer.]—A returning officer is not entitled to notice in an action for penalties under the Ontario Election Act, R. S. O. 1877 c. 10. *Walton* v. *Apjohn*, 5 O. R. 65.

Revenue Officer—*Ratification.*]—Where the seizure was by a person not then authorized, but whose act was subsequently adopted and sanctioned by the collector, he was held entitled to notice under the Customs Acts. *Wadsworth* v. *Murphy*, 2 U. C. R. 120.

A person who, acting as a revenue officer, or conceiving that he has authority so to act, seizes goods, is entitled to notice without the necessity of proving his commission or appointment. *Wadsworth* v. *Murphy*, 2 U. C. R. 190.

School Trustee.]—Held, in deference to former decisions, that a school trustee sued for any act done in his corporate capacity, is entitled to notice, and this notwithstanding that he may have signed a warrant individually instead of in his corporate capacity; if he was acting in the discharge of his duty as trustee. *Spry* v. *Mumby*, 11 C. P. 285.

Sheriff.]—A sheriff is not entitled to notice of an action against him arising out of his execution of a fi. fa. in a private suit. *McWhirter* v. *Corbett*, 4 C. P. 203.

Surveyor of Streets.]—Notice of action to surveyor of streets, under 24 Geo. II. c. 44:—Held, not necessary. *McFarlane* v. *McDougall*, 3 O. S. 73.

Tax Collector.] — A collector of school taxes, who committed a trespass while acting under a warrant issued by the trustee's authority, was held entitled to notice of action. *Spry* v. *Mumby*, 11 C. P. 285.

Tax collector sued for damages in respect of acts done by him in execution of his duty is entitled to the benefit of R. S. O. 1887 c. 73. *Howard* v. *Herrington*, 20 A. R. 175.

II. Form and Requisites.

Attorney's Name and Residence.] — The name and place of residence of the plaintiff's attorney were not indorsed on the notice, but added inside at the foot of it:—Held, sufficient; and that, at all events, such objection, not having been taken at the trial, could not be made in banc. *Bross* v. *Huber*, 15 U. C. R. 625.

Attorney's Name — *Plaintiff's Name.*]—Defendant was sued as mayor of a town for refusing to sign an order to enable plaintiff to obtain a saloon license. The notice of action was signed by plaintiff, with the name of plaintiff's attorney indorsed thereon:—Held, that the notice was insufficient, not being indorsed with the name and place of abode of the plaintiff and of his attorney or agent who served it. *Moran* v. *Palmer*, 13 C. P. 528.

The indorsement on the notice of action was that it was "given by V. M., of Queen street, in the city of Brantford, in the county of Brant, solicitor for the within named James Jones." Within was the notice, namely, "I do hereby as solicitor for and on behalf of

James Jones, of the village of Jarvis, in the county of Haldimand, farmer," &c.:—Held, that the notice taken in connection with the Interpretation Act, 31 Vict. c. 1. s. 29 (O.), was sufficient. Moran v. Palmer, 13 C. P. 528, not followed as decided prior to said Act; but quære, whether any notice of action was necessary. *Jones* v. *Grace*, 17 O. R. 681.

Attorney's Residence.]—It must declare the place of residence of the attorney. The subscription, therefore, of the attorney at the bottom of the notice, "A. B., attorney for the said C. D., Simcoe, Talbot District," was held insufficient. *Bates* v. *Walsh*, 6 U. C. R. 498.

Held, that in the notice set out in this case, the residence of plaintiff's attorney was sufficiently stated. *Gillespie* v. *Wright*, 14 U. C. R. 52.

——— *Court.*]—A notice of action given to a justice of the peace as follows:—"To John G. Bowes, of the city of Toronto, Esquire, — I, Annie Armstrong, of the city of Toronto, in the Province of Canada, spinster, residing with my father, James Armstrong, at No. 148 Duchess street, in the said city of Toronto," &c., signed by the plaintiff, and indorsed "C. P. Armstrong v. Bowes—Notice of Annie Armstrong to John G. Bowes.—The within named Annie Armstrong resides at No. 148 Duchess street, in the city of Toronto. Cameron & McMichael for the plaintiff:"—Held, insufficient, not having the place of abode, or business, of the attorney indorsed, nor the court in which the action was to be brought stated. *Armstrong* v. *Bowes*, 12 C. P. 539.

Conversion.] — Held, that the following notice of action, "And also for that you, on," &c., "at," &c., "did cause the horse upon which the said J. U. was then riding to be seized, taken, and led away, and the said J. U. to be obliged to dismount, and give up the said horse, and converted and disposed of the said horse to your own use, and also, for that you caused the saddle and bridle and halter then on the said horse to be seized, taken and carried away, and to be converted and disposed of to your own use, and other wrongs to the said J. U. then and there did," &c., was sufficient to enable the plaintiff to recover the value of the horse as being his property. *Upper* v. *McFarland*, 5 U. C. R. 101.

Court.]—A notice to a division court bailiff under C. S. U. C. c. 19, s. 193, stated that the writ would be sued out of the county court of Brant, but it was issued from the county court of Wentworth:—Held, notice insufficient. *Buck* v. *Hunter*, 20 U. C. R. 436.

A notice that the suit will be brought in the court of Queen's bench or common pleas is insufficient; the particular court intended must be specified. Where this objection had not been taken at the first trial, and a new trial was granted on other grounds:—Held, that the defendant could urge it at the second trial. *Bross* v. *Huber*, 18 U. C. R. 282; *Nevill* v. *Township of Ross*, 22 C. P. 487.

——— *Amendment.*] — The particular court in which the action is to be brought must be stated, and the failure to state it is such a defect as could not be amended under the Administration of Justice Act, 1873. *McCrum* v. *Foley*, 6 P. R. 164, 10 C. L. J. 105.

Defective Sidewalk.] — A notice of action against a municipal corporation upon a claim arising out of a defective sidewalk is sufficient if it states the cause of the accident together with the name of the street and the particular side of the street and reasonable information as to locality so as to enable the corporation to investigate. It is not necessary to mention the exact locality. *McQuillan* v. *Town of St. Mary's*, 31 O. R. 401.

Description of Accident.] — In an action against a municipal corporation for injuries caused by the defective state of a sidewalk the following letter from plaintiff's solicitor was relied on as a sufficient notice of action: "As it is Mr. Christie's intention to claim damages from you for such injuries, I give you this notice that a prompt inquiry into the circumstances may be made and such damages paid as Mr. Christie is entitled to:"—Held, that the letter of the solicitor was not a sufficient notice of action under the statute. If notice of action was necessary the want of it could not be relied on as a defence without being pleaded. *City of St. John* v. *Christie*, 21 S. C. R. 1.

Description of Defendant.]—No particular addition or description of the magistrate need be given in the notice. *Haacke* v. *Adamson*, 14 C. P. 201.

Division Court Clerk.] — Semble, that notice to a division court clerk is sufficient if it complies with C. S. U. C. c. 19, ss. 193, 194, though it may not contain all that is required by c. 126, for the latter Act does not overrule the former, but they establish rules for distinct cases. *McPhatter* v. *Leslie*, 23 U. C. R. 573.

Justice of the Peace — *Malice.*] — A notice of action, founded upon a cause of action arising in a case in which the justice had jurisdiction, must allege that the justice acted "maliciously, and without reasonable and probable cause." *Howell* v. *Armour*, 7 O. R. 363.

Mistake in Amount.] — The warrant directed T. to levy £1 11s. 6d., together with the charges of distress and sale. The notice of action described the warrant as one directing T. to levy a certain large sum of money, to wit, £1:—Held, no variance. *Higson* v. *Ward*, 8 U. C. R. 502.

Mistake in Name.] — The warrant to levy was stated in the notice of action to have been directed to William Thompson, when it really was directed to William H. Thompson:—Held, not fatal. *Higson* v. *Ward*, 8 U. C. R. 502.

Petty Trespass.]—In the notice for an act done under the Petty Trespass Act, it is necessary to specify the form of action intended. *Wadsworth* v. *Mewburn*, 6 O. S. 432.

Place.]—Notice of action must contain a statement of the place where the trespass or injury was committed. *Kemble* v. *McGarry*, 6 O. S. 570.

A notice of action against a magistrate must distinctly specify the place where the act complained of was done. *Madden* v. *Shewer*, 2 U. C. R. 115.

The notice of action in this case against magistrates for false imprisonment was held sufficient as to statement of place where injury committed. *Connolly* v. *Adams*, 11 U. C. R. 327.

A notice of action which wrongly states the name of the township in the county in which the arrest took place is insufficient. *Alderick* v. *Humphrey and Young*, 29 O. R. 427.

——— *Variance.*] — The place where the plaintiff was imprisoned must be correctly stated; the fact that the injury took place in the same district, though not at the exact place named in the writ, will not make the variance less fatal. *Cronkhite* v. *Sommerville*, 3 U. C. R. 129.

Plaintiff's Residence.] — A notice describing plaintiff's place of abode as "of the township of Garafraxa, in the county of Wellington, labourer," without giving the lot and concession:—Held, sufficient. *Neill* v. *McMillan*, 25 U. C. R. 485. Followed in *McDonald* v. *Stuckey*, 31 U. C. R. 577.

Seizure of Chattels.]—"For that you (the defendant) on," &c., "at," &c., "seized and took away divers goods and chattels of the plaintiff," stating the value, "and converted and disposed thereof to your own use, and other wrongs to the said (the plaintiff) did, to his great damage of £50, and against the peace of our lady the Queen."—Held, sufficient. *Gillespie* v. *Wright*, 14 U. C. R. 52.

Signature by Attorney.] — It is sufficient if notice of action under the Division Courts Act, 4 & 5 Vict c. 3, s. 61, be signed by the attorney of the party complaining. *Kemble* v. *McGarry*, 6 O. S. 570.

Time and Place.]—Semble, a notice to a magistrate is bad if it omit the time and place of alleged trespass. *Friel* v. *Ferguson*, 15 C. P. 584.

The notice stated a trespass on the 18th October, and on divers other days. The goods were seized on that day, but returned, and seized on the 18th November and sold:—Held, notice sufficient. *Oliphant* v. *Leslie*, 24 U. C. R. 398.

In an action against a justice of the peace the notice stated that defendant assaulted plaintiff, imprisoned him for four days, and caused him to be illegally arrested, and gave him into the custody of a constable, and illegally committed and sent him in such custody to the gaol at the town of Lindsay, and caused him there to be confined for a long time:—Held, insufficient, as omitting to state where and when the assault took place, and the evidence not being confined to the imprisonment at Lindsay. *Parkyn* v. *Staples*, 19 C. P. 240.

Notice of action held insufficient in stating no time when the grievance complained of was committed. *Sprung* v. *Ande*, 23 C. P. 152.

A notice of action in trespass under the Division Courts Act, C. S. U. C. c. 19, s. 193:—Held, insufficient for not stating the time and place of the alleged trespass. There is no substantial difference in this respect between the form of notice required under that Act, and under C. S. U. C. c. 126. *Moore* v. *Gidley*, 32 U. C. R. 233.

The notice of action stated the time of the trespass committed as "on or about the 28th of May," and the place was described as "at or near the west half of lot 31." The jury found that the seizure took place on the 23rd May; but the evidence shewed that it was only a technical seizure, and that the real cause of action was for the seizure on the 28th May, which was followed by the removal and sale. The jury also found that the trespass was committed on the east half of lot 32:—Held, that the notice was sufficient, as reasonable certainty only is required, so as to identify the acts complained of, and prevent the defendant from being misled. *Langford* v. *Kirkpatrick*, 2 A. R. 513.

——— *Service—Pleading.*]—In an action against justices of the peace for malicious arrest, the notice of action stated that the cause of action arose "in the month of May last, 1881, at said village of M. and in the town of P.;" and was served at the defendant C.'s head office on his agent there, also at his place of residence, and on his solicitors. The statement of claim alleged the service of such notice. The only defence was "not guilty by statute R. S. O. 1877 c. 73, s. 11," the section requiring notice being s. 10:—Held, that the statement of time and place as well as the service was sufficient. Oliphant v. Leslie, 24 U. C. R. 398, followed. No objection could now be taken to the notice, as under the O. J. Act and rules, the particular section of the statute relied on should have been pleaded. Semble, the omission to give notice of action must be pleaded, or the section which requires it referred to in the plea of "not guilty by statute." *Bond* v. *Conmee*, 15 O. R. 716, 16 A. R. 398.

Trespass.]—Trespass against magistrates for false imprisonment. The notice set out in the case held sufficient as to form of action to be brought. *Connolly* v. *Adams*, 11 U. C. R. 327.

A notice of action alleging that the defendant on the 8th September, 1893, wrongfully, illegally, and without reasonable and probable cause, issued his warrant and caused the plaintiff to be arrested and kept under arrest on a charge of arson, and on said 8th September, maliciously, illegally, and wrongfully, and without any reasonable and probable cause, caused the plaintiff to be brought before him and to be committed for trial, and to be confined in the common gaol, is a sufficient notice of action in trespass. Semble, per curiam, that notice of action was necessary. Sinden v. Brown, 17 A. R. 173, approved and followed. Judgment in 27 O. R. 117 affirmed. *McGuiness* v. *Dafoe*, 23 A. R. 704.

Variance.]—In a notice of action to a justice of the peace under 24 Geo. II. c. 44, the date of the warrant as stated in the notice varied from the date as proved:—Held, not fatal. In the notice the warrant was stated to have been directed to William Thompson, whereas it was really directed to William H.

Thompson:—Held, not a fatal variance. The warrant directed Thompson to levy £1 11s. 6d., together with the charges of distress and sale. The notice of action described the warrant as one directing Thompson to levy a certain large sum of money, to wit, the sum of £4:—Held, no variance. *Higson* v. *Ward*, 8 U. C. R. 502.

Workmen's Compensation for Injuries Act.]—Solicitors for the plaintiff before action wrote as follows to the defendant:—"We have been consulted by Mr. J. Cox concerning injuries sustained by him while in your employ by which he lost his left hand. We have received instructions to commence an action against you for damages unless the matter is satisfactorily settled without delay. If you intend contesting this suit, kindly let us have the address of your solicitors who will accept service of process on your behalf:"—Held, that this was sufficient notice of action to satisfy the requirements of 49 Vict. c. 28, ss. 7 and 10 (O.) Stone v. Hyde, 9 Q. B. D. 76, followed. *Cox* v. *Hamilton Sewer Pipe Co.*, 14 O. R. 599.

A notice of action under the Workmen's Compensation for Injuries Act does not require to be signed, or to be on behalf of any one. *Mason* v. *Bertram*, 18 O. R. 1.

III. Miscellaneous Cases.

Action Brought by Different Attorney.]—It is no objection that the plaintiff declares by a different attorney from the one by whom the notice was given and process issued. *McKenzie* v. *Mewburn*, 6 O. S. 486.

Action Brought too soon.]—It is sufficient if it appear by the nisi prius record that a month had elapsed between the service of notice and filing of the declaration, and if the writ were really sued out too soon, it must be shewn by the defendant. *Haight* v. *Ballard*, 2 U. C. R. 29.

Division Court Bailiff — *Pleading.*]—The plaintiff declares in trespass for breaking and entering his close in the Niagara District, &c. Defendant pleads that, being bailiff of a division court in the district of Brock, he committed the alleged trespass in discharge of his duty as such, and that no notice was given to him of the action one month before it was brought. Demurrer to the plea, on the ground that it is not shewn by what authority the defendant, though a bailiff in the district of Brock, acted in the district of Niagara, where the trespass is laid:—Held, plea bad. *Davis* v. *Moore*, 4 U. C. R. 209.

Form—*Allegations too Wide.*]—The first count and the notice alleged that defendant, on the 30th April, 1872, assaulted and imprisoned the plaintiff. The plaintiff's evidence, on which he obtained a verdict, shewed that about the 25th April he was brought before defendant, a justice of the peace, on defendant's warrant, requiring his appearance, and ordered to find sureties for the peace, and that on the 30th he was again arrested and confined in gaol, under defendant's warrant issued on that day for disobedience of the previous order:—Held, that for the cause of action proved the notice was clearly insufficient; but semble, that the plaintiff might have met the objection by confining his evidence and claim to the imprisonment on the 30th. *Sprung* v. *Ande*, 23 C. P. 152.

——— *Waiver.*] — A defendant, after accepting service of an informal notice, added, "and agree to accept the same as a sufficient notice of action to me under the statute:"—Held, that he could not afterwards rely on a defect in the notice. *Donaldson* v. *Haley*, 13 C. P. 87.

Justice of the Peace—*Proof of Allegations in Notice.*]—In an action against a justice of the peace a plaintiff need not prove every trespass described in his notice; he may prove what he can and recover for what he proves, provided it be an injury stated in the notice. *Byrnes* v. *Wild*, 7 U. C. R. 104.

Libel.]—The statement of claim must be confined to the matters complained of in the notice. *Obernier* v. *Robertson*, 14 P. R. 533.

Objection not Taken at Trial.]—The objection that no notice of action was necessary not having been taken at the trial:—Held, that it could not be raised in term. *Armstrong* v. *Bowes*, 12 C. P. 539. See also *Moran* v. *Palmer*, 13 C. P. 528.

Pleading — *Objection.*] — As to raising objection to want of notice of action by plea. See *Verratt* v. *McAulay*, 5 O. R. 313; *McKay* v. *Cummings*, 6 O. R. 400.

Proof of Service.]—Held, that the following evidence of a bailiff, as to the service of the notice—"He and two others held the respective papers while they were read and compared, but having allowed plaintiff's attorney to keep in the meantime the original with which the copies were thus compared, and not having marked it, he could not swear with certainty that the papers served were copies of that document,"—was sufficient to go to the jury. *Byrnes* v. *Wild*, 7 U. C. R. 104. See also *Gardner* v. *Burwell*, Tay. 54.

Protection Act not Retroactive.]—16 Vic. c. 180:—Held, not retrospective, so as to make the notice of action required by it applicable to causes of action accrued before the Act, or to compel the party injured to sue in case and not in trespass. *Cusick* v. *McRae*, 11 U. C. R. 509.

Where an action was commenced after 14 & 15 Vict. c. 54, for a trespass committed before, against an officer protected by this Act but not previously:—Held, that the statute would not apply, and that the defendant was therefore not entitled to notice. *White* v. *Clark*, *Parsill* v. *Clark*, 11 U. C. R. 137.

See also *White* v. *Clark*, 10 U. C. R. 490.

Time for Action.] — Notice of action served on the 28th March, and writ sued out on 29th April:—Held, sufficient, as being at least one calendar month's notice. *McIntosh* v. *Vanstreenburgh*, 8 U. C. R. 248.

The notice required under 4 & 5 Vict. c. 26, s. 40, "one calendar month, at least," before action, means a clear month's notice, exclusive of the first and last days. *Dempsey* v. *Dougherty*, 7 U. C. R. 313.

Workmen's Compensation for Injuries Act—*Notice of Objection.*]—The provisions of s. 14 of the Workmen's Compensation for Injuries Act, 55 Vict. c. 30 (O.), are not complied with merely by pleading that the notice of action relied on by the plaintiff is defective, or that notice of action has not been given. The defendant must give formal notice of his objection not less than seven days before the hearing of the action if he intends to rely upon it. *Cavanagh* v. *Park*, 23 A. R. 715.

See DIVISION COURTS, IV. 1 (a)—MALICIOUS PROCEDURE, II. 1 (f)—MASTER AND SERVANT, VI. 4 (a) — MUNICIPAL CORPORATIONS, I. 1—REGISTRY LAWS, VI. 3.

NOTICE OF DISHONOUR.

See BILLS OF EXCHANGE, IV.

NOTICE OF SALE.

See MORTGAGE, XIV. 3.

NOTICE OF TRIAL OR ASSESSMENT.

See TRIAL, VII.

NOTICE OF TRUST.

See TRUSTS AND TRUSTEES, III.

NOTICE TO ADMIT.

See PRACTICE—PRACTICE AT LAW BEFORE THE JUDICATURE ACT, IX.

NOTICE TO PRODUCE.

See EVIDENCE, XIV. 5 (b).

NOTICE TO QUIT.

See LANDLORD AND TENANT, XVI.

NOVATION.

See Purdom v. *Nichol*, 15 A. R. 244, 15 S. C. R. 610, 16 O. R. 699; *Sutherland* v. *Cox*, 15 A. R. 541; *Henderson* v. *Killey*, 17 A. R. 456; *Venner* v. *Sun Life Ins. Co.*, 17 S. C. R. 204; *Canadian Bank of Commerce* v. *Marks*, 19 O. R. 450.

See CONTRACT—PARTNERSHIP—PRINCIPAL AND SURETY, II. 2, 4.

NUISANCE.

I. ABATEMENT, 4910.

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I. ABATEMENT.

Injury from Abatement.] — A person who takes upon himself to abate a nuisance, e. g., a mill dam, may be called upon to pay damage for any unnecessary injury done to the plaintiff's property. *Truesdale* v. *McDonald*, Tay. 121.

Right to Abate — *Previous Acquiescence —Damages.*]—Plaintiffs built a wharf in the bed of the St. Lawrence river which communicated with the shore by means of a gangway, and had enjoyed the possession of this wharf and its approaches for many years, when defendant, on the ground that the wharf was a public nuisance, destroyed the means of communication which existed between the wharf and the shore. Plaintiffs sued defendant for damages, and prayed that the works be restored. After issue joined, defendant filed a supplementary plea, alleging that since the institution of the action one C. R., through whose property plaintiffs' bridge passed to reach the street on shore, had erected buildings which prevented the restoration of the bridge and wharf:—Held, that defendant, having allowed plaintiffs to erect the gangway on public property and remain in possession of it for over a year, had debarred himself of the right of destroying what might have been originally a nuisance to him, and that, notwithstanding the subsequent abandonment of this wharf and gangway, plaintiffs were entitled to substantial damages. *Caverhill* v. *Robillard*, 2 S. C. R. 575.

Sessions — *Jurisdiction—Costs.*]—The defendant was convicted at the general sessions on an indictment for a nuisance in obstructing the highway by the erection of a wall thereon, and directed to abate the nuisance, which not having been done, the sessions made an order directing the sheriff to abate the same at the defendant's costs and charges, and to pay the county crown attorney forthwith after taxation the costs of the application and order, and the sheriff's fees and costs and incidental expenses arising out of the execution of the order:—Held, that the sessions had no authority to make the order to the sheriff, the proper mode in such case being by a writ de nocumento amovendo; that the order being a judicial act was properly removed by certiorari, and must be quashed, but without costs. Remarks as to the jurisdiction of the sessions as to the costs. *Regina* v. *Grover*, 23 O. R. 92.

See Drew v. *Baby*, 6 O. S. 239, *infra*.

II. ACTIONS FOR DAMAGES.

Damages — *Abatement—Reduction—Release.*]—Where in an action for a nuisance by

landlords as reversioners, they recovered a verdict for £250 damages, which was confirmed on motion for a new trial, the court granted a rule nisi to reduce the verdict to 1s., on the nuisance being abated within a certain time, unless the landlords obtained a release from their tenants to defendant of any cause of action accruing to them from the nuisance. The rule was afterwards discharged on a release being produced, although the release was not exactly in accordance with the terms of the rule. Quære, whether the court had power to make the rule absolute. *Drew* v. *Baby*, 6 O. S. 239. See *S. C.*, 1 U. C. R. 438.

——— *Reversion — Continuance—Nominal Damages.*]—In an action on the case by reversioners for a serious injury to their reversionary interest by the erection of a nuisance in a public highway, the jury are not necessarily restricted to a verdict for nominal damages on the first trial, but may give damages commensurate to the injury which the plaintiffs may sustain by the possible continuance of the nuisance. *Drew* v. *Baby*, 1 U. C. R. 438.

Fences — *Railway.*] — Held, that barbed wire fences constructed by a railway company upon an ordinary country road could not be treated as a nuisance. *Hillyard* v. *Grand Trunk R. W. Co.*, 8 O. R. 583.

Injury to Individual.]—A person throwing noxious matter into Lake Ontario, or any other navigable water, is liable both to an indictment and to a private action at the suit of any individual distinctly and peculiarly injured thereby. *Watson* v. *City of Toronto Gas Light and Water Co.*, 4 U. C. R. 158.

Quære, can the gas company of the city of Toronto, under their Act of incorporation and their lease from the city of Toronto, carry on their work of manufacturing gas, &c., without liability for nuisances injurious to private rights, so long as they occasion no nuisance which they could by due care have avoided. *Watson* v. *City of Toronto Gas Light and Water Co.*, 5 U. C. R. 262.

Injury to Reversion—*Stable.*]—Defendant having erected a stable on his own ground, adjoining a dwelling house owned by the plaintiff and rented to one W.:—Held, not such a nuisance as would support an action by the plaintiff as reversioner, though it was shewn that he had been obliged in consequence of it to accept a lower rent for his house. *Lawrason* v. *Paul*, 11 U. C. R. 534.

Livery Stable—*Offensive Odours—Noise of Horses.*]—Though a livery stable is constructed with all modern improvements for drainage and ventilation, if offensive odour therefrom and the noise made by the horses are a source of annoyance and inconvenience to the neighbouring residents, the proprietor is liable in damages for the injury caused thereby. *Drysdale* v. *Dugas*, 26 S. C. R. 20.

Obstruction of Highway — *Continuing Nuisance Created by Another.*]—The owner of a house abutting on a highway placed without authority a trap-door in the sidewalk in order to obtain an entrance to his cellar, the hinges of the trap-door projecting about an inch above the sidewalk. The defendant obtained title from this owner and continued to use the trap-door, and the plaintiff, while lawfully using the highway, stumbled against the hinges and was hurt:—Held, that the defendant could not be held to be continuing the nuisance, as she had no title to the highway, and no right, strictly speaking, to remove the trap-door constructed by another, and that, as the accident was not caused during or by her user of the trap-door, she was not liable. *Ewing* v. *Hewitt*, 27 A. R. 296.

Parties — *Landlord and Tenant.*]—Held, that the landlord and tenant were both liable for damages arising from a nuisance (a water closet) erected by the landlord in the house, and continued to be used by the tenant while occupying it. *McCallum* v. *Hutchison*, 7 C. P. 508.

——— *Municipal Corporations—Individual —Water—Dam.*]—The defendants, the corporations of two townships, without being bound to do so, built a culvert under the highway between the townships, to which the other defendant, the owner of lands adjoining one side of the highway, in order to carry off the surface water of his lands, built a drain, and subsequently a "gangway" of stones for the convenience of access to the highway, which had the effect of damming the water on his land. He afterwards made an opening in the "gangway," and the water, suddenly rushing through the culvert, flooded the plaintiff's land on the other side of the highway, which was also connected with the culvert by a receiving drain, through which he had theretofore permitted the water in its ordinary course to flow:—Held, that the defendants the corporations were not, but that the other defendant was, liable for the damage sustained by the plaintiff. *Bryce* v. *Loutit*, 21 A. R. 100.

Pleading—*Declaration — Cause of Injury — Plea of Justification.*] — Semble, that a declaration would be good in charging, in general terms, the defendants with causing offensive vapours to arise, &c., without assigning the particular cause of the vapours. Were it, however, a good ground of special demurrer, the defect would be cured by the plea undertaking to describe the causes, &c., and to justify them. In an action against a gas company for a nuisance, a plea of justification averring that they are now managing their works carefully, and that the vapours complained of unavoidably arise, is bad, as applying the defence to the time of pleading, and not of action brought. *Watson* v. *City of Toronto Gas Light and Water Co.*, 5 U. C. R. 262.

See Park v. *White*, 23 O. R. 611, *post* V.

III. INDICTMENTS.

Agent.]—A party cannot justify as agent of another for maintaining a public nuisance. *Regina* v. *Brewster*, 8 C. P. 208.

——— *Landlord and Tenant.*]—An agent merely to let or receive rents is not liable for a nuisance upon the premises let by him. Quære, as to the liability of a general agent clothed with power to let, repair, and in all respects act for the owner. If the nuisance existed at the time of letting, both tenant and owner are liable. If it arises after the tenancy is created, the tenant only is responsible. *Regina* v. *Osler*, 32 U. C. R. 324.

Certiorari—*Fine—Costs.*]—Where the indictment was removed into the court of Queen's bench by the prosecutors:—Held, that the defendant was not liable to costs; but the court ordered that one-third of the fine imposed should go to the prosecutors, and suggested that the government might on application order the remaining two-thirds to be paid to them, the whole fine being less than their costs incurred. *Regina* v. *Jackson*, 40 U. C. R. 280.

A township municipality prosecuting an indictment for obstructing a highway in the township, which indictment had been removed on defendant's application into this court, and the defendant convicted thereon:—Held, to be "the party aggrieved" within 5 & 6 Wm. & M. c. 11, s. 3; and the defendant, having to pay their costs and his own, amounting to over $400, was fined only $1. *Regina* v. *Cooper*, 40 U. C. R. 294.

Complainants—*Status.*]—Persons having come to live within the scope of a nuisance after its creation, does not prevent their complaining of it as a public nuisance. *Regina* v. *Brewster*, 8 C. P. 208.

Evidence—*Variance.*]—An indictment alleged the nuisance to be near lot 16, and the evidence shewed it to be on it:—Held, a fatal variance. *Regina* v. *Meyers*, 3 C. P. 305.

Prescription.]—Held, that twenty years' user will legitimate an easement affecting private property, but not a nuisance. *Regina* v. *Brewster*, 8 C. P. 208.

Previous Conviction—*Res Judicata.*]—Where a defendant had been convicted of a nuisance in obstructing a certain highway by a fence, and after removal of such fence by the sheriff under process, replaced it upon the same highway, though not in precisely the same line as before:—Held, that the former conviction was conclusive against defendant as to the existence of the alleged highway, and that he could not again raise the question on this indictment for obstructing the same highway. *Regina* v. *Jackson*, 40 U. C. R. 280.

Way—*Non-repair—Preliminary Inquiry—Prohibition.*]—Proceedings against the corporation of a city on a charge of neglecting to repair and keep in repair one of its public streets, thereby committing a common nuisance, should be by indictment. Prohibition granted to restrain a preliminary investigation of such a charge before a police magistrate, and an order nisi to set aside the order granting prohibition refused by a divisional court. *Regina* v. *City of London*, 32 O. R. 326.

See *Watson* v. *City of Toronto Gas Light and Water Co.*, 4 U. C. R. 158, *ante* II.

See, also, STREET RAILWAYS.

IV. INFORMATIONS.

Construction and Use of Bridge in Unauthorized Manner — *Application to Restrain Prevention of Proper Use or Remove Bridge.*]—See *Attorney-General* v. *International Bridge Co.*, 27 Gr. 37.

Parties — *Attorney-General.*]—The Provincial Attorney-General is the proper person to file an information in respect of a nuisance, caused by interference with a railway. *Attorney-General* v. *Niagara Falls International Bridge Co.*, 20 Gr. 34.

Pleading — *Uncertainty.*]—An information to restrain a nuisance caused by the erection of a fence on a public highway, alleged that "the defendants or some or one of them," had put up such fence:—Held, bad on demurrer, as being too uncertain an allegation as to who had committed the act complained of. *Attorney-General* v. *Boulton*, 20 Gr. 402.

See, also, STREET RAILWAYS.

V. INJUNCTIONS.

Air—*Pollution — Acquiescence.*]—It is a plain common law right to have the free use of the air in its natural unpolluted state, and an acquiescence in its being polluted for any period short of twenty years will not bar that right. To bar the right within a stated period, there must be such encouragement or other act by the party afterwards complaining as to make it a fraud in him to object. *Radenhurst* v. *Coate*, 6 Gr. 139.

——— *Pollution—Means of Prevention—Consumption of Smoke.*]—Every one has a right to the air on his premises uncontaminated by the occupants of other property, though those who live in a city cannot insist on the complete immunity from all interference which they might have in the country. But the occupant of city property cannot justify throwing into the air in and around his neighbour's house any impurity which there are known means of guarding against. The defendant erected in the city of Kingston a planing machine and circular saw, driven by steam, and was in the habit of burning the pine shavings and other refuse: he took no means to consume or prevent the smoke, and it being carried to the plaintiff's premises in sufficient quantities to be a nuisance, the defendant was decreed to desist from using his steam engine in such a manner as to occasion damage or annoyance to the plaintiff from the smoke. *Cartwright* v. *Gray*, 12 Gr. 399.

Church—*Disturbance of Services.*]—In an action by the churchwardens and trustees of a church, wherein weekday services were held, to restrain the playing of a band in an adjoining skating rink, which had the effect of disturbing the services:—Held, that the use by the plaintiffs of the church in the way mentioned was an ordinary, reasonable, and lawful use of their property, and the inconvenience to them and the congregation by the defendants' mode of using their property, was such as to materially interfere with the use and enjoyment of the plaintiffs' property, and to constitute a nuisance. *Churchwardens of St. Margaret's* v. *Stephens*, 29 O. R. 185.

Commissioner of Public Works—*Provincial Lunatic Asylums—Pollution of Waters—Parties.*]—By 32 Vict. c. 28 (O.), all the public buildings and works are placed under the control and management of the commissioner of public works, but the Act negatives any authority of that officer to "cause expenditure not previously sanctioned by the

legislature, except for such repairs and alterations as the immediate necessities of the public service may demand." The London lunatic asylum was erected under the provisions of an Act of the legislature, and the drains of it were constructed in such a manner as to discharge into a stream crossing the lands of the plaintiff, thereby causing a serious nuisance to the plaintiff. To remedy this it was alleged that the only effectual means was, to carry the sewage to the river Thames at an estimated cost of $30,000:—Held, that the commissioner of public works could not be restrained by injunction from allowing the nuisance to continue. Semble, to such a suit the medical superintendent of the asylum is not a proper party. *Hiscock* v. *Lander*, 24 Gr. 250.

Interim Injunction — *Continuance of Nuisance—Laches.*]—A person had carried on the business of a soap and candle manufacturer for several years without any steps being taken to restrain him, after which a bill was filed for that purpose, on the ground of nuisance and inconvenience to the party complaining. The court, under the circumstances, refused a motion for an interlocutory injunction, but reserved the question of costs to the hearing. *Radenhurst* v. *Coate*, 6 Gr. 159.

Although the fact that a nuisance has commenced will raise a presumption that the same will continue, still, where it was alleged that the nuisance complained of was caused by the discharge of refuse matter from the manufactories of the defendants, and it was shewn that no such refuse matter had been discharged by them for upwards of a year, they having closed down their manufactories during that period, and that if the nuisance was increasing at all, it was not through the act of the defendants, the court refused an interlocutory injunction restraining the further continuance of such nuisance. P. granted permission to W., an adjoining owner, to dig a drain partly on his land, for the purpose of draining a pit on the lands of W. which had been in use for some years, and which it was alleged had created a nuisance:—Held, that P., after having granted the permission and lying by so long, was not in a position to obtain an interlocutory injunction restraining such nuisance, unless he could shew that the nuisance had increased of late beyond what it formerly was. *Swan* v. *Adams*, 23 Gr. 220.

Municipal Corporation — *Construction of Weigh Scale—Special Injury.*]—A municipal corporation, although it has under the statute full powers conferred upon it of opening, making, or stopping up roads, streets, and other communications, is not at liberty to place obstructions thereon whilst retained as roads or streets. Where, therefore, it was shewn that the corporation of a town were constructing a weigh scales on a corner of the principal street, which would have caused a special injury to the plaintiff, who kept a store at such corner, the court, at the instance of the plaintiff, restrained the construction on the ground of nuisance. *Cline* v. *Town of Cornwall*, 21 Gr. 129.

——— *Hospital.*]—Injunction granted to restrain a municipality from erecting a small-pox hospital within another municipality. *Township of Elizabethtown* v. *Town of Brockville*, 10 O. R. 372.

Offensive Trade — *Tannery — Acquiescence.*]—In 1861, while defendant was building a tannery on land adjoining the plaintiff's premises, the plaintiff encouraged defendant to proceed. The business was commenced the same year. In 1863 additions were made to the buildings with the plaintiff's knowledge and acquiescence; and the plaintiff made no complaint about the business until 1868, though all this time it had been carried on, and the plaintiff had been residing on the premises adjoining:—Held, that by his conduct he had debarred himself from relief in equity on the ground of a tannery being a nuisance. *Keenan* v. *Dewer*, 18 Gr. 438, 17 Gr. 638.

Parties — *Owner of property — Husband and Wife—Offensive Trade—Interlocutory Injunction—Discretion.*]—The defendant was engaged in making boilers and gas receivers; in the manufacture of which it was necessary to join together pieces of iron, about an inch thick, by riveting, which produced noises, continuing from seven in the morning until six o'clock at night, rendering the occupation of the house of the plaintiff's wife, which was only fifteen feet distant, and in which they lived, almost impossible, and seriously interfering with her health. Upon a bill filed by the plaintiff, the court (28 Gr. 461) granted an interlocutory injunction restraining the defendant from continuing the boiler-making in such a manner as to be a nuisance to the plaintiff and his premises:—Held, reversing this order, that the wife was the proper person to file the bill, for, as an injury to property is the ground of jurisdiction in cases of nuisance, the owner of the property is the proper party to complain. Quære, whether the husband had any title in the land, and whether his occupancy with his wife was more than permissive on her part. An application made by counsel to add the wife as a party, in order to meet the difficulty, authority having been given by her, was refused on the ground that the suit was not merely improperly constituted, but that, the husband having no locus standi, the suit had no proper existence at all, and another person who had the right could not be substituted for one who had not the right to institute the proceedings. Held, also, that if the suit had been properly constituted, the court would not have interfered with the discretion of the Judge granting the interlocutory injunction. *Hathaway* v. *Doig*, 6 A. R. 264.

Privy Pits — *Adjacent Land — Occupation.*]—The owner of houses occupied by tenants can maintain an action in his own name for damages and to restrain the continuance of a nuisance arising from privy pits on the land of an adjoining owner, if the nuisance is of such a nature as to be practically continuous and permanent. The owner of the adjoining land, although also occupied by tenants, is liable for the nuisance caused by them if the pits are so constructed that the constant use of them will necessarily result in the creation of a nuisance, or if allowed by the owner to remain in an unsanitary condition where there is power to remedy the grievance. *Park* v. *White*, 23 O. R. 611.

Railway—*Permission to Construct across Streets—Creation of Pool—Rights of Corporation.*]—See *City of Kingston* v. *Grand Trunk R. W. Co.*, 8 Gr. 535.

Railway on Highway — *Acquiescence of Municipal Council.*]—See *Township of Pembroke* v. *Canada Central R. W. Co.*, 3 O. R. 503; *Fenelon Falls* v. *Victoria R. W. Co.*, 29 Gr. 7.

Water — *Mill-Owner — Damming back— Evidence Necessary for Injunction.*]—See *Wadsworth* v. *McDougall*, 24 Gr. 1.

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PARENT AND CHILD.

I. DEALINGS WITH LAND, 4919.

II. OTHER MATTERS, 4923.

I. DEALINGS WITH LAND.

Agreement as to Crown Patent—*Trustee—Dower.*]—J. W. B., a widower, was locatee of the Crown, and agreed with his son J. B. to assign his interest in the land on condition of his son's making certain payments, and performing certain services for the father, which were all duly made and performed; and afterwards the patent was issued in the name of J. B., by which name the father was known to the officers of the land granting department. Meanwhile, before the issuing of the patent, the father married again. The son during all the father's life continued to occupy the premises, making valuable improvements, without any claim by the father except for his support under the agreement made between the father and son. After the father's death the widow filed a bill for dower in the premises:—Held, that, even admitting that the grant of land was to, and was by the government meant to be to, the father, he could be treated only as a trustee for the son. *Burns* v. *Burns*, 12 Gr. 7.

Agreement as to Purchase of Land—*Statute of Frauds—Purchase Money—Resulting Trust.*]—A father and son lived together on the same farm, of which they obtained a lease in their joint names, the son having for several years, owing to the infirm state of his father's health, the entire management of the farm; and any moneys he received from the sale of the produce thereof, he was in the habit of handing over to his mother for safe keeping, thus forming, as it were, a common fund. Subsequently he effected a purchase of the farm in his own name, when he paid $1,000 on account of the purchase money, derived partly from private funds, and partly from the fund held by his mother, and gave a mortgage, with the usual covenants, for the residue of purchase money, on which he subsequently made a payment of $1,520, $1,000 of which he borrowed from his wife, the balance being made up partly of funds of his own, partly of funds obtained from the common purse. The father claimed that the purchase had been made for his benefit and the benefit of the son and his brother, and filed a bill to enforce such claim. The son answered, denying having made the purchase in the manner alleged, and claiming to be the sole owner of the property, subject to the support of his father and mother out of the same:—Held, that, in the absence of any writing signed by the son, nothing was shewn to take the case out of the Statute of Frauds; and even if the defence of the statute were not set up, sufficient was not shewn to entitle the father to a decree on the ground of contract or on the ground of a resulting trust in his favour, by reason of his having paid a portion of the purchase money. *Wilde* v. *Wilde*, 20 Gr. 521.

Agreement to Convey — *Statute of Frauds—Part Performance.*]—The owner of real estate, having become greatly enfeebled and unable to wait upon himself, offered to his son that if he would relinquish his own farm, and come to reside with the father, and take care of him during his life, he would give the farm upon which he (the father) was resident to his son. To this proposal the son acceded, and removed with his family to the residence of his father:—Held, reversing the decision in 9 Gr. 403, that there had not been sufficient part performance to take the case out of the Statute of Frauds. *Black* v. *Black*, 2 E. & A. 419.

——— *Enforcement—Performance of Conditions.*]—A father and son entered into mutual bonds, the father agreeing that just before his death he would convey his farm to the son in fee; and the son agreeing that he would, during his father's life, work, till, and improve the farm in a good and farm-like manner, and would consult his father in all things reasonable. Quarrels took place afterwards; the son treated the father badly, though he did nothing which at law would be a breach of the condition of his bond; and ultimately the father left the farm, the son retaining possession until ejected at the father's suit:—Held, in a suit by the son against his father, that the contract should not be enforced against the father. *McDonald* v. *Rose*, 17 Gr. 657.

——— *Letter—Part Performance.*] — The defendant in 1871 wrote to his son, who had left home to work for himself, that if he would return he would give him fifty acres of his farm and a share of the cattle and sheep when the plaintiff got married, but if he stayed away he would sacrifice his own and his father's interests. Upon receipt of the letter the plaintiff returned and remained on the farm working it with his father, except at certain times when he went away to work for wages for himself. It was proved that the father had pointed out the fifty acres which he intended to give his son, and the son entered and erected a house thereon with his father's approval, and occupied it with his family, he having married in 1879:—Held, that the plaintiff was entitled to specific performance of this agreement. *Garson* v. *Garson*, 3 O. R. 439.

——— *Maintenance of Parent—Change of Intention—Improvements.*] — When a child seeks to enforce an agreement that if he remains with a parent and works his farm and provides for his declining years the parent will bestow the farm on him, the agreement must be established by the clearest evidence and a certain and definite contract for a valuable consideration proved. In the absence of such evidence the parent will be entitled to change his views and the disposition of the property. In this case the son, who had made certain improvements on the property, was held not to be entitled to a lien for them. *Smith* v. *Smith*, 29 O. R. 309.

——— *Specific Performance—Intention to Devise.*]—The plaintiff alleged that having remained at home working for his father until he was of the age of 25 or 26 years, he then told him he must have wages, whereupon the father agreed that he would purchase a certain farm, and that, if plaintiff would remain at home and work until the land was paid for, he would convey the same to the plaintiff; that the plaintiff accordingly remained with and worked for his father until the farm was fully paid for; upon which the father put the plaintiff in possession of it. In answer to a bill for a specific performance of the alleged agreement, the father positively denied the agreement alleged by the bill, although he admitted that he had bought the land intending to devise it to the plaintiff, and that he had executed a will so disposing of it, and alleged that he intended not to alter the disposition thereby made thereof. The court, under these circumstances, refused the relief prayed, and dismissed the bill with costs. Orr v. Orr, 20 Gr. 425, remarked upon and followed. *Jibb* v. *Jibb*, 24 Gr. 487.

Conveyance of Land — *Inadequacy of Price—Badge of Fraud.*]—Adequacy of consideration is not necessary to maintain a transaction under 13 Eliz., though the inadequacy may afford some evidence of guilty knowledge. But a conveyance by a father to his son, in consideration of an annuity of less value than the property conveyed, does not suggest the son's guilty knowledge of a fraud by his father, in the same way that a conveyance for an inadequate price to a stranger sometimes does. *Carradice* v. *Currie*, 19 Gr. 108.

——— *Joint Possession — Purchaser—Notice.*]—Where a father and son lived together on certain land of the father, and continued to do so after a conveyance by the father to the son:—Held, that the son's possession after the conveyance, did not affect a subsequent purchaser from the father. *Sherbonneau* v. *Jeffs*, 15 Gr. 574.

Improvements on Land — *Allowance for.*]—A testator placed his two sons in possession of certain portions of his real estate, intending to convey or devise the same to them, but during his lifetime retained the full control of the property; notwithstanding this, the sons made valuable improvements upon their respective portions. Upon a bill filed after the decease of the father for a distribution of the estate, the court refused to make to the sons any allowance in respect of such improvements. *Foster* v. *Emerson*, 5 Gr. 135.

Maintenance of Brother — *Charge — Right of Occupation—Duration.*]—A father conveyed to one of his sons certain farm lands, subject to his own life estate therein, and subject also to the use by another son, the plaintiff, of a bed, bed-room, and bedding, in the dwelling-house on the farm, and to his board, so long as the plaintiff should remain a resident on the farm:—Held, that the plaintiff took no estate under the deed, but merely the use, after the termination of the father's life estate, and while resident on the land, of the bed-room and board, which was a charge thereon; that no period was fixed for such occupation, which might be either permanent or temporary; and therefore no forfeiture was created by non-occupation. *Wilkinson* v. *Wilson*, 26 O. R. 213.

Maintenance of Brothers — *Enforcement of Agreement—Parties.*]—In consideration of a conveyance to him of a certain farm, the petitioner agreed with his mother that he would, during her life, provide her with a house on the farm, and with necessaries, and support his brothers and sisters thereon, until they reached sixteen years of age, so long as they remained at home on the said farm, and assisted him so far as they were able in the management of it:—Held, that the mother had no right or power to release the petitioner from the obligations undertaken by him with reference to his brothers and sisters under the above agreement, and if the children did their part they could hold their brother to his promise, though the agreement was not in terms made with them as parties. *Re McMillan*, 17 O. R. 344.

Maintenance of Parent — *Condition of Deed—Breach—Offer.*]—H. S., by deed dated 4th November, 1863, granted his farm and some chattels to his son T. S. in consideration of $300, "subject to be defeated and rendered null and void upon the non-performance by the said party of the second part of the following condition, or any part thereof, viz., the said party of the second part covenants to feed, clothe, support, and maintain the said party of the first part . . . during the term of his natural life . . . " T. S., having fulfilled the condition during his lifetime, died on 5th October, 1865, leaving a widow and one child. The widow removed from the farm, but offered to take H. S. with her to her father's house, and have him provided for there, or to allow him to go to her brother's house in the same way, both of which offers were declined, and, as no maintenance was provided for him by her at the farm, he treated the condition as broken, and brought an action of ejectment, and recovered judgment, and conveyed the farm away by deed, and the defendant became the owner by subsequent conveyance. H. S. was subsequently supported, part of the time on the farm, by the defendant, and died in 1880. In an action of ejectment by the infant daughter of T. S., claiming under the deed to her father against the defendant, it was:—Held, that the grantor was not bound to accept the offers made, and that the conditions of the deed were broken and the land forfeited. *Millette* v. *Sabourin*, 12 O. R. 248.

——— *Condition of Deed — Residence — Payment.*]—The plaintiff conveyed his farm to his son, subject to the payment of an annuity of $60 a year; and the plaintiff's "maintenance in board, washing, and keep out of the farm," or to "receive in cash an amount sufficient to pay for the same yearly." There was also a bond of same date whereby defendant covenanted to furnish such maintenance, or pay such sum. The defendant sold the farm and went to reside elsewhere. The plaintiff went and lived with him on the new farm for some years, receiving his maintenance, &c., but becoming dissatisfied left:—Held, that the plaintiff was not bound to reside with the defendant wherever he might choose to go; and under the circumstances was entitled to be paid a reasonable sum for his maintenance, payable at the end of each year. At the trial the defendant's counsel raised the objection that the amount, if any, was only payable at the end of the year. The trial Judge overruled the objection, and decreed that plaintiff was entitled to receive $2 a week, payable

weekly. The defendant's counsel then asked to have the amount payable monthly, to which the Judge acceded, and gave judgment accordingly:—Held, that the judgment could not be deemed to be by consent, so as to preclude the defendant from afterwards moving against it. *Sweeney* v. *Sweeney*, 16 O. R. 92.

Promise to Devise—*Part Performance.*]—As to what acts of part performance are sufficient to procure specific performance of an alleged contract based on promises to leave property by will. See *Campbell* v. *McKerricher*, 6 O. R. 85; *Walker* v. *Boughner*, 18 O. R. 448.

See, also, *Orr* v. *Orr*, 21 Gr. 397; *Jibb* v. *Jibb*, 24 Gr. 487; *Bicha* v. *Bicha*, 18 Gr. 497; *Smith* v. *McGuggan*, 21 A. R. 542, 21 S. C. R. 263; *Murdoch* v. *West*, 24 S. C. R. 305; *Smith* v. *Smith*, 29 O. R. 309.

Tenants in Common—*Infants—Profits of Land—Trustee—Injunction.*] — Although the general rule is, that the mere fact of one tenant in common holding possession of the entire estate will not render him liable to a co-tenant, who might himself enter and enjoy the possession with the other, and the court will not in such a case interfere with the dealing of such co-tenant in regard to the property; still, where the co-tenant in possession was the mother of the other co-tenants, all of whom were infants at the time of her second marriage, the court, at the instance of one of the children who had attained majority, restrained the husband and wife from selling or disposing of the crops of the current year or the proceeds thereof, unless they undertook to bring into court one-third of such proceeds; but refused to interfere with the possession of the mother and her husband in respect of previous years; although as to such years the mother might have been accountable to her infant children as trustee for them. *Bates* v. *Martin*, 12 Gr. 490.

II. Other Matters.

Death of Child—*Damages.*]—In an action by a parent to recover damages for the death of his child there need not be evidence of pecuniary advantage derived from the deceased; it is sufficient if there is evidence to justify the conclusion that there is a reasonable expectation of pecuniary benefit to the parent in the future, capable of being estimated. *Rombough* v. *Balch*, *Green* v. *New York and Ottawa R. W. Co.*, 27 A. R. 32; *Blackley* v. *Toronto Street R. W. Co.*, *ib.* 44 n.; *Ricketts* v. *Village of Markdale*, 31 O. R. 610.

Debts of Child—*Liability of Parent.*]—Plaintiff, upon their order, furnished to several of defendant's sons, who were at the time living with their father, certain articles of wearing apparel, charging the same to defendant, and delivering them at his house. Previously to this defendant had caused to be inserted once in one of the daily papers published in the place, and taken in by the person by whom plaintiff was employed, a notice to the effect that he would not be responsible for any debt contracted in his name from that date without his written order; but, after the goods in question had been furnished to his sons, he wrote to the plaintiff stating that he would not in any way be responsible for any debt incurred by any of his sons from and after that date unless under his written order:—Held, that, in the absence of evidence repelling the presumption of defendant's authority to his sons to contract the liability in his name, the fact of the delivery of the articles at the defendant's house for his sons, and the language of his letter to plaintiff were quite sufficient to justify the jury in finding defendant liable, and that it was not necessary to go further and prove the infancy of his sons. *Hayman* v. *Heward*, 18 C. P. 353.

Gift to Child—*Influence—Presumption.*]—See *Trust and Guarantee Co.* v. *Hart*, 31 O. R. 414.

Husband and Wife—*Removal and Harbouring of Wife by Parent.*]—See *Metcalf* v. *Roberts*, 23 O. R. 330.

Maintenance — *Liability of Parent.*]—Where a father whose children are maintained by another, and who could have obtained possession of their persons by habeas corpus, allows them to be so maintained, he is liable for their support and maintenance, to the person in whose care such children are. *Hughes* v. *Rees*, 10 P. R. 301.

——— *Liability of Parent — Transfer of Right—Agreement—Variation.*]—At common law there is no legal obligation on the part of a parent to maintain his children; the duty is only a moral one. A father, after the death of his wife, agreed in writing with her mother that she should, at her sole expense, have the custody, maintenance, and education of his children, in consideration of his renouncing his rights thereto and of other considerations:—Held, that he could transfer his rights as a parent; and, in the absence of fraud, evidence of an oral promise by him before the execution of the agreement that he would pay for the maintenance of the children, was inadmissible. *Wright* v. *McCabe*, 30 O. R. 390.

Maintenance and Education—*Liability of Parent's Estate—Oral Contract.*]—Upon an action brought against the executors of a testator for the board and education of his (the testator's) daughter, an oral contract with the testator, at the most for three years, was proved, and knowledge of his death being shewn by the plaintiffs themselves, by charges made in their account:—Held, that the contract not being a binding one upon the testator, if alive, this action could not be maintained thereon against the executors after his death. *Institute of Ladies of the Sacred Heart* v. *Matthews*, 10 C. P. 437.

——— *Liability of Parent's Estate—Stepfather—Costs.*]—In an administration suit it appeared that the stepfather of one of the children of the deceased, and who had the care of such, had been sued for the child's board while at school, his mother being a creditor of the estate, and neither she nor her husband having any funds to pay for such board, while there were funds applicable thereto:—Held, that the stepfather should be allowed the costs of such suit. *Menzies* v. *Ridley*, 2 Gr. 544.

Negligence of Child — *Liability of Parent.*] — The doctrine of the liability of a master for his servant's negligence applies in the case of the implied relationship of master and servant sometimes existing between parent and child, but as in the case of master

and servant so in that of parent and child there is no liability if at the time the negligent act is committed the child is engaged in his own affairs and not on the parent's behalf. The father of a lad of twenty, living at home, was held not liable therefore for an accident caused by the lad's negligence while driving, with the father's implied permission, the father's horse and carriage home from a shop to which the lad had gone to purchase, with money earned by himself, articles of clothing for himself. *Fife* v. *Unger*, 27 A. R. 468.

Partnership—*Settlement—Parties not on Equal Terms—Account.*]—D. B. and W. D. B. were partners in a certain joint stock savings bank, under articles which provided that the partnership should last during their joint lives, and that they should share the profits and expenses. D. B. died in April, 1874, leaving a will, whereby he bequeathed to the plaintiff, the son of W. D. B., the residue of his property, including his interest in the bank, and appointed L. his executor. In May, 1874, L. gave W. D. B. a general power of attorney to act for him. In July, 1879, the plaintiff came of age, and soon after demanded of W. D. B. an account of the assets of the partnership and a settlement with him; and in November, 1880, W. D. B. gave the plaintiff a cheque for $8,000, handing him at the same time a document for signature, which purported to be a receipt of the said sum in full of all claims on the estate of D. B., and the plaintiff signed it. He now brought this action against W. D. B. and L., alleging that after the death of D. B., W. D. B., with L.'s connivance, made certain arrangements for the winding-up of the partnership, and that large portions of the assets of D. B. and of the bank had been realized, and profits made, and converted by W. D. B. to his own use, and claiming to have the said release declared void, and an account of the estate of D. B., and of the partnership, and to have the same wound up, and payment of the share to which he was entitled:—Held, that as to the alleged settlement of November, 1880, the plaintiff and his father could not be said to have been on equal terms, and the document in question was not binding upon the former; that it was clearly the duty of his father, before making any settlement with him, to give him the fullest possible information regarding the estate and his dealings with it, even if then, under the circumstances, a settlement binding on the plaintiff could have been made. Held, on the whole case, that the plaintiff was entitled to the account asked, and that, as regarded the increase or profits in the dealings with the capital of the estate, these should be apportioned in accordance with the amount of such capital owned respectively by the testator and the defendant W. D. B., and the latter should be allowed a liberal remuneration for his exertions, care, time, and trouble in the management of the estate, which appeared to have been skilful and successful. *Burn* v. *Burn*, 8 O. R. 237.

Sale of Goods—*Continued Outward Possession—Finding of Jury.*]—G. had recovered a judgment against his father for costs in an action instituted by the latter, and under the execution issued thereon seized a horse as the property of the father in the possession of the plaintiff A., another son. It was shewn that, several years before, the father had agreed to convey his farm to A. and another brother W., both of whom assumed possession and control of the property before any conveyance was executed, and so continued in possession, the father continuing to reside on the place with the two sons, part of the consideration for the conveyance being that they should support him. The sons also bought the chattel property from their father, the horse in question having been purchased by A. for $50, and this he kept upon the premises, as had always been done, using him in the work of the farm, and occasionally working for others with him for hire, the father sometimes using him for his own purposes. On this state of facts the Judge of the county court, in an interpleader issue, left the question of property to the jury, who found a verdict for A. The court, being of opinion that, the claim of G. having arisen long after the alleged sale of chattels, it would require a preponderance of evidence in favour of G. to induce the court to interfere with the finding of the jury (but which did not exist), refused to disturb the conclusion of the Judge as to the finding of the jury, and dismissed an appeal with costs. *Danford* v. *Danford*, 8 A. R. 518.

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PARISH.

Creation—*Quebec Law.*]—Held, that under R. S. Q., tit. ix., c. 1, every decree for the canonical erection of a new parish which is valid according to ecclesiastical law is a sufficient foundation for proceedings with the view of obtaining the civil recognition of that parish. No objection thereto can be taken on the ground of antecedent irregularity of procedure. Proceedings before the commissioners of the diocese with a view to such civil recognition are not subject to the review or control of a court of justice. An objection to the formation of a new parish, on the ground that one of the old parishes dismembered for that purpose was in debt, is valid under s. 3380, R. S. Q.; but where the debt relied on was contracted by the Fabrique, it must be proved that the Fabrique was unable to pay it, and that a levy on the Roman Catholic freeholders of the parish has been duly authorized. *Alexandre* v. *Brassard*, [1895] A. C. 301.

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I. ELECTION OF MEMBERS.

1. *Accounts of Expenditure.*

Destruction by Agent.]—When all the accounts and records of an election are intentionally destroyed by the respondent's agent, even if the case be stripped of all other circumstances, the strongest conclusion will be drawn against the respondent, and every presumption will be made against the legality of the acts concealed by such conduct. *South Grey (Prov.)*, H. E. C. 52.

Disbursements by Friends of Candidate—*Absence of Account—Inference.*] — A candidate in good faith intended that his election should be conducted in accordance both with the letter and the spirit of the law; and he subscribed and paid no money, except for printing. Money, however, was given by friends of the candidate to different persons for election purposes, who kept no accounts or vouchers of what they paid:—Held, that bribery would not be inferred as against the candidate, who neither knew nor desired such a state of things, from the omission of the subordinate agents to keep an account of their expenditure, especially as the law was new, and contained no provision similar to the Imperial statute, which requires a detailed statement of expenditure to be furnished to the returning officer. But it is always more satisfactory to have the expenditure shewn by proper vouchers; and if money is paid to voters for distributing cards, or for teams, or for refreshment, these will be open to attack, and Judges will be less inclined, as the law becomes known, to take a favourable view of conduct that may bear two constructions, one favourable to the candidate and the other unfavourable. *East Toronto (Prov.)*, H. E. C. 70.

Money Paid by Candidate Personally —*Oath*—"*Other Corrupt Practices.*"]—The

Act 36 Vict. c. 2, ss. 7-12 (O.), requires that all election expenses of candidates shall be paid through an election agent; and the Act 38 Vict. c. 3, s. 6, requires the member-elect to swear that he has not paid and will not pay election expenses except through an agent, and that he "has not been guilty of any other corrupt practice in respect of the said election." Certain payments were made by the respondent personally, and not through an election agent:—Held, that such payments were not corrupt practices. Held, that the words "other corrupt practices" in the member's oath meant "any corrupt practice." *West Hastings (Prov.)*, P. E. C. 211.

Personal Expenses of Candidate—*Return.*]—Semble, that the personal expenses of the candidate should be included in the statement of election expenses required to be furnished to the returning officer under 37 Vict. c. 9, s. 123. *Bellechasse (Dom.)*, 5 S. C. R. 91.

Presumption — *Expenditure by Agent—No Account Rendered.*]—*Levis (Dom.)*, 11 S. C. R. 133.

See East Middlesex (Prov.), 1 E. C. 250.

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2. *Agency.*

(a) *Generally.*

Principles of Law—*Scope of Agency.*]—To sustain the relation of agency, the petitioner must shew some recognition by the candidate of a voluntary agent's services. The Westminster case, 1 O'M. & H. 89, as to agency, followed. *Welland (Prov.)*, H. E. C. 47.

Observations on the reasons why candidates should be held liable for acts done by their agents. The Taunton case, 1 O'M. & H. 184, approved. *West Toronto (Prov.)*, H. E. C. 97.

Agency in election matters is a result of law to be drawn from the facts of the case, and the acts of the individuals. *East Peterborough (Prov.)*, H. E. C. 245.

Act of agency and the decisions bearing thereon discussed. *North Ontario (Prov.)*, H. E. C. 304.

The law of election agency is not capable of precise definition, but is a shifting elastic law, capable of being moulded from time to time to meet the inventions of those who in election matters seek to get rid of the consequences of their acts. *North Ontario (Dom.)*, H. E. C. 785.

If an act, made a corrupt practice by statute, is done by an agent of a candidate, but not in pursuit of the object of the agency or the interest of the candidate, or in any way in relation to the election, but solely for the purpose, interest, or gratification of the agent, such act, not being done by such agent quâ agent, is not within the penalties of 36 Vict. c. 2, s. 3. *Lincoln (Prov.)*, H. E. C. 391.

Semble, where a corrupt act is committed during an election contest by an agent with the knowledge of the candidate, and it turns out that the person committing it was in fact or in contemplation of the election law the agent of the candidate, it is not necessary that the candidate should at the time have knowledge that the person committing the act is his agent or even that he should know such person individually. The Londonderry case, 1 O'M. & H. 278, and the Dungannon case, 3 O'M. & H. 101, referred to and followed. *Prescott (Prov.)*, 1 E. C. 88.

Allegation, that the government of the Province of Ontario, in the interest and on behalf of the respondent, used undue influence to secure his return. Objection, that no agency was alleged, and because no such agency, if alleged, could in law exist:—Held, that this objection should be left to be disposed of by the Judge at the trial; and semble, that evidence of agency could be given under the allegation. *West Huron (Dom.)*, 1 O. R. 433.

The parliamentary law of agency is a special law, and is different from the ordinary law of agency. In parliamentary elections the principal is liable for all acts of his agent, even where such acts are done contrary to the express instructions of such principal. *Cornwall (Dom.)*, H. E. C. 547.

No formal appointment or any particular words are necessary to constitute agency, and less positive evidence of appointment or recognition and adoption of a delegate to a party convention as an agent is required than in the case of one not a delegate. *West Simcoe (Prov.)*, 1 E. C. 128.

It is only for those acts of the agent which are done by him whilst acting or professing to act within the scope of his duties, that the candidate is responsible. It is contrary to all principle to hold any person affected by the act of an agent, unless it was shewn that the act was done in the course of the employment, and within the scope of the authority, although it may be in abuse of it. *West Simcoe (Prov.)*, 1 E. C. 128.

Agency in election cases differs from agency in ordinary commercial or other transactions of business, inasmuch as in the case of an election the agent, constituted by whatever acts are sufficient for the purpose, may bind his principal by acts which are not only outside the scope of an authority expressly given to him, but which may be directly contrary to the express directions of the person whose agent he is held to be. *Muskoka and Parry Sound (Prov.)*, 1 E. C. 197.

An agent who is not a general agent, but an agent with powers expressly limited, cannot bind the candidate by anything done beyond the scope of his authority. *Berthier (Dom.)*, 9 S. C. R. 102.

Effect of acts done by scrutineer who was also an agent. See *South Ontario (Prov.)*, H. E. C. 420; *Haldimand (Dom.)*, 15 S. C. R. 495.

See North Ontario (Prov.), 1 E. C. 1.

(b) *Sub-Agents.*

Responsibility of Candidate for Acts of.]—On a charge of bribery against one T.,

and one A., upon which this appeal was decided, the Judge who tried the petition found as a fact that A. had been directed by T., an admitted agent of the respondent, to employ a number of persons to act as policemen at one of the polling places in the parish of Bay St. Paul, on the polling day, and had bribed four voters previously known to be supporters of the appellant, by giving them $2 each:—Held, that A. was not an agent of the respondent, and, therefore, his acts could not void the election. Held, on appeal, that, as there was no excuse or justification for employing these voters, their employment was merely colourable, and these voters having changed their votes in consequence of the moneys so paid to them, and the sitting member being responsible alike for the acts of A., the sub-agent, as for the acts of T., the agent, and they having been guilty of corrupt practices, the election was void. *Charlevoix (Dom.)*, 5 S. C. R. 133.

The respondent gave to one H. some canvassing books, with directions to put them into good hands to be selected by him for canvassing. H. gave one of the books to B., a tavern-keeper, and B. canvassed for the respondent. B. was found guilty of a corrupt practice in keeping that part of his tavern wherein liquors were kept in store so open that persons could and did enter the storeroom and drink spirituous liquors there during polling hours:—Held that H. was specially authorized by the respondent to appoint sub-agents, and had under such authority appointed B. as sub-agent, and the corrupt practices committed by B. avoided the election. *Welland (Prov.)*, H. E. C. 187.

Held, that the persons amongst whom the respondent's moneys had been distributed by W., and persons acting under them, were sub-agents of respondent, and that their corrupt acts avoided the election. Semble, that no limit can be placed to the number of persons through whom the sub-agency may extend. *Niagara (Dom.)*, H. E. C. 509.

When a large and general authority is given to an agent, the candidate will be held responsible for the acts of sub-agents of such person. *Cornwall (Dom.)*, H. E. C. 547.

See South Grey (Prov.), H. E. C. 52; *West Toronto (Prov.)*, H. E. C. 97; *Niagara (Dom.)*, H. E. C. 508; *Kingston (Dom.)*, 11 C. L. J. 19.

(c) *What Constitutes an Agent—Members of Committees.*

About a dozen of the electors met some time before the election and nominated the respondent as the candidate who should contest the election in the interest of the political party to which they belonged. The respondent accepted and acted upon the nomination. They met occasionally for the purpose of promoting the respondent's election, procured voters' lists, canvassed voters, and got reports on which they estimated their chances of success:—Held, that if they did not style themselves a committee, they had assumed the functions which usually devolve upon such bodies. *North Wentworth (Prov.)*, H. E. C. 343.

If a meeting of electors assemble and has the sanction of the candidate, such candidate is responsible for its acts and the acts of the agents appointed by it. But where the meeting is large, then all present cannot be considered as agents; only those to whom certain duties, either as a committee or as individual canvassers, are assigned. *Cornwall (Dom.)*, H. E. C. 547.

The respondent nominated no committees to promote his election; but he was aware that committees were acting for him in each municipality. On one occasion he went to the door of one of the committee rooms, and left some printed bills to be distributed. One P., who attended the meeting of this committee, and who said he was considered on the committee, committed an act of bribery:—Held, that the committee were agents of the respondent; that P. was a member of the committee; and an act of bribery having been committed by him, the election was avoided. *East Northumberland (Dom.)*, H. E. C. 577.

Certain supporters of the respondent met in a room over a tavern to promote his election. Their meetings were presided over by an agent of his, and he attended at least one of such meetings:—Held, that the persons who attended such meetings were his agents. *North Ontario (Dom.)*, H. E. C. 785.

See also *post* (d).

See North Ontario (Prov.), 1 E. C. 1; *North Wentworth (Dom.)*, 11 C. L. J. 196, 296; *East Elgin (Prov.)*, 2 E. C. 100.

(d) *What Constitutes an Agent—Members of Political Associations.*

The delegates to a political convention assembled for the purpose of selecting a candidate, who never had intercourse with the candidate selected, and who never canvassed in his behalf, cannot be considered as agents for such candidate. *Welland (Prov.)*, H. E. C. 187.

Where a political organization, after nominating their candidate, divided into committees "to look after voters in the particular wards in which they resided;" and the respondent had not given authority to any member of such committees, nor to any canvasser, to canvass generally:—Held, that one K., who was a member of the committee for ward No. 2, and who was alleged to have committed an act of bribery in ward No. 6, having no authority to canvass in the latter ward, was an agent with limited authority to canvass in ward No. 2 only, and therefore the respondent could not be made liable for his alleged acts. *London (Prov.)*, H. E. C. 214.

One M. was a member of a township committee, organized by direction of the convention which nominated the respondent, and the work of the election was put into the hands of these township committees. M. canvassed his school section, and had a voters' list, which was taken from him by the committee on the allegation that he was not doing much. The respondent never asked M. to work for him, but M. asked the respondent what success he had. The respondent had no one acting for him except these committees and some volunteers, and he never objected to the aid they were giving him, nor did he repudiate

their services:—Held, on the evidence, that the respondent was responsible for the committees, and that M., as a member of one of such committees, was an agent of the respondent. *North Ontario (Prov.)*, H. E. C. 304.

The fact of a political association putting forward and supporting a particular candidate does not make every member of the association his agent; but the candidate may so avail himself of their services in canvassing for him and promoting his election, as to make them his agents. *North Grey (Prov.)*, H. E. C. 362.

By the constitution of a Reform association, each delegate to the convention was actively to promote the election of the candidate appointed by the convention. The respondent had himself been for six years a member of the association, and was familiar with its objects and constitution. He had also as a delegate acted and canvassed for other candidates in the promotion of their elections, and expected the like assistance from the present members of the association, and to the perfection of that system as an electioneering agency, the respondent owed his election:—Held, that the delegates to the association, acting as such in promoting the election of the respondent, were his agents, for whose acts he was responsible; and that an act of bribery committed by one R., a delegate, and who canvassed and otherwise acted for the respondent, avoided the election. *East Northumberland (Prov.)*, H. E. C. 387.

If a political association is formed for a place within the electoral district, and it is not shewn that there was any restriction on the members to work for their candidate within the limits of that place only, they are his agents throughout the whole district. *West Prince (Dom.)*, 27 S. C. R. 241.

As to the agency of T., it appeared that he was one of the local vice-presidents of the party association; he had been present at two meetings of local party men calling themselves a "Conservative Club," who were interesting themselves in the election, and had contributed towards the cost of hiring the club-room; at these meetings he had gone over the voters' list with others, which was the only work done; at a meeting held by the respondent in the place where T. lived, he had presided, having been elected chairman by the audience, and he made a speech introducing and commending the respondent; before the meeting he had met the respondent in the street, had shaken hands with him, and asked him how things were going. The respondent did not know that T. was local vice-president, and had never heard of the "Conservative Club." T. was not a delegate to the nominating convention nor present thereat. The association, as such, was not charged with any definite duty in connection with the election except the selection of a candidate:—Held, reversing the decision of the trial Judges, that T. was an agent of the respondent. *East Elgin (Prov.)*, 2 E. C. 109.

The respondent was nominated by a Conservative association, and he accepted the nomination. The delegates to the association were to do all they could to secure his election. A committee was appointed in O. to canvass the town, and a committee room was engaged and paid for by the association, voters' lists were procured and used as canvassing books, and members were appointed to canvass parts of the town, and reports were made to the committee of the result of the canvassing. The respondent, who resided at W., did not attend the meetings, but knew they were canvassing for him, and gave them blank appointments of scrutineers to fill up, which they did, but the respondent did not know who composed the committee:—Held, per Wilson, J., that the respondent, by authorizing such committee at O. to appoint scrutineers, made them his special agents for that particular matter and for that occasion only, and did not adopt them as his general agents for all the purposes of the election. One T., a member of such committee, canvassed actively for the respondent and to his knowledge, and on the nomination day attended a meeting of the respondent's friends in W., at which the respondent was present, and at which arrangements were made about canvassing and getting out votes, and generally about the election:—Held, by the court of appeal, that T. was an agent of the respondent for the purposes of the election. One G., a member of the same committee, had a voters' list, and canvassed for the respondent, and stated he had no doubt the respondent expected him to vote and work for him:—Held, per Wilson, J., that G. was not an agent of the respondent. The committee of the town of W., having been recognized and its meetings attended by the respondent, the members thereof were held to be his agents. *South Ontario (Prov.)*, H. E. C. 420.

A Reform association existed in the constituency as an organized body for bringing forward candidates and doing everything in their power to elect their nominees. B. was present at meetings of the association, and one witness swore "he took as much part as any of us." It was not shewn that the organization was well defined, or what was necessary to constitute membership. A committee and sub-committee were appointed for the township in which B. resided, but he was not on them, or any committee for election purposes. Committee meetings were held at his hotel at which he was present, but it was not shewn that he did any more at the meetings than any owner of a hotel would do at a meeting held in his house. B. swore that, with the exception of one man, he did no canvassing outside his own house; he did not report to the committee meetings in his house, because he had been doing nothing, but that he gave the respondent the name of one person who wished to see him. It was not shewn that he had any authority from the respondent, or any committee, or that the respondent expected his assistance, or gave him any instructions, or recognized any act done by him. At the trial it was proved that B. had been guilty of a corrupt practice, without the knowledge or consent of the respondent:—Held, following the North Ontario case, H. E. C. at p. 323, that B. was not an agent of the respondent. D. heard of a meeting, went there, and found about half-a-dozen people present going over a voters' list, in which he did not take part. It was not shewn that he had any authority from the respondent, or any committee or association, or any one on his behalf, or that any act he did was recognized. D. was found to have been guilty of corrupt practices without the knowledge or

consent of the respondent:—Held, following the North Ontario case, H. E. C. at p. 317, that he was not an agent. *Welland (Prov.)*, 1 E. C. 383.

See Haldimand (Dom.), 1. E. C. 572; *East Northumberland (Prov.)*, 1 E. C. 434; *West Simcoe (Prov.)*, 1 E. C. 128; *Muskoka and Parry Sound (Prov.)*, 1 E. C. 197.

(e) *What Constitutes an Agent—Other Circumstances.*

Admission by Counsel.] — See *Russell (Ont.)*, H. E. C. 199.

Attending Meetings with Candidate —*Canvassing.*]—Evidence was given to shew that certain persons had attended meetings with the respondent and canvassed for him, and had performed other acts of alleged agency, as set out in the evidence:—Held, that the acts of alleged agency relied on in the evidence were not sufficient to constitute such parties the agents of the respondent. The petition, nevertheless, was dismissed without costs. *North York (Prov.)*, H. E. C. 62.

——— *Canvassing—Carrying Voters to Poll.*]—One C. accompanied the respondent when going to a public meeting, and canvassed at some houses. On the journey, the respondent cautioned C. not to treat nor do anything to compromise him or avoid the election. The respondent's election agent paid for C.'s meals at the place where the meeting was held:—Held, that the evidence shewed that the respondent had availed himself of C.'s services, and was therefore responsible for his acts. A witness stated that he had asked the people in his neighbourhood to vote for the respondent, had attended a meeting of the respondent's friends and made arrangements for bringing up voters on polling day, and had a team out on polling day:—Held, that the evidence of his being an agent of the respondent was not sufficient. *East Peterborough (Prov.)*, H. E. C. 245.

——— *Canvassing—Other Acts.*]—Mere canvassing of itself does not prove agency, but it tends to prove it. A number of acts, no one of which might in itself be conclusive proof of agency, may, when taken together, amount to proof of such agency. Persons who canvassed and went to meetings with the respondent, and attended meetings to promote the election, at which meetings the respondent attended; and persons who canvassed with and introduced voters to the respondent, called meetings and appointed canvassers, and did other acts to further the election, and examined the results of the canvass, were held to be agents of the respondent; and corrupt practices committed by them, and by subagents appointed by them, avoided the election. *Cornwall (Dom.)*, H. E. C. 547.

——— *Warning.*]—One P., a tavern-keeper, took the petitioner's side at the election and at a meeting called by the petitioner, at which he was appointed chairman. Notices of this meeting were sent by the petitioner to P. to distribute, some of which P. put up at his house and some he sent to other places. On polling day P. desired to give a free dinner to some of the petitioner's voters, and asked the petitioner if he might do so. The petitioner did not approve of it in case it should interfere with his election, and told P. that, although he was not his (petitioner's) agent, he would rather he should not do it. P., notwithstanding this, paid for free dinners to forty of the petitioner's voters:—Held, that P. was not an agent of the petitioner. *North Victoria (2) (Dom.)*, H. E. C. 671.

Attending Meetings—*Acting as Chairman—Canvassing—Other Acts.*]—As to the agency of L., it appeared that the respondent was brought into the field as the candidate of his party, having been nominated at a convention of the party association for the electoral district: L. was not a delegate to, nor was he present at, the convention; and he was not upon the evidence connected with the association or its officers; he was not brought into touch with the candidate, nor any proved agent of his, either as regards his or their knowledge of the fact that he was working or proposing to work on behalf of the candidate, or as regards any actual authority conferred upon him to do so. But he was present at three meetings of electors when the voters' list was gone over; he acted as chairman of a public meeting called in the respondent's interest; he canvassed some voters; and, from his antecedents, the respondent hoped or believed or expected that he would be an active supporter:—Held, that L. was not an agent of the respondent. Haldimand case, 1 E. C. 572, distinguished. *East Elgin (Prov.)*, 2 E. C. 100.

Canvassing—*Recognition.*]—One C. canvassed for the respondent, and told the respondent he was going to support him, and the respondent expected and understood that he would do everything he could for him legitimately. C. did not attend any meetings of the respondent's committees, and made no returns of his canvassing:—Held, on the evidence, that C. was an agent of the respondent for the purposes of the election. *Cornwall (3) (Dom.)*, H. E. C. 803.

Carrying Voters to Poll—*Recognition.*] —One A. had hired teams and taken voters to the polls contrary to R. S. O. 1877 *c.* 10, s. 154, and it was proved that the candidate, being in the village of G., was told that A. was there for the above purposes, and that he went to see A. in his hotel and discussed the election and the probable results, with lists of voters, &c.:—Held, that this, and other circumstances of the case, established the agency of A. *Muskoka and Parry Sound (Prov.)*, 1 E. C. 197.

——— *Support of Candidate—Uncertainty.*]—The charge was that F., a licensed hotel-keeper, about four o'clock on the polling day served H. and a voter with drinks in the barroom. F. was a member of the Reform association, and generally took part in elections. He attended the meeting called for the nomination of the respondent, but he took no active part in it. On the election day he drove electors to the poll, but it did not appear on which side he was voting. The president of the Reform association said he did not think that F. worked for the respondent, and understood he was a friend of the defeated candidate: and H. said he thought he was working for the respondent. One of the trial Judges held that the evidence failed to shew that F. was an agent of the respondent; the other held that it was sufficient to establish such

agency. On appeal, one of the Judges agreed with the former view. The other Judges did not consider the point. *East Simcoe* (*Prov.*), 1 E. C. 291.

——— *Volunteer—Other Acts.*]—On the morning of the polling day, S. met McN. in an hotel, and asked him to vote for the respondent, to which he agreed; he then took him to his (S.'s) house, and afterwards to a tavern where he treated him, and then to a poll where he voted. S. always took an active part in every election on the Reform side, and during this election he had, on one occasion, attended a meeting of the local political organization, or committee, for whose acts in the management of the election the respondent would be answerable, when some election work was done, but it was not shewn that he had canvassed except in this particular case, or that he was a member of the committee, and he swore that he was not asked to do any work. On the polling day he was actively engaged in driving voters to the polls in his own conveyance, which he said he did as a mere volunteer:—Held, that the treating was a corrupt act, but that S.'s agency was not proved. *North Ontario* (*Prov.*), 1 E. C. 1.

Intrusting with Money—*Sub-Agents.*]—When a candidate puts money into the hands of his agent, and exercises no supervision over the way in which the agent is spending that money, but accredits and trusts him, and leaves him the power of spending the money, although he may have given directions that none of the money should be improperly spent, there is such an agency established that the candidate is liable to the fullest extent not only for what that agent may do, but also for what all those whom that agent employs may do. *South Grey* (*Prov.*), H. E. C. 52.

Nominating Convention—*Address of Candidate—Request for Support.*]—The petition in this case charged that one H., as agent of the respondent, in violation of R. S. O. 1877 c. 10, s. 157, sold or gave drink at his tavern within the limits of a polling subdivision on polling day, which, by R. S. O. 1877 c. 11, s. 2, s.-s. 6, is made a "corrupt practice." It appeared that H. was present, and had acted as a delegate at the convention of representative Reformers whereat the respondent was nominated. The latter did not undertake a personal canvass, or appoint any particular persons or association of persons his agents for the purpose of carrying on the contest, but at the said convention he made a speech intimating that he expected his friends to work for him:—Held, that this constituted an appointment by him of every one of those who constituted the convention as his agent for the purpose of the contest, and no proof of acts done by the persons thus addressed and recognized by the candidate, was necessary to establish the agency, and, as H. undoubtedly did sell the liquor as alleged, and as this corrupt act was not shewn to be of such trifling nature and extent as to come within R. S. O. 1877 c. 10, s. 159, the election must be declared void under s. 158. Held, at the trial, that the question of agency is one of fact, and must be decided in every case upon the circumstances immediately in question. *West Simcoe* (*Prov.*), 1 E. C. 128.

It appeared that when the candidate accepted the nomination of the convention of the party he intimated to those present, among whom was N., that he looked for their active exertions in carrying on the contest:—Held, at the trial, that this amounted to an authorization of those present, including N., to canvass and thus to act as agents, for the authorization to canvass covers agency, and even without any such express declaration the agency of those persons who were actually attending and taking part in the convention was established in the absence of anything shewing a repudiation or rejection of the offer of services which is implied by the very fact of their attending and making the nomination. *Muskoka and Parry Sound* (*Prov.*), 1 E. C. 197.

——— *Address of Candidate—Request for Support—Acts of Supporters.*]—The respondent was nominated by a convention of the Conservative party, composed of fifty or seventy-five persons, among whom was R., who was well known as a prominent member of the party, and was on intimate terms with the respondent, both of them being physicians. R. was one of the persons nominated at the convention, but the choice fell on the respondent, who then made a speech of acceptance, in which he said he expected his friends to take an interest in the election and to work for him. R. made no systematic canvass, but he asked several people for their votes, was at various informal meetings of voters held in the interest of the respondent, and with the respondent visited the houses of several voters:—Held, that R. was an agent of the respondent. F. D. was at the convention which nominated the respondent, and he and W. D. were among the supporters of the respondent in a particular locality who held meetings at which the voters' lists were discussed and arrangements were made for looking up doubtful voters:—Held, that these men were both to be regarded as agents of the respondent. *East Northumberland* (*Prov.*), 1 E. C. 434.

Ratification of Payment—*Knowledge.*]—A voter who had a claim of $3 from a former election of respondent, when canvassed to vote, said he did not think he should vote, evidently putting forth the $3 that was due to him as a grievance. The clerk of an agent of the respondent promised to pay it to him, and he voted, and the money was paid after the election, and charged by the clerk in the agent's accounts as "paid J. Landy $3," but without the knowledge of such agent. Another agent of the respondent (McD.), who was treasurer of the ward, and was aware of the claim, and had told the voter it would be made right, paid the first agent's account, but did not then take particular notice of the payment, and it was not explained to him. The clerk had been requested by his employer (the agent first mentioned) to canvass a particular voter, but was not employed as a canvasser generally by any one:—Held, that such clerk was not an agent or sub-agent of the respondent; (2) that the payment of the account by the agent (McD.) was not under the circumstances a ratification by him after the act, so as to affect the election. *West Toronto* (*Prov.*), H. E. C. 97.

Scrutineer — *Written Appointment.*]—A scrutineer appointed for a polling place at an

election under the written authority of a candidate is an agent for whose illegal acts at the polling place the candidate will be answerable. *Haldimand (Dom.)*, 1 E. C. 529.

Support of Candidate—*Motive—Recognition.*]—A year before the election the respondent paid part of the charges of a lawyer retained by one O. to attend the revision of the assessment rolls. O. at the time of the election attended one of the respondent's meetings at which he stated that his own mind was not made up, but he urged that the respondent ought to have the support of the voters, he being a local man; and in three or four instances O. asked voters to vote for the respondent. The respondent and his friends distrusted O., and in no way recognized him as acting with them:—Held, that O. was not an agent of the respondent for the purposes of the election. *Hatton (Dom.)*, H. E. C. 736.

One S., who desired nomination as a candidate by a Reform convention, was not nominated, and thereupon, from hostility to the convention and its nominee, opposed the candidate of the convention, which thereby had the effect of supporting the respondent. At the close of the poll, the respondent publicly thanked S. for being instrumental in bringing about his election. S. owned a shop and tavern, but the license for the latter was in his clerk's name; and during the polling hours on polling day spirituous liquors were sold and given in the shop and tavern:—Held, that what was done by S. at the election was in pursuance of a hostile feeling against the convention and its candidate, and did not constitute him an agent of the respondent. *Cardwell (Prov.)*, H. E. C. 389.

——— *Motive — Recognition — Attending Meetings.*]—One M., the reeve of a township, exerted himself strongly in favour of the respondent, to whom he was politically opposed, and against the other candidate, and attended meetings where the respondent was, and spoke in his favour. The reason for his supporting the respondent and opposing the other (ministerial) candidate with whom he was politically in accord, was, that the ministry of the day had separated the township of which he was reeve from the riding. He was annoyed and indignant at this separation, and announced his intention of using all his influence against the ministerial candidate. The respondent asked M. to attend a public meeting, which he did; and at another meeting which he attended, M. stated (but not in the respondent's hearing) that he was acting there on the respondent's behalf. M. was once in the respondent's committee room, and signed and circulated circulars issued by the respondent's friends:—Held, that the question of agency being one of intent, the respondent, under the circumstances, never conferred upon M. the authority, nor did M. accept the delegation, of an agent for the purpose of the election. *North Grey (Prov.)*, H. E. C. 362.

——— *Motive—Treachery.*] — L., being a municipal councillor, and as such a member of an association which had brought out the respondent as a candidate for election, had a personal disagreement with the respondent, and refused to attend the meeting of the nominating committee when the respondent received the nomination, and when asked by the respondent to support him refused so to do, saying that he now had an opportunity of getting even with him; but without the knowledge of the respondent he took an interest in the election and bribed a voter:—Held, that he was not an agent of the respondent, and that there was evidence tending to shew that he was acting treacherously toward him. *Lennox (Prov.)*, 1 E. C. 41.

——— *No Agents or Committees Appointed—Authority of Supporters—Recognition.*]—Semble, if a candidate in good faith undertakes the duties which his agent might undertake, the acts of a few zealous political friends in canvassing for him, introducing him to electors, attending public meetings and advocating his election, or bringing voters to the poll, would not make such candidate responsible for prohibited acts contrary to his publicly declared will and wishes, and without his knowledge and consent. The respondent in his evidence stated that he objected to committees; that he knew certain persons were his supporters, and believed they did their best for him, but he did not personally know that they acted for him. Other evidence shewed that these persons took part in the election on behalf of the respondent; some spoke for him at one of his meetings; and one of them stated that he and some of the others canvassed for the respondent, and that he gave the respondent to understand he was taking part in the election for him:—Held, that as it did not appear that any one of these persons was authorized by the respondent to represent him, and as they did not claim to have any such authority from him, but supported the respondent as the candidate of their party, the said persons were not agents of the respondent for the purposes of the election. Remarks on the evidence of agency. Semble, that if a candidate who had appointed no agents was aware that some of his supporters were systematically working for him, and by any act, or forbearance, could be fairly deemed to recognize and adopt their proceedings, he would make them his agents. *South Norfolk (Dom.)*, H. E. C. 669.

——— *Organization—Absence of—Recognition—Scrutineer.*]—At the election in question there was no formal organization of the party supporting the appellant. The county Reform association had been disbanded and the minutes, regularly kept since 1882, destroyed, as were the rough minutes of every meeting of a convention of the party held since that date. In lieu of local committees vice-presidents were appointed for the respective townships, and on the approach of a contest the vice-presidents called a meeting of the county association, composed of all Reformers in the riding, to go over the lists and do all the necessary work of the election. The evidence of H.'s agency relied on by the petitioner was, that he had always been a Reformer, had been active for two elections, had attended one important committee meeting and been recognized by the vice-president of the township as an active supporter of the appellant, and that he acted as scrutineer at the polls in the election in question. The trial Judge held that all these elements combined, in view of the state of affairs regarding organization, constituted H. an agent of the appellant:—Held, that the circumstances proved justified the trial Judge in holding the agency of H. established. *Haldimand (Dom.)*, 1 E. C. 572.

——— *Volunteer—Recognition.*]—S., who was a political friend and supporter of the respondent, treated a meeting of electors with the knowledge, though not with the direct assent, of the respondent. It was proved at the trial that S. was a noisy, talkative man, employed as a travelling agent through the country; he had a bet or bets on the election; the respondent saw him at the meeting, and had some conversation with him in the crowd. Some time during the contest, and later than the date of the meeting, he went to respondent's office to make some suggestions, and asked his opinion as to the result, as he said some men wanted to bet with him. While there he saw some "campaign literature" on the table and took some of it away with him, with the assent of the respondent. No evidence was given that he canvassed voters, and the respondent swore that he never gave him express authority to canvass or to do anything for him, and that he was not a man he would employ as an agent:—Held, that at the time of the meeting S. was nothing more than a volunteer, for whose acts the candidate was not responsible. *Prescott (Prov.)*, 1 E. C. 88.

Various Acts and Circumstances.]—Evidence to establish agency discussed. *South Perth (Ont.)*, 2 E. C. 30; *London (Dom.)*, 10 C. L. J. 281; *South Oxford (Dom.)*, 11 C. L. J. 161; *Brockville and Elizabethtown (Dom.)*, 32 U. C. R. 132; *South Ontario (Prov.)*, H. E. C. 420; *North Ontario (Dom.)*, H. E. C. 785; *Halton (Dom.)*, H. E. C. 736; *North Ontario (Prov.)*, 1 E. C. 1; *West Northumberland (Dom.)*, 10 S. C. R. 635; *Welland (Prov.)*, H. E. C. 47.

3. *Bribery and Corrupt Practices.*

(a) *Generally.*

Acts of Agents—*Motive—Ambiguity.*]—When these two things concur, an act that comes within the designation "corrupt practice," and that the doer of the act is an agent for the candidate, the court is not at liberty to say that the act was done in order to promote the objects of the agent, and not in order to promote the interest of the candidate, that, though true it is the act of the agent, it is not the act of the agent, quâ agent. It being an act which is profitable to the doer of the act, and the making of the profit being assumed to be the motive of the doer of the act, cannot dissociate the act from the election. The Lincoln case, H. E. C. 391, commented on. The Harwich case, 3 O'M. & H. 69, distinguished. *West Simcoe (Prov.)*, 1 E. C. 128.

——— *Motive — Influencing Electors.*]—Where a candidate in good faith intended that his election should be conducted legally, and had printed and circulated throughout the constituency a synopsis of the new law as to corrupt practices, and had caused an editorial article to be printed in a newspaper, and had taken trouble to have the law explained to the electors—Held, that, although many of the acts done during the election created doubt and hesitation in the Judge, yet, as the return of a member ought not to be lightly set aside, the Judge ought to be satisfied that the acts done were done to influence the electors and so done corruptly; and this election was upheld. *West Toronto (Prov.)*, H. E. C. 97.

Deputy Returning Officers — *Political Associations.*]—The suggestion of names and recommendation of deputy returning officers by political associations commented on and disapproved of. *North Ontario (Prov.)*, 1 E. C. 1.

Expenditure—*Absence of Account—Presumption.*]—When an agent of a candidate receives and spends for election purposes large sums of money, and does not render an account of such expenditure, it will create a presumption that corrupt practices have been resorted to. *Levis (Dom.)*, 11 S. C. R. 133.

Judgment — *General Finding.*]—In this case the judgment appealed from did not contain any special findings of fact or any statement that any of the charges mentioned in the particulars were found proved, but stated generally that corrupt acts had been committed by the respondent's agents without his knowledge, and declared that he had not been duly elected, and that the election was void. On an appeal to the supreme court on the ground that the judgment was too general and vague:—Held, that the general finding that corrupt acts had been proved was a sufficient compliance with the terms of the statute R. S. C. 1886 c. 9, s. 43. *Pontiac (Dom.)*, 20 S. C. R. 626.

Statutes—*Interpretation of—Meaning of Terms Used.*] — The plain and reasonable meaning of 32 Vict. c. 21 (O.) is, that when the prohibited things are done in order to induce another to procure, or to endeavour to procure, the return of any person to serve in parliament, or the vote of any voter at any election, the person so doing is guilty of bribery. The difference beween the Imperial statute (17 & 18 Vict. c. 102, s. 2, s.-s. 3, proviso), and the Ontario statute (32 Vict. c. 21, s. 67, s.-s. 3, proviso), as to "legal expenses" in elections, pointed out. *East Toronto (Prov.)*, H. E. C. 70.

Held, that "illegal and prohibited acts relating to elections," in the definition of corrupt practices in the Ontario Controverted Elections Act, 1871, were confined to bribery, hiring of teams, and undue influence, as defined by ss. 67 to 74 of the Election Act of 1868. *North York (Prov.)*, H. E. C. 62.

The words "illegal and prohibited acts in reference to elections," used in 34 Vict. c. 3, s. 3 (O.), mean such acts done in connection with, or to affect, or in reference to elections; not all acts which are illegal and prohibited under the election law. *Brockville (Prov.)*, H. E. C. 139.

The definition of "corrupt practices" in s. 3 of the Dominion Controverted Elections Act, 1873, considered. *North Victoria (Dom.)*, H. E. C. 584.

The Imperial and Dominion election laws, as to corrupt practices and their consequences, compared and considered. *Kingston (Dom.)*, H. E. C. 625.

Semble, that the term "wilful," as used in s. 98 of 37 Vict. c. 9 (D.), cannot be construed in a narrower sense than the term "corruptly" in s. 92, s.-s. 1; and that the term "corruptly" does not mean wickedly, or immorally, or dishonestly, but doing that which the legislature

plainly meant to forbid; as an act done by a man knowing that he is doing what is wrong and doing it with an evil object. *Halton (Dom.)*, H. E. C. 736.

The intention of the legislature was, that votes should be given from the conviction in the mind of the voter that the candidate voted for was the best person for the situation, and that the public interest would be best served by electing him, and the evil to be corrected was supporting a candidate for causâ lucri, or for personal gain in money or money's worth to the voter. *Halton (Prov.)*, H. E. C. 283.

Summons for Corrupt Practices—*Limitation of Time — Evidence — Several Charges.*]—See *Halton (Prov.)*, 2 E. C. 158.

See Muskoka (Prov.), H. E. C. 458; *West Hastings (Prov.)*, H. E. C. 211; *East Toronto (Dom.)*, 10 C. L. J. 248.

(b) *Acts of Trifling Nature and Extent not Affecting the Result of the Election.*

The majority of the respondent was 337; but it appeared in evidence that two agents of the respondent had bribed between forty and fifty voters; that in close proximity to the polls spirituous liquor was sold and given at two taverns during polling hours, and that one of such agents took part in furnishing such liquor; and that such agent had previous to the election furnished drink or other entertainment to a meeting of electors held for the purpose of promoting the election:—Held, that the result of the election had been affected thereby, and that the election was void. Prima facie corrupt practices avoid an election; and the onus of proof that they are not sufficient to affect the majority of votes rests upon the respondent. *West Hastings (Prov.)*, H. E. C. 539.

Where corrupt practices by agents, and others in the interest of the respondent, affected less votes than the majority obtained by the respondent at the election:—Held, under 39 Vict. c. 10, s. 37 (O.), that such corrupt practices did not extend beyond the votes affected thereby, and did not avoid the election. *Lincoln (Prov.)*, H. E. C. 489.

Although the irregularities of the deputy returning officer could not, by themselves, be said to have affected the election:—Quære, whether in conjunction with another corrupt act which was found to have been committed by an agent of the candidate, they could under R. S. O. 1877 c. 10, s. 159, conjointly be said to have done so. Held, at the trial, that the irregularities were not "illegal practices," as mentioned in that section, but were rather defaults than acts or practices, and entirely unconnected with corrupt practices. What is referred to in s. 159 is systematic illegality, whether amounting to corruption or falling short of it, to such an extent that the particular acts which are proved, may be reasonably considered merely to be instances in connection with the general system of corruption or illegality which has been prevalent during the contest. *Prescott (Prov.)*, 1 E. C. 88.

The power of saving an election under R. S. O. 1877 c. 10, s. 159, should be exercised very cautiously, and a fortiori by the Judges of the appellate court, where the rota Judges have deemed the case to be not proper for the application of the power given by this section of the Act. The object and purpose of R. S. O. 1877 c. 10, s. 159, do not require anything in the shape of an attempt to estimate the number of votes which can be shewn or surmised to have been affected by the corrupt act in question, and to balance that against the actual majority. Although, no doubt, the word "trifling" must be construed in each case with some reference to the majority, particularly when considering the extent of the corrupt acts, the court is not called upon to enter into a quasi-scrutiny for the purposes of this section. *West Simcoe (Prov.)*, 1 E. C. 128.

Held, per Boyd, C., that but one corrupt practice was proved in this case, and that, in view of the provisions of s. 159 of the Act, that one was not sufficient to avoid the return; that, inasmuch as respondent's personal expenses had not amounted to $100, and as, during the canvass, although he had treated friends, he had not done so to any greater extent than had previously been his habit, neither his personal conduct during the election nor the absence from the trial of one of his chief agents, against whom considerable suspicion was raised by the evidence, ought to prevent the court from applying the provisions of R. S. O. 1877 c. 10, s. 159, to the circumstances of this case. Held, per Cameron, C.J., that, although nothing corrupt or unusual was proved as to respondent's expenses or treating, he had not properly returned his personal expenses, and this circumstance, coupled with the keeping out of the way at the time of the trial of one of his chief agents, should prevent respondent receiving the benefit of s. 159 of the Act, and the election should be avoided. On appeal:—Held, that upon the evidence the election was saved under the provisions of s. 159. *East Middlesex (Prov.)*, 1 E. C. 250.

H. was a prominent supporter and agent of the respondent, secretary of the Reform association of the riding, delegate to the convention which nominated respondent, and an active organizer and manager of the election contest. R., a voter, well known to H. as what he called a "loose fish," and belonging to a family reputed to sell their votes, came to H., and asked for money for his vote; not succeeding, he returned next day and made a similar request. Finally he asked for $5, because, he said, he was sick and hard up, and wanted to pay his taxes. Whereupon H. gave him $5, but on R. pledging his word that it had nothing to do with his vote. R. told T., another voter, that if he wanted $4 or $5 now was his time, and introduced him to H.; T. asked if any money was going, and offered his own vote for $10, and his father and three brothers for $20. H. gave him $4, calling it a loan, and on T.'s word of honour that it would not influence him in the election. H. also hired the team of a man named C. for the election day. The election was very close, over 2,700 votes being polled, and the respondent's majority being twenty-three:—Held, that these were clearly corrupt acts. Per Boyd, C., that though the several acts of the agent in this case were clearly corrupt acts,

they did not avoid the election, as they came within the protection of R. S. O. 1877 c. 10, s. 159; and per Cameron, J., that they did avoid the election, as they were not within the said protection. Per Boyd, C.—The scope of the section was that an election should not be set aside for two or three illegal acts of a trifling nature or extent, where the majority is considerably more than the votes affected, unless these illegal acts and practices prevailed, and were so influential, extensive, and insidious as to induce the probable and reasonable belief that but for such acts and practices the result might have been different, while here, after striking off the corrupt votes, the respondent would still have a majority. Per Cameron, J.—The extent of the influence of the corrupt acts is not to be measured or estimated merely by the number of corrupt votes, but in connection with the influence of the party proved to be guilty of its commission, and by the opportunities he may have had of resorting to like practices in other cases. On appeal to the court of appeal:—Held, affirming the finding of Cameron, J., that the corrupt acts in this case did not come within the protection of s. 159, and therefore the election was avoided. *East Simcoe (Prov.)*, 1 E. C. 291.

Irregularities at nomination and at polling. See *S. C., ib.* See also *Monk (Prov.)*, H. E. C. 154.

At the trial of the petition one corrupt act, namely, the payment of the travelling expenses of a voter, M., by F., an agent of the respondent, was proved; it was also found that C. D. was guilty of bribery, in giving a dollar to each of two voters and offering money to another, but no agency was proved, and that L. R. gave liquor at his tavern during polling hours, but he was not proved to be an agent. It was contended that these latter acts, and the evidence as to the acts and conduct of three other persons in connection with other charges which were not proved, should all be taken into consideration with the proved corrupt act, in order to take the case out of s. 159 of the Election Act, R. S. O. 1877 c. 10, and prevent the respondent from saving his seat under the provisions of that section:—Held, that the election was not avoided. Per Patterson, J.A.—The "result" referred to in s. 159 is the result which touches the right to the seat which is being contested, i. e., the majority of legal and honest votes. The petitioner could not insist on giving evidence of any corrupt practice which he had not charged—and for this purpose illegal acts are corrupt practices—but whether the evidence given upon any charge is sufficient to establish it, or falls short of doing so, any facts or any course of conduct shewn by that evidence may be properly considered in connection with any other corrupt or illegal practice which has been proved, and the nature or probable extent of which it may serve to elucidate; but on consideration of all the facts in this case this election should be held good and the respondent duly elected. Per Ferguson, J.—The words "other illegal practices at the election," at the end of s. 159, must be illegal practices the existence of which is ascertained and known, and the way their existence becomes known is by the evidence. This cannot rest in conjecture, it must be proved. Whenever, in giving evidence to prove a corrupt practice charged as having been committed by an agent, it appears that illegal practices took place, though the evidence fail to prove the agency, these illegal practices are comprehended in the meaning of the words "other illegal practices at the election," and must be taken in connection with the corrupt act of the agent. On the whole case, the corrupt act proved was so trifling that the result cannot have been affected by it, either alone or in connection with the other illegal practices at the election; the election should not be avoided. *Welland (Prov.)*, 1 E. C. 383.

R. committed two clearly proved acts of bribery; F. D. and W. D. entered into a scheme for violating the secrecy of the election by inducing voters to exhibit their ballots, after they were marked, at a window; and the evidence developed at least two other acts of bribery, though not by agents, and some suspicious circumstances; but all these were without the knowledge or consent of the respondent. The vote polled was about 4,500, out of which there was a majority of fifty-one for the respondent:—Held, that the election was void because of the corrupt acts of R.; and, in view of the conduct and details of the contest, the saving provisions of s. 159 of the Election Act, R. S. O. 1877 c. 10, could not be applied. The scheme for violating the secrecy of the ballot was an illegal act under s. 146, and had no little significance when taken in connection with the proved acts of bribery. In estimating the application of s. 159 it was impossible to leave out of sight the illegal practices under s. 146. West Simcoe (Prov.), 1 E. C. 153, referred to and followed. *East Northumberland (Prov.)*, 1 E. C. 434.

Though the only corrupt act proved against a sitting member was of a trivial and unimportant character, and he had at public meetings warned his supporters against the commission of illegal acts, yet, as such act was committed by an agent whom he had taken with him to canvass a certain locality, and there were circumstances which should have aroused his suspicion, he should have given a like warning to his agent, and not having done so he was not entitled to the benefit of the amendment to the Controverted Elections Act in 54 & 55 Vict. c. 20, s. 19. *West Prince (Dom.)*, 27 S. C. R. 241.

Where only two acts of bribery were proved, but the perpetrators were both active, and one an important agent of the candidate, neither of whom was called at the trial, and one of the bribes, though only $2, was paid out of a general election fund, to which the respondent had contributed $250, and the respondent's majority was 65 out of a total vote of about 5,000:—Held, that the election was rightly avoided, notwithstanding the saving clause, s. 172 of R. S. O. 1897, c. 9. *North Waterloo (Prov.)*, 2 E. C. 76.

The total vote polled was over 4,500, and the majority for the respondent was 29. The trial Judges had reported one person guilty of an act of undue influence, three of being concerned in acts of bribery, and T. and two others of providing money for betting:—Held, that s. 172 of the Election Act, R. S. O. 1897 c. 9, could not be applied to save the election. *East Elgin (Prov.)*, 2 E. C. 100.

See Dufferin (Prov.), H. E. C. 530; *North Ontario (Prov.)*, 1 E. C. 1; *Hamilton (Prov.)*, 1 E. C. 499.

(c) *Bribery.*

Generally—*What It Is.*]—Bribery is not confined to the actual giving of money. Where a grossly excessive price has been paid for work or for an article, it is clearly bribery. *Cornwall* (*Dom.*), H. E. C. 547.

Where money was paid to voters for services agreed to be rendered, but such services were not rendered owing to the misconduct of the voters, such payment was not bribery. *West Toronto* (*Prov.*), H. E. C. 97.

Where half a cord of wood was given to a voter in poor circumstances during the election, and the giver swore that it was given out of charity:—Held, not an act of bribery. Where a voter was bailed out of gaol on the day of polling by a friend, but according to the evidence without reference to the election:—Held, not an act of bribery. *London* (*Prov.*), H. E. C. 214.

The giver of a bribe as well as the receiver may be indicted for bribery. The first principle of parliamentary law is that elections must be free; and, therefore, without referring to statutory provisions, if treating was carried on to such an extent as to amount to bribery, and undue influence was of a character to affect the election, the election would be void. *North Victoria* (*Dom.*), H. E. C. 584.

See London (*Prov.*), H. E. C. 214; *West Northumberland* (*Dom.*), 10 S. C. R. 635; *Halton* (*Dom.*), H. E. C. 736.

By Agents.]—One M., a carter, who voted for respondent, at the request of P., the respondent's agent, carried a voter five or six miles to the polling place, saying that he would do so without charge. Some days after the election P., the agent, gave M. $2, intending it as compensation for the conveyance of such voter to the poll, but M. thought it was in payment for work which he had done for P. as a carter. The candidate knew nothing of the matter:—Held, that there was properly no payment by P. to M. for any purpose, the money being given for one purpose and received for another; but that if there had been, it was made after P.'s agency had ceased, and there was no previous hiring or promise to pay, to which it could relate back. If such payment had been established as a corrupt practice, it would have avoided P.'s vote, but not M.'s; and it would not have defeated the election, for it was not found to have been committed with the knowledge or consent of the candidate, but the contrary. *Brockville* (*Prov.*), H. E. C. 139.

An elector when asked to vote for respondent said that it would be a day lost if he went to vote, which would cost him $1. To which the canvasser replied: "Come out, and your $1 will be all right:"—Held, not sufficient to establish a charge of bribery. *Monck* (*Prov.*), H. E. C. 154.

K., an agent, while canvassing a voter in ward No. 6, gave him money to get beer, for which the voter paid a lesser sum, and, as the voter was poor, told him to keep the change:—Held, under the circumstances, not an act of bribery. *London* (*Prov.*), H. E. C. 214.

One M., the financial agent of the petitioner, agreed with a voter who had a difference with the petitioner about a right to cut timber on the voter's land, to settle the matter—the voter when canvassed to vote for the petitioner having referred to this difference. M. signed an agreement in the petitioner's name, whereby he surrendered any claim to cut timber except as therein mentioned:—Held, that a surrender of the right to cut timber on the lands of another was a "valuable consideration," within the meaning of the bribery clauses of 32 Vict. c. 21 (O.). 2. That the agent M. was guilty of an act of bribery. *North Victoria* (*Prov.*), H. E. C. 252.

An agent of the respondent, while canvassing a voter, gave $8 to the widowed sister of the voter, an old friend of his, who was then in reduced circumstances. The agent stated that this was not the first money so given, and that it was in no way connected with the election:—Held, under the circumstances, not an act of bribery. An offer by an agent of the respondent when canvassing a voter, that he "would see him another time and things would be made right," is not an offer of bribery. *North Victoria* (*Prov.*), H. E. C. 252.

One H., a voter, held a claim against the respondent, and M., a member of a township committee, and another, for five years, which he had been endeavouring to procure payment of. When canvassed at the time of the election, he stated that if he did not get it settled he would not vote for the respondent. M. induced the respondent to give his promissory note to H. for the debt, but did not give the respondent to understand directly or indirectly that the note had anything to do with the election:—Held, that it is always open to inquire, under statutes similar to the Election Acts, whether the debt was paid in accordance with the legal obligation to pay it, or in order to induce the voter to vote or refrain from voting. 2. That, on the evidence, the motive which induced M. was that of procuring the voter H. to vote at the election, and that thereby an act of bribery was committed by M. as such agent, which avoided the election. *North Ontario* (*Prov.*), H. E. C. 304.

A large sum of money, averaging $3 per head, had been spent by two of the agents of the respondent, and money had been given by them to persons without any instructions:—Held, that where such money had been applied improperly, it must be considered that it was intended to be so applied. *Cornwall* (*Dom.*), H. E. C. 547.

One L., a tavern-keeper, was told by H., one of respondent's canvassers, that he thought L. could get $18 or $20 from P., if he would stay at home during the election. L. expected that the money would be spent at his tavern, and shewed that he did not know what was intended. Neither H. nor P. was examined:—Held, on the evidence, that there was no actual offer to bribe. *North Victoria* (*Dom.*), H. E. C. 612.

The agent C. employed one W. to go with him on the evening before the election to several electors, from whom both C. and W. made colourable purchases, but with the corrupt intention of inducing the persons from whom the purchases were made to vote or refrain from voting at the election:—Held,

that C. and W. were guilty of bribery, and that the election was avoided in consequence of their corrupt acts. *Cornwall (Dom.)*, H. E. C. 803.

P., an agent of the respondent, on the morning of the election, called on the wife of one K., and asked her to use her influence with her husband to induce him to vote for the respondent, saying: "I will make it all right." She told her husband, who laughed, and replied that he intended to vote for the respondent any way, or that he would do as he liked, and he did vote. After the election the wife called at P.'s store, and having reminded him of his promise, she went into the grocery department and got goods to the value of $4.49. Subsequently an account was rendered including this $4.49, and the husband objected to pay it. She then told a clerk of P.'s that that part of the account was "settled off election time," and a new account was subsequently rendered by the attorney of the estate, as P. had failed in the meantime, with that item omitted. Per Burton, J.A.—The words of the promise in themselves alone did not amount to "an offer or promise of money or other valuable consideration," but, being followed after the election by the present of goods, the gift was made in pursuance of the promise, and therefore corruptly; but, as P.'s agency had terminated with the election, it was not such a corrupt practice as to affect the candidate unless done with his privity and assent. Per Osler, J. A.—P. intended to convey and did convey to the wife the idea that if she procured or would induce her husband to vote as he wished, she would receive something of value; the giving of the groceries after the election was an act of bribery, and if it stood alone it would have been necessary to carry the evidence of agency further, but following the promise it shewed what both parties understood, and to what extent the respondent was affected by what was done after the election. Held, also, under all the circumstances, that, this being the single corrupt act proved, the case was a proper one for the application of s. 159, though the majority was only twenty, and the election should not be avoided. *North Ontario (Prov.)*, 1 E. C. 1.

A payment of $10 was made to P. H. to go some miles for voters, although another messenger was sent and paid by another agent for the same purpose, who failed to get through on account of the roads, and returned the money:—Held, that there was no reason to suppose that the money was paid colourably. *North Ontario (Prov.)*, 1 E. C. 1.

Where N., who appeared to have been agent of a candidate, called upon M., an elector, and, without directly asking him to vote, handed him one of the candidate's cards, and stated that he was going to give M.'s wife a present, but that he could not give M. a present, because it was election time, and that M. could get a present for his wife any day he was in B. (one of the places where voting was to take place); and M. went to B. on the night of the election and got the present, which was tea and sugar, &c., worth about $2:—Held, that this came within the acts spoken of in R. S. O. 1877 c. 10, s. 149 (a); and that, the goods having been given to M. under the idea that he had voted, it was immaterial whether it was proved that M. had actually voted or not. *Muskoka and Parry Sound (Prov.)*, 1 E. C. 197.

D., an agent of respondent, bribed M., a voter, by payment of money. The same D. gave one L., after he had voted, $1, which both D. and L. said was a loan and not a gift; —Held, that the first payment was a corrupt practice; as to the latter payment the trial Judges did not agree. H., a voter, was paid $4 by an agent of respondent for one day's work posting bills:—Held, per Boyd, C., not a corrupt practice; per Cameron, C.J., an unreasonably large payment for the work done, though not sufficient, if it were the only charge, to avoid the election. *East Middlesex (Prov.)*, 1 E. C. 250

The following acts were relied on as sufficient to have the election set aside. H., a Conservative, prior to the election, canvassed in company with the respondent, one B. On election day H. was selected by the assistant-secretary of the association (an acknowledged agent of the respondent) to represent the respondent at the Burnley poll, and obtained from him a certificate under s. 42 of the Dominion Elections Act, entitling him to vote at the Burnley poll. He there met B. and treated him by giving him a glass of whisky, and after B. had voted, he gave him $2, and subsequently sent him $50. The treating, according to B.'s evidence, was nothing more than an act of good fellowship; and, according to H.'s account, B. was not feeling well, and the whisky was given in consequence. B. negatived that the $2 was paid him for his vote, and H. said that he supposed it was a dollar bill, and told B. to "go and treat the boys" with it, and that it was not given on account of any previous promise or for his having voted:—Held, at the trial, that none of these acts constituted corrupt acts so as to avoid the election. On appeal to the supreme court of Canada:—Held, per Ritchie, C. J., and Henry and Taschereau, JJ., that there was sufficient evidence of H.'s agency. Per Strong, J.—There was no proof of H.'s agency. Agency was not to be presumed from the fact that the respondent permitted H. to canvass B. in his presence, and there was an entire absence of proof of any sufficient authority to H. to bind the respondent by his acts at the polling place in the matters of treating and the payment of the $2. Per Fournier, J., that the treating of B. on polling day, both before and after he had voted, by H., an agent, and the giving of the sum of $2 immediately after he had voted, were corrupt acts sufficient to avoid the election. *West Northumberland (Dom.)*, 10 S. C. R. 635.

The payment by an agent of a sum of $147 to a voter claiming the same to be due for expenses at a previous election, and who refuses to vote until the amount is paid, is a corrupt practice. *Levis (Dom.)*, 11 S. C. R. 133.

An election petition charged that H., an agent of the candidate whose election was attacked, corruptly offered and paid $5 to induce a voter to refrain from voting. The evidence shewed that H. was in the habit of assisting this particular voter, and that being told by the voter that he contemplated going away from home on a visit a few days before the election, and being away on election day, H. promised him $5 towards paying his expenses. Shortly afterwards the voter went to the house of H. to borrow a coat for his journey, and H.'s brother gave him $5. He

went away and was absent on election day:—Held, that the offer and payment of the $5 formed one transaction and constituted a corrupt practice under the Election Act. *Haldimand (Dom.)*, 1 E. C. 572, 17 S. C. R. 170.

Held, that the bribery by L. of two persons to abstain from voting against the respondent was established by the evidence, although it was not shewn that anything was said to them about voting; L. having paid them, for trifling services which he engaged them to perform upon election day, sums considerably in excess of the value of such services, knowing them to be voters and to belong to the opposite political party. *East Elgin (Prov.)*, 2 E. C. 100.

See West Simcoe (Prov.), 1 E. C. 128; *Prescott (Prov.)*, 1 E. C. 88; *Megantic (Dom.)*, 9 S. C. R. 279; *West Toronto (Prov.)*, H. E. C. 97; *Kingston (Dom.)*, H. E. C. 625; *East Simcoe (Prov.)*, 1 E. C. 291.

By Candidate.]—The respondent, after announcing himself as a candidate, gave $10 in two $5 bills to a child of a voter, then three or four years old, which had been named after him. He had two years previously intimated that he would make the child a present:—Held, that the gift, under such circumstances, was not bribery. The respondent while canvassing had refreshment for his man and two horses at a tavern for part of a day and night, for which he paid the tavern-keeper $5, and next day $5 more, in all $10, without asking for a bill. The bill would have amounted to about $3. The respondent stated that the tavern-keeper was an old friend of his, and was just starting in business, and that he thought it right to pay him as it were a compliment on his first visit to his tavern, and that he believed he would have done the same thing if it was not election time:—Held, that being an isolated case in an election contest, free from profuse expenditure, and this being a quasi-criminal trial, involving grievous results to the respondent if found a corrupt practice, such payment was not—after the explanations of the respondent—an act of bribery. *Glengarry (Prov.)*, H. E. C. 8.

The respondent intrusted about $700 to an agent for election purposes without having supervised the expenditure:—Held, that this did not make him personally a party within 34 Vict. c. 3, s. 46 (O.), to every illegal application of the money by the agent, or by those who received money from him. But if a very excessive sum had been so intrusted to the agent, the presumption of a corrupt purpose might have been reasonable. *South Grey (Prov.)*, H. E. C. 52.

A candidate in good faith intended that his election should be conducted in accordance both with the letter and spirit of the law; and he subscribed and paid no money, except for printing. Money, however, was given for election purposes by friends of the candidate to different persons, who kept no accounts or vouchers of what they paid:—Held, that bribery would not be inferred as against the candidate, who neither knew nor desired such a state of things, from the omission of these subordinate agents to keep an account of their expenditure, especially as the law is new, and contains no provision similar to that of the Imperial statute requiring a detailed statement of expenditure to be furnished to the returning officer. But it is always more satisfactory to have the expenditure shewn by proper vouchers; and if money is paid to voters for distributing cards, or for teams, or for refreshments, this will be open to attack, and Judges will be less inclined, as the law becomes known, to take a favourable view of conduct that may bear two constructions, one favourable to the candidate and the other unfavourable. *East Toronto (Prov.)*, H. E. C. 70.

The respondent had in 1873 compromised with his creditors for fifty cents on the $, and then promised to pay all his creditors in full. About the time of the election he paid one S., who had at the two previous elections supported the opposing candidate, a portion of the promised amount:—Held, under the circumstances, that the payment was not bribery. *Dundas (Prov.)*, H. E. C. 205.

At a late hour on the day preceding the election some agents of the respondent determined to resort to bribery, and they carried out such determination at an early hour on the morning of the polling day. There was no evidence of the respondent's knowledge of, or consent to, this act of his agents:—Held, that the shortness of the interval between the resolve and the execution of the bribery, which was carried out at a place several miles away from where the respondent lived, rendered improbable the fact of the respondent's actual knowledge of such bribery. The wife of one S., a voter, had been injured some years before the election by the horses of the respondent, and in 1872 the respondent gave S. compensation for the injury partly by cancelling a debt and partly in cash, for which S. signed a receipt "in full of all accounts and claims whatsoever." The respondent canvassed S. during the election, saying, "I would like to have you with me at the election," but S. declined, expressing dissatisfaction with the compensation made for the injury to his wife, to which the respondent replied that he was able to do, and could do, what was right. Afterwards the respondent sent his salesman to the wife of S., who told her that the respondent was still able to do justice, to which she replied she would write a letter, which she did, and in which she referred to her husband's vote. After the election the respondent gave S. $50, partly by cancelling a debt and partly in cash. The respondent denied that he gave S. to understand that he would give him anything to induce him to vote for him at the election:—Held, that the evidence shewed that an indirect offer of money or other valuable consideration was made by the respondent to S., to induce him to vote for the respondent. *Lincoln (Prov.)*, H. E. C. 391.

The evidence shewed that extensive bribery was practised by the agents of the respondent and by a large number of persons in his interest, but no acts of personal bribery were proved against him, and he denied all knowledge of such acts. It was in evidence that he had warned his friends, during the canvass, not to spend money illegally. The Judge (dubitante) held that no corrupt practice had been committed with the respondent's knowledge or consent, and avoided the election for corrupt practices by the respondent's agents. On appeal:—Held, that the circumstantial evidence in this case was sufficient

to shew that corrupt practices had been committed by the respondent's agents with his knowledge and consent. 2. That wilful intentional ignorance is the same as actual knowledge. 3. That the assent of a candidate to the corrupt acts of his agents may be assumed from his non-interference or non-objection when he has the opportunity. And such candidate's knowledge of and assent to the corrupt acts of his agents, may be established without connecting him with any particular act of bribery. *London (Dom.)*, H. E. C. 560.

A single bribed vote brought home to a candidate would throw doubt on his whole majority, and would therefore annul his return. *North Victoria (Dom.)*, H. E. C. 584.

Held, that the settlement by payment of a just debt by a candidate to an elector without any reference to the election is not a corrupt act of bribery, and especially so when the candidate distinctly swears he never asked the elector's support, and the elector says he never promised it and never gave it. One P., some years before the election, asserted that the respondent was indebted to him, but the respondent denied all liability, and the dispute caused a coolness between them. One H., four months before the election, was employed by P. to collect another account from the respondent, and did so. H. stated to P. that, as the respondent was in a good humour, it would be a good opportunity to get the old account settled, and asked P. if he would support the respondent in case the old account was settled. P. replied that he might promise what he liked. H. then took the account to the respondent, who looked it over and gave his note for it. H. and the respondent never referred to the election, nor to the settlement as affecting the election:—Held, that the respondent had not been guilty of bribery in this transaction. *South Ontario (Dom.)*, H. E. C. 751, 3 S. C. R. 641.

The respondent owed one M. a debt, which had been due for some time. He was sued for it about the time of the election, and was informed that his opponents were using the nonpayment of it against him in the election. The respondent stated he would not pay it until after the election, as it might affect his election:—Held, that the promise to pay the debt was not made to procure votes, but to silence the hostile criticism, and was therefore not bribery. *North Ontario (Dom.)*, H. E. C. 785.

The charge was that the respondent bribed one J. F. G., by the payment of a promissory note for $89. The evidence shewed that J. F. G. had been canvassing for respondent a long time before the note fell due, and had always supported him. He was on his way to retire his note, which was overdue or falling due that day, when respondent asked him to canvass that day, and promised to send into town and have the note arranged for him. At the same time J. F. G. was negotiating for a loan on a mortgage to respondent, and it was at first stipulated that the amount of this note should be taken out of the mortgage money. The agent of the respondent, after the election, at the request of J. F. G., paid the mortgage money in full and allowed the matter of the note to stand until J. F. G. could see respondent. J. F. G. stated that neither the note nor the mortgage transaction influenced him in any way, and that he had to pay the note and did not expect respondent to make him a present of it:—Held, that the evidence did not shew that the advance of money was made in order to induce J. F. G. to procure or endeavour to procure the return of the respondent, and was not therefore bribery within the meaning of s.-s. 3 of s. 92 of the Dominion Election Act, 1874. *Selkirk (Dom.)*, 4 S. C. R. 494.

One Mireau, a blacksmith, who was a neighbour of the respondent, had in his possession for two years several pieces of broken saws which the respondent had left with him for the purpose of making scrapers out of them on shares. A few days prior to nomination the respondent went into Mireau's shop with a scraper to be sharpened, and in return for sharpening the scraper told him to keep the old pieces of saw which he might still have. Mireau in his evidence answered as follows:—"Q. He did not speak of your vote? A. No. Q. What has he said? A. He said that M. Magnan was coming like mustard after dinner. Q. M. Dugas did not ask you for whom you were? A. No. * * Q. Do you swear on the oath you have taken that M. Dugas left with you these two pieces of saw in question with the intent to buy (bribe) you? A. I think so, I cannot say that it is sure, I don't know his mind (son idée). It is all I can swear. Q. It has not changed your opinion? A. No. Q. For whom were you in the last election? A. For M. Magnan." The scrapers were worth in all about $2, and were of no use to the respondent, and no other conversation took place afterwards between the parties. The Judge who tried the case found that there was no intention on the part of the respondent to corrupt Mireau, which decision was upheld by the Supreme Court. *Montcalm (Dom.)*, 9 S. C. R. 93.

Before setting out on a canvassing tour, the appellant, the sitting member, placed in the hands of one B., who was not his financial agent, $100 to be used for the purpose of the election. While visiting a part of the county with which the appellant was not much acquainted, but with which B. was well acquainted, they paid an electioneering visit to one K., a leading man in that locality, who indicated to B. his dissatisfaction with the candidate of his party, and stated that, although he would vote for the Liberal party, he would not exert himself as much as in the former elections. The appellant then went outside, and B. asked his host: "Do you want any money for your church?" And having received a negative reply, added: "Do you want any money for anything?" K. then answered: "If you have any money to spare, there is plenty of things we want it for. We are building a town hall, and we are scarce of money." B. then said: "Will $25 do?" K. answered: "Whatever you like, it is nothing to me." The money was left on the table. Then, when bidding the appellant and B. good-bye, K. said: "Gentlemen, remember that this money has no influence, as far as I am concerned, with regard to the election." The appellant did not at the time, nor at any subsequent time, repudiate the act of B. This amount of $25 was not included in any account rendered by the appellant or his financial agent, and large sums were admittedly corruptly expended in the election by the agent of the appellant:—Held, that the giving of the $25 by B. to K. was not an act of

liberality or charity, but a gift out of appellant's money, with a view to influence a voter favourably to the appellant's candidature, and that, although the money was not given in the appellant's presence, yet it was given with his knowledge, and therefore that the appellant had been personally guilty of a corrupt practice. *Megantic (Dom.)*, 9 S. C. R. 279.

See Halton (Prov.), H. E. C. 283; *North Ontario (Dom.)*, H. E. C. 785; *Bellechasse (Dom.)*, 5 S. C. R. 91; *Niagara (Dom.)*, H. E. C. 568; *Kingston (Dom.)*, H. E. C. 625; *Welland (Dom.)*, 20 S. C. R. 376.

Proof of Bribery—*Sufficiency of Evidence.*]—Where a charge of bribery is only the unaccepted offer of a bribe, the evidence must be more exact than that required to prove a bribe actually given or accepted. *South Grey (Prov.)*, H. E. C. 52.

Where the evidence as to the offer of bribes of offers or proposals to bribe, the evidence should be stronger than with respect to actual bribery. Where three voters swore to three separate offers of bribery made to each of them separately by an agent of the respondent, which such agent swore were never made by him:—Held, that the evidence was not sufficient to justify the setting aside of the election. The language of Martin, B., in the Wigan case, 1 O'M. & H., 192, adopted as a general rule applicable to this case. *East Toronto (Prov.)*, H. E. C. 70.

Where the evidence as to the offer of bribes was contradictory, and the parties making charges of bribery appeared to have borne indifferent characters:—Held, that the offer of bribes was not satisfactorily established. *Welland (2) (Prov.)*, H. E. C. 187.

Where one party affirmed and the other party denied a corrupt offer between them as to voting for the respondent:—Held, that the offer was not sufficiently proved. *Dundas (Prov.)*, H. E. C. 205.

The evidence respecting a charge of bribery, by payment of a disputed debt, was held insufficient to sustain the charge. *North Victoria (Prov.)*, H. E. C. 252.

Where in evidence of offers of bribery, an assertion on one side is met by a contradiction on the other, the uncorroborated assertion is not sufficient to sustain the charge. *West Peterborough (Prov.)*, H. E. C. 274.

A charge of bribery against the respondent, where the evidence was unsatisfactory and repugnant in itself, and rested more on suspicion than on clear positive proof, was held not proven. *North Ontario (Prov.)*, H. E. C. 304.

On a charge that one O. bribed a voter by promising him to procure a deed of his land for him if he would procure votes for the respondent:—Held, on the evidence, that though the voter had so represented, the procuring of the deed had nothing to do with the election. Semble, that O. was not an agent for whose acts the respondent was responsible. A witness stated that he had received a letter from a voter, asking for the fulfilment of an offer as to his vote, but the letter was not produced:—Held, that it was not proved that the letter in question was written by the voter referred to. One S., an alleged agent of the respondent, made offers of sheepskins to two voters in connection with their votes at the election; he swore the offers were made in jest. As the evidence did not shew that S. was an agent of the respondent at the time of the alleged offers, no effect was given to the charge. A statement that an offer to bribe was made in jest should be received with great suspicion; a briber may make an offer which he intends should be taken seriously, and then, if not accepted, he may assert it was made in jest. *North Middlesex (Prov.)*, H. E. C. 376.

See West Toronto (Prov.), H. E. C. 97; *Welland (Prov.)*, H. E. C. 187; *Cornwall (Dom.)*, H. E. C. 647.

The respondent was charged with several acts of corrupt practice. Each separate charge was supported by the evidence of one witness, and was denied or explained by the respondent. The Judge trying the petition stated that if each case stood by itself, oath against oath, and each witness were equally credible, and there were no collateral circumstances either way, he would have found that each case was not proved; but, as each charge was proved by a credible witness, the united weight of their testimony overcame the effect of the respondent's denial; and on the combined testimony of all the witnesses, he held the separate charges proved against the respondent:—Held, that in election cases, each charge constitutes in effect a separate indictment, and if a Judge on the evidence in one case dismisses the charge, the respondent cannot be placed in a worse position because a number of charges are advanced, in each of which the Judge arrives at a similar conclusion, and therefore the separate charges above referred to were held not sustained. *Muskoka (Prov.)*, H. E. C. 458.

A number of separate charges of corrupt practices against an agent of the respondent, based upon offers or promises, and not upon any act of such agent, each of which depended upon the oath of a witness to the offer or promise, but each one of which such agent directly contradicted, or gave a different colour to the language, or a different turn to the expressions used, which quite altered the meaning of the conversations detailed, or constituted in effect a complete or substantial denial of the charges attempted to be proved against such agent:—Held, that, although in acting on such conflicting testimony, where there was a separate opposing witness in each case to the testimony of the witness supporting the charge, the trial Judge might be obliged to hold each charge as answered and repelled by the counter-evidence, he could not give the like effect to the testimony of the same witness in each of the cases where the only opposing witness is confronted by the adverse testimony of a number of witnesses, who, though they do not corroborate one another by speaking to the same matter, are contradicted in each case by the one witness. 2. That the more frequently a witness is contradicted by others, although each opposing witness contradicts him on a single point, the more is confidence in such witness affected, until, by a number of contradicting witnesses, he may be disbelieved altogether. 3. That acting on the above and on a consideration whether the story told by the witness in support of the charge is reasonable or probable in itself, the charges of corrupt practices

against the agent of the respondent, set out in the judgment, were proved. *North Renfrew* (*Dom.*), H. E. C. 710.

A charge that the respondent promised to give a voter certain work to do if he voted for him, was disproved by the evidence of the respondent and another, and by the admissions of the voter made to other persons. The charge against the respondent and one B., of an offer of money to, and to procure an appointment as justice of the peace for, a voter, in consideration of his voting for the respondent, was supported by the evidence of the voter, who shewed bitter hostility to B.; but the charge was denied by the respondent. The evidence shewing the statement to be improbable, and shewing that the election contest was carried on by the respondent with a scrupulous and honest endeavour to avoid any violation of the law against corrupt practices, the charge was dismissed. *Halton* (*Dom.*), H. E. C. 736.

A promise to give work to a voter, made without reference to the election and as a joke, not evidence of bribery. *Halton* (*Dom.*), H. E. C. 736.

A charge against an agent of the respondent, that he had promised to procure the office of police magistrate for one W., was denied by the agent and the respondent; and it further appearing that W. had acted on the committee of and voted for the opposing candidate, the charge was dismissed. Charges against the respondent, that he had promised an office to the son of a voter, and a contract to the voter himself, were contradicted by other evidence and dismissed. *South Ontario* (*Dom.*), H. E. C. 751.

The respondent canvassed a voter, who at the trial swore that after he had agreed to vote for him, the respondent promised to give the voter some work; the respondent denied the promise:—Held, although the voter appeared to be a truthful witness and was not shaken on cross-examination, that the promise of employment was not made out beyond all reasonable doubt. *North Ontario* (*Dom.*), H. E. C. 785.

Treating—*Under what Circumstances it may be Bribery.*] — See *North Waterloo* (*Prov.*), 2 E. C. 76.

(d) *Fraudulent Device.*

Shortly before polling day the respondent's agents issued a circular, the substance of which was that they had ascertained upon undoubted authority that W., an independent candidate, despairing of election himself, was procuring his friends to vote for C., the opposition candidate. W. denied the truth of this report:—Held, that this was not a "fraudulent device," within the meaning of 32 Vict. c. 21, s. 32 (O.), to interfere with the free exercise of the franchise of voters. *East Northumberland* (*Prov.*), H. E. C. 803.

See Cornwall (3) (*Dom.*), H. E. C. 803.

(e) *Hiring Conveyances.*

The hiring of teams, &c., is not a "corrupt practice" within the meaning of s. 3 of the Controverted Elections Act, 1873, unless the hiring amounts to bribery. The words "Act of the Parliament of Canada" in that section refer to an Act of the Dominion of Canada. *East Toronto* (*Dom.*), 10 C. L. J. 248.

Cabs and carriages were hired for the use of committee-men and canvassers during the election and on the day of polling, with instructions to the drivers that they were not to convey voters to and from the poll. One cab was however used for that purpose for the greater part of the day, but without the assent of the agent of the respondent, who had charge of the cab:—Held, that, as the evidence did not shew that the cabs and carriages were colourably hired for the purpose of bribery or conveying voters to the poll, or that the one cab was so used with the assent of the agent of respondent, the hiring was not an illegal act within 32 Vict. c. 21, s. 71 (O.) *West Toronto* (*Prov.*), H. E. C. 97.

On polling day, one W. asked two voters to go with him and vote for the respondent, and he would bring them back, and they could feed their horses and have dinner. W. sent one of his horses on some of his own business, and hired from one of these voters a horse, for which W. paid him fifty cents, and then drove with the two voters to the poll:—Held, not a hiring of a horse, &c., to carry voters to the poll within 32 Vict. c. 21, s. 71 (O.), nor a furnishing of entertainment to induce voters to vote for the respondent, within s. 61 of the Ontario Election Act of 1868. *North Victoria* (*Prov.*), H. E. C. 252.

Where the amounts paid for hiring teams were fair and reasonable, such hiring was not bribery under the Dominion Controverted Elections Act, 1873. Where a canvasser for the respondent received money for hiring teams, and hired from those indebted to him, and agreed with them to give them credit for the respective amounts to be paid for the teams, such an arrangement was not evidence of corrupt practices. Money given to a person to hire a team and to go round canvassing, held, on the evidence, not bribery. *North Victoria* (*Dom.*), H. E. C. 612.

One L., a voter, hired a horse and cutter on the day of the election, and with M., a scrutineer for the respondent, drove to the poll and voted. The day after the polling L. and M. returned to their homes, and on the way M. gave L. $4 to pay for the horse and cutter:—Held, that the payment of $4 having been made after the election, and not having been made corruptly to influence the voter to vote for the respondent, was not a corrupt practice or a wilful violation of 37 Vict. c. 9, s. 96 (D.) 2. That M.'s agency was a limited one, and had ceased before the payment in question. *Halton* (*Dom.*), H. E. C. 736.

A room was procured at which private meetings were held of the friends of the respondent to promote his election, some of which meetings he attended. One W. attended these meetings, and was appointed to procure the vote of a certain voter who was absent from the riding. W. hired a vehicle to convey the voter to the poll:—Held, that W. was an agent of the respondent, and that his hiring such a vehicle was a corrupt practice. *North Ontario* (*Dom.*), H. E. C. 785.

The evidence shewed that M.'s team was hired some days before the opening of the poll by C., an agent of the respondent, for the purpose of bringing two voters to the polls. M. went for the voters, returned the day previous to the polling day without the voters, and was paid $15:—Held, that the term "six preceding sections," in s. 98 of the Dominion Elections Act, 1874, means the six sections immediately preceding the 98th, and therefore the hiring of a team to convey voters to the polls, prohibited by s. 96, was a corrupt practice within the meaning of s. 98. *Selkirk (Dom.)*, 4 S. C. R. 494.

The hiring and paying of carters by an agent to convey voters who are known to be supporters of the agent's candidate is a corrupt practice. Selkirk (Dom.), 4 S. C. R. 494, followed. *Levis (Dom.)*, 11 S. C. R. 133.

Held, that what is referred to in R. S. O. 1877 c. 10, s. 154, is hiring vehicles to convey persons with the intention of their voting, and the qualification of such persons, or their right to vote, is immaterial, whereas s. 153 requires persons therein referred to to be voters. *Muskoka and Parry Sound (Prov.)*, 1 E. C. 197.

W., an agent of the respondent, was in partnership as a livery stable keeper with G. Under an agreement between them, if either partner took out carriages for his own use he was to pay his co-partner half hire for them. On election day W. took out carriages of the partnership and conveyed voters to the poll, and afterwards, after the election, duly accounted to G. for half hire for the same:—Held, that this constituted a corrupt practice under R. S. C. 1886 c. 8, ss. 88, 91, being a hiring of carriages to carry voters to the poll, and that the election of the respondent was void. *West Middlesex (Dom.)*, 1 E. C. 465.

See Cornwall (Dom.), 10 C. L. J. 313.

(f) *Hiring Rooms.*

Alleged expenditure of money intended to influence a certain class of voters, viz., keepers of public houses; hiring of rooms at public houses to hold meetings—effect of, and how far a violation of the law as to bribery. *Kingston (Dom.)*, 11 C. L. J. 19.

The candidate is not restricted to his purely personal expenses, but may (if there is no intent thereby to influence voters or to induce others to procure his return) hire rooms for committees and meetings in connection with the election. *East Toronto (Prov.)*, H. E. C. 70.

(g) *Intimidation.*

One W., a voter, who was in arrears to the Crown for the purchase money of a lot of land, was canvassed by R., an alleged agent of the respondent, who told him that the government would look sharply after those in arrears for their land who did not vote for the supporters of the government:—Held, that what occurred was at most a brutum fulmen, if intended as a threat at all, and only an expression of opinion upon a subject on which every one was competent to form his own judgment. *North Ontario (Prov.)*, H. E. C. 304.

C. occupied as a boarding house, a house of a lumber company rent free, and was paid for boarding the men by the men themselves, but through the company retaining the amount thereof out of their wages. C. acted as scrutineer for the defeated candidate, and while so acting, but after he had voted, was sent for by P., the company's manager, an agent of the respondent, and given to understand that his so acting was not satisfactory to the company and against their interest. No threat of any kind was made. C. returned to the polling place and continued to act, but, on reflection, about twelve o'clock he ceased to do so. C. had canvassed the men at the boarding house for the defeated candidate, for whom some had promised to vote, and a good many of the men had voted before he left. It did not appear that what P. had said to C. was communicated to any voter, or that any voter was influenced thereby:—Held, that a charge of intimidation was not proved. After the election C. received notice of dismissal from the company, and was informed by P. that it was for talking too much in the election about one of the hands having been sent away to prevent his voting. It was charged that C. was dismissed on account of his having voted at the election:—Held, that the charge was not proved. *East Simcoe (Prov.)*, 1 E. C. 291.

See Halton (Prov.), H. E. C. 283; *Soulanges (Dom.)*, 10 S. C. R. 652; *Muskoka (Prov.)*, H. E. C. 458; *Welland (Prov.)*, H. E. C. 187.

(h) *Paying Canvassers and Public Speakers.*

A candidate may, if there is no intent thereby to influence voters or to induce others to procure his return, employ men to act as canvassers, to distribute cards and placards, and to perform similar services in connection with the election. The friends of the candidate formed themselves into committees, and some of them voluntarily distributed cards and canvassed different localities, with books containing lists of voters, noting several particulars as to promises, &c. These canvassers often met in public houses, and while there, according to custom, treated those whom they found there, and thus spent their money as well as their time. On this being represented to those who had charge of the money for election expenses, the latter, in several cases, reimbursed the canvassers:—Held, that these general payments, if not exceeding what would be paid to a person for working the same time in other employments, would not be such evidence of bribery as to set aside an election. *East Toronto (Prov.)*, H. E. C. 70.

The bonâ fide employment and payment of a voter to canvass voters belonging to a particular religious denomination, or to the same trade or business, or to the same rank in life, or to canvass voters who only understand the French or Celtic languages, is not illegal. The fact that such a voter has skill or knowledge and capacity to canvass would not make his employment illegal. Money was paid by an agent of the respondent ($7 each) to certain voters for canvassing, they observ-

ing that "a little money in election time was allowed for knocking around," which observation the agent considered was "going about to solicit votes." The agent denied that it was paid with any corrupt intent, although his evidence was not satisfactory. The voters swore the money was paid to their wives, and the agent was not recalled to explain it:—Held, that, although such payments might be open to unfavourable interpretation, it was not, according to the evidence, inconsistent with being made without any improper motive. *West Toronto* (*Prov.*), H. E. C. 97.

The respondent and one M. employed one H., a lawyer and professional public speaker, to address meetings in the respondent's interest, and promised to pay H.'s travelling expenses, if it were legal to do so:—Held, that such a promise was not bribery. *North Ontario* (*Dom.*), H. E. C. 785, 4 S. C. R. 430.

Held, per Armour, J., that the hiring of orators and canvassers at an election is bribery. *S. C.*, H. E. C. 785.

Per Fournier, J., that candidates may legally employ and pay for the expenses and services of canvassers and speakers, provided the agreement be not a colourable one intended to evade the bribery clauses of the Act. Per Taschereau and Gwynne, JJ., that such a payment would be illegal. *S. C.*, 4 S. C. R. 431.

Certain persons were paid as canvassers on behalf of the respondent:—Held, not a corrupt practice. *Lennox* (*Prov.*), 1 E. C. 41.

(i) *Paying Travelling Expenses.*

Held, that hiring by an agent of the respondent of a railway train to convey voters to and from places along the line of railway where they could vote, was a payment of the travelling expenses of voters in going to and from the election, within the meaning of 32 Vict. c. 21, s. 71 (O.), and was a corrupt practice, and avoided the election. *North Simcoe* (*Prov.*), H. E. C. 50.

The payment of a voter's expenses in going to the poll is illegal, as such, and a corrupt practice, even though the payment may not have been intended as a bribe. *South Grey* (*Prov.*), H. E. C. 52.

The court declined, in the present state of the law, to exclude inquiry as to the payment of travelling expenses of persons going to and returning from the poll, inasmuch as such payment might amount to bribery. *North Victoria* (*Dom.*), H. E. C. 584.

The obtaining by an agent of a candidate from the president of a railway company, of six passes, for which nothing had been or was ever intended to be paid, three of which were used in bringing as many voters to the poll, is not a corrupt practice within the meaning of the Election Act, s. 154. The mischievous effects that might arise from such a practice on the part of railway companies remarked upon. *South Victoria* (*Prov.*), 1 E. C. 182.

S., an agent of the respondent, with his own conveyance, brought a voter from N. to his own house, where he remained as a guest until after the polling day:—Held, not within s. 153 or s. 154 of the Act. *North Ontario* (*Prov.*), 1 E. C. 1.

When the agent of a candidate asked a voter if he intended to vote, and the voter said he did not think so, as he could not spare the money to go, but that if he went he would not vote for the opposing candidate, and the agent thereupon lent him the cost of a return ticket; and the evidence shewed that the transaction was a bonâ fide loan and not a gift, and was not made with the intention of influencing the voter in favour of the principal, and that the money was repaid shortly after the election without any demand made therefor:—Held, that the above did not constitute a corrupt practice under R. S. C. c. 8, s. 84 (a), or s. 88. The voter had the will to go and vote for the agent's principal, but he had not the means to enable him to do so, and these were furnished to him by the agent, but as a bonâ fide loan, not as a gift. Thus he was not induced but merely enabled to vote by a temporary loan, and no breach of the law contained in the above sections was committed. *East Elgin* (*Dom.*), 1 E. C. 475.

The payment of a voter's expenses in going to the poll is illegal, as such, even though the payment may not have been intended as a bribe. *Lincoln* (*Prov.*), H. E. C. 391.

One L., the agent of C., the respondent, gave to certain electors employed on certain steamboats, tickets over the North Shore Railway to enable them to go without paying any fare from Montreal to Berthier, to vote at the Berthier election, the voters having accepted the tickets without any promise being exacted from or given by them. The tickets shewed on their face that they had been paid for, but there was evidence that L. had received them gratuitously from one of the officers of the company. The Judge who tried the case found as a fact that the tickets had not been paid for, and were given unconditionally, and therefore held it was not a corrupt act:—Held, that the taking unconditionally and gratuitously of a voter to the poll by a railway company or an individual, whatever his occupation may be, or giving a voter a free pass over a railway, or by boat, or other conveyance, if unaccompanied by any conditions or stipulations that shall affect the voter's action in reference to the vote to be given, is not prohibited by 39 Vict. c. 9 (D.) 2. That if a ticket, although given unconditionally to a voter by an agent of the candidate, has been paid for, then such a practice would be unlawful under s. 96, and by virtue of s. 98 a corrupt practice, and would avoid the election. *Berthier* (*Dom.*), 9 S. C. R. 102.

G., a voter and a supporter of the respondent holding a free railway ticket to go to Listowel to vote, and wanting $2 for his expenses while away from home, asked for the loan of the money from W., a bar tender and friend. W., not having the money at the time, applied to S., an agent of the respondent, who was present in the room, for the money, telling him he wanted it to lend to G. to enable him to go to Listowel to vote. S., the agent, lent the money to W., who handed it over to G. The day before the trial W. returned the $2 to S. Held, that as the decision of the trial Judges depended on the inference drawn from the evidence, it could be

reversed in appeal, and that the proper inference to be drawn from the undisputed facts in the present case was that the loan by S. to W. was a mere colourable transaction by S. to pay the travelling expenses of G., within the provisions of s. 88 of the Dominion Elections Act, and a corrupt practice sufficient to avoid the election under s. 91. Per Strong and Patterson, JJ., affirming the judgment of the court below, that upon the evidence the Grand Trunk Railway tickets issued at Toronto and Stratford for the transportation of voters by rail to the polls in this case were free tickets, and that as the free tickets had been given to voters who were well known supporters of the respondent prepared to vote for him and him alone, if they voted at all, it did not amount to paying the travelling expenses of voters within the meaning of s. 88 of the Dominion Election Act. Berthier (Dom.), 9 S. C. R. 102, followed. *North Perth* (*Dom.*), 20 S. C. R. 331.

See South Renfrew (*Prov.*), 1 E. C. 359.

(j) *Subscriptions to Churches and Charities.*

The respondent was charged with using means of corruption at his election (1) by giving up a promissory note and also $20 to one M., on condition of M. and his sons voting for him; the charge depended upon the contradictory oaths of M. and the respondent; (2) by giving a large subscription to an election fund, some of which was expended for illegal purposes; and (3) by subscriptions to churches. The respondent denied any corrupt motive in these subscriptions. The trial Judge, on the evidence, found that the respondent was not personally guilty of corrupt practices, but he avoided the election on the ground of bribery by agents. Candidates and agents should select less suspicious seasons than election times for exercising their liberality towards charitable and religious objects. *South Huron* (*Dom.*), H. E. C. 576.

Held, that if gifts and subscriptions for charitable purposes, made by a candidate who is in the habit of subscribing liberally to charitable purposes, are not proved to have been offered or made as an inducement to, or on condition that, any body of men, or any individual, should vote or act in any way at an election, or on any express or implied promises or undertaking that such body of men, or individual, would, in consequence of such gift or subscription, vote or act in respect to any future election, then such gifts or subscriptions are not a corrupt practice, within the meaning of that expression as defined by the Dominion Election and Controverted Elections Acts, 1874. *South Ontario* (*Dom.*), H. E. C. 751, 3 S. C. R. 641.

(k) *Treating.*

Generally.]—Treating at an election, in order to be criminal, must be done corruptly, and for the purpose of corruptly influencing the voter. *South Norfolk* (*Dom.*), H. E. C. 660.

Treating is not per se a corrupt act, except when so made by statute; but the intent of the party treating may make it so, and the intent must be judged by all the circumstances by which it is attended. *North Middlesex* (*Prov.*), H. E. C. 376.

Where a charge of a corrupt intent in treating is made, the evidence must satisfy the Judge, beyond reasonable doubt, that the treating was intended directly to influence the election, and to produce an effect upon the electors, and was so done with a corrupt intent. *Glengarry* (*Prov.*), H. E. C. 8.

Treating, when done in compliance with a custom prevalent in the county and without any corrupt intent, will not avoid an election. *Welland* (*Prov.*), H. E. C. 37.

The general practice which prevails here of persons drinking in a friendly way when they meet, would require strong evidence of the profuse expenditure of money in drinking, to induce a Judge to say it was corruptly done, so as to make it bribery or treating at common law. *Kingston* (*Dom.*), H. E. C. 625.

Declaration, for hire of horses and carriages, and provisions furnished. Plea, that the alleged debt was contracted for and on account of spirituous liquors and other refreshments furnished by the plaintiff to defendant and his friends and supporters, during a parliamentary election, at which election defendant was a candidate, and for work and services performed, and for provisions and materials provided by plaintiff for defendant as a candidate at and during said parliamentary election, contrary to the law and statutes in such case made and provided:—Held, a good plea, under 23 Vict. c. 17, s. 6. *Mottashed* v. *Read*, 23 U. C. R. 432.

The word "treating" refused to be struck out of the petition though not specifically prohibited by the Act. *West Toronto* (*Prov.*), 5 P. R. 394.

See North Victoria (*Prov.*), H. E. C. 252; *North Victoria* (*Dom.*), H. E. C. 584.

At Meetings.]—The respondent, who was then representing the county in the legislature, on two several occasions at the close of public meetings of electors called by him to explain his conduct as such member, treated all present to liquor at taverns. He had not at the time made up his mind to be a candidate at the then coming election, but told the electors that "if they gave him their support he would expect it."—Held, under the circumstances, that such treating was not done with a corrupt intent. Quære, whether such treating was in any case a corrupt practice, under 32 Vict. c. 21, s. 61 (O.); or other than an illegal act which subjected the party to a penalty of $100 under s. 65—the statute pointedly omitting all mention of treating. *Glengarry* (*Prov.*), H. E. C. 8.

Reasonable refreshments furnished bonâ fide to committees promoting the election are not illegal. *South Grey* (*Prov.*), H. E. C. 52.

Violations of the Ontario Controverted Elections Act, 1871, s. 61 (treating at meetings), is not a corrupt practice within the meaning of that Act and of the Election Act of 1868, unless committed in order to influence voters at the election complained of. *North York* (*Prov.*), H. E. C. 62.

The respondent, who was a member of a temperance organization, held an election meeting in a locality within the electoral division, and, about an hour after the meeting had dispersed, went to a tavern where he met about ten or fifteen persons in the barroom, to whom he made the remark, "Boys, will you have something?" Nothing was then taken; but one E., a supporter of the respondent, said he would treat, and he did treat the persons present, and the respondent gave him the money to pay for the treat:—Held, that, as the meeting for promoting the election had dispersed an hour before the respondent went to the tavern, this was not a meeting of electors. 2. That the treating, not having been done with a corrupt intent, was not an offence under 32 Vict. c. 21, s. 61, as amended by 36 Vict. c. 2, s. 2, nor at common law. Quære, whether the Treating Act, 7 Wm. III. c. 4, is in force in this Province. *Dundas (Prov.)*, H. E. C. 205.

One F., an agent of the respondent, brought a jar of whisky to a meeting of electors assembled for the purpose of promoting the election, and gave drinks from the same to the electors present, which was held a corrupt practice, and a violation of the Ontario Election Act of 1868, as amended by the Election Act of 1873, so that the election was avoided thereby. *West Wellington (Prov.)*, H. E. C. 231.

A meeting of the electors was held in a town hall, and C. (an agent of respondent) and a number of electors went from the meeting to a tavern, where they were treated by C.:—Held, that this was a meeting of electors assembled for the purpose of promoting the election; and that the treating by C. was a corrupt practice, and a breach of 32 Vict. c. 21, s. 61, as amended by 36 Vict. c. 2, s. 2. *East Peterborough (Prov.)*, H. E. C. 245.

After a meeting of electors in a town hall, some friends of the respondent remained together consulting about the election, and afterwards went to a tavern, where some of them boarded, and had an oyster supper:—Held, that the evidence was not sufficient to sustain the charge that this was an entertainment furnished to a meeting of electors under 32 Vict. c. 21, s. 61 (O.), as amended by 36 Vict. c. 2, s. 2. *North Victoria (Prov.)*, H. E. C. 252.

Providing refreshments at a meeting of electors, all of one political party, or at a meeting of a committee to aid in returning a candidate, by and at the expense of one or more of their number, unless in some extreme case, cannot be deemed a breach of the provisions of the statute against treating. *Halton (Prov.)*, H. E. C. 283.

A meeting of the electors was held at a tavern, at which both candidates were present. A dispute arose, and the meeting broke up and the parties left the room as a disorderly crowd, and began pulling off their coats and talked of fighting. A treat was proposed to quiet the people, and one F. (an agent of the respondent) treated, and the crowd quieted down and dwindled away:—Held, that the treating, under the circumstances, was not furnishing drink to a meeting of electors assembled for the purpose of promoting the election. On appeal the court, without expressing any opinion as to the treating, held, on the evidence, that F. was not an agent of the respondent at the time of the treating. *North Ontario (Prov.)*, H. E. C. 304.

One W., a member of a political association, treated the members of the association present at a meeting in a tavern:—Held, that the members so present were electors assembled to promote the election of the respondent within s. 61 of the Election Act of 1868, and that such treating was a corrupt practice by W. *North Grey (Prov.)*, H. E. C. 362.

After the nomination of candidates on the nomination day, and on another occasion, after a "meeting assembled for the purpose of promoting the election," and after the business for which the electors had assembled was over, the electors left the building in which the meeting was held and dispersed to various taverns, at which their vehicles had been put up, and then before leaving for home treated each other; and at one of the taverns the respondent himself partook of a treat:—Held, not furnishing drink or other entertainment to meetings of electors within s. 61 of the Ontario Election Act of 1868. 2. That the meeting of electors for the nomination of candidates, is a "meeting assembled for the purpose of promoting the election." *North Middlesex (Prov.)*, H. E. C. 376.

An association formed "for the greater diffusion of Liberal principles and the social and intellectual improvement of its members," being prevented by an accident from meeting at the town hall, held a meeting in a tavern, and was treated by the respondent:—Held, not a meeting of electors within s. 151 of the Act. *North Ontario (Prov.)*, 1 E. C. 1.

A meeting of some thirty-five or forty electors had assembled for the purpose of promoting the election. During the meeting an agent of the respondent went into an adjoining room with four or five friends and treated and was treated by them:—Held, not to be a furnishing of entertainment "to a meeting of electors assembled," &c., under s. 151 of R. S. O. 1877 c. 10. The question must always be, whether the entertainment has been furnished to the general body of the electors composing such meeting, whether before, during, or after the business of the meeting, and while as a body such electors remain together at the place of meeting or elsewhere. *Prescott (Prov.)*, 1 E. C. 88.

It appeared that on 15th February the respondent was chosen by a convention of his party as their candidate. On 22rd February a public meeting was held by him in a room in a hotel, which meeting was composed of about sixteen persons, some belonging to the opposite political party. A chairman was appointed, and the respondent addressed the meeting, as did others also. As soon as the proceedings closed, i. e., when the speaking was over, nearly all present crossed the hall, and went into the barroom. The respondent followed, first inviting the few who remained to join them, and then in the barroom invited them to drink, which they did, he paying for the liquor. On 27th February the nomination took place, and the polling on 13th March:—Held, that this was a violation of R. S. O. 1877 c. 10, s. 151. Per Hagarty, C.J.O., and Burton, J.A.—R. S. O. 1877 c. 10, s. 151, refers clearly to a meeting of electors, whether

the formalities of appointing a chairman or secretary are observed or not. Held, also, that though the act of treating appeared to have been committed in ignorance that it was a violation of the statute, it did not appear to have been in an ignorance which was involuntary or excusable. Per Burton, J.A., that under the present enactment in R. S. O. 1877 c. 10, s. 151, it need not be shewn that the meeting in question was assembled for promoting the election of the candidate furnishing the entertainment, but the meeting referred to is a meeting assembled for the purpose of promoting the election of a representative of the electoral district. *Muskoka and Parry Sound (Prov.)*, 1 E. C. 197.

On different occasions a few members of one of respondent's local committees met together at different taverns, to go over voters' lists and arrange as to doubtful votes, and on each occasion liquor was furnished to the committee men thus engaged, at the expense of different agents of respondent:—Held, per Boyd, C., that such committee meetings were not "meetings of electors" within the meaning of s. 151 of R. S. O. 1877 c. 10; per Cameron, C.J., that s. 151 was specially directed against the treating of such committee meetings. On appeal:—Held, by the court, that such meetings were within the meaning of the section. Held, at the trial, that particulars and evidence shewing the furnishing of liquor to such meetings of committees, were admissible under the general allegation of the petition, that respondent by himself and his agents had been guilty of "treating." *East Middlesex (Prov.)*, 1 E. C. 250.

Where after a meeting of electors had broken up, an alleged agent of the respondent had treated at the bar of the hotel where it had been held, a mixed multitude composed of some who had been at it, and others who had not:—Held, that this was not treating "a meeting of electors assembled for the purpose of promoting the election," within s. 161 of the Ontario Election Act, R. S. O. 1897 c. 9, nor was such treating "bribery" within R. S. O. 1897 c. 9, s. 159. Corrupt treating in its nature runs very close to bribery on the part of the treater, but the circumstances in which a treat can be said to be a valuable consideration within s. 159 so as to amount to bribery on the part of the person accepting it, must be unusual. *North Waterloo (Prov.)*, 2 E. C. 76.

A number of voters met at a voter's house for the purpose of going over the voters' lists and then of having a card party. After the lists were disposed of the card party took place, and meat and drink were supplied by the host, but the drink, a quarter cask of beer, was paid for by subscription, according to the custom of the locality, which was a German settlement:—Held, not a corrupt practice within the meaning of s. 161 of the Elections Act, R. S. O. 1897 c. 9. *South Perth (Prov.)*, 2 E. C. 144.

By Agents.]—The furnishing of refreshment to voters by an agent of a candidate, without the knowledge or consent of the candidate and against his will, will not be sufficient ground to set aside an election, unless done corruptly or with intent to influence voters. Where the object of an agent in treating is to gain popularity for himself, and not with any view of advancing the interest of his employers, such treating is not bribery. *East Toronto (Prov.)*, H. E. C. 70.

One F., an agent of the respondent, on the day of the nomination of candidates to contest the election, and while the speaking was going on, treated a large number of persons at a tavern across the street from the place of the nomination for which he paid $7 or $8:—Held, a corrupt practice by an agent of the respondent, which avoided the election. *Dundas (Prov.)*, H. E. C. 205.

One D., who had been a candidate for various offices for twenty years prior to the election in question, and freely employed treating as an element in his canvassing, became an agent of the respondent, and treated extensively, as was his common practice, during the election. The respondent was aware of D.'s practices, and once, in the early part of the canvass, cautioned D. as to his treating, but never repudiated him as his agent:—Held, on the evidence, that, as D. did no more in the way of treating during the election than he had done on former occasions, and had employed treating as he ordinarily did as his argument, and had not used it as a means of corruptly influencing the electors, he was not guilty of a corrupt practice. Semble, the treating proved in this case, if practised by one not theretofore given to such practice, would have been sufficient to have avoided the election. Observation on the law as it now stands, as holding out inducements to candidates to employ men who are habitual drinkers to canvass by systematic treating, and thus cause electioneering to depend upon popularity aroused by treating, rather than the merits of the candidates, or the measures they advocate. *East Elgin (Dom.)*, H. E. C. 769.

During an election liquor was given to an elector who at the same time was asked to vote for a particular candidate:—Held, that this was corrupt treating under s. 86 of the Dominion Election Act, R. S. C. c. 8. *West Prince (Dom.)*, 27 S. C. R. 241.

See East Toronto (Prov.), H. E. C. 70; *West Northumberland (Dom.)*, 10 S. C. R. 635; *North Ontario (Prov.)*, 1 E. C. 1; *London (Prov.)*, H. E. C. 214.

By Candidate.]—About an hour after a meeting of a few friends of the respondent at a tavern, one of their number was sent some distance to buy oysters for their own refreshment, of which the parties and others partook. The following day a friend of the respondent treated at a tavern, and not having change, the respondent gave him twenty-five cents to pay for the treat:—Held, not to be corrupt treating, nor a violation of 36 Vict. c. 2, s. 2 (O.) *Welland (Prov.)*, H. E. C. 187.

The treating of persons by the candidate at a tavern during his canvass:—Held, under the evidence, not to be a treating of electors with corrupt motives. *London (Prov.)*, H. E. C. 214.

Semble, where treating is done by a candidate in order to make himself a reputation for good fellowship and hospitality, and thereby to influence electors to vote for him, it is a species of bribery which would avoid his election at common law. When the respondent, who, in the course of his business as a

drover, had been in the habit of treating at taverns, treated during his canvass, but to a less extent than was his habit, and not apparently for the purpose of ingratiating himself with the electors:—Held, under the circumstances, that such treating was not corrupt, and his election was not avoided. *North Middlesex (Prov.)*, H. E. C. 376.

A respondent during his canvass and on the same evening that a public meeting was held for the purposes of promoting the election treated a number of persons, many of whom were voters collected in a barroom. It was shewn that it was not the respondent's general habit to treat, and all persons were invited to drink, and that he had not treated more than twice or perhaps three times during the canvass:—Held, not a corrupt practice, and that in view of the ordinary custom of treating in the country it might be regarded more as an expression of good feeling to those who were supporting him. *North Ontario (Prov.)*, 1 E. C. 1.

The undisputed evidence shewed that the respondent from the time of his nomination as the candidate of his party frequently treated the electors and others in the barrooms of hotels whilst engaged in his canvass. He was not a man whose ordinary habit it was to treat, nor one who, in the course of his ordinary occupation, frequented barrooms:—Held, that the trial Judges properly drew the inference that the treating was done with corrupt intent, so as to avoid the election of the respondent. Remarks on the amendment to the Election Act, in respect to "the habit of treating," by 58 Vict. c. 4, s. 21 (O.) *West Wellington (Prov.)*, 2 E. C. 16.

See Glengarry (Prov.), H. E. C. 8; *Dundas (Prov.)*, H. E. C. 205; *North Ontario (Prov.)*, 1 E. C. 1; *Muskoka and Parry Sound (Prov.)*, 1 E. C. 197; *East Middlesex (Prov.)*, 1 E. C. 250; *North Wentworth (Dom.)*, 11 C. L. J. 196, 296.

By Other Persons.]—The giving of free dinners to a number of electors who had come a long distance in severe winter weather, in the absence of evidence that it was done for the purpose of influencing the election either by voting or not voting, or that such electors voted:—Held, not a corrupt act. *North Victoria (Dom.)*, H. E. C. 671.

Certain voters met at a tavern on polling day, and one B. said he did not know how to mark his ballot. One of the voters, after shewing B. how to mark his ballot, according to the candidate he desired to vote for, treated:—Held, that the treating was not a violation of s. 94 of the Dominion Elections Act, 1874, nor a corrupt practice under s. 98 of the Act. *North Ontario (Dom.)*, H. E. C. 785.

See North Ontario (Prov.), H. E. C. 304.

Selling Liquor or Treating on Polling Day.]—The distribution of spirituous liquors on the polling day with the object of promoting the election of a candidate, will make his election void. *South Grey (Prov.)*, H. E. C. 52.

The violation of s. 66 of 32 Vict. c. 21 (giving or selling liquor at taverns on polling day) is not a corrupt practice within the meaning of the Ontario Controverted Elections Act, 1871, or the Election Act of 1868, unless committed in order to influence voters at the election complained of. *North York (Prov.)*. H. E. C. 62.

H. and B. voted for respondent. H. kept a saloon, which was closed on the polling day; but upstairs, in his private residence, he gave beer and whisky without charge to several of his friends, among whom were friends of both candidates. B., who had no license to sell liquor, sold it at a place near one of the polls to all persons indifferently. This was not done by H. or B. in the interest of either candidate, or to influence the election, B. acting simply for the purpose of gain; and the candidates did not know of or sanction the proceedings:—Held (though with some doubt as to B.), that neither H. nor B. had committed any corrupt practice within 34 Vict. c. 3, s. 47 (O.), and therefore had not forfeited their votes; for they had not been guilty of bribery or undue influence, and their acts, if illegal and prohibited, were not done "in reference to" the election, which, under 34 Vict. c. 3, s. 47, is requisite in order to avoid a vote. *Brockville (Prov.)*, H. E. C. 139.

Section 66 of 32 Vict. c. 21 (Ontario Election Law of 1868) provides that "no spirituous or fermented liquors or drinks shall be sold or given to any person" during the day appointed for polling in the wards or municipalities in which the polls are held; and by 36 Vict. c. 2, s. 1, "corrupt practice" means "any violation of s. 66 of the Election Law of 1868 during the hours appointed for polling;" and by s. 3 of the latter Act any corrupt practice "committed by any candidate at an election, or by his agent, whether with or without the actual knowledge or consent of the candidate," avoids the election. On the day of the election in question, and during the hours appointed for polling, one M., an agent of the respondent for the purposes of the election, was offered by a person unknown to him spirituous liquor (whisky) in a bottle, which such agent, after remonstrating with such person, accepted and drank at the polling place where such agent then was. The unknown person also gave spirituous liquor from the same bottle to other persons then present:—Held, that, as the Legislature had, by the provisions as to the selling or giving of liquor during the hours of polling, provided for the punishment of one particular class, which was defined to be the seller or giver, it did not intend to include the other class, the purchaser or receiver, to which no reference was made, except inferentially, and that therefore such agent, as the receiver of spirituous liquor during such polling hours, was not guilty of a corrupt practice. *West Toronto (Prov.)*, H. E. C. 179.

One F., a tavern-keeper, was given $5 by the respondent, and requested to appoint a scrutineer to act for the respondent at the poll on polling day. F. kept his tavern open on polling day, and various persons treated there during polling hours. Counsel for the respondent, after the evidence of the above facts had been given, admitted that F. was an agent of the respondent, and that his acts were sufficient to avoid the election:—Held, that, although the court did not adjudicate that the respondent, by giving the $5 and requesting F. to appoint a scrutineer, had constituted him an agent for all purposes, it was the practice of the court to take the

admission of counsel in place of proof of agency, and therefore the admission of counsel as to F.'s agency was sufficient. Held, further, that F., as such agent, had been guilty of a corrupt practice in keeping his tavern open on polling day, and that such corrupt practice avoided the election. *Russell (Prov.)*, H. E. C. 199.

Where a member of the respondent's committee, on the day of election, invited some of his friends to his house, which was opposite the polling booth, and gave them beer, &c., during or soon after polling hours:—Held, not a contravention of 32 Vict. c. 21, s. 66. *London (Prov.)*, H. E. C. 214.

On the day of election and during the hours of polling, one W., an agent of the respondent, was offered a treat in a tavern within one of the polling divisions, of which such agent and others then partook:—Held, that giving a treat in a tavern during polling hours was a corrupt practice, and being an act participated in by an agent of the respondent, the election was avoided. *South Essex (Prov.)*, H. E. C. 235.

One B. was appointed, in writing, by the respondent to act as his agent for polling day. During the day he went to a tavern and asked for and was given a glass of beer:—Held, that B. treated himself, and neither gave nor sold, and was not therefore guilty of a corrupt practice. *East Peterborough (Prov.)*, H. E. C. 245.

One M., an agent of the respondent, treated at a tavern during polling hours on polling day. The evidence was, that decanters were put down, and people helped themselves, but there was no evidence that spirituous liquors were used. The evidence was objected to at the time, as the charge was not mentioned in the particulars, but admitted subject to the objection: — Held, that the nature of the treat in the barroom of a country tavern raised the presumption that the treat was of spirituous liquors, and was a corrupt practice, which avoided the election. 2. That had an application been made in regular form to add a particular embracing the charge, it would have been granted. *North Victoria (Prov.)*, H. E. C. 252.

The decision in the Lincoln Election Case, H. E. C. 391, that tavern-keepers alone are liable for the violation of 32 Vict. c. 21, s. 66 (O.), as amended by 36 Vict. c. 2, s. 1, not approved of. On the polling day and during the hours of polling, the respondent drove up to a tavern at C., where he met one S., a member of his committee, and addressing him or the assembled people, said, "Boys, this is the first time I came to C. when I dare not treat, and some one will have to treat me." S. replied that he would treat, and, with the respondent and a number of persons, variously estimated at from thirty to fifty, went into the tavern, where S. treated some of the people, and the respondent drank with the rest:—Held, that going into the tavern for the purposes of the treat, when the law directed that such tavern should be kept closed, and joining in and accepting such treat, was a literal as well as a substantial violation of the law, and a corrupt practice; that the concurrence of the respondent in the commission of such corrupt practice made him liable to the disqualification imposed by the statute for "a corrupt practice committed with the actual knowledge and consent of a candidate." *North Wentworth (Prov.)*, H. E. C. 343.

The respondent, during polling hours on the polling day, met one P., a supporter of the opposing candidate, and told him he would like a drink; and both of them, not thinking it illegal, went to a tavern, and the bar being closed, P. treated the respondent in the hall of the tavern:—Held, that the receiving of a treat by the respondent during the hours of polling, was a corrupt practice and avoided the election. Semble, that as to the seller or giver of the treat, the only person liable to the penalty of $100 would be the tavern-keeper, as the statute does not authorize two penalties for the same act. *North Grey (Prov.)*, H. E. C. 362.

One L., an alleged agent of the respondent, went into the tavern of one D. during polling hours on polling day, and purchased spirituous liquor, with which he treated himself and several persons there present:—Held, per Gwynne, J., at the trial, that the penalties provided by s. 66 of the Election Act of 1868 (O.) apply only to the tavern-keeper, who as such is able to control what is done on his own premises in violation of the Act, and that the treating by L. was not a corrupt practice. Per Draper, C.J.A.—(1) That s. 66 must be construed distributively. (2) That under the first part of the section the tavern-keeper is the only person who can incur the penalty for not keeping his tavern closed during the prescribed time. (3) That under the second part of the section the persons who incur the penalty are (a) the tavern-keeper who sells liquor in violation of the statute, and (b) the purchaser who gives the liquor purchased by him to persons in the tavern. *Lincoln (Prov.)*, H. E. C. 391.

One B. was a member of the committee at W. for the respondent's election, canvassed for him, and met him at the committee rooms once or twice. B. was also appointed in writing by the respondent to act as scrutineer for him on the polling day, and during polling hours gave whisky to the deputy returning officer in the polling booth:—Held, that B., while acting as such scrutineer, was not acting in his former capacity as committee man or agent of the respondent, and that his appointment as scrutineer did not empower him to do an act of treating so as to make the respondent answerable for it. The respondent, on polling day and during polling hours, went to a tavern at W., and partook therein of spirituous or fermented liquor, for which he did not then pay:—Held, that he did not "sell or give" spirituous liquors within the meaning of s. 66 of the Ontario Election Law of 1868. One C., a member of respondent's committee at W., partook of whisky in the kitchen of a tavern at W. during polling hours, and also, when bringing a voter from the town of O. to the town of W. (within the same electoral division) to vote at W., treated himself and the voter in O.:—Held, that C. was not guilty of corrupt practices within s. 66 of the Ontario Election Law of 1868. *South Ontario (Prov.)*, H. E. C. 420.

Held, by the court of appeal that s. 66 of the Ontario Election Law of 1868, 32 Vict. c. 21, as amended by 36 Vict. c. 2, applies only to shop, hotel, and tavern-keepers, who

alone are liable to the penalties for keeping open the tavern, &c., and for selling or giving spirituous liquors during the prohibited hours. Held, by the court of appeal, that the prohibition in such section (66) as to opening taverns and giving or selling liquor "in the municipalities in which the polls are held," applies to all the municipalities within the constituency, irrespective of the place where the vote is given, or to be given. *South Ontario (Prov.)*, H. E. C. 420.

By 39 Vict. c. 10, s. 3, (O.), which is substituted for s. 66 of the Election Law of 1868, tavern-keepers or persons acting in that capacity for the time, who sell or give liquor at taverns on polling day and within the hours of polling, are guilty of corrupt practices; but persons who treat or are treated at such taverns are not affected by the statute. *Ford's Vote, Lincoln* (2) *(Prov.)*, H. E. C. 500.

Held, upon the evidence, that one Peters was properly held not to have been an agent of the petitioner; and that the dinner given by him to forty electors at a distant polling place in the winter, where there was no inn, was not shewn to have been corruptly given or accepted, nor was there sufficient evidence that these persons all voted at the election. *North Victoria (Dom.)*, H. E. C. 671, 37 U. C. R. 234.

One M. canvassed a voter on polling day, and urged him to vote for the respondent, and while canvassing treated the voter four times; the voter then went and voted:—Held, that the treating was for the purpose of corruptly influencing the voter to vote or refrain from voting at the election. A scrutineer for the respondent had some whisky with him on polling day, and treated the deputy returning officer, poll clerk, and another in the polling station:—Held, not a corrupt practice. *North Ontario (Dom.)*, H. E. C. 785.

S., being an agent of the respondent, on the election day brought some whisky to a blacksmith shop near a poll, being a place where the neighbours were in the habit of congregating to warm themselves, &c., there being no tavern or public house in the neighbourhood, and treated those present (most of them being voters) without reference to their voting, and without distinction as to which side they supported:—Held, not a corrupt practice. *Lennox (Prov.)*, 1 E. C. 41.

Section 157 of R. S. O. 1877 c. 10 forbids the selling or giving of liquor at any time during the polling day, under a penalty of fine or imprisonment, and the same Act provides that any violation of that section during the hours appointed for polling, is a corrupt practice:—Held, at the trial, that a violation of the section during the polling hours by an agent of the candidate, must be conclusively presumed to have been intended corruptly to influence the election. *Prescott (Prov.)*, 1 E. C. 88.

It appeared in the evidence that at the place of polling the respondent's firm had a house in connection with their mills, where their workmen were boarded and where the respondent himself had rooms. A short time before the election Mrs. B., who had formerly been housekeeper of the house, had become tenant of it, or was allowed to occupy it, and have the use of the furniture, and was paid a certain sum per week or month for each man boarding there, and a sum per day for casual boarders, and she was in this position at the time of the election. On polling day H., a nephew and partner of the respondent, who spent the day at the polling place, told voters that if they went to the said boarding-house they could warm themselves and would find dinner if they wished it, and meat and drink was accordingly caused to be given to the voters at the boarding-house by H., who was clearly the respondent's agent throughout:—Held, at the trial, that the voters having come to the place for the purpose of voting, and that being their errand there, and the election being the occasion on which the provision was made and the hospitality extended to them, the act in question was done on account of each man so entertained "having voted or being about to vote," and, inasmuch as it was impossible to say that the result may not have been affected by the above offer of hospitality (R. S. O. 1877 c. 10, s. 159), the election would have been void by reason thereof under s. 158, had the matter been properly charged in the petition. Held, however, that the evidence did not shew that the corrupt act was committed with the actual knowledge and consent of the respondent, and therefore he had not incurred the penal consequences of R. S. O. 1877 c. 10, s. 161. *West Simcoe (Prov.)*, 1 E. C. 128.

Two agents of the respondent went for a voter, having a flask of brandy in their conveyance. The voter having said he was unwell was asked if he would have a drink, which the trial Judges held meant a drink from the flask, and which he declined:—Held, that this offer did not fall within the provision of s. 155, R. S. O. 1887 c. 9, as there was no "giving or causing to be given." Held, also, that it did not come within s. 151 (a), a drink not being a valuable consideration. *Hamilton (Prov.)*, 1 E. C. 499.

See West Hastings (2) *(Prov.)*, H. E. C. 539; *South Oxford (Prov.)*, H. E. C. 243; *Welland* (2) *(Prov.)*, H. E. C. 187; *West Northumberland (Dom.)*, 10 S. C. R. 635; *East Simcoe (Prov.)*, 1 E. C. 291; *North Middlesex (Dom.)*, 12 C. L. J. 14; *North Ontario (Prov.)*, 1 E. C. 1.

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(1) *Undue Influence.*

A candidate's appeal to his business, or to his employment of capital in promoting the prosperity of a constituency, if honestly made, is not prohibited by law. *West Peterborough (Prov.)*, H. E. C. 274.

One B. claimed the right to vote in respect of his wife's property, and was told by W., an agent of the respondent, that he could not vote unless he could swear the property was his own. The voter's oath was read to him, and the agent repeated his statement, and said he would look after the voter if he took the oath. The voter appeared to be doubtful of his right to vote, and withdrew:—Held, that the agent was not guilty of undue influence. Quære, whether the act of the agent as above set out was undue influence under 32 Vict. c. 21, s. 72. *Halton (Prov.)*, H. E. C. 283.

The respondent stated at a public meeting of the electors with reference to an alleged local grievance, that he understood it to be the constitutional practice, here and in England, for the ministry to dispense as far as practicable the patronage of the constituency on the recommendation of the person who contested the constituency on the government side; and that he being a supporter of the government would have the patronage in respect of appropriations and appointments, whether elected or not:—Held, that the respondent by such words did not offer or promise directly or indirectly any place or employment, to or for any voter, or any other person, to induce such voter to vote or refrain from voting. 2. That the respondent was not guilty of undue influence as defined by s. 72 of the Ontario Election Act, 1868, nor as recognized by the common law of the Parliament of England. 3. That to sustain such a general charge of undue influence, it would be necessary to prove that the intimidation was so general and extensive in its operation that the freedom of election had ceased in consequence. *Muskoka* (*Prov.*), H. E. C. 458.

Observations on the impropriety of division court bailiffs canvassing voters during an election. *North Victoria* (*Dom.*), H. E. C. 612.

Two agents of the respondent gave a voter M. some whisky on polling day, and took him in a boat to an island, where they stayed for some time. One of the agents then left, and the other sent M. to another part of the island for their coats. During M.'s absence the latter agent left the island with the boat, but M. got back in time to vote, being sent for by the opposite party:—Held, that the two agents were guilty of undue influence. *North Ontario* (*Dom.*), H. E. C. 785.

The election of a member for the House of Commons guilty of clerical undue influence by his agents is void. Sermons and threats by certain parish priests of the county of Charlevoix amounted in this case to acts of undue influence, and were in contravention of s. 95 of the Dominion Election Act, 1874. *Charlevoix* (*Dom.*), 1 S. C. R. 145.

See North Victoria (*Dom.*), H. E. C. 584.

(m) *Wagering or Betting.*

Where in addition to other corrupt acts, bets were made by agents of the respondent and others, with a number of voters who were supporters of N., the opposing candidate, the effect of the bets being that in order to win the bets, the voters must vote for the respondent:—Held, that these bets were for the purpose of getting votes for the respondent, and were corrupt practices, and that in connection with the other corrupt acts proved, they affected the result of the election; and that the election was therefore avoided. *Lincoln Election* (2) (*Prov.*), H. E. C. 489.

Money was given to certain voters to make bets with others on the result of the election, but, as there was no evidence of a previous understanding as to the votes, such bets were not bribery. The practice of making bets on an election condemned as like a device to commit bribery. *South Norfolk* (*Dom.*), H. E. C. 660.

One Pringle, an acknowledged agent of the respondent and the president of the Conservative association, whose candidate the respondent was, made a bet of $5 with one Parker, a Liberal, that he would vote against the Conservative party, and deposited with the stakeholder the $5, which, after the election, was paid over to Parker. At the trial Pringle denied that he was actuated by any intention to influence the conduct of the voter, and alleged that the bet was made as a sporting bet on the spur of the moment, and with the expectation that, as he said, Parker would warm up and vote; but he also admitted in evidence that it passed through his mind that some one on the voter's side would make the money good if he voted. Parker said he had formed the resolution not to vote before he made his bet, but the evidence shewed that he did not think lightly of the sum which he was to receive for his not voting, his answer to one question put to him being: "Oh, I don't know that $5 would be an insult to any one not to vote:"—Held, reversing the judgment in 1 E. C. 32, that the bet in question was colourable bribery within the enactment of s.s. 1 of s. 92 of the Dominion Election Act, 1874, and a corrupt practice which avoided the election. *West Northumberland* (*Dom.*), 10 S. C. R. 635.

Three persons, T. being one of them, each lent $10 to R. L., knowing that the moneys so lent were intended to be used by him, as he then told them, in betting on the result of the election. Any bet or bets which he made were to be his own bets, not theirs, and he was to return the money in a couple of days. He did not succeed in getting anyone to bet with him, and he returned the money to each on the following day:—Held, that this was providing money to be used by another in betting upon the election, and was a corrupt practice within the meaning of s. 164 (2) of the Election Act. *East Elgin* (*Prov.*), 2 E. C. 100.

See Trebilcock v. *Walsh*, 21 A. R. 55, *Walsh* v. *Trebilcock*, 23 S. C. R. 695.

(n) *Other Corrupt Practices.*

Appointment of Agent — *Place of Voting.*]—The appointment of a voter as an agent so as to allow him to vote in a division other than his own, and near where he was employed, is not a corrupt practice. *North Ontario* (*Prov.*), 1 E. C. 1.

Employment — *Casual or Indefinite.*] — Quære, whether the word "employment" used in the bribery clauses of 32 Vict. c. 21 (O.), refers to an indefinite hiring, or would include a mere casual hiring. *West Peterborough* (*Prov.*), H. E. C. 274.

——— *Promise by Candidate to Procure— Finding of Trial Judges.*]—On a charge by the petitioner that the appellant had been guilty personally of a corrupt practice by promising to a voter, W., to endeavour to procure him a situation in order to induce him to vote, and that such promise was subsequently carried into effect, the trial Judges

held on the evidence that the charge had been proved. The promise was charged as having been made in the township of Thorold on the 28th February, 1891. At the trial it was proved that W. some time before the trial made a declaration upon which the charge was based, at the instance of the solicitor for the petitioner, and had got for such declaration employment in Montreal from a railway company until the trial took place, and W. swore that the promise had been made on the 17th February. G., the appellant, although denying the charge, admitted in his examination that he intimated to W. that he would assist him, and there was evidence that after the election G. wrote to W. and did endeavour to procure him the situation, but the letters were not put in evidence, having been destroyed by W. at the request of the appellant:—Held, that, as the evidence of W. was in part corroborated by the evidence of the appellant, the conclusion arrived at by the trial Judges was not wrong, still less so entirely erroneous as to justify the court as an appellate tribunal in reversing it on the questions of fact involved. *Welland* (*Dom.*), 20 S. C. R. 376.

Evasion of Oath — *Scheme—Scrutineer—Costs.*]—One T., who was on the roll as an elector, and had sold his property in June, 1874, before the final revision of the assessment roll by the county Judge, was, with the knowledge of the respondent—who was aware a doubt existed as to T.'s right to vote—given an appointment to act as scrutineer at a distant polling place, and also a certificate from the returning officer under 38 Vict. c. 3, s. 28 (O.), to enable T. to vote at the place where he was to act as such scrutineer, at which place T. voted without taking the voter's oaths, and returned without entering upon the duties of scrutineer. On a question of law reserved on the above facts for the court of appeal:—Held, that the act complained of was not a corrupt practice under the statute; but, under the circumstances, the court gave the respondent no costs in appeal. *West Peterborough* (*Prov.*), H. E. C. 274.

Holding Meetings at Taverns.] — Meetings for promoting the respondent's election were held at public houses with the object of inducing the owners to support the respondent at the election, and because the weather was cold and meetings could not be held in the open air. No evidence was given by the petitioner that equally convenient places, and such as were more proper to be used for that purpose, could be obtained:—Held, that, as the respondent and his friends had a legitimate motive for holding their meetings at such houses, although their other motives might not be legitimate, no corrupt act had been committed. *Kingston* (*Dom.*), H. E. C. 625.

Inducing Aliens to Vote—*Paid Agents Voting—Amendment — Saving Clause.*] — A number (300) of forms of oaths of residence and allegiance were printed and paid for by the association supporting the respondent as part of the election expenses, and some of the respondent's agents actively canvassed a number of foreigners, who were aliens; and by getting them to swear to these affidavits, and by conversations induced them to believe that they were thus naturalized, and had the right to vote, and several of them did vote. The evidence did not shew how many were sworn, but 235 unused forms were produced, and the remaining sixty-five were not accounted for:—Held, that the procuring of the affidavits just before the polling day, when the agents knew that no court would sit in time to complete the naturalization proceedings by that day, was a plan, design, or scheme to induce aliens to vote for the respondent; that the knowledge, referred to in s. 160 of R. S. O. 1877 c. 9, is not a knowledge of the statute, but a knowledge of the facts disentitling the person to vote; that, although that section contains a penalty of $100, still it is partly penal and partly remedial; that in enforcing the penalty, the person against whom it is inflicted is the only person concerned, and it should be strictly construed; but in ascertaining whether a corrupt practice has been committed the whole constituency has concern, and only the remedial part of the section is invoked; that on the evidence an agent had the knowledge that one of the aliens had no right to vote at the time he induced him to vote. Before the trial notice was given that if the evidence failed to shew money received by the persons named in charge No. 8 for the purpose of influencing voters as therein stated, an application for an amendment would be made substituting a charge under paragraphs Nos. 11 and 13 of the petition, that those persons were paid for their services, and so were guilty of corrupt practices in voting for the respondent, knowing that they had no right to vote:—Held, that two agents of the respondent who were paid for their services, knowing the facts and being presumed to have known the law, were each guilty of a corrupt practice when they voted for him; and that the amendment as to them should be allowed, as it was really giving particulars under paragraph 13 of the petition, and could be made without any amendment of the petition, and that the evidence sustained it, and as notice had been given the respondent was not prejudiced. Held, that the acts of the two paid agents in voting, had they stood alone, not being part of any comprehensive scheme, the court would have hesitated before deciding that they did not fall within s. 103, in which case the election would not have been avoided; but, following the East Simcoe Case, 1 E. C. 291, that the inducing the aliens to vote was an overt act, part of an arranged system of operations, and was such a corrupt practice as could not be considered "of such trifling nature," or "of such trifling extent," that the result could not be supposed to be affected by it. Had the corrupt practice indicated above not been sufficient of itself to avoid the election, the two other corrupt practices proved, together with certain other illegal practices committed by a person not an agent of the respondent, the evidence as to which was uncontradicted, would have sufficed. *Hamilton* (*Prov.*), 1 E. C. 499.

Inducing Voter to Take False Oath.] —The insisting by a scrutineer upon the taking of the farmers' sons' oath T. by a hesitating voter whose vote is objected to and who is registered on the list as a farmer's son and not as owner, when, as a matter of fact, the voter's father had died previous to the final revision of the list, leaving the son owner of the property, is a wilful inducing or endeavouring to induce the voter to take a false oath so as to amount to a corrupt practice within ss. 90 and 91 of R. S. C. c. 8, and such corrupt practice will avoid the election under s. 93. *Haldimand* (*Dom.*), 1 E. C. 529.

Interference with Franchise of Voters — *Scheme — Deputy Returning Officer.*]—In an election petition it was charged that the respondent personally, as well as acting by C. A. C., D. F., and others, his agents, did undertake and conspire to impede, prevent, and otherwise interfere with the free exercise of the franchise of certain voters, and that, in furtherance of a premeditated scheme, which the respondent and his agents well knew to be illegal, they did, in fact so impede, prevent, and interfere with the exercise of the franchise of certain voters, by getting their ballots marked, rendered identifiable, and consequently void, whereby the franchise of these voters was unjustifiably interfered with. At a previous election the respondent had been defeated by a majority of three votes, and the election, having been contested, was set aside, and certain voters were reported by the Judge as having been guilty of corrupt practices, but had not been found guilty of such corrupt practices under s. 104 of the Dominion Elections Act, 1874. At a public meeting before the election, C. A. C., the respondent's agent, to intimidate these persons and prevent them from voting, in a speech made by him, threatened them with punishment if they voted; and, subsequently, printed notices to the same effect were sent to these voters. On the polling day D. F., who had been appointed deputy returning officer, on the distinct understanding with, and promise made to, the returning officer that he would not mark the ballots of these voters, consulted with C. A. C., and on his advice and in collusion with him, marked the ballots of certain of these voters:—Held, that the election was void by reason of the attempted intimidation practised by C. A. C., and by reason also of the conspiracy between the said agent and the deputy returning officer to interfere with the free exercise of the franchise of voters, violations of s. 95 of the Dominion Elections Act, 1874, and corrupt practices under s. 98 of the said Act. *Soulanges (Dom.)*, 10 S. C. R. 652.

See West Hastings (Prov.), H. E. C. 211; *East Northumberland (Prov.)*, 1 E. C. 434.

Providing Money for Betting Purposes.]—See *East Elgin (Prov.)*, 2 E. C. 100.

Voting without Right — *Knowledge.*]—Actual knowledge on the part of a voter that he has no right to vote is necessary to constitute a corrupt practice under R. S. O. 1887 c. 9, s. 160. Evidence to establish agency discussed and found insufficient. *South Perth (Prov.)*, 2 E. C. 30.

It was charged that a person had voted at the election, knowing that he had no right to vote, by reason of his not being a resident of the electoral district. He knew that his name was on the voters' list, and that it had been maintained there by the county Judge, notwithstanding an appeal, and he believed that he had, and did not know that he had not, a right to vote:—Held, that a corrupt practice under s. 168 of the Election Act, R. S. O. 1887 c. 9, was not established. Under that section the existence of the mala mens on the part of the voter, "knowing that he has no right to vote," not merely his knowledge of facts upon the legal construction of which that right depends, must be proved. The offence does not depend upon his having taken the oath; it may be proved apart from that; nor does the fact that he has taken the oath, even if it be shewn in point of law to be untrue, necessarily prove that the offence has been committed. Haldimand Case, 1 E. C. 529, distinguished. *East Elgin (Prov.)*, 2 E. C. 100.

See South Perth (Prov.), 2 E. C. 144.

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4. Candidates.

Disqualification.]—See *post* 5 (a).

Nomination — *Defect in Nomination Paper — Duty of Returning Officer.*] — The nomination paper of B., one of the candidates at the election complained of, was signed by twenty-five persons, and had the affidavit of the attesting witness duly sworn to as required by the statute. The election clerk found that one of the twenty-five persons was not entered on the voters' list, and thereupon the returning officer and election clerk compared the names on the nomination paper with the certified voters' lists in his possession, and on finding that only twenty-four of the persons who had so signed were duly qualified electors, he rejected B.'s nomination paper, and returned the respondent as member elect:—Held, (1) that, as the policy of the law is to have no scrutiny, or as little as possible, in election cases, and to give the people a full voice in choosing their representatives, the defect in the nomination paper was one to which the returning officer should not have yielded. (2) That if the election had gone on, the defect in the nomination paper would not, according to 37 Vict. c. 9, s. 80, have affected the result of the election. Semble, that the returning officer is both a ministerial and a judicial officer; and that he might decline to receive the nomination of persons disqualified by status or office, and also nomination papers signed by unqualified persons if he had good reasons for so doing. *South Renfrew (2) (Dom.)*, H. E. C. 705.

——— *Meeting — Statutory Requirements —Time.*]—Under s. 33 of R. S. O. 1877 c. 10, the returning officer is to fix the place and time of nomination, such time to be between eleven a.m. and two p.m. of the day fixed therefor. The returning officer, who lived at B., owing to inevitable accident arising from the train being blocked with snow did not reach O., the place of nomination, till two p.m. and the hustings until ten minutes afterwards. The two candidates who contested the constituency were then nominated in the presence of a large number of electors, including the petitioner, who made no protest. It did not appear that any injury had been caused thereby. Per Boyd, C.—The requirement was merely directory or regulative; noncompliance therewith might or not be fatal, and so avoid the election, according to circumstances; and, as no one was prejudiced, it could have no fatal effect. In any event the petitioner, under the circumstances, was estopped from raising the objection; and semble, he was also precluded from raising the objection by reason of, as it appeared, his claiming the seat for the defeated candidate, thus ratifying and adopting what was done at the election. Per Cameron, J.—The requirement was imperative, and noncompliance therewith avoided the election; and the petitioner was not estopped from raising the

objection. On appeal to the court of appeal, the judgment proceeded on another ground. Per Burton, J.A.—The point was covered by s. 48 of 47 Vict. c. 4 (O.) Per Patterson, J.A.—Quære, whether s. 48 was intended to apply to this point, this being a matter specially dealt with by s. 15 of R. S. O. 1877 c. 10. *East Simcoe (Prov.)*, 1 E. C. 291.

——— *Meeting of Electors.*]—Held, that the meeting of the electors at the nomination of candidates is a meeting "for the purpose of promoting the election of a candidate," within the meaning of 36 Vict. c. 2, s. 2 (O.) *North Middlesex (Dom.)*, H. E. C. 376.

Property Qualification of Candidates.]—Held, as in the North Victoria case, H. E. C. 584, that the Dominion Election Act of 1874 not being retrospective, the question of property qualification of candidates at elections for members of the House of Commons held before the passing of the Dominion Elections Act of 1875 could still be raised in pending cases. 2. That it is not necessary for an elector, demanding the property qualification of a candidate, to tender the necessary declaration for the candidate to make, the intention of the statute being that the candidate must himself prepare the declaration. 3. That if the property qualification of a candidate be properly demanded at the right time, the demand must be complied with; and it is not sufficient, after the return of a candidate is contested, for him to shew that at the time of his election or return he was duly qualified. *Cardwell (Dom.)*, H. E. C. 644.

Void Contract—*Printing of Hand-bills.*]—Held, that the printing of hand-bills by which a person announced himself a candidate for election to the legislative council, was a contract relating to a parliamentary election within 23 Vict. c. 17, and that the price of such printing was a lawful debt and might be paid without incurring the penalty of that statute; but such payment could not be enforced at law, the 6th section of the Act rendering it a void contract at law. *Luke* v. *Perry*, 12 C. P. 424. This Act is repealed as to Ontario, by 32 Vict. c. 21, s. 1 (O.)

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5. *Disqualification of Candidates and Others.*

(a) *Of Candidates.*

Corrupt Acts of Agents—*Expenditure of Money—Knowledge or Complicity of Candidate.*]—When all the accounts and records of an election are intentionally destroyed by the respondent's agent, even if the case be stripped of all other circumstances, the strongest conclusions will be drawn against the respondent, and every presumption will be made against the legality of the acts concealed by such conduct. *South Grey (Prov.)*, H. E. C. 52.

The respondent intrusted about $700 to an agent for election purposes without having supervised the expenditure:—Held, that this did not make him personally a party within 34 Vict. c. 3, s. 46 (O.), to every illegal application of the money by the agent, or by those who received money from him. But, if a very excessive sum had been so intrusted to the agent, the argument of a corrupt purpose might have been reasonable. *South Grey (Prov.)*, H. E. C. 52.

A candidate in good faith intended that his election should be conducted in accordance both with the letter and spirit of the law; and he subscribed and paid no money, except for printing. Money, however, was given for election purposes, by friends of the candidate to different persons, who kept no account of vouchers of what they paid:—Held, that bribery would not be inferred as against the candidate. A total expenditure of $610, where the number of voters on the roll was 4,669, was not excessive. *East Toronto (Prov.)*, H. E. C. 70.

Appeal from the judgment of the trial Judge, avoiding the election and disqualifying the respondent. His decision was sustained as to the complicity of the respondent in the "Stewart case," the particulars of which are set out in the report; but otherwise as to the "Sunday raid," his knowledge and consent to the corrupt acts of his agents being held not proven, the circumstances not being inconsistent with his innocence. The question discussed as to how far or when a candidate is to be assumed to be aware of and impliedly consenting to corrupt acts done by his agents, of which in the natural course of things he can scarcely be ignorant, or of which he wilfully avoids any knowledge. *Lincoln (Prov.)*, H. E. C. 391.

Held, that the circumstantial evidence was sufficient to shew that corrupt practices were committed by the agents of the respondent, and with his knowledge and consent, notwithstanding his disclaimer on oath. It is sufficient to shew the candidate's knowledge of and assent to the fact that his agents were using bribery to procure his election, without connecting him with any particular act of bribery; and his assent must be assumed from his non-interference or objection when he has the opportunity. Semble, that wilful intentional ignorance is the same as actual knowledge. *London (Dom.)*, 24 C. P. 434, H. E. C. 560.

The respondent, in a constituency where 642 persons voted, received 336 votes, and his election expenses were about $2,000. The money was intrusted by him to one G., with a caution to see that it was used for lawful purposes only. About $1,200 of this money was given by G. to one W., who distributed it to several persons in sums of $40, $100, $200, and $250. No instructions as to expenditure were given by G. to W., or by W. to the persons amongst whom he distributed the money; and by the latter several acts of bribery were committed. The respondent publicly and privately disclaimed any intention of sanctioning any illegal expenditure; but made no inquiries after the election as to how the money had been spent until a week or two before the election trial. He denied any act of bribery, direct or indirect, or any knowledge thereof; and no proof was given of a personal knowledge on his part of any of the specific wrongful acts or payments proved to have been committed by persons amongst whom his money had been distributed:—Held, that under the peculiar circumstances of the respondent's canvass, and on a review of the whole evidence, the respondent's emphatic denial of any corrupt motive or intention should be accepted. *Niagara (Dom.)*, H. E. C. 568.

Money had been contributed by the respondent and by his friends for the purposes of the election, which had been placed in the hands of one C., a personal and political friend of respondent, who gave it without any instructions or warnings to such committee men as applied for it. A great deal of the money was spent in corrupt purposes, in bribery, and in treating, to the extent of avoiding the election. The respondent in his evidence stated that he did not, directly or indirectly, authorize or approve of or sanction the expenditure of any money for bribery, or a promise of any for such purpose, nor did he sanction or authorize the keeping of any open house, and that he was not aware that any open houses had been kept, and that he always impressed on everybody that they must not violate the law. There was no affirmative evidence to shew that the money which the respondent knew had been raised for the purposes of the election was so large that as a reasonable man he must have known that some portion of it would be used for corrupt purposes:—Held, that looking at the whole case, and at this branch of it, as a penal proceeding, the respondent should not be held personally responsible for the corrupt practices of his agents. The avoidance of an election for an act of bribery committed by the agent of a candidate is a civil proceeding, and is not brought about to punish the candidate, but to secure an unbiassed election. *Kingston (Dom.)*, H. E. C. 625.

A candidate is not disqualified by the corrupt acts of his agents, under 36 Vict. c. 27, s. 18 (D.), without his knowledge or consent. *Cornwall (Dom.)*, 11 C. L. J. 81, H. E. C. 647.

It appearing that a number of persons visited the district, and that the object of their visit was to influence the electors by corrupt means, and that there was an organized and systematized plan to employ corrupt means to influence and carry the election in various ways, and that the trial Judges were not satisfied that the respondent was ignorant that such practices were likely to be committed by persons acting in his behalf in the conduct of the election, and found that corrupt practices prevailed at the election, and declined to relieve the respondent, under s. 162, of the penalties incurred by him under s. 161, the court of appeal now declined to interfere. Per Hagarty, C. J. O.—When a corrupt practice is proved, the onus is at once shifted to the respondent to bring himself within the saving clause, R. S. O. 1877 c. 10, s. 162. Prescott, 1 E. C. 88, followed. *Muskoka and Parry Sound (Prov.)*, 1 E. C. 197.

Corrupt Acts of Agents at Former Election—*Knowledge or Consent.*]—An election was held in January, 1874, under the Act of 1873, at which the petitioner and the respondent were candidates, and at which the respondent was elected. This election was avoided on the ground of corrupt practices by agents of the respondent, committed without his knowledge or consent (H. E. C. 547). A new election was held, under the Act of 1874, at which the petitioner and the respondent were again candidates, when the respondent was again elected. Thereupon another petition was presented, charging that the respondent was guilty of corrupt practices at this last election; that he was ineligible by reason of the corrupt acts of his agents at the former election; that persons reported guilty of corrupt practices at the former election trial had improperly voted at the last election; and claiming the seat for the petitioner:—Held, on preliminary objections, (1) that the two elections were one in law; and it was not material that they had been held under different Acts of Parliament. (2) That the respondent was not ineligible for re-election, as the corrupt practices of his agents at the former election had been committed without his knowledge or consent. *Cornwall* (2) *(Dom.)*, H. E. C. 647. But see R. S. C. c. 8, s. 95.

Corrupt Acts—*Defeated Candidate.*]—The 2nd sub-section of s. 3 of 36 Vict. c. 2 (O.) applies equally to the elected and defeated candidates at an election; and, if found assenting parties to any practice declared by the statute to be corrupt, each of them is liable to the disqualifications mentioned in the statute. *North Wentworth (Prov.)*, H. E. C. 343.

——— *Proof of Offence—Conflict of Evidence.*]—Before subjecting a candidate to the penalty of disqualification, the Judge should feel well assured, beyond all possibility of mistake, that the offence charged is established. If there is an honest conflict of testimony as to the offence charged, or if acts or language are reasonably susceptible of two interpretations, one innocent and the other culpable, the Judge is to take care not to adopt the culpable interpretation unless, after the most careful consideration, he is convinced that in view of all the circumstances it is the only one which the evidence warrants his adopting as the true one. *Welland* (2) *(Prov.)*, H. E. C. 187.

The respondent was charged with corrupt practices, in that, when canvassing one C., a voter who said he would not vote unless he was paid, respondent said he was not in a position to pay him anything, but that if C. would support him, one of his (the respondent's) friends would come and see about it. The respondent, as he was leaving the voter's house, met one K., a supporter, who, after some conversation, went into C.'s house and gave him $5 to vote for the respondent. The charge depended upon the evidence of the voter C. and his wife. The respondent denied making such a promise; and he was sustained by K. as to a conversation outside C.'s house, in which the respondent cautioned K. not to give or promise C. any money. The trial Judge on the evidence found that the respondent was not personally implicated in the bribery of the voter C. by K. Before an election Judge finds a respondent or any other person guilty of a corrupt practice involving a personal disability, he ought to be free from reasonable doubt. *Centre Wellington (Dom.)*, H. E. C. 579.

——— *Proof of Offence—Evidence—Penal Proceeding.*]—It is a general rule that no man can be treated as a criminal or mulct in penal actions for offences which he did not connive at; and it is settled law that enactments are not to be given a penal effect beyond the necessary import of the terms used. But the election laws are not to be so limitedly construed by an election Judge; and for civil purposes they are more comprehensive, and reach a candidate whose agents bribe in his behalf, with or without his authority. Where

the disqualification of a candidate is sought, they are to be construed as any other penal statutes, and the candidate must be proved guilty by the same kind of evidence as applies to penal proceedings. *Kingston (Dom.)*, H. E. C. 625.

——— *Treating—Participation in—Habitual Conduct—Intent.*]—After the nomination of the candidates in a rural constituency, and on another occasion after a meeting assembled "for the purpose of promoting the election of a candidate," the electors dispersed to various taverns, mostly to where their vehicles were put up, and then, according to the usual custom, treated each other before starting. The respondent himself partook of a treat:—Held, that this was not a contravention of 36 Vict. c. 2, s. 2 (O.), and that the respondent was not disqualified under s. 3, s.-s. 2, of the same Act. Treating per se is not, except when made so by statute, a corrupt act, but the intent of the party treating may make it so, and this intent must be gathered from the circumstances attending it. Where, therefore, it was sought to disqualify a candidate who had treated during his canvass, though to a much less extent than was his habit previously, and who did not seem to have treated for the purpose of ingratiating himself with the public:—Held, that such treating was not a corrupt act. *North Middlesex (Dom.)*, 12 C. L. J. 14, H. E. C. 376.

See Muskoka (Prov.), H. E. C. 458; *Centre Wellington (Dom.)*, H. E. C. 579; *North Grey (Prov.)*, H. E. C. 362; *North Ontario (Prov.)*, 1 E. C. 1; *South Renfrew (Prov.)*, 1 E. C. 359; *East Middlesex (Prov.)*, 1 E. C. 250; *West Simcoe (Prov.)*, 1 E. C. 128; *Welland (Dom.)*, 20 S. C. R. 376; *Halton (Prov.)*, H. E. C. 283; *West Wellington (Prov.)*, 2 E. C. 16.

Office or Contract—*Carrying Mails.*]—Held, that a member of the Ontario Legislature is not disqualified from holding his seat by reason of his having a contract for the conveyance of Her Majesty's mails. *Centre Simcoe (Prov.)*, 31 C. L. J. 68.

——— *Dual Membership.*]—By commission or instrument under the hand and seal of the Lieutenant-Governor of Prince Edward Island, one E. C. was constituted and appointed ferryman at and for a certain ferry for a term of three years, pursuant to the Acts relating to ferries, and it was by the commission provided that E. C. should be paid a subsidy of $95 for each year of said term. E. C. had given to the government a bond with two sureties for the performance of his contract. By articles of agreement between E. C. and S. F. P. (the respondent), E. C., for valuable consideration, assigned to S. F. P. one-fourth part or interest in the ferry contract, and it was agreed that one-fourth part of the net proceeds or profits of said contract should be paid over by the said E. C. to the said S. F. P. or his assigns. At the time the agreement was entered into S. F. P. was a member of the House of Assembly of Prince Edward Island, having been elected at the general election held on the 30th June, 1886. Subsequently S. F. P. was returned as a member elect for the House of Commons for the electoral district of Prince county, Prince Edward Island, and upon his return being contested:—Held, that by the agreement with E. C., S. F. P. became a person holding and enjoying, within the meaning of s. 4 of 39 Vict. c. 3 (Prince Edward Island), a contract or agreement with Her Majesty, which disqualified him and rendered him ineligible for election to the House of Assembly or to sit or vote in the same, and by s. 8 of the said Act, to be read with s. 4, his seat in the Assembly became vacated: and he was therefore eligible for election as a member of the House of Commons. *Prince (Dom.)*, 14 S. C. R. 265.

———*Notice of, to Electors.*]—The respondent, a postmaster in the service of the Dominion of Canada, became a candidate at an election held on the 14th and 21st March, 1871, and was elected. On the 11th March he resigned his office of postmaster, which was accepted by the postmaster-general on the 13th March. His accounts with the post office department were closed and his successor appointed after the election. Evidence of the notoriety of the alleged disqualification of the respondent was given, which was that such alleged disqualification was a matter of talk, and that all the people at the meeting for the nomination of candidates were supposed to be aware of the supposed difficulty as to such disqualification:—Held, that, even if the respondent was disqualified for election, the Judge could not on such evidence declare that the electors voting for the respondent had voted perversely, and had therefore thrown away their votes, so as to entitle the petitioner to claim the seat. *West York (Prov.)*, H. E. C. 156.

At the nomination a protest was handed to the returning officer, signed by the defeated candidate and three electors, claiming that respondent was disqualified, and that the opposing candidate was entitled to the seat. Notice thereof was posted at some of the polls, and some electors were told of it:—Held, on the evidence, the trial Judges having refused to award the seat to the defeated candidate, that the court in appeal would not interfere. *South Renfrew (Prov.)*, 1 E. C. 359.

———*Postmaster.*]—Held, that a member of the Ontario Legislature is not disqualified from holding his seat by reason of his filling the office of postmaster with no permanent salary, for a place which is not a city or town. *South Norfolk (Prov.)*, 31 C. L. J. 68.

(b) *Of Others.*

Forfeiture of Vote.]—The right to vote is not to be taken away or the vote forfeited by the act of the voter unless under a plain and express enactment, for it is a matter in which others besides the voter are interested. *Brockville (Prov.)*, H. E. C. 139.

Report to Speaker — *Effect of.*]—Held, that the fact of persons having been reported by the Judge as guilty of corrupt practices at a former election, had not the effect of disqualifying them from voting at a second election. The report of the Judge is not as to them an adjudication, for voters are not, in a proper judicial sense, parties to the proceedings at an election trial. *Cornwall (2) (Dom.)*, H. E. C. 647.

Trial — *Notice.*] — Quære, whether the Judge presiding at the trial should not direct

notice to be given to the parties who, from the evidence, were apparently guilty of corrupt practices, so that he might decide upon their liability to disqualification, and report them under the statute. *Prescott (Prov.)*, H. E. C. 1.

The election having been declared void on account of the corrupt practices of an agent of the respondent, the Judges, acting as a court for the trial of illegal acts committed at the election, after notice to such agent, granted an order for the punishment of such agent by fine and disqualification. *Stormont* (2) *(Prov.)*, H. E. C. 537.

See North Simcoe (Dom.), H. E. C. 617; *South Oxford (Prov.)*, H. E. C. 238, *post* 10 (h).

See post 11 (c).

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6. *Law and Statutes Governing Elections.*

Common Law.] — The common law of England relating to parliamentary elections is in force in Ontario, and applies to elections for the House of Commons. *Cornwall (Dom.)*, H. E. C. 547.

Dominion Elections Act — *Application to Pending Proceedings.*] — The Dominion Elections Act of 1874 does not affect the rights of parties in pending proceedings, which must be decided according to the law as it existed before the passing of that Act; s. 20 of that Act referring to candidates at some future election. *North Victoria (Dom.)*, H. E. C. 584.

——— *Crown.*]—The Crown is not bound by ss. 100 and 122 of the Dominion Elections Act, 1874. The 46th clause of s. 7 of the Interpretation Act, R. S. C. 1886 c. 1, whereby it is provided that no provision or enactment in any Act shall affect in any manner or way whatsoever the rights of Her Majesty, her heirs or successors, unless it is expressly stated therein that Her Majesty shall be bound thereby, is not limited or qualified by any exception such as that mentioned in the Magdalen College case, 11 Rep. 70b, "that the King is impliedly bound by statutes passed for the general good . . . or to prevent fraud, injury, or wrong." *The Queen* v. *Puliot*, 2 Ex. C. R. 49.

Ontario Elections Act—*Penalty.*]—See *Johnson* v. *Allen*, 26 O. R. 550; *Malcolm* v. *Race*, 16 P. R. 330.

Quebec Elections Act—*Promissory Note —Illegality.*]—In an action on a promissory note the evidence shewed that its proceeds were given to an election agent to be used as a portion of an election fund controlled by the maker:—Held, that the transaction was illegal under 38 Vict. c. 7, s. 266 (Q.), R. S. Q. Art. 425, which makes void any contract, promise, or understanding in any way relating to an election under that Act, and the plaintiff could not recover. *Dansereau* v. *St. Louis*, 18 S. C. R. 587.

See Cardwell (Dom.), H. E. C. 644.

See ante 3.

7. *Penalties—Actions for.*

(a) *Bribery.*

Constitutional Law—*Powers of Dominion Parliament — Imposition of Penalty.*]—The jurisdiction of the Provincial Legislatures over "property and civil rights" does not preclude the Parliament of Canada from giving to an informer the right to recover, by a civil action, a penalty imposed as a punishment for bribery at an election. The Dominion Election Act, 1874, by s. 106, provides that all penalties and forfeitures (other than fines in cases of misdemeanour) imposed by the Act shall be recoverable, with full costs of suit, by any person who will sue for the same, by action of debt or information, in any of Her Majesty's courts in the Province in which the cause of action arose, having competent jurisdiction:—Held, that the enactment was valid. *Doyle* v. *Bell*, 11 A. R. 326, 32 C. P. 632.

Dismissal for Delay—*Costs.*]—The acts of bribery complained of were committed between the 13th and 23rd June, 1882. The writ was issued on the 12th June, 1883, and was served on the defendant on the 27th November thereafter. The defendant, on the 29th November, moved to dismiss the action for wilful delay in prosecution under 39 Vict. c. 9 (O.). The plaintiff's solicitor swore that he was also solicitor for the petitioner in the Lennox election petition, at which election the acts of bribery complained of were alleged to have been committed, and in order not to endanger the success of that petition it was deemed advisable not to serve the writ until that petition was disposed of, which, on account of objections to the jurisdiction, was not tried till the 10th October, 1883. He also deposed that at the trial of the election petition an application was made for a summons against the defendant under 39 Vict. c. 9, to have the penalties for bribery imposed upon him; and that the application was not disposed of till the 23rd November, at which date the Judge declined to interfere:—Held, that such delay as would not expose an ordinary suit to dismissal may be fatal to an action under this Act, under the special provision that such an action shall be carried on without wilful delay. Held, also, that there had been wilful delay not to be excused by the explanations given, and that the plaintiff was entitled as of right to have the action perpetually stayed or dismissed. An order was made dismissing the action, but without costs, for the reason that a primâ facie case of bribery was established against the defendant, which he had not attempted to contradict. *Miles* v. *Roe*, 10 P. R. 218.

Informer—*Status—Infant.*] — Held, that 18 Eliz. c. 5, which enacts that an informer shall sue either in person or by attorney, is in force in this Province, and therefore the plaintiff, an infant suing by his next friend, could not maintain an action for a penalty under the Election Act. The appellant having omitted to take this objection in the court below, the court of appeal, in allowing the appeal on that ground, refused him his costs of appeal. A person who sues for a penalty given by the Election Act is a common informer. *Garrett* v. *Roberts*, 10 A. R. 650.

Quebec Election Act—*Appeal—Supreme Court of Canada — Future Rights.*] — See *Chagnon* v. *Normand*, 16 S. C. R. 661.

(b) *Illegal Voting.*

Informer — *Right to Sue — Crown.*]—In an action under R. S. O. 1877 c. 10, s. 182, against an agent for the sale of Crown lands, to recover a penalty alleged to have been incurred by voting at an election of a member for the legislative assembly, contrary to s. 4 of the Act:—Held, overruling a demurrer to the statement of claim, that, though forfeitures and penalties belong to the Crown unless otherwise disposed of, the sum declared to be forfeited by s. 4 of the Act for a breach thereof is a penalty within the meaning of s. 182, s.-s. 1, for which an action may be maintained by any person who will sue for the same. *Shrigley* v. *Taylor*, 4 O. R. 396.

See also *S. C., sub nom. Srigley* v. *Taylor*, 6 O. R. 108.

(c) *Refusing Votes.*

Deputy Returning Officer—*Duties of—Oaths—Notice of Action.*]—At the election of a member of the legislative assembly for Algoma, six persons tendered their votes and offered to take the necessary oaths required by R. S. O. 1877 c. 10, to entitle them to vote. The deputy returning officer refused the vote of one because he could not produce his title deeds, and of the others because they had no houses on their lands. Four of those rejected offered to take the oath prescribed, and described the property on which they claimed to vote. In an action for penalties for refusing the votes:—Held, that the duties of a deputy returning officer in taking the votes are ministerial (save where he suspects personation, want of qualification, &c., in which case he should exercise his judgment as to administering the oath), and that having refused the tendered votes of those who had sufficiently shewn their right to vote, he had refused to perform an obligation or formality, required of him within s. 180, and was liable to the penalties prescribed by the Act. One Anderson, when tendering his vote, was not able to describe his land accurately, but stated that it was in one of three townships which he named. His vote was refused on the ground that he had no house on his land:—Held, that the deputy returning officer was liable for the penalty for refusing this vote. Held, also, that the point as to whether the polling division in question was within Ontario or not, could not be raised by the deputy returning officer acting under a writ for an election in Ontario. Held, also, that notice of action was not necessary, nor was it necessary to aver or prove notice. *Walton* v. *Apjohn*, 5 O. R. 65.

——— *Wilful Misfeasance.*]—In an action against a deputy returning officer by a "person aggrieved," to recover a penalty under s. 186 of the Ontario Election Act, 55 Vict. c. 3, for an alleged wilful refusal to allow the plaintiff to vote:—Held, that the word "wilful" in the section means "perverse" or "malicious;" and, although the plaintiff was deprived of his vote by the refusal of the defendant to allow him to deposit a "straight" ballot, and there was thereby a contravention of the Act, yet, as the defendant honestly believed the plaintiff was not qualified, and believed in his own power to withhold the ballot, the action failed. Lewis v. Great Western R. W. Co., 3 Q. B. D. 195, followed. Walton v. Apjohn, 5 O. R. 65, distinguished. *Johnson* v. *Allen*, 26 O. R. 550.

——— *Shewing Ballot Paper and Refusing to Give New One—Breach of Duty.*] — The word "conveniently" in s. 109 of R. S. O. 1897 c. 9, the Ontario Election Act, means "conveniently for the voter and for his wish, purpose, and intention in voting." The plaintiff, an elector, in marking his ballot at an election of a member to serve in the legislative assembly of Ontario inadvertently marked it for the candidate against whom he intended to vote. He immediately and before he left the apartment at the polling place set apart for marking ballots informed the defendant, the deputy returning officer, of his mistake, and asked for another ballot paper. The defendant said he must first see the marked ballot paper, which the plaintiff refused to allow, but, on the scrutineer for his party recommending him to do so, he handed it to the defendant, without creasing or folding it that it might be placed in the ballot box, in such a way that those present could not see how it was marked. The defendant looked at it, and then either shewed or placed it so that it could be and was seen by nearly all present, and, contending that it was not a spoiled ballot, contrary to the plaintiff's protest, placed it in the ballot box, and it was counted for the person against whom the plaintiff intended to vote:—Held, that the defendant by his acts in disclosing how the plaintiff marked his ballot paper, in not cancelling it, and in refusing to give the plaintiff another ballot paper on his demanding one, and by his action compelling him to vote for the candidate whom he wished to oppose, was thereby guilty of breaches of duty which entitled the plaintiff to judgment in his favour for the penalties under the statute. *Hastings* v. *Summerfeldt*, 30 O. R. 577.

(d) *Returns—Neglecting Duties as to.*

Deputy Returning Officer — *Mistake—Pleading.*]—An action to recover the penalty of $200 imposed by 37 Vict. c. 9, s. 108 (D.) The sixth paragraph of the statement of claim alleged that the defendant as deputy returning officer neglected to make out the statement required by s. 57, and enclose it in the ballot box. The seventh paragraph alleged that defendant pretended that he did make up the statement in question, but that he enclosed it by mistake in the envelope containing the ballot papers; and charged that the doing so was a neglect of duty, within the meaning of the statute. The defence denied the statement of claim, and alleged, (2) that the non-performance of any formality was unintentional on the part of the defendant, and was not the result of a guilty mind. On a motion to strike out the second paragraph of the defence, leave was given to the plaintiff to take exception to that paragraph by demurrer. And semble, that the paragraph shewed no valid ground of defence, and that if the defendant made the alleged mistake, no cause of action existed under s. 57. *Cameron* v. *Clucas*, 9 P. R. 405.

Returning Officer—*Notice of Recount—Delay of Return—Powers of County Court Judge.*]—Action by the plaintiff, a defeated candidate at an election for the Ontario legislature, against the defendant, the returning

officer, for wilfully contravening the provisions of R. S. O. 1877 c. 10, s. 125, in not delaying the return after receiving notice from the county Judge of a recount of the ballots. The county Judge had mailed a notice to the defendant, which it was not controverted had reached him in time, and a duplicate of it was left at his residence with his wife:—Held, that the evidence did not shew that the notice came to defendant's knowledge before he made his return, and therefore he did not contravene the section, so that there could be no recovery. The plaintiff was a "person aggrieved" within s. 181 of the Act; and the defendant could not question the power of the county Judge to give the appointment or issue the notice on the material before him, because the process of the court or Judge must be obeyed while it stands when, as here, there was jurisdiction. *Hays* v. *Armstrong*, 7 O. R. 621.

(c) *Other Cases.*

Ontario Voters' Lists Act, 1889—*Notice of Action — Clerk of Municipality.*]—A clerk of a municipality is not an officer within the meaning of R. S. O. 1887 c. 73, in respect to the performance in that capacity of the duties prescribed by the Ontario Voters' Lists Act, 1889, 52 Vict. c. 3, and is not entitled in an action for the penalties imposed for default in that regard, to the protection of the above revised statute. *McVittie* v. *O'Brien*, 27 O. R. 710.

Summons for Corrupt Practices—*Time Limitation—Evidence—Several Charges.*]—See *Halton (Prov.)*, 2 E. C. 158.

8. *Recount and Scrutiny.*

Corrupt Practices at Previous Election.]—Evidence of corrupt practices committed by persons in the interest of both candidates at the previous election, may be given at the trial of the second petition, with the view of striking off the votes of any such persons who may have voted at the second election. *Cornwall* (2) *(Dom.)*, H. E. C. 647.

Inquiry as to Age of Voters.]—Held, that no inquiry could be made on a scrutiny as to voters being under the age of twenty-one, as the voters' lists were final and conclusive on that point. *South Perth (Prov.)*, 2 E. C. 144.

Practice on Scrutiny — *Onus.*]—On a scrutiny the practice is for the person in a minority to first place himself in a majority, and then for the person thus placed in a minority to strike off his opponent's votes. *Stormont (Prov.)*, H. E. C. 21.

Qualification of Farmers' Sons.]—Reading s. 41 in conjunction with s. 45, s.s. 2, and the oath T in schedule A of R. S. C. c. 8, an inquiry on a scrutiny as to the qualification of a farmer's son at the time of voting is admissible, and if it is shewn that a larger number of unqualified farmers' sons' votes than the majority were admitted, the election will be void. *Haldimand (Dom.)*, 1 E. C. 529.

Recount — *Interim Injunction against—Appeal.*]—Where, after the expiration by effluxion of time of an interim injunction order, proceedings are taken against a party to the action to commit him for contempt for disobeying the order, an appeal by him against the interim order will lie. A Judge of the high court has no jurisdiction to restrain by injunction a county court Judge and returning officer from holding a recount of the ballots cast at an election for the House of Commons. Centre Wellington, 44 U. C. R. 132, and North Perth, Hessin v. Lloyd, 21 O. R. 538, considered. Where an injunction is being applied for ex parte, counsel who desire to appear in opposition to the application should be heard. *McLeod* v. *Noble*, 24 A. R. 459.

——— *Interim Injunction against—Invalidity of—Disobedience to—Motion to Commit—Contempt.*]—The House of Commons of Canada alone has the right to determine all matters not relegated to the courts concerning the election of its own members, and their right to sit and vote in parliament. The preliminary recount provided for by R. S. C. c. 8, s. 64, is a delegation pro tanto of parliamentary jurisdiction, and the county court Judge, as the presiding officer, is one designated by parliament, and is responsible to the house for the right performance of his duties. On an application to commit for contempt of court a barrister who had in argument, as agent of a candidate, urged a county court Judge to disregard an injunction staying proceedings granted by the high court of justice for Ontario and to proceed with the recount, and a returning officer who had, under the direction of the county Judge, produced the ballots for the purpose of the recount, notwithstanding that the injunction prohibited him from so doing:—Held, that the plaintiff, the defeated candidate, had no particular specified legal right as applicant for a recount which entitled him to claim a specified legal remedy in the courts. Held, also, that the high court had no jurisdiction to enjoin the prosecution of proceedings connected with controverted elections of the Dominion, such as a recount under s. 64, R. S. C. c. 8. Held, also, that a county court Judge having jurisdiction, and having issued his appointment for a recount, the procuring of an injunction from the high court was an unwarrantable attempt to interfere with the due course of the election. Held, lastly, that the injunction, being one the court had no jurisdiction to grant, was extra-judicial and void, and might properly be disobeyed. *McLeod* v. *Noble*, 28 O. R. 528.

——— *Mandamus.*]—The court refused a mandamus to the junior Judge of the county court of Wellington to proceed with the recount of votes under 41 Vict. c. 6, s. 14 (D.), as being a matter not within its jurisdiction, but belonging to parliament alone. *Centre Wellington (Dom.)*, 44 U. C. R. 132.

——— *Objection not Taken at Poll.*]—Quære, whether the county Judge can object to the validity of a ballot paper when no objection has been made to the same by the candidate or his agent, or an elector, in accordance with the provisions of 37 Vict. c. 10, s. 56, at the time of the counting of the votes by the deputy returning officer. *Queen's (Dom.)*, 7 S. C. R. 247.

Registrar of Court — *Abandonment of Seat—Declaration by Court.*]—Where a petition claims the seat, a scrutiny of votes may

be ordered to be taken in each municipality by the registrar acting for the Judge on the rota. During the scrutiny of votes the respondent abandoned the seat to his opponent, after his opponent had secured a majority of eight votes, and agreed that such should stand as his opponent's majority, and that the court should declare such opponent duly elected; and the same was ordered by the court. *West Elgin (Prov.)*, H. E. C. 227.

Value of Property.]—On a scrutiny an objection that the persons objected to were not owners, tenants, or occupants within s. 5 of 32 Vict. c. 21, excluded an objection as to the value of the assessed property. *Morrow's vote, South Grenville (Prov.)*, H. E. C. 163.

Votes—*Striking of—What may be Shewn.*]—A petitioner claiming the seat on a scrutiny may shew, as to votes polled for his opponent: (1) that the voter was not twenty-one years of age; (2) that he was not a subject of Her Majesty by birth or naturalization; (3) that he was otherwise by law prevented from voting; and (4) that he was not actually and bonâ fide the owner, tenant, or occupant of the real property in respect of which he was assessed. *North Victoria (Dom.)*, H. E. C. 584.

See Russell (2) *(Prov.)*, H. E. C. 519; *Bothwell (Dom.)*, 8 S. C. R. 676.

See post 12 (b) and (g), 13 (a).

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9. *Returning Officers and Returns.*

Claim against Crown—*Services of Subordinates.*]—A person duly appointed and acting during an election as returning officer under the provisions of the North-West Territories Representation Act, R. S. C. 1886 c. 7, cannot recover from the Crown for the services of several enumerators, deputy returning officers, or other persons employed in connection with such election. *Lucas* v. *The Queen*, 3 Ex. C. R. 288.

Duties.]—Semble, that a returning officer is both a ministerial and judicial officer. *South Renfrew (Dom.)*, H. E. C. 705.

Return—*When Made.*]—The return of a member by the returning officer is only made when it has been actually received by the clerk of the Crown in chancery, and not when the returning officer has placed it in the express or post office for transmission to such clerk. *Ottawa (Prov.)*, 2 E. C. 64.

Witness Fees.]—Semble, a returning officer, whose conduct has been impeached, is not entitled to his expenses as a witness before a committee of the House of Commons, although he was summoned to attend by the Speaker's warrant, in the same manner as other witnesses. *Blacklock* v. *McMartin*, Tay. 320.

See ante 3 (n), 7 (c), (d).

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10. *Riots and Assaults.*

Conviction.]—Under the statute for repressing riots at elections no power is given to magistrates to convict summarily. The offenders must be tried by a jury. *Ferguson* v. *Adams*, 5 U. C. R. 194.

Penalty — "*Convicted.*"]—Section 60 of 32 Vict. c. 21 (O.) enacts that "every person convicted" of a battery committed during any part of the days whereon "any election is to be held, within two miles of the place where such election is so held, &c., shall incur a penalty of $50." By s. 77, all penalties imposed by the Act shall be recoverable by any person who will sue for the same by action of debt or information in any court having competent jurisdiction. And it shall be sufficient for the plaintiff in any such action or suit to state in the declaration that the defendant is indebted to him in the sum of money thereby demanded, and to allege the particular offence for which the action is brought, and that the defendant has acted contrary to the Act. It was held, in the county court, that the words "every person convicted," &c., did not mean who had been convicted in some criminal proceeding, but that the offence might be proved, and the person "convicted," in this action. On appeal the court was equally divided, and the appeal was dismissed. *Wilde* v. *Bowen*, 37 U. C. R. 504.

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11. *Trial of Controverted Elections.*

(a) *Appeals.*

Consent to Reversal of Judgment.]—Upon the application of counsel for the respondent and upon the written consent of the attorney and agent for the petitioner, the supreme court of Canada allowed (without argument) an appeal by the respondent from an order of a Judge overruling preliminary objections to the petition, and sustained the preliminary objections, all without costs. *Lincoln and Niagara (Dom.)*, 1 E. C. 428, 432.

The trial of two controverted Dominion election petitions was commenced more than six months after the filing of the petitions, no order having been made enlarging the time for the commencement of the trial. Upon the consent of the respondents, subject to the objection that the court had no jurisdiction, judgments were given voiding the elections for corrupt practices by agents. Upon the respondents' appeal to the supreme court of Canada, the petitioners filed a consent to the reversal of the judgments appealed from without costs, admitting that the objection was well taken. Upon the filing of an affidavit as to the facts stated in the consent, the appeal was allowed and the petitions dismissed without costs. *Bagot (Dom.)*, *Rouville (Dom.)*, 21 S. C. R. 28.

Disagreement of Trial Judges.]—Where the trial Judges have certified that they disagree, the whole case is before the court of appeal on the evidence, and ought to be disposed of in all respects as on an appeal from the trial Judges. *East Simcoe (Prov.)*, 1 E. C. 291.

Discontinuance — *Certificate of Registrar.*]—Upon the trial of a controverted Dominion election petition the respondent was unseated by the judgment of the superior court, by reason of corrupt practices by

agents, and appealed to the supreme court of Canada. When the case was called, no one appearing for the appellant, counsel for the petitioner stated that he had been served with a notice of discontinuance. The court ordered that the appeal be struck off the list. The notice of discontinuance having been filed, the registrar of the court certified to the Speaker of the House of Commons that by reason of such discontinuance, the decision and report of the trial Judges were left unaffected by the proceedings taken in the supreme court; and the Speaker subsequently issued a writ for a new election. *L'Assomption (Dom.)*, 21 S. C. R. 29.

Dissolution of Parliament—*Certificate of Registrar—Deposit—Costs.*]—In the interval between taking an appeal from a decision delivered on the 8th November, 1890, in a controverted election petition and the February sittings (1891) of the supreme court of Canada, parliament was dissolved, and by the effect of the dissolution the petition dropped. The respondent subsequently, in order to have the costs that were awarded to him at the trial taxed and paid out of the money deposited in the court below by the petitioner as security for costs, moved before a Judge of the supreme court in chambers (the full court having referred the motion to a Judge in chambers) to have the appeal dismissed for want of prosecution, or to have the record remitted to the court below. The petitioner asserted his right to have his deposit returned to him:—Held, that the final determination of the right to costs being kept in suspense by the appeal, the motion should be refused. Held, also, that inasmuch as the money deposited in the court below ought to be disposed of by an order of that court, the registrar of this court should certify to the court below that the appeal was not heard, and that the petition dropped by reason of the dissolution of parliament on the 2nd February, 1891. *Halton (Dom.)*, 19 S. C. R. 557.

Fresh Evidence — *Admission of — New Trial.*] — Charges of corrupt practices, consisting of promises of money and of employment, were made against the respondent and one M., his agent. Both the respondent and his agent denied making any promises of money, but left the promises of employment unanswered; and the Judge trying the petition avoided the election. Thereupon the respondent appealed to the court of appeal, and under 38 Vict. c. 3, s. 4 (O.), offered further evidence by affidavit, specifically denying any offer or promise, directly or indirectly, of employment. The Judge who tried the petition having intimated to the court that had the respondent and his agent made the explicit denial as to offers of money or employment which it appeared they had intended making, he would have found for the respondent:—Held, that the finding should be set aside, and that a new trial should be held before another Judge on the rota. Observations on the difference between an election trial and a trial at nisi prius. *Peel (Prov.)*, H. E. C. 485.

New Charge—*Particulars—Trial.*] — The petitioner was not allowed to urge before the court of appeal a charge of corrupt practices against the respondent personally, which had not been specified in the particulars, or adjudicated upon at the trial. *South Ontario (Prov.)*, H. E. C. 420.

Objection to Jurisdiction — *Appeal on —Remitter of Case to Court Below—Subsequent Appeal.*]—The original petition in this case was tried by the Judge on the merits subject to an objection to his jurisdiction. The Judge, having taken the case en délibéré, arrived at the conclusion that he had no jurisdiction, declared the objection to his jurisdiction well founded, and "in consequence the objection was maintained, and the petition of the petitioner was rejected and dismissed." This judgment was appealed from, and the now respondent, under s. 48 of the Supreme Court Act, limited his appeal to the question of jurisdiction, and the supreme court held that the Judge had jurisdiction, and it was ordered that the record be transmitted to the proper officer of the lower court, to have the cause proceeded with according to law. The record was accordingly sent to the prothonotary of the superior court at Montmagny. The Judge, after having offered the counsel of each of the parties a rehearing of the case, proceeded to render his judgment on the merits and declared the election void. The respondent then appealed to the supreme court, and contended that the Judge had no jurisdiction to proceed with the case:—Held, that the supreme court on the first appeal could not, even if the appeal had not been limited to the question of jurisdiction, have given a decision on the merits, and that the order of this court remitting the record to the proper officer of the court a quo, to be proceeded with according to law, gave jurisdiction to the Judge to proceed with the case on the merits, and to pronounce a judgment on such merits, which latter judgment was properly appealable under s. 48 of the Supreme Court Act. *Bellechasse (Dom.)*, 5 S. C. R. 91.

Particulars — *Vagueness—Objection on Appeal.*]—See *North Waterloo (Prov.)*, 2 E. C. 76.

Preliminary Objections—*Appeal on.*] —On the 21st April, 1877, an election petition was filed. The respondent pleaded by preliminary objections that this election petition, notice of its presentation, and copy of the receipt of the deposit had never been served upon him. Judgment was given maintaining the preliminary objections and dismissing the petition with costs. The petitioners, thereupon, appealed to the supreme court under 38 Vict. c. 11, s. 48 (D.):—Held, that the judgment was not appealable, and that under that section an appeal will lie only from the decision of a Judge who has tried the merits of an election petition. *Charlevoix (Dom.)*, 2 S. C. R. 319.

See Shelburne (Dom.), 14 S. C. R. 258; *L'Assomption (Dom.)*, *Quebec (Dom.)*, 14 S. C. R. 429; *Glengarry (Dom.)*, 14 S. C. R. 453.

——— *Appeal on—Jurisdiction*]—An appeal does not lie to the court of appeal from a judgment of the court of common pleas overruling a preliminary objection as to the jurisdiction of the court to try a controverted election for the Dominion. *Niagara (Dom.)*, 4 A. R. 407.

——— *Appeal on—Order Dismissing Petition—Affidavit of Petitioner.*]—The appeal given to the supreme court of Canada by the Controverted Elections Act (R. S. C. 1886 c.

9, s. 50), from a decision on preliminary objections to an election petition, can only be taken in respect to objections filed under s. 12 of the Act. No appeal lies from a judgment granting a motion to dismiss a petition on the ground that the affidavit of the petitioner was untrue. *Marquette (Dom.)*, 17 S. C. R. 219.

——— *Appeal on—Withdrawal of Deposit.*]—A petition was duly filed and presented by appellant on the 5th August, 1883, under the Dominion Controverted Elections Act, 1874, against the return of respondent. Preliminary objections were filed by respondent, and before the same came on for hearing the attorney and agent of respondent obtained, on the 13th October, from the Judge, an order authorizing the withdrawal of the deposit money and removal of the petition off the files. The money was withdrawn, but shortly afterwards, in January, 1883, the appellant, alleging he had had no knowledge of the proceedings taken by his agent and attorney, obtained, upon summons, a second order from the Judge rescinding his prior order of 13th October, 1882, and directing that upon the appellant repaying to the clerk of the court the amount of the security, the petition be restored, and that the appellant be at liberty to proceed. Against this order of January, 1883, the respondent appealed to the supreme court of New Brunswick, and the court gave judgment rescinding it. Thereupon petitioner appealed to the supreme court of Canada:—Held, that the judgment appealed from was not a judgment on a preliminary objection within the meaning of 42 Vict. c. 39, s. 10 (the Supreme Court Amendment Act, 1879), and therefore not appealable. King's County (Dom.), 8 S. C. R. 192, followed. *Gloucester (Dom)*, 8 S. C. R. 204.

Reversal — *Penal Statute — Benefit of Doubt.*]—In penal statutes questions of doubt are to be construed favourably to the accused, and where the court of first instance in a quasi-criminal trial has acquitted the respondent, the appellate court will not reverse his finding. *North Ontario (Prov.)*, H. E. C. 394.

——— *Questions of Fact.*]—On a charge that the respondent offered to bribe the wife of a voter by a "nice present," if she would do what she could to prevent her husband from voting, three witnesses testified to the offer; the respondent denied, and another witness who was present heard nothing of the offer. On this evidence, and there being no proof that the witnesses in support of the charge were acting from malicious motives or corrupt expectation, nor any evidence impeaching their veracity, the charge was held proved. The respondent appealed to the court of appeal: — Held, that an appellate court will not, except under special circumstances, interfere with the finding of the court of first instance on questions of fact depending on the veracity of witnesses and conflicting evidence. 2. That, as the Judge trying the petition had found that the respondent had made the offer to the wife of the voter in the manner above stated, such an offer was a promise of a "valuable consideration," within the meaning of the bribery clauses of 32 Vict. c. 21. *Halton (Prov.)*, H. E. C. 283.

From the judgment on the personal charges the petitioner appealed; but the court, on a review of the evidence, declined to set aside the finding of the election Judge. The appeal was dismissed without costs, as the petitioner had strong grounds for presenting it. *South Huron (Dom.)*, H. E. C. 576.

The charge upon which this appeal was principally decided was that of the respondent's bribery of one David Asselin. The Judge who tried the case found as a fact that the appellant had underhandedly slipped into Asselin's pocket the $5 for a pretended purpose that was not even mentioned to the recipient; that this amount was not included in the published return of his expenses as required by the Election Act, and this payment was bribery:—Held, that an appellate court in election cases ought not to reverse, on mere matters of fact, the findings of the Judge who has tried the petition, unless the court is convinced beyond doubt that his conclusions are erroneous, and that the evidence in this case warranted the finding of the court below that appellant had been guilty of personal bribery. *Bellechasse (Dom.)*, 5 S. C. R. 91.

Held, that the supreme court, on appeal, will not reverse on mere matters of fact the judgment of the Judge who tries an election petition, unless the matter of the evidence is of such a nature as to convey an irresistible conviction that the judgment is not only wrong, but is erroneous, and that the evidence in support of the charge of bribing one M., as well as of the other charges of bribery and treating, was not such as would justify an appellate court in drawing the inference that the respondent intended to corrupt the voters. *Montcalm (Dom.)*, 9 S. C. R. 93.

The judgment of the court below will not be reversed unless clearly wrong. *Berthier (Dom.)*, 9 S. C. R. 102.

At the trial it was found on a review of the evidence that an offer to bribe, which had not been carried out, was not proved:—Held, on appeal, that the finding of the trial Judges should not be disturbed unless the court above was convinced that it was wrong, and that if no more could be said than that the evidence might have warranted a different conclusion, it should not be interfered with. *Prescott (Prov.)*, 1 E. C. 88.

See North Perth (Dom.), 20 S. C. R. 331; *Welland (Dom.)*, ib. 376.

Trial of Corrupt Practices.]—The right of appeal given under s. 63 and following sections of the Controverted Elections Act, R. S. O. 1877 c. 11, does not extend to decisions either of the Judge or Judges for the trial of the petitions or other Judges sitting as a court for the trial of corrupt practices under ss. 174 and 175 of the Election Act, R. S. O. 1877 c. 10, and amendments. Observations upon anomalies and difficulties in the procedure. *Lennox (Prov.)*, 1 E. C. 422.

See Peel (Prov.), H. E. C. 485; *North Ontario (Dom.)*, 3 S. C. R. 374; *Kennedy* v. *Braithwaite*, 1 E. C. 195n.; *Haldimand (Dom.)*, 15 S. C. R. 495.

(b) *Costs.*

Admission of Bribery — *Pressing Personal Charges — Failure.*] — The petitioners,

after a notice from the respondent admitting bribery by one of his agents, examined witnesses on the personal charges, which were not proved, and in determining the question of costs, it was held, that as the petitioners might have come to the court on the notice served by the respondent, and have asked to have the election set aside, and as they had attempted, but had failed, to establish the personal charges, the respondent should only pay such costs as he would have had to pay had the petitioners accepted the notice served upon them before the trial. *West Northumberland* (*Dom.*), H. E. C. 562.

Agreement to Pay Costs—*Champerty—Stay of Proceedings.*]—It is not a champertous transaction that an association of persons, with which the petitioner was politically allied, agreed to pay the costs of the petition. Even if the agreement were champertous, that would not be a sufficient reason to stay the proceedings on the petition. *North Simcoe* (*Dom.*), H. E. C. 617.

Appeal—*Grounds for—Dismissal without Costs.*]—The Judge who tried an election case having set aside the election for bribery by agents, but found that the candidate was not himself guilty of corrupt practices, the court, on appeal, declined to interfere; but the appeal was dismissed without costs, as there were strong grounds for presenting it, and had the finding been otherwise, it would not have been disturbed. *South Huron*, 24 C. P. 488, H. E. C. 576.

Counsel Fees.]—On the trial of an election petition against the return of a member to the Ontario Legislature, which resulted in favour of the petitioner, to whom the costs were awarded, the defendant was retained by an association for prosecuting the petition, and acted as petitioner's attorney, and M., one of the plaintiffs, a firm of attorneys as well as barristers, acted as petitioner's senior counsel, under an agreement to that effect with defendant, neither he nor his firm being retained by petitioner. The petitioner's costs were settled by defendant and the respondent's attorney, and defendant received $1,600, including $395 counsel fees to M., which M. proved became the property of his firm. The plaintiffs having brought an action against defendant to recover these counsel fees, as money had and received to their use:—Held, that they could not recover, for that the costs, including these fees, belonged to the petitioner, and not to defendant as attorney. *Miller* v. *McCarthy*, 27 C. P. 147.

At the trial of an election petition, and on appeal from the judgment, the petitioner, a barrister, appeared in person, but was assisted by a junior counsel. On taxation, the petition having been dismissed, counsel fees were charged, to the first counsel at the trial $300, and to second counsel $150; and on argument of the appeal, to first counsel $150, second counsel $100. The master disallowed fees to the first counsel, but allowed $200 to the second counsel at the trial, and the $100 on appeal; there being no affidavit of payment or receipt for such fees, though it was called for and insisted upon for the respondent. On an application for revision:—Held, that the fees should not, under the circumstances, have been allowed without proof of payment. 2. That no more than $150 should have been taxed for the second counsel at the trial. A revision was therefore ordered, with an intimation that the $150 and $100 might be allowed on satisfactory proof of payment. *North Victoria* (*Dom.*), 39 U. C. R. 147.

Depriving Successful Party of Costs—*Conduct.*]—The petition was dismissed, but owing to the unwise and imprudent acts of the respondent, he was allowed only one half of the taxable costs. *Glengarry* (*Prov.*), H. E. C. 8.

Distribution of Costs—*Abandonment of Scrutiny.*]—Where the Judge reserved a special case for the Queen's bench as to his power to amend the petition at the trial by allowing the insertion of an objection to a voters' list used at the election, and the court of Queen's bench held that the Judge had power so to amend the petition, and on the reassembling of the election court the petitioners abandoned the scrutiny; the petitioners were ordered to pay the costs of the respondent up to the meeting of the election court, and the costs of the special case; but each party was ordered to pay his own costs of the trial. *Monck* (*Prov.*), H. E. C. 154.

——— *Failure of Charges.*]—The petitioner was held entitled to costs of the charges on which he succeeded, and the respondent to the costs of the charges on which the petitioner failed. *North Renfrew* (*Dom.*), H. E. C. 710.

The petitioner was allowed his costs, but not the costs of the charges which he failed to establish. *Cornwall* (*Dom.*), H. E. C. 803.

The petitioner was declared entitled to the general costs of the inquiry, and the costs of the evidence incurred in proof of the facts upon which the election was avoided; but the costs incurred in respect of charges which the petitioner failed to prove were disallowed. *South Essex* (*Prov.*), H. E. C. 235.

——— *Failure of Charges—Witnesses.*]—The costs of investigating charges of bribery against the respondent's election agent, though not established, were awarded against the respondent, owing to the equivocal conduct of his agent in the matters which led to the charges; also the costs of other charges of bribery which were not established, and the costs of proving that several tavern-keepers, for their own profit, had violated s. 66 of the Election Act of 1868, as the witnesses who gave evidence of these matters also gave evidence of other matters, as to which it was reasonable they should be subpœnaed. *West Wellington* (*Prov.*), H. E. C. 231.

——— *General Costs—Failure of Charges.*]—Held, that, although the respondent was duly elected, the costs did not follow this event, but, under s. 160 of R. S. O. 1877 c. 10, had to be disposed of as if the event had been the setting aside of the election; the respondent paying the general costs, including the full costs which would have been taxable if the only charges had been those on which the petitioner had succeeded, the latter being deprived of costs in respect to the charges on which he failed, the respondent bearing his own costs of those charges. *Welland* (*Prov.*), 1 E. C. 383.

——— *Scrutiny.*]—The petitioner was held entitled to the general costs of the petition,

except as to the cases of the voters whose names were not on the voters' lists, and as to the scrutiny of ballots. *North Victoria* (2) (*Dom.*), H. E. C. 671.

——— *Useless Scrutiny.*]—During the progress of a scrutiny of votes, certain ballot papers, counterfoils, and a voters' list were stolen from the court, which had the effect of rendering the proceedings in the scrutiny useless. And in disposing of the costs the court ordered the respondent to pay the costs up to the date the election was avoided, but that, under the circumstances, each party must bear his own costs of the scrutiny. *Lincoln* (2) (*Prov.*), H. E. C. 489.

——— *Unfounded Charges.*]—The respondent was charged with intimidating government servants during his speech at the nomination of candidates, by threatening to procure the removal of all government servants who should not vote for him, or who should vote against him. The evidence shewed that, though in the heat of debate, and when irritated by one U., he used strong language, there was no foundation for the corrupt charge; and, as it should not have been made, the costs in respect of the same were given to the respondent against the petitioner. The respondent was ordered to pay the costs of the petition and trial, except the costs of certain issues found in favour of the respondent, part of which costs were to be paid by petitioner to the respondent; and as to part, each party was ordered to bear his own. *Welland* (2) (*Prov.*), H. E. C. 187.

Failure of Petition—*Excessive Treating — Dismissed without Costs.*] — Where there had been excessive treating by an agent but not used as a means of corruptly influencing the voters, the petition was dismissed without costs, following the rule laid down in the Carrickfergus Case, 1 O.'M & H. 264. *East Elgin* (*Dom.*), H. E. C. 769.

——— *Inquiry — Public Interest.*] — The election was sustained, but it being in the public interest that the matters brought forward should have been inquired into, and as the respondent had not exercised supervision over the expenditure in connection with the election, the petition was dismissed without costs. *West Toronto* (*Prov.*), H. E. C. 97.

Inquiry into Bribery by Petitioner—*Costs of.*]—The respondent sought to establish, on an inquiry under a preliminary objection, that the petitioner (the opposing candidate) had been guilty of bribery, and was therefore disqualified as such. The inquiry was not concluded, as during its pendency the English election courts held that bribery would not disqualify a petitioner; but, so far as the evidence went, while it disclosed such a large expenditure of money by the petitioner and his agents as to lead to the suspicion that it was not all expended for the legitimate purposes of the election, it did not shew bribery by the petitioner. The respondent then consented to his election being avoided on the ground of bribery by one of his agents without his knowledge or consent:—Held, that the general rule as to costs should prevail, and that the respondent should pay the costs of the inquiry as well as the general costs of the cause. *South Renfrew* (*Dom.*), H. E. C. 556.

Mistakes of Deputy Returning Officers—*Costs Caused by.*]—When the petition has been rendered necessary by the mistakes of the deputy returning officers, for which neither the petitioner nor respondent was responsible:—Held, that each party should bear his own costs. *Russell* (2) (*Prov.*), H. E. C. 519.

Mistakes of Returning Officer—*Costs Caused by.*]—The returning officer having acted honestly and fairly in rejecting the nomination paper, each party to the petition was left to bear his own costs. *South Renfrew* (2) (*Dom.*), H. E. C. 705.

Particulars—*Costs of.*]—See *East Northumberland* (*Dom.*), H. E. C. 577.

Personal Charges Failing.] — Costs should follow the event, although the personal charges against the respondent fail, unless put in wantonly, or unless the expense of the trial has been thereby increased. *Cornwall* (*Dom.*), 10 C. L. J. 313.

Where bribery by an agent is proved, costs follow the event, even though personal charges made against the respondent have not been proved, there having been no additional expense occasioned to the respondent by such personal charges. *South Grey* (*Dom.*), H. E. C. 52.

The petitioner, having been warranted in continuing the inquiry as to the personal complicity of the respondent with the illegal acts of his agents, was held entitled to the full costs of the trial. *Kingston* (*Dom.*), H. E. C. 625.

——— *Bribery by Agents.*]—Various acts of bribery and of colourable charity having been proved against the agents and sub-agents of the respondent, the election was set aside, with costs, including the costs of the evidence on the personal charges against the respondent. *Cornwall* (*Dom.*), H. E. C. 547.

——— *Inquiry — Public Interest.*]—There being no grounds for charging the respondent personally with corrupt practices, and the scrutiny having been abandoned, the costs of those parts of the case were ordered to be paid by the petitioner. But with respect to the other costs, though the respondent was successful, the matters were proper to be inquired into in the public interest, and each party was left to pay his own costs. *East Toronto* (*Prov.*), H. E. C. 70.

Sheriff's Costs of Publication—*Payment by Petitioner—Claim on Security Deposited.*]—Where an election petition is dismissed at the trial without costs, the petitioner must pay to the sheriff the costs incurred in the publication of the notice of trial thereof; and, although the sum deposited as security is not security for such expenditure, payment out of court will only be ordered on the condition of its being made good to the sheriff. No charge can be made by the sheriff for attending to the publication, no allowance therefor being authorized by the tariff. *East Middlesex* (*Prov.*), 2 E. C. 150.

Unfounded Charges—*Witness Fees.*]—The election was set aside with costs, except as to the costs of certain charges which were unwarranted. A party, though successful, is not entitled to the costs of the witnesses he

may subpœna, nor is the fact of them being called or not called the test of such costs being taxable. *Niagara (Dom.)*, H. E. C. 568.

Witness Fees.]—In trials under the Controverted Elections Act of 1871, the costs and witness fees, and the materiality of evidence, are in the discretion of the master, subject to the court, as in other trials. The master will generally be the sole judge as to how many witnesses shall be allowed for as to one issue. So, where the master allowed fees to seventy witnesses subpœnaed, but not called, on charges of bribery by the petitioner, the election having been avoided on the evidence of other witnesses:—Held, that the master exercised a proper discretion, even though respondent's attorney swore he believed the witnesses would have disproved the charges they were called to prove; the facts that each witness was subpœnaed to prove appearing on the petitioner's brief put in before the master, and it appearing also by affidavit that the witnesses were subpœnaed bonâ fide, and were material. There is no presumption in a trial under the Controverted Elections Act of 1871, arising from the number of witnesses subpœnaed, that they are unnecessarily called. The presumption is to the contrary. *Prescott (Prov.)*, 32 U. C. R. 393.

The Judge at the trial declined to decide what witness fees should be paid by the respondent, thinking it to be the province of the taxing master on taxation, after hearing both parties, to decide what witnesses to allow or disallow, as in ordinary cases. *Niagara Election (Dom.)*, 10 C. L. J. 317

Witnesses—*Costs of Interviewing.*]—A petition under the Ontario Controverted Elections Act, R. S. O. 1877 c. 11, was dismissed with costs:—Held, on appeal, reversing the decision of one of the taxing officers, that under ss. 97 and 100, R. S. O. 1877 c. 11, the respondent was not entitled to tax against the petitioners the costs of interviewing, before the trial, persons named in the petitioner's bill of particulars as bribers and bribees. *West Middlesex (Prov.)*, 10 P. R. 509.

See North York (Prov.), H. E. C. 62; *West Peterborough (Prov.)*, H. E. C. 274; *Garrett* v. *Roberts*, 10 A. R. 650.

(c) *Court for Trial.*

Constitutional Law—*Powers of Dominion Parliament.*]—Held, that 37 Vict. c. 10 (D.), by which the trial of controverted elections to the House of Commons was referred to the court of common pleas, or any Judges thereof, amongst the other courts named in this Province, was not ultra vires of the Dominion Parliament; and a preliminary objection raising this question was disallowed with costs. *Niagara (Dom.)*, 29 C. P. 261; *South Ontario (Dom.)*, *West Hastings (Dom.)*, 29 C. P. 270. See also *Montmorency (Dom.)*, 3 S. C. R. 1, 5 App. Cas. 115, where the Act was also held to be intra vires.

Election Court—*Jurisdiction—Change in Law.*]—The Dominion Controverted Elections Act, 1874, 37 Vict. c. 10, repealed the Controverted Elections Act, 1873, 36 Vict. c. 28, under which the election court existed, except as respected elections held before the passing of the Act, and directed all controverted elections in future to be tried in the superior courts. The petitioner, on the 6th February, 1875, filed his petition under the last Act, but intituled "In the election court," the notice of filing and of the deposit and other papers being intituled in the same court, and delivered it to the clerk of the Crown, who was the clerk both of the election court and of the court of Queen's bench. Afterwards, on the 28th August, an order was made setting aside the notice of trial given, intituled in the court of Queen's bench, on the ground that no petition was filed therein; and by a rule of the election court the petition was taken off the files of that court, on the ground that the court had no jurisdiction to try a petition under the Act of 1874. The petitioner then, on the 29th November, 1876, applied to the court of Queen's bench to fix a day for the trial, which was refused; for there was no petition in the court; and if the petition had been at first well filed, the trial was not commenced within six months from its presentation, and no application made within the time to postpone it. *Kingston (Dom.)*, 39 U. C. R. 139.

Judicature Act—*Change in Names of Courts—Presentation of Petition—Intituling.*]—The court of Queen's bench is an existing court for the presentation and trial of Dominion controverted election cases, notwithstanding the O. J. Act, 1881. The petition in this case was intituled, "In the Queen's bench, high court of justice, Queen's bench division," and was delivered, without any special instructions to him, to an officer of, and in the office of, the Queen's bench division, with whom and in which the business of the court of Queen's bench had formerly been transacted, and the officer entered it in the procedure book of the Queen's bench division:—Held, that the words "High court of justice, Queen's bench division," added in intituling the petition, might be rejected as surplusage, and that the petition had been properly presented in the Queen's bench:—Held, also, that the act of the officer in entering it in a wrong book should not prejudicially affect the petition. *Russell (Dom.)*, 1 O. R. 439. But see the two cases next following.

A petition against the return of a member for the House of Commons was filed in the high court of justice, common pleas division, constituted by the O. J. Act; and the required security was furnished by the deposit thereof being made in a bank under a direction obtained therefor from the accountant of the said high court, appointed under the said Act:—Held, by Cameron, J., that the common pleas division of the said high court was not one and the same court as the court of common pleas as constituted prior to the passing of the Judicature Act; that the said court of common pleas still existed, and was capable of receiving and trying the said petitions; and, therefore, the said common pleas division had no jurisdiction to entertain the same. Held, also, that the question was properly raised by way of preliminary objection, as was also the question as to the security furnished. Held, also, that the onus of proving the preliminary objections rested on the respondent, who raised them. The question as to jurisdiction being important, and open to reasonable doubt, no costs were allowed. *North York (Dom.)*, 32 C. P. 458. Overruled. See the next case.

The election petition against the election and return of the respondent was intituled in the high court of justice, Queen's bench division, and was presented to the official in charge of the office of the Queen's bench division, and filed and entered in the books of that office. A preliminary objection was taken that the high court of justice had no jurisdiction:—Held, reversing the judgment in 1 O. R. 433, and overruling North York (Dom.), 32 C. P. 458, that the Ontario Judicature Act, 1881, makes the high court of justice and its divisions a continuation of the former courts merged in it, and that the petition had not been irregularly intituled and filed. *West Huron (Dom.)*, 8 S. C. R. 126.

(d) *Cross-Petition.*

Candidate—*Petitioner.*]—In a Dominion controverted election case, a sitting member can file a cross-petition only against a candidate who is not a petitioner. *North Oxford (Dom.)*, 8 P. R. 526.

Security for.]—See *Kingston (Prov.)*, 2 E. C. 10.

Time for Filing.] — The appellant, the sitting member, against whom an election petition had been filed by the respondent, an unsuccessful candidate, presented a cross-petition under s. 8, s.-s. 2, of the Dominion Controverted Elections Act, 1874, alleging that the respondent was guilty, as well by himself as by his agents, with his knowledge and consent, of corrupt practices at the said election. This cross-petition was not filed within thirty days after the publication in the Canada Gazette of the return to the writ of election by the clerk of the Crown in chancery, but within the delay mentioned in the last part of s.-s. 2 of s. 8, viz., fifteen days after the service of the petition upon the appellant complaining of his election and return. The cross-petition was met by a preliminary objection (maintained by a Judge), alleging that it was filed too late:—Held, on appeal, that the sitting member cannot file a cross-petition, within the delay of fifteen days mentioned in the last part of s.-s. 2 of s. 8, against a person who was a candidate and is a petitioner; that the extra delay of fifteen days is given only when a petition has been filed against the sitting member, alleging corrupt practices after the return. *Montmorency (Dom.)*, 3 S. C. R. 90.

(e) *Evidence.*

Admissions of Agent.]—Evidence of admissions made by an agent after his agency has expired, is inadmissible. *West Peterborough (Prov.)*, H. E. C. 274.

Admissions of Counsel.] — The admission of counsel in open court, that the giving of $2 to a voter by an agent of the respondent, after such voter had voted, such voter admitting that he did not know why the $2 was given to him, was bribery, acted upon, and the election avoided. *Carleton (Prov.)*, H. E. C. 6.

A voter who had been frequently fined for drunkenness was canvassed by C. to vote for the respondent, and was asked by him "how much of that money" (paid in fines) "he would take back and leave town until the election was over." Counsel for the respondent admitted that C. was an agent of the respondent, and that the evidence was sufficient to avoid the election:—Held, that the election was void on account of corrupt practices by an agent of the respondent. *Cornwall (Prov.)*, H. E. C. 203.

On the admission of the respondent's counsel the election was avoided, on the ground that agents of the respondent had, during the election hired and paid for teams to convey voters to the polls. *Prince Edward (Prov.)*, H. E. C. 45.

The respondent was elected by a majority of 261, and at the trial counsel for the respondent admitted that there was evidence capable of being produced which would have the effect of avoiding the election under R. S. O. 1877 c. 10, s. 159; and the court on such admission declared the election void. *Dufferin (Prov.)*, H. E. C. 530.

Admissions duly made upon an election trial may be acted upon as evidence of the facts admitted; but admissions as to how certain voters, whose ballots had been lost, voted, made before the registrar, when both parties were acting under the erroneous assumption that he had power to count the ballots, were held to be not binding. *Lincoln (Prov.)*, 4 A. R. 206.

See Russell (Prov.), H. E. C. 199.

Admissions of Respondent—*Bribery by Agent.*] — Before the trial the respondent served a notice upon the petitioner, admitting that the election must be avoided on the ground of bribery by an agent without his knowledge or consent: such admission was acted upon at the trial, and the election avoided accordingly. *North Simcoe (Dom.)*, H. E. C. 624.

——— *Bribery by Agent—Petitioner Pressing Personal Charges.*] — The respondent, a week before the trial, served a notice on the petitioner admitting bribery by one of his agents, and notifying the petitioner not to incur further costs. At the trial the respondent, pursuant to the notice, gave evidence of bribery by an agent, which the court held sufficient to avoid the election. The petitioner then contended that he had a right to shew that corrupt practices had extensively prevailed, and that the respondent had been personally guilty of corrupt practices:—Held, that the functions of the court were judicial and not inquisitorial, and that no further evidence should be received on the issue as to the avoidance of the election on account of bribery by agents. But if incidentally it should appear, in the inquiry as to the personal charges against the respondent, that corrupt practices extensively prevailed, the same would be certified in the report to the Speaker. *West Northumberland (Prov.)*, H. E. C. 562.

See South Renfrew (Dom.), H. E. C. 556.

Bribery and Corrupt Practices — *Proof of.*]—See *ante* 3 (c).

Disclosing Vote—*Persons not Entitled to Vote—Counting Votes.*]—Where it can be

ascertained, by taking into account the number of votes proved by inspection of documents to have been cast for each candidate, and the whole number cast, and as a mere matter of calculation, that certain persons have voted and for which candidate they have voted, these votes may, on this evidence, be counted for the candidate for whom they were cast. The statement of a voter cannot be received as evidence that he voted or for whom he voted, either by proving statements so made or by calling the voter as a witness. The petitioner, being bound to establish affirmatively that the party for whom he claims the seat was duly elected, cannot diminish the respondent's majority by the votes of these who have been held not entitled to vote, when owing to the loss of papers and inadmissibility of other evidence it cannot be ascertained for whom they voted. *Lincoln (Prov.)*, 4 A. R. 206

——— *Persons not Entitled to Vote—Pleading.*] — Allegation, that forty persons whose names were not on the voters' list and who were not entitled by law to vote, did vote and voted for the respondent. Objection, that the matters alleged were not available, because the seat was not claimed for the defeated candidate, and because it could not be shewn that the forty votes were cast for the respondent:—Held, that, though this objection came within East Elgin (Dom.), 4 A. R. 412, there appeared to be too much doubt about the question to strike out the allegation; for, semble, that a person who has voted without a right to do so is not entitled to the protection of the statute as to secret voting, and that an elector should not be prevented from shewing that the elected member obtained his majority through bad votes. *West Huron (Dom.)*, 1 O. R. 433.

Foreign Commission.] — A commission to examine witnesses in a foreign country may be issued in the case of the trial of an election petition. *Cornwall (3) (Dom.)*, H. E. C. 803, 8 P. R. 64.

Notes of Evidence.] — The shorthand notes of the shorthand writer employed by the court to take down the evidence were not extended in his handwriting, but were signed by him:—Held, that the notes of evidence could not be objected to. *Megantic (Dom.)*, 9 S. C. R. 279.

Particulars—*Liquor on Polling Day.*]—A witness called on a charge in the particulars of giving spirituous liquors in a certain tavern on polling day, during polling hours, cannot be asked if he got liquor during polling hours in other taverns. *South Oxford (Prov.)*, H. E. C. 243.

Preliminary Objections — *Evidence to Establish.*]—See *Megantic (Dom.)*, 8 S. C. R. 169.

Proof of Petitioners' Status—*Voters' List.*]—At the trial of the petition, the returning officer, who was also the registrar of the county of Megantic, and secretary of the municipality of Inverness, was called as a witness, and produced in court in his official capacity the original list of electors for the township of Inverness, and proved that the name of L. McM., one of the petitioners whom he personally knew, was on the list. The original document was retained by the witness, and, as neither of the parties requested that the list should be filed, the Judge made no order to that effect. The status of the other petitioners was proved in the same way:—Held, that there was sufficient evidence that the petitioners were persons who had a right to vote at the election to which the petition related under 37 Vict. c. 10, s. 7 (D.) *Megantic (Dom.)*, 9 S. C. R. 279.

Telegrams — *Production of—Agency.*]—The court ordered the agent of a telegraph company to produce all telegrams sent by the respondent and his alleged agent during the election, reserving to the respondent the right to move the court of appeal on the point; the responsibility as to consequences, if it were wrong so to order, to rest on the petitioner. *South Oxford (Prov.)*, H. E. C. 243.

Weight of Evidence — *Finding — Bribery.*]—Where in ordinary cases there is evidence to go to a jury, but on which the Judge, if sitting as a juror, would find for the defendant; in similar cases in election trials he ought to find against the charge of bribery. *West Toronto (Prov.)*, H. E. C. 97.

Witness—*Candidate—Expenditure.*] — A candidate, when examined as a witness at an election trial, may be asked his expenditure at former Provincial and Dominion elections at which he was a candidate. *North Simcoe (Dom.)*, H. E. C. 624.

——— *Ordering out of Court — Solicitor for Party.*]—The attorney for the respondent may be ordered out of court when a witness is being examined on a charge of corrupt bargain for his withdrawal from the election contest, when the evidence of such witness may refer to the sayings and doings of such attorney in respect of such withdrawal. *South Oxford (Prov.)*, H. E. C. 243.

Writ of Election—*Return.*]—The writ of election and return need not be produced or proved before any evidence of the election is given. *Stormont (Prov.)*, H. E. C. 21.

See West Northumberland (Dom.), H. E. C. 562; *East Middlesex (Prov.)*, 1 E. C. 250.

(f) *Judges' Report.*

Effect of — *Corrupt Practices.*] — The Judges' report to the Speaker as to those persons "other than the candidate," who have been proved guilty of corrupt practices, is not conclusive, so as to bring them within 34 Vict. c. 3, s. 49 (O.), and so render them liable to penal consequences. *South Oxford (Prov.)*, H. E. C. 238.

The definition of "corrupt practices" in s. 3 and the effect of s. 20 of the Controverted Elections Act, 1873, as to the report of election Judges to the Speaker, considered. *North Victoria (Dom.)*, H. E. C. 584.

——— *Disqualification of Candidate—Disagreement of Trial Judges—Saving Clause—Subsequent Election.*]—A provincial election trial was held in 1883, before Boyd, C., and Cameron, J., who made separate reports, agreeing in avoiding the election under R. S. O. 1877 c. 10, s. 161, by reason of respondent paying or consenting to the payment of the

travelling expenses of certain voters to convey them to the poll; but differing in their judgments as to whether the respondent was guilty thereby of a corrupt practice under s. 161. Cameron, J., reported that respondent was proved guilty of said corrupt practice; and Boyd, C., reported that the respondent committed an illegal act under s. 154 in sanctioning such payment, but without any corrupt intent, and in ignorance, which was involuntary and excusable, under a belief that as long as he did not personally bear or pay the said expenses it was not illegal, and under the fullest belief that the said voters were bound or were willing to repay the said expenses or allow them to be deducted from their wages. A subsequent election took place on 18th January, 1884, when respondent was elected. A petition was filed attacking his election on the ground of the prior disqualification of the respondent:—Held, affirming the judgment of the trial Judges, that the finding that the respondent was guilty of a corrupt practice was correct; and that he was therefore personally disqualified; and, as there was not a concurrent finding that he came within the relieving clause of s. 162, the disqualification was not removed; and that the amending Act 27 Vict. c. 4, s. 48 (O.), which was passed on 25th March, 1884, did not apply to this case. *South Renfrew* (*Prov.*), 1 E. C. 359. See 48 Vict. c. 2, s. 18 (O.)

Interim Certificate.]—The court cannot grant an interim certificate declaring an election void, as the statute contemplates only one certificate to the Speaker, certifying the result of the election trial. *Lincoln* (*Prov.*), H. E. C. 489.

Joint Report—*Separate Reports—Objection—Waiver.*]—On appeal from the decision of the trial Judges in this case (1 E. C. 70):—Held, per Osler, J. A., that one joint report of the trial Judges under the hands of both is not essential; but there may be two separate reports each under the hand of one of the Judges. Quære, whether the certificate under R. S. O. 1877 c. 11, s. 55, of the result of the trial, should be joint; but that this was not now open to the respondent, for by his becoming a candidate at the subsequent election he must be taken to admit that the former election was on some ground or other regularly set aside. *South Renfrew* (*Prov.*), 1 E. C. 359.

See Cornwall (*Dom.*), 11 C. L. J. 81.

Session of Parliament — *Report during.*]—See *North Waterloo* (*Prov.*), 2 E. C. 76.

(g) *Particulars.*

Amendment of.]—Where a question is raised as to the sufficiency of the notice of objection to voters, the Judge may amend the particulars; giving time to the party affected by the amendment to make inquiries. *Stormont* (*Prov.*), H. E. C. 21.

At the trial of the petition, an amendment of the particulars as to corrupt practices will be allowed; and if the respondent is prejudiced by the surprise, terms may be imposed. *Welland* (*Prov.*), H. E. C. 47.

The respondent was elected by a majority of twenty-three, and on the trial of an election petition, filed to set aside his election for corrupt practices and illegal votes, evidence was given by both sides on a charge not properly set out in the petitioners' particulars of corrupt practices. At the close of the evidence the respondent objected that the charge was not in the particulars, and that it was not verified by the affidavit of the petitioners:—Held, (1) that the petitioners might amend their particulars, and that the charges in the petition were wide enough to cover the charge. (2) That as to this charge, the parties had in fact gone into evidence without particulars, and that the petitioners' affidavit verifying the particulars was not necessary. *Lincoln* (*Prov.*), H. E. C. 489.

On an application by the petitioner to amend the particulars by adding charges of bribery against the respondent personally, and his agents, his attorney made affidavit that different persons had been employed to collect information; that the new particulars only came to his knowledge three days before the application; and that he believed they were material to the issues joined:—Held, that, as it was not shewn that the petitioner or the persons employed could not have given the attorney the information long prior to the application, and as it was not sworn that the charges were believed to be true, nor were they otherwise confirmed, and as the amendment might have been moved for earlier, the application should be refused. *South Norfolk* (*Dom.*), H. E. C. 660.

The evidence in support of the offer of a present, or something nice, to the wife of a voter to induce the voter to refrain from voting, shewing that it had reference to a different election than the one in question, an amendment of the particulars was refused and the charge dismissed. *Halton* (*Dom.*), H. E. C. 736.

Semble, that the powers of the Judge at the trial, as to amendment of the petition and particulars and postponement of the trial, should be liberally exercised, so as to prevent a failure of justice to either party. *West Toronto* (*Prov.*), 5 P. R. 436.

Application to Set aside — *Acceptance—Forum.*]—Where particulars were delivered after the time limited by the order for particulars, and apparently accepted, as they were not returned, an application made at the trial to set them aside was refused; such application should have been made in chambers before the trial. *North Victoria* (*Prov.*), H. E. C. 252.

Better Particulars.] — Where particulars of alleged corrupt practices, &c., have been delivered under an order for that purpose, better particulars will not be ordered if those delivered substantially comply with the spirit of the order by giving all reasonable information. Nor will better particulars be ordered even when the order is not complied with in furnishing certain details, provided the Judge to whom the application is made thinks these details unnecessary or unreasonable, nor unless the respondent can shew on affidavit that the want of such information will prejudice him in his defence. *West Toronto* (*Prov.*), 5 P. R. 436.

Charge not in Particulars—*Evidence at Trial.*]—Where evidence of an act of keeping open his tavern on polling days and sell-

ing liquor therein as usual, by P., an agent of the petitioner, came out on cross-examination, and during the argument the evidence was objected to because the charge was not in the particulars, the case was not considered. *North Victoria (Prov.)*, H. E. C. 252.

Costs of.]—The particulars not having been properly prepared, the petitioner, while obtaining the costs of the proceedings, was disallowed the costs of the particulars. *East Northumberland (Dom.)*, H. E. C. 577.

Order for—*Illegal Votes—Rejected Votes — Corrupt Practices.*] — Where the petition claimed the seat for the unsuccessful candidate on the grounds that (1) illegal votes and (2) improperly marked ballots were received in favour of the successful candidate, (3) good votes and (4) properly marked ballots for the unsuccessful candidate were improperly refused, and (5) the successful candidate and his agents were guilty of corrupt practices, and particulars of all such votes and ballots and corrupt practices were asked from the petitioner:—Held, (1) as to the illegal votes, that the 7th general rule prescribed the particulars to be given of votes objected to, and the time of filing and delivering the same, and a special order was not therefore necessary. (2) As to the improperly marked ballots and improperly rejected ballots, the petitioner, not having information respecting them, could not be ordered to deliver particulars of the same. (3) Particulars were ordered of the names, addresses, abode, and addition of persons having good votes, whose votes were improperly rejected at the polls; and particulars of the corrupt practices charged by the petitioner against the respondent, and his agents. Beal v. Smith (Westminster case), L. R. 4 C. P. 145, followed. *West Elgin (Prov.)*, H. E. C. 223.

Recriminatory Charges — *Particulars of.*]—See *North Victoria (Prov.)*, H. E. C. 252.

Verification of—*Appeal—Vagueness.*]—In proceedings under the Controverted Elections Act, R. S. O. 1897 c. 11, it is sufficient to attach an affidavit of verification to the particulars filed, without serving an affidavit of verification on the respondent. It is too late on appeal from the judgment on an election petition to object to the insufficiency or vagueness of the particulars. *North Waterloo (Prov.)*, 2 E. C. 76.

See South Ontario (Prov.), H. E. C. 420; *South Wentworth (Prov.)*, H. E. C. 531; *West Simcoe (Prov.)*, 1 E. C. 128; *South Victoria (Prov.)*, 1 E. C. at p. 195.

(h) *Petition.*

Affidavit of Petitioner—*Grounds of Belief—Examination—Verifying Petition.*]—By 54 & 55 Vict. c. 20, s. 3, amending the Controverted Elections Act, R. S. C. c. 9, an election petition must be accompanied by an affidavit of the petitioner "that he has good reason to believe and verily does believe that the several allegations contained in the said petition are true." The petitioner in this case used the exact words of the Act in his affidavit:—Held, that the respondent to the petition was not entitled on the hearing on preliminary objections to examine him as to the grounds of his belief. Held, further, that it was not necessary that the petition should be annexed to or otherwise identified by the affidavit, as in case of an exhibit, the references in the affidavit being sufficient to shew what petition was referred to. *Lunenburg (Dom.)*, 27 S. C. R. 226.

Allegations and Form of Petition—*Contents.*]—Section 73 of the Dominion Elections Act of 1874, which provides for striking off votes equal in number to the corrupt votes, only applies where the seat is claimed. The clauses in the petition herein which did not claim the seat, framed under the above section, were therefore struck out, with costs to the respondent. *East Elgin (Dom.)*, 4 A. R. 412.

The 6th general rule in election cases does not preclude the statement of evidence in the petition; it renders it unnecessary, and is intended to discourage such pleading. *South Oxford (Prov.)*, H. E. C. 288.

On a petitioner claiming the seat on a scrutiny, the court declined on a preliminary objection to strike out a clause in the petition, which claimed that the votes of persons guilty of bribery, treating, and undue influence, should be struck off the poll. The giver of a bribe, as well as the receiver, may be indicted for bribery; but quære, as to the effect on their votes respectively under the present state of the law. *North Victoria (Dom.)*, H. E. C. 584.

An election petition need not shew the time at which the return of the respondent was published in the Gazette. *Russell (Dom.)*, 1 O. R. 439.

An allegation in the petition "that the respondent was by himself, &c., guilty of corrupt practices as defined by the Controverted Elections Act of Ontario" sufficiently charges the commission of corrupt practices under ss. 152 and 153 of the Election Act, R. S. O. 1877 c. 10. *North Ontario (Prov.)*, 1 E. C. 1.

The petitioner, in his particulars delivered, charged the respondent with giving, or causing to be given, meat, drink, and refreshment to voters on polling day on account of their having voted or being about to vote, being a corrupt practice under R. S. O. 1877 c. 10, s. 153. The petition itself, however, merely charged that the respondent "before, during, at, and after the said election, was by his agents and by other persons on his behalf guilty of corrupt practices as defined by the Controverted Elections Act of Ontario, R. S. O. 1877 c. 11, s. 2:"—Held, at the trial, that this form of petition was objectionable, being hardly reconcilable with the intention of the legislature in requiring petitioners to file an affidavit with the petition stating that they had reason to believe and do believe the statements contained in the petition to be true in substance and in fact, and, moreover, the charge being only by reference to a statute, the affidavit in such case could only be intelligently and honestly made by one who had informed himself of the provisions of the statute and applied to them some definite construction, and in any event the deponent

would only be swearing to his own construction of the statute, without stating what that construction was. Held, further, that, inasmuch as "corrupt practices," so far as defined at all by R. S. O. 1877 c. 11, were declared to mean "bribery, treating, and undue influence, or any of such offences, as defined by this or any other Act of the legislature, or recognized by the common law of the Parliament of England," and also the violation of certain specific sections of R. S. O. 1877 c. 10, among which s. 153 was not included, and inasmuch as acts prohibited by s. 153 were clearly not corrupt practices under the common law of Parliament, nor is there any definition of "treating" in any of the Acts of our legislature, and therefore nothing to shew that it covers offences under s. 153, and therefore, inasmuch as there might be extended upon the face of the petition every offence covered by the description or definition of corrupt practices contained in the Controverted Elections Act of Ontario, and yet there would not be amongst them any charge under s. 153; therefore the petitioner could not succeed in avoiding the election upon any charge under s. 153, as he sought to do here, unless allowed to add it by way of amendment to his petition. On the cross-appeal of the petitioner on this point no judgment was given, the disposition of the respondent's appeal rendering it unnecessary to do so. Held, further at the trial, that such amendment could not be allowed, for R. S. O. 1877 c. 11, s. 9, sufficiently shews that the court has no jurisdiction to allow such an amendment, notwithstanding s. 2, s.s. 1, and s. 43, of that Act, as does also the requirement of an affidavit under s. 11. Maude v. Lowley, L. R. 9 C. P. 165 followed. Monck (Prov.), 11 E. C. 154, 32 U. C. R. 147, distinguished. *West Simcoe (Prov.)*, 1 E. C. 128.

It is no objection to an election petition that it is too general (as by the Act it may be in any prescribed form) if it follows the form that has always been in use in the Province. Moreover, any inconvenience from generality may be obviated by particulars. *Lunenburg (Dom.)*, 27 S. C. R. 226.

See Lincoln (2) (Prov.), 11 E. C. 489; *West Huron (Dom.)*, 1 O. R. 433.

Alteration after Filing—*Spoliators—Ratification.*]—After an election petition had been filed, two clerks of the Toronto agents of the solicitor for the petitioner were allowed to compare it with an engrossed copy, and finding that the two were different, they altered the filed petition so as to correspond with the copy, adding in one place the word "treating," which had the effect of introducing a charge of a corrupt practice not in the original. The copy served upon the respondent after this alteration corresponded with the petition as altered. It was not shewn and it was denied that the petitioner knew of the alteration:—Held, that the addition of the word "treating" was an alteration in a material part; but that the clerks in doing what they did were not the agents of the respondent or his solicitor. As the document was in the possession of the court, such an alteration made by persons who were mere strangers or spoliators had not the effect of destroying it. The service of the petition in its altered condition could not, in the absence of knowledge of the alteration, be treated as a ratification by the respondent. It was ordered that the petition should be restored to its original state, and that the copy served should be amended to conform with the petition as it was when filed. *Lincoln and Niagara (Dom.)*, 1 E. C. 428.

Amendment.]—The Judge trying an election case has power to amend the petition by allowing the insertion of any objection to the voters' list used at the election. *Monck (Prov.)*, 11 E. C. 154.

See West Simcoe (Prov.), 1 E. C. 128; *Hamilton (Prov.)*, 1 E. C. 499.

Copy—*Alteration—Service.*]—See *Lincoln and Niagara (Dom.)*, 1 E. C. 428, *supra.*

——— *Clerk of Court—Preliminary Objections—Rules of Court.*]—Held, that the Judges of the court of Manitoba not having made rules for the practice and procedure in controverted elections, the English rules of Michaelmas term, 1868, were in force (R. S. C. c. 9, s. 63,) and that under rule 1 of the said English rules the petitioner, when filing an election petition, is bound to leave a copy with the clerk of the court to be sent to the returning officer, and that his failure to do so is the subject of a substantial preliminary objection and fatal to the petition. *Lisgar (Dom.)*, 20 S. C. R. 1.

Filing—*Place of—Mistake—Remedy for.*]—Held, that under 37 Vict. c. 10 (D.) the filing of an election petition in the local registrar's office at L'Orignal was not a presentation of the petition within the requirements of the statute, which requires the filing to be at the head office, and that no amendment could be made to validate such petition. *Prescott (Prov.)*, 9 P. R. 481.

——— *Time for — Cross-petition.*] — See *Montmorency (Dom.)*, 3 S. C. R. 90.

——— *Time for—Holiday.*]—When the time limited for presenting a petition against the return of a member of the House of Commons of Canada expires or falls upon a holiday, such petition may be effectively filed upon the day next following which is not a holiday. (Leave to appeal to the privy council refused.) *Nicolet (Dom.)*, 2 S. C. R. 178.

——— *Time for—Return—Holidays.*]—Held, that the twenty-one days limited for filing an election petition after the return of the writ, are to be reckoned from the time of the receipt of the return of the clerk of the crown in chancery, and not from the time of mailing by the returning officer. Good Friday and Easter Monday are holidays within the meaning of the Act, and they are not to be reckoned in computing the twenty-one days. The joint effect of 23 Vict. c. 21 (O.) and the Ontario Interpretation Act, 31 Vict. c. 1, s. 7, s.s. 13, is, that when the word "holiday" is used, it includes the above days as "set apart by Act of the Legislature." *West Toronto (Prov.)*, 5 P. R. 394, 31 U. C. R. 409.

——— *Wrong Court.*] — See *Kingston (Dom.)*, 39 U. C. R. 139.

Parties—*Agent — Disqualification.*]—The petition, besides charging the respondent with various corrupt acts, charged one of his agents with similar acts, and claimed that the agent was subject to the same disqualifications and penalties as a candidate. The prayer of the

petition asked that this agent might be made a party to the petition, and that he might be subjected to such disqualifications and penalties:—Held, that there is no authority in the Election Act or elsewhere, for making an agent of a candidate a respondent in a petition on a charge of personal misconduct on his part. (2) There is no authority given to the election court or the Judge on the rota to subject a person "other than a candidate," to such disqualifications. *South Oxford (Prov.)*, H. E. C. 238.

Petitioner—*Description—Amendment.*]—Held, that the omission to set out in the petition the residence, address, and occupation of the petitioner, is a mere objection to the form, which can be remedied by amendment, and is therefore not fatal. *Lisgar (Dom.)*, 20 S. C. R. 1.

——— *Description—Occupation.*]—The petition in this case simply stated that it was the petition of Angus Chisholm, of the township of Lochiel, in the county of Glengarry, without describing his occupation, and it was shewn by affidavit that there were two or three other persons of that name on the voters' list for that township:—Held, that the petition should not be dismissed for the want of a more particular description of the petitioner. *Glengarry (Dom.)*, 20 S. C. R. 38.

——— *Status — Alien.*]—The respondent attacked the qualification of one of the petitioners on the grounds that he was an alien, and that he had no property qualification, having made an assignment in insolvency before the election. The Judge admitted the evidence, but:—Held, (1) that the evidence as to the petitioner having lived in the United States, without shewing that his parents were American citizens, was not sufficient to establish the charge of alienage. (2) That the Ontario Election Act of 1808, by the term "owner," gives to the husband whose wife has an estate for life or a greater estate, the right to vote in respect of his wife's property; and that the petitioner having that qualification, and being in possession of his wife's estate, was entitled to petition. *Prescott (Prov.)*, H. E. C. 1.

——— *Status — Alien—Substitution of New Petitioner.*]—A person by birth a British subject who has renounced his allegiance and become the subject of a foreign state, being an alien, has no status as a petitioner although on the voters' list. Terms upon which in such a case a new petition may be substituted. *South Ontario (Prov.)*, 18 C. L. T. Occ. N. 321.

——— *Status—Corrupt Practices.*]—As preliminary objections to an election petition, it was alleged in substance that the petitioner, who was a voter at said election, could not be a petitioner, because he had been guilty of corrupt practices at the election of members of the House of Commons within eight years before, and at the election complained of:—Held, that the objections must be disallowed, for that under 37 Vict. c. 9, s. 104 (D.), no disqualification arises until after the person has been found guilty, i. e., after conviction. *South Huron (Dom.)*, 29 C. P. 301.

The fact that a petitioner in an election petition, with regard to the Ontario Legislature, has been guilty of corrupt practices during the election, is no objection to his status as a petitioner. As the Ontario Election Act, R. S. O. 1877 c. 10, makes no provision, as the Dominion Act does, as to the time in which preliminary objections must be taken, the special circumstances of such an application must determine whether it is made with sufficient promptitude. *Dufferin (Prov.)*, 4 A. R. 420.

The respondent, on the opening of the case, charged that the petitioner was a candidate at the election, and as such candidate was guilty of corrupt practices, and therefore disqualified to be a petitioner. The Judge, without deciding whether the respondent had the right to attack the qualification of the petitioner, allowed the evidence to be given, but held the same to be insufficient. *Prince Edward (Prov.)*, H. E. C. 45. See next case.

A petitioner in an election petition who has been guilty of corrupt practices at the election complained of, does not thereby lose his status as a petitioner. Except where there are recriminatory charges against the unsuccessful candidate, or for the purpose of declaring the petitioner's vote void on a scrutiny, the conduct of a petitioner at an election cannot be inquired into, and in this case there is no distinction between a candidate-petitioner and a voter-petitioner. Semble, that if the petitioner in this case was proved at the trial of the election petition to have been guilty of corrupt practices at the election complained of, the petition could not be dismissed. *Dufferin (Prov.)*, H. E. C. 529, 4 A. R. 420.

A duly qualified voter is not disqualified from being a petitioner on the ground that he has been guilty of bribery, treating, or undue influence during the election. Disqualifications from corrupt practices on the part of a voter or candidate arise after he has been found guilty; there is no relation back. *North Simcoe (Dom.)*, H. E. C. 617.

In order to disqualify the petitioner acting as such, the respondent offered to prove (1) that the petitioner had been reported by the Judge trying a former election petition as guilty of corrupt practices; (2) that the petitioner had in fact been guilty of corrupt practices at such election; and (3) that he had been guilty of corrupt practices at the election in question:—Held, that such evidence, if offered, would not disqualify the petitioner as such. Held, that, as the petitioner did not on the petition claim the seat, evidence could not be gone into for the purpose of personally disqualifying him. *Cornwall (3) (Dom.)*, H. E. C. 803.

——— *Status—Property Qualification.*]—A candidate may be a petitioner although his property qualification be defective, if it was not demanded of him at the time of his election. If he claims the seat, his want of qualification may be urged against his being seated, but he may still shew that the respondent was not duly elected, if he so charge in his petition. *North Victoria (Dom.)*, H. E. C. 584.

——— *Status—Right to Vote.*]—By preliminary objections to an election petition the respondent claimed that the petition should be dismissed because the petitioner had no right to vote at the election. On the day fixed for proof and hearing of the preliminary

objections the petitioner adduced no proof, and the respondent declared that he had no evidence, and the preliminary objections were dismissed:—Held, per Ritchie, C. J., and Taschereau and Patterson JJ., that the onus probandi was upon the petitioner to establish his status, and that the appeal should be allowed and the election petition dismissed. Per Strong, J., that the onus probandi was upon the petitioner, but in view of the established jurisprudence the appeal should be allowed without costs. Fournier and Gwynne, JJ., contra, were of the opinion that the onus probandi was on the respondent. Megantic (Dom.), 9 S. C. R. 169, discussed. *Stanstead (Dom.)*, 20 S. C. R. 12.

The petition was served upon the appellant on the 12th May, 1891, and on the 16th May the appellant filed preliminary objections, the first being as to the status of the petitioners. When the parties were heard upon the merits of the preliminary objections no evidence was given as to the status of the petitioners, and the court dismissed the objections. On appeal to the supreme court:—Held, that the onus was on the petitioners to prove their status as voters. Stanstead (Dom.), 20 S. C. R. 12, followed. *Bellechasse (Dom.)*, 20 S. C. R. 181.

In this case the respondent, by preliminary objection, objected to the status of the petitioner, and, the case being at issue, copies of the voters' lists for the electoral district were filed, but no other evidence offered, and the court set aside the preliminary objection "without prejudice to the right of the respondent, if so advised, to raise the same objection at the trial of the petition." No appeal was taken from this decision, and the case went to trial, where the objection was renewed, but was overruled by the trial Judges, who held that they had no right to entertain it, and on the merits they allowed the petition and voided the election. Thereupon the appellant appealed to the supreme court of Canada, on the ground that the onus was on the respondents to prove their status, and that their status had not been proved:—Held, that the objection raising the question of the qualification of the petitioner was properly raised by preliminary objection and disposed of, and the Judges at the trial had no jurisdiction to entertain such objection: R. S. C. c. 9, ss. 12 and 13. *Prescott (Dom.)*, 20 S. C. R. 196.

Held, that where the petitioner's status in an election petition is objected to by preliminary objection, such status should be established by the production of the voters' list actually used at the election, or a copy thereof certified by the clerk of the Crown in chancery: R. S. C. c. 8, ss. 41, 57, and 65; c. 5, s. 32; and the production at the enquête of a copy, certified by the returning officer, of the list of voters upon which his name appears, but which has not been compared with the voters' list actually used at said election, is insufficient proof. *Richelieu (Dom.)*, 21 S. C. R. 168.

On the hearing of preliminary objections to an election petition, to prove the status of the petitioner a list of voters was offered, with a certificate of the clerk of the Crown in chancery, which, after stating that the list was a true copy of that finally revised for the district, proceeded as follows: "And is also a true copy of a list of voters which was used at said polling division at and in relation to an election of a member of the House of Commons of Canada for the said electoral district . . . which original list of voters was returned to me by the returning officer for said electoral district in the same plight and condition as it now appears, and said original list of voters is now on record in my office:" —Held, that this was, in effect, a certificate that the list offered in evidence was a true copy of a paper returned to the clerk of the Crown by the returning officer as the very list used by the deputy returning officer at the polling district in question, and that such list remained of record in possession of said clerk. It was then a sufficient certificate of the paper offered being a true copy of the list actually used at the election. Richelieu (Dom.), 21 S. C. R. 168, followed. *Winnipeg (Dom.)*, *Macdonald (Dom.)*, 27 S. C. R. 201.

——— *Substituting — Jurisdiction.*]—The court has no power in a proceeding under the Dominion Controverted Elections Act to substitute a new petitioner, unless either no day has been fixed within the time prescribed by statute or notice of withdrawal has been given by the petitioner; and where a petition came regularly down to trial, and the petitioner stated he had no evidence to offer, an application of a third party to be substituted as petitioner upon vague charges made on information and belief, of collusion in the dropping of the petition, which were contradicted, and of corrupt practices, was refused and the petition dismissed with costs. *South Essex (Dom.)*, 2 E. C. C. 6. See *South Ontario (Prov.)*, 18 C. L. T. Occ. N. 321; *Kingston (Dom.)*, 30 C. P. 389; and cases under (m) *post*.

See Peel (Prov.), 11. E. C. 485; *Megantic (Dom.)*, 8 S. C. R. 169; *Megantic (Dom.)*, 9 S. C. R. 279.

Preliminary Objections — *Appeal.*]—Per Strong, J.—An extremely strong case should be shewn to induce the court to allow an appeal from the judgment of the court below on preliminary objections. *Shelburne (Dom.)*, 14 S. C. R. 258.

——— *Jurisdiction of Court — Powers of Dominion Parliament.*] — See *Niagara (Dom.)*, 29 C. P. 261.

——— *Onus.*]—The election petition in this case complained of the return of the respondent as member elect for the county of Megantic (P. Q.) for the House of Commons. The petition was met by preliminary objections, in which the sitting member alleged, inter alia, that the petitioners were not electors, nor qualified to vote at the election in question, &c. A day having been fixed for the hearing of these preliminary objections, no evidence was given upon them, and they were dismissed, the trial Judge holding, following the practice adopted by the superior court of Quebec, sitting as an election court, in the L'Islet case, Duval v. Casgrain, 19 L. C. Jur. 16, that the onus probandi was on the respondent to support such objections. On appeal to the supreme court of Canada, the court being equally divided, the judgment of the court below stood affirmed with costs. *Megantic (Dom.)*, 8 S. C. R. 169.

——— *Petitioner—Mala Fides.*]—A charge that the petition was not signed by the petitioner bonâ fide, but that his name was used

malâ fide by other persons, is a matter of fact to be tried, and cannot be raised by preliminary objection. *North Simcoe (Dom.)*, H. E. C. 617.

——— *Status of Petitioner.*]—An objection to the status of a petitioner cannot be taken by preliminary objection. *Dufferin (Prov.)*, H. E. C. 529, 4 A. R. 420.

——— *Striking out Appeal.*]—The supreme court refused to entertain an appeal from the decision of a Judge in chambers granting a motion to have preliminary objections to an election petition struck out for not being filed in time. Such decision was not one on preliminary objections within s. 50 of the Controverted Elections Act, and, if it were, no judgment on the motion could put an end to the petition. *West Assiniboia (Dom.)*, 27 S. C. R. 215.

——— *Time.*]—As the Ontario Act. R. S. O. 1877 c. 11, makes no provision similar to that in the Dominion Controverted Elections Act, 1874, (37 Vict. c. 10), limiting the time within which preliminary objections to an election petition should be taken, the special circumstances of each case must determine whether the preliminary objections have been taken with sufficient promptitude. *Dufferin (Prov.)*, H. E. C. 529, 4 A. R. 420.

Preliminary objections to an election petition under 37 Vict. c. 10 (D.), though presented after the expiration of five days from the service of the petition, are not void but at most irregular, and while they remain on the files of the court the petition is not at issue, and there can be no examination of the parties. *Bothwell (Dom.)*, 9 P. R. 485.

See North Oxford (Dom.), 8 P. R. 526; *North York (Dom.)*, 32 C. P. 458; *West Huron (Dom.)*, 1 O. R. 433, 8 S. C. R. 126.

Service — *Copy—Certificate—Return.*]—A return by a bailiff that he had served an election petition by leaving true copies, "duly certified," with the sitting member, is a sufficient return. It need not state by whom the copies were certified: Arts. 56 and 78, C. C. P. Counsel for the person served will not be allowed to cross-examine the bailiff as to the contents of the copies served without producing them or laying a foundation for secondary evidence. *Beauharnois (Dom.)*, 27 S. C. R. 292.

——— *Notice — Evasion—Substitution.*]—It is not essential to the due service of the notice made necessary by s. 1 of 20 Vict. c. 23, that it should be made in the manner prescribed by that Act. Where, therefore, the sitting member removed himself and his family so as to avoid a personal service, and continued absent or concealed for the fourteen days allowed by the statute for personal service or service at his residence upon a grown up person of his family, service by nailing a copy of the notice on the door of his residence, and by leaving a copy with his brother, who was also his agent, was held sufficient. *Essex (U. C.)*, 4 L. J. 70. See *S. C.*, 4 L. J. 161.

——— *Notice of Presentation.*]—It is not essential under the Ontario Act, R. S. O. 1897 c. 11, s. 15, that a notice of the presentation of a petition should be served, where such notice is indorsed on the petition. *Ottawa (Prov.)*, 2 E. C. 64.

——— *Order Extending Time—Re-service.*]—On the 15th April, 1891, the petitioner omitted to serve on the appellant, with the election petition in this case, a copy of the deposit receipt, but on the 20th April applied to a Judge to extend the time for service that he might cure the omission. An order extending the time, subsequently affirmed on appeal by the court of appeal for Ontario, was made, and the petition was re-served accordingly with all the papers prescribed by the statute. Before the order extending the time had been drawn up, the respondent had filed preliminary objections, and, by leave contained in the order, he filed further preliminary objections after the re-service. The new list of objections included those made in the first instance, and also an objection to the power or jurisdiction of the court of appeal, or a Judge thereof, to extend the time for service of the petition beyond the five days prescribed by the Act:—Held, that the order was a perfectly valid and good order, and that the re-service made thereunder was a proper and regular service: R. S. C. 1886 c. 9, s. 10. *Glengarry (Dom.)*, 20 S. C. R. 38.

——— *Order Extending Time—Service out of Jurisdiction.*]—An order extending time for service of an election petition filed at Halifax from five days to fifteen days, on the ground that the respondent was at Ottawa, is a proper order for the Judge to make in the exercise of his discretion under s. 10 of R. S. C. c. 9. Semble that the court below had power to make rules for the service of an election petition out of the jurisdiction. *Shelburne (Dom.)*, 14 S. C. R. 258.

——— *Out of Jurisdiction.*] — A petition to unseat a member may be duly served out of the jurisdiction of the court; and it is not essential that an application should be made for leave to effect such service, or for allowing the service so made. *West Algoma (Prov.)*, 2 E. C. 13.

——— *Personal—Out of Province—Order.*]—Election petitions against the return of members for electoral districts in Prince Edward Island were served personally on the respondents at Ottawa:—Held, that such service, without an order of the court, was a good service under s. 10 of the Dominion Controverted Elections Act. *Queen's and Prince (Dom.)*, 20 S. C. R. 26.

——— *Personal—Residence of Respondent—Order.*]—Upon appeals from decisions of the supreme court of Nova Scotia dismissing preliminary objections to Dominion election petitions:—Held, that personal service on the respondents at Ottawa, with or without an order of the court at Halifax, or at the domicil of the respondents, was good service. *Shelburne, Annapolis, Lunenburg, Antigonish, Pictou, and Inverness (Dom.)*, 20 S. C. R. 169.

——— *Residence of Respondent.*]—The service of an election petition made in the Province of Quebec, at the defendant's law office, situated on the ground floor of his residence and having a separate entrance, by delivering a copy thereof to the defendant's law partner, who was not a member of, nor resident with, the defendant's family, is not a service within

s. 11 of c. 9, R. S. C. 1886, and Art. 57, C. C. P., and a preliminary objection setting up such defective service was maintained and the election petition dismissed. *Montmagny (Dom.)*, 15 S. C. R. 1.

Held, that leaving a copy of an election petition and accompanying documents at the residence of the respondent with an adult member of his household, during the five days after the presentation of the same, is a sufficient service under s. 10 of the Dominion Controverted Elections Act, even though the papers served do not come into the possession or within the knowledge of the respondent. *See* 54 & 55 Vict. c. 20, s. 8. *King's (N. S.)* *(Dom.)*, 19 S. C. R. 526.

——— *Residence of Respondent—Order Allowing Service.*]—There is no power in the court or a Judge under s. 10 of the Dominion Controverted Elections Act, R. S. C. 1886 c. 9, to make an order within the first five days after an election petition is filed allowing service of such petition in any manner other than that intended by the final part of the section. But where under an order made within the five days a petition was directed to be served, among other modes, upon the wife of the respondent at his domicile at the village of D.: —Held, that, as service on the respondent "either personally, or at his domicile," was good service, within the meaning of the section, no order was necessary, and the fact that the service in this case was made under an order did not make it any the less a good service. *Haldimand (Dom.)*, 1 E. C. 480.

(i) *Recriminatory Charges.*

Claim to Seat.]—Recriminatory charges are permitted in the interest of electors, in order to prevent a successful petitioner obtaining the vacated seat if he has violated any provision of the election law. *North Victoria (Prov.)*, H. E. C. 252.

Where the right of the petitioner to claim the seat is decided adversely in one case, it is no prejudice to the respondent's case that other charges against the petitioner are not pronounced upon. *North Victoria (Prov.)*, H. E. C. 252.

——— *Withdrawal of.*] — In an election petition claiming the seat for the defeated candidate, recriminatory charges were brought against the defeated candidate, and the trial Judge, after having found that the election of the sitting member should be set aside for corrupt practices, fixed a day for the evidence upon the recriminatory charges. Thereupon the petitioners withdrew the claim to the seat, and the Judge gave judgment avoiding the election:—Held, that s. 42 of c. 9, R. S. C., no longer applied, and the Judge was right in refusing to proceed upon the recriminatory charges. *Joliette (Dom.)*, 15 S. C. R. 458.

Mere Irregularities.]—J., the appellant, claimed under 37 Vict. c. 10, s. 66 (D.), that, if he was not entitled to the seat, the election should be declared void, on the ground of irregularities in the conduct of the election generally, and filed no counter-petition, and did not otherwise comply with the provisions of 37 Vict. c. 10:—Held, that s. 66 only applies to cases of recriminatory charges, and not to a case whether neither of the parties nor their agents are charged with doing any wrongful act. *Queen's (Dom.)*, 7 S. C. R. 247.

Method of Trial.]—Where a charge of corrupt practices by way of a recriminatory case is alleged by a respondent against a petitioner, it may be reserved until the conclusion of the petitioner's case. *North Simcoe (Prov.)*, H. E. C. 50.

Particulars—*Costs.*]—Particulars of recriminatory charges delivered were allowed, but the petitioner was allowed to apply for time to answer the charges therein, and was given such costs as had been occasioned by the granting of the application. *North Victoria (Prov.)*, H. E. C. 252.

(j) *Reserving Special Case.*

Doubt as to Law.]—A special case may be reserved for the opinion of the court of Queen's bench only when the Judge presiding at the election trial has a serious doubt as to what the law is; or believes that the court might entertain a different opinion from his. *North York (Prov.)*, H. E. C. 62.

Powers of Trial Judge.] — Quære, whether, under 34 Vict. c. 3, s. 20, the rota Judge has power, before the close of the case, to reserve questions for the court. *Brockville (Prov.)*, H. E. C. 139.

Question of General Importance — *Abandonment of Case — Costs.*] — Where a class of persons affected by the decision of a case is numerous, and the question involved is one of general importance, the Judge may reserve a special case for the opinion of the court of Queen's bench, and the Judge here decided to take that course. The petitioner, after such special case had been reserved, appeared before the Judge trying the election petition, and consented to the abandonment of the special case and the dismissal of the petition, with costs, and it was so ordered. *West York (Prov.)*, H. E. C. 156.

See Monck (Prov.), H. E. C. 154.

(k) *Security.*

Deposit—*Receipt—Deputy Prothonotary.*] —In Prince Edward Island two members are returned for the electoral district of Queen's County. With an election petition against the return of the two sitting members, the petitioner deposited the sum of $2,000 with the deputy prothonotary of the court, and in the notice of presentation of petition and deposit of security he stated that he had given security to the amount of $1,000 for each respondent, "in all, two thousand dollars," duly deposited with the prothonotary, as required by statute. The receipt was signed by the deputy prothonotary appointed by the Judges, and acknowledged the receipt of $2,000, without stating that $1,000 was deposited as security for each respondent: — Held, that, there being at the time of the presentation of the petition security to the amount of $1,000 for the costs of each respondent, the security given was sufficient: ss. 8 and 9 (e), c. 9, R. S. C. Held,

also, that the payment of the money to the deputy prothonotary of the court at Charlottetown was a valid payment: s. 9 (g), c. 9, R. S. C. *Queen's and Prince (Dom.)*, 20 S. C. R. 26.

——— *Receipt—Acting Prothonotary.*]—Upon appeals from decisions of the supreme court of Nova Scotia dismissing preliminary objections to Dominion election petitions:—Held, that payment of the security required by s. 9 (e) of R. S. C. 1886 c. 9 into the hands of a person who was acting for the prothonotary at Halifax, and a receipt signed by such person in the name of the prothonotary, under s. 9 (g), were valid. *Shelburne, Annapolis, Lunenburg, Antigonish, Pictou, and Inverness (Dom.)*, 20 S. C. R. 169.

——— *Receipt—Prothonotary.*]—The preliminary objection in the case was that the security and deposit receipt were illegal, null, and void, the written receipt signed by the prothonotary of the court being as follows:—"That the security required by law had been given on behalf of the petitioners by a sum of $1,000 in a Dominion note, to wit, a bank note of $1,000 (Dominion of Canada) bearing the number 2914, deposited in our hands by the said petitioners, constituting a legal tender under the statute of the Dominion of Canada now in force." The deposit was, in fact, a Dominion note of $1,000:—Held, that the deposit and receipt complied sufficiently with s. 9 (f) of the Dominion Controverted Elections Act. *Argenteuil (Dom.)*, 20 S. C. R. 194.

——— *Subsequent Disposition of.*]—The deposit of $1,000 was given to the clerk at the time of the presenting the petition, but it was afterwards paid into a bank under the direction of the accountant of the supreme court:—Held, that having been properly paid to the clerk, the subsequent disposition of it could not affect the petitioner. *Russell (Dom.)*, 1 O. R. 439.

Necessity for—*Cross-petition.*]—Under s. 13 of the Controverted Elections Act, R. S. O. 1887 c. 10, security for costs is required only in the case of the original or principal petition, and not in that of a cross-petition. *Kingston (Prov.)*, 2 E. C. 110.

Payment into Court of Chancery.]—A Dominion note for $1,000 was offered as security in this case to the registrar of the court of chancery, who stated to the petitioner's solicitors that he could not receive it, but directed them to make payment of it through the accountant of the court in the same manner as moneys were usually paid into court. The solicitors then paid the money into the bank to the credit of the matter of the petition according to the usual practice of the court of chancery:—Held, that the deposit of the security, as required by the Act 37 Vict. c. 10 (D.), was properly given. *North York (Dom.)*, H. E. C. 749.

Payment out of Court — *Mistake — Change in Courts.*]—One thousand dollars, the deposit required to be paid in on filing Dominion election petitions, was handed to D., who had been the clerk of the election court (then abolished), and was also clerk of the Queen's bench. The latter court, no petition having been filed in it, refused an order to pay the money out. *Kingston (Dom.)*, 41 U. C. R. 310. See, also, *S. C.*, 39 U. C. R. 139.

——— *Persons Furnishing Money.*]—When the money deposited in court as security for the costs of an election petition is not the money of the petitioner but belongs to other persons who furnished it on behalf of the petitioner, it may be paid out to the persons furnishing it, after the purpose for which it was deposited has been served, and a creditor of the petitioner has no claim upon it. The agreement by which the money was so deposited is not illegal as savouring of champerty and maintenance. *Halton (Dom.)*, 12 C. L. T. Occ. N. 33.

Recognizance—*Amount—Place — Surety—Magistrate.*] — Held, that upon a petition against two members, under 36 Vict. c. 28 (D.), only the same security in amount need be given as upon a petition against one. 2. That the place where it was taken need not be shewn on the face of the recognizance. 3. That a practising attorney may be a surety. 4. That a county magistrate can take the recognizance in a city which has a police magistrate, if within his county. *Hamilton (Dom.)*, 10 C. L. J. 170.

——— *Validity.*]—The recognizance filed in this case was in the usual form, but was not signed as directed by rule 24 of the general rules of the election court:—Held, that the recognizance was nevertheless valid. *Niagara (Dom.)*, 10 C. L. J. 249.

Substitution of Petitioner—*Retention of Deposit—"Corrupt Bargain."*]—The applicant, alleging that there was a corrupt agreement for the withdrawal of the petition in these cases, by which the petitions were to be allowed to lapse, each petitioner withdrawing the charges by him respectively preferred, applied to have himself substituted as petitioner in each case, and that the deposits made therein should remain as security for any costs that might be incurred by him; and for the appointment of a day of trial of such petitions:—Held, that under s. 2 of the Act of 1875, the trial of election petitions must take place within the six months limited by that Act, unless postponed as therein directed; and it appearing that the time so limited had expired prior to the application, it could not therefore be entertained. Held, also, that, in any event, the deposits would not be directed to remain as such security, for, although the said agreement might be deemed in law to constitute a "corrupt bargain," yet that it would not be so under the statute 37 Vict. c. 10, s. 5 (D.), for that thereunder the motives and intent of the parties must be considered, and the evidence shewed that no corrupt bargain was intended. *Kingston (Dom.)*, 30 C. P. 389.

See East Middlesex (Prov.), 2 E. C. 150; *South Leeds (Dom.)*, 2 E. C. 1.

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(1) *Time for Trial.*

Commencement of Trial—*Sufficiency of.*]—Where the proceedings for the commencement of the trial have been stayed during a session of Parliament by an order of a Judge, and a day has been fixed for the trial within the statutory period of six months as

so extended, on which day the petitioners proceeded with their enquête and examined two witnesses, after which the hearing was adjourned to a day beyond the statutory period as so extended, to allow the petitioners to file another bill of particulars, those already filed being declared insufficient:—Held, that there was a sufficient commencement of the trial within the proper time, and the future proceedings were valid under s. 32, R. S. C. c. 9. *Jolicite (Dom.)*, 15 S. C. R. 458.

Enlargement—*Expiry of Period—Motion to Dismiss.*]—An order may be made extending the time for the trial of an election petition under 38 Vict. c. 10, s. 2 (D.), notwithstanding that six months have elapsed since the presentation of the petition, and though the application for such extension is not made within the six months. Semble, if the trial be not commenced within the six months, the respondent should move to dismiss the petition. *West Middlesex (Prov.)*, 10 P. R. 27.

——— *Expiry of Period—Order—Invalidity.*]—The time within which the trial of an election petition must be commenced cannot be enlarged beyond six months from the presentation of the petition, unless an order has been obtained on application made within said six months. An order granted on an application made after the expiration of the six months is an invalid order, and can give no jurisdiction to try the merits of the petition, which is then out of court. *Glengarry (Dom.)*, 14 S. C. R. 453.

——— *Expiry of Period—Power—Discretion.*]—The time for the commencement of the trial may be enlarged under s. 33, R. S. C. 1886 c. 9, notwithstanding the expiration of the six months; but it had not been established in this case that the requirements of justice rendered such enlargement necessary; and the court refused to appoint a time and place for trial or to enlarge the time. *Algoma (Dom.)*, 1 E. C. 448.

——— *Session—Order—Necessity for Respondent's Presence at Trial.*]—The petition was presented on the 6th May, 1887, during a session of parliament which ended on the 23rd June, and issue was joined on the 3rd June; no application was made or steps taken after that until the 6th December, 1887, when the petitioner applied to have a time and place appointed for trial and to have the time for the commencement of the trial enlarged. The first part of s. 32 of the Controverted Elections Act, R. S. C. 1886 c. 9, is as follows: "The trial of each election petition shall be commenced within six months from the time when such petition has been presented, and shall be proceeded with from day to day until such trial is over; but if at any time it appears to the court or Judge that the respondent's presence at the trial is necessary, such trial shall not be commenced during any session of parliament; and in computation of any time or delay allowed for any steps or proceeding in respect of any such trial, or for commencement thereof as aforesaid, the time occupied by such session of parliament shall not be included:"—Held, that the exception in the last clause is confined to a case in which the court is satisfied that the respondent's presence is necessary; "such trial" refers to a trial at which the respondent's presence has been declared to be necessary; and no such declaration having been made in this case, the time of the session of parliament was not to be excluded from the six months within which the trial was to be commenced. It was not incumbent upon the respondent to move to dismiss the petition for default. The court could not nunc pro tunc declare that the respondent's presence at the trial was necessary. *Algoma (Dom.)*, 1 E. C. 448.

——— *Orders—Notice of Trial—Appeal—Notes of Evidence.*]—On the 10th October, 1891, the Judge in this case, within six months after the filing of the election petition, by order enlarged the time for the commencement of the trial to the 4th November, the six months expiring on the 18th October. On the 19th October another order was made by the Judge fixing the date of the trial for the 4th November, 1891, and 14 clear days' notice of trial was given. The respondent objected to the jurisdiction of the court:—Held, that the orders made were valid; ss. 31, 33, c. 9, R. S. C. 1886. Held, also, 1st, that the objection to the sufficiency of the notice of trial given in the case under s. 31 of c. 9, R. S. C., was not an objection which could be relied on in an appeal under s. 50 (*b*) of c. 9, R. S. C.; 2nd, that evidence taken by a shorthand writer, not an official stenographer of the court, but who has been sworn and appointed by the Judge, need not be read over to witnesses when extended. *Pontiac (Dom.)*, 20 S. C. R. 626.

——— *Session — Order.*] — On the 23rd April, 1891, after the petition in this case was at issue, the petitioners moved to have the respondent examined prior to the trial, so that he might use the deposition upon the trial. The respondent moved to postpone such examination until after the session, on the ground that, being attorney in his own case, it would not "be possible for him to appear, answer the interrogatories, and attend to the case, in which his presence was necessary, before the closing of the session." This motion was supported by an affidavit of the respondent stating that it would be "absolutely necessary for him to be constantly in court to attend to the present election trial," and that it was not possible "for him to attend to the present case, for which his presence is necessary, before the closing of the session;" and the court ordered the respondent not to appear until after the session of parliament. Immediately after the session was over, on the 1st October, 1891, an application was made to fix a day for the trial, and it was fixed for the 10th December, 1891, and the respondent was examined in the interval. On the 10th December the respondent objected to the jurisdiction of the court on the ground that the trial had not commenced within six months following the filing of the petition, and the objection was maintained:—Held, that the order was in effect an enlargement of the time for the commencement of the trial until after the session of parliament, and, therefore, in the computation of time for the commencement of the trial, the time occupied by the session of parliament should not be included: R. S. C. c. 9, s. 32. *Laprairie (Dom.)*, 20 S. C. R. 185.

Objection Overruled at Trial—*Appeal—Session.*]—Held, that the decision of a Judge at the trial of an election petition overruling an objection taken by respondent to the jurisdiction of the Judge to go on with the trial, on the ground that more than six

months had elapsed since the date of the presentation of the petition, is appealable to the supreme court of Canada under s. 50 (*b*), R. S. C. 1886 c. 9. *Glengarry (Dom.)*, 14 S. C. R. 453.

In computing the time within which the trial of an election petition shall be commenced, the time of a session of parliament shall not be excluded unless the court or Judge has ordered that the respondent's presence at the trial is necessary. *Ib.*

Order Before Trial—*Motion to Dismiss —Appeal.*]—An order in a controverted election case made by the court below or a Judge thereof not sitting at the time for the trial of the petition, and granting or rejecting an application to dismiss the petition on the ground that the trial had not been commenced within six months from the time of its presentation, is not an order from which an appeal will lie to the supreme court of Canada under s. 50 of R. S. C. 1886 c. 9. *Assomption (Dom.), Quebec (Dom.)*, 14 S. C. R. 429.

Order Fixing Time — *Alteration.*]—The day appointed for the trial of an election petition may be altered to an earlier day by consent of the parties, and by an order of the Judge. *West Elgin (Prov.)*, H. E. C. 227.

——— *Forum.*]—Held, that an order fixing the time for the trial of the petition in this case might be made by the three Judges of a divisional court, sitting together, or by any one of them sitting alone, and that it was in their discretion to dispense with notice of the application under the circumstances in this case. Semble, a Judge making such an order need not necessarily be sitting formally in court. *Haldimand (Dom.)*, 1 E. C. 480.

Session — *Judgment Reserved — Delivery during Session.*]—Notwithstanding R. S. O. 1897 c. 11, s. 48, providing against the trial of a petition during a session or within 15 days from the close thereof, when judgment has been reserved after examination of witnesses and hearing and the arguments of counsel, the trial Judges may give judgment and issue their certificate and report at any time whether during or after a session. *North Waterloo (Prov.)*, 2 E. C. 76.

——— *Undertaking of Member to Appear.*] —The provision in s. 32 of the Controverted Elections Act, R. S. C. 1886 c. 9, as to the suspension of proceedings during the session of parliament, is for the benefit of the sitting member, and if he is desirous of having the proceedings expedited, and undertakes to appear at the trial, a time for proceeding with the trial during the session will be named. *South Perth (Dom.)*, 12 C. L. T. Occ. N. 317.

See Kingston (Dom.), 30 C. P. 389; *Glengarry (Dom.)*, 12 C. L. J. 117; *Addington (Dom.)*, 39 U. C. R. 131; *Kingston (Dom.)*, 39 U. C. R. 139.

(m) *Withdrawal of Charge or Petition.*

Recommendation of Court — *Substitution of Petitioner.*]—The court recommended the petitioner to withdraw his petition in this case; and on an application for that purpose, another elector having applied to be substituted as a petitioner:—Held, that, as the court of appeal had been placed in possession of all the charges against the respondent, and of the evidence in support of them, and had recommended the withdrawal of the petition, and no sufficient additional grounds had been shewn for such substitution of petitioner, the order for the withdrawal of the petition should be granted. *Peel (Prov.)*, H. E. C. 485.

Solicitor—*Change of—Right to Object to —Security—Time to Apply to Substitute Petitioner.*]—The only person who can complain of an order changing solicitors in an election matter is the former solicitor, and his right is a limited right; and the court will not consider it unless as a part of a scheme to get rid of the petition. An ordinary voter has no status to attack the order. Even if the applicant here had the right to move against an order allowing the petition to be withdrawn:—Held, on the evidence adduced, that there was no irregularity in the application to withdraw. Semble, even if there was reason to suspect collusion, the petitioner had the right to withdraw, but the Judge might order that the deposit should remain as security for the costs of a substituted petitioner. The proper time to make an application to substitute a petitioner is at the time the motion is made to withdraw the petition, and the Judge's power is limited in that respect. If no application is then made, and the order for withdrawal is granted, the petition is out of court and cannot be revived. Even if there was power to make such an order at a later period, it should be applied for within a reasonable time and full explanation of the delay given, neither of which conditions being complied with and a delay of more than two months occurring:—Held, that the application here was too late. *South Leeds (Dom.)*, 2 E. C. 1.

Leave to Withdraw.]—There being only one question raised, and it being disposed of, leave to withdraw the petition and for payment out of the deposit was granted, the court being satisfied that there had been compliance with all the prescribed formalities as to publication of notice of the application, and the bona fides of it. *Centre Simcoe (Ont.)*, 31 C. L. J. 68.

Leave was given to withdraw the petition, the court being satisfied that there was no collusion, and that, holding a clear opinion in the respondent's favour on the question raised, a special case ought not to be stated for the opinion of the full court. *South Norfolk (Prov.)*, 31 C. L. J. 68.

Willingness of Petitioner to Withdraw—*Duty of Court—Corrupt Practices.*] —Semble, if evidence shewed that corrupt practices had been committed by a respondent, it would be the duty of the court so to adjudicate, whether the petitioner was willing to withdraw the charge or not. *South Renfrew (Dom.)*, H. E. C. 556.

See South Essex (Dom.), 2 E. C. 6; *South Ontario (Prov.)*, 18 C. L. T. Occ. N. 321; *Kingston (Dom.)*, 30 C. P. 389.

(n) *Other Cases.*

Adjournment of Trial.] — After the trial of an election petition has been commenced the trial Judge may adjourn the case from time to time, as to him seems convenient. *Jolicête* (*Dom.*), 15 S. C. R. 458.

New Trial.]—See *Peel* (*Prov.*), H. E. C. 485.

Place of Trial — *Order of Court* — *Adjournment.*]—When a rule of court has been issued under the Controverted Elections Act, appointing a place for the trial not within the constituency the election for which is in question, the Judge by whom the petition is being tried has no power to adjourn, for the further hearing of the cause, from the place named in the rule of court to a place within such constituency. *South Grey* (*Prov.*), H. E. C. 52.

Postponement of Trial.]—The trial of an election petition should not be postponed without the applicant shewing very cogent and almost unanswerable grounds. In this case the reason given was that the Lieutenant-Governor of Ontario was a necessary and material witness, and that he could not properly leave Toronto during the sittings of the house of assembly:—Held, not a sufficient reason. Held, that the application to postpone a trial allowed by 38 Vict. c. 10, s. 2, is confined to that part of the enactment relating to the proceeding of the trial de die in diem after it has commenced. *Glengarry* (*Dom.*), 12 C. L. J. 117.

38 Vict. c. 10, s. 2 (D.), enacts, "The trial of every election petition shall be commenced within six months from the time when such petition has been presented, and shall be proceeded with de die in diem, until the trial is over, unless on application supported by affidavit it be shewn that the requirements of justice render it necessary that a postponement of the case should take place." The petition here was filed on the 12th December, 1874. Hilary and Easter terms, and the session of parliament, took up three months and eleven days, so that under the Act the six months would not expire until the 21st September, 1875. The trial having been fixed for the 10th August, the respondent's attorney consented, without prejudice, to adjournment, and on the 30th July an order was made postponing the trial until a Judge should be able to attend. On the 22nd December, 1875, the trial was fixed for the 18th January, 1876, and afterwards by consent postponed till the 2nd February:—Held, that the trial need not be commenced within six months in order to authorize a postponement, but that the commencement may be postponed beyond that time. Glengarry (Dom.), 12 C. L. J. 117, not followed. But, under the facts more fully stated in the report, it was held that the long delay was not warranted; and all further proceedings stayed. *Addington* (*Dom.*), 39 U. C. R. 151.

Principles of Law—*English Decisions.*]—The effect of s. 30 of 34 Vict. c. 3 (O.) is that the Judge is to act on the principles upon which election committees in England have acted where he has no light from the rules which his own professional experience supplies him with; and he is in addition to be bound by the decisions of the rota Judges in England trying elections under Acts similar to our own, in the same way as the courts feel bound by their judicial decisions in other legal matters. *West Toronto* (*Prov.*), H. E. C. 97.

Respondent's Answer.] — Where a respondent had filed certain preliminary objections to the petition, which were overruled, he was not allowed to insert similar objections in his answer, and the clause containing them was struck out. The respondent cannot, in his answer, set up that the petitioner was, by himself and his agent, guilty of corrupt practices, whereby he became disqualified to be a candidate. The court or a Judge has power on a summary application to strike out any allegations in an answer which are not an answer in law, and might be embarrassing at the trial to the petitioner. *North Oxford* (*Dom.*), 8 P.R. 526.

Sittings of Divisional Court.] — Semble, that R. S. C. c. 9, s. 33, s.-s. 2, does not prevent a Judge proceeding with the trial of an election petition pending the sitting of the divisional court of which he is a member. *West Muddlesex* (*Dom.*), 1 E. C. 465.

Two Petitions — *Separate Trials* — *Bracketing* — *Prothonotary.*]—Two election petitions were filed against the appellant, one by A. C., filed on the 4th April, 1892, and the other by A. V., the respondent, filed on the 6th April, 1892. The trial of the A. V. petition was, by an order of a Judge in chambers, dated the 22nd September, 1892, fixed for the 26th October, 1892. On the 24th October the appellant petitioned the Judge in chambers to join the two petitions and have another date fixed for the trial of both petitions. This motion was referred to the trial Judges, who, on the 26th October, before proceeding with the trial, dismissed the motion to have both petitions joined, and proceeded to try the A. V. petition. Thereupon the appellant objected to the petition being tried then, as no notice had been given that the A. C. petition had been fixed for trial, and, subject to such objection, filed an admission that sufficient bribery by the appellant's agent without his knowledge had been committed to avoid the election. The trial Judges then delivered judgment setting aside the election. On an appeal to the supreme court:—Held, 1st, that under s. 30 of c. 9, R. S. C., the trial Judge had a perfect right to try the A. V. petition separately; 2nd, that the ruling of the Court below on the objection relied on in the present appeal, viz., that the trial Judges could not proceed with the petition in this case, because the two petitions filed had not been bracketed by the prothonotary, as directed by s. 30 of c. 9, R. S. C., was not an appealable judgment or decision: R. S. C. c. 9, s. 50. *Vaudreuil* (*Dom.*), 22 S. C. R. 1.

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12. *Voters.*

(a) *Assessment Roll and Voters' List.*

Finality of List—*Assessment Roll.*]—The court will not go behind the voters' list to inquire whether a voter's name was entered upon the assessment roll in a formal manner or not. *North Simcoe* (*Dom.*), H. E. C. 617.

——— *Attack on Names—Onus—Qualification—Mistake as to—Court of Revision*

Value.]—Special report, and observations on making the revised lists of voters final, except as to matters subsequent to the revision. See *Stormont (Prov.)*, H. E. C. 21.

The name of the voter being on the poll-book is primâ facie evidence of his right to vote. The party attacking the vote may either call the voter, or offer any other evidence he has on the subject. *Ib.*

A voter being duly qualified in other respects, and having his name on the roll and list, but by mistake entered as tenant instead of owner or occupant, or vice versa:—Held, not disfranchised merely because his name was entered under one head instead of another. *Ib.*

The only question as to the qualification of a voter settled by the court of revision under the Assessment Act, is the one of value. *Stewart's vote, ib.*

Being rated as tenant instead of owner:—Held, not to affect the vote. *Blair's vote, ib.*

Where the voter had only received a deed of the property on which he voted on the 16th August, 1870, but previous to that date had been assessed for and paid taxes on the place, but had not owned it:—Held, that not possessing the qualification at the time he was assessed, or at the final revision of the roll, he was not entitled to vote. *Cahey's vote, ib.*

Where the voter had been originally, before 1865 or 1866, put upon the assessment roll merely to give him a vote, but by a subsequent arrangement with his father, made in 1865 or 1866, he was to support his father, and apply the rest of the proceeds to his own support:—Held, that if he had been put on originally merely for the purpose of giving a vote, and that was the vote questioned, it would have been bad, but being continued several years after he really became the occupant for his own benefit, he was entitled to vote, though originally the assessment began in his name merely to qualify him. *Gore's vote, ib.*

The voter and his son leased certain property; the lease was drawn in the son's name alone, and when the crops were reaped the son asserted that they belonged to him solely. The voter owned other property, but was assessed for this only, and voted on it:—Held, that the vote was bad. *Hill's vote, ib.*

——— *Effect of 41 Vict. c. 21.*]—Particulars for a scrutiny of votes were delivered by the respondent objecting to certain voters, as (1) aliens; (2) minors; (3) not owners, tenants, or occupants of the property assessed to them; and (4) farmers' sons not residing with their fathers upon the farm, as required by law. On a motion to strike out such particulars:—Held, that under the Voters' Lists Finality Act, 41 Vict. c. 21, s. 3 (O.), the legality of the votes so objected to could not be inquired into, and that the particulars should be struck out. Held, further, that the effect of the Act was to render the voters' lists final and conclusive of the right of all persons named therein to vote, except where there had been a subsequent change of position or status, by the voter having parted with the interest which he had (or by the assessment roll appeared to have) in the property, and becoming also a non-resident of the electoral division. *South Wentworth (Prov.)*, H. E. C. 531.

——— *Name on Roll—Inconclusiveness—Mistakes in Copying—Result.*]—The assessment roll is conclusive as to the amount of the assessment; but the mere fact of the name of a person being on the roll is not conclusive as to his right to vote. The returning officer is bound to record the vote if the person takes the oath, but that is not conclusive. Mistakes in copying the voters' lists should not deprive legally qualified voters of their votes any more than the names of unqualified voters being on the list would give them a right to vote. But the mere fact that the lists were not correct alphabetical lists, or had not the correct number of the lot, or were not properly certified, or the omitting to do some act as to which the statute is directory, is no ground for setting aside an election, unless some injustice resulted from the omission, or unless the result of the election was affected by the mistake. *North Victoria (Dom.)*, H. E. C. 584.

Mistake as to Polling Subdivision.]—Where a voter properly assessed, who was accidentally omitted from the voters' list for polling subdivision No. 1, where his property lay, and entered on the voters' list for polling subdivision No. 2, voted in No. 1, though not on the list, his vote was held good. *Little's vote, Brockville (Prov.)*, H. E. C. 129.

Mistake as to Property.]—A.'s name appeared on the assessment roll and voters' list as owner, but no property appeared opposite his name; just below A.'s name, the name of B. was entered as tenant, with certain property following it, but B.'s name was not bracketed with A.'s. Evidence was admitted to shew that A. owned the property next below his name, for which B., his tenant, was assessed as tenant, and A.'s vote was held good. *Baker's vote, ib.*

If a man be duly assessed for a named property on the roll, even though there was a clerical error in describing such property in the voters' list, or erroneously setting down another property on the voters' list, if no question or difficulty arose at the poll as to the taking the oath, the vote will not be struck off on a scrutiny. *S. C.*, 7 C. L. J. 221.

——— *Evidence of Value — Qualification Different from List.*]—The mistake of the number of the lot in the assessment roll does not come under the same rule as the mistake of a name, as the latter is provided for in the statute and the voter's oath. *Place's vote, South Grenville (Prov.)*, H. E. C. 163.

Parol evidence is inadmissible on a scrutiny to alter the value assessed against property in the assessment roll. *Stewart's vote, ib.*

Where a voter was assessed for property which he sold on the 27th February, 1871, before the revision of the assessment roll, and was not assessed for other property of which he was in possession as owner or tenant, he was held not entitled to vote. *Place's vote, ib.*

A person assessed for land he does not own, though receiving rent for it from a tenant, is not qualified to vote. *Clark's vote, Lincoln (Prov.)*, H. E. C. 500.

A voter was assessed in two wards of a town; he parted with his property qualification in one of the wards, but voted in such

ward:—Held, that the vote might be supported on the qualification in the other ward, which, if the voter had voted on it, would have made it necessary for him to vote in another polling division. *Gibson's vote, ib.*

Mistake as to Qualification—*Voting in Wrong Capacity.*] — The respondent was elected by four votes. At the election the names of twelve persons who were entered on the assessment roll as "freeholders," appeared on the voters' lists, owing to a printer's mistake, as "farmers' sons." Their votes were challenged at the poll, and they were required by the petitioner's scrutineers to take the farmers' sons' oath, which they refused. Subsequently they offered again to vote and to take the owner's oath, and the deputy returning officer, who was also clerk of the municipality, knowing them, gave them ballot papers and allowed them to vote:—Held, (1) that having been rightly entered on the assessment roll, the mistake as to their qualification on the voters' list did not disfranchise them. (2) That their refusal to take the farmers' sons' oath was not a refusal to take the oath required by law. A refusal to swear is where a voter refuses to take the oath appropriate to his proper description. (3) That having a right to vote, although they voted in a wrong capacity, their votes could not be struck off. Semble, that the provisions of the law as to how voters are to be entered on the voters' list in respect to their property, and as to the manner in which they are to vote, are directory. *Prescott (Dom.)*, H. E. C. 789.

Omission of Names — *Tendered Votes.*] —The names of certain persons who were qualified to vote at the election appeared on the last revised assessment roll of the municipality, but were omitted from the voters' list furnished to the deputy returning officer, and used at the election. They tendered their votes at the poll, but their votes were not received; and a majority of them stated to the deputy returning officer that they desired to vote for the petitioner. The petitioner had a majority without these votes:—Held, no ground for setting aside the election. *North Victoria* (2) *(Dom.)*, H. E. C. 671.

Where all the requisite preliminaries in the preparation of voters' lists under the Act had been duly observed, but in one of the printed copies delivered to the county court Judge, and certified to by him, two pages containing voters' names were accidentally omitted, and this defective copy was sent by the Judge to the clerk of the peace, who from such copy certified to the returning officer similarly defective lists, which were used at the election:—Held, that the voters whose names were so omitted were not disfranchised. Held, also, that those voters so omitted were entitled to vote by "tendered ballot," and their votes should be counted on a scrutiny. Semble, that the effect of ss. 72 and 103 of the Ontario Election Act, 1887, is that where a person who has a right to vote is omitted from the list he may vote by tendered ballot. *East Durham (Prov.)*, 1 E. C. 489.

Previous Year's Assessment—*Qualification Arising Subsequent to Final Revision of Roll—Freeholders—Tenants.*]—Where the assessment for a city, on which the rate for the year 1898 was levied and the voters' list based, was made in the previous year, the roll having been finally revised on the 2nd December, 1897, freeholders, who were such between that date and the last day for the revision of the voters' list, were, under s. 86 of the Municipal Act, R. S. O. 1897 c. 223, and s. 14 (7) of the Ontario Voters' Lists Act, R. S. O. 1897 c. 7, held entitled to be placed on the list; and freeholders also who had parted with the property for which they were assessed, but had acquired other sufficient property, were held entitled to remain on the list; otherwise as regards tenants, under similar circumstances, the form of oath required to be made by them precluding them. *Re Voters' Lists of St. Thomas*, 2 E. C. 154.

Proper List at Election—*Irregular List —Result.*]—Held, (1) that the proper list of voters to be used at an election is "the last list of voters made, certified, and delivered to the clerk of the peace at least one month before the date of the writ to hold such election." (2) That an irregular voters' list had been used in one of the townships in the electoral division; but that the result of the election had not been affected thereby, and that the election was not avoided. *Monck (Prov.)*, H. E. C. 154.

Held, following the last case, that the list of voters to be used at an election must be the list, made, certified, and delivered to the clerk of the peace at least one month before the date of the writ to hold such election. *Prince Edward* (2) *(Prov.)*, H. E. C. 160.

The list of voters used at the election in the township of Hillier was not filed until the 28th November, 1871, and the writ of election was dated 9th December, 1871:—Held, that the list of voters of 1871 should not have been used, and the seat was thereupon awarded to the other candidate, he having obtained on a scrutiny a majority of the votes. *Ib.*

——— *Triplicate.*]—Any one of the three voters' lists regularly prepared, and certified to by the county court Judge under the Voters' Lists Acts, is "the proper list to be used," and in case of irregularity in, loss or destruction of, or other accident to one, the other or others may be resorted to for the purpose of the election. *East Durham (Prov.)*, 1 E. C. 489.

Sufficiency of Description of Property.]—The right of a voter, whose name has been entered on the voters' list, to exercise the franchise, is not destroyed under 32 Vict. c. 21, ss. 5-7 (O.), by the want of a sufficient or of any description of the real property on which his qualification depends. The provision requiring such description to be inserted is directory only, and does not make it essential to the right to vote; and this, notwithstanding the enactment in s.-s. 3 of s. 7, that the time therein mentioned should be directory only, the maxim expressio unius, &c., not being applicable. Per Moss, C.J.A.—The description must be accepted as sufficient where it is the same as that given in the assessment roll, as it was in this case. *Lincoln (Prov.)*, 2 A. R. 324.

See South Perth (Prov.), 2 E. C. 30; *East Elgin (Prov.)*, *ib.* 100; *McVittie* v. *O'Brien*, 27 O. R. 710.

(b) *Court of Revision and County Court Judge—Complaints and Appeals.*

Certificate of Judge—*Time—Finality.*]—The assessment roll of a municipality was finally revised and corrected by the court of revision on the 31st May, 1882. The clerk of the municipality prepared the voters' list therefrom, and on the 7th September, 1882, posted a copy thereof in his office, as required by R. S. O. 1877 c. 9, s. 3. He transmitted copies of the list to some, but not to all the persons entitled to receive them under ss. 3 and 4, and no complaints having been received by him up to the 30th October, he on that day signed the certificate and report mentioned in s. 11 of the Act, and obtained the certificate of the deputy Judge of the county court on three copies of the list as being the revised list of voters for the municipality. The Judge of the county court found that the clerk's certificate was false, and made with intent to deceive the deputy Judge, and that the clerk had designedly withheld the lists; and he therefore set aside the clerk's certificate and the certificate of the deputy Judge:—Held, that as soon as the list is posted up in the clerk's office the time for making complaints in respect of it begins to run; that such time being by s. 9 expressly limited to thirty days from the posting up of the list, and no complaint having been made within it, the deputy Judge was bound to certify; that the omission to transmit the copies, whether negligent or wilful, could not authorize an extension of time; and that the deputy Judge's certificate was final, and could not be set aside. *In re Voters' List of L'Orignal, In re Johnson*, 9 P. R. 425.

Court of Revision — *Refusal to Hear Complaints — Appeal — Mandamus.*] — By s. 13, s.-s. 1, of the Manhood Suffrage Act, 51 Vict. c. 4 (O.), it is provided that complaints of persons not having been entered on the roll as qualified to be voters who should have been so entered, may, by any person entitled to be a voter or to be entered on the voters' list, be made to the court of revision as in the case of assessments, or the complaints may be made to the county Judge under the Voters' Lists Act. By s. 61 of the Assessment Act, R. S. O. 1877 c. 193, it is provided that the court of revision of each municipality shall meet and try all complaints in regard to persons wrongfully omitted from the roll; and by s. 68, s.-s. 1, that an appeal to the county Judge shall lie, not only against a decision of the court of revision on an appeal to that court, but also against the omission, neglect, or refusal of said court to hear or decide an appeal. The court of revision of a municipality refused to hear or adjudicate upon a complaint made by M. under s. 13 of the Manhood Suffrage Act, that the names of the certain persons had been wrongfully omitted from the assessment roll:—Held, that it was the duty of the court of revision under s. 61 to try the complaint made by M.; and that if no other complete, appropriate, and convenient remedy had existed, M. would have been entitled to a mandamus to compel the court to perform its duty; but, as the legislature by s. 68 had given a specific remedy for this very breach of duty, by appeal to the county Judge, M. was not entitled to a mandamus. The right which M. was seeking to enforce was to have the names of certain persons placed on the assessment roll; not, as was contended, to have his complaint disposed of by the court of revision; the complaint to the court of revision was a means of enforcing his right, not the right itself. *In re Marter and Court of Revision of Town of Gravenhurst*, 18 O. R. 243.

Duty of Judge—*Revision of Lists—Adding Names — Nullity—Income—Assessment.*]—The duty of a Judge in revising the voters' list under 37 Vict. c. 4 (O.), only extends to correcting and varying it in respect of the qualification of those who are before him on the revision; and he has no authority to decide who is entitled to vote. *Lincoln (Prov.)*, 2 A. R. 316.

Upon a revision of the voters' list under 37 Vict. c. 4 (O.), the Judge, without making any order in accordance with s. 11 of that Act, added certain names which were not on the assessment roll, and made no mention in the list of the property or income upon which they were rated:—Held, that the added list was a nullity. *Ib.*

Under 37 Vict. c. 4 (O.), the Judge has no power to add to the voters' list in respect of income any person or persons who are not assessed for income in the last revised assessment roll. *Ib.*

Notice of Complaint—*Expiry of Time for—Omission to Notify Voter—Mandamus.*]—Under 39 Vict. c. 11, s. 5 (O.), as amended by 40 Vict. c. 10, s. 1, persons qualified to vote, whose names are omitted from the voters' list, must, in order to have the omission rectified, notify the clerk of the municipality within thirty days after the posting by him of the said list, of their intention to make application therefor. In this case the applicant's name, which was properly on the assessment roll for income, was, without any notice to him, erased by the court of revision, and was in consequence omitted by the clerk from the voters' list. The applicant did not discover the omission until after the expiration of the thirty days, when he made application to the clerk to have his name inserted in the list, and on his refusal to do so he applied for a mandamus to the county Judge and clerk to make the insertion:—Held, that the application must be refused. *In re Browning and Judge of County Court of Wentworth*, 43 U. C. R. 15.

——— *Loss of—Parol Evidence.*]—A list of appeals, containing names sought to be added to the voters' lists, was prepared, and a voter's notice of complaint in form 6 to the Ontario Voters' Lists Act, R. S. O. 1897 c. 7, was signed by the complainant, attached to the list of names to be added, and handed to the clerk in his office within the thirty days required by the statute. When the list was produced by the clerk in court, the notice of complaint was missing:—Held, that it was competent for the Judge to hear and receive parol evidence as to the form and effect of the notice in question and of its loss; and that, upon his being satisfied by such evidence that a sufficient notice of complaint was duly left with the clerk, the complaint might be dealt with. *Re Voters' Lists of Marmora and Lake*, 2 E. C. 162.

——— *Service on Clerk—Registered Letter.*] — A notice of complaint, with list of names, was received by the clerk through the

mail by registered letter, in due time:—Held, that s. 17 (1) of the Voters' Lists Act, R. S. O. 1897 c. 7, had been complied with. *Re Voters' Lists of Madoc*, 2 E. C. 165.

——— *Signing—Validity.*]—Held, that the notice required by R. S. O. 1877 c. 9, s. 9, of a complaint of any error or omission in the voters' list, must be signed by the voter giving the same, or his agent. The name in the beginning is not a sufficient signature. Semble, that the question of the validity of the notice can be raised before the Judge hearing the appeal, after it has been received and entered in the list of appeals, the clerk who receives and enters it having no judicial duty to perform. *In re Simpson and County Judge of Lanark*, 9 P. R. 358.

Order of Judge—*Hearing of Complaints—Jurisdiction — Time — Interference with Election Officers—Prohibition.*]—The voters' lists for the city of St. Thomas were posted up in the office of the city clerk, on 23rd October, 1886. On the 19th November, three days before the time for giving, by a voter, notice of any complaint against the list, had expired, the clerk made a report to the county Judge in the form No. 7 in the schedule to the Voters' Lists Act, R. S. O. 1877 c. 9; and the said Judge thereupon, on said 19th November, made an order appointing the 30th November, 1886, for the holding of a court to hear complaints of errors and omissions in the said voters' list, and notice of the time and place thereof was duly published in a newspaper published in said city. Previous to the 19th November, notice of a number of complaints of errors and omissions in the list was given to the clerk. On an application for a writ of prohibition to prohibit the county Judge from holding the court, on the ground that he had no jurisdiction to make the order, inasmuch as the thirty days for filing appeals had not then expired:—Held, that the county court Judge had jurisdiction to make the order, and the application was therefore refused with costs. Per Cameron, C.J.—The appeal or complaint made within the thirty days after the clerk has posted the voters' list would be in time, and should be disposed of, whether made after the order for holding the court or not; but quære, whether the Judge could deal with such appeals at the 30th November court. Per Cameron, C.J.—Quære, whether the court has the right to interfere with election officers, except where express statutory power to do so is given. Per Rose, J.—Under the Voters' Lists Act, the Judge is not confined by the report of the clerk, but may and should hear all appeals. *In re Revision of Voters' List of St. Thomas, In re Boyes*, 13 O. R. 3.

Status of Complainants.]—Under 37 Vict. c. 4, s. 5 (O.), the county Judge has the right to examine and decide whether the person objecting to any votes in the list of voters is a voter or person entitled to be a voter, although such complainant may appear on the roll as duly qualified. The Judge having found as facts, on the evidence before him, that one of the two complainants did not give the notice of his complaint required by s. 6, and that the other was not entitled to be a voter:—Held, that his decision could not be reviewed. *In re Parsons and Toms, Re Voters' List of Goderich*, 36 U. C. R. 88.

Voters' List—*Signature of Clerk—Irregularity.*]—The list of voters required to be posted to various persons under 37 Vict. c. 4 (O.), was prepared and certified by the clerk of the municipality, ready for transmission on a certain day, but he died before that day came, and they were in fact transmitted by his successor without any alteration in the certificate. They were regular in every respect, with this exception:—Held, that, as s. 3 of 37 Vict. c. 4 was only directory, and as the object of the statute was fulfilled to all intents and purposes, the list was sufficient to give jurisdiction to the county Judge to revise it. *In re Revision of Voters' Lists of Township of Goderich*, 6 P. R. 213.

See ante 8, *post* 12 (g).

(c) *Disqualification.*

Crown Lands Agent — *Security.*]—By order in council the defendant was appointed agent for the location and sale of lands under the Free Grants and Homesteads Act, R. S. O. 1877 c. 24. By letter from the Crown lands department, the defendant was instructed to enter upon his duties respecting the location of free grants, but not to sell lands or receive money until he had given the usual security. By R. S. O. 1877 *c.* 10, s. 4, all "agents for the sale of Crown lands," amongst other persons, are disqualified from voting at elections for the legislature, under a penalty. The defendant, before he had given the necessary security, voted at an election for the legislature:—Held, that he was an agent for the sale of Crown lands within the meaning of the section, and therefore liable to the penalty imposed. Whether or not the defendant was such an agent is a question of law and not a question for the jury. *Srigley* v. *Taylor*, 6 O. R. 108.

Forfeiture of Vote—*Statute—Construction.*] — The words "illegal and prohibited acts in reference to elections," used in 34 Vict. c. 3, s. 3 (O.), mean such acts done in connection with, or to affect, or in reference to elections; not all acts which are illegal and prohibited under the election law. The right to vote is not to be taken away or the vote forfeited by the act of the voter unless under a plain and express enactment, for it is a matter in which others besides the voter are interested. *Brockville (Prov.)*, 32 U. C. R. 132.

Postmaster — *Penalty.*] — Held, that a postmaster of a city is not liable to a penalty for voting at an election for a member of the house of commons of the Dominion. But, semble, he is not entitled to vote, and should he do so his vote might be struck off on a scrutiny. *Savage* v. *Deacon*, *Smythe* v. *Deacon*, 22 C. P. 441.

See ante 5.

(d) *Income Qualification and Manhood Suffrage.*

Requirements of Statute.] — A voter whose qualification is successfully attacked may shew a right to vote on income; but in such case he must prove that he has complied with all the requirements of the Act which are essential to qualify him to vote on income. *Gray's vote, Lincoln (Prov.)*, H. E. C. 500

"Resided Continuously"—*Meaning of.*] —The provision of s. 8 of the Ontario Voters' Lists Act, R. S. O. 1897 c. 7, that persons to be qualified to vote at an election for the legislative assembly, must have resided continuously in the electoral district for the period specified, does not mean a residence de die in diem, but that there should be no break in the residence; that they should not have acquired a new residence; and where the absence is merely temporary, the qualification is not affected. Where, therefore, persons resident within an electoral district, and otherwise qualified, went to another Province merely to take part in harvesting work there, and with the intention of returning, which they did, their absence was held to be of a temporary character, and their qualification was not thereby affected. *Re Voters' Lists of Seymour*, 2 E. C. 69.

(e) *Naturalized Subjects and Aliens.*

Certificate of Naturalization.] — Naturalized subjects are not required to procure certificates of naturalization in order to entitle them to vote. *West Elgin (U. C.)*, 9 L. J. 330.

——— *Oath of Allegiance.*]—An alien who came to Canada in 1850, and had taken the oath of allegiance in 1861, but had taken no proceedings to obtain a certificate of naturalization from the court of quarter sessions, was held not qualified to vote. *Bacon's vote, Brockville (Prov.)*, H. E. C. 129.

An alien whose father had taken the oath of allegiance on obtaining the patent for his land under 9 Geo. IV. c. 21:—Held, not qualified to vote. *Healey's vote, ib.*

Oath of Allegiance—*Administration of.*] —Certain aliens had taken the oaths of allegiance, &c., before a justice of the peace of a town, which oaths were administered to them in a township, but within the same county:—Held, that under the Alien Act, 34 Vict. c. 22, s. 2 (D.), the justice of the peace, in administering the oaths, was acting ministerially and not judicially; and that the oaths were properly administered. *Johnson's vote, Lincoln (Prov.)*, H. E. C. 500.

Place of Birth — *Evidence.*] — The evidence that the parents of a voter had stated to such voter that he was born in the United States, but that his father was born in Canada, received, and the vote held good. *Wright's vote, Brockville (Prov.)*, H. E. C. 129.

——— *Evidence—Oath at Polls—Naturalization—Presumption.*]—Where evidence was given of parol admissions made by certain voters, some years before the election, that they had been born in a foreign country, and also evidence that since the parol admission the voters had voted at parliamentary elections, and had taken the voter's oath as to being British subjects by birth or naturalization:—Held, (1) that the oath at the polls could not be treated as testimony, not having been given in any judicial proceeding. (2) That by swearing at the polls he was a British subject by birth or naturalization, the voter only stated the legal result of certain facts. (3) That there was therefore no presumption of naturalization sufficiently strong to rebut the presumption of the continuance of the original status of alienage. *Shenck's vote, Lincoln (Prov.)*, H. E. C. 500.

Where a voter, in support of his own vote, swore that he was born in the United States but that his parents were British subjects:—Held, that the whole statement of the voter must be taken, and that it amounted to this: "I was born in the United States of British parents." *Mulrennan's vote, ib.*

——— *Parentage — Residence.*] — Where the voter was born in the United States, his parents being British-born subjects, his father and grandfather being U. E. Loyalists, and the voter residing nearly all his life in Canada:—Held, entitled to vote. *Place's vote, Stormont (Prov.)*, H. E. C. 21.

See Hamilton (Prov.), 1 E. C. 499; *South Perth (Prov.)*, 2 E. C. 30; *South Ontario (Prov.)*, 18 C. L. T. Occ. N. 321.

(f) *Property Qualification.*

(*See ante* (a)).

How Regulated.] — Held, that by the Dominion Election Act of 1873, the qualification of voters to the house of commons was regulated by the Ontario Act. *North Victoria (Dom.)*, H. E. C. 584.

Husband and Wife.]—Where the owner died intestate, and the husband of one of his daughters leased the property and received the rents, such husband was held not entitled to vote. *Leslie's vote, Brockville (Prov.)*, H. E. C. 129.

Where a husband had possession of a lot for which he was assessed as occupant and his wife as owner, but which belonged to the wife's daughter by a former husband, his vote was held good. *Whaley's vote, ib.*

Parent and Son.]—Where a father was by an oral agreement "to have his living off the place," the son being owner and in occupation with the father, the father was held not entitled to vote. *Wiltse's vote, ib.*

Where it was proved that an agreement existed (oral or otherwise) that the son should have a share in the crops as his own, and such agreement was bonâ fide acted on, the son being duly assessed, his vote was held good; the ordinary test being: had the voter an actual existing interest in the crops growing and grown? *Caldwell, Moore, and Smith's votes, ib.*

Where it was proved that for some time past the owner had given up the whole management to his son, retaining his right to be supported from the product of the place, the son dealing with the crops as his own, and disposing of them to his own use, the son's vote was held good. *Ib.*

But where such crops could not be seized for the son's debt, the son was held not entitled to vote. *Francis's vote, ib.*

Where the agreement did not shew what share in the crops the son was to have with

his father, and it appeared to be in the father's discretion to determine the share, such son was held not entitled to vote. *Johnson's vote, ib.*

The widow of an intestate owner continuing to live on the property with her children, who own the estate and work and manage it, should not, till her dower is assigned, be assessed jointly with the joint tenants, nor should any interest of hers be deducted from the whole assessed value. Where, therefore, four joint tenants and such dowress occupied property assessed for $900, the joint tenants were held entitled to the qualification of voters. *Gilroy's vote, ib.*

Where the father had made a will in his son's favour, and told the son if he would work the place and support the family he would give it to him, and the entire management remained in the son's hands from that time, the property being assessed in both names, the profits to be applied to pay the debt due on the place:—Held, that, as the understanding was that the son worked the place for the support of the family, and beyond that for the benefit of the estate, which he expected to possess under his father's will, he did not hold immediately to his own use and benefit, and was not entitled to vote. *Wyatt's vote, Stormont (Prov.),* H. E. C. 21.

Where the objection taken was that the voter was not at the time of the final revision of the assessment roll the bonâ fide owner, occupant, or tenant of the property in respect of which he voted; and the evidence shewed a joint occupancy on the part of the voter and his father on land rated at $240:—Held, that the notice given did not point to the objection that if the parties were joint occupants, they were insufficiently rated, and as the objection to the vote was not properly taken, the vote was held good. The court intimated that if the objection had been properly taken, or if the counsel for petitioner (whose interest it was to sustain the vote) had stated that he was not prejudiced by the form of the objection, the vote would have been held bad. *Baker's vote, ib.*

Where a certain occupancy was proved on the part of the son distinct from that of the father, but no agreement to entitle the son to a share of the profits, and the son merely worked with the rest of the family for their common benefit:—Held, that, although the son was not merely assessed for the real but the personal property on the place (his title to the latter being on the same footing as the former), he was not entitled to vote. *Raney's vote, ib.*

Where the voter and his son leased certain property, and the lease was drawn in the son's name alone, and when the crops were reaped the son claimed them as belonging to him solely, the voter owning other property, but being assessed for this only and voting on it:—Held, that he was not entitled to vote. *Hill's vote, ib.*

Where father and son live together on the father's farm, and the father is in fact the principal to whom money is paid, and who distributes it as he thinks proper, and the son has no agreement binding on the father to compel him to give the son a share of the proceeds of the farm, or to cultivate a share of the land, but merely receives what the father's sense of justice dictates:—Held, the son has no vote. *Eamon's vote, ib.*

In a milling business where the agreement between the father and son was, that if the son would take charge of the mill and manage the business, he should have a share of the profits, and the son, in fact, solely managed the business, keeping possession of the mill, and applying a portion of the proceeds to his own use:—Held, that the son had such an interest in the business, and while the business lasted such an interest in the land, as entitled him to vote. *Bullock's vote, ib.*

Where the voter was the equitable owner, the deed being taken in the father's name, but the son furnishing the money, the father in occupation with the assent of his son, and the proceeds not divided:—Held, that being the equitable owner, notwithstanding the deed to the father, he had the right to vote. *Blair's vote, ib.*

Where the voter had been originally, before 1865 or 1866, put upon the assessment roll merely to give him a vote, but by a subsequent arrangement with his father, made in 1865 or 1866, he was to support the father, and apply the rest of the proceeds to his own support:—Held, that if he had been put on originally merely for the purpose of giving a vote, and that was the vote questioned, it would have been bad; but being continued several years after he really became the occupant for his own benefit, he was entitled to vote, though originally the assessment began in his name merely to qualify him. *Gore's vote, ib.*

Where an oral agreement was made between the voter and his father in January, 1870, and on this agreement the voter from that time had exercised control, and taken the proceeds to his own use, although the deed was not executed until September following:—Held, he was entitled to vote. *Gollinger's vote, ib.*

Where a father had made a will devising a lot to his son, who was assessed for it, and the son took the crops except what was used by the father, who resided on the lot with his wife, the son residing and working on another farm:—Held, that the son had not such a beneficial interest in the lot as would entitle him to vote. *Mullin's vote, South Grenville (Prov.),* H. E. C. 163.

Where the owner of a lot told his son that he might have the lot, and advised him to get a deed drawn, and the lot had been assessed to the son for three or four years, and was rented to a tenant by the father with the consent of the son, who paid to the father his wages, but the father collected the rent:—Held, that, as there was nothing but a voluntary gift from the father to the son, without possession, the son's vote was bad. *Lundy's vote, ib.*

Where the owner of mortgaged property died intestate, leaving a widow and sons and daughters, and the property was sold under the mortgage, and the deed made to the widow, but three of the sons furnished some of the purchase money and all remained in possession, and the eldest son was assessed as occupant:—Held, that, as the eldest son did not

shew that the property was purchased for him, and the presumption from the evidence being that it was bought for the mother, such eldest son had no right to vote. *Morrow's vote, ib.*

Partners and Joint Owners.]—Where a son was assessed at $700 for a farm in which he and his father were partners, in the proportion of three-fourths of the profits to the father and one-fourth to the son, and the objection to the voter was non-ownership:—Held, that the partnership was established by the evidence, and in view of the objection taken, the vote was sustained. *Smale's vote, ib.*

Where two partners in business occupied premises, the freehold of which was vested in one of them, and the assessment of the premises was sufficient to give a qualification to each, both partners were held qualified to vote. *Fitzgerald's vote, ib.*

Where one of two joint owners was assessed for property at $200:—Held, that neither of such joint owners was entitled to vote. *Stewart's vote, ib.*

Tenants.]—Where the voter was the tenant of certain property belonging to his father-in-law, and before the expiration of his tenancy the father-in-law, with the consent of the voter (the latter being a witness to the lease), leased the property to another, the voter's lease not expiring until November, and the new lease being made on the 28th March, 1870:—Held, that after the surrender by the lease, to which he was a subscribing witness, he ceased to be a tenant on the 28th March, 1870, and that to entitle him to vote he must have the qualification at the time of the final revision of the assessment roll, though not necessarily at the time he voted, so long as he was still a resident of the electoral division. *Rupert's vote, Stormont (Prov.)*, H. E. C. 21.

A tenant from year to year cannot create a sub-tenancy nor create a right to vote by giving another a share in the crops raised on the leased property. *Dunham's vote, Brockville (Prov.)*, H. E. C. 129.

Toll Collector.]—Where a man occupied a house as toll collector, and not in any other right, he was not qualified to vote. *McArthur's vote, ib.*

Trustees.]—A trustee under a will, having no present beneficial interest in the real property assessed to him, was held not entitled to vote. *Jones's vote, South Grenville (Prov.)*, H. E. C. 163.

Where A., who resided out of the riding, had made a contract in writing to sell to B. the property assessed to him as owner, but had not at the time of the election executed the deed, B. having been in possession of the property for several years under agreements with A.:—Held, that A. was a mere trustee for the purchaser, and had therefore no right to vote. *Holden's vote, ib.*

Vendor—*Licensee.*]—Where a vendor before the revision of the assessment roll had conveyed and given possession of the property to a purchaser, and such purchaser had afterwards given him a license to occupy a small portion of the property, such vendor was held not entitled to vote. *Noblin's vote, South Grenville (Prov.)*, H. E. C. 163.

Voters in Unorganized Townships.]—Held, that a person, the owner of real estate of the value of $200 or upwards, anywhere within the electoral district, has the right to vote at any polling place in the unorganized townships in the electoral district where he may happen to be on polling day. (2) That where the real estate on which such person relies as his qualification to vote is situate in one of the unorganized townships his right is to vote in any of the unorganized townships without being restricted to the township where his property may be situate. (3) That to entitle a person to vote in the unorganized townships on the qualification of householder, he must be a householder—i. e., have his qualification as such—within the limits of the unorganized township. *Muskoka and Parry Sound (Prov.)*, 1 E. C. 197.

(g) *Revising Officers.*

Mandamus—*Voters' List—Notice of Objections—Service — Proof—Time.*]—A revising officer under the Electoral Franchise Act, 48 & 49 Vict. c. 40 (D.), having declined to entertain the application of S. to have the name of D. struck off the voters' list, on the ground that the notice to D. provided for by s. 26 of the Act was not proved, and that the notice to the revising officer provided for by same section was not duly served on or given to him in time; on an application for a mandamus to the revising officer, although it appeared no copy of the notice to D. was kept, and no notice to produce the original was served, it was shewn by two witnesses that a notice to D., filled up on a printed form with his name, address, and the objection to his vote, had been mailed to him by a prepaid registered letter on the 26th June, for the sittings of the revising officer of 12th July following, and the certificate of registration was produced, although the witnesses had no distinct individual knowledge of the particular notice to D., and that such evidence had been given before the revising officer:—Held, that, in the absence of evidence to the contrary, such proof was sufficient. *Re Simmons and Dalton*, 12 O. R. 505.

The notice to the revising officer was left with his clerk at his office during the absence from town of the revising officer, on Monday the 28th June, and on his return on the afternoon of that day he was told what had been done, and that if he did not consider that sufficient the notice would be procured again and served on him personally, but he said what was done was sufficient:—Held, that the last day for service for the sittings for the final revision to be held the 12th July was Sunday the 27th June, but that, under s. 2, s.-s. 2, of the Act, the time was extended, and S. had all the next day, and that the notice was well given on Monday. *Ib.*

Held, that the service of the notice on the clerk of the revising officer was, under ss. 19 and 26, a sufficient "depositing with" the revising officer to satisfy the statute, and the conduct of the revising officer amounted to an adoption of the action of the clerk, and was equivalent to personal service if such were required by the statute. *Ib.*

Held, that the revising officer erred in point of law in assuming that the notice to him required personal service, and that it was too late, and in holding that notice to produce the notice to D. should have been given, which were not findings of fact, and such mistakes or errors are not such decisions as prevent the granting of the writ of mandamus. If he had found as a matter of fact that notice was not given to D., there might have been some difficulty in interfering with his conclusion. The Centre Wellington Case, 44 U. C. R. 132, referred to and distinguished. *Ib.*

It was contended that the revising officer was an appointee of the Dominion Government, and that his sittings were sittings of a court of record, and that there was no jurisdiction in a provincial court to issue a mandamus to him:—Held, that the Dominion Parliament had, by the Electoral Franchise Act, interfered with civil rights in this Province, and having made no provision for a court to superintend the conduct of the officials, and following Valin v. Langlois, 3 S. C. R. 1, that until such a court is created the provincial courts, by virtue of their inherent jurisdiction, have a right to superintend the discharge of their duties by any inferior officer or tribunal. *Ib.*

——— *Voters' List—Notice of Objection—Grounds—Appeal.*]—Held, by the Queen's bench division, that a notice under s. 19 of the Electoral Franchise Act, R. S. C. c. 5, as amended by 51 Vict. c. 9, s. 4, to a person whose name was objected to, for the purpose of having the name taken off the voters' list at the final revision, which simply gave "not qualified" as the ground of objection, was sufficient. The revising officer (who was not a Judge) having ruled that the notice was valid, the person whose name was objected to appealed from that ruling to the county Judge, who held that the notice was invalid, and the revising officer thereupon refused to go on and hear the complaint:—Held, that no appeal was given by s. 33 of the Act from the revising officer's ruling; and therefore the proceedings before the county Judge were coram non judice. A mandamus was granted. Held, by the court of appeal, that the Queen's bench division having ordered a mandamus to issue directing a revising officer to consider the objections to the qualification of certain persons whose names appeared on the preliminary voters' lists, and the revising officer having obeyed the mandamus, this court should not consider the question of the right to grant the mandamus. A notice of application to have a name removed from the voters' lists, giving as the ground of objection only the statement "not qualified," is sufficient; per Hagarty, C.J.O., Burton and Maclennan, JJ.A. *In re Lilley and Allin*, 21 O. R. 424, 19 A. R. 101.

Prohibition—*Jurisdiction of High Court of Justice.*]—There is no jurisdiction in the high court of justice to issue a writ of prohibition to a revising officer to compel him to abstain from "performing any duty under the Electoral Franchise Act." The legislation in regard to such matters does not trench upon nor is the question one of "property and civil rights in the Province." Re Simmons and Dalton, 12 O. R. 505, not followed. *Re North Perth, Hessin* v. *Lloyd*, 21 O. R. 538.

See ante 8, 12 (b).

13. *Voting.*

(a) *Ballot Papers.*

Marking by Voters—*Irregularities in.*]—The Election Act in its enacting part requires ballots to be marked with a cross on any place within the division which contains the name of the candidate. Ballots marked with a straight line within the division, or with a cross on the back, were rejected. Observations on the difference between the English and Ontario statutes in this respect. *South Wentworth (Prov.)*, H. E. C. 531.

The following ballots were held invalid: (1) Ballots with a single stroke; (2) ballots with the candidate's name written thereon in addition to the cross; (3) ballots with marks in addition to the cross, by which the voter might be identified, although not put there by the voter in order that he might be identified; (4) ballots marked with a number of lines; (5) ballots with a cross for each candidate. *North Victoria* (2) *(Dom.)*, H. E. C. 671.

Quære, whether ballots with a cross to the left of the candidate's name should be rejected, as the deputy returning officer is not bound to reject such ballots under s. 55 of the Dominion Elections Act, 1874. *Ib.*

The following irregularities in the mode of marking ballot papers, held to be fatal: (1) making a single stroke instead of a cross; (2) any mark which contains in itself a means of identifying the voter, such as his initials or some mark known as being one used by him; (3) crosses made at left of name, or not to the right of the name; (4) two single strokes not crossing. *Monck (Dom.)*, H. E. C. 725.

The following ballots were held invalid: (1) ballots with a cross in the right place on the back of the ballot paper instead of on the printed side; (2) ballots marked with an *x* instead of a cross. *Queen's (Dom.)*, 7 S. C. R. 247.

The following ballots were held valid: (1) ballots with a cross to the right just after the candidate's name, but in the same column, and not in the column on the right hand side of the name; (2) ballots with an ill-formed cross, or with small lines at the ends of the cross, or with a line across the center or one of the limbs of the cross, or with a curved line like the blades of an anchor. *North Victoria* (2) *(Dom.)*, H. E. C. 671.

The following irregularities held not to be fatal: (1) An irregular mark in the figure of a cross, so long as it does not lose the form of a cross. (2) A cross not in the proper compartment of the ballot paper, but still to the right of the candidate's name. (3) A cross with a line before it. (4) A cross rightly placed, with two additional crosses, one across the other candidate's name, and the other to the left. (5) A cross in the right place on the back of the ballot paper. (6) A double cross or two crosses. (7) Inadvertent marks in addition to the cross. (8) Cross made with pen and ink instead of a pencil. *Monck (Dom.)*, H. E. C. 725.

In ballot papers containing the names of four candidates the following ballots were held valid: (1) Ballots containing two crosses, one on the line above the first name,

and one on the line above the second name, valid for the two first-named candidates. (2) Ballots containing two crosses, one on the line above the first name, and one on the line dividing the second and third compartments, valid for the first-named candidate. (3) Ballots containing properly made crosses in two of the compartments of the ballot paper with a slight lead pencil stroke in another compartment. (4) Ballots marked in the proper compartments, thus ✓. *Queen's (Dom.)*, 7 S. C. R. 247.

Certain ballot papers were objected to as having been imperfectly marked with a cross, or having more than one cross, or having an inverted V, or because the cross was not directly opposite the name of the candidate, there being only two names on the ballot paper and a line drawn dividing the paper in the middle:—Held, that these ballots were valid. Whenever the mark evidences an attempt or intention to make a cross, though the cross may be in some respects imperfect, the ballot should be counted, unless from the peculiarity of the mark made it can be reasonably inferred that there was not an honest design simply to make a cross, but that there was also an intention so to mark the paper that it could be identified, in which case the ballot should be rejected. But if the mark made indicates no design of complying with the law, but on the contrary a clear intent not to mark with a cross as the law directs, as, for instance, by making a straight line or round O, then such non-compliance with the law renders the ballot null. *Bothwell (Dom.)*, 8 S. C. R. 676.

On this appeal, certain ballot papers being objected to:—Held, that it will require a clear case to reverse the decision of the trial Judge who has found as a question of fact whether there was or was not evidence that the slight pencil marks or dots objected to had been made designedly by the voter. Also, that where the × is not unmistakably above or below the line separating the names of the candidates, the ballot is bad. *Haldimand (Dom.)*, 35 S. C. R. 495, 1 E. C. 529.

If a ballot is so marked that no one looking at it can have any doubt for which candidate the vote was intended, and if there has been a compliance with the provisions of the Act, according to any fair and reasonable construction of it, the vote should be allowed:—Held, that the dividing lines on the ballot between the names of the candidates, and not the lines between the numbers and the names, indicate the divisions within which the voter's cross should be placed, and the space containing the number is part of the division of the ballot containing the candidate's name, and that votes marked by a cross to the left of the lines between the numbers and the names were good. Held, also, that a ballot, from which a portion of the blank part on the right-hand side had been removed, leaving all the printed matter except a portion of the lines separating the names, but which was properly marked by the voter, was good. Held, also, that ballots marked for both candidates, and a ballot marked on the back, although over a candidate's name, were properly rejected. Held, also, that certain ballots with other marks on them besides the cross were good or bad under the circumstances of each case, set out in the report. Held, also, that a ballot, having the name of a candidate marked on its face in pencil, in addition to being properly marked for that candidate, was good; that a ballot with two initials on the back as well as those of the deputy returning officer, was good; that a ballot with the name of a voter on the back was bad; and that ballots with certain peculiar crosses marked thereon were good. *West Elgin* (No. 1) *(Prov.)*, 2 E. C. 38.

The fact that a number has been placed on the back of each ballot paper in a voting subdivision, in pencil, by the deputy returning officer, will not invalidate them. The fact that the cross is marked in the division on the left-hand side of the ballot paper containing the candidate's number, and not in the division containing his name, will not invalidate it. *West Elgin* No. 1 *(Prov.)*, 2 E. C. 38, followed. Where the printer had printed the surname of a candidate too high up and in the division of the ballot paper occupied by the name of another candidate:—Held, that the ballots marked with a cross above the dividing line but opposite to the surname so placed could not be counted for such candidate, but were either marked for the other candidate, or were void for uncertainty. *South Perth (Prov.)*, 2 E. C. 47.

Where the surname of a candidate has been printed so high up in the ballot paper as to appear in the division containing the name of another candidate and to lead to uncertainty as to which of the two candidates' divisions of the ballot paper it was in, it was held that the votes marked opposite to such surname were ambiguous and could not be counted for either candidate, and under the circumstances a new election was ordered. *South Perth (Prov.)*, 2 E. C. 52.

A ballot from which the official number was torn off, without any thing to shew how it happened, was held bad. Ballots marked Y or A were held good. Queen's (Dom.), 7 S. C. R. 247, followed. Ballots marked for a candidate, but having (1) the word "vote" written after his name; (2) having the word "Jos.," being an abbreviation of the candidate's christian name, written before his name; (3) having the candidate's surname written on the back of the ballot; were held bad. *West Huron (Prov.)*, 2 E. C. 58.

Marking for Illiterate Voters — *Irregularities.*]—One B., a voter who could neither read nor write, came into a polling booth, and, in the presence of the deputy returning officer, asked for one C., who was not present, to give him instructions how to mark his ballot. The deputy returning officer gave a ballot paper to the voter, who then stated he wished to vote for the respondent. One W., an agent of the respondent, in the polling booth, took the pencil and marked the ballot as the voter wished, and the voter then handed it to the deputy returning officer. No declaration of inability to read or write was made by the voter:—Held, that no one but the deputy returning officer was authorized to mark a voter's ballot, or to interfere with or question a voter as to his vote; and the deputy returning officer, by permitting the agent of a candidate to become acquainted with the name of the candidate for whom the voter desired to vote, violated the duty imposed on him to conceal from all persons the

mode of voting, and to maintain the secrecy of the proceedings. *Halton* (*Prov.*), H. E. C. 283.

The deputy returning officer, in polling the votes of some fifty illiterate voters, instead of taking from each illiterate voter a declaration "that he was unable to read," asked each if he was able to read or write, and, having received an answer in the negative, requested him to put his mark to the declaration of illiteracy, explaining what he conceived to be its effect thus, "you hereby sign that you are unable to read or write sufficiently to mark your ballot paper." He then openly marked the ballot paper as instructed by the voter, in the presence of both candidates, their agents, and the poll clerk, all of whom had taken the usual declaration of secrecy. One witness also said the constable was in the room:—Held, that substantially there was no violation of the principle of secret voting laid down in R. S. O. 1877 c. 10, and that the votes were not improperly taken. Per Osler, J.A.—There is nothing in the Act which makes it necessary that the deputy returning officer should withdraw with the agents of the candidates and the voter to another room, or which forbids the poll clerk or other persons lawfully present in the polling booth from remaining there while the voter announces for whom he wishes to vote. Per Spragge, C. J.O.—The illiterate voters were not misled, but the conduct of the deputy returning officer was perverse. The manifest policy of the Act is that the voting shall be in all cases as secret as under the circumstances it can be. It was not necessary that more than the three persons named in the Act besides the voter himself should be present: the deputy returning officer and one representative of each candidate. The presence of any others was not in accordance with the spirit and policy of the Act and should not have been permitted by the deputy returning officer. Per Burton, J.A.—Beyond the slight mistake made by the deputy returning officer in explaining the declaration, there appears nothing in the course pursued which was not warranted by the Act; there was no one present except the deputy returning officer, the candidates and their agents, and the poll clerk, all of whom had taken the oath of secrecy except the constable, who was in another part of the room. *Prescott* (*Prov.*), 1 E. C. 88.

Marks Improperly Made or Omitted by Deputy Returning Officers.]—On a recount before a county court Judge, J., the appellant, who had a minority of votes according to the return of the returning officer, was declared elected, all the ballots cast at three polling districts, in which the appellant had polled only 131 votes, and the respondent, B., 345, having been struck out on the ground that the deputy returning officer had neglected to place his initials upon the back of the ballots. On the trial of a controverted election petition it was proved that the deputy returning officer had placed his initials on the counterfoil before giving the ballot paper to the voter, and afterwards, previous to his putting the ballot in the ballot box, had detached and destroyed the counterfoil, and that the ballots used were the same as those he had supplied to the voters, and the trial Judge held that the ballots of the three polls ought to be counted, and did count them. On appeal to the supreme court of Canada:—Held, affirming the judgment, that the deputy returning officer having had the means of identifying the ballot papers as being those supplied by him to the voters, and the neglect of the deputy returning officers to put their initials on the back of these ballot papers not having affected the result of the election or caused substantial injustice, the election was not invalidated. Monck (Dom.), H. E. C. 725, commented on and approved of. *Queen's* (*Dom.*), 7 S. C. R. 247.

In a polling division, No. 3, Dawn, there was no statement of votes either signed or unsigned in the ballot box, and the deputy returning officer had indorsed on each ballot paper the number of the voter on the voters' list. These votes were not included in the count before the returning officer, nor in the resumming up of the votes by the Judge of the county court, nor in the recount before the Judge who tried the election petition:—Held, that the ballots were properly rejected. *Bothwell* (*Dom.*), 8 S. C. R. 676.

In division No. 1, Sombra, during the progress of the voting, at the request of one of the agents, who thought the ballot papers were not being properly marked, the deputy returning officer, who had been putting his initials and the numbers on the counterfoil, not on the ballot papers, initialled and numbered about twelve of the ballot papers, but, finding he was wrong, at the close of the poll, he, in good faith and with an anxious desire to do his duty, and in such a way as not to allow any person to see the front of the ballot paper, and with the assent of the agents of both parties, took these ballots out of the box and obliterated the marks he had put upon them:—Held, that the irregularities complained of not having infringed upon the secrecy of the ballot, and the ballots being unquestionably those given by the deputy returning officer to the voters, these ballots should be held good, and that such irregularities came within the saving provisions of s. 80 of the Dominion Elections Act, 1874. Queen's (Dom.), 7 S. C. R. 247, followed. *Ib.*

The petitioner had received a majority of the ballots cast at the election; but, on a recount before the county Judge, certain ballots, with other marks on the back than the initials of the deputy returning officers, were rejected, thereby giving a majority to the respondent. Evidence was given on the hearing of the petition that the deputy returning officers had, from a mistaken idea of their duty, placed the numbers of the voters, as marked in the voters' list, on the backs of the ballots:—Held, that under 42 Vict. c. 4, s. 18 (O.), the marks so made did not avoid the ballots, and that such ballots should be counted. Semble, that the county Judge, acting ministerially on the recount of ballots, could not have inquired by whom or for what motive such marks had been made on the ballots. *Russell* (2) (*Prov.*), H. E. C. 519.

Certain deputy returning officers, before giving out ballot papers to the voters at the election in question, placed numbers on the ballots corresponding with the numbers attached to the names of such voters on the voters' lists:—Held, (1) that the deputy returning officers had acted contrary to law in numbering the ballots, and that the ballots so numbered should be rejected as tending to

the identification of the voters. (2) That such conduct of the deputy returning officers having had the effect of changing the result of the election, a new election should be ordered. *East Hastings* (*Dom.*), H. E. C. 764.

The neglect or irregularities of a deputy returning officer in his duties under the Dominion Elections Act, 1874, will not invalidate an election, unless they have affected the result of the election or caused some substantial injustice:—Held, therefore, that the neglect of a deputy returning officer to initial the ballot papers, and the providing pen and ink instead of a pencil to mark them, would not avoid the election. *Monck* (*Dom.*), H. E. C. 725.

Irregular acts or omissions by a deputy returning officer in dealing with a ballot before or after it has been cast by a voter do not warrant its disallowance for the candidate indicated by the voter. When there appeared, along with the ordinary printed forms of ballots, certain written ballots, giving little more than the names of the candidates, but apparently supplied by the deputy returning officers and counted by them:—Held, that, on a recount, the county Judge was not justified in rejecting the written ballots. *Muskoka and Parry Sound* (*Dom.*), 18 C. L. J. 304.

A ballot properly marked, but not initialled by the deputy returning officer, having instead the initials C. S., which appeared and were assumed to be those of the poll clerk, was held good. *West Huron* (*Prov.*), 2 E. C. 58. *See Soulanges* (*Dom.*), 10 S. C. R. 652; *Prescott* (*Prov.*), 1 E. C. 88.

Torn Ballot Paper—*Inadvertence.*]—A voter who had inadvertently torn his ballot and whose ballot was rejected on the counting of votes, was allowed his vote, the evidence proving that no trick was intended for the purpose of shewing how he intended to vote. *South Wentworth* (*Prov.*), H. E. C. 531.

(b) *Irregularities in Taking the Poll.*

At a polling subdivision, through a series of mischances, and without any wilful default of the officials, the poll was not opened till between half-past one and two, whereby, it was charged, a number of electors were deprived of the opportunity of voting. The petitioner failed to prove the charge, while, if the onus of doing so were on the respondent, he shewed there was ample time to poll all the votes at that subdivision, and that all who desired to vote could have done so. The supply of ballot papers at a polling subdivision, through a blunder of the officials, ran out, and, while waiting for instructions, the poll was closed for half an hour, whereby, it was charged, some seventeen voters were prevented from voting; but as a matter of fact none of these voters was prejudiced thereby. The deputy returning officer and subordinate officers at a polling subdivision, through improvidence, but not mala fide, did not make the declaration of secrecy required by s. 147 of R. S. O. 1877 c. 10; but the result was not affected thereby:—Held, by the trial Judges, that, as these grounds of irregularity did not per se affect the result, they came within the protection of s. 197, and did not avoid the election. *East Simcoe* (*Prov.*), 1 E. C. 291.

See Bothwell (*Dom.*), 8 S. C. R. 676; *Prescott* (*Prov.*), 1 E. C. 88.

(c) *Refusal to Take Oath.*

Freeholders who appeared on the voters' lists, owing to a printer's mistake, as farmers' sons, being challenged at the poll, refused to take the farmers' sons' oath:—Held, that their refusal to take such oath was not a refusal to take the oath required by law. A refusal to swear is where a voter refuses to take the oath appropriate to his proper description. *Prescott* (*Dom.*), H. E. C. 780.

(d) *Refusing Ballot Paper.*

An elector duly qualified, who has been refused a ballot paper by the deputy returning officer, cannot be deprived of his vote; otherwise it would follow that because the deputy returning officer had wrongfully refused to give such elector a ballot paper, his vote would not be good in fact or in law. *North Victoria* (2) (*Dom.*), H. E. C. 671.

(e) *Secrecy in Voting.*

Where a voter offered to vote at a poll, but did not ask for or put in a tendered ballot paper:—Held, that the Ballot Act required the vote to be given secretly, and that the parol declaration of the voter as to his vote could not be received in order to add it to the poll. *Secord's vote, Lincoln* (*Prov.*), H. E. C. 500.

Secrecy of the ballot is an absolute rule of public policy, and it cannot be waived. See R. S. C. c. 9, s. 71. *Haldimand* (*Dom.*), 1 E. C. 529.

Semble, that, though the only mode of voting is by ballot, if it became necessary to decide the election by determining the right to add certain votes, it should be determined in the manner most consistent with the old law, and which would have saved the disfranchisement of electors, and the necessity of a new election. If the right of voting can only be preserved by divulging from necessity for whom the elector intended to vote, the necessity justifies the declaration the elector is forced to make, as there is nothing in the Act which prevents the elector from saying for whom he intends to vote. *North Victoria* (2) (*Dom.*), H. E. C. 671.

Declaration of Secrecy by Returning Officer and Others.] — See *East Simcoe* (*Prov.*), 1 E. C. 291.

(f) *Tendered Ballots.*

See East Durham (*Prov.*), 1 E. C. 489; *Secord's vote, Lincoln* (2) (*Prov.*), H. E. C. 500; *North Victoria* (*Dom.*), H. E. C. 671.

14. *Other Cases.*

Commissioner for Taking Evidence—*Legislative Council.*]—A Judge of a county court in a Legislative Council electoral division had authority, where the election for the division was contested, to take evidence under 20 Vict. c. 23. *Tecumseth (U. C.)*, 4 L. J. 283, 284.

——— *Fees of—Recovery.*]—Held, that a commissioner for taking evidence in a contested election, under 20 Vict. c. 23, s. 9, might maintain an action for his fees, and was not restricted to the remedy given under the recognizance. Held, also, that all those who had petitioned against the return, and taken an active part in the case before him, were liable, not the person only on whose written request the evidence was taken. *Burritt* v. *Hamilton*, 8 U. C. R. 461, 14 U. C. R. 443.

20 Vict. c. 23 did not extend to elections for the Legislative Council. Where a county court Judge, assuming that it did so extend, acted at defendant's request as commissioner for taking evidence in a contested election for that body:—Held, that he could recover nothing for his services. *Burritt* v. *Jones*, 19 U. C. R. 194.

Contempt of Court—*Power to Punish.*]—All the powers which the court of Queen's bench possessed with respect to controverted elections were transferred by 38 Vict. c. 3, s. 2 (O.), to the court of appeal, which has therefore now the power to punish for contempt in election cases. *Lincoln (Prov.)*, 2 A. R. 353.

Costs of Defence — *Prosecution for Bribery—Private Prosecutor.*]—The plaintiffs were tried for bribery at an election at the Haldimand assizes in the spring of 1887, and acquitted. The information upon which the indictment was supposed to have been founded was laid against them by the defendant, and he was examined as a witness before the grand jury. At the conclusion of the trial the presiding Judge, at the request of the counsel for the accused, indorsed on the indictment the statement that it was proved that the defendant was the private prosecutor. The plaintiffs taxed their costs of the prosecution, and brought this action to recover payment of these costs from the defendant. The information and indictment (there being no evidence connecting the latter with the former), with the indorsement, and the fact that the defendant was examined as a witness before the grand jury, were the only evidence that the defendant was the private prosecutor:—Held, that the indorsement on the indictment had no force as a judgment or finding of fact and could not be accepted as proof of the defendant's position. Held, also, that the facts that the information was laid by the defendant, and that he was examined as a witness before the grand jury, were not sufficient evidence that he was the private prosecutor. *May* v. *Reid*, 16 A. R. 150.

Costs of Opposing Petition—*Action—Declaration.*]—As to the form of declaration under 4 Geo. IV. c. 4. s. 35, to recover the costs incurred by a member of parliament in opposing a petition against his return. *Smith* v. *Rourke*, 6 O. S. 307.

Powers of Legislative Assembly—*Issue of Writ—Session.*]—Held, that the legislative assembly has power while in session to order the issue of a writ to hold a bye-election, s. 33 of R. S. O. 1897 c. 12, applying only to vacancies occurring while the assembly is not in session. *South Perth (Prov.)*, 2 E. C. 144.

Summary Trial for Illegal Acts—*Appeal.*]—The right of appeal given under s. 63 and following sections of the Controverted Elections Act, R. S. O. 1877 c. 11, does not extend to decisions either of the Judge or Judges for the trial of the petitions or the other Judges sitting as a court for the trial of corrupt practices under ss. 174 and 175 of the Election Act, R. S. O. 1877 c. 10, and amendment. Observations upon anomalies and difficulties in the procedure. *Lennox (Prov.)*, 1 E. C. 422.

——— *Time—Limitation—Evidence—Several Charges.*]—The limitation of one year for bringing action prescribed by s. 195, s-s. 3, of the Ontario Election Act, R. S. O. 1897 c. 9, applies only to actions for penalties under that section, and not to proceedings by summons for corrupt practices under ss. 187-8, nor are the latter within the limitation of two years for actions prescribed by R. S. O. 1897 c. 72, s. 1. On such proceeding under ss. 187-8 the Judges may, if they see fit, hear the evidence on all the charges before giving judgment on any of them. *Halton (Prov.)*, 2 E. C. 158.

II. MINISTERS OF THE CROWN.

Change of Office.]—Defendant, while a member of parliament, was appointed to the office of postmaster-general, and again re-elected for the same constituency. On the 29th July he resigned that office, and within a month was appointed president of the council, which office he resigned on the same day, and on the next day was re-appointed to his old office of postmaster-general:—Held, that this was authorized by 20 Vict. c. 22. The penalties imposed by that Act apply to members of the assembly retaining their seats without re-election after acceptance of office, and not only to persons absolutely ineligible. The exemption contained in the seventh clause is not confined to one resignation and acceptance of office, but allows the change to be repeated, and the person may thus go back to the same office which he first resigned. It was stated in the pleadings that the ministry, of which defendant as postmaster-general was a member, all resigned office on the 29th July, and on the 2nd August were succeeded by the opposition, who resigned on the following day: that on the 6th the old ministry were re-appointed, but took different offices from those which they before held, and on the 7th resigned again and were re-appointed to their old places; and it was alleged that the appointment to a different office in the first instance was colourable, and made only to enable defendant to resume his original appointment without going back for re-election:—Held, that, although such a proceeding was probably not contemplated by the Act, it was allowed by it; that the court could not look at defendant's motives, or strain the construction of the statute so as to impose a penalty; and that whether the course taken

was or was not consistent with the system of political government established in this Province, was a question which they could not take into consideration. *McDonell* v. *Smith*, 17 U. C. R. 310. *See*, also, *Macdonell* v. *Macdonald*, 8 C. P. 479.

Postmaster-General — *Printing.*] — Quære, as to whether an action for parliamentary and departmental printing would lie against the postmaster-general, and the propriety of asking the courts to pass an opinion. *Taylor* v. *Campbell*, 33 U. C. R. 264.

See Stewart v. *Jones*, 19 P. R. 227.

III. Privilege of Parliament.

1. *Actions against Members.*

Bill and Summons.]—A member of parliament had formerly the privilege of being sued by the bill and summons, not by the ordinary process. This was abolished by 12 Vict. c. 66; C. L. P. Act, s. 2. For decisions under the old practice, see *McKoane* v. *Fothergill*, Tay. 350; *Phelps* v. *McKenzie*, 5 O. S. 80; *Mahon* v. *Ermatinger*, 1 U. C. R. 334; *Hincks* v. *Crooks*, E. T. 2 Vict., R. & H. Dig. 333; *Lyster* v. *Boulton*, 5 U. C. R. 632.

Declaration.]—In an action against a member, the declaration would not be set aside for a variance between it and the original bill. *Hill* v. *McNab*, 1 U. C. R. 413.

Examination for Discovery—*Order for —Enforcement—Attachment.*]—Where a defendant resides out of Ontario, and is only in it for a temporary purpose, his attendance to be examined for discovery can only be obtained, under rule 477, by a Judge's order upon notice, and not by appointment under rule 443. An order was made under rule 477 for the examination in Ontario of a defendant who resided in British Columbia and who was temporarily in Ontario attending the meetings of the House of Commons of Canada, of which he was a member. Although this order could not be enforced by attachment against the defendant while the house was in session, in the event of his refusing or neglecting to attend, it could be enforced, under rule 454, by striking out his defence. *Cox* v. *Prior*, 18 P. R. 492.

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2. *Arrest and Attachment.*

An attachment was granted against a sheriff who was a member of parliament, for not returning a writ pursuant to a rule of court. *Bell* v. *Buchanan*, M. T. 1 Vict.

Members of parliament in Upper Canada have the same privilege from arrest as in England. One of the defendants, being a member, was arrested on the 29th November, 1851, under an attachment issued against him as an attorney for non-payment of a debt. The last preceding session during which he had been a member expired on the 30th August, 1851, and that parliament was dissolved on the 6th November following. On the 10th December he was again elected, and in February applied to be discharged on the ground of privilege:—Held, that he was not privileged under the first election, as at the time of arrest he was not a member, and more than forty days had elapsed from the close of the last session; but that he was entitled to his discharge as a member of the new parliament, having been arrested within forty days next before the return of the writ of election. The return at the new election was held sufficiently proved by the affidavit of the applicant. *Regina* v. *Gamble*, 9 U. C. R. 546.

An attachment against a member of parliament is illegal, and may be set aside, though no proceedings have been taken upon it. *S. C.*, 1 P. R. 222.

An order to commit to close custody for not attending to be examined pursuant to a Judge's order is a commitment for contempt, not a commitment in execution. A member of parliament is therefore not privileged from arrest under such order, and a party committed under it is not entitled to his discharge on payment of the debt and costs. Semble, that if the order be so framed as to entitle defendant to his discharge on payment of the claim, the privilege of parliament would avail against it. *Henderson* v. *Dickson*, 19 U. C. R. 592.

An order will not be made for the examination of a judgment debtor whose home is in the Province of Quebec, though temporarily residing in Ontario, attending to his duties as a member of parliament. *Regan* v. *McGreecy*, 5 P. R. 94.

A member of the provincial parliament is privileged from arrest for forty days after the prorogation or dissolution of parliament, and for the same period before the next appointed meeting. *Wadsworth* v. *Boulton*, 2 C. L. Ch. 76.

Defendant applied to set aside an arrest for irregularity; his application was defeated, not on the merits, but owing to plaintiffs applying for and obtaining an order to amend:—Held, therefore, that the defendant was still at liberty to move after the amendment against the arrest on the ground of illegality. *Ib.*

Where a party having privilege had been in contempt for non-compliance with an order of the court, and the order nisi for a sequestration had been duly served; but between that and the application for the writ to issue, the party had ceased to be a member, the court refused the writ, and directed the party moving to commence proceedings for the contempt de novo. *Meyers* v. *Harrison*, 4 Gr. 148.

An application to commit the sitting member for contempt in not attending the investigation before the county Judge as a witness for his adversary, refused. *Essex Election*, 4 L. J. 212.

See Cox v. *Prior*, 18 P. R. 492, *ante* 1.

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3. *Other Cases.*

Contempt — *Committee of House.*] — The house of assembly has the power of imprisoning persons guilty of contempt in answer-

ing or refusing to answer questions before a select committee. *McNab* v. *Bidwell*, Dra. 144.

Speaker's Warrant — *Departure from Limits—Authority.*]—To an action on a bond, alleging a departure, defendants pleaded that the debtor, by virtue of a warrant of the Speaker of the House of Assembly, then in session, was required to attend as a witness before the house, and that to obey the warrant he left the limits and remained away ten days:—Held, no defence, as it was not shewn that the Speaker knew the debtor to be on the limits, or what occasion there was for requiring his attendance, or that any process had issued by which he was placed in custody of an officer while absent. *Brown* v. *Paxton*, 19 U. C. R. 238.

Witness—*Parliamentary Duties — Postponing Trial.*]—The engagements of a witness, who was a senator of the Dominion and a member of the executive council, at his duties at Ottawa, where the senate was in session, were deemed sufficient excuse for not procuring his attendance, and good grounds for putting off the hearing. *Rees* v. *Attorney-General*, 2 Ch. Ch. 386.

IV. Miscellaneous Cases.

Conspiracy to Bribe Members.] — A conspiracy to bribe members of the Legislative Assembly is a misdemeanour at common law, and as such is indictable. *Regina* v. *Basting*, 7 O. R. 524.

Parliamentary Committee—*Contracts —Liability of Crown.*]—When a tender for parliamentary printing had been accepted by both houses of parliament, and a contract executed between the suppliants and the clerk of the joint committee of both houses on printing:—Held, that such a contract could not be enforced against the Crown. *The Queen* v. *Maclean*, 8 S. C. R. 210.

——— *Services—Liability of Crown.*]—The Crown is not liable upon a claim for the services rendered by any one to a committee of the house of commons at the instance of such committee. *Kimmitt* v. *The Queen*, 5 Ex. C. R. 130.

——— *Witness—Expenses.*]—Semble, that a returning officer, whose conduct has been impeached, is not entitled to his expenses as a witness before a committee of the house of commons, although he was summoned to attend by the Speaker's warrant in the same manner as other witnesses. *Blacklock* v. *McMartin*, Tay. 329.

Parliamentary Grant — *Bounty of Crown—Receiving Order.*] — See *Stewart* v. *Jones*, 19 P. R. 227.

Resignation of Members—*Voluntary Act—Vacancy.*]—Sections 10 and 12 of 32 Vict. c. 4 (O.) provide that a member may resign: 1. by giving notice in his place of his intention; 2. by delivering to the Speaker a declaration of such intention, either during a session or in the interval between two sessions; or 3. by delivering it to any two members, in case there is no Speaker, and the resignation is made in the interval between two sessions:—Held, to mean only an interval between two sessions of the same assembly, and not to apply to the interval between the last general election and the election of a Speaker. Section 3 provides for a new election in case of a vacancy happening by the death of any member, or by his accepting any office, or by his becoming a party to any contract, as mentioned in the third section. And s. 14, for the case of a vacancy arising subsequently to a general election, and before the first meeting of the assembly thereafter, "by reason of the death or other of the causes aforesaid:"—Held, that the "other of the causes aforesaid" were the two other causes besides death mentioned in s. 13; and that a voluntary resignation, therefore, did not create a vacancy within s. 14. *West Durham (Prov.)*, 31 U. C. R. 404.

PARLIAMENT, POWERS OF.

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PARLIAMENTARY ELECTIONS.

See Parliament, I.

PARTICULARS.

See Defamation, XI. 2—Ejectment, VI. 14 (d)—Evidence, X.—Parliament, I. 11 (g)—Patent for Invention, IV. 5.

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I. Amendments, Demurrers, and Applications to Add, Strike out, or Substitute.

1. *Adding Parties in Master's Office.*

General Rule—*Necessary Parties.*]—The proper practice is, to bring all necessary parties before the court at the hearing, and not to add them in the master's office. *Herchmer* v. *Benson*, 1 Gr. 92.

[But see con. rules (1897) 190, 659, 744.]

Defendants petitioned for a second re-hearing on the ground that certain persons, necessary parties, were not before the court; but, as two opportunities of making the objection had been disregarded, and the interests of the parties complaining of the omission would be properly protected by making them parties in the master's office, the petition was refused. *Patterson* v. *Holland*, 8 Gr. 238.

——— *No Direct Relief Sought.*]—Unless where the parties to be charged are too numerous to be made parties to the bill, or there is some other special reason, the 42nd general order of the 3rd June, 1853, is confined to cases where no direct relief is sought against the parties to be added; or where the object is to bind their interests by the proceedings in a manner similar to what is provided for by the 6th of the same orders. *Ralph* v. *Upper Canada Building Society*, 11 Gr. 275.

Adverse Claimant — *Administration.*]—In an administration suit the referee has no power to make an order allowing a person claiming adversely to the heirs to be made a party in the master's office with a view of establishing a claim there. *Re Tobin, Tobin* v. *Tobin*, 7 P. R. 67.

Incumbrancers.]—To a bill by an incumbrancer for the sale of the property, all other incumbrancers, whether prior or subsequent to the plaintiff, must be made parties in the master's office; and the proceeds of the sale will pay off all the incumbrances according to their priorities. *White* v. *Beasley*, 2 Gr. 660.

G., a creditor of F., under a judgment recovered in 1856, filed his bill to redeem W., the alleged mortgagee under a deed of conveyance to him from F., absolute in form. A creditor of W., under judgment recovered in 1859, and kept alive by fi. fa. lands, was made a party in the master's office as an incumbrancer subsequent to plaintiff: — Held, that he could not properly be thus made a party: but the plaintiff was allowed to amend his bill by making him a party, in order that an opportunity might be afforded him of contesting the plaintiff's right to treat the conveyance from F. to W. as a mortgage as against him. *Glass* v. *Freckleton*, 10 Gr. 470.

A registered judgment creditor had filed a bill impeaching a conveyance made by his debtor, which was ultimately declared void, and, in proceeding to take the account in the master's office, the plaintiff obtained and served an order from the master making a prior incumbrancer a party:—Held, that, as the plaintiff in his proceedings had elected not to make the prior incumbrancer a party to his bill, his serving him with the order in the master's office was irregular, and the order was discharged at the instance of such prior incumbrancer. *Crawford* v. *Meldrum*, 19 Gr. 165.

Certain machinery was placed in a factory on the premises in question, some before and some after the execution of the mortgage to the plaintiffs in 1874. The mortgagor, the defendant, had no interest in any of the machinery at the date of the mortgage to the plaintiff, having previously sold out to A., but afterwards he became solely entitled to all of it, and he then executed a chattel mortgage of the same to a lumber company. On the reference under the decree obtained by the plaintiffs the master made the lumber company parties as subsequent incumbrancers:—Held (assuming the machinery or some portions of it to be trade fixtures removable as between landlord and tenant), that the machinery or such portions aforesaid, when acquired by the mortgagor, would go to increase the plaintiff's security, and that therefore the master was right in making the lumber company parties as subsequent incumbrancers. *London and Canadian Loan, &c., Co.* v. *Pulford*, 8 P. R. 150.

——— *Mortgagee of Reversion—Administration Action — Method of Objection.*]—A testator divided his real estate among his three sons, the portion of A. C., the eldest, being charged with the payment of $1,000 to each of his brothers and its proportion of the widow's dower. The will also provided that "should any of my three sons die without lawful issue and leave a widow, she shall have the sum of $50 per annum out of his estate as long as she remains unmarried, and the balance of the estate shall revert to his brothers with the said $50 on her marriage." A. C. died after the testator, leaving a widow but no issue:—Held, that the mortgagee of the reversionary interest of one of his brothers in the lands devised to A. C. was improperly

added, in the master's office, as a party to an administration action, and could take objection at any time to the proceeding either by way of appeal from the report or on further directions, and was not limited to the time mentioned in order 48 of the supreme court of judicature, which refers only to a motion to discharge or vary the decree. Judgment in 23 A. R. 457 reversed. *Cowan* v. *Allen*, 26 S. C. R. 292.

Semble, that if a person is improperly made a party in the master's office after judgment in administration proceedings, he is not limited to moving against the order making him a party, but may appeal from the report. *Cowan* v. *Allen*, 23 A. R. 457.

Master as Party—*Change of Reference.*]—Where it becomes necessary in the course of a suit to add as a defendant the master to whom the cause stands referred, a change of reference will be made on the ex parte application of the plaintiff. *Weldon* v. *Templeton*, 1 Ch. Ch. 360.

Mechanics' Liens — *Holders — Owner — Sub-contractor's Suit.*]—Where a bill is filed by a sub-contractor against the owner of property, and a contractor with him, to enforce a claim against such contractor, the owner of the property and all persons claiming to have liens are necessary parties in the master's office, whose costs will be ordered to be paid out of the amount found due to the contractor, and the balance distributed ratably among the several lien holders, and a personal order made against the contractor for the deficiency, if any. *Hovenden* v. *Ellison*, 24 Gr. 448.

Mortgagor's Children—*Decease of One — Redemption.*]—Before a redemption suit one of the mortgagor's surviving children died an infant and intestate:—Held, that this suit enured to the benefit of those entitled to her share, including her mother as tenant for life, under R. S. O. 1877 c. 105, s. 27. Held, also, that the mother should be directed to be made a party in the master's office under G. O. 438, since the present case did not fall under the Judicature Act. Semble, if under that Act, the same might have been directed under rule 89. *Faulds* v. *Harper*, 2 O. R. 405.

Partner.]—One of several partners being out of the jurisdiction and alleged by the bill to be insolvent, a decree to take the accounts and wind up the affairs of the partnership was made in his absence; and he, after the decree had been carried into the master's office, returned to this Province, and was, by order of the master, made a party defendant in his office. From this order the defendant so added appealed:—Held, that under the 42nd of the general orders of 1853, s. 15, the master had authority to add such party in his office, and the appeal was dismissed with costs. *Paterson* v. *Holland*, 7 Gr. 563.

In proceeding upon a reference under a decree, the master cannot, under general orders 244, 245, order a person to be made a party to the suit against whom any relief is sought; and where in proceeding under a decree for the administration of a testator's estate, the master directed one D., who had been in partnership with the testator up to the time of his death, to be made a party, and requiring him with the executors to bring in under oath an account of the partnership dealings, against which D. appealed:—Held, that the object of making D. a party was for the purpose either of relief or discovery, and in either view the plaintiff could not obtain it in this mode of proceeding, as D., so far as discovery was concerned, could only be regarded as a witness. *Hopper* v. *Harrison*, 28 Gr. 22.

Purchaser of Land.] — In September, 1855, one G. entered into a contract (which was never registered) with one M., for the sale to him of a lot of land. In October, 1857, the plaintiffs recovered and registered a judgment against G., and thereby acquired priority over M., on the lot sold by him, and in March, 1861, filed a bill against G. to enforce their judgment against the lot contracted to be sold to M., as well as against other lands of G., to which bill the plaintiffs (having no notice of the contract) did not make M. a party, a certificate of lis pendens being however registered. In March, 1862, M. obtained from G., under the contract, a conveyance of the lot, which he registered in September, 1862, and the plaintiffs becoming aware thereof applied ex parte on the 10th June, 1864, under the order of the 29th June, 1861, for, and obtained, an order to make M. a party in the master's office:—Held, that the suit was not pending as against M. prior to the date of the order to make him a party; that therefore there was no suit pending against him on the 18th May, 1861; and, in consequence, that the lien created by the registration of the plaintiffs' judgment against the lot, the subject of the contract, was gone; and that M. was not a necessary or proper party to the suit. *Juson* v. *Gardiner*, 11 Gr. 23.

See Kline v. *Kline*, 3 Ch. Ch. 161; *Hill* v. *Merchants' and Manufacturers' Ins. Co.*, 28 Gr. 560; *Duff* v. *Canadian Mutual Ins. Co.*, 6 A. R. 238; *Reinhart* v. *Shutt*, 15 O. R. 325; *Lally* v. *Longhurst*, 12 P. R. 510; *Wilgress* v. *Crawford*, 12 P. R. 658.

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2. *Misjoinder and Nonjoinder.*

(a) *Misjoinder of Defendants.*

Co-indorsers — *Judgment.*] — Two indorsers agreed that the maker of the notes indorsed by them should convey to the holder thereof certain property in discharge of his indebtedness, which property was to be sold, and, if the same did not realize sufficient to pay the amount for which they had indorsed, that they would pay the difference. Subsequently the holder of the notes sold the property to one of the indorsers, but he never paid the purchase money or any portion of it, in consequence of which he was sued and judgment recovered against him for part of the purchase money, and an action was also brought against the indorsers on their agreement to pay, in which action judgment was recovered and writs against lands were sued out on both judgments, and placed in the hands of the sheriffs of several counties in which the defendants had equitable estates; whereupon a bill was filed against both the defendants to enforce these several judgments, to which they severally demurred on the ground of misjoinder:—Held, that the bill against the two jointly was proper, and the demurrers were overruled with costs. *Smith* v. *Bogart*, 10 Gr. 560.

Distinct Causes of Action—*Penalties.*]—In an action by several plaintiffs qui tam against two defendants for penalties for not registering their partnership under R. S. O. 1877 c, 123, of which s. 11 gives the right of action to "any person" who may sue:—Held, (1) that under the above section and the Interpretation Act any objection to the action being brought in the name of more than one person could not prevail. (2) That the circumstance that the plaintiffs resided out of the jurisdiction could not defeat their action. (3) That the joinder of two defendants for several penalties was not a ground of demurrer. *Chapat* v. *Robert*, 14 A. R. 354.

——— *Polluting Stream.*]—The plaintiff, the owner of a water lot and boathouse abutting on the Ottawa river, who carried on the business of letting boats for hire, brought an action against four sawmill owners, alleging that they, being each the owner of a sawmill situated higher up on the river than the plaintiff's lot, had each been in the habit of throwing sawdust, slabs, &c., into the river, and that this waste matter floated down and lodged upon and in front of the plaintiff's water lot, and had there formed into a solid mass:—Held, that the four sawmill owners were properly joined as defendants in one action. *Ratté* v. *Booth*, 10 P. R. 649.

——— *Specific Performance — Other Relief.*] — The plaintiff's claim as against her husband, one of the defendants, was for specific performance of an ante-nuptial contract to transfer to her certain property of various kinds, and as against the several other defendants, to whom the husband had made transfers of such property, or in whose hands it was, for relief by way of declaration, cancellation, and order for payment:—Held, that, although the plaintiff's right to each cause of action was historically connected with each of the others, that connection related only to her rights; the rights of each set of the defendants were as distinct as they were before the events which conferred upon the plaintiff the rights which she asserted; and such causes of action could not properly be joined in one action. Smurthwaite v. Hannay, [1894] A. C. 494, and Sadler v. Great Western R. W. Co., [1896] A. C. 450, followed. *Faulds* v. *Faulds*, 17 P. R. 480.

Heirs-at-Law of Mortgagor — *Judicature Act.*]—Since the Judicature Act the proceeding by demurrer for misjoinder of parties is no longer available. Werderman v. Société Générale D'Electricité, 19 Ch. D. 246, followed. In an action upon a mortgage for foreclosure, immediate payment, and immediate possession, the plaintiff joined as defendants the heirs-at-law of the deceased mortgagor (who had died after the Devolution of Estates Act) with the administrator of the real and personal estate. One of the heirs-at-law demurred to the statement of claim, on the ground that the administrator represented the estate in all regards, that the heirs-at-law were not bound by any covenants of the deceased, and that no relief was claimed or could be granted against them:—Held, that the demurrer was in effect one for misjoinder of parties, and that the proper remedy was a motion under rule 324 (a) to strike out the name of the demurring defendant. *Carter* v. *Clarkson*, 15 P. R. 379.

Shareholders.]—See *McKenzie* v. *Dewan*, 36 U. C. R. 512.

Stranger to Contract — *Intention to Sign.*]—To an action brought on an indenture of apprenticeship, purporting to have been made by two defendants, an amendment by striking out the name of one defendant who had not signed was refused, on the ground that the other would not then have been liable, as it was intended that both should execute:—Held, that he would have been liable, notwithstanding such intention, and that the reason for the refusal was therefore insufficient. *Judge* v. *Thomson*, 29 U. C. R. 523.

(b) *Misjoinder of Plaintiffs.*

Insolvent and Assignee.] — A railway company entered into a contract for the construction of their road, which was to be completed and in perfect running order by the 1st January, 1875; and to be paid for partly in cash and municipal bonds, partly in bonds or debentures of the company, and partly in guaranteed shares or stock of the company; and the contractors entered upon the construction of the work, but owing to financial difficulties they were obliged to suspend in 1873, and in August, 1874, they made a deed of composition with their creditors, and J. was appointed their official assignee. After the time appointed for the completion of the work, the assignee and contractors filed a bill in their joint names against the railway company, asking that the contract might be performed by the company, offering on their own part to perform it, and seeking to restrain the company from entering into any new contract for the work with any other person; and from making, signing, or issuing any stock or bonds of the company, until the stock or bonds to which the plaintiffs were entitled, were issued to the assignee. A demurrer for want of equity and for misjoinder of plaintiffs was allowed; the rule of the court being that it will not decree the specific performance of works which the court is unable to superintend; and that an insolvent or bankrupt cannot be joined as a co-plaintiff with his assignee. *Johnson* v. *Montreal and City of Ottawa Junction R. W. Co.*, 22 Gr. 290.

Master and Servant — *Assault.*]—Two plaintiffs joined in an action a claim by one for damages for the wrongful interference of the defendants with him in the completion of a building, and for assaulting and arresting his servant and co-plaintiff, and a claim by the other for damages for the same assault and arrest:—Held, that each was a separate and distinct cause of action, and could not properly be joined, under rule 300. Smurthwaite v. Hannay, [1894] A. C. 194, and Carter v. Rigby, [1896] 2 Q. B. 113, followed. Booth v. Briscoe, 2 Q. B. D. 496, distinguished. *Mooney* v. *Joyce*, 17 P. R. 241.

Owners of Separate Parcels of Land —*Crown Patent.*]—Several persons being in possession of separate portions of Crown lands filed a bill, claiming to have, by the invariable usage of the government, a preemptive right, each to the portion he was in possession of, alleging that a patent had been obtained for all the lands by a defendant through fraud, and praying that the patent might be rescinded. A demurrer of the bill for misjoinder

was allowed. *Westbrooke* v. *Attorney-General*, 11 Gr. 264.

——— *Drainage.*]—The plaintiffs brought this action as land owners injuriously affected by certain drainage works of the defendants and the assessments made under by-laws relating to the same, seeking damages and other relief:—Held, that there was no misjoinder of plaintiffs, nor was it incumbent on the plaintiffs to sue on behalf of any others, and the plaintiffs had the right thus to proceed by way of action and not of arbitration. *Alexander* v. *Township of Howard*, *Galbraith* v. *Township of Harwich*, 14 O. R. 22.

Several Interests.]—The plaintiffs, who were severally interested in certain chattels, joined in a bill seeking to have an alleged sale and transfer of them to defendant set aside, on the ground of fraud by defendant. A demurrer, on the ground of misjoinder of plaintiffs, was allowed. *Skinner* v. *Palmer*, 20 Gr. 374.

Shareholders.] — The company having joined some of their bondholders and shareholders as co-plaintiffs, raising questions affecting them individually:—Held, that the action of the court should be confined to issues between the company and the defendants. *Great North-West Central R. W. Co.* v. *Charlebois*, [1899] A. C. 114.

Stranger to Contract.] — Two of the plaintiffs contracted under seal to do certain work, which was done by the three, but not according to the agreement. The three having sued were nonsuited on production of the contract. The nonsuit was upheld, and an amendment by striking out the name of the third plaintiff, in order to save the Statute of Limitations, was refused. *Bricker* v. *Ancell*, 23 U. C. R. 481.

A claim was compromised, the creditors agreeing to receive in satisfaction part of the debt secured by acceptances of B. indorsed by C., who were no parties to the contract. Before the acceptances were given a bill was filed by the debtor and proposed acceptor for the specific performance of the agreement:—Held, on demurrer, that the latter was improperly joined as co-plaintiff. The absence of any allegation that the proposed indorser had indorsed or was ready and willing to indorse, was also held to be a fatal objection. *Gartshore* v. *Gore Bank*, 13 Gr. 187.

See Chaput v. *Robert*, 14 A. R. 354, *ante* (a).

(c) *Nonjoinder of Defendants.*

Alternative Claim — *Company—President—Contract.*] — The plaintiff, having a claim for arrears of salary and damages for wrongful dismissal, sued the defendant company therefor, alleging an agreement made with the president and certain directors before the company's incorporation, and a subsequent by-law and resolution of the company ratifying the agreement. In consequence of what was alleged in the statement of defence, and after discovery had, the plaintiff applied for leave to amend by adding another company and the president of the defendant company as defendants, fearing that he might not recover against the defendant company, because, although they got the benefit of his services, it might appear that his contract was not with them, but with the other company, or that, from want of authority of those who assumed to act on behalf of one or other of the companies, his contract was in law with the president personally, or the president was liable to him in damages as upon a warranty of authority:—Held, that the plaintiff was entitled, by virtue of rule 192, to have the question as to which one of the three parties was responsible to him, decided in one action; and, although he had omitted to join two of them originally, an order should be made, under rule 206 (2), adding these two as defendants at this stage of the proceedings. Bennetts v. McIlwraith, [1896] 2 Q. B. 464, followed. *Tate* v. *Natural Gas and Oil Co. of Ontario*, 18 P. R. 82.

Beneficiaries under Will — *Costs—Inquiry.*] — Where on the hearing it appeared from the plaintiff's evidence that certain persons named in the will of plaintiff's ancestor were necessary parties, and had not been brought before the court, leave was given to amend by adding them, though it would enable the plaintiff to vary to some extent the case made out and the relief prayed, though not as against the present defendants. And as the defect of parties did not appear by the bill:—Held, that leave could only be granted on payment of the costs of the day. Where it comes out in the course of a cause, that the ancestor of one of the parties to the suit, who claims as heir-at-law, has in fact made a will, it is incumbent on the court to direct an inquiry on that point, although unnoticed in the pleadings. *Chisholm* v. *Sheldon*, 1 Gr. 108.

Joint and Several Sureties — *Insolvency.*]—In a suit against one of two sureties of an assignee in insolvency and the administrator ad litem of the assignee, the bill alleged that P. (the other surety), was "without means or other estate of any kind that the plaintiff can discover, and is in fact, as the plaintiff believes, insolvent," as a reason for not making P. a party defendant:—Held, that these allegations were not sufficiently distinct to dispense with the necessity of joining him as a defendant. Sureties were jointly and separately bound; but a general account being necessary, the consolidated order 62, allowing proceedings to be taken against one of two or more persons jointly and severally liable, does not apply to such a case; and the allegation as to the insolvency of one of them is not sufficient to dispense with him as a party. That order is only available where the suit is for a liquidated sum or for a single breach of trust. Quære, whether in such a case the administrator ad litem sufficiently represents the estate of the principal debtor. *Garrow* v. *McDonald*, 20 Gr. 122.

Joint Contractors.] — This action was brought to rescind a contract for the sale of a vessel by the plaintiffs to the defendant, on the ground that the defendant had failed to perform his part of the contract, and for damages for breach of the contract and for injuries to the vessel, which had been delivered to the defendant, and to restrain the defendant from dealing with it, and for delivery up thereof. The defendant applied to add as a co-defendant one W., on whose behalf, as well as his own, the defendant had made the contract in question, and who with knowledge of

it had ratified and adopted it, but who was not formally a party to it:—Held, following Kendall v. Hamilton, 4 App. Cas. at p. 513 et seq., that the defendant had no right to force W. upon the plaintiff as a defendant, in the character of a joint contractor. Quære, whether W. would have a right to be brought as a defendant on his own motion. *Toronto and Hamilton Navigation Co.* v. *Silcox*, 12 P. R. 622.

Under an incomplete agreement with the plaintiff, the defendant and one R. went into possession of the plaintiff's shop, intending to carry on business as partners. The agreement never was completed, the defendant and R. were put out of the shop, and the plaintiff brought this action to recover the amount received by the defendant from sales of goods while in possession of the shop. The defendant asserted that the contract was a joint one on the part of himself and R., but the plaintiff and R. denied this:—Held, that an order under con. rule 324 (a) compelling the plaintiff to add R. as a party defendant, in the character of a joint contractor, was under the circumstances a proper order. *Robb* v. *Murray*, 13 P. R. 397.

——— *Committeemen.*]—Where credit is given to an abstract entity such as a club, the creditor may look to those who in fact assumed to act for it and those who authorized or sanctioned that being done, at all events where he did not know of the want of authority of the agent to bind the club. Review of English cases on this subject. The liability in such cases is not several, but joint. *Aikins* v. *Dominion Live Stock Association of Canada*, 17 P. R. 303.

Necessary Party as to Part of Claim.]—The rule of equity is that if any person not made a party to the suit be a necessary party in respect of any part of the relief prayed by the bill, it is ground of demurrer. Where, therefore, a bill was filed against the Dominion Telegraph Company, seeking to restrain that company from carrying out an agreement for the transfer of telegraph messages to the American Union Telegraph Company, on the ground that such agreement was in contravention of an agreement previously entered into between the plaintiff and defendant companies for mutual exclusive connections and exchange of telegraphic business, without making the American Union Company a party, a demurrer for want of parties on that account was allowed with costs. *Atlantic and Pacific Telegraph Co.* v. *Dominion Telegraph Co.*, 27 Gr. 592.

Next of Kin—*Action to Establish Will.*]—See *Cornell* v. *Smith*, 14 P. R. 275.

(d) *Nonjoinder of Plaintiffs.*

Assignee of Subject of Action Pendente Lite.]—Whether an agreement by a plaintiff with persons not parties to the action respecting the assignment of the subject of the action made pendente lite makes the action defective depends upon the nature of the agreement. If its legal effect is such as to render it impossible for the court to give the relief asked for without the addition of the other parties, the action becomes defective and cannot be proceeded with until proper parties are before the court; but it is otherwise when the nature of the agreement does not prevent the court from giving the relief asked for. *Scott* v. *Benedict*, 9 C. L. T. Occ. N. 181.

Beneficial Plaintiff—*Bank—Cheque.*]—A cheque had been drawn upon the plaintiffs, payable to the Hamilton Tool Company, and, upon an indorsement purporting to be that of the company, the defendants cashed the cheque, and upon presentation by them to the plaintiffs, were repaid the amount. The company repudiated the indorsement. The defendants' solicitor swore that he had good reason to believe, and did believe, that a third person was the beneficial plaintiff, and that there were equities which would attach as against the present plaintiffs. Leave to add such third person was refused, but leave was given to the defendants to amend by alleging that the third person was the beneficial plaintiff, and to set up any defence that might be open to them on that ground. *Bank of Commerce* v. *Bank of British North America*, 10 P. R. 158.

Consignor and Consignee.]—The plaintiff consigned goods to persons in England, and shipped them by the defendant companies on bills of lading, describing them as shipped by the plaintiff, to be delivered to —— order or his assigns, he or they paying freight. The plaintiff indorsed the bills of lading to various persons in England, to whom he had sold the goods. The consignees paid the drafts drawn upon them for the price, and the goods having been seriously damaged in transit, they made claim upon the plaintiff for the loss. The plaintiff now sued for the damage, and was nonsuited on the ground that he had not sufficient interest, or was not the proper person to sue. The court, without deciding as to the plaintiff having no right of action, or the effect of R. S. O. 1877 c. 116, s. 5, set aside the nonsuit, and directed a new trial, with leave to the plaintiff to add as co-plaintiffs any or all of the consignees or indorsees of the bills of lading, the evidence already given to stand with any additions the parties might desire, reserving all costs. *Hately* v. *Merchants' Despatch Co.*, 2 O. R. 385.

An objection was taken in the divisional court, that the action should have been brought by the consignee, J., because, as was alleged, the evidence shewed that the property had passed to him. The objection was not taken at the trial or in the pleadings, otherwise it would have been shewn that the property was still in the plaintiff; and in any event J. consented to be added as a co-plaintiff:—Held, that the objection could not now be raised; and, even if there were anything in it, the court would allow J. to be added as a co-plaintiff. *Dyment* v. *Northern and North-Western R. W. Co.*, 11 O. R. 343.

Husband and Wife.]—In a bill the style of cause named several female plaintiffs as being severally wives of their respective husbands, but the stating part of the bill did not allege that they were married; a demurrer on the ground that their husbands were not named as parties was overruled with costs. *Webster* v. *Leys*, 28 Gr. 471.

Insolvent—*Assignee.*]—A suit was transferred from the Queen's bench under the A. J. Act, which, on argument of a demurrer,

proved to be defective for want of the assignee in insolvency as a party, there not being the necessary allegation in the plaintiff's pleadings to shew that the right of action had vested in the plaintiff; the court, however, directed the cause to stand over in order to make the necessary allegation in the pleadings or to add the assignee as a defendant. *Curtis v. Wilson*, 23 Gr. 215.

One C., a practising barrister, dealt largely in land transactions, but it was not shewn that he depended thereon for his living. Becoming insolvent, proceedings under the Insolvent Act of 1875 were taken against him. The plaintiff was assignee of a mortgage made by C., and brought an action thereon against H., the assignee in insolvency of C., and D. and others, the owners of the parts of the mortgaged lands. It was objected by D. that C. should have been made a party:—Held, that C. was not a trader within the meaning of the Insolvent Act, and that nothing passed to the assignee in the insolvency proceedings. C. was therefore declared to be a necessary party, and leave was given to add him as a defendant. *Joseph v. Haffner*, 29 Gr. 421.

Action by plaintiffs for $460, as assignees under an assignment from the assignee in insolvency of the estate of W. & A. At the trial the Judge held that, under the circumstances, the amount did not pass to the plaintiffs under the assignment to them, but he refused to add the insolvents as co-plaintiffs, because the defendant was not in a position to know whether he had a defence as against them. During the following sittings of the court, the defendant having had sufficient time to ascertain his rights, and shewing no defence, the court under the O. J. Act, rule 30, directed the insolvents to be added, and judgment to be entered for the plaintiffs for the amount claimed, but, under the circumstances, without costs. *Woodward v. Shields*, 32 C. P. 282.

See Kitching v. Hicks, 9 P. R. 518, *post* 7.

——— *Company—Receiver.*]—A receiver has no right to sue in his own name for a debt due to the person or corporation whose assets he has been appointed to receive; nor can that right be conferred on him by order. But where by an ex parte order made in the action in which the plaintiff was appointed receiver, he was authorized to bring actions in his own name for the collection of debts due to a certain Grange, and brought this action pursuant thereto:—Held, that an amendment should be made adding the Grange as co-plaintiffs without security being given for their costs, they being insolvent. If there were no person in whose name the action could be brought, there would perhaps be jurisdiction to direct it to be brought in the name of the receiver. *McGwin v. Fretts*, 13 O. R. 699.

Seduction—*Action by Step-father—Addition of Mother.*]—Plaintiff caused defendant to be arrested for the alleged seduction of his step-daughter, she at the time of the alleged seduction not being in his service. Afterwards he applied to amend his declaration by joining his wife, striking out the allegation that the girl seduced was the daughter of the plaintiff, and substituting the statement that she was the daughter of the wife. The application was refused. *Lawson v. McDermott*, 9 L. J. 45.

(e) *Procedure in Cases of Misjoinder and Nonjoinder.*

Added Plaintiffs—*Right to Object at Hearing.*]—Where new plaintiffs are added by amendment, they have at the hearing the same rights, and the court has the same discretion in the case of a misjoinder, as if they had been plaintiffs originally; and the court may, under the general orders, treat such new plaintiffs as the sole plaintiffs. *Meson v. Seney*, 11 Gr. 447.

Adding Plaintiff after Appeal—*Attorney-General—Final Judgment.*]—A motion made by the plaintiffs, after the judgment in 23 A. R. 566, for leave to amend by adding the attorney-general as a party plaintiff in order to meet the difficulty raised by the judgment that the plaintiffs had no locus standi, was refused, upon the ground that such an amendment could not be made after final judgment. *Johnston v. Consumers' Gas Co. of Toronto*, 17 P. R. 297.

See S. C., 27 O. R. 9, 23 A. R. 566.

Adding Plaintiff at Trial—*Consent.*]—A patentee assigned part of his interest to the plaintiff, who alone filed a bill to restrain the infringement of the patent. At the hearing an objection was taken that the patentee was not a party to the suit; but he, by his counsel, appearing and consenting to be named as a plaintiff and to be bound by the proceedings in the cause, an amendment in that respect was directed by the decree to be made, and relief granted as prayed. *Yates v. Great Western R. W. Co.*, 24 Gr. 495.

Adjourning Hearing to Add Parties.]—A plaintiff filed a bill to enforce a legal right only, and in the course of the proceeding it appeared that there were others in regard to whom it was a question proper to be discussed whether they had not an equitable right in the subject of the suit; one of whom had not been made a party, and the other had failed in a legal defence which he had set up, but the point was not raised by the parties. The court, under the circumstances, ordered the cause to stand over, without costs, in order to add parties; the party so failing in his legal defence to be at liberty to put in a supplemental answer if so advised. *Wilson v. Proudfoot*, 14 Gr. 630.

——— *Duty of Trustees.*]—Where a bill is filed against a trustee by persons claiming adversely to his cestuis que trust, without making them parties to the bill, it is the duty of the trustees to object that the owners of the estate are not before the court. Where, therefore, a trustee under such circumstances neglected to make the objection, the cause was, notwithstanding, ordered to stand over, with leave to amend by adding parties, without costs. *Cleveland v. McDonald*, 1 Gr. 415.

Demurrer—*Amendment — Costs.*]—A demurrer was filed for want of parties and for want of equity, and on the argument it was admitted that the bill was defective as to parties. The court refused to allow the other question to be argued until the bill was made perfect as to parties, and gave the plaintiff liberty to amend on payment of costs. *Malcolm v. Malcolm*, 14 Gr. 165.

——— *Effect of Judicature Act.*]—Misjoinder of parties since the Judicature Act,

is no longer a ground of demurrer. *Young* v. *Robertson*, 2 O. R. 434; *Carter* v. *Clarkson*, 15 P. R. 397.

——— *Examination.*]—A proper mode of taking an objection to a person being made a defendant is by demurrer to the bill; he need not wait until he is examined, and then object to the questions put to him. *Kerr* v. *Read*, 22 Gr. 529.

——— *Particularity.*]—Where a defendant demurs for want of parties, he should shew with sufficient precision the persons who ought to be parties, not necessarily by name, but in such a manner as to point out to the plaintiff the objection to his bill, and enable him to amend by adding the proper parties. *Calvert* v. *Linley*, 21 Gr. 470.

——— *Time.*]—When a demurrer is filed for want of parties as well as for want of equity, the question of parties must be disposed of before the demurrer for want of equity can be argued. *Malcolm* v. *Malcolm*, 2 Ch. Ch. 200.

Injunction—*Consent to Add Parties.*]—On a motion for injunction an objection was taken, that certain necessary parties were not before the court; but counsel appearing for the absent parties, and consenting to their being made parties, to be bound by the proceedings, and treated as if actually defendants on record:—Held, that this cured the defect for the purposes of the motion. *Attorney-General* v. *County of Grey*, 7 Gr. 592.

——— *Effect of Adding Parties—Costs.*]—A plaintiff having obtained the common injunction for want of answer, upon a bill defective for want of parties, defendant put in his answer and obtained an order nisi to dissolve the injunction. Before the motion was heard, and on the morning of the day on which it was heard, the plaintiff amended the bill by adding the necessary parties:—Held, that such amendment was an answer to the objection, made on the motion, of want of parties; and, as the amendment consisted entirely of the addition of parties, and did not materially alter defendant's position, and he had not pointed out the objection by his answer, the court refused him the costs of the motion up to the amendment. *Newton* v. *Doran*, 1 Gr. 473.

Nolle Prosequi—*Nonsuit.*] — Misjoinder of defendants in a joint action of assumpsit cannot be cured either by a nolle prosequi or by a nonsuit as to some of the defendants. A nonsuit as to some is a nonsuit as to all, and a verdict returned for some of the defendants is null and void. *Commercial Bank* v. *Hughes*, 4 U. C. R. 167.

Objection First Taken on Appeal.]—It is too late to raise an objection for the first time in the argument before the supreme court that the legal representatives of the assured were not made parties to the cause. *Tenner* v. *Sun Life Assurance Co.*, 17 S. C. R. 394.

Objection Taken after Hearing.]—After witnesses had been examined and the cause heard at Sandwich, the cause was re-argued at Toronto:—Held, that the defendant could not insist, as a matter of right, on an objection for want of parties not taken at the hearing at Sandwich. *King* v. *Keating*, 12 Gr. 29.

Staying Proceedings for Misjoinder of Plaintiffs—*Leave to Bring New Actions—Ante-dating Writs—Statute of Limitations.*]—Upon the defendants' application, in a case of misjoinder of plaintiffs, under rule 324, the usual order is that all proceedings be stayed till election is made as to the plaintiff who shall proceed, and that the names of the others be struck out. But there is no power to direct that the rejected plaintiffs shall be allowed to issue writs of summons for their respective causes of action against the defendants nunc pro tunc as of the date when the writ in the original action was issued, there being no power to alter the date of the process. Clarke v. Smith, 2 H. & N. 753, Nazer v. Wade, 1 B. & S. 728, and Doyle v. Kaufman, 3 Q. B. D. 7, 340, followed. Nor can a term be imposed that in the new actions the defendants be restrained from setting up the Statute of Limitations. Smurthwaite v. Hannay, [1894] A. C. 494, 506, specially referred to. *Huthnance* v. *Township of Raleigh*, 17 P. R. 458.

Staying Proceeding until Defendants Added—*Affidavit.*]—By analogy to the old practice where a plea in abatement for nonjoinder of co-contractors was pleaded, a defendant now moving to stay proceedings until the co-contractors are added as parties, should shew by affidavit the names and residences of the persons alleged to be joint contractors whom he seeks to have added, and the same liability as to costs, in case persons are added who turn out not to be liable, should be entailed upon him. In an action begun against an unincorporated company, as a partnership, to recover a sum for costs paid by the plaintiffs, an order in chambers allowing the plaintiffs to amend by adding as defendants certain members of the executive committee of the company, and to charge them in the alternative as personally liable by reason of their having sanctioned the arrangement between the plaintiffs and the association, was affirmed without prejudice to the defendants applying to add parties. *Aikins* v. *Dominion Live Stock Association of Canada*, 17 P. R. 303.

——— *Partners.*]—In the case of a nominal corporation, which has no legal status as such, the ostensible corporators are partners; and their liability as partners, on the contracts of the company, is a joint, and not a joint and several, liability. Where some, but not all, of the contractors are sued in an action, they are entitled of right to have all the others within the jurisdiction added as defendants; and, the plea of abatement having been abolished, the method of exception is by prompt application to the court under rule 324. As to the representatives of the deceased or insolvent partners, there is a discretion to add or not. *Gildersleeve* v. *Balfour*, 15 P. R. 293.

Staying Proceedings until Plaintiff Added—*Insolvency.*]—Where a suit was commenced in the name of a person who had previously assigned his interest to a creditor by way of security, and the plaintiff became insolvent before decree, but the cause proceeded to a hearing without any change of parties, and a decree for the plaintiff was pronounced, the court, at the instance of defendants, stayed proceedings until all proper

parties should be brought before the court. *McKenzie* v. *McDonnel*, 15 Gr. 442.

Striking out and Adding Defendants at Trial.]—At the trial, on objection by defendants' counsel, that one defendant had been improperly joined, the Judge, on plaintiff's application, struck his name out of the record; and upon defendants' counsel claiming the right to plead in abatement the non-joinder of another party, the name of such party was with his consent added to the record as a defendant:—Held, that the first amendment had been properly made, but not the second. *McKee* v. *Joli*, 20 C. P. 516.

Striking out Defendant after Verdict — *Costs* — *Pleading.*]—The plaintiff obtained a verdict against two defendants as partners, which was set aside because partnership was not proved. The plaintiff then applied to strike out the name of one of the defendants:—Held, that the amendment might be made, with costs to the defendant struck out, as upon a nolle prosequi. Held, also, that the defendant might plead de novo, without swearing to his defence, within two days after the amendment and payment of costs. *Bowling* v. *Eastwood*, 1 C. L. Ch. 63.

——— *Nolle Prosequi.*]—Two defendants being sued on the common counts joined in a plea of never indebted. After the record had been entered for trial, their attorney told the attorney for the plaintiff that the defendants were not jointly liable, but that one was, and the plaintiff's attorney thereupon entered a nolle prosequi on the record as to one, but omitted to file it. He then took a verdict against the other, upon a written agreement, signed by the attorney after such entry, to admit his liability in a sum named. After the verdict this defendant was arrested, and he then moved to set aside the proceedings:—Held, that the plaintiff, instead of entering a nolle prosequi, should have moved to strike out the defendant's name, but under the circumstances this was allowed to be done after the verdict, and the rule was discharged without costs. *Barnard* v. *McPherson*, 2 P. R. 313.

Striking out Defendant without His Consent.]—In an action for services rendered to defendants' vessel, the plaintiffs proved orally that the four defendants sued owned the vessel. One of them was then called, and swore that another defendant had ceased to have any interest in the vessel when the services were rendered, though he was still a registered owner. The name of this defendant was then struck out. No certificate of registration was produced:—Held, that under the C. L. P. Act, s. 68, the amendment was authorized; and that the name of a defendant improperly joined may be struck out without his consent, and even against his express objection. *Lake Superior Navigation Co.* v. *Realty*, 34 U. C. R. 201.

Striking out Plaintiff — *Husband and Wife* — *Abatement.*]—Under the practice in Nova Scotia, when the wife is improperly joined as co-plaintiff with the husband, the suit does not abate, but the wife's name must be struck out of the record and the case determined as if brought by the husband alone. *Caldwell* v. *Stadacona Fire and Life Ins. Co.*, 11 S. C. R. 212.

See McKean v. *Jones*, 19 S. C. R. 489; *Lee* v. *Hopkins*, 20 O. R. 666; *Crerar* v. *Holbert*, 17 P. R. 283; *Chaput* v. *Robert*, 14 A. R. 354; *Cowan* v. *Allen*, 23 A. R. 457, 26 S. C. R. 292.

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3. *Practice in Adding Parties.*

After Decree—*Petition—Costs.*]—An application to amend after decree, under order 438, by adding a party interested in the equity of redemption, need not be on petition, but is properly made on motion. Where such a motion was opposed on the grounds of irregularity as not being by petition, the costs of opposing it were refused. *Harrison* v. *Grier*, 2 Ch. Ch. 440.

——— *Petition—Devisee of Mortgagor.*]—A., a mortgagee, filed his bill to foreclose against B., alleging that the mortgagor had died intestate, leaving him his heir-at-law, and so entitled to the equity of redemption. After decree, A. discovered that the mortgagor had by will devised the mortgaged premises to C., and, by petition, sought to add him as a party, and that he might be held bound by the past proceedings in the suit. The leave was refused. *Portman* v. *Paul*, 10 Gr. 458.

See Rogers v. *Rogers*, 2 Gr. 137.

After Replication—*Costs.*] — After replication:—Held, that the plaintiff might amend his bill by adding a defendant, without withdrawing the replication, but on payment of costs. *Johnson* v. *Cowan*, 2 Ch. Ch. 13.

Bill Taken pro Confesso.] — Where a plaintiff had obtained an order to take the bill pro confesso against one of the defendants, and afterwards applied to amend by adding parties without prejudice to the order which had been so obtained, the motion was refused. *Herchmer* v. *Benson*, 1 Gr. 92.

Dispensing with Service on Original Parties — *Judgment Creditor—Assignment.*]—Where a plaintiff desired to amend by adding as a defendant a judgment creditor who had assigned his claim to the plaintiff, leave was given for that purpose, dispensing with service on the defendants already before the court. *Boomer* v. *Gibson*, 4 Gr. 430.

Evidence after Amendment.]—Where, after the evidence at the hearing was closed on both sides, the court ordered the cause to stand over to add a party, further evidence between the original parties was held to be inadmissible at the adjourned hearing. *Attorney-General* v. *Toronto Street R. W. Co.*, 15 Gr. 187.

Evidence before Amendment.] — Where a bill is amended by adding parties plaintiff, the depositions of witnesses who had been previously examined in the cause may be read at the hearing. *Chisholm* v. *Sheldon*, 2 Gr. 178.

Laches in Applying.]—An application for leave to withdraw the replication and amend the bill by adding parties, where the cause had been set down for examination, and where the amendment would postpone examination till the following term, was refused with costs, the plaintiffs having been guilty of laches in making the application. *Woodstock* v. *Niagara*, 1 Ch. Ch. 166.

Leave to Amend—*Scope of.*]—When a cause stands over with leave to amend by adding parties, the plaintiff has no right to introduce any amendment, though immaterial, that is unconnected with such leave. But the amendment made in this case was not so unconnected with the order to amend as to render a motion to expunge the same proper. *Chisholm* v. *Sheldon*, 1 Gr. 294.

Where a cause stood over at the hearing with leave to add parties and to exhibit an interrogatory to prove the will of the testator, and the plaintiff afterwards amended by making the devisees of the testator co-plaintiffs, and in addition to the interrogatory to prove the will exhibited interrogatories to prove the fact of the persons so added as co-plaintiffs being those named in the will; a motion made to expunge those interrogatories as being unwarranted by the order to amend, was refused with costs. *S. C., ib.* 425.

Where, after the time for amending as of course, an order is obtained to amend by adding a party "with apt words to charge him or otherwise, as plaintiff shall be advised," the plaintiff can only make such amendment as is required to introduce the additional party. *Gillespie* v. *Grover*, 2 Gr. 120.

Praecipe Order.]—A party plaintiff may be added under a praecipe order to amend. *Dunn* v. *McLean*, 6 P. R. 97.

Waiver of Contempt.]—An amendment of a bill by adding parties, requiring no answer from the defendant, is a waiver of process of contempt for want of answer, and in such a case the court will on an ex parte motion order the defendant's discharge. *Thrasher* v. *Connolly*, 1 Gr. 422.

Waiver of Injunction.]—After service of an injunction the plaintiff amended his bill, and added a new defendant, who was a mere trustee for the plaintiff, without however altering the frame of the bill, or the prayer. Afterwards defendants committed a breach of the injunction, and the plaintiff moved to commit them:—Held, that the amendment was not a waiver of the injunction. *McDonell* v. *McKay*, 12 Gr. 414.

Where a motion for injunction stood over, and before it was again brought on the plaintiff amended his bill by adding necessary parties, and again brought on the motion without giving a fresh notice, the court refused to hear the motion on this objection being taken. *Westacott* v. *Cockerline*, 13 Gr. 159.

See Jones v. *Miller*, 24 O. R. 268, *post* II. 3.

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4. *Practice in Striking out Parties.*

At Trial—*Defendant — Objection.*]—Under C. L. P. Act, s. 68, the name of a defendant improperly joined in an action on contract may be struck out at the trial, without his consent, and even against his objection. *Lake Superior Navigation Co.* v. *Beatty*, 34 U. C. R. 201.

See Burritt v. *Hamilton*, 17 U. C. R. 443.

——— *Plaintiff.*]—Where in assumpsit the wife of the plaintiff was improperly joined:—Held (before the C. L. P. A.), that the Judge at the trial could not strike out her name. *Rischmuller* v. *Uberhaust*, 10 U. C. R. 612.

Defendants not Served.]—Where the plaintiff had declared against several defendants, and only one had been served, the others were allowed to be struck out of the declaration. *Zavitz* v. *Hoover*, M. T. 1 Vict.

Ex Parte Order.]—Neither a party plaintiff nor a party defendant can be struck out under an order to amend obtained ex parte. *Dunn* v. *McLean*, 6 P. R. 97.

Witnesses—*Incompetency — Removal by Striking out as Parties.*]—The plaintiffs sued defendants H., M., and S., as joint makers of a note. H. and M. did not appear, and judgment was signed by mistake against all, but set aside as against S., who pleaded:—Held, that an application to strike out the names of H. and M. from the record, so that they might be called as witnesses for S., was properly refused. *Kerr* v. *Hereford*, 17 U. C. R. 158.

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5. *Revivor.*

(*See*, also, SCIRE FACIAS AND REVIVOR.)

Death of Party—*Infants—Guardian.*]—When it becomes necessary to revive by way of amendment against infant defendants, the proper course is to amend simply in the first instance by making the infants parties. After that is done, if the infants fail to have a guardian appointed, the plaintiff may apply under the 13th order to have a solicitor appointed guardian, and in either case the plaintiff will be in a position to move that the suit do stand revived. *Kirkpatrick* v. *Fouquette*, 4 Gr. 549.

——— *Mortgage — Ejectment — Improvements.*]—In ejectment the plaintiff obtained a verdict, but, as the defendant had made improvements on the land under a bonâ fide belief that the land was his own, he was held entitled to the relief given by R. S. O. 1877 c. 95, s. 4, and a master was directed to ascertain the value of such improvements and report thereon, which he did. A rule nisi having been obtained to refer back the report for the reasons stated, it appeared that after the report the defendant died intestate, and that no personal representative had been appointed, leaving a widow who was residing on the land in question and a son by a former wife, but no children by the second wife, and also that defendant had assigned all his interest in the sum to be found due for improvements to a loan society. The court permitted the plaintiff to amend his rule nisi by calling on the widow or son of the deceased and on the loan society to shew cause why they should not be made parties to the suit, and why the former should not be appointed under A. J. Act, s. 9, to represent the estate of the defendant for the purposes of this motion and all subsequent proceedings in the reference, and why in that event the relief asked by the rule should not be granted. *McCarthy* v. *Arbuckle*, 31 C. P. 48.

——— *Order to Amend.*]—When any of the parties to a suit die, and it is necessary to bring the representatives of such deceased

parties before the court, an order to amend the bill for that purpose will be granted. *Smith* v. *Meredith*, 2 Gr. 691.

——— *Order to Amend—Notice of Motion.*]—When a defendant to a suit dies, and the plaintiff desires to amend by way of revivor, pursuant to s. 15 of the 9th general order, the proper mode of proceeding is to serve notice of motion to amend upon the person intended to be brought before the court by the amendment. *Goodeve* v. *Manners*, 4 Gr. 101.

Proceeding without Order — *Subsequent Adding of Parties.*]—When a suit becomes defective, and is proceeded with without an order of revivor being taken out, a subsequent application, by petition, to supply the defect by adding parties, is not improper; but the new parties may not be bound by the proceedings had in their absence. *Peck* v. *Backe*, 2 Ch. Ch. 294.

See Quantz v. *Smelzer*, 6 P. R. 228, *post* II.

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6. *Solicitor Joining Plaintiffs without Authority.*

(*See*, also, SOLICITOR.)

Striking Out—*Costs.*]—Name of person improperly made a plaintiff by a solicitor struck out, and solicitor ordered to pay the costs. *Miller* v. *Hill*, 4 C. L. J. 78.

——— *Right of Defendant to Apply—Costs.*]—By a resolution of the council of a municipal corporation the mayor and clerk were instructed to grant a certificate under the corporate seal to the solicitors for the other plaintiffs authorizing them to join the corporation as plaintiffs in this action upon receiving a bond, to the satisfaction of the mayor, indemnifying the corporation against all costs. A bond was accordingly handed to the mayor, who retained it, but the action was brought by the solicitors, and the corporation joined therein as plaintiffs, without the granting of any certificate under the corporate seal. After the action had been begun the mayor informed the defendants' solicitors that no certificate had been issued, and stated that he would not sign one until he had been properly advised by counsel:—Held, that the action was brought in the name of the corporation without authority; and that the defendants had the right to move to have such name struck out. Semble, that the corporation should have been parties to the motion. Held, also, that as the solicitors for the plaintiffs other than the corporation were not guilty of any intentional wrong-doing in joining the corporation as plaintiffs, they should not be made liable for the defendants' costs. *Town of Barrie* v. *Weaymouth*, 15 P. R. 95.

——— *Right of Defendants — Absence of Authority—Corporate Seal—Costs.*] — Solicitors who began an action in the name of a public school board and an individual as plaintiffs were retained for the board by a special committee appointed by resolution of the board, not under the corporate seal; the purposes of the appointment, as stated on the face of the resolution, embraced the commencement of any action respecting the matters referred to and the employment of counsel, the subject of the action being one of such matters:—Held, that this was not proper authority from the school board to the solicitors to bring the action, and the defendants had the right to have the name of the board as plaintiffs struck out. Town of Barrie v. Weaymouth, 15 P. R. 95, followed. The solicitors having acted in good faith and under the belief that their retainer was sufficient, no costs were awarded. *Barrie Public School Board* v. *Town of Barrie*, 19 P. R. 33.

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7. *Strangers Applying to be Added.*

Creditors — *Substantial Interest — Assignee.*]—The defendant C., as assignee of the defendant H. for the benefit of creditors, had taken possession of the goods in question, on which the plaintiff claimed a lien under an unregistered agreement in the nature of a chattel mortgage. On motion of certain creditors they were made parties to the action, under rule 103, O. J. Act, on the ground that they had a substantial interest in the subject matter of the action. *Kitching* v. *Hicks*, 9 P. R. 518.

Judgment Creditor — *Registration of Judgment—Priorities.*]—A. obtained a judgment against B. and registered same and issued fi. fas. against lands, kept them in force, and filed a bill on the judgment, before the Act abolishing the registration of judgments; C. had obtained judgment against B. and registered it, but subsequently to A.; C. filed his bill to set aside a prior sale made by B. to D., not making A. a party. A decree was pronounced in his favour sustaining the sale, but giving him a lien on the purchase money. A. applied by petition to be made a party, and have his priority declared in that suit:—Held, that he could not by petition make himself a party to that suit, and that his remedy, if at all, was by bill. Quære, had he any remedy at all? *City Bank* v. *McConkey*, 3 C. L. J. 125.

Purchaser—*Improvements.*] – A. having an interest in improvements for which, in a suit between B., his vendor, and C., B. obtained a decree:—Held, that A. could not, by petition, make himself a party to such suit; and that his remedy was by bill. *Slater* v. *Young*, 11 Gr. 268.

Wife Seeking Alimony — *Collusive Suit.*]—The action was brought by one F. and his wife, against Archibald F., to recover nine years' arrears, under an annuity deed made by the defendant to secure $120 a year to the plaintiffs during their lives. Janet F., the defendant's wife, had joined in the annuity deed to bar her dower. Subsequently the defendant abandoned his wife and absconded; Janet F. then brought an action for alimony, and now applied to be let in to defend this action, on the ground that it was collusively brought for the purpose of defeating her suit for alimony, and to deprive her of her dower in the lands:—Held, that Janet F. was entitled to be admitted to defend. *Ferris* v. *Ferris*, 9 P. R. 443.

See Toronto and Hamilton Navigation Co. v. *Silcox*, 12 P. R. 622, *ante* (2) (c).

8. *Substitution of Parties.*

(a) *Defendants.*

Municipal Corporations — *Water Commissioners.*]—Under the extensive powers of amendment conferred by recent statutes:—Held, that there was power to substitute the corporation of the city of Toronto as defendants in this case. *Trotter* v. *Toronto Water Works Commission*, 14 C. L. J. 368.

See also *Hoorigan* v. *Driscoll*, 8 P. R. 184.

(b) *Plaintiffs.*

Class Suit — *Dismissal of Action—Appeal to Court of Appeal.*]—Upon motion on behalf of the plaintiff to a Judge of the court of appeal for an order substituting a new plaintiff for him, and extending the time for giving security for the costs of his appeal from a judgment dismissing the action and for delivering reasons of appeal: — Held, that although where a judgment has been pronounced in favour of the plaintiff in a class action, that judgment enures to the benefit of the class, and he cannot deprive the others of that benefit, this is not so where the action has been dismissed; the reasons which apply in favour of depriving a plaintiff of the control of a favourable judgment do not exist in the case of an adverse decision; and in this case there was no ground upon which, unless by consent of the defendants, an order for substitution could be made. *Macdonald* v. *City of Toronto*, 18 P. R. 17.

Controverted Municipal Election — *Withdrawal of Relator.*]—Where the relator in a proceeding in the nature of a quo warranto under the Consolidated Municipal Act, 1892, desires to withdraw, the court has no power, under the statute or otherwise, to compel him to go on against his will, nor to substitute a new relator. The power given by s. 196 is to substitute a new defendant, not a relator. *Regina ex rel. Masson* v. *Butler*, 17 P. R. 382.

Ejectment.]—The C. L. P. Act, 1856, does not authorize the striking out all the plaintiffs' names in a summons in ejectment, and substituting a new set therefor, after the entry of the record for trial. *Robinson* v. *Bell*, *Vastbinder* v. *Bell*, 9 C. P. 21.

Promissory Note — *Division Court.*] — Revised rules 211, 216, and 224 of the division courts authorized the Judge in this case to substitute the name of the plaintiff for that of the original holder of the promissory note sued on as plaintiff in the action. *Pegg* v. *Howlett*, 28 O. R. 473.

See *Worthington* v. *Boulton* 6 P. R. 68.

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9. *Other Cases.*

Beneficiaries — *Consent — Amendment — Discretion.*]—To entitle a defendant to security for costs, it is not sufficient to shew that the plaintiff is a man of no means and has no beneficial interest in the subject-matter of the action; it must be shewn that it is really the action of some other person. Gordon v. Armstrong, 16 P. R. 432, explained. The defendant sought, in the alternative, to have the persons alleged to be really beneficially interested added as plaintiffs:—Held, that they could not be added without their consent in writing: rule 324 (b). Leave given to amend the defence by setting up that these persons were necessary parties. Semble, however, that the court has discretion, under rule 319, to proceed in the absence of some of the persons interested in the question under adjudication. *Major* v. *Mackenzie*, 17 P. R. 18.

Collateral Proceedings.]—Semble, that the power to bring other parties before the court under s. 8 of the A. J. Act, 1873, does not apply to summary proceedings collateral to the action. *Victoria Mutual Fire Ins. Co.* v. *Bethune*, 1 A. R. 398.

Counterclaim — *New Defendants to — Striking out.*] — A person brought into an action as defendant to a counterclaim delivered by the original defendant cannot deliver a counterclaim against such defendant. Such a pleading, not being authorized by the rules or the practice, was struck out on summary application. Construction of rules 371-383. Street v. Gover, 2 Q. B. D. 498, followed. Green v. Thornton, 9 C. L. T. Occ. N. 139, distinguished. Semble, if the company brought in here as defendants by counterclaim had been proper parties, cross-relief might have been given them, under rule 374, by staying execution upon any judgment recovered against them until they should establish their set-off in an independent action. The action was upon a promissory note. The counterclaim of the original defendants alleged that the plaintiffs took the note under circumstances which disentitled them to recover:—Held, a defence and not a counterclaim. It further asked that the plaintiffs might be ordered to deliver up the note to be cancelled:—Held, that if that was a proper subject of counterclaim, it was one arising between the plaintiffs and the defendants as the result of the establishment of the defence, and did not render the introduction of new parties necessary. It further asked that if the plaintiffs should be found entitled to recover upon the note, the new defendants by counterclaim should be ordered to pay it:—Held, not a matter in which the plaintiffs were concerned, and therefore, under rule 376, other persons could not be brought in as defendants by counterclaim. It further alleged that the plaintiffs and the new defendants by counterclaim conspired together with the fraudulent intention of keeping certain insurance moneys without applying them upon the note sued on; but there was no assertion that the plaintiffs received the insurance moneys, or any part of them, beyond the amount of the note; and the prayer was that the new defendants by counterclaim, and not the plaintiffs, should account for the insurance money over and above the amount of the note:—Held, that there was no excuse for joining the plaintiffs as parties liable to account with the added parties, and therefore no excuse for adding the latter. And the counterclaim of the original defendants, as far as it added new parties, was struck out. *General Electric Co.* v. *Victoria Electric Light Co. of Lindsay*, 16 P. R. 476, 529.

Creditors — *Chattel Mortgage.*] — The plaintiffs took a chattel mortgage from W., who the next day assigned to the defendant

in trust for the benefit of his creditors. The defendant was not a creditor, and, before any creditor had been informed of the assignment, the plaintiffs, who had omitted to register their mortgage, demanded of the defendant the goods contained in it, which was refused, whereupon this action was brought. Upon the application of the defendant, with the consent of M., a creditor of W., the master in chambers ordered M. to be added as a party defendant, in order to test the validity of the plaintiffs' mortgage:—Held, that the defendant was not entitled to the order, for when the plaintiffs demanded the goods the creditors had no right, and they could not by a subsequent assent make good their claim under the assignment. *Hyman* v. *Bourne*, 5 O. R. 430.

Owner of Adjoining Land—*Rescission of Sale—Fraud.*] — The defendant and his brother partitioned their lands, defendant taking the west half of a lot, on which was an hotel, and the brother the east half, on which a store was erected, each supposing that the division line ran between the two buildings. The defendant sold his portion to the plaintiff, who had lived opposite for many years, the land being described as the west half according to a plan. The hotel encroached upon the east half at the rear end of the building about thirty-four inches, the value of the land encroached upon being very trifling. It appeared that the hotel could be moved for about $40; and that the defendant had offered to procure a lease of the portion encroached upon at a nominal rent, which was refused. The plaintiff charged that the defendant had falsely and fraudulently represented that the division line between the two lots ran between the two buildings, and brought an action therefor, praying for a rescission of the sale, for an account of improvements, and for damages. The deed was drawn after the alleged misrepresentation, and after the plaintiff knew of the encroachment, and nothing was then said about the line. The Judge at the trial found that there was no false representation, but he added defendant's brother as a party, and directed him to convey to the plaintiff the land encroached upon:—Held, that the brother should not have been added; and the plaintiff, having based her action on the ground of fraud, should not be allowed to rely upon an entirely different ground. *Dunbar* v. *Meek*, 32 C. P. 195.

Release by One Plaintiff.]—After issue joined one of two plaintiffs gave to the defendant a release under seal of all actions and demands. The defendant thereupon moved to stay all proceedings in the suit:—Held, that the defendant should plead the release, and that he was not entitled to a stay of proceedings, and the remaining plaintiff was allowed to strike out the name of the other plaintiff. *McAlpine* v. *Carling*, 8 P. R. 171.

Transferees of Goods — *Assignee for Creditors.*]—The firm of R. & Co., consisting of three members, supplied goods to the defendants, and subsequently one of the members retired, and transferred his interest in the assets of the firm to the remaining partners, who continued to carry on business under the same firm name, and afterwards made an assignment to E., under 48 Vict. c. 26 (O.), for the benefit of their creditors. E., as assignee, sold to the plaintiff the debt supposed to be due from the defendants to R. & Co. for the price of the goods supplied, and also the interest of R. & Co. in any goods supplied and charged to anyone, remaining unsold, and the plaintiff brought this action to recover the same. The goods in question, however, were not purchased by defendants, but were consigned to them for sale by R. & Co., by whose instructions the proceeds of the goods actually sold were remitted to H. & Co., to whom they had been assigned by R. & Co. At the trial it appeared from the evidence that the defence was undertaken and conducted for the defendants by H. & Co. The Judge found that no debt had ever existed from the defendants to R. & Co., and dismissed the action, refusing to add H. & Co. as parties. The plaintiff moved by way of appeal from this judgment, seeking to make H. & Co. and E. parties, and to charge the defendants in the character of bailees of the residue, remaining unsold, of the goods consigned to them by R. & Co., in which he claimed an interest, subject to the right of H. & Co., if the transfer to them should be upheld, or absolutely if that transfer should be set aside as a fraudulent preference:—Held, that these questions were "questions involved in the action" within the meaning of rule 103, O. J. A., having regard to the manner in which the defence was conducted, and to the fact that the transfer to H. & Co. was set up in the defence, and that the plaintiff should be allowed to amend under that rule, but the amendment must be confined to the plaintiff's possible rights. 2. That by s. 7 of 48 Vict. c. 26, E. was the only person entitled to enforce the right of the creditors of R. & Co. to set aside the transfer to H. & Co., but that transfer was not made by the same firm of R. & Co. who assigned to E.; that the two estates were distinct, and the creditors of the original firm, not the creditors of the new firm, were those only against whom a fraudulent preference by the original firm could be declared void; that the plaintiff could have no higher right than E., through whom he claimed, and could not therefore attack the assignment to H. & Co. The plaintiff was granted leave to amend by adding H. & Co. as defendants, his claim against them to be limited to an account of their debt and of payments on account thereof, and, as against the original defendants, to obtain the unsold goods as soon as the debt due H. & Co. should be satisfied; and by adding E. as a plaintiff upon filing his consent, payment by the plaintiff of the defendants' whole costs to be a condition precedent. *Adams* v. *Watson Manufacturing Co.*, 15 O. R. 218.

II. Necessary and Proper Parties.

1. *Assignor and Assignee of Chose in Action.*

Absolute Transfer — *Demurrer — Res Judicata.*] — C., by instrument under seal, assigned to the defendant, as security for moneys due, his interest in certain policies of insurance, on which he had actions pending. C. afterwards gave to B. & Co. an order on the defendant for the balance of the insurance money that would remain after paying his debt to the defendant. B. & Co. indorsed the order and delivered it to the plaintiff, by

whom it was presented to the defendant, who wrote his name across its face. B. & Co. afterwards delivered to the plaintiff a document signed by them stating that, having been informed that the indorsed order was not negotiable by indorsement, to perfect the plaintiff's title and enable him to obtain the money in the defendant's hands, they assigned and transferred their interest therein and appointed the plaintiff their attorney, in their name, but for his own use and benefit, to collect the same. The defendant, having received the amounts due C. on the insurance policies, informed the plaintiff, on his demanding an account, that there were prior claims that would absorb it all. The plaintiff then filed a bill in equity for an account and payment of the amount found due him, to which the defendant demurred for want of parties, alleging that the order, though absolute on its face, was, in fact, only given as security, and that, an account between B. & Co. and C. being necessary to protect C.'s rights, C. was a necessary party to the suit. The demurrer was overruled and the judgment overruling it not appealed from, and the same defence of want of parties was set up in the answer to the bill:—Held, that the question of want of parties was res judicata by the judgment on the demurrer, and could not be raised again by the answer. Even if it could, the judgment was right, as C. was not a necessary party. As between the plaintiff and the defendant the order was an absolute transfer of the fund to be received by the defendant, and was treated by all the parties as a negotiable instrument. The defendant had nothing to do with the equities between C. and B. & Co., or between B. & Co. and the plaintiff, but was bound to account to the plaintiff in accordance with his undertaking as indicated by the acceptance of the order. *McKean* v. *Jones*, 19 S. C. R. 489.

Written Assignment — *Restoration of Assignee's Right.*]—Under the provisions of R. S. O. 1887 c. 122, in order to enable the assignee of a chose in action to sue in his own name, the assignment must be in writing, but a written instrument is not required to restore the assignor to his original right of action. *Rennie* v. *Block*, 26 S. C. R. 356.

See Prittie v. *Connecticut Fire Ins. Co.*, 23 A. R. 449; *Walls* v. *Sault Ste. Marie Paper and Pulp Co.*, 18 C. L. T. Occ. N. 117; *Scott* v. *Benedict*, 9 C. L. T. Occ. N. 181; *Bank of Commerce* v. *Bank of British North America*, 10 P. R. 158; *Yates* v. *Great Western R. W. Co.*, 24 Gr. 495; *McCarthy* v. *Arbuckle*, 31 C. P. 48.

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2. *Attorney-General.*

Canal Company—*Suit by Shareholders —Improper Conduct of Directors.*]—Where by the Act of incorporation the government is authorized to purchase the corporate estate on payment of its full value, the attorney-general is not a necessary party to a bill by the stockholders against the directors, complaining of improper conduct on the part of the latter in dealing with the corporate funds. *Hamilton* v. *Desjardins Canal Co.*, 1 Gr. 1.

Charitable Bequest.]—To a bill either to establish or impeach the legality of certain charitable bequests, the attorney-general may be made a party. *Davidson* v. *Boomer*, 15 Gr. 1.

Church Corporation — *Suit by Member.*]—A bill will lie by a member of the corporation of the church society of the diocese of Toronto, on behalf of himself and all other members of the society, to correct and prevent alleged breaches of trust by the corporation; and to such a bill the attorney-general is not a necessary party. *Boulton* v. *Church Society*, 15 Gr. 450. See *S. C.*, 14 Gr. 123.

Church Trustees — *Action to Set aside Deed.*]—Where a bill was filed in the name of "The Trustees of the Franklin Congregation of the Methodist Church of Canada," against persons claiming under a deed from their grantor, for the purpose of setting aside such deed as a cloud upon the title of the plaintiffs:—Held, that the suit was properly instituted by the trustees as such; and that neither their grantor nor the attorney-general was a necessary party thereto. *Trustees of Franklin Church* v. *Maguire*, 23 Gr. 102.

Crown.]—The attorney-general is not a necessary party where the result of a suit, whatever it may be, will not prejudice the Crown, and there is no interest of the Crown to be protected. *Bennet* v. *O'Meara*, 5 Gr. 396.

——— *Title to Land.*] — The attorney-general was held a necessary party where a question affected the right of the government to the land granted in a patent; and leave to amend was granted to enable him to be added as a party, although the defendant was in a position to move, and made a counter-motion, to dismiss; but defendant was allowed costs. *Great Western R. W. Co.* v. *Jones*, 2 Ch. Ch. 219.

Crown Patent—*Suit to Set aside.*]—The bill alleged that the patentees obtained their patent by false representations to the government, and shewed a case in which the patentees would not be entitled to compensation if the patent were set aside and the land given to another:—Held, that to such a bill the attorney-general was not a necessary party. *Rees* v. *Attorney-General*, 16 Gr. 467.

Expropriation of Land—*Title to Roadway.*]—See *Re Trent Valley Canal*, 11 O. R. 687.

Gas Company—*Application to Add Attorney-General after Final Judgment.*]—See *Johnston* v. *Consumers' Gas Co. of Toronto*, 27 O. R. 9, 23 A. R. 566, 17 P. R. 297.

Insurance Company—*Suit by Shareholder — Non-payment of Stock Subscriptions.*]—An insurance company was incorporated by statute with a capital of $500,000, and by the Act it was provided that when $100,000 was subscribed and 10 per cent. paid up, a general meeting of the shareholders might be called and directors elected; but the company was not to commence business until at least $50,000 of its capital stock should be paid up. It appeared that the $50,000 required by the Act had been paid into

the minister of finance, who had thereupon granted a license to the company to transact insurance business, but that the money had been borrowed for the purpose of being so deposited; that the 10 per cent. payment on stock subscribed for had not been made in cash, but notes of hand taken from several of the subscribers therefor; and that the $50,000 of the stock required by the statute to be paid up had not been so paid. One of the stockholders, who had paid his deposit in cash, thereupon filed a bill setting up these facts and seeking to restrain the company from carrying on business under their charter until at least the $50,000 was paid up:—Held, on demurrer, that the bill was properly filed by the shareholder alone, and need not be on behalf of himself and others. 2. That the attorney-general was not a necessary party. 3. That the shareholders who had paid their deposits by promissory notes were not necessary parties. *Cass* v. *Ottawa Agricultural Ins. Co.*, 22 Gr. 512.

Legacy for Religious Purposes.]—The attorney-general was held a necessary party to a bill filed to administer an estate and declare a legacy for religious purposes void. *Long* v. *Wilmotte*, 2 Ch. Ch. 87.

Municipal Corporation—*Suit by.*]—The attorney-general is not a necessary party to a bill filed by the municipal council of an incorporated town to prevent an injury to the property of the municipality. *Town of Guelph* v. *Canada Co.*, 4 Gr. 632.

——— *Suit by Inhabitants — Illegality — Mayor.*] — A bill will lie by some of the inhabitants of a municipality alleging an illegal application of the funds by the mayor, which the council refused to interfere with. The attorney-general is not a necessary party to such a suit. *Paterson* v. *Bowes*, 4 Gr. 170.

——— *Suit by Ratepayer—Debentures—Bank.*]—A municipal corporation, after raising money on the credit of the municipal loan fund for a purpose specified in a by-law, passed another by-law diverting the debentures to another purpose; and under this second by-law the debentures passed into the hands of the Bank of Upper Canada:—Held, that a bill would lie by a ratepayer, on behalf of himself and all other ratepayers of the municipality, against the bank and the municipal corporation, for the restoration of the debentures to the corporation; and a demurrer, on the ground that the attorney-general was not a defendant, was overruled. *Brogdin* v. *Bank of Upper Canada*, 13 Gr. 544.

See McMurray v. *Northern R. W. Co.*, 22 Gr. 476.

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3. *Companies, Shareholders, and Officers.*

Company made Party with Directors—*Forfeiture of Stock.*]—Held, that the company were properly made parties to an action to restrain a forfeiture of stock made under a resolution of the directors, it being alleged that the number of directors had been illegally reduced, as the reduction of the directorate was the act of the company. *Christopher* v. *Noxon*, 4 O. R. 672.

Company made Party with Shareholders.]—In an action by an execution creditor of a company against shareholders to make them liable upon their shares for the amount unpaid thereon, the plaintiff sought also to recover from the defendants moneys shewn to be in their hands, which were really the property of the company:—Held, that the plaintiff was entitled to judgment against the defendants for payment to him of such moneys; but the company were necessary parties to the action; and their consent to being added as plaintiffs not having been filed as required by rule 324 (b), they should be added as defendants. Held, also, a proper case, under rules 324 (c) and 326, for dispensing with service upon the company, as the defendants already before the court were directors and the principal shareholders in the company. *Jones* v. *Miller*, 24 O. R. 268.

Officers made Defendants with Company—*Infringement of Patent.*]—A bill was filed against a joint stock company (limited) to restrain the infringement of a patent, to which certain officers of the company were made parties, and the bill alleged that "the defendants" were committing the act complained of, and prayed relief against "the defendants." A demurrer on the ground that the officers were improperly made parties was overruled with costs; these officers being charged personally with committing the acts complained of, and relief being prayed against them. *Cline* v. *Mountainview Cheese Factory*, 20 Gr. 227.

——— *Removal of Privileges of Membership.*]—A bill was filed by a member of an incorporated association, against the corporation, the president, and the secretary thereof, charging that these officers had colluded and conspired together to refuse and deprive the plaintiff of the rights and privileges of the association, and setting forth certain loss and damage sustained by the plaintiff by reason thereof, and praying amongst other things that defendants might be ordered to pay and make good such loss and damage, and that the defendants, other than the secretary, might be ordered to pay the costs of the suit:—Held, notwithstanding the provisions of the 63rd general order of 1868, that the secretary was a proper party to the bill; and a demurrer by him, on the ground that that he was not a necessary or proper party, was overruled with costs. Cline v. Mountainview Cheese Factory, 20 Gr. 227, approved of and followed. *Cuthbert* v. *Commercial Travellers' Association of Canada*, 24 Gr. 531.

Railway—*Purchase by New Company—Rights against Old Company.*]—The statute 19 Vict. c. 21, incorporating the Buffalo and Lake Huron R. W. Co., with power to purchase the railway therein mentioned, did not deprive unpaid owners of any lien they had for the price of land theretofore sold to the old company. The old company was held to be a necessary party to a suit by a land owner to enforce a lien for purchase money in respect of land sold to the old company before the transfer of the railway to the new company; it not appearing but that the old company was interested in the question to be litigated. *Paterson* v. *Buffalo and Lake Huron R. W. Co.*, 17 Gr. 521.

Railway Companies—*Carriage of Goods—Connecting Lines.*]—The plaintiff shipped

goods from St. Johns, Quebec, to Dundas, Ontario, to be carried from St. Johns to Toronto by the Grand Trunk R. W. Co., who delivered them to the Great Western R. W. Co., who carried them to Dundas, where they arrived in a damaged state. The plaintiff, being in doubt as to which company was liable, there having been a separate contract with each, joined both as defendants. Held, affirming the order of a Judge, who had affirmed the order of the master in chambers 19 P. R. 80, that the case came within rule 94 of the Judicature Act, and that the plaintiff had a right to make both companies parties. *Harvey* v. *Grand Trunk R. W. Co.*, 7 A. R. 715.

Railway Company—*Joint Tort-feasor.*]—Plaintiff sued defendant for flooding his land by means of a mill dam, after the determination of a license to do so. The Great Western R. W. Co. had turned the waters of the stream into another channel, which was not deep enough to carry off all the water if the defendant's dam were removed, so that by the act of the railway company the plaintiff could not obtain complete relief by succeeding against defendant:—Held, that the plaintiff should have liberty under rules 91, 163, O. J. A., to add the railway company as defendants. *Head* v. *Bowman*, 9 P. R. 12.

Retired Directors—*Parties in Master's Office.*]—A decree was obtained in a suit by a shareholder on behalf of himself and all other shareholders, for the administration of the assets of the society, and charging the directors with losses sustained:—Held, that persons who had ceased to be directors before the suit could not be made parties in the master's office. *Rolph* v. *Upper Canada Building Society*, 11 Gr. 275.

Use of Company's Name by Shareholders.]—Where the directors of an incorporated company misappropriated the funds, a bill against them and the company, in respect of such misappropriation, cannot be sustained by some of the stockholders on behalf of all except the directors; the company must be made plaintiffs whether the acts of the directors are void or only voidable, and the stockholders have a right to make use of the name of the company as plaintiffs in such proceedings. *Hamilton* v. *Desjardins Canal Co.*, 1 Gr. 1.

Where a suit is necessary to obtain from the directors or officers of an incorporated company an account of their dealings with the company, or to recover from them, or any other person, property or money of the corporation, the only proper plaintiff is the company itself. Where one shareholder of a railway company filed a bill on behalf of himself and all other shareholders (except a defendant) against the company and its managing director, alleging that the managing director had virtually the appointment of a majority of the directors, and thus controlled the action of the company; and charging that such managing director had misappropriated large amounts of the company's funds, and had also been guilty of several other acts of misconduct, which, if it were true, were properly subjects for the cognizance of a court of equity, and in respect of which the directors had omitted to call him to account, but the plaintiff failed to shew that the consent of the directors or of the shareholders could not be obtained to institute proceedings in the name of the company, a demurrer to the bill for want of equity, as well as for want of parties, filed by the company and the managing director, was allowed. Such an objection to the frame of a bill is not a mere "formal objection," such as is intended to be provided for by the Administration of Justice Act of 1873, s. 49. To such a bill the attorney-general, though a proper, is not a necessary party. Hamilton v. Desjardins Canal Co., 1 Gr. 1, and Paterson v. Bowes, 4 Gr. 170, followed. Brogdin v. Bank of Upper Canada, 13 Gr. 544, distinguished. *McMurray* v. *Northern R. W. Co.*, 22 Gr. 476.

A demurrer to a bill filed by shareholders of an incorporated company on behalf of themselves and all other shareholders except the defendants, in which the company were joined as co-plaintiffs, attacking a transaction whereby all the shareholders, including some of those whom the plaintiffs assumed to represent, received shares in the transaction sought to be impeached, was allowed. *City Light and Heating Co. of London* v. *Macfie*, 28 Gr. 363.

See Cass v. *Ottawa Agricultural Ins. Co.*, 22 Gr. 512; *Johnston* v. *Consumers Gas Co. of Toronto*, 17 P. R. 297; *Jones* v. *Imperial Bank of Canada*, 23 Gr. 262; *McKenzie* v. *Dewan*, 36 U. C. R. 512; *Tate* v. *Natural Gas and Oil Co. of Ontario*, 18 P. R. 82; *Great North-West Central R. W. Co.* v. *Charlebois*, [1899] A. C. 114; *International Wrecking Co.* v. *Murphy*, 12 P. R. 423.

See, also, *ante* 2.

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4. *Debtors and Creditors.*

Creditors—*Fraudulent Conveyance—Execution.*]—Where a suit is instituted by a judgment creditor, who has not placed an execution against lands in the hands of the sheriff, in order to set aside a deed as fraudulent, he must sue on behalf of all creditors of the defendant, and the fact that the deed was made by a third party in consideration of money paid by the debtor does not alter the rule of pleading in this respect. *Morphy* v. *Wilson*, 27 Gr. 1.

The plaintiff filed her bill for alimony, alleging that a conspiracy had been entered into between her husband and the other defendant to prevent her realizing any alimony that might be awarded her, and that for that purpose her husband fraudulently conveyed all his lands to the co-defendant, and the bill prayed to have such conveyance declared fraudulent. The grantee in the impeached conveyance demurred for multifariousness, for want of equity, and want of parties. The court overruled the demurrer on the first two grounds, but allowed the demurrer for want of parties; the plaintiff, not having recovered judgment and execution, could only sue in a representative capacity—that is, on behalf of herself and all other creditors. Longeway v. Mitchell, 17 Gr. 190, Turner v. Smith, 26 Gr. 198, Culver v. Swayze, 26 Gr. 395, and Morphy v. Wilson, 27 Gr. 1, considered and followed. *Campbell* v. *Campbell*, 29 Gr. 252.

——— *New Cause of Action.*]—An action was brought by one of the next of kin to set

aside, as having been obtained by undue influence, a transfer to the defendant of policies on the life of a person who had died intestate; and subsequently his administrator was, on his own consent, added as a party plaintiff. After the action was entered for trial, the plaintiffs' solicitors, also acting as solicitors for certain creditors of the deceased, obtained an order under rule 445 from the master in chambers to amend the statement of claim and record by making such creditors parties, suing on behalf of themselves and all other creditors to set aside the transfer of the policies as fraudulent and void against them:—Held, that the addition of the new plaintiffs was not necessary to determine the real matter in dispute in the "action commenced," as required by the rule, but was the introduction of a new action altogether distinct from the action commenced, and one which the plaintiffs in that action could not maintain; and the order of the master was set aside. *Tinning* v. *Bingham*, 16 P. R. 110.

——— *Trust Deed—Action by or against Trustee.*]—To a suit brought by or against a trustee of an insolvent's estate, in respect of a sum owing by one of the debtors of the insolvent, the creditors for whose benefit the trust deed was executed are not necessary parties. *O'Connell* v. *Charles*, 2 Gr. 489.

——— *Trust Deed — Representation.*] — A large body of creditors may be represented by one or more of the number, but in any such proceeding the bill must disclose a sufficient reason for this departure from the rule of practice requiring all persons interested to be parties to the suit. Where, therefore, a bill by one of several creditors entitled under a deed of trust was filed, and stated "that the creditors of the said L. entitled to the benefit of the said indenture are too numerous to make it practicable to prosecute this suit if they were all made parties:"—Held, that such statement was too general to satisfy the court that the rule could not be complied with. Quære, whether it is necessary to furnish proof of the allegation that the parties are too numerous to be all brought before the court; and whether in a creditor's suit any decree can be made without previous proof of his debt. *Michie* v. *Charles*, 1 Gr. 125.

Where a bill was filed by one of several creditors of a debtor who had assigned his estate for the benefit of his creditors, against the debtor and the trustees, seeking an account of the estate and payment, without making any other creditor a party, the court overruled an objection for want of parties, on the ground of the absence of any such creditor. *Wood* v. *Brett*, 9 Gr. 78. See *Wylie* v. *McKay*, 20 Gr. 421.

Where a bill was filed by one or two creditors, both of whom claimed to be paid in priority to the other creditors, of an estate, against the representatives of the trustee and one of several creditors who claimed that all should share pro rata:—Held, that all the parties interested were sufficiently represented. *Wigle* v. *McLean*, 24 Gr. 237.

Debtor—*Judgment—Surety.*]—To a suit by a surety against the creditor for an assignment by him of a judgment recovered against the debtor, the debtor is a necessary party. *Cockburn* v. *Gillespie*, 11 Gr. 465.

Execution Creditors — *Mortgage.*]—A suit was instituted upon a mortgage against the assignee in insolvency of the mortgagor, and on proceeding to the master's office it appeared that there were creditors of the mortgagor who had executions in the hands of the sheriff at the date of the assignment in insolvency:—Held, that it was proper to add such creditors as parties in his office. *Canada Landed Credit Co.* v. *McAllister*, 21 Gr. 593.

Execution Debtor — *Sale under Execution—Sheriff.*]—Semble, that the court would entertain a bill for the purpose of compelling a sheriff to convey property sold under an execution, but to such a bill the execution debtor whose property has been sold must be made a party. *Witham* v. *Smith*, 5 Gr. 263.

Joint Debtors—*Fraudulent Conveyance by One.*]—To a bill by an execution creditor of two joint debtors, to set aside conveyances by one of them as fraudulent and void against creditors, the grantor was a defendant:—Held, that if the grantor was a necessary party, his co-debtor should be a party also. *Pyper* v. *Cameron*, 13 Gr. 131.

Judgment Creditor.] — When a judgment has been recovered pendente lite, it is not necessary to make the judgment creditor a party. *Wallbridge* v. *Martin*, 2 Ch. Ch. 258.

See City Light and Heating Co. v. *Macfie*, 28 Gr. 363; *Beattie* v. *Wenger*, 24 A. R. 72; *Ferguson* v. *Kenny*, 12 P. R. 455; *Gibbons* v. *Darvill*, 12 P. R. 478; *Boomer* v. *Gibson*, 4 Gr. 430; *City Bank* v. *McConkey*, 3 C. L. J. 125; *Hyman* v. *Bourne*, 5 O. R. 430; *Adams* v. *Watson Mfg. Co.*, 15 O. R. 218.

See also *post* 9.

5. *Executors and Administrators.*

Annuity—*Enforcement against Land.*]—In a suit to enforce a lien for an annuity secured upon real estate, it is not necessary to make the personal representative of the person bound to pay a party, unless an account of the personal estate of the deceased is asked. *Paine* v. *Chapman*, 7 Gr. 179.

Assignor in Trust—*Personal Representative—Rights of Cestuis que Trust.*]—J. M. by an informal instrument purported to assign to his son-in-law, W. M., all his estate real and personal, "with notes and accounts, on condition that he pay his heirs in the manner following;" and the instrument then proceeded to direct the payment to certain of the assignor's children and grandchildren of $400 each; it also contained this agreement: "The said W. M. hereby becomes bound to pay the above mentioned sums to the parties therein named at the time of the decease of the said J. M., or as soon after as can conveniently be done:"—Held, that the effect of the instrument was to entitle each of the beneficiaries to file a bill in his own name after the death of J. M., to enforce payment of the $400 coming to him; and that the personal representative of J. M. was not a necessary party. *Mulholland* v. *Merriam*, 19 Gr. 288.

Executors without Probate.] — Such executors as have proved may sue without making the others parties, though the latter

have not renounced. *Forsyth* v. *Drake*, 1 Gr. 223.

——— *Renunciation.*]—A party entitled as a residuary devisee filed a bill against one of three persons named as executors and trustees, praying to have the trusts in the will carried out; alleging that the other two persons named as executors and trustees had renounced probate, and had never acted in the trusts. Defendant's residence was unknown to plaintiff, and service had been effected by advertisement, under the general orders; the bill was taken against him pro confesso, and there was no evidence other than such admission of defendant, as to the other parties having renounced or refused to act. The court refused to make any decree in the absence of the co-executors. *Lane* v. *Young*, 17 Gr. 100.

Insured—*Personal Representative—Claim to Insurance Moneys.*]—A life policy was assigned absolutely to one F., who afterwards left the country. The insured died insolvent, and no one administered to his estate. The plaintiffs claimed the insurance money, alleging that the assignment had been made in trust for them, to secure a larger sum owing to them by the assignor; and having filed a bill to compel payment by the company to them, they moved under the G. O. No. 30 (June, 1853), that they might be at liberty to proceed without a personal representative to the estate of the insured; but the court held the case was not within the order. *Toronto Savings Bank* v. *Canada Life Assurance Co.*, 13 Gr. 171.

Intestate — *Personal Representative—Distribution of Estate.*] — A., domiciled in Scotland, died there intestate, leaving personal property. Three of the next of kin, a brother and two sisters, concurred in appointing an agent in Scotland to wind up the estate and transmit an account to them therefor. The agent did so, and transmitted to the brother some money and personal chattels as all that remained after paying the intestate's debts and funeral expenses. The brother paid the sisters their shares of the money, but kept all the chattels. In a suit by the sisters for a division of these, an objection taken to the absence of any personal representative of deceased in this country, was overruled. *Sutherland* v. *Ross*, 13 Gr. 507.

Mortgage — *Personal Representative of Mortgagor's Husband.*] — Where several tenants in common, and the husband of one of them, in order to secure a debt due by another of them, executed a mortgage which conveyed a life estate only to the mortgagee, and on default in paying the mortgage money, the mortgagee had sued and obtained judgment and execution against all the mortgagors for the amount of the debt, and under the execution so obtained had sold their reversion, and the mortgage was thereby satisfied; but the purchaser went into possession during the life of the mortgagee:—Held, that the personal representative of the husband was a necessary party to a suit by the mortgagors for a reconveyance of the mortgagee's life estate and an account of the rents and profits. *Nelson* v. *Robertson*, 1 Gr. 530.

Partner—*Personal Representative.*]—One of several joint contractors having died during the progress of the work contracted for, and a bill being afterwards filed by the survivors to enforce a claim under the contract:—Held, that the personal representatives of the deceased partner should have been made parties; the rules respecting the rights of surviving partners to sue alone not applying to suits in equity. *Sykes* v. *Brockville and Ottawa R. W. Co.*, 9 Gr. 9.

Where a suit was brought by a surviving partner against a person entitled to the equity of redemption in certain railway stocks and bonds, for the purpose of realizing the amount due on the mortgage, it was held to be unnecessary to make the personal representatives of the deceased partner parties. The last case not followed. *Bolckow* v. *Foster*, 24 Gr. 333.

——— *Real or Personal Representative.*]—Where the mortgage debt is taken in the name of one partner to secure a partnership debt, and a bill is filed to enforce the security, the representatives real or personal of a deceased partner are not necessary parties. *Stephens* v. *Simpson*, 12 Gr. 493.

Personal Representative ad Litem.]—By order No. 30 of 1853, the court may proceed without any personal representative of a deceased person where none has been appointed, or may appoint some person to represent the estate for the purpose of the suit. This does not apply to cases where parties have a beneficial or substantial interest, but only to cases of mere formal parties. *Sherwood* v. *Freeland*, 6 Gr. 305.

[But see con. rule (1897) 194].

Purchaser of Land — *Specific Performance.*]—Quære, where it is clear that a purchaser of real estate has paid all his purchase money, whether it is necessary, in a suit for specific performance against the heirs-at-law of the vendor, to make the personal representatives parties to the bill therefor. In such a case it would seem sufficient to add the personal representatives as parties in the master's office. *Addaman* v. *Stout*, 13 Gr. 632.

Testator — *Personal Representative—Account.*]—Where the will had not been proved, a bill filed for an account against persons said to be in possession of the assets, was dismissed on the ground that the personal representative was a necessary party. *Zimmerman* v. *O'Reilly*, 14 Gr. 646.

——— *Personal Representative — Charge under Will.*]—Where a testator devised his real and personal estate to A., subject to a charge of $200 in favour of B., and A., after the testator's death, mortgaged the real estate to B. to secure a further sum, a bill by B. for payment of the two sums, praying in default a foreclosure or sale, was held not to be multifarious. In such a case the personal representative of the testator was held to be a necessary party; and an allegation that the defendant had been appointed executor by the will was held insufficient, in the absence of any allegation that he had proved the will or had acted as executor. *Kelly* v. *Ardell*, 11 Gr. 579.

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6. *Heirs-at-law, Next of Kin, and Persons Interested under Wills.*

Devisees—*Dower—Devolution of Estates Act.*]—Since the Devolution of Estates Act,

R. S. O. 1887 c. 108, s. 4, devisees are not necessary parties to an action for dower. *Malone* v. *Malone*, 17 O. R. 101.

Mortgage Actions.]—See MORTGAGE.

Trustee and Cestui que Trust.] — A bill having been filed by the assignee of the right to certain lands against the trustee thereof, without making the heir of the assignor a party, and the trustee having set up a defence impeaching the assignment, and insisting that such heir was the party entitled to the conveyance, the court, at the hearing, ordered the cause to stand over, with liberty to amend by adding the heir as a party defendant. *Miller* v. *Ostrander*, 12 Gr. 349.

Vendor and Purchaser.]—Where a vendee, before obtaining a conveyance, assigned to A. half of the land purchased, and to B. the other half; and the vendor afterwards executed a conveyance to each, intending to convey to A. and B. their respective portions, but by a mistake the conveyance to A. comprised B.'s land and did not comprise A.'s own, nor did the conveyance to B. comprise A.'s land; but each took and kept possession of the land actually intended for him:—Held, that to a bill afterwards filed by B. against A. for a conveyance of B.'s land to him, the heir of the original vendor, in whom the legal estate in A.'s land was still vested, was a necessary party. *Rowsell* v. *Hayden*, 2 Gr. 557.

Will — *Action to Annul.*]—See *Currie* v. *Currie*, 24 S. C. R. 712.

——— *Action to Establish.*]—The plaintiffs propounded a will in a surrogate court, under which they took the whole estate, and were named as executors. The defendant, who was one of several next of kin, all having an equal interest if the will was invalid, contested its validity, and the case was removed into the high court. The other next of kin also disputed the will, but were not acting in concert with the defendant. Upon an objection taken by the defendant at the trial:—Held, that the other next of kin should be made parties; and the trial was adjourned for that purpose, it appearing that they could conveniently be added. *Cornell* v. *Smith*, 14 P. R. 275.

In an action to establish a will where the execution is impeached on the ground of undue influence, all parties interested should be made parties to the action; rule 319 (con. rule, 1897, 202) being confined to cases where some special reason exists for not bringing all proper parties before the court. *Gunn* v. *Cor*son, 11 C. L. T. Occ. N. 47.

——— *Beneficiaries—Married Woman.*]—Where a house and land, the separate property of a married woman, were sold, and the proceeds taken and retained by her husband, who had never accounted for them:—Held, in an action on a promissory note of the wife, twenty-six years after, that the husband remained a trustee for his wife of the proceeds, and the wife's claim constituted separate estate. Semble, that where, in such an action, the plaintiff claims that the married woman is entitled to separate estate under a certain will, the court will determine the point without requiring the other beneficiaries under the will to be added as parties. *Briggs* v. *Willson*, 24 A. R. 521.

——— *Decease of Heir-at-law—Revivor.*]—The rule that all parties interested in the subject matter of a suit must be before the court, should only be relaxed, under con. order 57, where the interests of justice manifestly require it. A suit was brought to set aside a will, and the persons interested under the will, as well as those interested as next of kin or heir-at-law in the event of the will being set aside, were made parties. The defendant M. S., one of the heirs-at-law, died subsequently to the institution of the suit:—Held, that the suit should be revived against the representatives of M. S.; and that, although their interest was represented by other parties to the suit, con. order 57 did not apply, as they might afterwards bring another suit to impeach the same will in case this suit failed, and no sufficient reason was given to justify the suit being proceeded with in their absence. *Quantz* v. *Smelzer*, 6 P. R. 228.

——— *Person to Whom Legacy Paid.*]—A testator gave legacies to three grandchildren, to be paid at majority or marriage, and provided: "In case of the death of any one of my grandchildren, the bequests . . . shall be divided among and go to the survivor or survivors of them, share and share alike." All three survived the testator, but two died before marriage or majority, and the executor paid all three legacies to the survivor. The plaintiff, the personal representative of the grandchild who was the second to die, brought this action against the executor to recover one-half of the legacy of the grandchild who died first:—Held, that, as a determination of the proper construction of the will was necessary to entitle the plaintiff to succeed, it was not an improper exercise of discretion to require the surviving grandchild, or his representative, to be added as a party, so as to prevent an adjudication being had as to his rights under the will, behind his back, and to have the question decided in one action. *Clifton* v. *Crawford*, 18 P. R. 316.

——— *Persons Interested under—Account.*]—See *Dorion* v. *Dorion*, 20 S. C. R. 430.

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7. *Husband and Wife.*

Fraudulent Conveyance to Husband.]—The inchoate right of dower at law obtained by a wife in land conveyed to her husband makes her a proper party defendant to a suit to set aside a conveyance made to her husband by fraud in which the wife is alleged to have assisted. *McFarland* v. *McFarland*, 9 P. R. 73.

Fraudulent Conveyance to Wife.]—In a proceeding against a married woman to obtain a conveyance of property vested in her, it is not necessary to join her husband as a party. Where, therefore, a trader in contemplation of insolvency had purchased land, the conveyance of which he took in his wife's name, with the fraudulent design of withdrawing part of his estate from his creditors, and thereupon a bill was filed by the official assignee for the purpose of obtaining a conveyance or sale of property, to which the husband was made a party defendant, the court allowed a demurrer thereto by the husband on the ground that he was not a necessary party. *Boustead* v. *Whitmore*, 22 Gr. 222.

Fraudulent Mortgage by Wife.]—To a bill against a married woman to set aside a mortgage made to her, on the ground that the same was fraudulent as against creditors, the husband was made a party defendant:—Held, on demurrer, that since the passing of the Married Women's Property Act, 1872, the husband was not a necessary or proper party. *McFarlane* v. *Murphy*, 21 Gr. 80.

Injunction in Respect of Wife's Property.]—See *Hathaway* v. *Doig*, 6 A. R. 264.

Separate Estate of Wife.]—In suits by a married woman respecting her separate property, she must sue separately from her husband (by her next friend), and must make her husband a defendant, as otherwise the proceeding is looked upon as exclusively the suit of the husband, and would not be conclusive on the wife or those claiming under her. *Houlding* v. *Poole*, 1 Gr. 206.

Title to Land of Wife—*Action to Remove Cloud.*]—Action to remove a cloud from the title to certain land of the plaintiff, a married woman, whose husband when in embarrassed circumstances had bought the land and taken a conveyance in her name. The plaintiff had no separate estate, and her husband was not a person of substance. There was no trust between the husband and wife:—Held, that, although suing alone and without separate estate, a married woman is not required to give security for costs. The only person who could be plaintiff on the title was the wife, and her husband could not be joined as a necessary or even a proper party. *McKay* v. *Baker*, 12 P. R. 341.

Tort against Wife.]—A married woman may bring an action of libel in her own name without joining her husband as plaintiff. The omission of the words "either in contract or in tort or otherwise," found in s. 2 (2) of the Married Woman's Property Act, 1884, from s. 3 (2), R. S. O. 1887 c. 132, does not limit the legal effect and operation of that section. *Spahr* v. *Bean*, 18 O. R. 70.

Tort Committed by Wife.]—Under R. S. O. 1877 c. 125, in an action for a tort committed by a wife during coverture the husband is not a proper party, but the wife must be sued alone. *Amer* v. *Rogers*, 31 C. P. 195.

Action against a husband and wife alleged to have been married before 1884, for a tort committed by the wife:—Held, on demurrer, that the husband was properly joined as a party. Amer v. Rogers, 31 C. P. 195, and Seroka v. Kattenburg, 17 Q. B. D. 177, considered. *Lee* v. *Hopkins*, 20 O. R. 666.

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8. *Infants.*

Dower — *Will—Beneficiaries.*]—Where a testator devised land to A. for life or till marriage, and after A.'s decease or marriage to the testator's executors, in trust to sell the same and apply the proceeds for the benefit of infant children of the testator, and in payment of certain legacies:—Held, that the children were not necessary parties to a bill by the testator's widow for dower, and the plaintiff was ordered to pay them their costs. *Craig* v. *Templeton*, 8 Gr. 483.

Partition—*Infants out of Jurisdiction.*]—Where in a bill for partition it was stated that certain infants residing with or near their father, out of the jurisdiction of the court, not parties, were interested in the lands sought to be partitioned, their father being a party defendant, a demurrer for want of parties was allowed. *Tryon* v. *Peer*, 13 Gr. 311.

See Kirkpatrick v. *Fouquette*, 4 Gr. 549.

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9. *Insolvent and Assignee.*

Conspiracy — *Account—Partnership.*]—In an action for damages for a conspiracy in pursuance of which the defendants, as alleged, fraudulently withdrew moneys from the assets of a firm of which the plaintiff was a member:—Held, reversing the decision in 18 P. R. 76, that refusing the plaintiff leave to amend by adding the assignee of the firm for the benefit of creditors as a party and by claiming an account of the moneys withdrawn by the defendants, was a proper exercise of discretion by the trial Judge which ought not to have been interfered with by a divisional court. *Smith* v. *Boyd*, 18 P. R. 296.

Deed of Composition — *Action to Vacate.*]—Where a bill was filed by a creditor to vacate a deed of composition and discharge, where the discharge had been obtained by a fraudulent concealment of assets:—Held, that the assignee in insolvency was not a necessary party. *McGee* v. *Campbell*, 2 O. R. 130.

Preferential Arrangement with Creditor—*Action for Account.*]—An insolvent trader having made an assignment of all his estate for the benefit of his creditors, under R. S. O. 1887 c. 124, his stock-in-trade was purchased by his wife from the assignee, the defendants, who were creditors of his, becoming responsible to the assignee for payment of the purchase money, and, by a secret arrangement made beforehand, receiving security from the wife upon the goods purchased by her, not only for the amount for which they had become responsible, but also for the full amount of their claims as creditors of the husband:—Held, that the assignee was a necessary party to an action by another creditor for an account. *Segsworth* v. *Anderson*, 23 O. R. 573.

Preferential Transfer — *Action to Set aside.*]—The debtor is not a proper party to an action by his assignee against a creditor to set aside a preferential transfer. *Beattie* v. *Wenger*, 24 A. R. 72.

Refusal of Creditors to Accept Assignment — *Action by Insolvent.*]—An assignment for the benefit of creditors is revocable until the creditors either execute or otherwise assent to it. Where creditors refused to accept the benefit of an assignment under R. S. O. 1887 c. 124, and the assignor was notified of such refusal and that the assignment had not been registered, an action for damages was properly brought in the name of the assignor against a mortgagee of his stock in trade who sold the goods in an improper manner. *Rennie* v. *Block*, 26 S. C. R. 356.

Transactions before Insolvency—*Discovery.*]—An insolvent who has made an assignment under the statute is not a proper party to a bill in respect of transactions occurring before his insolvency, notwithstanding

that the bill seeks to obtain information of facts which are unknown to any one other than the insolvent; although if it were not shewn that he had been engaged in fraudulent transactions whereby he had acquired property, it would seem he might be made a party; and that, although the property so acquired had, by the operation of law, been transferred to his assignee. Under no circumstances is it proper to make an insolvent a defendant for the purpose of discovery only. *Kerr* v. *Read*, 22 Gr. 529.

See McKenzie v. *McDonnel*, 15 Gr. 442; *Garrow* v. *McDonald*, 20 Gr. 122; *Johnson* v. *Montreal and City of Ottawa Junction R. W. Co.*, 22 Gr. 290; *Kitching* v. *Hicks*, 9 P. R. 518; *Wylie* v. *McKay*, 20 Gr. 421; *Thompson* v. *Dodd*, 26 Gr. 381.

See, also, *ante* I. 2 (d), II. 4.

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10. *Mortgagor and Mortgagee.*

(a) *Mortgagee.*

Administration — *Mortgagee of Reversion.*]—See *Cowan* v. *Allen*, 23 A. R. 457, 26 S. C. R. 292.

Compensation for Land Taken.]—The land in respect of which the claim was made was mortgaged:—Held, that the mortgagee was not a necessary party, the proceedings not being for compensation for land taken, but as a defence of and protection to property. As, however, his security might be prejudiced or diminished by the washing away of the land, and he might be able to assert some right to the compensation, there could be no objection to his being joined; but, as the compensation was only some $50, the court would not require him to be made a party. *In re Nickle and Town of Walkerton*, 11 O. R. 433.

Damages for Injury to Land.]—It was contended on the part of the defendants that the mortgagees of the property should be made parties:—Held, that O. J. Act, s. 17, s.-s. 5, enables a mortgagor entitled to the possession of land, as to which the mortgagee has given no notice of his intention to take possession, to sue to prevent, or recover damages in respect of, any trespass or other wrong relative thereto, in his own name only, and that the objection for want of parties ought not to prevail. *Platt* v. *Grand Trunk R. W. Co.*, 12 O. R. 119.

Realization of Charge on Land.]—In an action for arrears of an annuity and to declare the same a charge on land, mortgagees of the land whose mortgage was subsequent to the will creating the charge and subject to the terms of it, were made defendants by the writ of summons; but, on their own application immediately after delivery of statement of claim, their name was struck out with costs. *Nelson* v. *Cochrane*, 13 P. R. 76.

Right of Way.] — Where an action is brought to establish a right of way over lands adjoining those of which the plaintiff is the owner, subject to a mortgage, and, having regard to the value of the property, the amount of the mortgage, and other circumstances, the lands may be said to be really the mortgagee's, and the action substantially his, the defendant is entitled to security for costs, if the plaintiff be without substance: — Held, in chambers, that the mortgagee was not a necessary party to the action. Semble, by a divisional court, that he was. *Gordon* v. *Armstrong*, 16 P. R. 432.

Trespass.]—See *Brookfield* v. *Brown*, 22 S. C. R. 398.

See Polson v. *Degeer*, 12 O. R. 275; *Macdonald* v. *McCall*, 12 A. R. 593; *McMullen* v. *Free*, 13 O. R. 57; *McVean* v. *Tiffin*, 13 A. R. 1.

(b) *Mortgagor.*

Fire Insurance—*Transferee of Note.*]—The mortgagor covenanted to insure, and insured accordingly. The houses having been burned, he attended, with the mortgagee, at the office of the insurance company, and signed an order, drawn up by the secretary of the company, to pay the insurance money to the mortgagee, upon an oral agreement on his part to expend it in rebuilding. The mortgagee having withdrawn from this agreement, the mortgagor attended before the board of directors, and obtained from them the usual promissory note of the company at three months, for the amount of the policy, which he transferred for value to a third party, who was aware of the claim of the mortgagee. The mortgagee thereupon filed a bill against the mortgagor and the company, claiming the insurance money to the extent of the amount due on his mortgage. The court made a decree for payment, and ordered the company to pay plaintiff the costs, but dismissed the bill as against the mortgagor with costs, he being an unnecessary party:—Held, that the person to whom the note of the company was transferred was not a necessary party. *Watt* v. *Gore District Mutual Ins. Co.*, 8 Gr. 523.

Injunction.]—The plaintiff filed his bill against M. and B., claiming to be entitled to certain mortgage moneys as against B., which were payable by M. The only contest being between the plaintiff and B., an injunction was prayed to restrain M. from paying and B. from receiving them, and M. was made a party solely for this purpose:—Held, that M. was a proper party to the suit, and a demurrer by him for multifariousness and want of equity was overruled. *McKenzie* v. *Brown*, 15 Gr. 399.

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11. *Municipal Corporations and Officers.*

Debentures — *Railway Aid—Township—County.*]—The county of Simcoe had, under a by-law, passed in pursuance of 35 Vict. c. 66, s. 15, issued debentures to the amount of $200,000 to aid in the construction of the Hamilton and North Western Railway (see 20 Gr. 211), but, by reason of the neglect of the company to commence the construction of the railway within the time limited, their charter had become forfeited, and the by-law under which the debentures had been issued had therefore become void and of no effect, whereupon one of the townships which had joined in the petition for the passing of the by-law filed a bill against the railway company, the county corporation, and trustees of

the debentures, seeking to restrain the trustees from selling or parting with the debentures and to have the same handed back to the county:—Held, on demurrer by the county, (1) that the township had no interest to maintain such a suit, and (2) that the corporation of the county was the proper party to institute proceedings. *West Gwillimbury* v. *Hamilton and North Western R. W. Co.*, 23 Gr. 383.

——— *Warden.*]—Where a bill was filed to restrain the issue of debentures by a municipal council, but did not allege that the warden was individually acting in the matter, or taking any step otherwise than as the officer of the council, and under the by-law, the court on demurrer held that he was not a necessary or proper party to the suit. *West Gwillimbury* v. *Simcoe*, 21 Gr. 68.

——— *Water Commissioners.*]—Where a bill was filed to restrain one of the chartered banks of the Province from purchasing from the water commissioners of the city of Toronto $900,000 of debentures issued by the city:—Held, that the water commissioners were necessary parties to the suit. *Jones* v. *Imperial Bank of Canada*, 23 Gr. 262.

Inhabitants—*Suit against Mayor.*]—A bill will lie by some of the inhabitants of a municipality alleging an illegal application of the funds by the mayor, which the council refused to interfere with. *Paterson* v. *Bowes*, 4 Gr. 170.

Municipal Councillors—*Collusion with Treasurer—Ratepayers.*]—An action by two ratepayers on behalf of themselves and all other ratepayers of A. against all the members of the municipal council of A., charging that the defendants, acting fraudulently and in collusion with the treasurer of A., continued him in office after it had come to their knowledge that he was a defaulter, and allowed him to receive further moneys, causing loss to the municipality:—Held, that the law attaches the liability of trustees to the municipal councillors and that it was sufficient to charge them as such without using the word "trustees;" that the action was one in the former exclusive jurisdiction of the court of chancery, and a jury notice was therefore improper. Semble, that the municipal corporation should have been made a party to the action, and the action should have been on behalf of all ratepayers, except the defendants. *Morrow* v. *Connor*, 11 P. R. 423.

Schools—*Treasurer of Township.*]—To a bill by a rural school section corporation to compel the municipality to make good money paid by the municipality to a person alleged not to be the duly appointed officer of the corporation, the treasurer of the municipality is not a proper party. *Hamilton School Trustees* v. *Neil*, 28 Gr. 408.

Street Railway—*Statutory Restrictions—Information — Contract—Action to Enforce.*]—An Act having been passed authorizing the construction of a street railway, confirming a covenant entered into for the purpose with a municipal corporation, and providing that the rails should be laid flush with the streets, &c.:—Held, that to enforce the contract against the company, a suit by the municipal corporation, the other party to the contract, was necessary; that an information by the attorney-general to enforce the statutory restrictions was proper; but that the municipal corporation was a necessary party to the information. *Attorney-General* v. *Toronto Street R. W. Co.*, 14 Gr. 673.

Tax Sale—*Suit to Set aside.*]—A municipality in proceeding to a sale of land for taxes is in the position of a trustee; and if it is afterwards sought to impeach the sale for any irregularity, and to make the municipality answerable to the purchaser for the purchase money paid, or the costs of the suit, the municipality must be made a party to the cause. *Ford* v. *Proudfoot*, 9 Gr. 478.

To a suit by an owner to set aside a sale for taxes, the plaintiff offering to repay the purchase money with interest, the corporation of the county is not a necessary party. *Smith* v. *Redford*, 12 Gr. 316.

The corporation of the local municipality is not a proper party to a bill impeaching a tax sale. *Mills* v. *McKay*, 14 Gr. 692.

A municipal officer charged with some irregularities in the performance of his duty, but not guilty of any fraud or intentional wrong, is an improper party to a bill to set aside a tax sale on the ground of such irregularities. *Mills* v. *McKay*, 15 Gr. 192.

In an action for the cancellation of a tax deed:—Held, that the fact that the defendants might have a remedy over against the municipal corporation which had sold the land for taxes, did not make the corporation a necessary party to the action. *Charlton* v. *Watson*, 4 O. R. 489.

Town Trust—*Mayor.*]—The mayor of Cobourg was ex officio one of the commissioners of the Cobourg town trust when certain acts complained of were done, but ceased to be such before the institution of a suit by a party injured by such acts to be relieved in respect thereof:—Held, notwithstanding, that he was a proper party to the bill. *Standly* v. *Perry*, 23 Gr. 507.

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12. *Partners.*

Continuing Partners — *Insolvency.*]—Prior to the general orders of 1853 (rule 8, order 6,) it would have been necessary to make the continuing partners parties to such a bill as in this case unless it were shewn that they were insolvent, in which case that would afford a sufficient reason for not making them parties. *Harper* v. *Knowlson*, 2 E. & A. 253.

Corporators — *Nominal Corporation.*]—*See Gildersleeve* v. *Balfour*, 15 P. R. 283; *Seiffert* v. *Irving*, 15 O. R. 173.

Dissolution—*Action against Firm.*]—The cause of action arose before, and the writ of summons was issued after, the dissolution of the defendants' firm:—Held, that the defendants were properly sued in their firm name. *Wilson* v. *Roger McLay & Co.*, 10 P. R. 355.

Release of Interest in Partnership—*Action to Set aside—Surviving Partners—Executor of Deceased Partner.*]—D. B. and W.

D. B. were partners in a certain joint stock savings bank, under articles which provided that the partnership should last during their joint lives, and that they should share the profits and expenses. D. B. died in April, 1874, leaving a will, whereby he bequeathed to the plaintiff, the son of W. D. B., the residue of his property, including his interest in the bank, and appointed L. his executor. In May, 1874, L. gave W. D. B. a general power of attorney to act for him. In July, 1879, the plaintiff came of age, and soon after demanded of W. D. B. an account of the assets of the partnership and a settlement with him; and in November, 1880, W. D. B. gave the plaintiff a cheque for $8,000, handing him at the same time a document for signature, which purported to be a receipt for the said sum in full of all claims on the estate of D. B., and the plaintiff signed it. He now brought this action against W. D. B. and L., alleging that after the death of D. B., W. D. B., with L.'s connivance, made certain arrangements for the winding-up of the partnership, and that large portions of the assets of D. B. and of the bank had been realized, and profits made, and converted by W. D. B. to his own use, and claiming to have the said release declared void, and an account of the estate of D. B., and of the partnership, and to have the same wound up, and payment of the share to which he was entitled:—Held, that the suit in its present shape was maintainable as brought, for, though the general rule is, that persons who have possessed themselves of the property of the deceased, or are debtors to the estate generally, cannot be made parties to a suit against the executor, yet this rule is relaxed in the case of surviving partners of the deceased, whom it is allowed to make parties with the executor in order that the plaintiff may have an account of the personal estate entire. At all events, such an action may be supported in all cases where the relationship between the executors and the surviving partners is such as to present a substantial impediment in the prosecution by the executors of the rights of the parties interested in the estate against the surviving partners, as seemed the case here, although it did not appear that there had been actual collusion between L. and W. B. D. *Burn* v. *Burn*, 8 O. R. 237.

Taking Accounts of Partnership—*Statute of Limitations.*]—Where a member of a partnership, whose accounts the master was directed to take, was by order made a party in the master's office, but on subsequent inquiry it appeared that all liability on his part was barred by the Statute of Limitations, the master on the application of the party added discharged his former order, holding that the applicant was not a necessary or proper party, and that all partnership accounts required to be taken could be taken in his absence. *Kline* v. *Kline*, 3 Ch. Ch. 161.

Winding-up of Partnership—*Sale of Partner's Interest.*]—In a bill to liquidate the joint liabilities and wind up the affairs of a partnership, a partner whose interest has been sold under execution is a necessary party. *Partridge* v. *McIntosh*, 1 Gr. 50.

See Cowan v. *McIntyre*, 19 U. C. R. 607; *Paterson* v. *Holland*, 7 Gr. 563; *Dowding* v. *Eastwood*, 1 C. L. Ch. 63; *Hopper* v. *Harrison*, 28 Gr. 22; *Thomas* v. *Torrance*, 1 Ch. Ch. 46.

See, also, *ante* 5.

13. *Persons Jointly Liable.*

(*See*, also, *ante* 12.)

Joint Contractors—*Absence from Jurisdiction.*]—On a joint contract by three, all must be sued, if within the jurisdiction. If one is without, the other two must be sued. One alone cannot be sued if there are two remaining within the jurisdiction, because all three cannot be sued. *Corbett* v. *Calvin*, 4 U. C. R. 123.

Joint Debtors—*Partners.*]—See *Dueber Watch Case Mfg. Co.* v. *Taggart*, 26 A. R. 295, 30 S. C. R. 373; *Millelberger* v. *Merritt*, 1 U. C. R. 330.

Joint Duty.]—Semble, that when the tort alleged is the non-performance of a joint duty, e.g., to repair a bridge, if the joint duty be not proved, the plaintiff must fail in toto, and cannot recover against the defendant on whom alone the duty is imposed. *Woods* v. *County of Wentworth*, 6 C. P. 101.

Proof of Liability.]—Action by a joint stock road company, incorporated under 12 Vict. c. 84, against stage proprietors, for tolls. The plaintiffs proved that defendants had used the road with their stage coaches, and had paid tolls; that in former negotiations for settling this claim they had acted as recognizing a joint liability; that the advertisements put out by them were of a joint concern; and that their horses were employed over the whole route, though among themselves the line was divided into portions, and the fares distributed accordingly:—Held, that the defendants' joint liability was sufficiently shewn. *Paris and Dundas Road Co.* v. *Weeks*, 11 U. C. R. 56.

See Head v. *Bowman*, 9 P. R. 12; *Smith* v. *Bogart*, 10 Gr. 560; *Chaput* v. *Robert*, 14 A. R. 354; *Judge* v. *Thomson*, 29 U. C. R. 523; *Mooney* v. *Joyce*, 17 P. R. 241; *Toronto and Hamilton Navigation Co.* v. *Silcox*, 12 P. R. 622; *Aikins* v. *Dominion Live Stock Assn.*, 17 P. R. 303; *Atlantic and Pacific Telegraph Co.* v. *Dominion Telegraph Co.*, 27 Gr. 592; *Kerr* v. *Hereford*, 17 U. C. R. 158; *Garrow* v. *McDonald*, 20 Gr. 122.

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14. *Trustee and Cestui que Trust.*

Avoidance of Trust Deed—*Benefit of Creditors.*]—Where a bill is filed to impeach a conveyance to trustees for the benefit of creditors, whether such assignment is or is not in insolvency, the trustees are necessary parties. A demurrer was therefore allowed, because one G., to whom it was alleged in the bill that M. had conveyed his estate and effects for the benefit of his creditors, was not made a party. And quære, whether the bill was not also demurrable on the ground that it did not distinctly shew the relation of trustee and cestuis que trust between M. and his creditors to have been created by the conveyance, to G., or that such conveyance was anything more than a deed of management. *Wylie* v. *McKay*, 20 Gr. 421.

———*Partnership.*]—To a bill filed by one co-partner against another seeking to set aside a marriage settlement, as having been made by the settlor at a time when he was

insolvent, the trustees and cestuis que trust of the settlement are necessary parties, as they are entitled to have the accounts of the partnership taken, and assets thereof applied in exoneration of the settled lands. *Thomas* v. *Torrance*, 1 Ch. Ch. 46.

——— *Representation.*]—The court has jurisdiction to decree a trust deed void, in the absence of the cestuis que trust, the trustees sufficiently representing them under order 6, s. 2, rule 7 (1858); and it is in the exercise of the discretion of the court under that rule, that in such cases the cestuis que trust, or some of them, are required to be made parties. *King* v. *Keating*, 12 Gr. 29.

——— *Tenant for Life.*]—Where the tenant for life was trustee, and after the cesser of other estates was to hold the estate for the benefit of the children of P. C.:—Held, that they need not be parties to a bill impeaching the trust deed as fraudulent against creditors. *Thompson* v. *Dodd*, 26 Gr. 381.

Bank—*Liability of Shareholders.*]—The trustees of the bank of Upper Canada were held necessary parties to a bill by creditors to enforce the double liability of shareholders. *Brooke* v. *Bank of Upper Canada*, 17 Gr. 501.

Breach of Trust—*Participant—Devisee of Trustee.*]—Where a trustee commits a breach of trust, a person participating in it is not a necessary party to a suit for the general administration of the trust estate. One devisee of a trustee, against whose estate a suit is brought, sufficiently represents those interested in the estate. *Tiffany* v. *Thomson*, 9 Gr. 244.

——— *Personal Representative.*]—Where a bill has been filed against an alleged trustee for breach of trust, which, it was stated in the bill, consisted of the sale and receipt by him of the proceeds of certain real estate, which, by the terms of the trust, he was to sell absolutely, and hold the proceeds on the trusts specified:—Held, that such a bill could only be sustained by the personal representative of the cestui que trust. A demurrer for want of equity to a bill by the next of kin was in such a case allowed with costs. *Allan* v. *Gamble*, 3 Ch. Ch. 105.

Destruction of Trust Estate.]—Where a bill seeks the destruction of a trust estate, some or one of the cestuis que trust are necessary parties. *Baker* v. *Trainor*, 15 Gr. 252.

Enforcement of Trust—*Cashier of Bank—Representation.*]—W. undertook to settle the property of his intended wife as her guardians should require. After the marriage the wife's property was all sold, and the proceeds applied to the purposes of his business by W., who subsequently, and while in a state of insolvency, assigned to the cashier of a bank a policy on the life of himself (W.), in trust, to pay certain bills of his in the hands of the bank, and after payment thereof to hold the moneys to be received on the policy for the benefit of his wife and children, but, in the event of W. paying off the bills, to re-assign the policy to him, or as he should appoint. W. having died, the trustee received the insurance money, paid these bills, and claimed a right to apply the surplus in paying off other liabilities of W. to the bank. Upon a bill filed by the widow and children of W. against the trustee:—Held, that the trustee, being the cashier of the bank which had thus received the benefit of the moneys, he sufficiently represented the bank, and it was therefore not necessary to make the institution itself a party to the suit. *Whittemore* v. *Lemoine*, 10 Gr. 125.

Person Beneficially Entitled under Agreement.]—Held, that inasmuch as, if the parents of the plaintiff had brought a suit upon the agreement made by them for her benefit and recovered, they would be trustees of the proceeds for her, the plaintiff might maintain the suit in her own name. *Roberts* v. *Hall*, 1 O. R. 388.

Possession of Trust Estate.]—In a suit by trustees to reduce into possession the trust estate, and in which the existence of the trust estate is called in question by the defendant, the cestuis que trust are necessary parties. *Houlding* v. *Poole*, 1 Gr. 206.

Will—*Trustee under—Renunciation.*]—One of the devisees in trust under a will refused to accept the trust:—Held, that he was not a necessary party plaintiff in an action for rent of the premises devised, although his formal renunciation in writing was not made until after the rent had accrued due. *Hughes* v. *Brooke*, 43 U. C. R. 609.

——— *Trustees under—Representation.*]—Where the whole of the testator's property, real and personal, and the whole control of it, were vested in trustees subject to the trusts declared by the will:—Held, not necessary to make any of the cestuis que trust parties to a suit for the purpose of enforcing a contract of purchase which the testator had entered into during his lifetime. *Delisle* v. *McCaw*, 22 Gr. 254.

The plaintiff was the surviving trustee under the will of one J. B., of certain land, on which was erected a two storey brick house, the westerly wall of which formed the boundary of one L.'s land, immediately adjoining the plaintiff's on the west. L. leased to F., who erected thereon a large brick building, using the plaintiff's westerly wall as a party wall, inserting joists therein, and building thereon so as to raise it two storeys higher, thereby weakening the plaintiff's wall. F. mortgaged to a building society, who, on default, sold to the defendant:—Held, that the plaintiff under the O. J. Act, rule 95, was entitled to maintain an action as representing the estate, without making the cestuis que trust parties. *Brooke* v. *McLean*, 5 O. R. 209.

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15. *Other Persons.*

Arbitrators—*Nomination of—Residence out of Jurisdiction.*]—In a suit to set aside the nomination by the defendants of an arbitrator on behalf of the plaintiffs for irregularity in such nomination:—Held, that the arbitrators being necessary parties and the defendants resident in this country, the arbitrators though resident out of the jurisdiction, were properly made defendants to the bill. *Direct Cable Co.* v. *Dominion Telegraph Co.*, 28 Gr. 648.

Assignee of Purchaser—*Specific Performance—Costs.*]—A purchaser of land

agreed before conveyance to assign his interest. In a suit subsequently brought by the vendor to enforce a specific performance, the assignee was made a party defendant, and a decree was pronounced against him with such costs as were occasioned by making him a party in the event of his co-defendant, the purchaser, failing to pay the general costs of the suit, which were awarded against him. *Dennison* v. *Fuller*, 10 Gr. 498.

Churchwardens — *Change.*]—A bill was filed by churchwardens, and during the progress of the suit the churchwardens were changed at the vestry meeting; the new churchwardens were not made parties. The suit not being brought to a hearing within the time required by the practice; it was held that a notice to dismiss the bill served on the plaintiff's solicitor was regular. Quere, whether it was necessary to make the new churchwardens parties. *McVeeters* v. *Dixon*, 3 Ch. Ch. 84.

Claimant in Issue.]—See *Henderson* v. *Rogers*, 15 P. R. 241.

Claimant of Purchase Money—*Action by Purchaser—Failure of Consideration.*]—The tendency of modern practice is to dispense with parties, where it can be done with safety; therefore, where in certain interpleader proceedings one R. disclaimed any right to the proceeds of a sale under execution, and subsequently obtained possession of the property sold by means of a writ of replevin, but afterwards gave notice to the person holding the money that he claimed the proceeds of the sale, and forbade him paying back the purchase money to the purchaser, whereupon the latter filed a bill seeking to recover back the amount, on the ground of an entire failure of consideration, to which he made R. a defendant, who demurred, as being not a necessary or proper party, the demurrer was allowed with costs, liberty being given to the plaintiff to amend in order to make a better case, if so advised. *McDonald* v. *Reid*, 25 Gr. 139.

Consignor and Consignee.]—See *Hately* v. *Merchants Despatch Co.*, 2 O. R. 385; *Dyment* v. *Northern and North Western R. W. Co.*, 11 O. R. 343.

Debentures—*Person to Whom Issued.*]—A bill being filed by the holder of debentures, issued by the defendants and payable to bearer, to enforce payment of the debentures, the company by answer objected that the person to whom the debentures were issued was a necessary party to the suit, but did not name the person:—Held, that the company must be presumed to know who this person was; that there was no presumption that the plaintiff knew him; and that the person not being named in the answer, the objection could not be insisted on at the hearing. *Woodside* v. *Toronto Street R. W. Co.*, 14 Gr. 369.

Dowress—*Vendor's Lien.*]—Where a suit to enforce by sale a vendor's lien is instituted against the heirs-at-law of the purchaser, the widow of the vendee is a necessary party in respect of her right to dower. *Paine* v. *Chapman*, 7 Gr. 179.

Grantor of Defendant — *Ejectment — Fraud.*]—In an action of ejectment, where the plaintiff claimed title under a conveyance from the father of the defendant in 1885, and the defendant claimed by virtue of possession since 1874, under an oral agreement to purchase made with his father, and the defendant said on his examination that he had paid his father money on account of the purchase, which he had entered in his father's books:—Held, that the father might have been made a party under rule 169, on the ground of his having been a party to a fraud in conveying land to the plaintiff after he had made an agreement with his son. *McMaster* v. *Mason*, 12 P. R. 278.

Incumbrancers.]—See *ante* I. 1.

Insurance Company—*Fire—Action for Negligence — Joining as Co-plaintiffs.*]—See *Wealleans* v. *Canada Southern R. W. Co.*, 21 A. R. 297.

Lessees of Bridge—*Nuisance.*] — To an information alleging that the bridge erected by the International Bridge Company constituted a nuisance, a railway company who had become lessees of the bridge were held to be proper parties. *Attorney-General* v. *International Bridge Co.*, 27 Gr. 37.

Lessees of Railway—*Costs.*]—The lessees of a railway having been made parties to the bill, the court refused relief against them, with costs to be paid by the lessor company. *Cameron* v. *Wellington, Grey, and Bruce R. W. Co.*, 27 Gr. 95.

Mechanics' Liens—*Parties to Action to Enforce.*]—See *Bank of Montreal* v. *Innes*, 3 O. R. 183, 10 A. R. 592; *Oldfield* v. *Barbour*, 12 P. R. 554; *McLean* v. *Tiffin*, 13 A. R. 1; *Horenden* v. *Ellison*, 24 Gr. 448.

Owner of Equity — *Vendor's Lien.*] — Where a purchaser of a mortgaged estate takes the same subject to his vendor's mortgage, and sells to another without paying off said mortgage, he will be compelled to fulfil his undertaking to do so. Thus, A., being the owner in fee of a certain lot of land, mortgaged the same to B., and then sold to C., leaving the mortgage to be paid by C. to B. as the balance of the purchase money. C. then sold to D. without paying the mortgage, and, default having been made, B. sued A. at law on his covenant, whereupon A. filed a bill against C. and D. to pay off their morigage:—Held, that A. as surety for C. had a right to call upon him to pay the mortgage to B. and also his costs of the action at law. Held, also, that D. was a proper party where the vendor sought to enforce his lien on the land. *Joice* v. *Duffy*, 5 L. J. 141.

Owner of Legal Estate—*Way.*]—Since a way of necessity can only pass with the grant of the soil, the owner of the legal estate in the land as to which it is claimed, should be a party to an action claiming such way, and where an equitable owner of the land sued, he was permitted to make the owner a co-plaintiff by amendment at the hearing. *Saylor* v. *Cooper*, 2 O. R. 398.

Owners of Separate Parcels of Land —*Annuity.*]—Where a suit is brought to enforce the payment of an annuity issuing out of several parcels of lands, it is not necessary that all the persons interested in these lands should be made parties; but where this was not done the court directed that the defendants

should be at liberty to proceed by petition to add the persons whom they might consider liable to contribute to the claim of the annuitant; it being more reasonable that the questions involved should be litigated at the expense of the defendants than at the expense of the annuitant. The rule applicable to mortgage cases where the legal estate is in the hands of several parties, does not apply, as there the party seeking to redeem is entitled to a re-conveyance of the whole estate, and in that view the whole estate must be represented. *Miller* v. *Vickers*, 23 Gr. 218.

Person out of Jurisdiction.]—Where a party interested was not before the court, the bill stating him to be out of the jurisdiction, but there was no proof of the fact, the court refused, even with consent, to proceed without such proof. *Michie* v. *Charles*, 1 Gr. 125.

The fact that a person interested in the subject matter of a suit is resident out of the jurisdiction of the court, is not a sufficient reason for not making such absent person a party. *Munro* v. *Munro*, 17 Gr. 205.

Persons Interested under Deed of Assignment.]—See *Guertin* v. *Gosselin*, 27 S. C. R. 514.

Policy-holders—*Mutual Insurance Company — Branch — Representation.*]—Where a right of suit exists in a body of persons too numerous to be all made parties, the court will permit one or more of them to sue on behalf of all, subject to the restriction that the relief prayed is one in which the parties whom the plaintiff professes to represent have all of them an interest identical with that of the plaintiff. But where a mutual insurance company had established three distinct branches, in one of which, the waterworks branch, the plaintiff insured, giving his promissory note or undertaking to pay $168, and the company made an assessment on all notes and threatened suit in the division court for payment of such assessment, whereupon the plaintiff filed a bill "on behalf of himself and the other policy-holders associated with him as hereinafter mentioned," alleging that the company was about to sue him and the other policy-holders in said branch, that large losses had occurred in the company prior to the time of his effecting his insurance, insisting that he and the other policy-holders could be properly assessed only in respect of such losses as had arisen since they entered the company, and praying that the necessary inquiries might be made and accounts taken, alleging that the division courts had not the machinery for that purpose:—Held, that, according to the statements of the bill, the policy-holders in the waterworks branch were not represented in the suit, and a demurrer on that ground filed by the company was allowed with costs. *Thomson* v. *Victoria Mutual Fire Ins. Co.*, 29 Gr. 56.

Principal and Agent.]—The contract in this case having been made between appellant and respondents only, and being a contract of agency apart from any question of ownership, the action was properly brought by appellant in his own name. *Weldon* v. *Vaughan*, 5 S. C. R. 35.

Principal and Surety.]—Where proceedings were taken against sureties without joining their principal:—Held, that the plaintiffs could not proceed against the sureties alone if they required the joinder of the principal in order that they might have their remedy over against him. *Exchange Bank* v. *Springer*, *Exchange Bank* v. *Barnes*, 29 Gr. 270.

Provincial Government—*Railway Aid—Petition of Right.*]—An Act of the Legislature of Canada provided that a railway company should be entitled to 4,000,000 acres of the waste lands of the Crown, on the completion of the road, and a proportionate quantity of such lands on the completion of 20 miles of the road, and on completion of 20 miles the grant of the proportion then due was refused. The company filed a petition of right against the Province of Ontario, when it was alleged that the Province of Ontario had not sufficient lands along the line of railway to make the grant desired:—Held, that this formed no ground for the Province of Ontario insisting that the Province of Quebec should have been made a party. *Canada Central R. W. Co.* v. *The Queen*, 20 Gr. 273.

Purchaser of Land—*Enforcement of Lien.*]—See *Juson* v. *Gardiner*, 11 Gr. 23.

Purchasers of Railway.]—See *Allen* v. *Ontario and Rainy River R. W. Co.*, 29 O. R. 510.

Ratepayer—*Class Action.*]—Where a person suing on behalf of himself and others is disentitled to sue on his own behalf, he cannot do so on behalf of the others interested. *Dillon* v. *Township of Raleigh*, 13 A. R. 53, 14 S. C. R. 739.

Receiver.]—See *McGuin* v. *Fretts*, 13 O. R. 699.

Registrar of Deeds.]—Parties to an action for the removal of an instrument from the register where the registration of such instrument is not authorized by the Registry Act. See *Ontario Industrial Loan and Investment Co.* v. *Lindsey*, 3 O. R. 66.

Relators—*Counterclaim.*]—In an action brought in the name of the Attorney-General upon the relation of certain persons to restrain the defendants from collecting tolls or keeping their toll-gates closed upon their roads, the defendants alleged by way of defence certain wrongful acts of the relators, and by way of counterclaim asked damages against them:—Held, that the relators were not in any sense plaintiffs; and the allegations against them must be struck out. *Attorney-General* v. *Vaughan Road Co.*, 14 P. R. 516.

Remaindermen—*Ratification of Deed—Grantor and Grantee.*]—By a deed of gift from a father to his daughter it was intended to convey a life estate to the daughter with remainder to her issue, but, through the want of skill of the person preparing the deed, the same conveyed the fee simple to the daughter, whose interest was afterwards sold under execution, the sheriff at the time of sale distinctly stating in the presence and hearing of the purchaser that the interest he was selling was only an estate for life of the defendant in the writ. The purchaser afterwards claimed the fee in the lands under the terms

of the deed of gift and conveyance of the sheriff; whereupon, and upwards of fifteen years after the sheriff's sale, a bill was filed by the children of the daughter, seeking to have both the deeds rectified in accordance with the true intention of the grantor, to which the defendant demurred on the ground that the plaintiffs had not shewn any interest in the land:—Held, that the plaintiffs, though volunteers, had such an interest as entitled them to have the deeds rectified. To such a bill it was considered that the grantor, in the deed of gift, was not a necessary party, but that the grantee must be made a party, as she had a right to insist that the deed had been correctly drawn, and the defendant had a right to have her before the court, in order to protect him from another suit. *Calvert v. Linden*, 21 Gr. 470.

Settlor—*Fraudulent Settlement.*]—Where a person in embarrassed circumstances hastened the marriage of his daughter, and made a conveyance of all his real estate to a trustee for the benefit of his daughter and the issue of the intended marriage, the court, upon a bill filed by a judgment creditor against the husband and wife and their infant children, to set aside such settlement, declared the same void as against creditors. To such a bill the settlor is not a necessary party. *Commercial Bank of Canada v. Cooke*, 9 Gr. 524.

Sub-tenants—*Ejectment.*]—In an action by a landlord for possession of the premises, it is not necessary to make sub-tenants in actual possession parties defendant, and a judgment for possession may be given against the tenant under which the sub-tenants must go out. *Incorporated Synod of Toronto v. Fiske*, 29 O. R. 738.

Subsequent Incumbrancers—*Action to Realize Charge on Land—Master's Office.*] —See *Rutherford* v. *Rutherford*, 17 P. R. 228.

Superintendent of Public Building—*Nuisance.*]—To a bill filed for an injunction to restrain the commissioner of public works from allowing a drain from the London lunatic asylum, which was a nuisance, to continue to flow across the plaintiff's premises:—Held, that the medical superintendent of the asylum was not a proper party. *Hiscox* v. *Lander*, 24 Gr. 250.

Tenant in Possession—*Dower.*]—To a bill for equitable dower, the tenant in actual possession of the premises may be a proper though not a necessary party. *McIntosh* v. *Wood*, 15 Gr. 92.

Water Commissioners — *Injunction — Bank.*]—Where a bill was filed to restrain one of the chartered banks of the Province from purchasing from the water commissioners of a city, debentures issued by the city:—Held, that the water commissioners were necessary parties to the suit. *Jones* v. *Imperial Bank of Canada*, 23 Gr. 262.

III. PARTIES TO APPEALS.

County Court Appeal — *Claimant.*]—Under s. 42 of the County Courts Act, R. S. O. 1887 c. 47, an appeal lies to the court of appeal from the order or judgment of a county court disposing of an issue directed by an order made in an action in such county court upon a garnishing application; and the claimant, the plaintiff in the issue, though not a party to the original action, is a "party" within the meaning of s. 42, and may be an appellant. Sato v. Hubbard, 6 A. R. 546, distinguished. The court will not ordinarily quash or dismiss an appeal because the order or judgment appealed from has not been drawn up. *Henderson* v. *Rogers*, 15 P. R. 241.

Cross-appeal—*Third Parties.*]—An order was made by a local Judge, upon the ex parte application of the defendant, allowing him to serve a third party notice, but, upon the application of the third parties so called upon, this order was set aside by an order of the master in chambers, which was affirmed by a Judge at chambers and by a divisional court upon the appeal of the defendant. That court, however, at the same time made an order staying the proceedings until the plaintiff should add the third parties as defendants, and from this order the plaintiffs appealed to the court of appeal, not making the third parties respondents. The defendant, however, served notice of cross-appeal upon the plaintiffs and the third parties, by which he asked that the order made by the local Judge might be restored; and the third parties moved to strike out this notice:—Held, that the word "parties" in rule 821 means persons who are parties to the action or proceeding in question on the appeal; and that what the defendant sought by the cross-appeal was not a variation of the order appealed from, which is what rule 821 speaks of, but the substitution of one of an entirely different character; and the notice was struck out. *Begg* v. *Ellison*, 14 P. R. 267.

Quebec Appeal—*Judgment of Distribution—Incidental Proceedings—Persons Interested.*]—See *Guertin* v. *Gosselin*, 27 S. C. R. 514.

Rehearing — *Dismissed Party.*] — Where a cause is re-heard at the instance of some of the defendants against whom relief has been granted, a defendant against whom a bill was dismissed at the original hearing must be before the court on the re-hearing. *Hiscox* v. *Lander*, 24 Gr. 250.

Third Party—"*Party Affected by the Appeal*"—*Notices.*] — The defendants, alleging that another person was liable to indemnify them against the plaintiff's claim, caused him to be served with a third party notice under rule 209. The third party appeared, and an order was made under rule 213 that he should be at liberty to appear at the trial and take such part as the Judge should direct and be bound by the result; that the question of his liability to indemnify the defendants should be tried after the trial of the action; and that pleadings should be delivered between the defendants and him. The Judge who tried the case dismissed the action, but held the third party bound to indemnify the defendants against any costs they incurred in the action. The third party appealed from this judgment to a divisional court, and the plaintiff appealed to the court of appeal:—Held, that the third party was a "party affected by the appeal" of the plaintiff within the meaning of rules 799 (2) and 811, and it was the plaintiff's duty to give the notices

therein provided for; but there his duty as regards the third party ended, unless he was in a position to demand some relief against him; and the third party was not by the order made before the trial placed in the position of a defendant so as to entitle the plaintiff to relief against him. But, as the defendants, for their own convenience, brought the third party into the action, and did not procure him to be made a defendant, they should, if they desired to retain him before the court for the purposes of the plaintiff's appeal, do whatever might be necessary to that end beyond what was required of the plaintiff under rules 799 and 811. *Eckensweiler* v. *Coyle*, 18 P. R. 423.

See Macdonald v. *City of Toronto*, 18 P. R. 17 (*ante* I., 2); *Ewing* v. *City of Toronto*, 18 P. R. 137, *post* V.

IV. Parties to Particular Proceedings.

Ejectment.]—See Ejectment.

Interpleader Issue.] — See Interpleader.

Mechanics' Liens.]—See Lien.

Mortgage Actions.]—See Mortgage.

V. Third Parties.

Close of Pleadings—*Reopening—Order Permitting Third Parties to Defend.*]—Where a third party notice had been served by the defendant before the close of the pleadings between the plaintiffs and defendant, but the action had been set down by the plaintiffs to be tried at Toronto without a jury and notice of trial given before the plaintiffs were aware that such third party notice had been served, and before notice of motion had been given by the defendant for an order giving directions as to the trial:—Held, that the order made upon such motion, which permitted the third parties to come in and defend, and directed that the issue between the defendant and the third parties should be tried at the same time as the action, reopened the pleadings, and they were not closed (the third parties having delivered a defence) until the expiration of the time for replying to that defence. The duty of the plaintiffs then was to draw up a new record of the pleadings, including in it the defence of the third parties, enter the case again for trial, and give notice of trial to the defendant and third parties, under rule 542. *Confederation Life Association* v. *Labatt*, 18 P. R. 238.

Contribution — *Agreement* — *Notice* — *Setting aside*—*Appearance.*]—The plaintiffs' claim against the defendants was for the balance of a sum agreed to be paid for the hire of a race track. The defendants alleged that a ferry company had agreed with the plaintiffs to pay and contribute towards the hire of the track a certain sum for each day of the race meetings, in consideration of the increased travel, and that defendants had thereby been induced to enter into the agreement with the plaintiffs: — Held, that this allegation was not sufficient to support a claim against the ferry company for contribution, indemnity, or any other relief over, within rule (1897) 209; and therefore the defendants should not have been allowed to serve a third party notice. Held, also, that the proper practice in moving against a third party notice, is to move without entering an appearance. Leave to appeal refused. *Windsor Fair Grounds and Driving Park Association* v. *Highland Park Club*, 19 P. R. 130.

——— *Leave to Appear.*]—In an action for the non-delivery of coal, one of the defendants gave notice to S. and M., under the first part of rule 107 and rule 108, of the action, and that he claimed contribution from them to the extent of one-half of any sum recovered against him, on the ground that they were co-partners in the transaction, &c. S. and M. appeared to this notice, and the master in chambers subsequently made an order giving them leave to appear, and directing that they should be bound by any judgment against the said defendant:—Held, that the order had been properly made. *McLaren* v. *Marks*, 19 P. R. 451.

Determining Question in Action—*Replevin.*]—J. stored certain goods with the defendant, and the plaintiff brought this action for possession of the goods and damages for their detention, and replevied them:—Held, not a case in which J. should be added as a defendant, under rule 324, and not a case for the application of rule 328; but rather a case in which a notice should be served on him under rule 330, in order to have him bound by the judgment to be given. *Peterson* v. *Fredericks*, 15 P. R. 361.

——— *Specific Performance.*] — In an action for specific performance by a vendor against a purchaser, the question raised by the defence, whether a third person has a title to the whole or part of the land, is not one which, under con. rule 328, should be determined between the parties to the action, or either of them, and the third person: and an order cannot properly be made under that rule and con. rule 330, adding such third person as a defendant. Neither do con. rules 329, 331, or 332 apply in such a case. The consolidated rules as to third parties discussed. *Begg* v. *Ellison*, 14 P. R. 384.

See, also, *S. C.*, 14 P. R. 267, *ante* III.

Dismissal of Action — *Discretion of Trial Judge—Appeal.*]—Where a third party has been brought into an action by the defendant, and an order obtained by the latter directing that the question of indemnity as between the third party and himself be tried after the trial of the action, and that the third party be at liberty to appear at the trial of the action and oppose the plaintiff's claim, so far as the third party is affected thereby, and at the trial the action is dismissed:—Semble, that the third party is entitled against the defendant to costs up to and inclusive of the trial. Held, however, that the disposition of such costs is in the discretion of the trial Judge, whose order, by R. S. O. 1897 c. 51, s. 72, is not subject to appeal without leave. Held, also, that the third party cannot be heard in a divisional court upon an appeal by the plaintiff from the judgment at the trial, and is entitled to no costs of such appeal. *Ewing* v. *City of Toronto*, 18 P. R. 137.

Indemnity — *Appearance — Costs.*] — Where, in an action for negligence, the defendants served a third party, under rule 329, with notice of a claim for indemnity, but he did not appear thereto, and no order was made or applied for under rule 332:—Held, that he was under no obligation to take any proceeding, and was not bound by the result of the action; and his subsequently appearing at the trial, and asking to be made a defendant, was gratuitous, and he was not entitled to costs against the defendants. *Gibb* v. *Township of Camden*, 16 P. R. 316.

——— *Appearance — Pleading — Trial — Costs.*]—Where a third party was called upon by the defendants for indemnity and appeared; and, upon a motion by the defendants under rule 332, an order was made, against the plaintiff's objection, directing that the third party might deliver a defence to the plaintiff's claim against the defendants, and a defence to the defendants' claim for indemnity; that the question of indemnity between the defendants should be tried after the trial of the plaintiffs' action, as the trial Judge might direct; and that all costs should be reserved:—Held, that the order was within the powers conferred by rules 328-332, and was a proper order to make under the circumstances of the case. *Christie* v. *City of Toronto*, 15 P. R. 415.

——— *Breach of Contract.*] — Rule 328 (1313) applies only to claims to indemnity as such, either at law or in equity, and does not apply to a right to damages arising from breach of contract, the latter being a right given by law in consequence of the breach of the contract between the parties, while the former is given by the contract itself. Birmingham and District Land Co. v. London and North-Western R. W. Co., 34 Ch. D. 261, followed. Page v. Midland R. W. Co., [1894] 1 Ch. 11, distinguished. And where an action was brought against lessees of a road for a declaration that they had no right to exact tolls, &c., and the defendants claimed to be indemnified by their lessors upon the ground that the latter had warranted their title to the road by the lease:—Held, not a case in which leave should be given to issue a third party notice. *Payne* v. *Coughell*, 17 P. R. 39.

——— *Claim against Co-defendant — Trial.*]—No order is necessary to enable a defendant to plead a claim for indemnity against his co-defendant, but such a claim will not be tried without an order providing for the determination of the question so raised. P. borrowed money from the plaintiff and then went into partnership with N. P. and N. afterwards sold the business to B. The plaintiff, having judgment against P., brought this action against P., N., and B. to set aside the sale to B., as fraudulent. P. alleged in his defence that N. agreed to pay half his debts, including that to the plaintiff, and that B. agreed to pay the liabilities of P. and N. appearing on their books, which the liability to the plaintiff did, and he claimed indemnity against N. and B.:—Held, that the trial of the question whether or not the sale to B. was fraudulent as against the plaintiff would involve an inquiry as to the terms upon which B. purchased from the other defendants, and that the whole matter was one that might be advantageously disposed of at one hearing. *Burke* v. *Pittman*, 12 P. R. 662.

——— *Claim against Co-defendant — Trial.*]—The plaintiff sued a municipal corporation and a railway company for damages; the corporation in their statement of defence claimed indemnity or relief over against the company, but the company did not answer the pleading, and no order was made or applied for before or at the trial to have the question determined; judgment was given for the plaintiff against the corporation, but nothing was decided either in favour of or against the company. After the judgment had been affirmed by a divisional court, the corporation applied to the trial Judge for an order under con. rule 328 to have the question between them and the company determined:—Quære, whether there was power under the rules to make the order. Held, that, if there was power, it would not be a wise exercise of discretion to make it; for new pleadings and a new trial would be necessary, and it would be better that a fresh action should be brought than that the plaintiff should be kept before the court while the defendants settled their dispute. *Mead* v. *Township of Etobicoke*, 13 P. R. 341.

——— *Co-defendant.*] — See *Walker* v. *Dickson*, 14 P. R. 343.

——— *Exchequer Court — Jurisdiction — Costs.*]—In an action by the Crown upon two customs export bonds, defendants applied for an order to bring in a third party, and it appeared that such bonds were given by the defendants personally, and did not indicate that the person against whom the third party order was sought was in any way liable to the Crown in respect of the bonds. The defendants, however, alleged that in giving the bonds they were only acting as agents for such person, and that he had agreed to indemnify them against the payment thereof:—Held, that the court had no jurisdiction to try the issue of indemnity between the defendants and such proposed third party, and that the application should be dismissed with costs to the Crown in any event. *The Queen* v. *Finlayson*, 5 Ex. C. R. 387.

——— *Judgment against Principal — Proof against Surety.*]—The plaintiff, having an unsatisfied judgment against the administratrix of an estate, procured an assignment of the administration bond and brought an action thereon against the sureties, when a person who had indemnified the sureties was made a third party under an order whereby the question of the indemnity was to be tried after the trial of the action, as the Judge might direct, with liberty to appear by counsel and defend the action and to call and cross-examine witnesses, and it was also ordered that he should not thereafter be at liberty to dispute the defendants' liability, if any, to the plaintiff. At the trial the judgment was put in, and one of the defendants called as a witness, who stated that the amount of the judgment was correct. It was objected on behalf of the third party that the liability had not been properly proven as against him, and there should be a reference to ascertain and determine the defendants' liability, which was refused, and judgment entered for the plaintiff:—Held, that the judgment so recovered was not sufficient to bind the third party, and a new trial was directed. *Zimmerman* v. *Kemp*, 30 O. R. 465.

——— *Landlord.*] — The plaintiff and defendant occupied adjoining shops under leases

from the same landlord, the plaintiff having the prior lease. The plaintiff brought this action to restrain the defendant from obstructing his light and view, and the defendant served a third party notice upon the landlord, claiming, under a covenant for quiet enjoyment, to be protected against the plaintiff's claim:—Held, that the defendant could not call upon his landlord to defend him against an unfounded claim; but if the plaintiff's claim was well founded, it was by reason of an easement expressly or impliedly granted by his lease, and the defendant took subject to such easement, and could not claim that the landlord covenanted with him for quiet enjoyment of that which did not pass under his lease; and, therefore, whether the plaintiff's claim was well or ill founded, the landlord was not a proper party to be called on for indemnity under rule 329. Thomas v. Owen, 20 Q. B. D. 225, followed. Held, also, that upon a motion by the defendant, under rule 332, for directions as to the mode of trial, where a third party had been notified under rule 329, it was proper to make an order dismissing the third party from the action, without any motion on his part. Schneider v. Batt, 8 Q. B. D. 701, followed. *Scripture* v. *Reilly*, 14 P. R. 249.

——— *Mortgage—Counterclaim.*] — In an action by the assignee of a mortgage against the mortgagor and the purchasers from him of the equity of redemption, the latter alleged that they had been induced by the mortgagee to purchase the lands by his promise to discharge the mortgage and accept in its place an assignment of another mortgage, which agreement he had failed to carry out and had afterwards assigned the mortgage to the plaintiff, his wife:—Held, that the purchasers of the equity were not entitled to claim "indemnity" against the mortgagee, within the meaning of that word as used in rule 328, as amended by rule 1313; and a third party notice served upon him was set aside. Semble, a proper case for counterclaim against the plaintiff and third party jointly to enforce the alleged agreement or for damages. *Moore* v. *Death*, 16 P. R. 296.

——— *Mortgage—Interest.*]—The plaintiff and P. both claimed to be entitled by assignment to a mortgage made by the defendant. The defendant paid P. one gale of interest, and received indemnity for the amount paid against any claim on the part of the plaintiff. The plaintiff then brought this action claiming the interest which had been paid to P., and also the principal for default in payment of interest. The defendant applied to have P. added as a co-defendant:—Held, not a proper case for adding P. as a party under rule 103 (a), but rather one in which a notice might be served upon P. by the defendant under rule 108, O. J. Act. Quære, whether the defendant had not a remedy by interpleader. *Hewitt* v. *Heise*, 11 P. R. 47.

——— *Negligence—Breach of Contract—Identity of Claims.*]—In an action to recover damages for injuries sustained by the plaintiff in the defendants' factory in October, 1897, the negligence charged was that there was a defect in the lugs holding fast the doors of a retort, whereby they were broken by the force of steam, and the plaintiff thereby injured from the escape of hot air, &c., and that the retort was dangerous because not furnished with a safety valve, whereby the lugs were exposed to an undue pressure of steam. The defendants sought to bring in as third parties the manufacturers of the retort, which was made in January, 1896, under written contracts, which contained no warranty, and from which it appeared that the defendants undertook to provide and put in their own fittings, including the safety valve:—Held, that the object of the rules permitting a third party to be brought into an action is to prevent the same question, common as between the plaintiff and defendant and the defendants and the third party, from being tried on different occasions and in different forums, and there was no such identity here; there could be no claim for indemnity against the manufacturers; if the defendants could recover at all, their damages would be assessed on a different principle from those of the plaintiff; and no relief over could be obtained. *Wilson* v. *Boulter*, 18 P. R. 107.

——— *Negligence — Insurance Company.*] — The plaintiff sued for a personal injury, which by his statement of claim he alleged he had received, when acting as a conductor of a street railway car operated by the defendants, by reason of the negligence of a servant of the defendants, who was driving a scavenger waggon used by the defendants. The company who had operated the railway before the defendants assumed it, were insured against all sums for which they should become liable to any employee in their service, while engaged in their work. The insurance policy was assigned to the defendants when they assumed the railway. The defendants served on the insurance company a third party notice claiming indemnity: — Held, that the policy did not cover injuries accruing by reason of the negligence of the defendants or their servants in other branches of their service; and that the insurance company should not be kept before the court on the chance of a different state of facts being developed at the trial from that which the plaintiff alleged. An order was, therefore, made in chambers setting aside the third party notice. *Ferguson* v. *City of Toronto*, 14 P. R. 358.

——— *Relief over — Partnership — Estate of Deceased Partner.*] — In an action by creditors of a partnership against the surviving partner and the administratrix of the estate of the deceased partner, the name of the administratrix was struck out, leaving the creditors to pursue their remedy against the estate in a proceeding pending for its administration, and to proceed concurrently with the action against the surviving partner. Held, also, that a claim of the surviving partner against the estate of the deceased for indemnity or relief over in respect of the plaintiffs' claim, must be made in the administration proceedings and not in the action under the third party procedure. Held, further, that the right of the surviving partner against the administratrix, in her personal capacity, to recover upon a mortgage given by her as a security to him against his liability to the plaintiffs, was neither a right to indemnity nor to relief over, because it was a right which might be enforced before he was damnified, there being no reference on the face of the instrument to the liability asserted by the plaintiffs; and, therefore, she could not be brought in as a third party. *Campbell* v. *Farley*, 18 P. R. 97.

——— *Trial—Action.*] — The action was upon promissory notes made by the defendants

to the order of the B. C. L. Co., and by them indorsed to the plaintiffs. The defendants claimed indemnity against the B. C. L. Co., and at the trial that company, against the protest of the plaintiffs, was made a third party defendant, and judgment was directed to be entered against them in favour of the defendants to indemnify the defendants against the judgment recovered against them at the suit of the plaintiffs:—Held, reversing the order making the company a third party, and the judgment against them, that third parties shall be joined only before trial: that in any case they can be joined only for the purpose of binding them by the judgment against the original defendant; and that in order that the original defendant may obtain indemnity against a third party he must bring a separate action. *Lockie* v. *Tennant*, 5 O. R. 52.

Intervention of Third Party—*Quebec Law.*]—*See Price* v. *Mercier*, 18 S. C. R. 303; *Ball* v. *Caffrey*, 20 S. C. R. 319.

Relief against Co-defendants — *Pleading.*]—In an action for the price of goods sold, C., to whom the defendant had paid the price of the goods, believing him and not the plaintiff to have the title thereto, and J. C. F. and A. F., who were charged by C. with having fraudulently obtained possession of the goods and made a pretended sale of them to the plaintiff, were added as defendants under rule 109, O. J. Act, with a direction that C. should, in his pleading, state his case against J. C. F. and A. F., and that they should be at liberty to reply. *Brown* v. *Cousineaux*, 11 P. R. 363.

——— *Security for Costs.*]—Where a defendant proceeds under rule (1897) 215 to seek relief from a co-defendant which he would not be entitled to upon the pleadings and proofs between the plaintiff and defendants, he is a "plaintiff" within the meaning of rule 1198, and, if resident out of the jurisdiction, is liable to an order for security for costs. Walmsley v. Griffith, 11 P. R. 139, considered. *Molsons Bank* v. *Sawyer*, 19 P. R. 316.

Relief Over—*Amendment — Time—Order — Discretion — Appeal.*] — An action was brought against two defendants, one of whom suffered judgment by default; the plaintiff proceeded against the other, claiming by virtue of an assignment from the first of his cause of action against the second, which was in the nature of a claim for indemnity against liability for the claim on which the judgment by default had been suffered. At the trial the action was dismissed against the second on the ground that the assignment was inoperative. Upon an appeal by the plaintiff to a divisional court, an order was made directing that, notwithstanding the assignment, the first defendant should be allowed to amend the pleadings by claiming over against the second defendant, who was to be allowed also to amend, and further evidence was to be taken, if necessary:—Held, not a mere discretionary order, but one from which an appeal lay. Hately v. Merchants' Despatch Transportation Co., 12 A. R. 640, followed. 2. That the order could not be sustained under Rules 328-332 (1313) or otherwise, as it was made at too late a stage, and upon the application of the plaintiff only. *Boultbee* v. *Cochran*, 17 P. R. 9.

——— *Conversion of Goods—Vendor.*]—In an action for the conversion of goods, the defendant may bring in the person who sold him the goods as a third party, the words "any other relief over" in rule 209 being wide enough to include a claim made by the defendant against his vendor. *Confederation Life Association* v. *Labatt* (No. 2), 18 P. R. 266.

Remedy Over—*Municipal Corporations.*]—A third party is "a party to the action" within the meaning of s. 531, s.-s. 5, of the Municipal Act, 55 Vict. c. 42; and where a defendant municipal corporation, under that enactment, seeks to have another corporation or person added as a party for the purpose of enforcing a remedy over, such person or corporation should be made a third party and not a defendant, unless the plaintiff seeks some relief against such added party; and it is improper to add such party both as a defendant and a third party. *Erdman* v. *Town of Walkerton*, 15 P. R. 12. See, also, *S. C.*, 22 O. R. 633, 20 A. R. 444, 23 S. C. R. 352.

Trial of Claim against Third Party.]—Under rule 112, where in an action the plaintiff is entitled to recover against the defendant against whom the action is brought, the defendant is precluded from trying questions arising between himself and a third party added at his instigation under rule 108, in the trial of which the plaintiff has no interest, and which has the effect of delaying the plaintiff in his recovery. *Town of Dundas* v. *Gilmour*, 2 O. R. 463.

Defendants, sued by the plaintiffs for the amount due under a lease of a tollgate, brought in W. as a defendant, alleging that an agreement to commute tolls payable by W. had been made by the plaintiffs, and claiming as a set-off the difference between such computation and the tolls otherwise payable by W. This agreement having been disproved, the parties proceeded to try the question as to the liability of W. to the original defendants, in which the plaintiffs had no interest, and judgment was given in favour of the original defendants:—Held, that such judgment must be set aside. *Ib.*

See Torrance v. *Livingston*, 10 P. R. 29; *Tomlinson* v. *Northern R. W. Co.*, 11 P. R. 419, 526; *Eckensweiler* v. *Coyle*, 18 P. R. 423, *ante* 111.

VI. Miscellaneous Cases.

Appearance.]—Where a bill is filed and a defendant served with a copy thereof, he thereby becomes a party to the cause; appearance by the defendant, or by the plaintiff for the defendant, having been abolished by the general order 6 of 1868. *Meyers* v. *Meyers*, 21 Gr. 214.

Relief Prayed—*Parties not Interested in —Costs.*]—Plaintiff having in the same bill asked to have it declared that certain lands were held in trust for him, and that he was entitled to a conveyance thereof or an order of the court vesting the same in him, and to have certain title deeds delivered up to him, it appearing that plaintiff would, in a suit framed for that purpose, have been entitled to this relief, a decree was made in his favour to this extent, notwithstanding the misjoinder of parties not interested in this portion of the

relief prayed, who did not object, the court desiring not to put plaintiff to the necessity of filing a new bill, but under the circumstances ordered the plaintiff to pay the costs of all parties. *McDougall* v. *Bell*, 10 Gr. 283.

Stranger to Contract — *Interest.*] — Land having been conveyed in consideration of the grantee agreeing to convey a certain portion to a third person, who was no party to the transaction, it was held that this person could maintain a suit in his own name for such portion. *Shaw* v. *Shaw*, 17 Gr. 282.

See DEED, V. 3—DEFAMATION, IX.—DIVISION COURTS, XIII. 1—DOWER, I. 4—EJECTMENT, III. 15—FRAUD AND MISREPRESENTATION, III. 3 (d)—LIEN, V. 7—MORTGAGE, IV. S, X. 4 (b), XIII. 5—NEGLIGENCE, IX.—PARTITION, V.—PATENT FOR INVENTION, IV. 6—SALE OF GOODS, III. 4—SEDUCTION, I. 5 —SPECIFIC PERFORMANCE, V. 15 (c)—TROVER AND DETINUE, I. 1—WORK AND LABOUR, IV. 1.

PARTITION.

I. GENERALLY—WHEN AWARDED.

1. *Status of Applicant*, 5119.

2. *Other Cases*, 5120.

II. ALLOWANCE FOR IMPROVEMENTS, 5123.

III. CONFIRMATION, 5124.

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VII. SALE—WHEN ORDERED, 5129.

VIII. MISCELLANEOUS CASES, 5130.

I. GENERALLY—WHEN AWARDED.

1. *Status of Applicant.*

Dowress.]—A dowress is not entitled to demand, although she is compelled to suffer, partition. R. S. O. 1877 c. 101, s. 49, s.-s. 2, refers to the case of a married woman who joins in a petition with her husband who is entitled to demand partition. *Rody* v. *Rody*, 1 C. L. T. 546.

A person entitled only to dower, unassigned, out of land is entitled to apply for partition. Rody v. Rody, 1 C. L. T. 546, overruled. But where one only of several is desirous of partition, all that that one is entitled to is to have his or her portion set aside, leaving the others to hold jointly or in common, as before. Hobson v. Sherwood, 4 Beav. 184, followed. *Devereux* v. *Kearns*, 11 P. R. 452.

Where the dowress applied for partition or sale, confessedly with the object of obtaining the latter, and all the other parties opposed it, and it appeared that the applicant had by another proceeding obtained the right to have her dower assigned out of the lands, the application was refused with costs. *Ib.*

Although some expressions in the Partition Act, R. S. O. 1877 c. 101, authorize a person entitled to dower not assigned to apply for partition or sale of the lands in which she is interested, yet the court may, in its discretion, refuse the application and leave the dowress to proceed under the Dower Procedure Act, R. S. O. 1877 c. 55, or otherwise, to have her dower assigned. The provisions of the two Acts must be harmonized. *Fram* v. *Fram*, 12 P. R. 185.

The application of a dowress for partition or sale of two parcels of land owned by the defendants in severalty, subject to the right of dower, was refused where the defendants opposed the application and the proposed proceedings were for the benefit of the applicant only. Devereux v. Kearns, 11 P. R. 152, discussed. *Ib.*

Effect of partition on inchoate right of dower. *Re Hewish*, 17 O. R. 454.

Mortgagee.]—A mortgagee, whose title has not been perfected by foreclosure or otherwise, is not entitled to an order for partition or sale upon summary application under rule 989. *Mulligan* v. *Hendershott*, 17 P. R. 227.

Mortgagee of Interest.] — Quære, whether the appellant in this case, whose only interest was that of mortgagee of the interest of one S., the owner of an undivided one-sixth interest in the lands, had any locus standi to bring a suit for partition or to appeal without his co-plaintiff. *Laplante* v. *Seamen*, 8 A. R. 557.

Purchase at Sheriff's Sale—*Interest in Equity.*]—A decree for partition issued by a local master at the instance of a purchaser at sheriff's sale under an order made by a county court Judge, where the interest which had been sold was that of one of four tenants in common in an equity of redemption in land, which was subject to two mortgages in different hands, was on appeal reversed with costs. *Wood* v. *Hurl*, 28 Gr. 146.

Remaindermen.]—See *Murcar* v. *Bolton*, 5 O. R. 164.

Tenant for Life.]—A tenant for life is entitled to a partition, and where there is a right to a partition there may be a right to a sale as the court may determine. *Lalor* v. *Lalor*, 9 P. R. 455.

A sole tenant for life of an estate has no locus standi under the Partition Act, R. S. O. 1887 c. 104, to apply for sale of the estate. In the nature of things no partition is possible as regards the life tenancy. *Fisken* v. *Ife*, 28 O. R. 595.

Trustee for Sale.]—The plaintiff, being a trustee for sale, was held not to be in a position to ask for partition. *Keefer* v. *McKay*, 29 Gr. 162.

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2. *Other Cases.*

Admission of Common Title.]—The Partition Act of 1869 only applies to cases in which some common title in the petitioner and respondents, to the land in question, is admitted. *Bennetto* v. *Bennetto*, 6 P. R. 145.

Adverse Title—*Possession.*]—A summary application for partition or sale of land by the plaintiff as one of several heirs was dismissed with costs where the plaintiff before making it knew that a defendant was in possession claiming title to the exclusion of the plaintiff and his co-heirs. *Hopkins* v. *Hopkins*, 9 P. R. 71.

Agreement to Partition—*Acting on*—*Infants*—*Improvements.*]—The adult co-heirs of an estate agreed to partition, and bound themselves to execute quit claims to carry it out as soon as the minors came of age and united therein. Some of the co-heirs went into possession of their portions and made improvements; some released their interest in the property allotted to others; but some of the minors on coming of age declined to adopt the agreement:—Held, on that account, that the agreement was not binding on any of the parties to it; and a decree for partition was made; and the master was directed to have regard in partitioning to the possession and improvements by the parties. *Wood* v. *Wood*, 16 Gr. 471.

Consent—2 *Wm. IV. c. 35.*]—The court could not award a writ of partition, under 2 Wm. IV. c. 35, where all the parties interested in the partition consent to its being made. *In re Eastwood*, 1 U. C. R. 3; *In re Usher*, ib. 527.

Crown Lands—*Representatives of Locatee.*]—The court will not decree the partition of lands the title of which is vested in the Crown; neither will it decree the sale of such lands at the instance of the representatives of a deceased locatee. *Abell* v. *Weir* 24 Gr. 464. See also *Pride* v. *Rodger*, 27 O. R. 320, *post* II.

——— *Squatter.*] — The right which a squatter acquires by being in possession of lands of the Crown, is not such an interest therein as the court will order a partition of amongst his heirs: in such a case the only remedy is by application to the government. *Jenkins* v. *Martin*, 20 Gr. 613.

Order for Sale—*C. S. U. C. c. 86, s. 17*—*Refusal to Act under*—*Rescission.*]—A sale of lands having been ordered, under s. 17 of C. S. U. C. c. 86, to be made by certain persons agreed upon by the parties, one of these persons refused to act, and the petitioners then applied on this ground to rescind the order for sale, and for partition by the real representative:—Held, that the court could not interfere, not having any original or common law jurisdiction, and such a case not being provided for in the Act. Quære, whether the person refusing might not have been regarded as guilty of contempt, or have been subjected to costs. Quære, also, whether the order might not have been varied or rescinded by consent of all those who consented to its being made; or if one of those appointed to make the sale were to die or become incapable of acting, whether the court might not order the proceedings to be completed by those remaining. *In re Knowles and Post*, 24 U. C. R. 311.

Outstanding Term.]—The fact that there is an outstanding term in lands to portions of which infants are entitled, is no defence to a bill of partition, although it may influence the court in deciding between a sale or a partition of the estate. *Fitzpatrick* v. *Wilson*, 12 Gr. 440.

Sale of Part—*Charge on Remainder*—*Vesting Order.*]—In a suit for partition the greater part of the property, the subject of the partition, had been sold under the decree of the court, but portions of it still remained unrealized. It appearing that all prior charges upon the property (such as the costs of the various parties to the suit, &c.) had been paid, and that the unrealized property was far less in value than the amount for which one of the co-owners (the plaintiff) was entitled to credit, in account with the other co-owners; on a petition by plaintiff, an order was granted, vesting all the unrealized property in him. *Arnold* v. *Hurd*, 1 Ch. Ch. 252.

Will—*Executors — Refusal*—*2 Wm. IV. c. 35.*]—Where a testator directed in his will that after the death of A., his land should be divided between his children, by his executors:—Held, that, in the absence of any refusal of the executors to make the partition after the death of A., the court could not direct a partition under 2 Wm. IV. c. 35. *Cronk* v. *Cronk*, 6 O. S. 332.

——— *Period for Partition—Infants.*]—Where an estate consisted in large part of personalty, and by the will of the testator the whole was to be divided among his children on the youngest attaining twenty-one, all of whom took vested interests on their attaining majority, and in the event of the death of any before the period of distribution, leaving issue, the share of the one so dying was to go to his children, share and share alike:—Held, that until the youngest child attained twenty-one, the adult parties were not entitled to call for a partition or distribution of the property. *Murphy* v. *Mason*, 22 Gr. 405.

——— *Trustees — Legacies—Charge.*]—A testator dying in 1820 devised his farm to trustees in trust to pay certain legacies, and divide the residue amongst the testator's three sons. The trustees refused to act, and the eldest son, in consequence, on coming of age in 1823, sold portions of the land, and applied the proceeds, or part of them, towards paying the legacies. After his death the surviving trustee executed a conveyance of the whole farm to the two surviving sons, from misunderstanding the nature of the deed presented to him for execution. The two sons then sold what remained of the farm, and brought an action of ejectment against the plaintiff, who was in possession of the parcels sold by the eldest son during his lifetime. The court restrained this action, declared the plaintiff entitled, as far as might be necessary for his protection, to stand in the place of the eldest son in regard to his undivided third of the whole property, and to his charge for two-thirds of the legacies he had paid on his brothers' undivided two-thirds of the estate, and decreed a partition and the necessary inquiries to give effect to such declaration. *Hiscott* v. *Berringer*, 4 Gr. 296.

——— *Trustees—Power of Sale—Majority of Heirs.*]—J. C. died in 1867, having by his will provided as follows: "And whereas trouble . . . may arise among my family with regard to the property . . . on account of its being put out of the power of my trustees to sell or dispose of the property, I

hereby order, direct, and fully authorize, at and after twenty years after my death, my trustees . . . to absolutely sell and dispose of all my property in T. to the best advantage, provided only that it be the wish of a majority of my heirs who may then be living to do so and not otherwise," &c. In 1887 a meeting of a large majority of those interested was held, and it was decided to sell by public auction. On an application by the plaintiffs, who were trustees for one of the heirs and represented only a one-sixth share of the property, for the usual order for partition and sale, which was resisted by a majority of the heirs:—Held, that the land in question was vested in the trustees on the express trust to sell at the end of twenty years from the testator's death, provided a majority of the heirs were in favour of a sale, which was proved, and that the jurisdiction to partition was ousted. *Re Dennis, Downey* v. *Dennis*, 14 O. R. 267.

See In re Foster, 1 Ch. Ch. 103; *Murcar* v. *Bolton*, 5 O. R. 164; *Grant* v. *Grant*, 9 P. R. 211; *Merritt* v. *Shaw*, 15 Gr. 321.

II. Allowance for Improvements.

Agreement to Partition—*Action on—Infants.*]—See *Wood* v. *Wood*, 16 Gr. 471.

Crown Lands — *Locatee—Jurisdiction—Declaratory Relief—Statute of Limitations.*]—A locatee of Crown lands left the Province in 1868, and was last heard of in 1877. The defendant, a son of his, had resided continuously on the property since 1881, cultivating and improving it, and the plaintiff, a daughter, resided on it also, from time to time, till 1887. There were two other children, who had not been in possession of the land for more than ten years before action, which was brought in 1895: — Held, that the locatee must be presumed to have been dead by 1884, and the defendant had acquired a title by possession as against the children other than the plaintiff, whose claim as to one-quarter was as good as his, and in making partition the Crown should recognize his right to improvements. The Statute of Limitations, R. S. O. 1887 c. 111, applied because the rights involved upon the record were merely private rights not affecting the pleasure or the sovereignty of the Crown. Even in the case of unpatented lands, declaratory relief may in a suitable case be given, which will work practically the result of a partition of the property, subject to the Crown being willing to act upon the judgment of the court. *Pride* v. *Rodger*, 27 O. R. 320.

Parent and Son—*Intention to Advance.*]—A father placed one of his sons in possession of certain wild land, and announced his intention of giving it to him by way of advancement. He died without carrying out this intention; but meanwhile the son had taken possession, and by his improvements nearly doubled the value of the land:—Held, that the son was entitled to a charge for his improvements, and to have the land allotted to him in the division of his father's estate, provided the present value of the land in its unimproved state would not exceed his share of the estate. Quære, in such a case, whether the son is not entitled to an absolute decree for the land. *Bichn* v. *Bichn*, 18 Gr. 497. *See Hovey* v. *Ferguson*, *ib.* 498.

——— *Intention to Devise.*]—A testator placed his two sons in possession of certain portions of his real estate, intending to convey or devise the same to them, but during his lifetime retained the full control of the property; notwithstanding this, the sons made valuable improvements upon their respective portions. Upon a bill filed after the decease of the father for a distribution of the estate, the court refused to make to the sons any allowance in respect of such improvements. *Foster* v. *Emerson*, 5 Gr. 135.

Tenant in Common.]—See *Lasby* v. *Crewson*, 21 O. R. 255.

III. Confirmation.

Decree—*Finding of Master—Further Directions.*]—Where a decree, which reserved no further directions, directed that a sale or partition of the property should take place, as the master might consider most for the interest of the parties, the court, on motion, ordered the execution of conveyances and the delivery of the possession of the property agreeably to the finding of the master. *O'Lone* v. *O'Lone*, 2 Gr. 642.

Report—*Partition Suit.*]—The report in a partition suit by bill under C. S. U. C. c. 86, does not require to be specially confirmed by the court, but before it will be acted upon it will be examined by the court to see whether there is in it the manifest error referred to in s. 24 of the Act. *Dunn* v. *Dowling*, 1 Ch. Ch. 365.

Rule Confirming—*Non-issue of—Acquiescence—Death of Party.*]—In 1855 the widow and children of one of two joint owners of land petitioned for a partition under 2 Wm. IV. c. 35, the other owner being respondent. In the same year partition was made by the sheriff, the return and plan were filed, and a rule to record and confirm it was moved for, but by some mistake never issued, and there was no official entry of its having been either granted or refused. In 1860 the respondent died. The partition thus made had always been acquiesced in, the parties supposing that it had been confirmed:—Held, that the court could not now, even by consent, examine and confirm such partition, for it would in effect be giving judgment against a party (the respondent) several years dead, and the proceeding would be void. *In re Park and Park*, 24 U. C. R. 459.

Sale in Parcels — *One Unsold.*] — In a proceeding for partition under C. S. U. C. c. 86, a sale had been ordered by the court, under which the real representative sold four of the five lots into which the property had been divided by the real representative; but, there being no bidders for the remaining one at what he considered a reasonable price, he withdrew it. The court suggested that it might be better to wait till the rest of the property was sold; but, after consideration, confirmed the sale and ordered deeds to be executed. *In re Westervelt*, 10 L. J. 15.

See Jenking v. *Jenking*, 11 A. R. 92.

IV. COSTS.

Apportionment — *Direction — Solicitor and Client.*]—In a suit for partition, the decree omitted a direction to tax the costs as between solicitor and client, or to apportion them amongst the several parties. On a motion for an order directing the master to do so upon the taxation, the order to apportion the costs was made. The order for taxation as between solicitor and client was refused as being a variation of the decree. *Bernard* v. *Jarvis*, 1 Ch. Ch. 24.

Commission in Lieu of Costs.]—The sum allotted to the guardian of infants for commission in partition suits should not be measured only by the work done in the master's office. *Cameron* v. *Leroux*, 9 P. R. 304.

——— *Taxed Costs of Special Motion.*]—*See Clark* v. *Clark*, 8 P. R. 156.

Party and Party—*Solicitor and Client.*]—The costs decreed in partition suits are, as in other suits, party and party costs, and where any of the parties are not sui juris, costs as between solicitor and client are not decreed even by consent. *Harkness* v. *Conway*, 12 Gr. 449.

Proportionate Allotment.] — In suits between joint owners for partition or sale, the costs are to be borne by the parties in proportion to their respective interests in the property, except that in the case of partition the court, if it see fit, may give no costs to either party up to the hearing. *Cartwright* v. *Dichl*, 13 Gr. 360.

Unnecessary Suit — *Infants — Next Friend.*]—The court will not countenance the unnecessary incurring of costs of filing a bill for the partition and sale of the estate of infants for the purpose of discharging a mortgage thereon, which object could be obtained as effectually in the ordinary way by proceedings being taken at the instance of the mortgagee; and where such a suit was brought in the name of infants, the court, on dismissing the bill, ordered the costs of the defendants to be paid by the next friend of the infants. *Carroll* v. *Carroll*, 23 Gr. 438.

See Brown v. *Brown*, 9 P. R. 245; *Campbell* v. *Campbell*, 8 P. R. 159; *McKay* v. *McKay*, 8 P. R. 334.

V. PARTIES.

(*See* also *ante* I. 1.)

Absentee — *Guardian — Dispensing with Service — Substituted Service.*]—Where, in a proceeding for partition or sale of lands, begun by summary application, a person interested in the estate, not originally made a party, had been long unheard of, and there was uncertainty whether he were living or dead, an order was made by a Judge, under ss. 16 to 29 of the Partition Act, R. S. O. 1897 c. 123, which are expressly made applicable by s. 33 of the Judicature Act, R.S.O. c. 51, appointing a guardian and directing that he be served with an office copy of the judgment or order for partition, and notice, for the absentee. Semble, that the master to whom a reference is directed by the judgment or order has power to dispense with service of his warrant or of an office copy of the judgment: Rules 203, 659. Smith v. Houston, 15 P. R. 18, discussed. Semble, also, that the court or Judge has power to make an order for substituted service of an office copy of a judgment or order. *Re Hynes, Hodgins* v. *Andrews*, 19 P. R. 217.

Infants.] — Where in a bill for partition it was stated that certain infants residing with or near their father, out of the jurisdiction of the court, not parties, were interested in the lands sought to be partitioned, their father being a party defendant, a demurrer for want of parties was allowed. *Tryon* v. *Peer*, 13 Gr. 311.

——— *Plaintiffs — Official Guardian.*]—Where in a partition suit commenced by summary application under G. O. Chy. 640, the infants interested in the estate had been joined as plaintiffs, and a sale of the land had taken place by public auction:—Held, that the infants were improperly joined as plaintiffs; that they should have been defendants and represented by the official guardian; and a reference was directed to the master to fix the guardian's commission as if he had been engaged in the suit from the beginning. On consent of the guardian, it was ordered that the proceedings taken for sale, if they proved to be regular, should stand; but this was not to be a precedent. *Brown* v. *Brown*, 9 P. R. 245.

Lessee.]—To a bill for partition a lessee for years may be a necessary party. *Fitzpatrick* v. *Wilson*, 12 Gr. 440.

Mortgagee.]—Although partition may be directed of an estate subject to a mortgage thereon, still, if one of several co-tenants creates an incumbrance on his undivided share and institutes proceedings to obtain a partition of the estate, the party holding the incumbrance must be brought before the court, and the party creating the charge must bear any additional expense occasioned thereby. *McDougall* v. *McDougall*, 14 Gr. 267.

Opposing Party.]—A petition for a partition under 2 Wm. IV. c. 35, must have been verified by affidavit, and there must be an opposing party, although the suit was an amicable one, and one of the parties consenting to the partition had to be dropped for that purpose. *Ex p. Robinson*, M. T. 2 Vict.

VI. PRACTICE.

Advertisement for Creditors — *Dispensing with.*] — The fact that an intestate, whose estate is being partitioned, has been dead for forty-five years, does not warrant the master in dispensing with the usual advertisement for creditors. *Biggar* v. *Biggar*, 8 P. R. 488.

——— *Inquiries — Dispensing with.*] — Sales by the court of real estate held in cotenancy are governed by the provisions of the Partition Act, R. S. O. 1877 c. 101; and masters should not, without any specific or sufficient reasons, dispense with inquiries and advertisements for creditors holding specific

or general liens upon the whole or any undivided share of the estate, down to the time of sale, and not merely at the time when the order under G. O. Chy. 640 is made. *Robson* v. *Robson*, 10 P. R. 324.

Consolidation — *Forum.*]—An application to consolidate two motions for administration and partition pending before a local master, should be made to him and not to a Judge in chambers. *Lambier* v. *Lambier*, 9 P. R. 422.

Lands in Different Counties—*Local Master.*]—After an order for partition of lands in the county of Peel had been granted by a master under G. O. 641, an order was made by a Judge in chambers to include in said order lands in another county, though such lands were known of at the time the partition order was made. The costs of the application were allowed, exclusive of the usual commission under G. O. 643. *Clark* v. *Clark*, 8 P. R. 156.

Where lands are situate in different counties, a local master has no jurisdiction to make an order for the partition or sale thereof, and such an order and the proceedings thereunder, even as to lands within the county in which he is master, are wholly void. Regina v. Smith, 7 P. R. 429, followed. *Nichol* v. *Allenby*, 17 O. R. 275.

Petition—*Affidavit.*]—See *Ex p. Robinson*, M. T. 2 Vict. *ante* V.

——— *Demurrer.*]—The respondent to a petition for partition under 2 Wm. IV. c. 35 might demur. *Cronk* v. *Cronk*, 1 U. C. R. 471.

Real Representative—*Partition or Sale—Reference.*]—Partition, where ordered, is to be made by the real representative. *In re Foster*, 1 Ch. Ch. 103.

The question whether partition or sale should be ordered is proper to be referred to the real representative, who is to make sale if ordered. *Ib.*

The court may order a sale in the first instance, if it see fit. *Ib.*

The court will use its own machinery for carrying the purposes of the Act into effect. *Ib.*

Reference—*Powers of Master.*]—Power of master on a reference for partition or sale of lands to try the validity of a lease, or a fraudulent alteration in a sealed instrument. *Re Rogers, Rogers* v. *Rogers*, 11 P. R. 90.

——— *Powers of Master—Scheme of Partition.*]—In the course of a reference to make a partition of lands, a master appointed two skilled persons to examine the property and prepare a scheme of partition, and on their evidence he adopted the scheme prepared:—Held, that the course adopted by the master was a reasonable one: that he had the power under G. O. Chy. 240, to take such course, and that the fees paid to the skilled persons by the defendant should be taxed. *McKay* v. *Keefer*, 12 P. R. 256.

Sale—*Death of Appointee.*]—Where a sale of lands is ordered under C. S. U. C. c. 86, s. 17 (the Partition Act), to be made by certain persons agreed upon by the parties:—Quære, if one should die or become incapable of acting, whether the court might not order the proceedings to be completed by those remaining. *In re Knowles and Post*, 24 U. C. R. 311.

Service of Bill—*Infant.*]—In a partition suit an order allowing substitutional service of the bill on the official guardian of an infant defendant, resident without the jurisdiction of the court, was granted on the ground that the share of the infant in the lands in question amounted to only $40, and substitutional service would be inexpensive. *Weatherhead* v. *Weatherhead*, 9 P. R. 96.

Service of Notice —*Time.*]—A writ of partition could not be ordered, under 2 Wm. IV. c. 35 without forty clear days' notice before the term. Where, therefore, the service was made on the 21st July, and the term began on the 30th August, it was held insufficient. *In re Loney*, 10 U. C. R. 305.

Summary Application—*Forum—Place of Reference.*]—Under G. O. 640, where special circumstances are shewn on an application for partition or sale of lands, a reference to a master other than the master in the county town of the county where the lands are situate, will be directed. The application under the order should be made to a Judge in chambers. *Re Arnott, Chatterton* v. *Chatterton*, 8 P. R. 39.

——— *Injunction—Necessity for Bill.*]—A notice of motion for partition having been served, the plaintiff moved for an injunction restraining the defendant from collecting rents, and for a receiver. It appeared that the defendant was a stranger, whose right to be in possession was denied:—Held, that no relief could be had against him without bill filed. *Young* v. *Wright*, 8 P. R. 198.

——— *Time—Death of Intestate.*]—An order for partition of the realty was refused, when the application was made within six months of the death of the person whose estate was sought to be partitioned. The rule laid down by the Partition Act, R. S. O. 1877 c. 101, s. 6, held applicable. *Grant* v. *Grant*, 9 P. R. 211.

——— *Title — Necessity for Bill.*] — The Partition Act of 1863 only applies to cases in which some common title in the petitioner and respondents to the land in question is admitted. Where it appeared, from the statements in the petition, that two of several respondents claimed to be entitled absolutely to part of the lands sought to be partitioned, and that the petitioners contested such claim:—Held, that the proper mode of proceeding as against these respondents was by bill in the ordinary way. *Bennetto* v. *Bennetto*, 6 P. R. 145.

The jurisdiction created by G. O. 640 is intended to be exercised in simple cases only where there is no dispute. Where questions are raised of title, or the like, a bill must be filed. *Macdonell* v. *McGillis*, 8 P. R. 339.

The defendant, who occupied the property in question in a partition suit, claimed an absolute title by possession under the Statute of Limitations. The master, notwithstanding, continued the inquiry and proceeded to take evidence. The chancellor directed the plaintiff to file a bill within two weeks, and the parties to go to a hearing at the then next

ensuing sittings, costs to be costs in the cause. *Re McMillan, Patterson* v. *McMillan*, 8 P. R. 546.

See ante V.

Title—*Issue—Hearing.*]—In a partition suit, a question of title raised between co-defendants was decided at the hearing, and without being referred to the master. *Wood* v. *Wood*, 16 Gr. 471.

Trial — *Notice of — Irregular Issue — Forms.*]—Where a defendant is not misled by a notice of trial, any trifling irregularity therein, as, in this case, the omission of the words, "In the matter of partition between" before the plaintiff's and defendant's names in the style of cause, will not entitle the defendant to set aside the verdict; and irregularities of this kind should be objected to promptly, otherwise the court will not interfere. Issues in partition suits under 32 Vict. c. 35 (O.) are within 32 Vict. c. 6, s. 17, ss. 2 (the Law Reform Act, 1868); and such an issue in the county court may, therefore, be tried at the assizes. *Symonds* v. *Symonds*, 20 C. P. 271.

VII. Sale—When Ordered.

Nature of Property—*Immediate Sale.*]—Where on the hearing of a cause for partition, it was shewn that the estate could not be divided without prejudice, the court, without waiting for any return to that effect, ordered a sale. *Bennett* v. *Bennett*, 8 Gr. 446.

———*Number of Claimants.*]—Where the property was not indivisible in its nature, but the freeholders returned that it was desirable that no division should take place, but that the whole should be taken by one of the parties entitled, or otherwise sold, there being more than eighteen claimants; the court approved of the return. *In re Dennie*, 10 U. C. R. 104.

——— *Outstanding Term.*]—See *Fitzpatrick* v. *Wilson*, 12 Gr. 440.

——— *Reference to Master—Sale of Portions.*]—In a suit for partition, where infants were interested, affidavits were produced shewing that a sale rather than a partition would be for the benefit of the infants; and that the property was not susceptible of equal partition. The court directed a reference to the master to enter into contracts for the sale of portions of the estate, which sales should be carried into effect upon being approved of by the Judge. *Steven* v. *Hunter*, 14 Gr. 541.

——— *Water Privilege.*]—The plaintiff filed her bill for a partition of 200 acres of land on the river Ottawa and a water mill privilege appurtenant thereto. The property in question had been acquired by her and one H. as tenants in common, and H. had subsequently conveyed an undivided one-fifth of his portion to the four other defendants. The evidence shewed that in order to divide the water privilege very complicated structures would have to be made at heavy expense, and a large sum of money expended annually in maintaining them. It also appeared that the difficulties in carrying out the scheme would be very great:—Held, that it was the duty of the court to consider the interests of all the defendants, and a partition could not be decreed without injuring them; but that, even if the case were decided without reference to the interests of the defendants other than H., partition was under the circumstances rightly refused; and a sale of the water privilege, together with a sufficient quantity of land for the purpose, was ordered. *Blasdell* v. *Baldwin*, 3 A. R. 6.

Reference to Real Representative.]—The question whether partition or sale should be ordered, is proper to be referred to the real representative, who is to make sale if ordered. The court may order a sale in the first instance, if it see fit. *In re Foster*, 1 Ch. Ch. 103.

Remaindermen—*Right to Sale—Tenant for Life—Prohibition.*]—The Crown, by letters patent, granted land to F. B. for life, with remainder to her children, the petitioners, as tenants in common in fee simple. On a petition presented to the Judge of the county court, under R. S. O. 1877 c. 101, for partition or sale, a sale was ordered. A motion for a prohibition was made on behalf of F. B., the tenant for life:—Held, that the case did not come within the Partition Acts, and that there was no power to compel a sale of the lands as against the tenant for life. Prohibition ordered. *Murcar* v. *Bolton*, 5 O. R. 164.

See In re Knowles and Post, 24 U. C. R. 311; *Arnold* v. *Hurd*, 1 Ch. Ch. 252; *Lalor* v. *Lalor*, 9 P. R. 455; *Devereux* v. *Kearns*, 11 P. R. 452; *Fram* v. *Fram*, 12 P. R. 185.

VIII. Miscellaneous Cases.

Account of Personal Estate — *Executor—Infant Legatees.*] — In a suit for the partition of the real estate of an intestate, who was one of the executors of his father's will, and had taken possession of the personal estate, and who died a minor, it was contended on behalf of infant legatees, who had not been paid their legacies, that an account should be taken of the personal estate come to the hands of such executor, and that their shares thereof should be charged upon the land in question before partition:—Held, that the executor having been a minor, his estate was not liable to account therefor. *Nash* v. *McKay*, 15 Gr. 247.

Advancement—*Hotchpot.*]—A child who has been advanced is bound to bring into hotchpot that wherewith he has been advanced only when it has been so expressed in writing either by the parent or the child so advanced. *Fulman* v. *Fulman*, 15 Gr. 643.

Agreement to Partition—*Secret Promise—Enforcement—Statute of Frauds — Married Woman.*]—A testator having devised his real property to such of the persons named as should be living at the death of his widow, the parties interested came to an agreement for partition during the widow's lifetime. There were several questions between the parties. The plaintiff, who was one of the devisees, was induced to consent to the partition upon a distinct understanding with another of the devisees, that the latter should, after partition, hold a portion of her share in trust for the plaintiff. This agreement was not known to the other devisees; the partition

deed was executed by all the parties; the partition would not have been agreed to by the plaintiff but for the promise stated:—Held, that the promise was not binding, both because there was no writing within the Statute of Frauds, and because the party making it was a married woman. *Morley* v. *Davison*, 20 Gr. 96.

Appeal—*Special Case.*]—An appeal will lie under the Partition Act, 32 Vict. c. 33 (O.), from the judgment of a county court Judge on a special case stated. *In re Shaver and Hart*, 31 U. C. R. 603.

Consent—*Mode of Partition—Relief against—Forum.*]—In a partition suit, a gentleman who was not a solicitor, nor a clerk of any solicitor in the cause, was employed by the defendant's solicitor to attend to the case for defendant, and gave a consent in good faith, but inconsiderately, and without the knowledge or authority of or communication with the defendant or his solicitor, to a mode of partition suggested by the opposite party:—Held, that the consent might be relieved against on terms, it not appearing that the plaintiff would thereby be prejudiced. Held, also, that an application for relief against the consent, and to set aside the report, was properly made in chambers, and not in court. *Rolfe* v. *Coote*, 1 Ch. Ch. 308.

Creditor's Claim—*Administratrix—Costs.*]—An order for partition or sale was made under G. O. 640, by a master, of the estate of one M., deceased. In proceeding under that order the master advertised for creditors, and M. & M. sent in a claim for obtaining letters of administration, and for defending an action in the court of common pleas, brought by W. M., a defendant in this suit, and entitled to a share of the estate against the administratrix. The master allowed the claim, and W. M. appealed, on the ground that neither the deceased nor his estate were indebted to M. & M., and that they were not entitled to prove as creditors in this cause:—Held, that the administratrix was justified in defending the suit, and the appeal was dismissed. *McKay* v. *McKay*, 8 P. R. 334.

Judgment in Partition—*Effect of.*]—When proceedings for a partition in a county court have been terminated by an order confirming such partition, and nothing remains to be done by way of enforcing the judgment, such judgment cannot afterwards be impeached on the ground of fraud or deception on the court otherwise than in resisting an action in which it is relied on, or by bringing an action for the express purpose of setting it aside. *Jenking* v. *Jenking*, 11 A. R. 92.

See Van Velsor v. *Hughson*, 9 A. R. 390.

Mistake—*Family Arrangements.*]—See *Baldwin* v. *Kingstone*, 18 A. R. 63.

Proceeds of Sale—*Infant—Realty.*]—When lands are sold for the purpose of effecting a partition, the share of an infant retains its character of realty. *Thompson* v. *McCaffrey*, 6 P. R. 193.

——— *Lunatic's Interest—Statute—Realty.*]—One of several heirs of an intestate being lunatic, an Act was procured authorizing the sale of the intestate's lands, and the investment of the lunatic's share, for the benefit of the lunatic "and his representatives." The lunatic afterwards died:—Held, that this share, for the purpose of distribution, retained the character of realty, and was to be divided between his real representatives and not his next of kin. *Campbell* v. *Campbell*, 19 Gr. 254.

——— *Payment into Court—Interest.*]—In a partition suit the mortgagors of an undivided share became the purchasers, but they did not pay the purchase money into court until long after the day named in the master's report:—Held, that the mortgagee, though a party to the suit, was entitled to interest at the rate reserved in the mortgage until notice of such payment into court. *McDermid* v. *McDermid*, 7 P. R. 457.

Retrait Successoral—*Quebec Law—Sale by Co-heir—Prescription.*]—See *Baxter* v. *Phillips*, 23 S. C. R. 317.

Setting aside Partition.]—An unequal partition obtained in a county court against a minor of feme covert, through the contrivance of the co-tenant, the gross laches of the guardian ad litem, and the misapprehension of the referee (appointed under s. 17 of the Partition Act) as to the extent of his duty and power, was held not binding. The minor, on coming of age, filed a bill for a new partition, and a decree was made accordingly. *Merritt* v. *Shaw*, 15 Gr. 321.

See Jenking v. *Jenking*, 11 A. R. 92, *supra*.

Transfer of Share in Land—*Construction of Instrument.*]—One of the devisees of an estate sold her interest therein to her brother, and executed with her husband an instrument in the form of a power of attorney, authorizing the assignee for his own benefit to demand and receive of and from the executor, &c., all moneys which might become due and payable to her and her husband, or either of them, by virtue of all devises and bequests under the last will and testament of her father; in fact, at the time of the execution of this instrument, she was entitled to a share of another brother's portion of the estate by assignment from him:—Held, on appeal from the report of the master, that the instrument executed by the husband and wife had not the effect of transferring the share of the wife in the portion of the brother so assigned. *Pherrill* v. *Pherrill*, 10 Gr. 580.

See CROWN, II. 6 (c).

PARTNERSHIP.

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I. Generally.

1. *Proof of Partnership.*

Admissions.]—In an action against a member of a joint stock company, his admissions that he was a partner are sufficient to prove his liability, without producing the partnership deed. *Lee* v. *McDonald*, 6 O. S. 130.

The admissions of one partner, that a third person was jointly interested with himself and his co-partners, is not evidence against the latter to prove such joint interest. *Carfrae* v. *Vanbuskirk*, 1 Gr. 539.

Contradictory Affidavits.]—On the contradictory affidavits in this case, the court refused to interfere on the ground of an alleged partnership between plaintiff and defendant. *Clark* v. *Chipman*, 26 U. C. R. 170.

Dissolution—*Evidence — Jury.*] — Held, that on the evidence in this case the jury were justified in finding defendants to be liable as partners, notwithstanding the proof of a dissolution. *Jordan* v. *Smith*, 17 U. C. R. 590.

Evidence — *Inference — Intention.*] — Where there has been a contribution of capital as well as participation in the profits accruing from that capital, a partnership will be inferred, even though the parties have agreed that they will not call themselves partners, or did not intend to constitute that relationship:—Held, that the evidence, which is fully set out in the report, was sufficient to prove that the defendant was a partner. *Botham* v. *Keefer*, 2 A. R. 595.

——— *Inference—Jury.*]—Where upon a question of partnership between father and son (defendants), the evidence shewed that the son, a young unmarried man, lived with his father, was in general occupied with his business, carrying beer to his customers, receiving money and making payments for him, &c., and had furnished part of the money with which his father had built his brewery:—Held, that this evidence laid no ground upon which a partnership between father and son could be inferred. The jury having found for the plaintiff, a new trial was granted on payment of costs. *Sculthope* v. *Bates*, 5 U. C. R. 318.

——— *Interest in Mine—Working of.*]—See *Stuart* v. *Mott*, 14 S. C. R. 734.

Parol Agreement—*Statute of Frauds—Interest in Land — Mineral Claim.*] — See *Archibald* v. *McNerhanie*, 29 S. C. R. 564.

Representation — *Agent — Letters.*] — The representation of an agent that his principals are a firm in a distant Province, and that such firm is composed of A. and B., coupled with evidence of receipt by the person to whom the representation is made of letters from one of the alleged members of the firm, written on paper on which the names of such members are printed, in answer to letters from such person, is primâ facie evidence that A. and B. constitute the said firm. *McDonald* v. *Gilbert*, 16 S. C. R. 700.

Repudiation—*Delay.*]—Where a plaintiff filed a bill alleging that he and the defendants had agreed to be partners in certain government contracts, and it appeared that the defendants had repudiated the partnership as soon as the contracts were entered into, that the contracts were to be completed in a year, and that the bill was not filed for about eighteen months after the repudiation—the court offered the plaintiff a reference to the master to inquire the cause of the delay, or that his bill should be dismissed without costs. *Haggart* v. *Allan*, 2 Gr. 407.

See Darling v. *Magnan*, 12 U. C. R. 471; *Sylvester* v. *McCuaig*, 28 C. P. 443; *Bank of Rochester* v. *Stonehouse*, 27 Gr. 327; *Haggart* v. *Allan*, 4 Gr. 36.

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2. *What Constitutes a Partnership.*

Agreement—*Construction.*]—Held, upon the agreement and facts as given in this case, that the defendant M., in certain transactions between the plaintiffs and defendants, must be considered as a partner with defendants. *Tobin* v. *Merritt*, 2 U. C. R. 1.

Held, that the agreement, given in the report of this case, did not create between the parties a partnership inter se, and that consequently the one could sue the other thereon at common law. *Hawley* v. *Dixon*, 7 U. C. R. 218.

——— *Creditors—Profits—Holding out.*]—G. R. and his brother were lumber merchants at Stayner. P. & H., of Toronto, received consignments of lumber from them for sale,

and accepted their drafts drawn against such consignments. P. & H. were paid by commission until 1872, when R. and brother dissolved. It was then agreed that the business should be carried on by G. R.; that P. & H. should receive one-half the net profits of the business, to be credited to them upon a statement and settlement of mutual accounts each year, instead of a commission as formerly, and should guarantee all sales made by them; and that the amount then due to P. & H. should be carried to the debit of G. R. No provision was made in respect of losses, but, by a special agreement when R.'s mill and a large quantity of lumber were destroyed by fire in 1873, P. & H. shared half of the loss, partly, as they said, to save him from ruin, which would have destroyed all prospect of their getting paid what he owed them, and partly because they were to blame for not seeing that he was insured. P. & H. had access to R.'s books, and the yearly balancing was done under their supervision. One purchase of timber land was made in the joint names of R. and a member of the firm of P. & H., which was said to have been by way of security to them, but it was paid for by R. alone. G. R. having become insolvent, P. & H. claimed as his creditors for the balance due them, but their claim was resisted on the ground that they were partners with the insolvent. It appeared from the evidence that no partnership was ever intended by the parties, and that they had never held themselves out as partners:—Held, that no partnership existed. *In re Randolph*, 1 A. R. 315.

——— *Creditor—Profits.*]—The plaintiffs sued G. and W. for the price of goods sold to the firm of P. W. G. & Co., and the principal question in the action was, whether W. was an actual partner in the firm, the evidence failing to shew that he was an ostensible partner, and as such, liable to third persons:—Held, that the true test to be applied to ascertain whether a partnership existed, was to determine whether there was a joint business, or whether the parties were carrying on business as principals and agents for each other:—Held, that the facts and documents set out in the report did not establish that the business was the joint business of G. and W., or that they were carrying it on as principals or agents for each other; but that they did establish that the true relation was that of debtor and creditor; and W. was therefore not liable to the plaintiffs. *Mendelssohn Piano Co.* v. *Graham*, 19 O. R. 83, 17 A. R. 378.

——— *Creditor—Security—Profits.*]—Two deeds of the same date were executed by D. B., one of the defendants, who lived chiefly at Montreal, and by W. B. and H. L., the last two being then in partnership at Hamilton, under the name of B. I. & Co. The first deed recited that the firm were indebted to D. B. for goods supplied and agency, in £1,454 4s. 1d., the time for payment of which he had agreed to enlarge as therein set forth; and they thereby covenanted to furnish him with a yearly balance sheet to shew the state of their business, and that they would pay him the sum due with interest, as follows, namely, £6,000 by instalments specified, and after satisfying that sum that the profits of each year, after deducting expenses and a certain sum for each partner, should be applied towards payment of the balance due. It was provided that D. B. should, until his debt was paid, have free access to their books, and, although he should have power to enlarge the time for payment of any part of his claim beyond the days specified, yet that in case of default in payment according to the covenant, either of £6,000 or the balance, from the profits, as set forth, he should be entitled to enforce payment of the whole principal and interest then unpaid. The second deed recited the indebtedness of the firm to D. B., and the enlargement of the time for payment; and it was thereby agreed that until the final discharge thereof, or until an election by said D. B., of the alternative plans thereinafter proposed for the settlement thereof, the said D. B. should act as agent of the firm in the purchase and shipment of goods, &c., and that in consideration thereof, instead of commission, they should pay him £500 a year. It was then provided that so soon as the capital stock of each of the partners should equal the sum then due to D. B., so that by transferring his claim to the firm he would have an equal third share, then he should be entitled to demand either to be admitted as a partner, or a bonus by way of compensation for such right, and on such demand being made and acceded to his annual salary should cease. No such election had been exercised, nor was it shewn that the circumstances of the firm had been such as to make it possible:—Held, that D. B. did not become by either deed a partner in the firm. *Darling* v. *Bellhouse*, 19 U. C. R. 208.

Held, upon the same facts as set out in the last case, that a person agreeing to give a firm who were indebted to him, five years for the payment of the debt, with the understanding that he was to be paid out of the profits, and with the right, when the debt due to him equalled the interest of the members of the firm, to become a co-partner therein, if he chose, or to receive a bonus from the business, did not constitute him a member of the partnership or make him liable for its debts. Such an agreement does not constitute a participation in profits. *Hill* v. *Bellhouse*, *Darling* v. *Bellhouse*, 10 C. P. 122.

——— *Crops—Landlord and Tenant.*]—A. leased a farm to B. upon the condition that B. was to deliver to him one-half of the wheat to be raised on the farm. B. was to harvest and thresh it, and deliver it in to the defendant's granary:—Held, that under this agreement A. and B. were not partners in the wheat while it grew in the field, but stood to each other in the relation of landlord and tenant; and that therefore no legal property in the wheat could vest in A. till B., the tenant, had threshed it and delivered to him his portion. *Haydon* v. *Crawford*, 3 O. S. 583.

——— *Interest in Patent—Licensee.*]—The holder of patents for improvements in certain agricultural implements agreed to assign to the defendant the exclusive right to sell these implements, but not to manufacture them; and in certain contingencies he also agreed to assign the patents themselves. In fact the patents were invalid for want of novelty, and the defendant, having reassigned any interest he had in the patents, claimed the right to manufacture the implements for his own benefit:—Held, that the effect of such agreement was not to constitute the defendant a partner, but to give him an interest in the patents; and that he was not a mere licensee of the patentee. *Gillies* v. *Colton*, 22 Gr. 123.

——— *Profits—Agency.*]—It was agreed between the present plaintiffs and one B.,

under seal, that B. should purchase in Canada, and ship to plaintiffs in Albany, such lumber as they should direct—in consideration whereof plaintiffs were to furnish B. with the necessary funds for purchasing, shipping, and other expenses connected therewith, and out of the profits when the lumber was sold, to allow and pay to B. a percentage for his services, and to apply the remainder of the said profits in payment of B.'s prior indebtedness to plaintiffs. The now defendant, as an execution creditor of B., seized the lumber purchased by him, and an interpleader issue was ordered to try the right of the now defendant to the goods as against the plaintiffs:—Held, that there not being a community of profit and loss between the plaintiffs and B., there could be no partnership. 2. That B. was not the owner of the lumber, but the mere agent and servant of the plaintiffs. *Clark* v. *McKellar*, 12 C. P. 562.

Where the defendant P. entered into a written agreement, as "D. P. & Co.," with the other two defendants N. and J., as "H. J. N. & Co.," reciting that the parties had agreed to carry on certain lumber transactions on joint account, and providing for a joint capital to carry on such joint transactions; that advances on the joint account should bear interest; that the returns from a certain cove should be on the joint account, and the rental thereof paid out of the profits of the joint account; that any of the parties that might be agreed upon might contract for timber for their joint interest, and all expenses should be charged to the joint account; that the profits or losses of the joint business should be divided in a certain way, and the commission, charge, and profits arising from the joint account shared equally, and in case of difference as to their joint transactions, arbitration should be resorted to; and where, subsequently, P. entered into separate written contracts with G. S. & M. to furnish D. P. & Co. a certain quantity of timber, there being no mention in such agreements of any joint stock, nor of any contribution by G. S. & M. for losses sustained, nor of any share proper of the profits to be enjoyed by them (except as to a certain class of timber, the total profits of which they were to share equally with D. P. & Co.), but in return for their services they were to receive half the profits of the timber up to a certain price per foot, which it was stipulated should belong to D. P. & Co., and be delivered to them at a certain point in Lower Canada; that D. P. & Co. should make advances to aid in the manufacture and conveyance of the timber to its destination, and that the parties should pay them interest on such advances; and where the plaintiffs carried to T., over their railway, the timber forwarded by the parties in pursuance of their agreements, charging the freight in their books to said parties, and not to P. D. & Co., but parting with the timber at the request of D. P. & Co. before payment of the freight, contrary to their previous course of dealing with G. S. & M.:—Held, that the firstly above referred to agreement, entered into by the defendants with one another, created a partnership between them, and that when P. contracted with G. S. & M., he did so as agent of the defendants, under the partnership name of "D. P. & Co." 2. That the agreement secondly above referred to, entered into between D. P. & Co. and G. S. & M., constituted a mere contract of hiring and service, and not a partnership, not even as to the timber, in the total profits of which they were to share equally; for that there were none of the incidents of a partnership contained in the agreements, inasmuch as there was an absence of all community of interest in the general and final result of the adventure, no interest in or share of the capital, a mere contribution of personal service towards the enterprise, for which they were to be remunerated by a certain proportion of profits, and no liability for possible losses beyond a certain sum agreed to be paid them for their services. *Northern R. W. Co.* v. *Patton*, 15 C. P. 332.

By articles of agreement entered into by several persons, it was stipulated that one of them should furnish the premises in which to carry on the business at a stipulated rental, and capital for carrying on the business at a certain rate of interest, and that he should receive a stipulated sum annually for his time and expenses, and the others certain stipulated sums together with a certain proportion of the net profits:—Held, that this contract had the effect of creating a special agency, not a partnership, between the parties. *Munson* v. *Hall*, 10 Gr. 61.

——— *Profits — Ownership—Plant.*]—The defendant, owner and publisher of a newspaper, entered into an arrangement with C., by which C. was to purchase half the interest in the paper and plant for $850, to receive $500 a year for his labour, out of the business, and half the remainder of the net profits. Afterwards one F. came into the concern, paying a certain sum, and he and C., being practical printers, were each to have $500 a year for their labour out of the business, after paying expenses, and to own each one-third of the plant; and the balance of the net profits, if any, was to be divided equally among the three. Nothing was said about losses in either case:—Held, that a partnership existed in each case. *Pinkerton q. t.* v. *Ross*, 33 U. C. R. 508.

——— *Railways — Working — Profits.*] — Semble, that a valid agreement in the terms of the resolution passed by plaintiffs, authorizing an arrangement by which they should work defendants' road for a certain period, and share the profits with defendants, would not have created a partnership between the parties. *Great Western R. W. Co.* v. *Preston and Berlin R. W. Co.*, 17 U. C. R. 477.

The agreement between the two companies set out in 29 & 30 Vict. c. 95, was for the working of defendants' lines by the Grand Trunk Railway Company, from 1st July, 1864, for 21 years; the net receipts with certain deductions to be divided in certain proportions between the two companies; the control and working of the defendants' road from the time of its being handed over to the Grand Trunk Railway Company, to be placed in the hands of the latter, under a joint committee selected from the boards of each company, and the defendants' railway and appurtenances during said term to be kept in good repair, &c.:—Held, that, because the defendants were to receive a portion of the net profits to be divided in certain proportions between them and another railway company, they were not on that account to be considered partners and liable as such. *McCallum* v. *Buffalo and Lake Huron R. W. Co.*, 19 C. P. 117.

Assignment for Creditors — *Effect of Execution by.*] — An assignment for the

benefit of creditors gave the trustees power from time to time, as they should deem expedient, "to purchase stock for the purpose of enabling them to assort and sell off the present stock to the best advantage, for the benefit of the estate:"—Held, that creditors executing would not by this become partners in the business. *Maulson* v. *Peck*, 18 U. C. R. 113.

A similar assignment, made before 22 Vict. c. 96, provided that the assignee might carry on the business for the benefit of the creditors executing, and employ the debtor to manage it, at such salary as might be agreed on, and supply goods to keep up the stock and for the more beneficial management of the business for the interest of the creditors, and pay for such goods out of the trust estate. Quære, whether this would make the executing creditors partners in the business. *Crapper* v. *Paterson*, 19 U. C. R. 160.

Co-operative Association — *Abortive Organization — Members.*]— The defendants (other than C.) and others signed a certificate of their intention to become incorporated as a co-operative association under R. S. O. 1877 c. 158. They failed, however, to fulfil the requirements of the Act, and never actually became a corporation under it. In the meanwhile the plaintiff supplied the defendants and other intended members of the association with certain goods, and now sued the former for the balance due in respect thereof:—Held, that the plaintiff was entitled to judgment against the defendants as partners; but as to C., who came into the arrangement at a later date than the others, only as to goods supplied after such later date. *Seiffert* v. *Irving*, 15 O. R. 173.

Purchase of Land—*Ownership par Indivis.*]—W. and D. entered into a joint speculation in the purchase of real estate; each looked after his individual interests in the operations resulting from this co-partnership: no power of attorney or authority was given to enable one to act for the other, and they did not consider that any such authority existed by virtue of the relations between them; all conveyances required to carry out sales were executed by each for his undivided interest. Upon the death of W. and D., the business was continued by their representatives on the same footing, and the representatives of W. subsequently sold their interest to T. W., who purchased on behalf of, and to protect, some of the legatees of W., without any change being made in the manner of conducting the business. A book-keeper was employed to keep the books required for the various interests, with instructions to pay the moneys received at the office of the co-proprietors into a bank, whence they were drawn upon cheques bearing the joint signatures of the parties interested, and the profits were divided equally between the representatives of the parties interested, some in cash, but generally by cheques drawn in a similar way. M. N. D., who looked after the business of the representatives of D., paid diligent attention to the interests confided to him, and received their share of such profits, but J. C. B., who acted in the W. interest, so negligently looked after the business as to enable the book-keeper to embezzle moneys which represented part of the share of the profits coming to the representatives of W. In an action brought by the representatives of W. to make the representatives of D. bear a share of such losses:—Held, that the facts did not establish a partnership between the parties, but a mere ownership par indivis, and that the representatives of D. were not liable to make good any part of the loss, having by proper vigilance and prudence obtained only the share which belonged to them. Even if the partnership existed, there would be none in the moneys paid over to the parties after a division made. *Archbald* v. *DeLisle*, *Baker* v. *DeLisle*, *Mowat* v. *DeLisle*, 25 S. C. R. 1.

Ship — *Ownership — Earnings.*] — Part owners of a ship are tenants in common of the ship, and partners in the earnings only. *Baker* v. *Casey*, 19 Gr. 537.

See Mair v. *Bacon*, 5 Gr. 338; *Merchants Bank* v. *Thompson*, *Mallon* v. *Craig*, 3 O. R. 541; *Crossman* v. *Shears*, 3 A. R. 583.

II. Actions and Proceedings by and against Partners.

Appearance—*Subsequent Proceedings.*]—In an action against two partners sued as a firm in the firm name, though after dissolution, one of the partners appeared in his individual name, and afterwards delivered a statement of defence and counterclaim, also in his individual name. The other partner did not appear. By rule 288, "Where partners are sued in the name of their firm, they shall appear individually in their own names; but all subsequent proceedings shall, nevertheless, continue in the name of the firm:"—Held, that the words "subsequent proceedings" should be confined to proceedings by the plaintiff; and a motion to set aside the pleading was dismissed. *Langman* v. *Hudson*, 14 P. R. 215.

——— *Want of Authority—Judgment—Execution—Creditors' Relief Act—Sheriff.*]— After service of the writ of summons upon one of the partners in an action against a partnership in the firm name, an appearance was entered by a solicitor in the names of both partners individually, but upon the instructions of one partner only and without the authority of the other. Upon motion by the latter to set aside the appearance and subsequent proceedings:—Held, that the appearance and the plaintiffs' judgment founded thereon were irregular. After the judgment had been set aside, several creditors of the defendants obtained judgments against them and placed writs of fi. fa. in the sheriff's hands, under which he sold the defendants' goods. Upon a motion by the plaintiffs, made in their own action and also in the several actions in which judgments had been obtained, for an order directing the sheriff to pay the proceeds of the sale into court, instead of making the usual entries under the Creditors' Relief Act, in order to preserve the priority of the plaintiffs' judgment, in case it should be restored upon appeal:—Held, that there was no power, upon the plaintiffs' application, to interfere with the sheriff's proceedings upon writs of fi. fa. regularly in his hands. *Mason* v. *Cooper*, 15 P. R. 418.

Arbitration — *Agreement—Execution by one Partner.*]—In an action on an agreement under seal to abide by an award, the declaration alleged that defendant agreed with the plaintiffs to refer:—Held, not supported by

proof of an agreement made and executed by one plaintiff only on behalf of himself and the others, being his partners. *French* v. *Weir*, 17 U. C. R. 245.

Discovery — *Examination of One Partner.*]—The statement of one partner on his examination in a suit against the firm as to transactions which occurred during the partnership, binds all the partners, unless they seek, by an examination of some of themselves, to contradict or qualify the statements of the partner whose evidence they object to. *Taylor* v. *Cook*, 11 P. R. 60.

——— *Quasi-Plaintiff.*]—See *Frothingham* v. *Isbister*, 14 P. R. 112.

Examination as Judgment Debtor— *Actual Partner—Division Courts Act, R. S. O. 1887 c. 51, s. 108, s.-ss. 4, 5, 6.*]—See *Re Young* v. *Parker & Co.*, 12 P. R. 646.

Judgment — *Bar to Proceeding against Other Partners.*] — See *Dueber Watch Case Mfg. Co.* v. *Taggart*, 26 A. R. 295, 30 S. C. R. 373.

——— *Execution.*]—Where an application is made under rule 876 for leave to issue execution, upon a judgment against a firm, against an alleged member of the firm, who has not admitted that he was and has not been adjudged to be a partner, and who was not served as a partner with the writ of summons, and who disputes his liability, there is no power in a court or a Judge, under rule 756 or otherwise, to summarily determine the question of his liability: but an issue must be directed. Tennant v. Manhard, 12 P. R. 619, overruled. *Standard Bank of Canada* v. *Frind & Co.*, 14 P. R. 355.

——— *Execution—Issue—Amendment.*] — The latter part of rule 876, providing for an application for leave to issue, upon a judgment against a firm, execution against some person as a member of the firm other than those mentioned in s.-ss (b) and (c) of the rule, applies only where there is in truth a partnership which is bound by the judgment obtained against the firm in consequence of the service of the writ of summons upon one of its members or its manager. Where there is in fact no partnership, no one can be bound by a judgment against an abstraction called "a firm," except the person who has been served under the provisions of rule 266, and who has appeared or pleaded in the action. And where the wife of the manager of the business of a so-called firm, who was shewn by the subsequent proceedings to have been merely a trustee for him of the profits, was personally served as a defendant with process in an action against the firm upon a bill of exchange, and defended:—Held, that, as there was in fact no partnership, an issue directed to determine whether the husband was liable to have execution issued against him as a member of the firm, upon a judgment recovered in the action against the firm, must be found in favour of the husband; and no amendment could be made which would enable the court to determine otherwise. *Standard Bank of Canada* v. *Frind*, 15 P. R. 438.

——— *Execution—Judgment Summons—Division Court.*]—A member of a partnership, against which a judgment has been recovered in a division court in the firm name, who has not been personally served with the summons, and has not admitted himself to be or been adjudged a partner, cannot be proceeded against by an order for committal for non-attendance on a judgment summons. Decision in 25 O. R. 573 reversed. *In re Reid* v. *Graham Brothers*, 26 O. R. 126.

Judgment against Firm — *Proceeding against Alleged Partner.*]—See *Ray* v. *Isbister*, 24 O. R. 497, 22 A. R. 12, 26 S. C. R. 79.

Laches — *Accounting for—Arbitration—Correspondence.*]—Delay in filing a bill to enforce a disputed agreement for a partnership, was considered sufficiently accounted for by evidence of an unanswered proposal for an arbitration and of correspondence between the plaintiff and his solicitors before suit. *Haggart* v. *Allan*, 4 Gr. 36.

Nominal Corporation — *Status of Corporators — Parties — Application to Add Co-partners.*]—In the case of a nominal corporation which has no legal status as such, the ostensible corporators are partners; and their liability as partners on the contracts of the company is a joint, and not a joint and several, liability. Where some but not all of the co-contractors are sued in an action, they are entitled of right to have all the others within the jurisdiction added as defendants; and, the plea of abatement having been abolished, the method of exception is by prompt application to the court under rule 324. As to the representatives of deceased or insolvent partners, there is a discretion to add or not. *Gildersleeve* v. *Balfour*, 15 P. R. 293.

Parties — *Dormant Partner.*]—In an action for goods sold and delivered the non-joinder of a dormant partner is not fatal. *Briggs* v. *Bower*, 5 O. S. 672.

——— *Penalty — Non-registration—Jurisdiction.*]—In an action by several plaintiffs qui tam against two defendants for penalties for not registering their partnership under R. S. O. 1877 c. 123, of which s. 11 gives the right of action to "any person" who may sue:—Held, that under the above section and the Interpretation Act, any objection to the action being brought in the name of more than one person, could not prevail; (2) that the circumstance that the plaintiffs resided out of the jurisdiction could not defeat their action; (3) that the joinder of two defendants for several penalties was not a ground of demurrer. *Chaput* v. *Robert*, 14 A. R. 354.

——— *Settlement — Lease—Improvements —Pleading.*]—A. and B. being partners, A. alone orally leased certain premises for a place of business, for five years, at a given rent. A. and B. went into possession. A memorandum for a lease was prepared by A., but never signed by the lessor. It was orally agreed between the lessor and A. that A. should erect a granary, &c., on the premises, the lessor to furnish the lumber and pay for the improvements at the end of the term. The lumber was furnished and the buildings erected with partnership funds. In the meantime the lessor ran an account at the store for goods. A. and B. afterwards dissolved, and B. released and assigned to A. all his right to debts, &c. A. then took C. into partnership, with whom the lessor settled the account for the

goods by allowing an alleged set-off. A. afterwards sued his lessor for the goods sold and the value of the granary:—Held, (1) that B. should have joined in such action; (2) that the settlement with C. was not bonâ fide as against A.; (3) that no lease having been executed, upon the facts, A. was a tenant at will, and that it might be orally agreed that he should make the improvements and be paid for them, and that the plaintiff might sue for them in his own name, though they were made with partnership funds. *Brougham* v. *Balfour*, 3 C. P. 72.

Partnership Name — *Action by One Plaintiff—Amendment.*]—A person carrying on business alone, in a name denoting a partnership, cannot bring an action in that name. Where, however, such name consisted of his surname, prefaced by the initials of his Christian names, and followed by the words "and Co.:"—Held, that these words in the style of cause in an action were mere surplusage, or, if not, they should be struck out; and, as the mistake was trifling, and no one was misled or affected by it, an amendment at the trial should have been granted as of course. Mason v. Mogridge, 8 Times L. R. 865, distinguished. *Lang* v. *Thompson*, 16 P. R. 516.

——— *Dissolution.*]—The cause of action arose before, and the writ of summons was issued after, the dissolution of defendants' firm:—Held, that the defendants were properly sued in their firm's name. *Wilson* v. *Roger, McLay, & Co.*, 10 P. R. 355.

Pleading—*Sufficiency of Traverse.*]—See *Mylius* v. *Jackson*, 23 S. C. R. 485.

Service of Writ of Summons.]—Blakeslee, Brown, & O. carried on business in partnership, under the name of Blakeslee & Co. Blakeslee absconded, and the business continued. O. assigned his interest to Brown, and after such assignment, but before it had been made public, the plaintiff served his writ of summons against the firm on O.:—Held, that the service was good. *Bank of Hamilton* v. *Blakeslee*, 9 P. R. 130.

Set-off.]—Evidence of a debt due by one of a firm (plaintiffs) in his individual capacity, will not support a plea of set-off to an action by the firm for a partnership claim. *Pegg* v. *Plank*, 3 C. P. 398.

In a partnership suit, the partnership was found indebted to the defendant; and, on the other hand, the defendant was liable to certain costs. The defendant having become insolvent, it was held that the plaintiff was entitled, notwithstanding the insolvency, to set off the costs against the debt. *Brigham* v. *Smith*, 17 Gr. 512.

Slander of Firm — *Right of Action.*]—See *Bricker* v. *Campbell*, 21 O. R. 204.

III. Contracts of Partnership — Construction, Effect, and Terms of.

Debt by Firm to Partner—*Purchase of Plant—Valuation.*]—The respondents, having on hand large contracts to fulfil, entered into partnership with the appellant, under the style of J. W. & Co. The respondent A. P. M. subsequently filed a bill against W., the appellant, and his two sons, co-partners, asking for a decree declaring him and his two sons entitled to receive credit to the amount of $40,000, the estimated value of certain plant, &c., used in the construction of the works done by the partnership. Under an article (set out in the report) in the deed of partnership executed before a notary public in the Province of Quebec, the respondent claimed to be entitled to a credit of $40,000. There was evidence that the plant had cost originally $57,000, and that it was valued in the inventory at $40,000 at the request of the appellant; it was also shewn and admitted that the profits of the business were sufficient to reimburse the appellant the sum of $24,000 and other moneys advanced, and that there was still a large balance to the credit of the partnership:—Held, varying the judgment in 7 A. R. 531, that the plant, &c., furnished by the respondents having been inventoried and valued in the articles of partnership at $40,000, the respondents had thereby become creditors of the partnership for the said sum of $40,000, but, as it appeared by the articles of partnership that the plant was subject at the time to a lien of $24,000, and that the lien had been paid off with the partnership moneys, the respondents were only entitled to be credited, as creditors of the partnership, with the sum of $16,000, being the difference between the sum paid by the partnership to redeem the plant and the value at which it had been estimated by both parties in the articles of partnership. *Worthington* v. *Macdonald*, 9 S. C. R. 327.

Execution of Contract—*Non-completion—Co-partnership of Separate Firms—Sharing Profits—Giving Credit to One.*]—Held, upon the facts set out in the report, (1) that the refusal of two of the members of a firm to sign a certain agreement rendered it inoperative not only as to those refusing to sign it, but also as to those who had signed it, and that until all had signed it was not a completed agreement; (2) that those who actually signed the agreement could not thereby bind their co-partners who did not sign it; (3) that, even if the agreement had been completed, it did not constitute a partnership between the two firms, so as to enable one firm to pledge the other firm's credit, for advances in carrying on the trade; (4) that the provision for sharing profits and losses, which in an ordinary trading association, where there is a community of capital and stock-in-trade, and a common undertaking, is conclusive evidence of a partnership, is nevertheless not a conclusive test of partnership where there is an extraordinary adventure between two partnerships presenting a well defined and well known separation of interests and ownerships; (5) that the way in which the profits are to be participated in is the essence of the matter, and that when the right to call for a proportion of the profits arises by virtue of an express contract to that effect, which would not otherwise flow from the relations of the parties, the right exists, quâ debt, and not by virtue of partnership; (6) that, even assuming that the agreement constituted a partnership between the two firms, yet the plaintiffs with knowledge of all the facts, by electing to give credit to one firm alone, were precluded from thereafter resorting to the other. *Merchants Bank* v. *Thompson*, *Mallon* v. *Craig*, 3 O. R. 541.

Interest — *Capital—Proceeds of Bills—Currency.*]—Parties about to enter into partnership, in Canada, agreed each to pay in $8,000 capital, and one of them omitted to pay in any portion thereof: — Held, that such omission formed no ground for charging the party with interest on his share of the proposed capital. The same partner, during the continuance of the partnership, drew bills in the name of the firm, the proceeds of which he applied to his own purposes:—Held, that on these he was liable to be charged interest, although the general rule is, that, after a dissolution of partnership, interest is never charged against one partner in favour of another. *Wilson* v. *McCarthy*, 25 Gr. 151.

Certain of the parties paid in the amount of their proposed capital in United States securities, mortgages, and notes, in respect of which the master credited them with their value in Canadian currency ($7,200):—Held, on appeal, that the agreement must be taken to have meant that the amount each agreed to pay in was that sum in Canadian currency, or its full equivalent in United States currency. *Ib.*

Loss — *Speculation—Apportionment.*]— A partnership was formed between two civil engineers and architects, the profits of which were to be divided in shares of three-fifths and two-fifths. During the partnership they invested moneys of the partnership in the purchase of real estate, which resulted in a loss:—Held, that the loss was to be borne by the partners in the same proportion as they were to share the profits and loss of their other business. *Storm* v. *Cumberland*, 18 Gr. 245.

Misrepresentations — *Relief from Contract.*]—A person was induced to become a member of a firm, on the faith of representations made to him that the previous losses of the firm only amounted to $18,000, but it subsequently turned out that such losses amounted to about $22,000 or $24,000:—Held, that by reason of such misrepresentation he was entitled to be relieved from such agreement, and to be indemnified by the other members of the firm against all liabilities incurred by him as such partner prior to the discovery of the untruth of the representation made as to the losses of the firm. Held, also, that having become a partner also on the faith that the firm in question intended to form a syndicate arrangement with another firm, which arrangement failed to be carried out for want of the concurrence of some of the members of such other firm, he was on that account also entitled to be relieved from his agreement to become a partner. *Mallon* v. *Craig*, 3 O. R. 541.

Profits — *Construction of Contract.*] — Where by articles of partnership between M. and L. it was recited, in substance, that they had for some years been equally interested as partners in trade, and that all their then or after acquired property and all profits should be divided equally, and that at the settlement or dissolution of the partnership M. should have £150 over and above one-half of all which they might then possess; and it was then provided, inter alia, that all profits and losses should be borne equally, "except, as has already been done, that M. should receive £150 more than L.:"—Held, that the £150 should be deducted from the gross amount of money, and not from L.'s share merely. *O'Lone* v. *O'Lone*, 2 Gr. 125.

An agreement was entered into for a joint speculation in lands; A. to find the capital, and B. to select the lands and make purchases; A. to be allowed in the first place to retain out of each sale of any of the lands, as made, his money expended upon the same, and the remainder, the profits, to be equally divided between them; B.'s trouble, experience, and time, being considered equal to A.'s capital:—Held, that the profits divisible between the parties was the value, whether ascertained upon re-sale or by valuation, after deducting the cost and incidental expenses. *Proudfoot* v. *Bush*, 7 Gr. 518.

Variation — *Presumption — Laches — Trust—Statute of Frauds.*] — A partnership was formed between three persons, A., B., and C., to dig for gold on the property of one Allan. A. and B. were to do the work, and C. to pay the expenses; all three to share in the profits. The place so named was afterwards abandoned by mutual consent, and A. and B. removed, at the instance of C., to a lot in another township, Elzevir, where they resumed work, C. paying expenses as before:—Held, that, in the absence of any express agreement, it was to be presumed they were working on the same terms as at the place originally named. The plaintiff had occasion to leave the work on the 2nd March, and did not return. He filed a bill to enforce his partnership rights on the 30th July:—Held, that, as there was no stipulation respecting the time he was to work, and he was not requested to resume work, and no notice was given him of any complaint or intention to exclude him from the profits of the adventure, the delay did not bar the suit. C., in his own name, bought the privilege of digging for gold on the Elzevir lot, and subsequently formed a company by whom that lot was purchased:—Held, that the plaintiff, one of the working partners, was entitled to a share of all the profits and advantages made by C. in this transaction. There was no writing signed by C. acknowledging the agency and trust:—Held, that A. and B. having entered and worked on the lot, the Statute of Frauds did not apply. *Burn* v. *Strong*, 14 Gr. 651.

See Loucks v. *Wallbridge*, 31 U. C. R. 32; *Seiffert* v. *Irving*, 15 O. R. 173; *Frank* v. *Beswick*, 44 U. C. R. 1, *post* V. 4; *Crossman* v. *Shears*, 3 A. R. 585, *post* XI.; *Hibben* v. *Collister*, 30 S. C. R. 459, *post* IV.

IV. Death of Partner.

Contract with Apprentice—*Liability of Survivor.*]—A surviving partner is bound by the covenant of himself and his deceased partner to teach an apprentice until the end of the term for which he was apprenticed. *Connell* v. *Owen*, 4 C. P. 113.

Contract with Servant—*Termination by Death.*]—A contract of hiring entered into with a firm by a commercial traveller is put an end to by the death of one of the partners. *Burnet* v. *Hope*, 9 O. R. 10.

Executor—*Carrying on Business—Capital.*]—A testator's directions to his executors to continue to carry on business with his surviving partners, does not authorize the executors to embark any new capital in the business. *Smith* v. *Smith*, 13 Gr. 81.

——— *Carrying on Business—Debts—Liability of Estate.*]—The assets of a deceased person are not liable for debts incurred by an executor or administrator in continuing the trade or business of the deceased. *Lovell* v. *Gibson*, 19 Gr. 280.

Heirs, being also next of kin, who had been parties to the continuing of the business of the deceased with his assets and those of his partner, were held precluded from objecting to payment by the estate of the losses incurred in continuing the business. *Ib.*

Farm Stock of Partnership—*Jus Accrescendi.*]—A., of whom plaintiff was administratrix, and defendant having worked and stocked a farm in partnership:—Held, that on the death of one, the survivor did not take the whole of the chattels, but that the maxim "Jus accrescendi inter mercatores locum non habet," applied. *Rathwell* v. *Rathwell*, 26 U. C. R. 179.

Insolvency after Death—*Estate—Assignee.*]—Upon the death of one member of the firm and the subsequent insolvency of the surviving partners, the joint estate passes to their assignee in insolvency. *Davidson* v. *Papps*, 28 Gr. 91.

Lands of Partnership—*Executor—Tenant in Common.*]—The executor of a deceased partner in trade is tenant in common with the surviving partners, and the surviving partners cannot sue him in trespass for a wrongful sale and conversion of the whole of the partnership property against their will. *Strathy* v. *Crooks*, 2 U. C. R. 51.

——— *Legal Estate in One—Heir—Demand.*]—Though a surviving partner may have an equitable title in lands, yet this does not make a demand of possession necessary on the part of the heir of the deceased partner suing in ejectment upon his ancestor's legal title. *Doe d. Atkinson* v. *McLeod*, 8 U. C. R. 344.

——— *Mortgage — Foreclosure—Parties—Personal Representative — Sheriff's Sale — Judgment — Execution — Revivor.*]—Three partners having taken a conveyance of real estate, "as and for partnership property, for the purposes of the partnership," and one of the partners having left the Province and another died, a mortgagee of the property filed a bill for the foreclosure of his mortgage:—Held, that the personal representative of the deceased partner was a necessary party, and that the plaintiff must prove the absence from the jurisdiction of the non-resident partner, and perhaps the plaintiff's inability to serve him with process. *Baxter* v. *Turnbull*, 2 Gr. 521.

Quære, the effect of a sheriff's sale to a subsequent incumbrancer of an equity of redemption in real estate of a partnership, where the execution was issued against all the partners, but one of the defendants had died after judgment and before execution, the judgment not having been revived, and such sale having taken place pending a suit by the first mortgagee for the foreclosure of the mortgage. *Ib.*

——— *Personality.*]—Two merchants entered into partnership, inter alia, in the buying and selling of lands; and accordingly bought lands with partnership moneys, some of which were conveyed to each partner, and some to both jointly:—Held, that, as between the real and personal representative of one partner who died, the lands so bought were personal estate. *Wylie* v. *Wylie*, 4 Gr. 278.

Persons engaged in the "oil business" purchased land, on parts of which they sank wells, and leased or sold other portions thereof to various persons desirous of extracting oil from them:—Held, that such lands were part of the partnership assets and to be treated as personal property. *Sanborn* v. *Sanborn*, 11 Gr. 359.

Purchase of Share—*Discount—Goodwill—Continuance of Partnership after Expiry of Term.*]—A deed providing for a partnership during seven years from its date provided for purchase by the survivors of the share of a deceased partner, with a special provision that if one partner should die the value of his share should be subject to a discount of 20 per cent. After the seven years had expired, the partners continued the business by oral agreement for an indefinite period, and while it so continued K. died:—Held, that, even if the parties had not admitted that the business was continued under the terms of the partnership deed, such terms would still govern, as there was nothing in the deed repugnant to a partnership at will; that the surviving partners had, therefore, a right to purchase the share of K. and to be allowed the deduction of 20 per cent. therefrom as the deed provided; and that, in the absence of any stipulation in the deed to the contrary, the goodwill of the business and K.'s interest therein should be taken into account in the valuation to be made for such purpose. *Hibben* v. *Collister*, 30 S. C. R. 459.

Railway Stock and Bonds—*Sale—Purchase Money—Surviving Partner—Action by—Representative of Deceased Partner—Pleading—"Firm."*]—Where a sale of railway stock and bonds was effected by a partnership, a mortgage being taken back to secure part of the purchase money, and one of the partners subsequently died:—Held, that the right to enforce payment of the unpaid purchase money remained in the surviving partner, whether the subject of sale was to be treated as realty or goods and chattels. *Bolckow* v. *Foster*, 24 Gr. 333.

In such a case the plaintiff in his bill set forth that he, as well on his own behalf as that of the firm, sold to the purchaser and the purchaser bought from the plaintiff and the firm; and then alleged the death of his partner, "leaving the plaintiff sole surviving partner of the said firm; and the plaintiff is now solely entitled to all the interest of the said firm under the said agreement with the defendant," the purchaser:—Held, that this sufficiently stated the title of the plaintiff as the surviving partner of the firm. *Ib.*

Held, on rehearing, affirming the decision in 24 Gr. 333, that the right to enforce payment of the unpaid purchase money remained in the surviving partner, and that the representative of the deceased partner was an unnecessary party to the bill. Held, also, that the word "firm" meant a partnership; and that property alleged to belong to a firm must be taken as belonging to its members as partners, and not as tenants in common. *Bolckow* v. *Foster*, 25 Gr. 476.

Survivor—*Rights of—Representatives of Deceased Partner — Rights of — Receiver — Sale.*]—A surviving partner, by reason of his liability to pay the debts due by the partnership, is entitled to receive all moneys and collect all debts due to, and dispose of all the effects of, the firm for that purpose. The representatives of the deceased partner have a right to inspect the books of the partnership, and to be informed of the proceedings of the survivor; and any exclusion of them in these respects will entitle them to an injunction and receiver. *Bilton* v. *Blakely*, 6 Gr. 575.

Although a surviving partner may not be chargeable with any fraud or misconduct, still when there is a difference of opinion between him and the representatives of his deceased partner as to the mode of winding up the estate, they are entitled to the assistance of this court for that purpose, through the medium of a receiver and sale. *S. C.*, 7 Gr. 214.

Valuing Share of Deceased Partner—*Debts of Firm—Probate Fees.*]—For the purpose of taking out probate and paying the fees thereon, the representative of a deceased partner in a mercantile firm must be taken to be interested in the corpus of the partnership effects to the extent of the share of the deceased, undiminished by the debts and liabilities of the firm. *In re Surrogate Court of Wentworth and Kerr*, 44 U. C. R. 207.

See Frank v. *Beswick*, 44 U. C. R. 1, *post* V. 4.

V. Dissolution.

1. *Agreements as to Payment of Debts.*

Continuing Liability of Retiring Partners — *Co-sureties — Equality as to Amount.*] — A. and B., a trading partnership, entered into a joint speculation with C. and D. for the purchase and sale of lands. Afterwards E. was admitted into the concern; each to be entitled to one-fourth of the profits, and liable in the same proportion to any losses incurred. For the purposes of the co-partnership the parties were in the habit of discounting notes, which were made by E., and indorsed by A. and B. and C. and D. in their individual names. After nearly three years C. wrote to A. and B. and E., proposing to retire on receiving a certain amount in lands at a valuation, he agreeing for a certain period to continue to indorse renewals of the notes then outstanding, as accommodation indorser, which proposal was communicated to D., but nothing further was done with regard to it. Shortly afterwards D. made a similar proposition to A. and B. and E., on their "assuming all my share of the liabilities incurred by or for the said company, excepting only my liability for twelve or fifteen months as accommodation indorser after Knowlson (C.) on the paper in the Bank of Upper Canada," which proposal was accepted by A. and B. and E. Subsequently both C. and D. by a joint memorandum formally relinquished their interests in the company, but it did not appear that D.'s stipulation as to indorsing the notes was ever communicated to C. The notes so indorsed by C. and D. had been all consolidated into one note of £3,200, and upon a renewal of this note an action was subsequently brought against all the parties thereto, and a sale of D.s' lands was effected under the execution in that action, which realized only a portion of the amount. Thereupon D. filed a bill against C., seeking to make him, as prior indorser, pay the amount still remaining due in respect of the judgment, to reimburse D. what his lands had sold for, and also to make up the loss sustained by him in consequence of the sale of his lands at, as was alleged, a great undervalue. Under the circumstances of the case, the court below treated C. and D. as co-sureties for the continuing partners, and as such liable only to make up the amount of the claim in equal proportions; and, it appearing that C. had already paid more than his moiety of the demand, ordered D. to repay the excess to him, together with the costs of the suit. An appeal was dismissed with costs. *Harper* v. *Knowlson*, 2 E. & A. 253.

Covenant against Receipt of Debts.]—Defendant, on retiring from partnership with the plaintiff, covenanted not to receive any debts due to the firm; and to an action on this covenant pleaded that he had received only $10, which he retained as the consideration for his executing to the plaintiff at his request a lease of certain land; on which the plaintiff took issue. On a reference to find the facts, with power to the court to give such judgment thereon as might appear just, the arbitrator reported that after the defendant had received the $10 the plaintiff, by letter, offered him $10 if he would execute the lease, which defendant did accordingly; and that the plaintiff had not paid defendant the $10. The court gave judgment for defendant. *Teer* v. *Smith*, 21 U. C. R. 417.

Indemnity — *Recovery of Judgments—Non-payment.*]—Upon a bond given by a retiring partner on a dissolution conditioned to protect, save harmless, and keep indemnified the continuing member against all actions, charges, damages, &c., which might be commenced against him, or which he might have to pay or become subject or liable to, by reason of the debts of the late firm:—Held, that the obligee was entitled to recover the full amount of judgments obtained against him afterwards for partnership debts, though he had paid nothing upon them. Held, also, that the facts with regard to one of the judgments formed no ground for diminishing the amount to be recovered against defendants on account of it. *Smith* v. *Teer*, 21 U. C. R. 412.

The plaintiff and M. having been in partnership, on their dissolution M., with the two other defendants, agreed to pay the debts of the firm, and to relieve the plaintiff therefrom, in consideration of which the plaintiff assigned to defendants all accounts, &c., due to the firm. In an action against defendants for certain debts due by the firm, which the plaintiff alleged defendants had not paid, and for some of which the plaintiff had been sued, and judgment recovered:—Held, that the plaintiff had no right of action, unless he had himself paid such debts. *Gray* v. *McMillan*, 22 U. C. R. 456.

New Firm—*Agreement to Pay Debts of Old—Creditors' Rights—Trust—Novation.*]—A firm composed of two members dissolved partnership. One of the partners continued the business, giving to the retiring partner a number of notes in payment of his share in

the business. The continuing partner afterwards formed a partnership with another person, and, by the articles thereof, transferred to the new firm, as his contribution to the capital, all the assets of his business, subject to the deduction therefrom of his liabilities, which they were sufficient to pay in full, and which were to be assumed by the co-partnership and charged against him. Among these liabilities, known to the new partner, was a number of the notes which the retiring partner had indorsed to the plaintiff before maturity. The new firm paid two of these notes and interest on another, and had some negotiations with plaintiff for an extension of time for payment of the unpaid notes:—Held, by a majority of the court, disagreeing with the judgment in 14 O. R. 137, that no trust was established in favour of the retiring partner by the articles of partnership of the new firm, and that the plaintiff was not entitled to enforce against the new firm the performance of the stipulation in the articles for payment of the notes held by her. Held, also, by a majority of the court, that an independent agreement by the new firm with the plaintiff to pay the notes was not proved. Gregory v. Williams, 3 Mer. 582, and In re Empress Engineering Co., 16 Ch. D. 125, specially considered. The court being evenly divided as to the result, the appeal was dismissed with costs. *Henderson* v. *Killey*, 17 A. R. 456. Reversed in *Osborne* v. *Henderson*, 18 S. C. R. 698. (The judgment of the supreme court of Canada is nowhere reported in full, but the judgment of Patterson, J., in that court, is printed in 11 C. L. T. Occ. N. 88.)

——— *Agreement to Pay Debts of Former Firm—Damages—Novation.*] — A firm which had contracted with respondents to supply them with a number of bicycles, was subsequently dissolved, one partner retiring, and a new partner taking his place. The notice of dissolution stated that the business would be carried on by the new firm, who would pay the indebtedness of the old, and who were alone authorized to collect his debts, and, by the agreement for dissolution, the partners released each other from all liability, and it was agreed that all the claims of the old firm belonged to and would be collected by the new. The respondents had a large claim for damages against the old firm for non-fulfilment of contract, and upon learning from appellants the facts as to the dissolution, made claim against the new firm:—Held, upon the correspondence, that novation had taken place, and that the respondents were entitled to claim against the appellants the damages which the former had sustained through breach of the contracts, but that such damages must be limited to those arising from breaches occurring prior to the dissolution. Judgment in 27 O. R. 631 varied. *Seyfang* v. *Mann*, 25 A. R. 179.

See also *McKeand* v. *Mortimore*, 11 U. C. R. 428; *Hine* v. *Beddome*, 8 C. P. 381; *Canadian Bank of Commerce* v. *Marks*, 19 O. R. 450, *post* VI. 3.

Promissory Note—*Part Failure of Consideration—Tender.*]—To an action on a promissory note for $498, made by the defendant to the plaintiff, the defendant pleaded, on equitable grounds, that, by an agreement between the parties, a partnership which had existed between them was dissolved, and the defendant was to give the plaintiff the promissory note in question, and to pay certain debts and liabilities of the firm, and in consideration thereof to become the sole owner of certain property of the firm, and to have assigned to him by the plaintiff all the plaintiff's interest in certain debts and accounts due to the firm, as well as certain debts and accounts due to the plaintiff personally; that the defendant had performed his part of the agreement by giving the note and paying such debts and liabilities, but that the plaintiff, although requested so to do, had neglected to perform his part by giving the defendant such a power of attorney or assignment as would enable him to sue for the said debts and accounts, whereby he was prevented from obtaining payment of the same; that, except as aforesaid, there was no consideration for the making of the said note; and that such debts and accounts were equal to the plaintiff's claim on the said note:—Held, plea bad, as shewing only a part failure of consideration; and that defendant's remedy was by cross-action. Semble, that the plea was also bad, for not averring a tender to the plaintiff for execution of the power of attorney and assignment required. *Kilroy* v. *Simkins*, 26 C. P. 281.

Retaining Title on Retirement—*Nature of Title—Security for Payment of Debts.*]—Where a partner, desiring to retire from the business, agrees to sell out his interest in the joint property subject to the payment of all claims against the partnership; and a sale is effected by the remaining partner to a third party subject to such payment; the title which remains in the retiring partner until the payment of the debts of the firm is a legal, not a merely equitable right, and such as an execution against the remaining partner, for a private debt, will not affect. S. and A. were in partnership as dealers in lumber, and had become involved to some extent, in consequence of which it was agreed that A. should sell out his interest to S., and retire from the business, leaving S. sole owner, who thereupon, and without anything having been paid to A., entered into an agreement with the plaintiff for carrying on the same business as partner; the plaintiff agreeing that the first proceeds of the partnership sales should be employed in discharge of the claims against the firm of S. & A., which the plaintiff alleged he thought were composed of $17,000 due to the banks. In reality a claim of about $8,000 was held by the brother of S., who sued for and recovered judgment and execution, under which the sheriff seized and advertised the timber of the partnership for sale, whereupon the plaintiff filed a bill impeaching the bona fides of the judgment and seeking to restrain the sale, on the ground, amongst others, of the peculiar value of the timber. The court, however, being of opinion that the debt recovered was not fictitious, refused to interfere with the sale, but offered the plaintiff a reference to the master for the purpose of procuring the production of certain papers—not produced at the hearing—to impeach the bona fides of the debt; the master's report to be procured within fifteen days after their production; if the reference not taken, or if the master's report were in favour of the bona fides of the claim, the bill to be dismissed with costs; but, if the master reported against the bona fides of the debt, further directions and costs were reserved, and the amount of the judgment with interest and costs was directed to be paid into court—otherwise the execution

of the process not to be interfered with. *Stevenson* v. *Sexsmith*, 21 Gr. 355.

See post VI. 3.

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2. *Cause for Dissolution.*

Misconduct.]—Articles of co-partnership provided that a manager of the business should be appointed by a majority of the co-partners and subject to their control; and a manager was accordingly appointed, who was subsequently dismissed by a majority, but remained, nevertheless, in the management, at the request of another partner:—Held, that this was such misconduct in such partner as entitled the others to a dissolution. *Newton* v. *Doran*, 1 Gr. 590.

——— *Subsequent Consent—Forfeiture of Goodwill.*]—Partnership articles for a firm of three persons provided that if any partner should violate certain conditions of the terms of partnership the others could compel him to retire by giving three months' notice of their intention so to do, and a partner so retiring should forfeit his claim to a share of the goodwill of the business. One of the partners having broken such conditions of the partnership, the others orally notified him that he must leave the firm, and to avoid publicity he consented to an immediate dissolution, which was advertised as "a dissolution by mutual consent." After the dissolution the retiring partner made an assignment of his goodwill and interest in the business, and the assignee brought an action against the remaining partners for the value of the same:—Held, reversing the judgments in Mead v. O'Keefe, 15 O. R. 84, 15 A. R. 103, that the action of the defendants in advertising that the dissolution was "by mutual consent" did not preclude them from shewing that it took place in consequence of the misconduct of the retiring partner; that the forfeiture of the goodwill was caused by the improper conduct which led to the expulsion of the partner in fault and not by the mode in which such expulsion was effected; and, therefore, the want of notice of intention to expel required by the articles could not be relied on as taking the retirement out of that provision of the articles by which the goodwill was forfeited:—Held, also, that if it was a dissolution by one partner voluntarily retiring no claim could be made by the retiring partner in respect to goodwill, as the account to be taken under the partnership articles in such cases does not provide therefor. Semble, that the goodwill consisted wholly of the trade name of the firm. *O'Keefe* v. *Curran*, 17 S. C. R. 596.

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3. *Notice of Dissolution.*

The plaintiff sued M. and B. upon a promissory note signed M. and Co., made by M., dated 10th October, 1853. For the defence, a deed of dissolution of partnership between M. and B. was proved, dated 25th May, 1853, and three Canada Gazettes giving notice of such dissolution, the first dated 25th June, 1853. It was not shewn that the plaintiff ever knew of B. being a partner, and the note was made at Port Hope, where M. and B. had carried on business, but B. lived in Montreal:—Held, that a verdict should have been found for defendant B. *Darling* v. *Magnan*, 12 U. C. R. 471.

See Seyfang v. *Mann*, 25 A. R. 179, *ante* 1; *Bryce* v. *Davidson*, 25 U. C. R. 371, *post* 4; *Caldwell* v. *Accident Ins. Co. of North America*, 24 S. C. R. 263.

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4. *Rights and Obligations of Partners after Dissolution.*

Brokers—*Discount of Promissory Note—Misappropriation of Proceeds.*]—Defendants H. and G., who had been in partnership as brokers, were sued for money had and received, the cause of action being for the proceeds of two notes made by the plaintiff, payable to them, to be discounted, which it was alleged they had received and not paid over. G. allowed judgment to go by default. It appeared that the plaintiff had handed the notes to G., acting for the firm, to get them discounted for him; that they were indorsed in the name of the firm while it continued; and that after the partnership had been duly dissolved G. sold them, and received the proceeds, which he applied to pay a debt of his own, contracted by him in the name of the firm, H. not being aware of the sale. It was objected that the plaintiff could not recover against both defendants on this evidence, and the plaintiff was then allowed at the trial to add a count charging that defendants as brokers received the notes to negotiate for the plaintiff and pay him the proceeds, but that by their neglect of duty said notes, before they became due, were indorsed by defendants, and came so indorsed into the hands of one G., who sold the same to one A., and applied the money to his own use; and that the plaintiff was afterwards compelled to pay the notes to A. The plaintiff entered a nolle prosequi as to G., and defendant refused to plead to this count, objecting to its being allowed. The jury having found a general verdict for the plaintiff:—Held, that the plaintiff could not recover against both defendants on either count, for as to the first count the money was not received by the firm, but by G. alone, after the dissolution, and without the knowledge of H.; and as to the second, it was no breach of duty in G. to discount the notes, that being the purpose for which he received them, and for the wrong committed by him in not paying over the money received after the partnership had ceased. H. was not liable. *Hammond* v. *Heward*, 20 U. C. R. 36; *S. C.*, 11 C. P. 261.

Contract before Dissolution—*Enforcement.*]—The defendants contracted to deliver lumber to a firm of three partners. Before delivery the firm was dissolved, and the defendants refused to carry out their contract. In an action brought in the individual names of the three partners for damages for non-delivery:—Held, that the dissolution of the firm was no justification in law for the defendants' refusal to carry out their contract. *McCraney* v. *McCool*, 19 O. R. 470, 18 A. R. 217.

Interest — *Delay in Settlement — Misconduct.*] — When the defendant was, at the dissolution of a partnership, to receive £150 more than the plaintiff, and it appeared that

a settlement of the accounts had been delayed by the misconduct of the defendant:—Held, that he was not entitled to interest on the £150 from the time of the dissolution. *O'Lone* v. *O'Lone*, 2 Gr. 125.

——— *Valuation of Stock.*]—In a deed of dissolution between plaintiff and defendant, it was recited that the plaintiff had agreed to give up all his interest in the assets on defendant satisfying all claims, and paying to him £3,080, for which amount the plaintiff agreed to take certain stock at a valuation, so far as it would go; the balance, after deducting the value of said stock, to be paid to the plaintiff in equal amounts, at three, six, nine, and twelve months, with interest from the valuation of said stock; and defendant covenanted to pay the plaintiff at the expiration of three, six, nine, and twelve months after the valuation, the balance of said £3,080, with interest. The valuation was delayed for some time:—Held, that interest could be claimed only from such valuation, not from the dissolution. *Rowe* v. *Cotton*, 17 U. C. R. 533.

Lien of Retiring Partners—*Profits—Account.*]—A retiring partner obtained from one of the continuing partners a letter agreeing to reimburse the amount advanced by him out of the one-fourth of the profits from the business:—Held, that the retiring partner had a lien on such fourth part of the profits, and a corresponding portion of the capital stock and assets of the partnership, and was entitled to an account of the partnership dealings. *McGregor* v. *Anderson*, 6 Gr. 354.

Promissory Notes—*Use of Name of Retiring Partner—Power of Attorney.*]—Defendant, on the 8th August, 1863, gave a bond to the plaintiffs conditioned to pay, to the extent of $2,000, debts then due or to be incurred to them by the firm of M. & G., carrying on business at Galt, whom the plaintiffs had been supplying with goods. In July or August, 1863, G. went to Buffalo, telling M. that he was going to leave the firm; and before going, in June, he gave to the defendant, his uncle, a power of attorney, which recited his intention to reside some time in Buffalo, and that his interest in the firm would continue notwithstanding, and authorized defendant to carry on the business, with power to close it up, and to sign bills, notes, &c., in G.'s name, or that of the firm. After he left, the sign, by the defendant's direction, was changed to M. & Co., but defendant told M. to give notes in the name of M. & G., to the plaintiffs for goods supplied after the date of the power of attorney. In June, a notice of intended, and in September a notice of actual, dissolution, was published in a local paper, of which the plaintiffs were not proved to have had notice. In April, 1864, M., with the defendant's knowledge, signed notes in the name of M. & G., payable at different dates, for the balance according to an account then rendered, and a separate note for the goods bought in March previous; and in September, 1864, defendant, in writing to the plaintiffs, expressed his hope that it would soon be an advantage to them to continue their account with M. & G., without his guarantee. G. returned to Galt in September, 1863, and was employed in the bank of which defendant was agent; but he said he had not authorized his name to be used to the notes given in April, 1864. In an action against defendant on this bond, the court being left to draw inferences of fact:—Held, that G.'s return from Buffalo, without in any way interfering with the defendant, was not a revocation of the power; that, notwithstanding the dissolution, which must be held to have taken place in September, 1863, he might permit his name to be used as it was in closing up the business; that the power sufficiently authorized defendant so to use it; that the inference from the facts was, that in what he did he was acting under such power; and that defendant, therefore, was liable for the purchase made in March, 1864. *Bryce* v. *Davidson*, 25 U. C. R. 371.

Receiver — *Exclusion—Security.*]—Two partners dissolved. On a bill afterwards filed by one for exclusion, the defendant justified the exclusion on the ground of a parol agreement, which the other denied, and it was not otherwise proved:—Held, that the plaintiff was entitled to a receiver for his security until the hearing. *Steele* v. *Grossmith*, 19 Gr. 141.

Sale of Partnership Assets by Continuing Partner — *Pending Suit for Account.*]—G. D. and A. D., who were in partnership as bakers, purchased some wheat for their business, but, not being of the required quality, it was not used by them. On 28th January, 1876, the partnership was dissolved by an instrument under seal, G. D. giving A. D. $165 in cash and a note for $500, retaining the assets and continuing the business. On 14th March, A.D., on the ground of his being a minor and not bound by the terms of the dissolution, filed a bill in chancery by his next friend for a partnership account. On 16th March, being after the dissolution, G. D., to meet existing demands against the partnership, and to convert the assets into money for the benefit of the partners, bonâ fide sold the wheat for value to the plaintiff, who was aware of the dissolution, but not of the chancery proceedings:—Held, that the sale was valid. *Murphy* v. *Yeomans*, 29 C. P. 421.

The defendant, who held the wheat in store for the firm, on receiving a delivery order signed by G. D., undertook to hold the wheat for the plaintiff, and negotiated with him for the purchase of it, but afterwards repudiated the plaintiff's title, and, on being indemnified by A. D., refused to give the wheat up to the plaintiff:—Semble, that the defendant, after what he had done, could not be permitted to set up A. D.'s title against the plaintiff. *Ib.*

Solicitor—*Action for Costs.*]—Defendant signed a written retainer of D. & E. as his attorneys to prosecute one M. While the suit was pending the partnership between them was dissolved, and E. retired, assigning to D. all his rights. D.'s name alone appeared as plaintiff's attorney on the record:—Held, that D. might sue alone for the costs. *Dougall* v. *Ockerman*, 9 U. C. R. 354.

Withdrawal of Capital—*Agreement as to—Effect of Dissolution.*]—Plaintiff and two others entered into partnership under articles of agreement, dated 9th January, 1877, providing that on the death of any one partner the business was to be closed until stock was taken and the affairs of the firm settled, when there was to be a division of profits; and that if any partner desired to withdraw after a year from the date of the articles he should

give the other two members the right of refusal of his share of the business, &c. There was a contemporaneous agreement as to what and how plaintiff was to pay for his share of the business; and then there was an instrument providing for the purchase by the other two partners of plaintiff's interest on certain conditions, with the alternative proviso, that if the plaintiff desired to withdraw from the firm he should be repaid all moneys put into the concern by him from the day of partnership up to 1st January, 1878; two months' notice of purchase or sale to be given on either side. One of the two other partners died within six months from the date of the articles, and the plaintiff more than two months before the expiration of the year gave notice of his desire to retire and get back his money:—Held, that the effect of the death in the partnership within the year was to dissolve the firm, and that, taking the three instruments together, the plaintiff could only have obtained the benefit of the last agreement in case the firm continued to exist until after the close of the year; and therefore that his right of action was defeated by the dissolution, and his only remedy was an account in the ordinary way. *Frank* v. *Beswick*, 44 U. C. R. 1.

See Re Walker, 6 A. R. 169; *Birkett* v. *Metivier*, 31 C. P. 430, 7 A. R. 53; *Wilson* v. *Roger, McLay, & Co.*, 10 P. R. 355; *Melbourne* v. *City of Toronto*, 13 P. R. 346; *Reid* v. *Coleman*, 19 O. R. 93; *Standard Bank* v. *Dunham*, 14 O. R. 67; *Stroud* v. *Wiley*, 27 A. R. 516.

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5. *Other Cases.*

Assignment of Interest of Partner—*Possession of Partnership Premises—Tavern License.*]—A partnership for a definite term, which has not expired, can be put an end to by the voluntary assignment by one of the partners of his interest in the business, at his own instance or at the instance of his assignee, against the will of the other partner. And where a partnership was so put an end to, the assignor being the lessee of the premises on which the business was carried on, and assigning the term to the assignee, the latter was held entitled to recover possession of the premises against the other partner without notice to quit or demand of possession. Where the holder of a tavern license enters into partnership with another person, to whom he assigns an interest in his tavern business, such assignment is not an assignment of his business within the meaning of s. 37 of the Liquor License Act, R. S. O. 1887 c. 194, and does not require a transfer of the license. Under the construction of the partnership agreement in this case, the new partner did not take an undivided one-half interest in the license. *Westbrook* v. *Wheeler*, *Wheeler* v. *Westbrook*, 25 O. R. 559.

Purchase of Partner's Interest by Co-partners — *Errors in Statements — Fraud.*]—In order to avoid a dissolution of partnership and a winding-up of the business, the interest of a partner in the partnership assets was purchased by his co-partners, for an amount equal to the profits standing at his credit, his salary to the time of the purchase, and a percentage of his capital as shewn in the last yearly balance sheet, which was based upon statements prepared under the supervision of this partner. More than two months after the transaction, the purchasers brought this action, alleging that part of the stock-in-trade had been over-valued in the statements, and claiming repayment of part of the purchase money: — Held, upon the evidence, that the purchase price was arrived at as a compromise, and not as an arbitrary proportion of definite items: but that, apart from this, as the statements had been prepared in good faith and in accordance with the uniform usage of the business, the defendant was not liable. *Stroud* v. *Wiley*, 27 A. R. 516.

Settlement—*Valuation—Deceit.*]—Plaintiff and defendants were partners. Defendants, before the expiration of the term, induced the plaintiff to agree to a dissolution. A valuation of the assets was thereupon made by the defendants, and a settlement took place, founded on such valuation, under the erroneous impression on the part of the plaintiff that one of the defendants was to retire from the business, and that the interest of the other defendant in the valuation was identical with the interest of the plaintiff; while the fact was, that the defendants had entered into a private agreement, that, after settling with the plaintiff, the stock should be sold for the joint benefit of the defendants, and that they should share equally the proceeds and carry on the business:—Held, that by reason of this deceit the transaction was not binding on the plaintiff. *O'Connor* v. *Naughton*, 13 Gr. 428.

Simulated Dissolution — *Husband and Wife — Creditors.*] — In April, 1886, J. S. McL. retired from the firm of McL. Bros., composed of himself and W. McL., and agreed to leave his capital, for which he was to be paid interest, in a new firm to be constituted by W. McL. and another. It was arranged that such capital should rank after the creditors of the old firm had been paid in full. The new firm undertook to carry on business under the same firm name up to 31st December, 1889. J. S. McL. died on 18th November, 1886. His wife, who was separate as to property, had an account in the books of both firms. On 16th April, 1890, an agreement was entered into between the new firm of McL. Bros. and the estate of J. S. McL. and Mrs. J. S McL., whereby a large balance was admitted to be due by the firm to each. The new firm was declared insolvent in January, 1891. Claims having been filed by the estate of J. S. McL. and by Mrs. J. S. McL., they were contested by the Merchants Bank, on the following grounds among others:—1. That the bank had been creditors of the firm, and continued to make advances to the new firm on the faith of the agreement of April, 1886; 2. that Mrs. J. S. McL.'s money was part of her husband's capital; 3. that the dissolution was simulated: — Held, reversing the judgment in O. R. 2 Q. B. 431, that the dissolution of the partnership was simulated; that the moneys which appeared to be owing to Mrs. J. S. McL., after crediting her with her own separate moneys, were in reality moneys deposited by her husband in order to confer upon her, during marriage, benefits contrary to law; and that the bank had a sufficient interest to contest these claims, the transaction being in fraud of their rights as creditors. *Merchants Bank of Canada* v. *McLachlan*, *Merchants Bank of Canada* v. *McLaren*, 23 S. C. R. 143.

VI. Liability of Partners to Others.

1. *As to Bills, Notes, and Cheques.*

(a) *Note Given for Partnership Purposes.*

Accommodation Acceptance by Partner—*Mala Fides of Holder.*]—The three defendants carried on business in partnership as stock brokers and financial agents, under the name of Cassels, Son, & Co. By the articles of partnership it was required that all bills, drafts, cheques, &c., should be signed in the name of the firm. It appeared that one of the defendants and one L. were engaged in private transactions not connected with or known to the firm, and in the course thereof L., who had no available funds in the firm's hands, drew a cheque or order on them in favour of the plaintiff for $600, and C., one of the defendants, marked across it "Good." L. then procured plaintiff to discount it at the rate of thirty per cent. per annum, and to hold it for a month:—Held, that the firm were not liable on such order, for the acceptance was not in the name of the firm, and the evidence shewed that the cheque or order was not taken by plaintiff in good faith. *Hovey* v. *Cassels*, 30 C. P. 230.

——— *Notice to Holder—Release of Drawer—Pleading.*]—In an action by indorsees for value, against a firm of M. & C., on a bill drawn by S. & Co., in their own favour, accepted by the defendants and indorsed by S. & Co. to plaintiffs, the defendant C. pleaded that the bill was accepted by his partner M. in the name of the firm as an accommodation for S. & Co., and without his (C.'s) authority, and was not within the scope and objects of the partnership business, and that the plaintiffs took it with notice. Also, equitably, that the plaintiffs after the bill had matured, having notice of the accommodation acceptance, agreed with S. & Co., the drawers, without the consent of defendant, to accept a composition from S. & Co., which composition was paid to plaintiffs, who thereupon discharged S. & Co. from liability; and that defendants were discharged in equity thereby:—Held, that the first plea was insufficient in not stating that the acceptance had no reference to any dealing between S. and the firm of M. & C. 2. That the equitable plea was bad, for the plaintiff, having notice only after the bill matured, might release the drawers without releasing the accommodation acceptors. *City of Glasgow Bank* v. *Murdock*, 11 C. P. 138.

Accommodation Indorsement by Partner—*Knowledge of Holder.*]—H. made a note payable to L., or order, and took it to M., requesting him to indorse it for his accommodation. M., who was in partnership with the other defendant, indorsed it in the name of the firm, but without his co-partner's sanction or knowledge. L. afterwards indorsed, but without recourse, and the plaintiff took it with knowledge of the circumstances:—Held, that M. could not bind his partner by indorsing for such a purpose, and the plaintiff could not recover. *Harris* v. *McLeod*, 14 U. C. R. 164.

The plaintiffs discounted a note for J. N., the maker, payable to and indorsed by a firm in the partnership name by one of the partners, the plaintiffs knowing that it was so indorsed as security for J. N., and having no reason to suppose that it was in connection with the partnership business:—Held, that the other partners were not liable. *Federal Bank* v. *Northwood*, 7 O. R. 389.

——— *Want of Knowledge of Holder.*]—The plaintiff, having a claim against M. agreed to give him time, on receiving a good indorsed note, and M. sent him a note made by himself, payable to W. M. or order, and indorsed by W. M. and by the firm of "J. & J. Carveth." The plaintiff took the note before it was due, knowing nothing of the circumstances under which it was indorsed by the firm or of the authority of James Carveth, who indorsed it, to use the partnership name. When it fell due, James Carveth being absent from the country, the plaintiff sued the other partner, John:—Held, that he was entitled to recover. *Henderson* v. *Carveth*, 16 U. C. R. 324.

Debt of Partner.]—A note given by a partner for a private debt in the name of the firm, was held not binding on the firm. *Beals* v. *Sheldon*, 4 O. S. 302.

Fraudulent Acceptance—*Discount—Notice — Change in Partnership Name.*]—Where the plaintiffs, a bank, discounted a bill drawn by one partner, and accepted by him in the name of the firm, the manager being aware that it was intended by such partner to reimburse himself for moneys which he alleged that he had advanced to the firm; and it appeared that such acceptance was unauthorized by the other partners:—Held, that the bank could not recover against them. *Royal Canadian Bank* v. *Wilson*, 24 C. P. 362.

The partnership name, when the bill was so drawn and accepted, was J. S. W. & Co., and the acceptance was in the name of W. M. & Co.:—Held, that this also would have been fatal to the plaintiffs' recovery. *Ib.*

Fraudulent Indorsement—*Discount—Misappropriation.*]—Plaintiff gave defendants, who were co-partners and brokers, two notes, payable to their order, to get discounted for him. He afterwards drew upon them for £200 on account of the notes. Defendants did not discount the notes till after they had dissolved partnership, when one defendant, in fraud of his co-partner, indorsed the partnership name on the notes, and passed them away, and applied the proceeds to his own personal use:—Held, that defendants were jointly liable, and that the draft for £200 did not annul the original contract or affect the responsibility of defendant H. *Hammond* v. *Heward*, 11 C. P. 261.

Fraudulent Making—*Discount—Value—Notice.*]—Defendants and one M. were in partnership in the lumber business at Barrie, the two defendants residing there, and M. in Hamilton. The working capital was $5,100 furnished equally by the three, and was in M.'s hands; and the lumber was, by arrangement of the partners, to be consigned by the defendants to M., who was to accept their drafts for the value, and the necessary funds were to be raised by discounting them. The partnership was formed in December, 1873, and lasted until March, 1874, when M. absconded. In January, 1874, M. took to the plaintiffs a note for $808 filled up in his writing, and purporting to be made by W. M. & Co., payable to himself, and indorsed by him, which the plaintiffs took from him for

value. This note was made for his own private purposes in fraud of the partnership, and the evidence was contradictory as to whether the name of the firm was in his writing or not. The plaintiffs' manager swore that he relied on M.'s security and did not inquire about the firm. It was intended or agreed that the name of the firm should be W. M. & Co.: but that of J. W. & Co. was used until March without M.'s knowledge, when the former name was adopted. The trial Judge held that the defendants were not bound. The court of Queen's bench held, as an inference of fact from the evidence, that M. did sign the name of the firm as makers and in the proper partnership name; and entered a verdict for the plaintiffs. On appeal the court was equally divided and the judgment below was therefore affirmed. *Canadian Bank of Commerce* v. *Wilson*, 36 U. C. R. 9.

——— *Notice to Holder.*]—The defendant W. acted as agent for his co-defendants under a written agreement that no partnership should be created between them, or "the parties held to be partners." To all appearance, however, W. acted as a partner and as such effected a sale to the plaintiff of a quantity of wine, &c., at ninety days' credit. Subsequently he applied to plaintiff for a loan of money for the purpose, as he stated, of retiring notes of customers of the firm, but which he told the plaintiff he was desirous of concealing from the other defendants, his so-called partners, and for the amount so borrowed he gave the promissory note of the firm:—Held, that what transpired between W. and the plaintiff when lending the money, was sufficient to shew that the advances had not been for partnership purposes, and therefore that the other defendants were not liable. *McConnell* v. *Wilkins*, 13 A. R. 438.

E. was a member of the firm of S. C. & Co., and also a member of the firm of E. & Co., and in order to raise money for the use of E. & Co. he made a promissory note which he signed with the name of the other firm, and indorsing it in the name of E. & Co. had it discounted. The officers of the bank which discounted the note knew the handwriting of E., with whom the bank had had frequent dealings. In an action against the makers of the note C. pleaded that it was made by E. in fraud of his partners, and the jury found that S. C. & Co. had not authorized the making of the note, but did not answer questions submitted as to the knowledge of the bank of want of authority: — Held, that the note was made by E. in fraud of his partners, and that the bank had sufficient knowledge that he was using his partners' names for his own purposes to put them on inquiry as to authority. Not having made such inquiry, the bank could not recover against C. *Creighton* v. *Halifax Banking Co.*, 18 S. C. R. 140.

——— *Notice to Holder—Dissolution.*]—J. E. Dunham carried on business at Montreal from February, 1886, to 1st September, 1886, under the style of J. E. Dunham & Co. The same J. E. Dunham, with W. W. Park, carried on business at Toronto from 1st May, 1886, to 1st August, 1886, under the same style, J. E. Dunham & Co. By the articles of partnership between Dunham and Park it was agreed that Dunham should not sign the firm name to bills or notes. The dissolution of the partnership between Dunham and Park was not advertised until the 20th August, 1886. Dunham, for purposes of his own, and without the knowledge of Park, upon the 11th August, 1886, signed a series of notes amounting to $21,000 with the firm name of J. E. Dunham & Co., and gave them to one Isaacs. The note in question in this action was one of that series, but antedated upon the 30th July. The plaintiffs, who had no knowledge of Park being a member of J. E. Dunham & Co., took this note without notice of any infirmity, and to secure a pre-existing debt which was overdue. The Judge at the trial charged the jury that the plaintiffs had a right to resort to either firm for payment:—Held, a misdirection, and that there was no such right of election; that it was for the creditor to prove who his debtor was and not for the defendants to prove that they were not the debtors. Held, also, that if this note had been given before the 1st August, the Judge at the trial should have left it to the jury to say which firm Dunham intended to bind; but that, as the note was not given during the partnership, and as the plaintiffs had no knowledge of the firm, or of Park being a member of it, the question was not material. Held, also, that, as the plaintiffs knew nothing of the firm of J. E. Dunham & Co., or the members of it, and had had no dealings with it, the defendant Park was not liable upon the note signed after the 1st August, when the dissolution actually took place, although before the 20th August, when publication of the same was made. As the facts were all before the court, instead of ordering a new trial, judgment was given for the defendant Park with costs. *Standard Bank* v. *Dunham*, 14 O. R. 67.

——— *Notice to Holder—Presumption of Want of Authority.*]—The plaintiff, knowing that the defendants were a firm of solicitors, advanced to one A. money upon a joint note signed by him and by one of the defendants in the firm's name, without the knowledge or consent of his partner. No usage or general mutual authority to sign notes in the name of the firm was proved, and it was admitted that the plaintiff had no knowledge of the transactions relied upon to shew such authority:—Held, that the plaintiff could not recover against both defendants, but that the defendant who signed the note was liable. Semble, that, even in the case of a trading partnership, a partner has no implied power to give the partnership name to secure the debt of a third person. *Wilson* v. *Brown*, 6 A. R. 411.

See Ex parte Griffin, In re Rankin, 3 A. R. 1.

(b) *Other Cases.*

Consideration—*Settlement*— *Conditions*—*Pleading.*]—To an action upon two notes against the maker by the indorsee of the payee, K., the defendant pleaded that the notes were given when he and the plaintiff and K. were in partnership, and in respect of transactions between defendant and K. as partners and of matters involved in the said partnership, and with the understanding and agreement between defendant and K. and the plaintiff—that the notes were to be held by K. and the plaintiff merely as evidence of such transactions, &c., and as security for any sums which might be found due to K. or the plaintiff, on accounts being taken and settlement made between them and defendant as partners, and upon the terms and condition of such

an account being taken at or after the dissolution of the partnership; but that the partnership had since been dissolved, and no such account taken or settlement made:—Held, on demurrer, plea bad, for it admitted a good consideration for the notes, and did not allege expressly that they were not to be sued upon. Semble, that it was also defective in not negativing any other consideration than that appearing on its face. *Stultzman* v. *Teagley*, 32 U. C. R. 630.

Debt of Partnership — *Acceptance of Note of New Firm—Novation—Pleading.*]—Declaration against R. and H. for goods sold. Plea by defendant H., on equitable grounds, in substance, that he and R. purchased the goods while in partnership; that afterwards he retired, W. taking his place, and R. & W. assuming the debts of the old firm, including this claim; and that the plaintiff, being aware of this arrangement, took the note of the new firm, R. & W., for his debt:—Held, a good plea. The third plea alleged that the plaintiff had notice of the arrangement, as in the former plea; and that, in consideration that W. would assume the liability of H. for this debt, the plaintiff accepted R. & W. in place of defendants, and took their note, and relinquished his claim against H.:—Held, good. The fourth plea averred satisfaction of the plaintiff's claim by the delivery and acceptance of the note of R. & W.:—Held, clearly good. *Watts* v. *Robinson*, 32 U. C. R. 362.

——— *Acceptance of Note of One Partner.*]—To an action against two partners for wharfage and warehouseroom of goods, defendants pleaded the delivery and acceptance of the promissory note of one of them in satisfaction of the claim. At the trial the plaintiffs' book-keeper said that he presented the account, and took the note made by one defendant in settlement, writing at the foot of the account "received payment by note." The Judge thereupon directed a verdict for defendants. On motion for judgment non obstante veredicto, or for a new trial:—Held, that the plea was good, but that it should have been left to the jury to find whether the note was accepted by the plaintiffs in satisfaction of the demand; and a new trial was ordered. *Port Darlington Harbour Co.* v. *Squair*, 18 U. C. R. 533.

Guarantee — *Indorsement by One Partner.*] — Where a non-negotiable promissory note, given for money lent to a firm, is made by one member thereof and indorsed by the other, the character in which the indorsement is made will be implied from the purposes for which the note is given, the indorsement obtained, and the particular circumstances of the case, which were here held to make such indorser liable as guarantor. *McPhee* v. *McPhee*, 19 O. R. 603.

Implied Authority to Indorse Cheques — *Land Transactions — Acquiescence.*]—When a partnership is entered into for the purpose of buying and selling lands, the lands acquired in the business of such partnership are, in equity, considered as personalty, and may be dealt with by one partner as freely as if they constituted the stock-in-trade of a commercial partnership. The active partner in such business has an implied authority to borrow money on the security of mortgages acquired by the sale of partnership lands. An amount so borrowed was paid by a cheque made payable to the order of all the partners by name. The active partner had authority, by power of attorney, to sign his partners' names to all deeds and conveyances necessary for carrying on the business, but had no express authority to indorse cheques:—Held, that, having authority to effect the loan and receive the amount in cash, he could indorse his partners' names on the cheque, and the drawees had a right to assume that he did it for partnership purposes, and were justified in paying it on such indorsement. Held, also, that if the payment by the drawees was not warranted, the drawers having, for two years after, received monthly statements of their account with the drawees, and given receipts acknowledging the correctness of the same, they must be held to have acquiesced in the payment. *Manitoba Mortgage Co.* v. *Bank of Montreal*, 17 S. C. R. 692.

Joint Indorsers—*Partnership Purposes—Action by One.*]—A promissory note for $6,200, made by the president and secretary of a syndicate formed for completing the Hamilton and Dundas Street railway, in favour of O., S., and the defendants, was indorsed by them to the Bank of Commerce or order. On the day the note fell due O. and S. respectively paid the same, O. paying $2,000, and S. $4,200, the remaining sum due thereon, S. at the time directing the bank agent to indorse it to the plaintiff, who it appeared gave no value for it. The agent indorsed it as follows: "Pay to J. S." (the plaintiff) "or order. D. Hughes Charles, Manager." The plaintiff thereupon sued the defendants as indorsers:—Held, that the plaintiff could not recover, for the evidence shewed that S. by his payment intended to satisfy the note, and it being made for a purpose directly relating to and not collateral to the partnership of which S. and defendants were partners, S. could not recover against defendants thereon, and, as the plaintiff was found to have only the same right as S., neither could he recover. *Small* v. *Riddel*, 31 C. P. 373.

See Honsinger v. *Love*, 16 O. R. 170.

A third person holding a note for the benefit of one joint indorser, cannot maintain a joint action against the co-indorsers under R. S. O. 1877 c. 116, ss. 2, 3, as indorsers, for the full amount of the note, but must sue each separately in a special action for his share of the contribution. Held, also, that the Act does not refer to partnership transactions. *Small* v. *Riddel*, 31 C. P. 373.

Joint and Several Promissory Note—*Dissolution—Discharge of Collateral Security —Release of Retiring Partner.*]—A. and B., partners in business, borrowed money from C., giving him as security their joint and several promissory note and a mortgage on partnership property. The partnership having been dissolved, A. assumed all the liabilities of the firm and continued to carry on the business alone. After the dissolution, C. gave A. a discharge of the mortgage, but without receiving payment of his debt, and afterwards brought an action against B. on the promissory note:—Held, affirming the judgment in 20 A. R. 695, that the note having been given for the mortgage debt, C. could not recover without being prepared, upon payment, to convey to B. the mortgaged lands, which he had incapacitated himself from doing. Held, also, that, by the terms of the dissolution of the partnership, the relations between A. and B. were changed to those of

principal and surety, and it having been found at the trial that C. had notice of such change, his release of the principal. A., discharged B., the surety, from the liability for the debt. *Allison* v. *McDonald*, 23 S. C. R. 635.

Joint Stock Company—*Suppression of Notes—Subsequent Circulation.*]—A partner in a joint stock company, the notes of which were suppressed by 7 Wm. IV. c. 13, having retired their notes which were in circulation after the suppression, cannot put them into circulation again so as to bind the partnership. *Hall* v. *Buck*, T. T. 2 & 3 Vict.

Judgment against Firm—*Action thereon against Alleged Partner—Res Judicata—Partnership by Estoppel.*]—An action was brought against a firm in the firm name as makers, and an individual as indorser, of a note, and was dismissed as against the indorser on the ground that he had indorsed at the request of the holders for their accommodation, judgment being given against the firm:—Held, reversing the judgment in 24 O. R. 497, that the dismissal of this action was an answer to an action on the judgment, in which it was sought to prove that the indorser was, as regards the plaintiffs, a partner by estoppel, and therefore bound by the judgment against the firm. Held, however, affirming the judgment, that the plaintiffs had the right to proceed by action on the judgment and to try therein the question whether the defendant was a member of the firm so as to be bound by the judgment. Clark v. Cullen, 9 Q. B. D. 355, followed. *Ray* v. *Isbister*, 22 A. R. 12. See the next case.

Where promissory notes are signed by a firm as makers, a person who holds himself out to the payees as a member of such firm, though he may not be so in fact, is liable as a maker. In an action upon a promissory note against M. I. & Co., as makers, and J. I. as indorser, judgment was rendered by default against the firm, and a verdict was found in favour of J. I., as it appeared by the evidence that he had indorsed without consideration for the accommodation of the holders, and upon an agreement with them that he should not be held in any manner liable upon the note:—Held, in a subsequent action on the judgment to recover from J. I. as a member of the firm who had made the note, that the verdict in the former suit was conclusive in his favour, the said agreement meaning that he was not to be liable either as a maker or indorser. Judgment in *S. C.*, *sub nom.* Ray v. Isbister, 22 A. R. 12, affirmed. *Isbester* v. *Ray*, 26 S. C. R. 79.

Judgment against One Partner—*Subsequent Claim against Partnership.*]—In the absence of express agreement to that effect, a creditor taking the note of one partner for a debt of the partnership, and suing thereon, and recovering judgment but failing to realize the amount of the note, is not precluded from afterwards claiming the amount of the note against the partnership. *Carruthers* v. *Ardagh*, 20 Gr. 579.

J. C. and T. A. formed a partnership under the style or firm of "C. & A." Both parties were illiterate and unused to business, and in giving notes for debts of the partnership were in the habit of each signing his own surname, thus forming the partnership name. One of such notes being about to fall due, and the partnership being unable to retire it, the holder agreed to renew it; and he, together with C., endeavoured to find A. to procure his signature in the usual way to the new note, but being unable to find him, C. gave his own note for a sum sufficient to cover the old note and an account for goods furnished to the partnership by the holder. This note being unpaid, an action was brought by the holder against C., and a small portion of the amount realized by sale of his goods under execution. Subsequently a suit was brought by C. against A. to wind up the partnership, and the holder of the note sought to prove for the amount of it against the partnership estate, which the master refused to allow, and on appeal his order was affirmed. The holder thereupon re-heard the appeal motion:—Held, that the holder, by the proceeding he had taken, was not precluded from claiming the amount against the partnership assets. *Ib.*

Name of One Partner.]—A. and B., representing themselves as partners, obtained C.'s accommodation indorsement to a note made by A. alone, but stated by B. to be made for their joint benefit, and on their joint liability. The note was discounted at a bank, and C. was subsequently obliged to pay it. A. having in the meantime absconded:—Held, that C. could not recover against B. on the note, but that he might maintain his action on the count for money paid. *Annis* v. *Lowes*, 5 O. S. 198.

One partner cannot bind the firm by a bill drawn in his own name, although for partnership purposes. *Goldie* v. *Maxwell*, 1 U. C. R. 424.

—— *Joint Name—Implied Authority—Collateral Security.*]—In April, 1876, F. & C. entered into partnership for the purpose of purchasing one M.'s interest in a macadamized road contract and completing it; C. alone to provide the necessary funds on his own credit, but F., for the use of his name to secure the contract, to have half the profits. On 2nd May, C., being in want of funds, made a note in his own name for $150, which was indorsed by one Cockburn, and the proceeds applied to the partnership purposes. On 25th May he made two further notes for $175 respectively, one in the name of the firm and the other in his own name, but of the proceeds of the latter note $87 was applied to partnership purposes. Both these notes were also indorsed by Cockburn. At the same time C. also made a note for $500, in the name of the firm, in favour of Cockburn, as security for his above indorsations. This note Cockburn indorsed to the plaintiff, but without consideration, and the plaintiff merely stood in Cockburn's place:—Held, that there could be no recovery on this note, for as to the $150 and one of the $175 notes, they were not made in the partnership name; and as to the other $175 note, it was outstanding in the hands of a third party. Semble, that one partner in such a business has no implied authority to raise money, even for partnership purposes, in the joint name. *McCord* v. *Field*, 27 C. P. 391.

Notice of Dishonour.]—Where a note is payable to or indorsed by several persons jointly who are not partners, notice to one is notice to all. *Bank of Michigan* v. *Gray*, 1 U. C. R. 422.

The following notice was held insufficient, the note having been indorsed by defendant in his own name only, although he was one of the firm: "Messrs. P. M. Grover & Co. Gentlemen:—Take notice that the promissory note," &c., "on which you are indorsers, due this day, remains unpaid. Therefore the holders look to you for payment thereof as such indorsers." *Bank of Montreal* v. *Grover*, 3 U. C. R. 27.

Signature to Note — *Agent.*]—"A. & Co., by A. junr.," primâ facie imports that A. signs the notes for, and not as one of, the firm. *Dowling* v. *Eastwood*, 3 U. C. R. 376.

Solicitors—*Evidence of Authority.*]—In an action against B. & S., a firm of solicitors, on notes indorsed by B. in the name of the firm, it was proved that on other occasions S. had so indorsed in the same manner, and, as the witness believed, with B.'s knowledge, but it did not appear what the consideration was for the indorsements sued on, or that S. knew of them:—Held, sufficient evidence to go to the jury of a mutual authority. *Workman* v. *McKinstry*, 21 U. C. R. 623.

Sureties—*Liability—Joint or Several.*]—Where a firm of two or more indorse in the partnership name, the liability as sureties is a joint liability, and not the several liability of each partner. *Clipperton* v. *Spettigue*, 15 Gr. 269.

Transaction outside Scope of Business—*Benefit of Partnership.*]—One partner cannot bind his co-partner for transactions out of the usual scope of the business; nor for things which are sometimes done by it, but are of unusual or rare occurrence. Where, therefore, one member of a mercantile firm, without the knowledge of his co-partner, purchased lands from a debtor of the firm in his own name, which were subject to incumbrances, and to discharge such incumbrances gave promissory notes in the name of the firm, but without the knowledge of his co-partner, the partnership was held not liable on the notes, although it was alleged that the arrangement had been effected to more effectually secure the debt due the firm. *Fraser* v. *McLeod*, 8 Gr. 268.

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2. *Execution of Deeds.*

Agreement under Seal—*Benefit of—Estoppel.*]—Where an agreement under seal, but of a nature not requiring a seal, was executed by one of two partners in the name of the firm, and the partner not executing afterwards acted under and received the benefit of it, such agreement was sustained as his deed; and it was held that he could not dispute the authority by which it was executed in his name. *Bloomley* v. *Grinton*, 9 U. C. R. 455.

———*Signature of Firm.*]—An agreement under seal was made between the plaintiff, of the one part, and "Samuel Farwell & Co." of the other part, and signed "S. Farwell & Co.":—Quære, whether this contract, as executed by Farwell, could bind the other defendants, his partners. *Logan* v. *Stranahan*, 12 U. C. R. 15.

Defendants, B. and A., being in partnership, agreed under seal to buy a quantity of tobacco, B. signing the name of defendants' firm opposite to one seal:—Quære, whether one or both defendants could be held liable upon the deed. *Moore* v. *Boyd*, 23 U. C. R. 459.

Arbitration Bond.]—One of two partners cannot execute an arbitration bond in the partnership name without the authority or consent of the other partner, so as to bind the other partner. *Baby* v. *Davenport*, 3 U. C. R. 54.

Assignment for Creditors.]—One partner in trade cannot, without the express consent of his co-partner, execute a deed disposing of all the stock-in-trade and assets of the firm to a trustee to dispose of the same for the general benefit of the creditors of the partnership. *Cameron* v. *Stevenson*, 12 C. P. 389; *Stevenson* v. *Brown*, 9 L. J. 110.

One of two partners, a few days before an attachment against both under the Act of 1864 had issued, assigned his estate for the benefit of his creditors:—Held, void as against the official assignee. *Wilson* v. *Stevenson*, 12 Gr. 239.

See Nolan v. *Donnelly*, 4 O. R. 440, *post* XII.

Covenant for Payment of Money.]—Two persons carrying on business in partnership as bankers took from a customer as security for his indebtedness to them a conveyance to them individually of certain land which was subject to a mortgage in favour of the plaintiffs. Subsequently, upon proceedings being threatened by the plaintiffs upon their mortgage, one of the partners, without the knowledge or assent of the other, in consideration of a stay of proceedings, signed in the firm name a covenant under seal to pay to the plaintiffs the arrears due on the mortgage:—Held, that this covenant bound only the partner who signed it. *Hamilton Provident and Loan Society* v. *Steinhoff*, 23 A. R. 184.

Deed — *Signature — Seal — Assent.*]—Where one partner signs in the name of both in the presence of the other and for him, with his assent, though there is but one seal, it is the deed of both. *Moore* v. *Boyd*, 15 C. P. 513.

Indenture of Apprenticeship — *Signature—Assent.*]—Upon an application under 29 & 30 Vict. c. 45, for the discharge of a prisoner committed under the Apprentices and Minors Act for disobedience to his masters, on the ground, inter alia, that the indenture of apprenticeship was not a binding contract, it having been executed by only one of the employers, in the name of the firm:—Held, that the indenture must be considered to be sufficiently executed, as it was binding at all events upon the apprentice and the partner who had signed it, and there was nothing to shew that his co-partners had not been present and assented to the execution. *Regina* v. *McNaney*, 5 P. R. 438.

Mortgage — *Authority.*]—One partner of a firm authorized the other to obtain an indorser, in order to raise money from a bank:—Held, that if express authority was required, this empowered the partner to mort-

gage all the stock-in-trade of the firm to secure such indorser. *Paterson* v. *Maughan*, 39 U. C. R. 371.

——— *Unknown Partner.*]—A mortgage with distress clause, by the legal owner of property of which, at the time, he is in possession, and to all appearance in sole possession, is valid at law and in equity against an unknown partner, whose only claim to the possession, when the mortgage was executed, was as tenant at will. *Mason* v. *Parker*, 16 Gr. 230.

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3. *Other Cases.*

Contract of Partner—*Assent of Co-partner—Powers of Managing Partner.*]—Where S., a partner, had contracted in writing, in the partnership name, to sell certain timber limits, property of the partnership, but standing in his name only, and M., his co-partner, when informed thereof, had not dissented, but had shortly afterwards furnished information to the purchaser, which he was only entitled to ask for as such purchaser:—Held, having regard to all these circumstances, that M. had assented to the contract, and was bound thereby. It appeared also, that S., who was the managing partner, and the purchaser, subsequently put an end to the terms of credit, and agreed to a cash payment of $15,500, part of the purchase money:—Held, that it was competent for them so to do, and within the power of S., so far as his co-partner was concerned. *Reid* v. *Smith*, 2 O. R. 69.

Damages—*Chose in Action — Assignment of—Counterclaim—Novation.*]—See *Seyfang* v. *Mann*, 27 O. R. 631, 25 A. R. 179, *ante* V. 1.

Debt of Partner—*Payment out of Partnership Funds — Authority — Action.*]—The defendants were indebted to the plaintiffs' firm, consisting of two partners, and one partner was individually indebted to the defendants. This partner wrote two letters to the defendants, one over his own signature and the other over the firm name, stating that he had paid certain sums due by him to the defendants by giving the defendants credit in the books of his firm. This was done without the authority of the other partner, but the entries were actually made in the books of the firm, to which the other partner had access, though he did not in fact know of the entries until after the firm had been dissolved. Accounts were afterwards rendered to the defendants without any claim being made in respect of the sums credited. This action was brought after the dissolution, in the name of the firm, for the price of goods sold:—Held, that the defendants were not entitled to credit for the sums referred to. Leverson v. Lane, 13 C. B. N. S. at p. 285, In re Riches, 4 DeG. J. & S. at p. 585, and Kendal v. Wood, L. R. 6 Ex. 243, applied and followed. Held, also, that rule 317 authorized the bringing and sustaining of the action in the name of the partnership existing at the time the goods were furnished to the defendants. *Fisher & Co.* v. *Robert Linton & Co.*, 28 O. R. 322.

Election to Look to Directors—*Trading Association—Undertaking.*]—Where parties associate for a trading purpose, taking specified shares of a fixed amount, with a mutual understanding that they are only to be liable to the extent of their shares, and on the agreement that their business is to be conducted by a committee from the partners acting as managers, if a party dealing with such directors, with a full knowledge of the terms and stipulations of the association, accept an undertaking from them which is expressly founded on such terms and stipulations, he cannot maintain an action based upon his dealings against the shareholders and directors charging them with a joint liability as ordinary partners in a trading concern. *Coleman* v. *Bellhouse*, 9 C. P. 31.

Election to Look to One Partner.]—Where goods had been sold and delivered by the plaintiffs to a partnership consisting of the two defendants prior to the dissolution of the firm, the retiring partner set up in an action for the price of the goods that the plaintiffs had agreed to discharge him and look to the remaining partner alone. The only evidence of this was the fact that the plaintiffs had rendered an account for these goods, along with others for which the remaining partner alone was liable, to the remaining partner, and afterwards had accepted promissory notes for the amount, signed in the firm name, with the knowledge that the firm was then composed of the remaining partner only:—Held, insufficient to shew an agreement such as was set up; for the facts were quite consistent with an intention on the plaintiffs' part to look to both defendants in case the notes should not be paid at maturity. *Bresse* v. *Griffith*, 24 O. R. 492.

The defendant set up that the plaintiffs had elected to treat the other member of the firm as their sole debtor, by reason of their having proved their claim with and having purchased the assets of the partnership from the assignee thereof under an assignment for the benefit of creditors, in which it was recited that the other was the only person composing the firm; and that the defendant had relied and acted upon their conduct and election, and they were therefore estopped from suing him as a partner:—Held, that, even if there was evidence that the defendant had acted in any way by reason of the plaintiffs' action, no estoppel arose, because the plaintiffs did nothing shewing an election not to look to him, and he had no right to assume an election from what they did, nor to act as if such an election had been made. *Ray* v. *Isbister*, 24 O. R. 497, 22 A. R. at p. 17. Affirmed, 26 S. C. R. 79.

——— *Surety—Discharge.*] — H. and M. were carrying on business in co-partnership, and H. becoming dissatisfied with the manner in which the business was conducted, a dissolution was agreed upon, in October, 1876, with the knowledge and approval of the plaintiffs, one of them having assisted in arranging it, H. retiring and assigning to M. his interest in the partnership assets, in consideration of $1,332, for which M. gave his promissory notes at three, six, nine, and twelve months, and bound himself to pay all the debts of the co-partnership. M. continued to carry on the business, and in doing so had several transactions with the plaintiffs, from whom he continued to receive goods on credit, giving promissory notes for the price as well as to cover the firm's indebtedness, during which time the plaintiffs rendered periodical statements to M., ignoring apparently the

existence of H., in which the liabilities of the firm and M. were embraced; although expressed "M. and H. liability," giving the items, and "J. M. liability," also detailing the items. M., by means of contra accounts against H., had reduced the latter's claim to about $400. In November or December, 1876, the plaintiffs applied to H. to renew the partnership notes, but this he declined to do, on the ground that he was not liable, notwithstanding which the plaintiffs continued to deal with M. until he became insolvent in January, 1880, when they instituted proceedings against both partners to recover their claim:—Held, reversing the judgment in 31 C. P. 430, that the effect of the dealings between H. and M. was not to constitute H. a surety for M., and that he and M. remained liable to the plaintiffs for the partnership debts. *Birkett* v. *McGuire*, 7 A. R. 53. Reversed by the supreme court, *Cassels' Dig.* 398.

Guarantee — *Authority to Bind Firm.*]—One D. having recovered a judgment against M. & Co., certain notes payable to the firm were deposited with B., and underneath a list of them was the following guarantee: "We hereby, in consideration of £50 by us received from D. this day, guarantee the payment of the above notes by the respective makers at the respective maturities thereof." This was signed by M. & Co., and underneath was an agreement that on payment of the judgment within ten days the notes should be returned to M.:—Held, that M. had authority to bind his partners by signing the guarantee. *Day* v. *McLeod*, 18 U. C. R. 256.

Incoming Partner — *Action—Joint Liability—Assets.*]—An agreement was entered into under seal between A., B., and C., for the advance of certain moneys from A. to B. and C., who were partners in a mill business, and who, from the assets arising from the business, were to repay such advances. D. afterwards became a partner with B. and C.:—Held, that A. could not maintain an action of assumpsit against B., C., and D. jointly, for the recovery of the balance of such advances. *Mittleberger* v. *Merritt*, 1 U. C. R. 339.

——— *Assumption of Liabilities—Rights of Creditor — Knowledge.*] — Defendant M., having been in business alone, was indebted to the plaintiff for goods. He then entered into partnership with W., on the understanding that W. should share in the profits, and be liable for the debts from the commencement of M.'s business. There was no written agreement between them. After this W. was introduced to the plaintiffs by M. as his partner, and M. and W. together purchased from the plaintiffs to a considerable amount. W. then retired from the firm. There was no evidence to shew that the plaintiffs were aware of the arrangement between M. and W.:—Held, that such arrangement, without the assent of the plaintiffs, could not convert the separate debt of M. into the joint debt of the firm; and, therefore, that W. was liable only for the goods supplied after the partnership. *McKeand* v. *Mortimore*, 11 U. C. R. 428.

——— *Assumption of Liabilities—Rights of Creditor—Notice.*]—Held, that an incoming partner, who as between himself and co-partners entered into a joint liability (with notice to the creditor), as well for prior as subsequent debts, was liable for debts contracted before he became a member of the firm, contrary to the general principle of law. *Hine* v. *Beddome*, 8 C. P. 381.

——— *Assumption of Liabilities—Rights of Creditor—Trust—Novation.*]—A firm consisting of two persons dissolved partnership, the retiring partner receiving a number of promissory notes in payment of his share in the business, which notes he indorsed to the plaintiff H. The continuing partner of the firm afterwards entered into a partnership with O., the defendant, and transferred to the new firm all the assets of his business, his liabilities, including the above mentioned promissory notes, being assumed by the co-partnership and charged against him. The new firm paid two of the notes and interest on others, and made a proposal for an extension of time to pay the whole, which was not entertained:—Held, reversing the decisions in 14 O. R. 137 and 17 A. R. 456, sub nom. Henderson v. Killey, that the agreement between the continuing partner and the defendant did not make the defendant a trustee of the former's property for the payment of his liabilities, and the act of the defendant in paying some of the notes did not amount to a novation, as it was proved that the plaintiff had obtained and still held a judgment against the maker and indorser of the notes in an action thereon, and there was no consideration for such novation. *Osborne* v. *Henderson*, 18 S. C. R. 698. See *S. C.*, 11 C. L. T. Occ. N. 88.

A certain firm was indebted to the plaintiffs. Another firm bearing the same name, but composed of different individuals, assumed its liabilities, as between itself and the former firm, and continued the business, and made certain payments to the plaintiffs, and also asked for time to pay the balance. There was no evidence of any assets of the first firm being taken over by the second:—Held, that the above was not sufficient to create a new obligation as between the plaintiffs and the new firm. Osborne v. Henderson, 18 S. C. R. 693, referred to. *Canadian Bank of Commerce* v. *Marks*, 19 O. R. 450.

See, also, *Scyfang* v. *Mann*, 25 A. R. 179, *ante* V. 1.

——— *Covenant of Indemnity—Assignment of.*]—Upon a covenant by an incoming partner to indemnify and save harmless a retiring partner against the liabilities, contracts, and agreements of the firm, no cause of action accrues to the covenantee merely because an action to recover unliquidated damages for an alleged breach of agreement has been brought against the firm. Mewburn v. Mackelcan, 19 A. R. 729, and Leith v. Freeland, 24 U. C. R. 132, distinguished. Such a covenant is not assignable by the covenantee to a plaintiff suing the firm so as to enable him to join the covenantor as a defendant in the action to recover against him the damages for which the firm may be ultimately held responsible. *Sutherland* v. *Webster*, 21 A. R. 228.

Money Borrowed—*Assent of Partner.*]—Money borrowed by a partner, with the knowledge and assent of his co-partner, is not necessarily chargeable by the creditor against the latter; it must appear that the money was borrowed on partnership account, or used for partnership purposes. *Hamilton* v. *McIlroy*, 15 Gr. 332.

——— *Use for Partnership Purposes.*]—Where one member of a partnership borrows

money upon his own credit by giving his own promissory note for the sum so borrowed, and he afterwards uses the proceeds of the note in the partnership business of his own free will, without being under any obligation to, or contract with, the lender so to do, the partnership is not liable for the loan, under Art. 1867, C. C. Maguire v. Scott, 7 L. C. R. 451, distinguished. *Shaw* v. *Cadwell*, 17 S. C. R. 357.

Mortgage from Partner—*Extension of Time—Extinguishment of Debt—Contract.*]—Where there is a simple contract debt due by A. and B., partners, and the plaintiff takes a mortgage from A., giving time, the simple contract debt is thereby extinguished as regards B. *Loomis* v. *Ballard*, 7 U. C. R. 366.

Quære, where there are partners employed in making engines, &c., and the plaintiff makes an express contract with one for an engine, can he, notwithstanding such contract, sue them all. *Ib.*

Partnership by Estoppel.]—When a person, not in fact a partner, authorizes his name to be used in the firm name of a partnership, there is a holding out of himself as a partner to any one who knows or has reason to believe that this represents the name of the person so authorizing its use; but a partnership by estoppel or by holding out will not be created if the real position of affairs is known to the creditor. Judgment in 21 O. R. 683 reversed in part. *McLean* v. *Clark*, 20 A. R. 660.

Action against the defendant S. W., as a member of the firm of S. W. & Son, on promissory notes made by the firm in favour of the plaintiff. The defence was that the defendant had retired from the firm long before the notes were made, and, although his son had carried on the business under the same firm name, he, S. W., had no interest in it; also that at the most he could be liable only in respect to the business of a general country store, which was the business of the firm before he withdrew, and not for that of buying and selling real estate and investing in securities, which business his son alone had carried on, and in respect of which the notes in question were given:—Held, that public notice of the dissolution of the partnership between the defendant and his son had not been given; that the defendant was aware that his name still appeared as a member of the firm on the bill-heads and in other ways; that he was aware of the general nature of the new business carried on by his son in the firm name; and that the defendant was therefore liable on the notes. *Wigle* v. *Williams*, 24 S. C. R. 713.

Payment to Firm—*Deduction of Sum Due by Partner.*]—A. and B., partners, agreed to sell to C. 500 barrels of flour at so much per barrel, to be paid per 100 barrels after the delivery, and upon the production of the wharfinger's receipt. The son of A. (one of the partners) came to C. with the wharfinger's receipt for 100 barrels; C. gave him a cheque for the amount due in favour of the firm, and took his receipt. As the son was leaving C.'s store, C.'s clerk reminded him that a private note of A.'s to C. for £40 was then due and unpaid. A.'s son, with the proceeds of C.'s cheque, took up the note of £40. B., the other partner, in consequence of this application of the money of the firm by A., refused to send C. any more flour till the £40 was made good to him. C. then sued A. and B. and recovered:—Held, that the payment to A.'s son, under the circumstances, was such a payment to the partnership as acquitted C. upon the whole sum paid. Semble, that if it could have been shewn by B. that C. paid A.'s son upon the previous understanding that A.'s private debt was to be retained out of the cheque given to the firm, the son's receipt would not have discharged C. from the repayment of the £40 to the firm. *Brunskill* v. *Chumasero*, 5 U. C. R. 474.

Purchase of Goods for Use of Partner—*Scope of Business.*]—Where a partner without collusion gives orders in the name of the firm for goods in the use of which he is himself solely interested, and the goods are of such a nature that strangers cannot tell whether they might not be for the joint business of the firm, such orders will bind the partners. *Simpson* v. *McDonough*, 1 U. C. R. 157.

Retiring Partner—*Notice of Retirement—Estoppel.*]—The plaintiffs received from their traveller an order for goods from the firm of C. Bros., hotelkeepers. Before they delivered the goods they became aware by means of a mercantile agency that a partnership had existed under the name of C. Bros., and that S. L. C. was one of the members of it, and they were at the same time informed that the partnership still existed. They shipped and charged the goods, and also goods subsequently ordered, to C. Bros. As a matter of fact, however, the partnership did not exist at the time the first order was given, S. L. C. having retired from the business, and the plaintiffs had had no dealings with the firm while it was in existence. No public notice was given of the dissolution; S. L. C. continued to live at the hotel except when he was absent on his own business; the lamp with the name of C. Bros. continued at the door; the liquor license in the name of C. Bros. continued to hang in the barroom; and letter-paper with the heading "C. Bros., proprietors," continued to be handed to customers:—Held, that where a known member of a firm retires from it, and credit is afterwards given to the firm by a person who has had no previous dealings with it, but has become aware as one of the public that it existed, and has not become aware of his retirement, the retiring member of the firm is liable unless he shews that he has given reasonable public notice of his retirement; and, as such notice was not given here, S. L. C. was liable, not only for the goods first, but for those subsequently ordered, no notice of the retirement having ever been given. *Reid* v. *Coleman*, 19 O. R. 93.

Solicitor—*Liability for Fraudulent Conduct of Partner.*]—See *Re McCaughey and Walsh*, 3 O. R. 425.

——— *Liability for Negligence of Partner in Making Investments.*]—See *Thompson* v. *Robinson*, 16 A. R. 175.

Stock Subscription—*Authority to Bind Firm—Calls—Creditors—Pleading.*]—To an action by creditors of a railway company against shareholders, under the Railway Act, s. 80, defendants pleaded, on equitable grounds, in substance: 2. That the company was incorporated to construct their road from B. to

D., with a capital of £500,000; that they entered into a contract with the plaintiffs and others to make a portion of it, and instructed them to proceed, without having enough stock subscribed to afford a reasonable expectation that they would obtain subscriptions for the whole, or for enough to give a reasonable hope that they would be able to complete the line; that this contract was afterwards abandoned and another made with the plaintiffs for a smaller portion of the line; that the sum required for this last contract exceeded what could reasonably have been expected from the stock subscriptions, which had since proved insufficient to pay it; that when they entered into these contracts the company had no means and no reasonable hope of obtaining the means to complete the whole line, of which the plaintiffs then had notice; that no portion of the road had been completed; that the plaintiffs' judgment was obtained upon the last contract; that defendants never consented to the construction, or to any contract for the construction, of any portion of the railway without the whole stock having been subscribed for; and that they never waived the implied condition on which they subscribed, namely, that they were only to be liable provided the whole stock was subscribed for; and so they said they never were shareholders, nor liable to pay for their shares. 3. That the defendants (three in number) at the time of the alleged subscription were in partnership as ironmongers; that by the terms of their co-partnership no one of them could bind the others by such a subscription without their consent; that the subscription was signed by C., one of them, in the name of the firm, without the consent of G., another of the partners, but on the express condition that unless he should ratify it the same should not bind any of them, and that G. refused to ratify; and defendants denied that they had ever paid anything on account of the shares, as alleged in the declaration:—Held, on demurrer, both pleas bad; for, as to the first, the facts alleged would clearly not entitle defendants to a perpetual injunction, if to any relief, in equity; and as to the second, though one partner could not bind the others in such a matter, it should have been averred that when the calls were made upon the defendants as alleged, they refused to pay on the ground that they were not shareholders or liable. Semble, that the second plea was bad also, as being pleaded as a defence by all, when it was a defence for C. only, by reason of the facts pleaded. *Moore* v. *Garney*, 21 U. C. R. 127.

Undertaking to Indemnify — *Scope of Partnership — Interest — Consideration — Parties.*]—Action against K. and M., alleging in the first count that defendants promised the plaintiff that if he would refrain from suing one F. in respect of certain matters stated, and would sue G. and D. instead, defendants would indemnify the plaintiff against any loss, costs, or charges, which he might sustain by reason of bringing such action, and would, in the event of failure to recover from G. and D. the value of certain goods taken from the plaintiff, which constituted the plaintiff's cause of action against them, repay to the plaintiff the price paid by him to F. for said goods. The second count alleged that the plaintiff purchased goods from F. as assignee in insolvency of W. and K.; that certain creditors of W. and K., disputing F.'s right to sell, had taken the goods from the plaintiff, who had sued these creditors and their bailiff for such taking, and the defendants in such action having obtained a verdict, a new trial had been granted to the plaintiff; that defendants, being creditors of W. and K., and so interested in maintaining F.'s title, requested the plaintiff to proceed with the action, and promised, if he would do so, to indemnify him against the costs then incurred or to be incurred, and to pay him the value of said goods in case he should fail to recover in said action or to collect the same from G. and D.; that the plaintiff, in consideration of defendants' promise, promised defendants to proceed with said action, which otherwise he would not have done, and recovered judgment therein, but was unable to collect it; yet that defendants had not kept their promise. As to the first count, it appeared that the promise, if made at all, was made without the knowledge of defendant K., and that the transaction out of which the promise arose was one in which a firm composed of K. and B. only, in which M. had never been a partner (though he was a partner in the firm of K., B., & M.), were alone interested:—Held, that neither of the defendants was liable, for as to K. the promise was not one relating to the business of the partnership, so that B. could bind him by it; and as to M., B., as a partner in the firm of K., B., & M., could not bind that firm in a matter in which they had no interest. As to the second count:—Held, that the plaintiff could not recover, for the reasons already given, and further, because no sufficient consideration appeared for the alleged promise, the evidence shewing that defendants were not creditors of W. and K. at all. *Macklin* v. *Kerr*, 28 C. P. 90.

See Jones v. *Brown*, 9 C. P. 201.

VII. Limited Partnership under 12 Vict. c. 75 (C. S. C. c. 60.)

See R. S. O. 1897 c. 151.

Creation of General Partnership by Conduct — *Consent — Contribution — Indemnity.*]—Although parties may enter into an undertaking intending to form a limited partnership only, still they may act in such a manner, either knowingly or unknowingly, that a general partnership may be created as to third parties; and when this occurs with the consent and concurrence of all the parties, the effect may be to make them answerable not only as to the third parties, but as between themselves. *Patterson* v. *Holland*, 6 Gr. 414.

Although the members of a limited partnership may so act as to create a general partnership not only as to third persons, but also inter se; still, if the acts creating such a general partnership as to the world are done by some of the partners without the knowledge or consent, or against the consent, of the others, they will not be entitled to contribution from the others, but will be liable to indemnify them against the consequence of the acts so done. *Ib.*

Pleading — *General Partner—Sufficiency of Allegation.*]—Defendant was described in the declaration as the general partner of the firm of D. B. & Co., and evidence was given that the steamer was understood to be owned by D. B. & Co.:—Held, sufficient to charge

defendant, there being no plea in abatement. *Howland* v. *Bethune*, 13 U. C. R. 270.

Special Partners — *Contribution—Cash Payment — False Statement.*] — The Act requires the special partners to contribute actual cash payments to the capital of the firm, and if any false statement be made in the certificate filed, all the partners are to be liable for the debts of the firm. *Whittemore* v. *Macdonell*, 6 C. P. 547.

One of the special partners paid by bills of exchange the sum specified in the certificate as cash:—Held, that the special partners became, in consequence, liable for the debts of the firm *Ib.*

——— *Contribution—Cash Payment—Deficiency—Winding-up—Profits of Partner.*]—A large number of persons agreed to form themselves into a limited partnership; but several of them, instead of paying in the amounts of their contributions to the partnership funds, gave promissory notes therefor. Upon a bill filed by some of the partners seeking to compel their co-partners to contribute towards making up a large deficiency, ascertained on the winding-up of the affairs of the company:—Held, that the circumstances which had transpired rendered the parties general partners not only as to third parties, but also as between themselves. *Patterson* v. *Holland*, 7 Gr. 1.

One of the members of a limited partnership was appointed manager of the business, and while so acting furnished from his shop goods for the partnership, upon which he charged the usual trade profits:—Held, that primâ facie these transactions could not be sustained. *Ib.*

——— *Contribution—Cash Payment—Representations.*]—Under 12 Vict. c. 75, ss. 2, 4, the money to be contributed by the special partners must be actually paid in cash, or they will be liable as general partners. Where the note sued on was signed T. & Co., and it was asserted that the firm was a limited partnership, composed of T. as general and W. as special partner, but it appeared that W., when he gave the note, had represented to the payee that he was a partner, and had an interest in the business:—Held, sufficient to warrant the jury in finding W. equally liable with T. *Watts* v. *Taft*, 16 U. C. R. 256.

——— *Contribution — Cash Payment—Description of Business.*]—A. and B. formed a limited partnership, A. to be the general partner, and B. the special, contributing £750. B. held A.'s notes for that sum, which he gave up to A. by way of payment:—Held, not a payment in money within the statute. Held, also, that a description of the business to be carried on as that of "general dealers" was insufficient. Quære, whether under a plea of non fecit to a note signed by the firm, defendant was entitled to shew a limited partnership: but where he was allowed to do so—Held, that the plaintiff might, in answer, object to the description of the business; and semble, that he might also object that the special partner had not paid in his share. *Benedict* v. *Van Allen*, 17 U. C. R. 234.

——— *Interference—Effect of—Nature of Business.*] — Assumpsit by plaintiffs as indorsees of a note made by D. B., under the name of D. B. & Co., as the general partner of a limited partnership under 12 Vict. c. 75, payable to H. or order, and indorsed by H. and the two other defendants, P. and M. The company was formed about 1849 for the purpose of building and running steamboats, and was composed of eighty-three subscribers, D. B. being the general partner, and B., one of the plaintiffs, one of the special partners:—Held, that the business in which the parties were engaged might properly be the subject of a limited partnership under the statute. Held, also, that the acts of interference on the part of the plaintiff B., as mentioned in the case, and the controlling power exercised over the business by the committee of which B. was chairman, were such as to render him liable as a general partner, and therefore that, being bound by the partnership signature as maker, he could not recover against the indorsers. Semble, that when a special partner has by any such acts become a general partner, under s. 14, he is so for all purposes, as regards the relations between himself and the other partners, and not merely as respects his liability to creditors. *Bowes* v. *Holland*, 14 U. C. R. 316.

——— *Interference — Formation of Partnership.*]—Where defendants are charged as general partners, having become so liable by intermeddling, it is not necessary for the plaintiff to shew that the limited partnership was regularly formed under the statute:—Held, that in this case the evidence of interference was sufficient to establish defendants' liability. *Davis* v. *Bowes*, 15 U. C. R. 280.

——— *Interference — Liability Continuing.*]—Where a special partner has once rendered himself liable as a general partner under s. 14, by interference, he continues so liable, and is not relieved after he has ceased to intermeddle. *Hutchison* v. *Bowes*, 15 U. C. R. 156.

——— *Interference—Liability for Debts.*]—The special partners elected a board of directors to advise the general partner, the members of which board interfered in the transaction of the business of the firm, especially during the absence of the sole general partner in England:—Held, that the members of the board became liable for the debts of the firm. *Whittemore* v. *Macdonell*, 6 C. P. 547.

VIII. Partnership and Separate Estate.

Administration of Partner's Estate—*Claim against Partnership — Action against Surviving Partner—Indemnity.*]—At law, as in equity, before the Judicature Act, a partnership debt was, in strictness, joint and not several, and upon the death of one partner the only liability existing at law was that of the surviving partner; the estate of the deceased partner being only made available through the equities existing in favour of the surviving partner, which the partnership creditors were allowed to make use of; and the Act has not converted into a joint and several debt that which had theretofore been merely joint. Kendall v. Hamilton, 4 App. Cas. 504, and In re Hodgson, 31 Ch. D. 177, followed. And in an action by creditors of a partnership against the surviving partner and the administratrix of the estate of the deceased partner, the name of the administratrix

was struck out, leaving the creditors to pursue their remedy against the estate in a proceeding pending for its administration, and to proceed concurrently with the action against the surviving partner. Held, also, that a claim of the surviving partner against the estate of the deceased for indemnity or relief over in respect of the plaintiffs' claim, must be made in the administration proceedings and not in the action under the third party procedure. Held, further, that the right of the surviving partner against the administratrix, in her personal capacity, to recover upon a mortgage given by her as a security to him against his liability to the plaintiffs, was neither a right to indemnity nor to relief over, because it was a right which might be enforced before he was damnified, there being no reference on the face of the instrument to the liability asserted by the plaintiffs; and, therefore, she could not be brought in as a third party. *Campbell* v. *Farley*, 18 P. R. 97.

——— *Claims of Creditors — Valuing Securities.*] — A partner who has individually joined as a maker in a promissory note of his firm for their accommodation is not "indirectly or secondarily liable" for the firm to the holder within the meaning of 59 Vict. c. 22, s. 1, s.-s. 1 (O.), but is primarily liable, and in claiming against his insolvent estate in administration the holder need not value his security in respect to the firm's liability. *Bell* v. *Ottawa Trust and Deposit Co.*, 28 O. R. 519.

——— *Claim of Co-partners — Fraud.*]— The rule in equity, as well as in bankruptcy, is, that the separate estate of a partner is to be applied first in discharge of his separate debts; and, in applying this rule, money paid by co-partners on a liability created by the fraud of the partner towards them is treated as a separate debt, provable and payable pari passu with the claims of the other separate creditors of such partner in case of his death insolvent. The mere liability so fraudulently created cannot be proved against the separate estate as a debt until the liability is paid, or until something equivalent to payment takes place. Where the fraud was in the use of the partnership name on bills, the other partners becoming insolvent, the holders of the bills proved them against the partnership estate. The assignee, in a suit for administering the separate estate of the guilty partner, claimed to prove the amount against the separate estate; but the master restricted the proof to the expected dividend from the partnership estate and the separate estate of the surviving partners:—Held, that the assignee was not entitled to prove for a larger sum. *Baker* v. *Dawbarn*, 19 Gr. 113.

——— *Joint and Separate Creditors.*]—In the administration by the court of the insolvent estate of a deceased partner the surviving partner is entitled to rank for a balance due to him in respect of partnership transactions and partnership debts paid by him, when, apart from his claim, there would be no surplus available for partnership creditors. *In re Ruby, Trusts Corporation of Ontario* v. *Ruby*, 24 A. R. 509.

Assignment by Firm for Benefit of Creditors—*General Property of Partners.*]—Held, by the Queen's bench division, that an assignment under R. S. O. 1887 c. 124, for the general benefit of creditors, made by the members of a trading partnership, in the words mentioned in s. 4, vests in the assignee all the properties of each of the partners, several as well as joint. But, by the court of appeal, that the benefit of a covenant by a third person to indemnify one of the partners against a mortgage does not pass to the assignee. *Ball* v. *Tennant*, 25 O. R. 50, 21 A. R. 602.

Assignment by Partner for Benefit of Creditors — *Rights of Partnership Creditors.*]—Where an assignment for the benefit of creditors is made by an assignor carrying on business by himself, creditors having claims against him for goods sold to a firm in which he was formerly a partner are entitled to rank against his estate ratably with creditors having claims for goods sold to the assignor alone. Section 5 of R. S. O. 1887 c. 124 does not apply to such a case, but only to the case of an assignor who has both separate estate and joint estate. *Macdonald* v. *Balfour*, 20 A. R. 404.

——— *Right of Assignee to Examine Former Employee of Firm.*]—When a partnership has been dissolved a former employee or servant of the firm may be examined, under the Assignments and Preferences Act, R. S. O. 1897 c. 147, s. 34, by the assignee of the separate estate of one of the partners, as to the affairs of such estate. *Re Guinane*, 18 P. R. 208.

Creditors — *Priorities — Preference.*]— The court has jurisdiction, and will exercise it, to prevent a creditor of one partner obtaining an undue preference over the creditors of a firm by means of proceedings in court. *Felan* v. *McGill*, 3 Ch. Ch. 68.

Execution against Partner—*Seizure of Partnership Property.*]—Under an execution against an individual partner the sheriff can seize the partnership goods and sell the execution debtor's share, whatever may be the difficulties which arise thereafter; and the Judicature Act has made no difference in this respect. *Harrison* v. *Harrison*, 14 P. R. 436.

Insolvency of Partnership and of Partner—*Transfer of Interest — Rights of Several Assignees.*]—A partnership existing between two persons was, within three months of the issue of a writ of attachment in insolvency, dissolved, and one of the partners transferred his interest in the partnership property to the other, but at the time of such transfer the firm, as well as the partner individually, were insolvent, which they were aware of or had probable cause for believing. Afterwards, the remaining partner and the firm were placed in insolvency by compulsory liquidation and a different assignee appointed for each:—Held, that the transfer was fraudulent and void, and that nothing passed under it; and that the assignee of the firm, therefore, and not of the separate partner, was entitled to the effects of the partnership; and an order made by the county Judge for the transfer of such property from the separate to the joint assignee was confirmed. Held, that, even if the partnership creditors could prove against the effects in the hands of the separate assignee, so that all that was required was a direction to that effect, as the making of the order was purely a matter of discretion, the court would not interfere. *In re Caton and Cole*, 26 C. P. 308.

Judicial Abandonment—*Dissolution—Composition — Subrogation — Confusion of Rights—Compensation.*]—A partner in a commercial firm which made a judicial abandonment was indebted to the firm at the time of abandonment in a large amount overdrawn upon his personal account. Subsequently he made and carried out a composition with the creditors of the firm, and with the approval of the court the curator transferred to him, by an assignment in authentic form, "all the assets and estate generally of the said late firm, . . . as they existed at the time the said curator was appointed." At the same time the creditors discharged both him and his partners from all liability in respect to the partnership:—Held, that the effect of the judicial abandonment was to transfer to the curator not only the partnership estate, but also the separate estate of each partner, as well as the partners' individual rights as between themselves. Held, that the assignment of the estate by the curator and the discharge by the creditors, taken together, had the effect of releasing all the partners from the firm debts, but vested all the rights which had been transferred by the abandonment in the transferee personally, and could not revive the individual rights of the partners as between themselves, and that, in consequence, any debt owing by the transferee to the partnership at the time of the abandonment became extinguished by confusion. *MacLean* v. *Stewart*, 25 S. C. R. 225. Reversed by the judicial committee of the Privy Council, 28th July, 1896 (unreported).

Partner as Surety—*Cross-examination—Liabilities of Firm.*] — A surety on a bond, who is a member of a mercantile partnership, but justifies on his own individual property, not on his share in the partnership, is not compellable, upon cross-examination on his affidavit of justification, to disclose the liabilities of the partnership. *Douglas* v. *Blackey*, 14 P. R. 504.

See Wallace v. *James*, 5 Gr. 163, *post* XI. 2 (e).

IX. Powers of Partners.

To Assign Debts.]—C., one of two partners, in consideration of $100 paid to him, assigned to the plaintiff a debt of $118 due to the firm for goods sold to the defendant in the ordinary course of business, by a deed made and executed in his individual name, without his partner's knowledge, but by which he professed to transfer all debts due to the two partners, naming them, from the defendant. At the trial his partner swore that he considered himself bound by the assignment, and that he thought that C. had authority to make it:—Held, that the assignment was within the scope of the partnership business, and covered by the agency of one partner for the other. Held, also, that, even in the absence of implied authority, the subsequent ratification was sufficient. Held, also, that the fact that the transfer was by deed did not deprive it of its effect as a written contract. *Howell* v. *McFarland*, 2 A. R. 31.

To Mortgage Stock-in-trade.] — One partner of a firm authorized the other to obtain an indorser, in order to raise money from a bank:—Held, that, if express authority was required, this empowered the partner to mortgage all the stock-in-trade of the firm to secure such indorser. *Paterson* v. *Maughan*, 39 U. C. R. 371.

To Pledge Goods—*Lien of Pledgee.*]—A partner intrusted with possession of goods of his firm for the purpose of sale may, either as partner in the business or as factor for the firm, pledge them for advances made to him personally, and the lien of the pledgee will remain as valid as if the security had been given by the absolute owner of the goods notwithstanding notice that the contract was with an agent only. *Bingwall* v. *McBean*, 30 S. C. R. 441.

To Sell Partnership Lands.] — See *Crain* v. *Rapple*, 22 O. R. 519, 20 A. R. 291.

See Reid v. *Smith*, 2 O. R. 69, *ante* VI. 3.

X. Registration of Co-partnerships.

See R. S. O. 1897 c. 152.

Necessity for Registration — *Notice—Mere Change in Firm—Dissolution.*]—T. N., trading in co-partnership with J. B. N. under the style of T. N. & Son, retired from the firm, which had been registered in accordance with the Registration Act of 1868, 33 Vict. c. 20 (O.), under an agreement that J. W. should succeed him; that the style of the new partnership, which was to be composed of J. B. N. and W., should be N. & Co.; and that the new firm should assume all the liabilities of the old to its creditors; but no declaration of this change was filed. Subsequently a note was signed by J. B. N. in the name of T. N. & Son, and accepted by the plaintiffs, who knew that the firm of T. N. & Son had been dissolved, in renewal of certain notes made before the retirement of T. N.:—Held, in the Queen's bench, 43 U. C. R. 447, that there was merely a change in the membership and alteration in the name of the partnership, which should have been registered under the statute, and that T. N. therefore was liable. Held, reversing this judgment, that the evidence shewed an entire dissolution, to which 33 Vict. c. 20 did not apply, and that T. N. was therefore not liable. *Bank of Toronto* v. *Nixon*, 4 A. R. 346.

Penalty — *Publication of Newspaper.*]—The business of printing and publishing a newspaper constitutes the partners employed in it a partnership "for trading purposes," within the meaning of 33 Vict. c. 20, s. 1 (O.), and liable to the penalty for not registering such partnership. *Pinkerton q. t.* v. *Ross*, 33 U. C. R. 508.

Qui Tam Action for Penalties for not Registering.]—See *Chaput* v. *Robert*, 14 A. R. 354.

Registered Declaration—*Evidence Contradicting—Penal Action.*]—Section 6 of 33 Vict. c. 20 (O.), by which the declaration of the names, &c., of a partnership required to be filed under that Act is made incontrovertible, does not apply to the case of a penal action brought against a member of the firm for neglecting to file such declaration. The preamble and general tenor of the Act shew that it was intended for cases in which a claim is made against the firm, or in which the part-

nership is concerned. Where, therefore, such declaration was filed on the 6th July, 1870, and stated that the partnership existed since the 23rd August, 1869:—Held, that it was competent for defendants to prove that in fact it was not formed until the 1st July, 1870, so that the declaration was filed in time. *Cassidy q. t. v. Henry*, 31 U. C. R. 345.

——— *Evidence Contradicting.*]—See *Caldwell* v. *Accident Ins. Co. of North America*, 24 S. C. R. 263.

XI. Rights and Obligations of Partners between Themselves.

1. *At Law.*

Balance on Settlement of Accounts.]—When on a dissolution one partner has admitted a balance due his co-partner, assumpsit will lie although there be no promise to pay. *McNicol* v. *McEwen*, 3 O. S. 485.

An action cannot be maintained by one partner against another, on an offer made on arranging for a dissolution to pay a certain sum if he were allowed to keep the books and collect the debts. *Burgess* v. *Fanning*, 4 O. S. 188.

A., one of two partners, entered in the partnership books: "I have this day (5th April, 1841) examined our books and find them correct, and a balance due my co-partner of £288." No promise to pay the balance was proved by B., the co-partner, and subsequently to that entry the two partners continued the business, and afterwards finally settled and dissolved:—Held, that B. had no right of action against A., upon the balance stated in the entry. *Allan* v. *Garven*, 4 U. C. R. 242.

An unsettled balance due by one partner to another cannot be attached, but if the balance has been fully ascertained by a settlement of accounts it may be attached. *Campbell* v. *Peden*, 3 L. J. 68.

Dower—*Partnership Lands—Pleading.*]—Dower. Plea, on equitable grounds, that the land was part of the partnership property and the stock in trade of the husband and S. trading together as merchants, and was purchased by them as such partners, and paid for out of their partnership money, and used in the said partnership business, and that the husband was never seised thereof otherwise than as such partner:—Held, that the plea sufficiently shewed the land to have been purchased for partnership purposes, and formed a good defence. *Conger* v. *Platt*, 25 U. C. R. 277.

Money Had and Received.] — See *Lefebvre* v. *Awbry*, 26 S. C. R. 602.

Promissory Note—*Advance of Partnership Funds.*]—A member of a joint stock company, not incorporated, lending with the assent of the company out of the joint fund to another member, and taking from him a promissory note payable to himself individually for repayment, can recover on the note, notwithstanding the funds were advanced from the common stock. *Comer* v. *Thompson*, 4 O. S. 256.

Trespass—*Executor of Deceased Partner—Sale.*]—The executor of a deceased partner in trade is tenant in common with the surviving partners of the partnership property, and the surviving partners cannot sue him in trespass for a wrongful sale and conversion of the whole of the partnership property against their will. *Strathy* v. *Crooks*, 2 U. C. R. 51.

Trover—*Conversion.*] — One partner cannot maintain trover against another for converting the partnership property. *Smith* v. *Book*, 5 O. S. 556.

——— *Conversion—Sale.*]—One tenant in common of chattels may maintain trover against the other for a sale of the property, where such sale is plainly intended not for the objects of the joint owners, such as to pay partnership debts, &c., but in order to deprive the other owner of all interest in the property or proceeds. In this case the defendant, who had worked and stocked a farm in partnership with A., after A.'s death sold the stock and crops on the farm, and threatened to go off with the money, unless the plaintiff (A.'s administratrix) would settle with him on his own terms. After action brought he applied part of the proceeds towards payment of the debts, but until then he had never pretended that the sale was made with that object. The court being left to draw inferences of fact:—Held, that such sale was a conversion, and that the plaintiff might maintain trover. *Rathwell* v. *Rathwell*, 26 U. C. R. 179.

——— *Conversion — Sheriff—Pleading.*]—In an action by a sheriff under the Absconding Debtors Act, against a partner of the absconding debtor, for converting the joint property:—Semble, that, inasmuch as there may be a conversion by one co-partner of the joint property, it was not necessary to allege more than the fact of conversion, leaving it to be shewn by the evidence that there was such a destruction of the joint property as would make it between persons so situated a conversion. *Taylor* v. *Brown*, 17 C. P. 387.

——— *Retention by Partner.*]—The plaintiff, having compiled a book, caused it to be printed by a firm consisting of himself and defendant, on paper furnished by them; and defendant having refused to give up to him the copies thus printed, he brought trover:—Semble, that he could not recover, for the property belonged to the firm, and defendant had as much right to retain as the plaintiff to take it. *Doupe* v. *Stewart*, 28 U. C. R. 192.

——— *Vendee of Partner—Fraud.*]—One partner may recover in trover the value of partnership goods from the vendee of his co-partner where there has been a fraudulent collusion between the vendor and vendee; but each partner has a power of sale over the effects of the firm, and the mere omission of the vendor to consult his co-partner is no ground of fraud as against the vendee:—Held, therefore, that in this case the plaintiff could not recover the value of the partnership goods. *Fox* v. *Rose*, 10 U. C. R. 16.

See, under next sub-head, *Garven* v. *Allan*, 3 Gr. 238; *Newton* v. *Doran*, 3 Gr. 353; *Mitchell* v. *Lister*, 21 O. R. 318.

2. *In Equity and Since the Judicature Act.*

(a) *Account.*

Costs—*Improper Conduct of Defendant—Action at Law.*]—Where a memorandum had been made in partnership books and signed by one partner, A., stating that he was indebted to his co-partner, who subsequently sued for that sum, notwithstanding that it was evident from the entries in the books that it was not due; the court, upon a bill filed by A., directed an account of the partnership dealings to be taken, with costs to be paid by defendant up to the hearing. *Garven* v. *Allan*, 3 Gr. 238.

———*Increase by Hearing—Taking Accounts.*]—In a partnership suit defendant's answer stated the terms of the partnership. The plaintiff, not accepting the statement, took the case to a hearing, instead of moving for decree, and he proved a slight difference, which involved a further charge of £4 only against the defendant:—Held, that the plaintiff should pay the extra costs occasioned by the hearing. The rule which charges the costs of taking partnership accounts on both parties is not to be applied where it would be tantamount to the denial of any remedy. In a partnership suit the reference embraced private as well as partnership transactions; there were no partnership assets; the suit did not involve the administration of a partnership estate. The defendant claimed a large balance to be due to him, while the result had been a report for $418.74 in favour of the plaintiff; and there were no special circumstances in favour of the defendant. The court charged him with the costs of taking the account. *Woolans* v. *Vansickle*, 17 Gr. 451.

——— *Prejudice of Creditors.*]—A bill was filed to establish a partnership, and the partnership being proved, the usual accounts were directed, including an account of the claims of creditors:—Held, that the costs of the suit should not be paid out of the fund to the prejudice of creditors. *Bingham* v. *Smith*, 16 Gr. 373.

——— *Scale of—Amount in Question.*]—On a reference to take an account of partnership dealings the report found that the plaintiff had contributed to the partnership capital $87.39, and the defendant $233.89, and that there was due from the defendant to the plaintiff $43.74. The taxing officer taxed the plaintiff's costs upon the lower scale, on the ground that the case came within C. S. U. C. c. 15, s. 34, s.-s. 1. On appeal, the taxing officer's ruling was reversed. *Blaney* v. *McGrath*, 9 P. R. 417.

——— *Untrue Statement.*]—Where, on the dissolution of a partnership between the plaintiff and defendant, it was agreed that the defendant should wind up the concern, and the plaintiff having demanded a statement of account, the defendant rendered an untrue and imperfect one, whereupon the plaintiff brought this action for a winding-up, claiming that the defendant was indebted to him on account of partnership assets received, which the defendant denied, and the plaintiff succeeded:—Held, that the defendant must pay the costs of the suit. *Carmichael* v. *Sharp*, 1 O. R. 381.

Costs in Partnership Actions.]—See COSTS, IV.

Discovery.]—See *Mack* v. *Dobie*, 14 P. R. 465.

Settled Accounts — *Releases—Opening up.*]—One of two members of a firm not possessing business capacity, the other managed and controlled all the affairs, presenting at intervals to his partner statements of accounts, which the latter signed on being assured of their correctness. In 1891 mutual releases of all claims and demands against each other, based upon statements so submitted by the active partner, were executed by each. In an action against the active partner to set aside these releases and open up the accounts:—Held, that all it was necessary to establish was, that in the accounts as settled there were such errors and mistakes as would inflict material injustice upon the plaintiff if the accounts should be held to be closed. *West* v. *Benjamin*, 29 S. C. R. 282.

Suit for Account—*Breach of Articles—Business Done by Partner—Profits.*]—Where articles of partnership bound the parties to be just and true to each other, and to devote their time diligently to the concerns of the firm, and not to engage in any other business; and it appeared that after notice of dissolution had been given, one of the partners had taken orders on his own account to be filled by him after the termination of the partnership:—Held, that his co-partner had no equity to compel him to account for the profits of the business thus done by him. The remedies in such a case are by injunction, or by action for damages. Dean v. MacDowell, 8 Ch. D. 345, followed. *Mitchell* v. *Lister*, 21 O. R. 318.

——— *Business in Name of One Partner.*]—An agreement between two that they should carry on business as co-partners in the sole name of one of them, the other being in debt, and wishing by this means to keep the property from his creditors, does not exempt the partner whose name was used from rendering an account of the partnership dealings to his co-partner. *Brigham* v. *Smith*, 3 E. & A. 46.

——— *Delay in Filing—Repudiation of Partnership.*]—Where a plaintiff filed a bill alleging that he and defendant had agreed to be partners in certain government contracts; and it appeared that the defendant had repudiated the partnership as soon as the contracts were entered into, that the contracts were to be completed in a year, and that the bill was not filed for about eighteen months after the repudiation; the court offered the plaintiff a reference to the master to inquire the cause of the delay, or that his bill for an account and to restrain defendant from receiving moneys, should be dismissed without costs. *Haggart* v. *Allan*, 2 Gr. 407.

——— *Division of Assets—Mandate.*]—In the Province of Quebec, when there is no other arrangement between the partners, the partition of the property of a commercial partnership must be made according to the rules laid down in the civil code in relation to the partition of successions, in so far as they can be made to apply. Upon the dissolution of a partnership, where one of the partners has been intrusted with the collection of moneys due as the mandatory of the others, any of his co-partners may bring suit against him

directly either for an account under the mandate, or for money had and received. *Lefebvre* v. *Aubry*, 26 S. C. R. 502.

——— *Jurisdiction of County Court.*]—See *Allen* v. *Fairfax Cheese Co.*, 21 O. R. 598.

——— *Mandate—Termination — Action — Sequestration.*]—In November, 1886, G. B. by means of a contre-lettre became interested in certain real estate transactions in the city of Montreal, effected by one P. S. M. In December, 1886, G. B. brought an action against P. S. M. to have a sale made by the latter to one Barsalou declared fraudulent, and the new purchaser restrained from paying the balance due to the parties named in the deed of sale. A plea of compensation was filed, and pending the action a sequestrator was appointed, to whom Barsalou paid over the money. In September, 1887, another action was instituted by G. B. against P. S. M. asking for an account of the different real estate transactions they had conformably to the terms of the contre-lettre. To this action a plea of compensation was also filed:—Held, that the plea of compensation was unfounded, G. B. having the right to put an end to P. S. M.'s mandate by a direct action, and therefore, until the account which had been ordered in the second action had been rendered, the moneys should remain in the hands of the sequestrator appointed with the consent of the parties. *Bury* v. *Murphy*, 22 S. C. R. 137.

——— *Multifariousness—Several Partnerships.*]—Three partners carried on business for a short period, when one retired; the other two continued for some time afterwards, when a dissolution took place, but no settlement of the accounts of either of the co-partnerships was had. One partner filed a bill against the other two for an account of the partnership dealings of both firms. To this bill a demurrer by the partner who had retired, on the ground of multifariousness, was allowed with costs. *Crooks* v. *Smith*, 1 Gr. 356.

——— *Parties — Vendee of Partner—Costs.*]—One of several partners, engaged in the purchase of wheat and flour, sold half of his interest to a third party, to which the other partner, who supplied all the funds in the transactions of the firm, assented, and a loss having occurred upon a re-sale, he filed a bill against the original co-partner and his vendee for an account and payment by them of one-half of the loss sustained on such re-sale:—Held, that the vendee was not, by what had taken place, constituted a partner of the plaintiff, and the bill as against him was dismissed with costs, but an account directed as against the other defendant with costs to the hearing. *Mair* v. *Bacon*, 5 Gr. 338.

——— *Profits—Right to Share—Burden of Proof.*]—In June, 1874, the plaintiff and defendant by writing entered into an agreement for supplying together the iron for the Grand Junction Railway, and providing for the division of the surplus or profits. No division of the profits was made, and the defendant went on investing the receipts from that enterprise in other contracts, and the plaintiff claimed a like interest in them also, which the defendant denied his right to:—Held, that the onus of negativing such right of the plaintiff rested on the defendant, and having failed to negative his right to such share, the court declared him entitled thereto, and directed a reference to take the accounts between the parties. *Cameron* v. *Bickford*, 11 A. R. 52. This case was reversed by privy council. Not reported.

The fact that the plaintiff, who had for some years acted as legal adviser of the defendant, was appointed one of the directors of the railway company at the same time that he claimed to be interested with the defendant in the contract for the construction of the road, formed no ground for the defendant refusing to account to the plaintiff for his share of the profits of the enterprise. *Ib.*

——— *Sale of Interest to Co-partner—Falsifying Books.*]—One member of a co-partnership was intrusted with the sole management of the books and finances of the company. The books, kept by the book-keeper of the company, shewed him in advance to the firm, while in reality they should have shewn a balance against him for a considerable amount. This partner sold out his interest to one of his co-partners:—Held, that such purchase did not vary the right of the partner to call upon the other to account for moneys not appearing in the books of the co-partnership. *Kintrea* v. *Charles*, 12 Gr. 117.

——— *Statute of Limitations—Resulting Trust—Amendment.*]—A bill was filed by a surviving partner against the representatives of the deceased partner, praying an account of certain partnership dealings, to which a demurrer for want of equity was allowed, on the ground that the relief sought was barred by the lapse of more than six years between the death of the deceased partner and the filing of the bill; but leave was given to amend, with the view of shewing that certain lands held by the deceased partner, which had descended to his heir-at-law, had been purchased with partnership assets, and that therefore there was a resulting trust in favour of the plaintiff. *McFadgen* v. *Stewart*, 11 Gr. 272.

——— *Statute of Limitations.*]—See *Cotton* v. *Mitchell*, 3 O. R. 421.

Taking Accounts—*Administration Decree—Adding Party.*]—Under an administration decree a creditor claimed by virtue of a partnership with the testator. It was objected that the establishment of his claims involved taking the partnership accounts, and they could not be gone into under the decree. The master held that the claim could be entertained, and directed that a third partner, who was a stranger to the suit, should be served with an office copy of the decree and notified of the proceedings to take the partnership accounts. *Kline* v. *Kline*, 3 Ch. Ch. 137.

——— *Charge—Dissolution.*]—Under a decree for taking partnership accounts, a charge made by the master against one of the partners for his board, &c., with the other, after the dissolution of the partnership:—Held, wrong, and that the objection could be taken on the hearing on further directions. *O'Lone* v. *O'Lone*, 2 Gr. 125.

——— *Charges—Interest on Capital Advanced.*]—Two partners, W. and M., agreed

each to furnish a certain amount of capital wherewith to carry on business together. In pursuance thereof W. did bring in the amount stipulated, but M. brought in nothing. In a proceeding to wind up the partnership estate, W. claimed to charge M.'s representatives with interest on the amount agreed to be paid, which the master refused to allow, and on appeal, his ruling was sustained. Rishton v. Grissell, L. R. 5 Eq. 326, specially referred to. *Wilson* v. *McCarty*, 13 C. L. J. 303.

——— *Charges—Interest on Capital Advanced—Commission on Sales—Objections—Delay.*]—In the absence of a special custom or an agreement, interest is not usually allowable to a partner on advances of capital made by him to the partnership, or for partnership purposes. Where parties agreed to purchase goods on joint account, and at the joint risk, and that one should furnish the funds in the first instance:—Held, that interest could not be charged on the funds so furnished. *Jardine* v. *Hope*, 19 Gr. 76.

In such a case a firm in Canada was to advance the funds, and the goods were to be consigned for sale to their firm in Liverpool, which went by a different name:—Held, that they could not charge commission on their sales. *Ib.*

Three months before the filing of a bill respecting the partnership, accounts had been furnished in which interest and commission were charged, and none of the partners had before suit suggested their objections to those charges:—Held, that they were not precluded by this delay from objecting thereto in the suit. *Ib.*

——— *Claim for Damages—Misconduct.*]—Under the usual directions for taking partnership accounts, the master may entertain and adjudicate upon a claim by one partner for damages sustained through the misconduct of the other, occasioning the dissolution before the expiration of the term agreed upon. *Doupe* v. *Stewart*, 13 Gr. 637.

——— *Claim of Clerk.*]—In a suit to wind up a partnership for alleged misconduct by one partner and the confidential clerk and manager of the business, the court, having reference to the facilities for investigating matters of account before the master, gave the clerk leave to carry in and prove any claim he had against the firm for his services, although it was clear that he had been guilty of gross misconduct, and might have been left to sue at law for his demand, if any; and directed sufficient of the partnership funds to be reserved to satisfy the claim if established. *Newton* v. *Doran*, 3 Gr. 353.

——— *Direction of Master—Executor of Partner.*]—The survivor of two partners, after having continued the business with the personal representative of the deceased partner, filed a bill for an account of the partnership dealings, and a decree was made for that purpose, and in proceeding on that decree the master directed the executor to bring in an account of the partnership dealings between the deceased and the surviving partner:—Held, that the executor was bound to make up the accounts from the books of the partnership in his possession. *Strathy* v. *Crooks*, 6 Gr. 162.

Distribution of Assets—Costs.]—In partnership actions, in the absence of special circumstances such as misconduct or negligence, the assets will be applied, first, in payment of creditors, next, in payment of the sum found due to the successful party, and lastly, in payment of the costs of all parties. Hamer v. Giles, 11 Ch. D. 942, followed. *Chapman* v. *Newell*, 14 P. R. 208.

——— *Interest—Delay.*]—When defendant was at the dissolution of a partnership to receive £150 more than the plaintiff, and it appeared that a settlement of the accounts had been delayed by the misconduct of defendant:—Held, that he was not entitled to interest on the £150 from the dissolution. *O'Lone* v. *O'Lone*, 2 Gr. 125.

——— *Investments of Partnership—Losses.*]—A partnership was formed between two civil engineers and architects, the profits of which were to be divided in shares of three-fifths and two-fifths. During the partnership they invested moneys of the partnership in the purchase of real estate, which resulted in a loss:—Held, that the loss was to be borne by the partners in the same proportion as they were to share the profits and loss of their other business. *Storm* v. *Cumberland*, 18 Gr. 245.

——— *Misrepresentations as to Liabilities—Interest—Profits—Advances to or by Partners—Erection of Buildings—Continuance of Partnership — Sheriff's Sale—Award—Wilful Default.*]—The proper method of taking partnership accounts in a very special case, discussed and illustrated. *Davidson* v. *Thirkell*, 3 Gr. 330.

Allowances made to an incoming partner in respect to misrepresentations made to him by his co-partners, as to the liability of the business when he joined it. *Ib.*

In such a case the master was held to have jurisdiction to charge the guilty parties with either interest or trade profits, on the advances which such misrepresentations rendered it necessary for the incoming partner to make. *Ib.*

Interest allowed to and against each partner on advances by and to him during the partnership. *Ib.*

One partner, A., was held to have been properly allowed by the master for buildings erected by him for the purposes of the business without the sanction of or reference to his co-partner, during a period that the existence of any partnership between them was not recognized by either; the one, A., affirming it had been put an end to by sheriff's sale, which the other B., denied, affirming on his part that an award was valid, which, amongst other things, put an end to it, and which award A. impeached, the court having afterwards held that the partnership continued notwithstanding both sheriff's sale and award, and having directed the accounts to be taken accordingly. *Ib.*

It is contrary to the ordinary course to charge partners with what but for their wilful default they would have received. *Ib.*

——— *Master's Office—Statute of Limitations.*] — In a partnership suit it was held that the defence of the Statute of Limitations could not be raised under the common decree directing an account of the partnership dealings and transactions. *Carroll* v. *Eccles*, 17 Gr. 529.

——— *Report of Master—Opening up.*]—In a partnership suit the usual decree had been made and the master made a general report, finding that a certain balance was due from defendant to plaintiff, but that all the partnership assets had not been realized. After this defendant applied for leave to carry into the master's office and prove a charge and discharge. It appeared that defendant had been guilty of gross negligence, which was not explained, in omitting to bring these papers in; but the court was of opinion that the report was erroneous in finding a sum to be due from the one party to the other before the assets were realized, and the liabilities paid; and as the report could not be acted upon, defendant's application was granted on terms. *Smith* v. *Crooks*, 3 Gr. 321.

See Robertson v. *Junkin*, 26 S. C. R. 192.

(b) *Injunction and Receiver.*

Injunction — *Breach of—Misappropriation of Assets — Following by Receiver.*] — Where it was proved that a partner had purchased a house, and a large part of the furniture thereof, with partnership funds, improperly withdrawn by him for that purpose; and such partner, being the defendant in the cause, had withdrawn all the partnership books and papers from the jurisdiction, in breach of an injunction, the court ordered the mother and sister of the defendant, whom he left in possession, to deliver up to the receiver, already appointed, the house and all the furniture, as partnership property. *Prentiss* v. *Brennan*, 1 Gr. 484.

——— *Breach of—Sequestration—Sale of Property—Claim by Strangers—Reference.*]—Where a receiver of partnership property had been appointed, and certain chattels had been seized under a sequestration against the defendant for contempt of the injunction, and the chattels so seized were alleged to be the property of the defendant and his co-partner, but it appeared that third persons claimed an interest therein—the plaintiff having moved to sell this property, a reference was directed on such motion (on which the claimants had appeared), to inquire as to their interests, and any further order on the motion was reserved, the parties to the motion electing to have a reference instead of issues to try the questions in dispute. *Prentiss* v. *Brennan*, *Re Brennan*, 2 Gr. 274.

——— *Breach of—Sequestration — Transfer of Security to Strangers—Leave to Attack.*]—In a suit in which a receiver of partnership effects had been appointed and a sequestration issued against the defendant for contempt, the court retained a motion against third persons for delivery or payment to the receiver or sequestrators of a promissory note, the property of the partnership, transferred subsequently to the issuing of the injunction and sequestration, but before the note became due by the defendant, in a foreign country, the affidavit as to the bona fides of such transfer being contradictory; the court giving leave to file a bill against such third persons. *Prentiss* v. *Brennan*, *Re Bunker*, 2 Gr. 322.

——— *Judgment at Law—Relief against—Interim Order—Terms.*]—The plaintiff and defendant entered into an agreement, under which the defendant was to procure goods, or guarantee the payment for goods, which were to be obtained and sold by the plaintiff for their joint benefit, in certain proportions; and the plaintiff, to secure and indemnify the defendant against all loss in respect thereof, executed a confession of judgment, to be acted upon only in default of plaintiff meeting the payment on such goods. The plaintiff made default, and the defendant entered up judgment and sued out execution. The court dissolved an injunction which had been issued, although upon the construction of the agreement it was doubtful whether a partnership had not been created between the parties; but the defendant (the plaintiff in the execution) having caused certain goods, provided by himself under the agreement, to be levied upon, the court directed that the amount thereof, at cost and charges, should be deducted from the amount of the debt and costs, or that the injunction should be continued in respect of that amount. *Watt* v. *Foster*, 4 Gr. 543.

——— *Judgment on Award—Relief against—Error—Interim Order.*]—The court will relieve against an award made between partners in ignorance, on the part of the arbitrators and of the remaining partners, of important omissions by the other, the managing partner, in the books of the firm, in consequence of which the award had been too favourable to such managing partner. *Wilson* v. *Richardson*, 2 Gr. 448.

An injunction to restrain proceedings on a judgment recovered upon such an award was continued to the hearing, when the ultimate success of the plaintiffs at the hearing was not considered clear, the amount of the judgment being ordered into court. *Ib.*

——— *Misapplication of Funds—Interim Order—Bill.*]—Where a partner in a special contract applies the funds derived from such contract to other contracts, not belonging to such special partnership, an injunction will be granted against him, until the partnership be wound up, although such injunction may not have been prayed for in the original bill. *Thibodo* v. *Scobell*, 5 L. J. 117.

Injunction and Receiver—*Exclusion of Executor of Partner.*]—A surviving partner, by reason of his liability to pay the debts due by the partnership, is entitled to receive all moneys of, and collect all debts due to, and dispose of all the effects of, the firm for that purpose; the representatives of the deceased partner have a right to inspect the books of the partnership, and to be informed of the proceedings of the survivor; and any exclusion of them in these respects will entitle them to an injunction and receiver. *Bilton* v. *Blakely*, 6 Gr. 575.

——— *Exclusion of Partner — Refusal to Account.*] — Where a managing partner was charged, on affidavit of his co-partner, with excluding the latter from access to the books and papers of the partnership, and with not delivering to him accounts, which the partnership articles stipulated for—an injunction and a receiver were granted against such managing partner, though his affidavit denied the principal charges, but not satisfactorily. *Prentiss* v. *Brennan*, 1 Gr. 371.

Receiver—*Interim Sale of Assets.*]—Under special circumstances an order may be made, in an action for the dissolution and

winding-up of an insolvent partnership, for the sale of assets by the receiver before the trial. *McLaren* v. *Whiting*, 16 P. R. 552.

——— *Misappropriation of Assets by Partner.*] — After the dissolution, one partner claimed most of the partnership property as his own by reason of certain misconduct he charged against the plaintiff, and made use of the partnership property in carrying on business on his own account:—Held, that such proceedings were wrong, and entitled the other partner to a receiver. *Doupe* v. *Stewart*, 13 Gr. 637.

——— *Partnership Articles—Appointment.*] —Where partnership articles provide that on dissolution the partners shall appoint a person to collect the accounts and settle the partnership affairs, the court will, on failure of the parties to agree on some person, appoint a receiver. *Mitchell* v. *Lister*, 21 O. R. 22.

See Young v. *Huber*, 29 Gr. 49; *Mason* v. *Parker*, 16 Gr. 81.

(c) *Other Cases.*

Assets of Partnership—*Disposal of, by one Partner—Estoppel—Lien.*]—In 1867 defendant S. entered into an agreement with the plaintiff for an advance of money to enable him to perform a stipulation in a lease made to him a short time before for the period of seven years by the Rossin House Hotel Company, that he would expend $10,000 in providing furniture, &c., for the hotel. The agreement was as follows: "Said E. D. C. agrees to advance the money necessary to open the Rossin House in Toronto, not exceeding the sum of $10,000, and G. P. S. to pay interest on one-half the amount till repaid to E. D. C., and each party to share equally in all profits, articles of furniture, supplies, &c., put in the said house, and E. D. C. to have a chattel mortgage on everything belonging to both parties, until the half of all the money advanced is repaid to E. D. C." After the expiration of the term there were negotiations between the plaintiff and S. for a settlement, in the course of which the latter rendered statements to the plaintiff in which he assigned a value to the furniture and treated it as an asset belonging to them jointly. After these negotiations S. continued to carry on the business of the hotel without any dissent by the plaintiff, under a new lease which had been granted to him by the hotel company before the expiration of the original term. In 1875, S. becoming embarrassed, a new arrangement was concluded between him and the company, by which he surrendered the old lease and obtained a new one for the term of ten years; and in consideration of an advance of money and arrears of rent, he executed a bill of sale to the company of the furniture. The lease contained a stipulation that on certain conditions being performed the furniture should at the end of the term belong to S. Subsequently S. assigned the lease to one L., who had actual notice of the plaintiff's interest in the furniture. Evidence was given to prove that the company had notice of the relation existing between S. and the plaintiff in reference to this furniture. There was no evidence to shew that the plaintiff knew of this transaction until after it was consummated, when he promptly repudiated it:—Held, that there being a partnership between plaintiff and S., and they being joint owners of the furniture, S. had no power to sell and convey the plaintiff's interest therein. Held, also, that the plaintiff was not estopped by simply remaining passive from asserting his right to the furniture, and that he was entitled to a lien for any balance that might be due to him on the accounts being taken. *Crossman* v. *Shears*, 3 A. R. 583.

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

Capital of Partnership—*Irregularity—Contribution.*] — Four persons who entered into a joint undertaking for the purchase of oil lands, for the purpose of re-sale, agreed to contribute and did contribute the necessary capital in certain unequal proportions. One of them (the plaintiff) subsequently acquired the interests of two of the co-partners. The lands having become greatly depreciated in value, the plaintiff, in whose name the conveyance of the lands had been taken for the joint benefit, filed a bill calling on the other party interested to make up the difference in money contributed by him and that paid in by the plaintiff and those whom he represented. A demurrer for want of equity was allowed with costs. *Foster* v. *Chaplin*, 19 Gr. 251.

Costs—*Declaration of Partnership—Hearing—Reference.*]—In a suit for the dissolution of a partnership and for an account and a receiver, where one or two partners denied the existence of a partnership, and a bill was in consequence filed against him, and by the evidence taken in the cause the partnership was established, the court gave the plaintiff the costs up to the hearing, also the costs of a consent reference as to the fact of partnership, and beyond that refused costs to either party. *O'Lone* v. *O'Lone*, 2 Gr. 125.

Creditor's Claim—*Separate Business of Partner—Mining.*]—One of two partners carried on the business of bill broker on his own account, and in that capacity received from plaintiff moneys by cheques and proceeds of drafts on the plaintiff, as the price of certain promissory notes, and the money was by the broker paid into and used with the partnership funds. It was afterwards discovered that these had been all forged by the broker, who absconded, and the remaining partner assigned all the joint effects to trustees for the benefit of all the creditors; but on a bill filed for that purpose: — Held, that the plaintiff had a right to be paid his claim out of the partnership assets. *Wallace* v. *James*, 5 Gr. 163.

Declaration of Partnership — *Admissions—Parties.*] — Upon a bill against three partners by a person who claimed to be a copartner, and proved admissions made by two of the three to that effect:—Held, that no relief could be granted against the two, excluding the third. *Carfrae* v. *Vanbuskirk*, 1 Gr. 539.

Discovery — *Production of Documents—Establishing Partnership.*]—A plaintiff seeking to establish a partnership, is not bound by the defendant's view of the relevancy or otherwise of papers which he seeks, and, although the defendant swears positively that the papers have no bearing upon the case made by the bill, the court will order their production. *Saunders* v. *Furnivall*, 2 Ch. Ch. 49.

Disposal of Individual Interest in Partnership Property—*Right to Profits.*]—M. and G. met and agreed to jointly purchase 150 acres of land and sell it in lots, or perhaps en bloc, to a syndicate, if one could be got up. Both parties knew that others were interested under each of the two principals. M. had one-third interest and G. had two-thirds. No syndicate was got up to take the whole, and G. telegraphed M. that he was going to arrange a syndicate for two-thirds, and he formed a syndicate of eight persons, of whom he was one, to purchase his two-thirds' interest, and obtained a large profit thereon. This arrangement was made in writing, and recited that G. was seised in fee of the lands, and had executed a declaration of trust of one-third in favour of M., and "executed this declaration as to the remaining two-thirds." A quit claim deed was afterwards executed by M. in favour of G., and a declaration of trust as to one-third in favour of M., was signed by G. In an action by M. for a share of G.'s profit:—Held, that there was no sale of any of the lots that belonged to M. The two-thirds had not been disposed of so as to pass out of the partnership, though as to them there might be a sub-partnership; there had been no dealing with the joint property of the partnership, but only of the individual interest of one partner; he had sold some portion of his individual share, and no injury had resulted to his partner, and, even if any had, it would be no more than one of the inevitable concomitants attendant upon the right of one member to deal as he pleases with his share of the partnership concern. The action was, therefore, dismissed with costs. *Mitchell* v. *Gormley*, 9 O. R. 139, 14 A. R. 55.

Fraud or Misrepresentation in Formation of Partnership.]—See *Merchants Bank* v. *Thompson*, *Mallon* v. *Craig*, 3 O. R. 541; *Morrison* v. *Earls*, 5 O. R. 434.

Illegal Contract — *Refusal to Enforce — Costs.*]—A member of a municipal corporation agreed with another person to take a contract from the corporation for the execution of certain works in his name, the profits whereof were to be divided between the parties:—Held, that such a contract was in contravention of the Municipal Act, 16 Vict. c. 181, and the court refused to enforce the agreement for a partnership; but, the defendant having denied the existence of a partnership, which was established by the evidence, the bill was dismissed without costs. *Collins* v. *Swindle*, 6 Gr. 282.

Judgment against Firm—*Payment by Partner—Right to Enforce.*] — The plaintiff and defendant were partners, and judgment was recovered against them in 1876 by a bank, upon certain promissory notes, of which they were respectively maker and indorser. The plaintiff paid the judgment immediately after its recovery, took an assignment of it, and in 1886 proceeded to enforce it against the defendant. The partnership accounts were taken by a referee, whose finding, approved by the court was, that the defendant should have paid one-half of the judgment:—Held, that the plaintiff was entitled to that extent to stand in the place of the original judgment creditor, and enforce the judgment against the defendant. Per Armour, C.J.—The Mercantile Amendment Act, R. S. O. 1887 c. 122, ss. 2, 3, 4, applies to the case of partners. Small v. Riddel, 31 C. P. 373, Potts v. Leask, 36 U. C. R. 476, and Scripture v. Gordon, 7 P. R. 164, not followed, in view of the opinions expressed in London and Canadian L. and A. Co. v. Morphy, 14 A. R. 577. *Honsinger* v. *Love*, 16 O. R. 170.

Right of partner paying a judgment against the firm to enforce it for his own benefit. See *London and Canadian L. and A. Co.* v. *Morphy*, 14 A. R. 577.

Lands Used by Partnership—*Ownership—Inquiry—Evidence.*]—Where partnership business was carried on in buildings erected by the funds of the firm upon lands, for part of which the patent from the Crown had issued in the name of one of the partners, parol evidence was received to shew whether the land was separate or joint property. *Newton* v. *Doran*, 3 Gr. 353.

Misconduct of Partner—*Remedy of Co-partner — Dissolution — Indemnity—Knowledge.*]—Where one co-partner acts so improperly in the affairs of the co-partnership as to render it liable to an action for damages, the other members may maintain a suit for the amount thereof against him, even though on the dissolution of the partnership the continuing partner gave to the one so acting a bond of indemnity, and to save him harmless from actions, if it appear that the fact of such improper acting of his partner was withheld from him. *Kintrea* v. *Charles*, 12 Gr. 123.

Purchase of Lands—*Title—Notice of Defect.*]—M. and G. were negotiating for the formation of a partnership to be carried on in respect of premises which G. was negotiating for the purchase of, during the pendency of which, and on the day before the purchase was completed, M. was informed that the object of the vendor in disposing of this property was to defraud his creditors, but which information M., did not communicate to G.:—Held, that this was not sufficient to affect G. with notice; although on the completion of the purchase M. might have some rights against G. in respect of the property so purchased. *Driffill* v. *Goodwin*, 23 Gr. 431.

Statute of Limitations.]—In partnership suits the defence of the Statute of Limitations is not available unless six years have elapsed before the filing of the bill since the dealings of the partners wholly ceased. *Storm* v. *Cumberland*, 18 Gr. 245.

Winding-up—*Services — Remuneration.*]—If the business of winding up a partnership concern is apportioned between the partners, and each undertakes to perform the share allotted to him, one of them cannot afterwards claim to be paid salary or other remuneration merely for the reason that his share of the work has been more laborious or difficult than that performed by his co-partner, in the absence of any express agreement to that effect, or one to be implied

from the conduct of the parties. *Liggett* v. *Hamilton*, 24 S. C. R. 665.

See Baker v. *Dawbarn*, 19 Gr. 113, *ante* VIII.

XII. Miscellaneous Cases.

Arbitration — *Disputes Subsequent to Submission.*]—Where arbitrators were authorized to dissolve a partnership:—Held, that they might, in order to adjust the terms of the dissolution, award upon disputes arising as to the partnership subsequent to the submission. *Thirkell* v. *Strachan*, 4 U. C. R. 136.

Assessment—*Personalty.*]—Held, that the personal property of a partnership must be assessed against it at its usual place of business. *In re Hatt*, 7 L. J. 103.

Assignment for Benefit of Creditors —*Execution by One Partner—Assent of Creditors.*] — An assignment for the benefit of creditors was executed by one partner, at the request of his co-partner, in the partnership name, and was made at the request of several creditors:—Held, that the assignment was properly executed, and that there was sufficient assent of the creditors. *Nolan* v. *Donnelly*, 4 O. R. 440.

——— *Sale of Assets—Extinguishment of Debt—Joint Debtors — Judgment.*] — An assignment of the assets of a partnership was duly made pursuant to the provisions of the Assignments and Preferences Act, and the assignee, with the approval of the creditors, sold and transferred the assets to a nominee of the plaintiffs and two other creditors of the firm, in consideration of the payment to the other creditors of a composition, and subject to the claims of these three creditors. The purchaser covenanted with the assignee to settle the claims of these three creditors and to indemnify him therefrom:—Held, that the claims of these three creditors were thus made part of the purchase money, and were extinguished by the transfer of the assets. A judgment recovered against one or more of partners or other joint debtors under rules (1897) 587, 603, and 605, does not prevent the plaintiff from proceeding in the same action to judgment against the other defendants. McLeod v. Power, [1898] 2 Ch. 295, distinguished. *Dueber Watch Case Manufacturing Co.* v. *Taggart*, 26 A. R. 295. Affirmed, 30 S. C. R. 373.

Auctioneer—*Sale of Goods—Purchase by Partner.*]—Where goods were sold by auction, but not having been taken away by the purchaser, were afterwards re-sold at a loss, and were purchased by a person who was a partner of the auctioneer, although in another business totally distinct from that of the auctioneer, and an action was afterwards brought by the auctioneer to recover from the first purchaser the loss on the re-sale:—Held, that it was no ground of objection to such action that the goods on the re-sale had been purchased by such partner of the auctioneer. *Clarkson* v. *Noble*, 2 U. C. R. 361.

Award—*Invalidity — Estoppel — Agreement—New Trial.*]—The plaintiff, having compiled a book, caused it to be printed by a firm consisting of himself and defendant, on paper furnished by them; and defendant having refused to give up to him the copies thus printed, he brought trover:—Semble, that he could not recover, for the property belonged to the firm, and defendant had as much right to retain as the plaintiff to take it. There was evidence, however, of an agreement between them by which the copies had become the plaintiff's property; and, as this view had not been fully submitted to the jury, and the damages given for the plaintiff were excessive, a new trial was granted. An award having been made between the parties, the plaintiff afterwards filed a bill to dissolve and wind up the partnership as if no such award had been made, and swore that he was advised and believed the award was invalid:—Held, that this bill was not evidence against him to shew that he had so treated the award, but that he should not have used the award to support his case, and on this ground the new trial was granted without costs. *Doupe* v. *Stewart*, 28 U. C. R. 192.

Bequest of Partnership Business—*Acceptance by Legatee—Right to Account.*]—J. and his brother carried on business in partnership for over thirty years, and the brother having died, his will contained the following bequest: "I will and bequeath unto my brother J. all my interest in the business of J. & Co. in the said city of St. Catharines, together with all sums of money advanced by me to the said business at any time, for his own use absolutely forever, and I advise my said brother to wind up the said business with as little delay as possible:"—Held, that J. on accepting the legacy was under no obligation to indemnify the testator's estate against liability for the debts of the firm in case the assets should be insufficient for the purpose, and did not lose his right to have the accounts taken in order to make the estate of the testator pay its share of such deficiency. *Robertson* v. *Junkin*, 26 S. C. R. 192.

Change in Firm — *Notice under Special Agreement—Validity.*]—See *Francis* v. *Turner*, 25 S. C. R. 110.

Chattel Mortgage and Assignment for Creditors—*Execution by Infant Partner.*]—See *Powell* v. *Calder*, 8 O. R. 505.

Chattel Mortgage Taken in Individual Name of a Partner—*Moneys Advanced by the Firm—Validity as Against Creditors.*] See *Hobbs Hardware Co.* v. *Kitchen*, 17 O. R. 363; *Ross* v. *Dunn*, 16 A. R. 552.

Debt of Partnership—*Securities — Application of Payments.*]—One partner of a firm gave as security for half of the partnership indebtedness a mortgage on his separate real estate; the other partner gave an indorsed note for the remaining portion of the debt. Subsequently payments were made to the creditor on account of the joint debt, which he credited on the note, claiming to hold the mortgage for the entire balance:—Held, that an assignee of the mortgagor was entitled to have one-half of all sums which had been paid out of the partnership assets on account of the debt credited on the mortgage security. *Moore* v. *Riddell*, 11 Gr. 69.

Execution against Partner—*Sale—Injunction —Infant—Parties—Execution Creditors.*]—In a suit by an infant partner against his co-partner praying for dissolution, receiver, reference, &c., after a decree pro confesso, and during the taking of the accounts—under an agreement for the continu-

ance of the partnership business for that purpose—certain creditors of the firm obtained judgments and executions at law against the partner of the infant, who was not informed of these proceedings until the sheriff had seized, and was about to sell, the whole of the partnership property:—Held, on motion for injunction, that the proceedings at law were not within the provisions of R. S. O. 1877 c. 123, s. 8, and that the sale should be restrained. Held, also, that the execution creditors might be made parties for that purpose on motion simply. *Young* v. *Huber*, 29 Gr. 49.

Firm Name—*Injunction.*]—H. P. and N. P. carried on business under the name of H. P. & Bro. They afterwards dissolved partnership, and each carried on a like business in his own name. Subsequently H. assigned his business to the plaintiff, with authority to carry it on in H.'s name, and then two sons of N. P. carried on a similar business next door, under the firm name of H. P. & Co. An injunction to restrain the use of that name was refused. *Aikins* v. *Piper*, 15 Gr. 581.

Goodwill—*Sale of.*]—See *O'Keefe* v. *Curran*, 17 S. C. R. 596.

Injunction—*Mortgage by One Partner—Restraining Sale.*]—Two persons were in joint possession of and carried on business as partners on property of one, when the owner mortgaged it, giving a power of distress in case of default, and the mortgagee distrained on the partnership property. On a bill by the assignee of the other partner, it not appearing that the latter assented to or had notice of the mortgage, the court granted an injunction to the hearing. *Mason* v. *Parker*, 16 Gr. 81.

Judgment—*Declaration of Existing Partnership—Vesting Partner's Property—Jurisdiction.*]—Upon a bill filed by the plaintiff, as assignee in insolvency of the firm of S. J. & Co., seeking to have the defendant declared a member of the firm, and to vest his property in the plaintiff, as such assignee, the court made a decree as asked. Objection to the jurisdiction of the court of chancery to entertain such a bill was taken for the first time in the reasons of appeal:—Held, that the court of chancery had jurisdiction under general order 538 to declare the defendant a partner, as upon proof of the partnership the plaintiff could have asked to have the partnership accounts taken; but that it had no power to vest defendant's property in the plaintiff. *Botham* v. *Keefer*, 2 A. R. 595.

Mercantile Amendment Act.]—See *Honsinger* v. *Love*, 16 O. R. 170, *ante* XI. 2 (c).

Mineral Claim—*Interest in—Statute of Frauds—Parol Agreement.*]—Sections 50 and 51 of the Mineral Act of 1896 (B. C.), which prohibit any person dealing in a mineral claim who does not hold a free miner's certificate, does not prevent a partner in a claim recovering his share of the proceeds of a sale thereof by his co-partner, though he held no certificate when he brought his action, having allowed the one he had up to the time of sale to lapse. A partnership may be formed by a parol agreement notwithstanding it is to deal in land, the Statute of Frauds not applying to such a case. Judgment in 6 B. C. Reps. 260 affirmed. *Archibald* v. *McNerhanie*, 29 S. C. R. 564.

Municipal Elections—*Property Qualification.*]—In 1892 a city council passed a by-law exempting the property of the partnership of the respondent, who had been elected alderman, from taxation except as to school rates, for a period of seven years:—Held, that the exemption, not being founded upon any contract, but being an exemption without a contract, as provided for by 56 Vict. c. 35, s. 4 (O.), there was no disqualification. Regina ex rel. Lee v. Gilmour, 8 P. R. 514, distinguished. Held, also, that the respondent was entitled to qualify upon his rating upon the assessment roll of 1895 as the joint owner of a freehold estate in the partnership property, the four partners being rated for this property as freeholders to the amount of $10,000; 55 Vict. c. 42, ss. 73 and 86 (O.) The words "exempt from taxation" in 56 Vict. c. 35, s. 4, mean exempt from payment of all taxes, including school rates. *Regina ex rel. Harding* v. *Bennett*, 27 O. R. 314.

Held, that "actual occupation" in s. 73 of the Consolidated Municipal Act, 1892, 55 Vict. c. 42 (O.), which provides, with regard to the property qualification of candidates, that where there is actual occupation of a freehold rated at not less than $2,000 the value for the purpose of the statute is not to be affected by incumbrances, does not necessarily mean exclusive occupation; and that when two partners were in occupation of partnership property, each should be deemed in actual occupation of his interest in the property within the meaning of the above enactment. Regina ex rel. Harding v. Bennett, 27 O. R. 314, followed as to the latter point. *Regina ex rel. Joanisse* v. *Mason*, 28 O. R. 495.

Principal and Surety—*Agent Becoming Partner—Continuance of Surety's Liability.*]—A person became surety for another for the due discharge of his duty as agent in the purchase of wheat for a mercantile firm. Afterwards the agent and his principals entered into an agreement for partnership, and during the continuance thereof he became indebted to his co-partners in the sum of £750; and the surety, having been called upon, executed a confession of judgment for the amount of his principal's indebtedness, in ignorance, as he alleged, of the fact that the agency had ceased and a partnership been formed. Upon a bill filed to enforce the judgment against the surety, the court, under the circumstances, directed a reference to ascertain what, if any, portion of the debt for which the assignment was given arose in respect of dealings during the agency, reserving further directions and costs; or, if the plaintiffs should decline this reference, then that the bill should be dismissed with costs. *Gooderham* v. *Bank of Upper Canada*, 9 Gr. 39.

Release—*Liabilities — Partnership or Individual.*]—A release by creditors to one of two partners of all actions and causes of actions, suits, debts, &c., which they now have, or ever had, or are entitled to in respect of any act, matter, or thing from the beginning of the world, is a release of individual as well as partnership liabilities. *Hall* v. *Irons*, 4 C. P. 351.

Sale of Intestate's Interest.]—Under the statute to amend the law of property and

trusts, the court made an order approving of a proposed sale to a partner of an intestate's interest in the partnership assets. *Ex parte Sessions*, 2 Ch. Ch. 360.

Unincorporated Company—*Committeemen—Liability — Amendment — Co-contractors—Addition of as Parties.*]—Where credit is given to an abstract entity such as a club, the creditor may look to those who in fact assumed to act for it and those who authorized or sanctioned that being done, at all events where he did not know of the want of authority of the agent to bind the club. Review of English cases on this subject. The liability in such cases is not several, but joint. By analogy to the old practice where a plea in abatement for non-joinder of co-contractors was pleaded, a defendant now moving to stay proceedings until the co-contractors are added as parties should shew by affidavit the names and residences of the persons alleged to be joint contractors whom he seeks to have added, and the same liability as to costs, in case persons are added who turn out not to be liable, should be entailed upon him. In an action begun against an unincorporated company, as a partnership, to recover a sum for costs paid by the plaintiffs, an order in chambers allowing the plaintiffs to amend by adding as defendants certain members of the executive committee of the company, and to charge them in the alternative as personally liable by reason of their having sanctioned the arrangement between the plaintiffs and the association, was affirmed without prejudice to the defendants applying to add parties. *Aikins* v. *Dominion Live Stock Association of Canada*, 17 P. R. 303.

See BANKRUPTCY AND INSOLVENCY, I. 7, VI. 7—BILLS OF EXCHANGE, VIII. 5—COVENANT, III. 1—EXECUTION, VIII. 1—LIMITATION OF ACTIONS, IV. 1 (a)—MINES AND MINERALS, V.—PARTIES, II. 12—RECEIVER, I. 2 (c).

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PATENT FOR INVENTION.

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I. GENERALLY.

[*See* R. S. C. c. 61.]

Interpretation of Grant.]—The granting of letters patent to inventors is not the creation of an unjust monopoly, nor the concession of a privilege by mere gratuitous favour, but it is a contract between the state and the discoverer, which, in favour of the latter, ought to receive a liberal interpretation. *Barter* v. *Smith*, 2 Ex. C. R. 455.

Invention—*Simplicity.*]—The simplicity of an invention is no reason why a patent therefor should not be protected. *Powell* v. *Begley*, 13 Gr. 381; *Yates* v. *Great Western R. W. Co.*, 24 Gr. 495.

Where, therefore, by a simple contrivance of cutting away a portion of the log out of which a pump was to be manufactured, thus giving it the form of a chair, and by the introduction into the tube of a conical tube through which the piston worked, the plaintiff had been enabled to construct a force pump made of wood, the court restrained the infringement of a patent procured therefor. *Powell* v. *Begley*, 13 Gr. 381.

The invention of an inclined plane in a certain form and position, as a means or appliance for directing a tool cutter, so as to produce spiral or curved grooves in a roller: —Held, a proper subject for a patent; the simplicity of a new contrivance being no objection to a patent for it. *Summers* v. *Abell*, 15 Gr. 532.

The mere attaching of the support of the handle of a pump higher or lower in position than that formerly in use, is not the subject of a patent. *Owens* v. *Taylor*, 29 Gr. 210.

Process and Product—*Purchaser of Articles Infringing—Profits and Damages—Accounts — Courts — Decisions.*]—A patent granting the exclusive right of making, constructing, using and selling to others to be used, an invention, as described in the specifications setting forth and claim-

ing the method of manufacture, protects not only the process but the thing produced by that process, and an action will lie against any person purchasing and using articles made in derogation of the patent, no matter where they came from; and, although the plaintiff cannot have both an account of profits and also damages against the same defendant, he may have both remedies as against different persons (e.g., maker and purchaser) in respect of the same article. A keeping of the accounts pending the action against the importers does not operate as a license to justify the sale of the articles; it is only an expedient to preserve the rights of all parties to the close of the litigation. As the infringing articles were manufactured in the United States and brought into Canada for sale, there was sufficient evidence given that they were made according to the plaintiffs' process to throw the onus on the defendants of shewing the contrary. Although the high court may be in the particular case the final court of appeal, it will defer to previous cases decided affirming the validity of a patent and follow the court of appeal in refusing to disturb a decision in the exchequer court. Earlier and later American cases commented on. *Toronto Auer Light Co.* v. *Colling*, 31 O. R. 18.

II. CANCELLATION OR FORFEITURE.

Improper Importation.]—Where the subject of a patent is a new combination of old devices, the patentee cannot import such devices in a manufactured state, and simply apply his combination to them in Canada, without violating the prohibition against importation contained in s. 28 of the Patent Act, 1872. *Mitchell* v. *Hancock Inspirator Co.*, 2 Ex. C. R. 539.

To bring an importation by the patentee within the prohibition of s. 37 of the Patent Act, R. S. C. c. 61, it is necessary that it consist of, or affect, the particular invention in respect of which the patent has been granted. *Wright* v. *Bell Telephone Co.*, 2 Ex. C. R. 552.

——— *Non-manufacture.*]—Section 37 of the Patent Act, R. S. C. c. 61, does not require the patentee, or his legal representatives, to personally manufacture his invention in Canada. So long as he puts it within the power of persons to obtain the invention at a reasonable price in Canada, he fulfils the requirement of the statute. *Brook* v. *Broadhead*, 2 Ex. C. R. 562.

Although a patentee may not have commenced to manufacture the patented article within the period limited in s. 28 of 35 Vict. c. 26 (D.), as amended by 38 Vict. c. 14, s. 2, yet, so long as he is in a position either to furnish it, or to license its use, at a reasonable price to any person desiring to use it, his patent ought not to be declared forfeited. (2) It is not incumbent upon a patentee to shew that he has made active efforts to create a market for his patented invention in Canada. It rests upon those who seek to defeat the patent to shew that he neglected or refused to sell the invention for a reasonable price when proper application was made to him therefor. (3) The intention of the legislature in enacting the provisions of s. 28 of 35 Vict. c. 26, which prohibit the patentee from importing his invention in a manufactured state after the expiry of a given time from the granting of his patent, was to protect the industrial interests of Canada, and the prohibition should not be extended to operate a forfeiture in cases where the character and circumstances of the importation tend to promote rather than prejudice such interests. (4) If, after the time has expired wherein the patentee may have imported the invention without prejudice to his rights, he consents to its importation by others, such consent brings him within the prohibition of the statute and avoids his patent. *Barter* v. *Smith*, 2 Ex. C. R. 455.

——— *Non-manufacture — Unreasonable Price.*]—The claim in the specification for the re-issue of a patent was as follows:—"The method herein described of making incandescent devices, which consists in impregnating a filament, thread, or fabric of combustible material with a solution of metallic salts of refractory earths suitable when oxidized for an incandescent, and then exposing the impregnated filament, thread, or fabric to heat until the combustible matter is consumed:"—Held, that it was open to the owners of the patent to import the impregnating fluid or solution mentioned in the specification of their patent, without violating the provisions of the law as to manufacture. (2) That, although the plaintiffs had at the outset put an unreasonable price upon their invention, yet, as it was not shewn that during such time any one desiring to obtain it had been refused it at a lower and reasonable price, the plaintiffs had not violated the provisions of the law as to the sale of their invention in Canada. (3) That it is not open to any one in Canada to import for use or sale illuminant appliances made in a foreign country in accordance with the process protected by the plaintiffs' patent. *Auer Incandescent Light Manufacturing Co.* v. *O'Brien*, 5 Ex. C. R. 243.

——— *Prescribed Time — Sale—Importation of Parts.*]—The A. D. T. Co. were the assignees of patent No. 38,284 for an improvement in tires for bicycles. They imported, after the period allowed by the Patent Act for importations of the patented invention to be lawfully made, some twenty-two tires in a complete and finished state, and fifty-nine covers that required only the insertion of the rubber tube to complete them. Of the completed tires and in the covers in the state in which they were imported was to be found the invention protected by the said patent. These tires and covers were not imported by the company for sale, but to be given to expert riders to be tested, and for the purpose of advertising the tire so patented. However, one pair of such tires was sold through inadvertence or otherwise but they were not imported for sale. The company had a factory in Canada, where the invention patented was manufactured, and the value of the labour displaced by the importation complained of only amounted to $2.18:—Held, in accordance with the decision in Barter v. Smith, 2 Ex. C. R. 455, which the court felt bound to follow, that the facts did not constitute sufficient ground for cancellation of the patent under the provisions of s. 37 of the Patent Act. (2) In order to avoid a patent for illegal importation, the thing imported must be the patented article itself, and not merely consist of materials which, while requiring but a trifling amount of labour and expense

to transform them into the patented invention, yet do not in their separate state embody the principle of the invention. *Anderson Tire Co. of Toronto* v. *American Dunlop Tire Co., American Dunlop Tire Co.* v. *Anderson Tire Co. of Toronto*, 5 Ex. C. R. 82.

Non-manufacture—*Improper Importation.*]—Where the owner of several patents illegally imports elements common to the composition of all his inventions, but uses the same in the construction of one of them only, such importation operates a forfeiture in respect of the particular invention so constructed, but does not affect the other patents. A patentee is within the meaning of the law in regard to his obligation to manufacture, when he has kept himself ready either to furnish the patented article or to sell the right of using, although not one single specimen of the article may have been produced, and he may have avoided his patent by refusal to sell, although his patent is in general use. *Toronto Telephone Mfg. Co.* v. *Bell Telephone Co.*, 2 Ex. C. R. 524.

——— *Refusal to Sell—Improper Importation.*]—If an article imported by a patentee and used by him in the construction of his invention is a common commercial article employed for many purposes, and is not specified in the patentee's claim as an essential part of his invention, such importation does not operate a forfeiture of the patent. (2) A fair test of the patentee's ability to freely import any article required in the construction of his invention is to ascertain if it is open to every person in Canada to manufacture, import, sell, and use the same without thereby infringing the patent in question. If the article is thus part of the public domain, the patentee is at liberty either to import it or purchase it in Canada for the purposes of such construction. (3) Where the subject of a patent is a combination of elements, and one of them is a novelty invented by the patentee, such novelty is in the same position as the other elements with respect to importation by him unless its production or manufacture is covered by the patent in question. (4) There is no express provision in the statute imposing the penalty of forfeiture for importing into Canada the various parts of the invention in respect of which the patent was granted, much less for importing one of its parts. The words of the statute are "the invention for which the patent is granted," and they ought not to be extended beyond their plain meaning. In administering the statute, the minister can only apply the penalty to the offence which the statute forbids. He cannot apply it to an attempt to evade the statute. (5) In imposing penalties Parliament must take its own measures to prevent evasion, and it would be most unsafe to impose, in the case of an evasion, the heavy penalty which the law has levelled at the principal offence, on the theory, which may or may not be correct, that Parliament intended by an equal penalty to forbid the doing of that which would be almost or quite an equivalent of the principal offence. (6) Where the article patented is of delicate and skilful manufacture, and one from which the patentee can only reap the reward of his labour and expenditure through its being esteemed successful by the public, it is reasonable for him, at a time when public opinion with respect to it is in suspense, to decline to sell his invention unconditionally to those who, by unsuitable use, would fail to derive benefit from it themselves, and would create an impression in the public mind that the invention was a failure. If, upon application made to him for the purchase of his invention, he imposes a limitation in respect of its use, he ought not to be held to have thereby forfeited his patent, unless it appear that such limitation is imposed for the purpose of evading compliance with the provisions of the statute which require him to sell the patented invention at a reasonable price. (7) In relation to the provisions of s. 37 of the Patent Act touching the price of the patented invention to purchasers, it would appear that the evil the statute was principally intended to prevent is the exaction of exorbitant prices under the monopoly secured by the patent. *Royal Electric Company of Canada* v. *Edison Electric Light Co.*, 2 Ex. C. R. 576.

——— *Refusal to Sell—Improper Importation—Connivance.*]—The importation of the component parts of a telephone, in such a state of manufacture as to simply require putting together in Canada to make the completed instrument, falls within the prohibition of s. 28 of 35 Vict. c. 26 (D.), as amended by 38 Vict. c. 14, s. 2. Upon application being made to the respondents to purchase a number of their telephones for private purposes, they refused to sell the same, accompanying such refusal by the statement: "We do not sell telephones, but we rent them:" — Held, that the respondents had thereby afforded a good ground for forfeiture of their patent. Connivance by the patentee in an improper importation is equal to importing or causing to be imported within the meaning of the statute. *Toronto Telephone Manufacturing Co.* v. *Bell Telephone Co.*, 2 Ex. C. R. 495.

Practice in Action to Avoid—*Default of Pleading—Judgment.*]—Upon a motion for judgment for default of pleading in an action to avoid certain patents of invention, the court granted the motion, but directed that a copy of the judgment should be served upon the defendants, and that the registrar should not issue a certificate of the judgment for the purpose of entering the purport thereof on the margins of the enrolment of the several patents in the Patent Office until the expiry of thirty days after such service. *Peterson* v. *Crown Cork and Seal Co.*, 5 Ex. C. R. 400.

III. Combination and Novelty.

Defective Patent—*Reissue—Operation—Amendment—User.*]—In November, 1879, the plaintiff obtained a patent for a new and useful improvement in bakers' ovens, which was expressed to be, "In combination with a baker's oven, a furnace, 'D.', set within the oven but below the sole, 'A.'" This patent he surrendered, and a new one issued in August, 1880, on the ground that the first was inoperative by reason of the insufficiency of the description. The new patent was for the unexpired portion of the five years covered by the first patent. The claim of invention, as set forth in the specification, was: "(1) In a fire-pot or furnace placed within a baker's oven, below the sole thereof, and provided with a door situated above the grate. (2) In a fire-pot or furnace placed within a baker's oven, provided with a door above the level of the sole of the oven, and connected with the said

furnace by an inclined guide. (3) In a flue, 'H.', leading from below the grate, 'B.', to the flue, 'E.' (4) In a baker's oven provided with a circular tilting grate situated below the sole of the oven, and provided with a door. (5) In a cinder grate, 'F.', placed beneath the fire grate, 'B.', in combination with a flue, 'H.'" The plaintiff in his specifications claimed all these as his inventions; in his evidence he claimed each of the combinations to be the subject of his patent:—Held, that, if the plaintiff was correct in the latter view, the last four combinations being new, the first patent could not have been inoperative as to them; and the second patent in respect of these must be construed as an independent one, issuing for the first time on its date, and as all other than the first combination had been used for upwards of a year prior to the patent, he was not entitled to a patent therefor. (2) That the fifth combination of previously known articles, as applied to a baker's oven, which was productive of results which were new and useful to the trade, was a subject of a patent. Some of the devices were in use before the patent, but numerous witnesses engaged in baking testified that they never knew of the combination before the plaintiff's invention:—Held, that the defence for want of novelty failed. Held, also, that the first combination in the patent of 1880 was such an amendment as is contemplated by the Act 35 Vict. c. 26, s. 19 (D.). The defendant's oven was completed early in July, 1880, and before the reissue of the plaintiff's patent; she had in use the first and fourth combinations, and continued to use them after such reissue:—Held, that there was not any remedy for the intermediate user, as the patent was then inoperative; but as to any subsequent infringement, the user under the defective patent could not operate as a defence. *Hunter* v. *Carrick*, 28 Gr. 489. Reversed, 10 A. R. 449, 11 S. C. R. 300.

Held, by the court of appeal, that the combination of the tilting gate and the feed door below the sole of the oven was so wanting in novelty as to render the patent obtained in respect thereof invalid. *S. C.*, 10 A. R. 449.

Held, by the supreme court of Canada, that the combination, being a mere aggregation of parts not in themselves patentable, and producing no new result due to the combination itself, was no invention, and consequently it could not form the subject of a patent. *S. C.*, 11 S. C. R. 300.

Improvement—*Absence of New Combination.*]—The plaintiff introduced into a drum stove, in addition to a spiral flue, which had been previously in use, a centre pipe closed at the sides and open at both bottom and top, as a means of producing a greater amount of heat, and obtained a patent for "the spiral flue in connection with the pipe in the centre:"—Held, that the improvement did not involve any new principle or new combination, and that the patent was void. *North* v. *Williams*, 17 Gr. 179.

——— *Absence of Novelty — Lack of Invention.*]—The plaintiff obtained a patent for a new and useful improvement on machines for bending wood for making chairs, and other purposes, and sued the defendants for infringement of it. By the old process the wood to be bent for the back of a chair was placed on an iron strap, one end resting against a fixed shoulder upon the strap, the other confined by a movable shoulder, which was tightened against the end of the wood by a wedge, in order to give the end pressure required to prevent the wood from breaking or splintering in bending. In the plaintiff's machine a screw was used in place of the wedge, and by it, but not by the wedge, the pressure could conveniently be regulated and adjusted during the bending. With the wedge, too, only a single curve or semi-circle for the back of the chair could be accomplished, while by the plaintiff's machine the two ends of the back piece could be bent down, so as to connect with the seat or body of the chair as side pieces. This also was effected by end pressure with the screw; and the side piece and back were thus formed out of one piece by continuous pressure, instead of from separate pieces. Semble, that the use of the screw to produce the end pressure could not be the subject of a patent, though the construction of the side and back in one piece might be. *Bonathan* v. *Bowmanville Furniture Manufacturing Co.*, 31 U. C. R. 413.

——— *Change in Form or Proportion.*]—Quære, whether the patent in this case, which was for an improvement in the form of the mould board in ploughs, called the "Gain Twist," was not for an improvement which is, in the language of s. 21 of C. S. C. c. 34, "simply changing the form or the proportion of any machine or composition." If so, it should not be deemed a discovery. *Huntingdon* v. *Lutz*, 13 C. P. 168.

——— *Combination—Claim—New Invention.*]—A patent is good for a combination of old or before-used inventions, as well as for an entirely new one, provided the patentee does not claim it as an invention new in all its parts, but merely for the improvement in the combination. *Emery* v. *Iredale*, *Emery* v. *Hodge*, 11 C. P. 106.

——— *Prior Suggestion — Validity.*]—On the 15th October, 1892, J. obtained a patent in Canada for alleged new and useful improvements in boiler furnaces. The distinctive feature of J.'s invention was that, instead of using a fuel chamber or magazine bowl-like in shape, such as that claimed in W.'s United States patent, he employed an oblong trough or bath-tub shaped fuel chamber with upwardly and outwardly inclined closed sides. This form of fuel chamber was suggested in the W. patent, but was not worked out by its inventor, it being his view apparently that several magazines or chambers bowl-like in shape could be used within the trough-shaped chamber. The W. patent was not commercially successful. J., using an oblong or trough-shaped chamber, was the first to manufacture a mechanical stoker that was commercially successful. Between W.'s and J.'s there was all the difference between failure and success:—Held, that J.'s patent was valid. *General Engineering Co. of Ontario* v. *Dominion Cotton Mills Co.*, 6 Ex. C. R. 309. See also *S. C.*, *ib.* 357, *post* XI.

——— *Substantial Identity — Infringement.*]—The plaintiffs were the owners of letters patent No. 38,284, for improvements in bicycle tires. The inventors' object was to produce a pneumatic tire combining the advantages of both the "Dunlop" tire and the "Clincher" tire, and that was done by finding a new method of attaching the tire to the rim of the wheel. They used for this purpose an outer covering, the two edges of which

were made inextensible by inserting in them endless wires or cords, the diameter of the circle formed by each wire being something less than the diameter of the outer edge of the crescent or "U" shaped rim that was used and into which the tire was placed. Then when the inner or air tube was inflated, the edges of the outer covering were pressed upwards and outwards, as far as the endless wires would permit, and were there held in position by the pressure exerted by the air tube. In the second and third claims made by the plaintiffs, and in their description of the invention they describe a rim "provided with an annular recess near each edge into which enters the wired edge of the outer tube or covering." In their first or more general statement of the claim is described "a rim, the sides of which are so formed as to grip the wired edges of the outer tube;"—Held, that a rim with annular recesses did not constitute an essential feature of the invention, the substance of which consisted in the use of an outer covering having inextensible edges which are forced by the air tube when inflated into contact or union with a grooved rim, the diameter of the outer edges of which are greater than the diameters of the circles made by such inextensible edges. (2) The defendants manufactured a pneumatic tire with an outer covering through the edges of which was passed an endless wire forming two circles instead of one. The wire was placed in pockets, in the outer covering, which ran nearly parallel to each other except at one point where the two circles crossed each other. The wire being endless, the two circles performed in respect of the inextensibility of the edges of the outer covering, the same part and office that the wire with a single coil or circle in the plaintiffs' tire performed. There was, however, this difference, that the two circles, into which the wire would form itself in the defendants' tire when the inner tube was inflated, would not be concentric, but as one circle became larger the other would become smaller:—Held, that, while the defendants' tire might have been an improvement on that of the plaintiffs', it involved the substance of the plaintiffs' patent and constituted an infringement upon it. *American Dunlop Tire Co.* v. *Anderson Tire Co.*, 5 Ex. C. R. 194.

——— *Validity — Infringement.*]—C. obtained a patent for an alleged invention styled "The Paragon Black Leaf Check Book," and in his specification claimed as his invention, "In a black leaf check book of double leaves (one-half which are bound together while the other half fold in as fly-leaves), both being perforated across so that they can be readily torn out, the combination of the black leaf bound into the book next the cover and provided with tape across its ends, the said black leaf having the transferring composition on one of its sides only." A half interest in this patent was assigned to the defendant, with whom C. was in partnership, and on the dissolution of such partnership said half interest was reassigned to C., who afterwards assigned the whole interest to the plaintiffs. Prior to the said dissolution the defendant obtained a patent for what he called "Butterfield's Improved Paragon Check Book," claiming as his invention the following improvements on check books previously in use: (1) A kind of type. (2) The membrane hinge for a black leaf, the whole bound by an elastic band to the ends or sides of the lower cover. (3) A totalling sheet. After the dissolution he proceeded to manufacture check books under his patent. The plaintiffs instituted proceedings to restrain such manufacture, claiming that their patent was thereby infringed:—Held, reversing the judgment in 11 A. R. 145, that the patent of the plaintiffs under which they claimed was a valid patent, and that it was infringed by the manufacture and sale of the defendant's books. *Grip Printing and Publishing Co. of Toronto* v. *Butterfield*, 11 S. C. R. 291.

Insufficient Novelty—*New Combination—Prior Similar Application.*]—The plaintiff had obtained a patent for an improved gearing for driving the cylinder of threshing machines, and the gearing was a considerable improvement; but it appeared that the same gearing had been previously used for other machines, though not before applied to threshing machines:—Held, that the novelty was not sufficient to sustain the patent. *Abell* v. *McPherson*, 17 Gr. 23, 18 Gr. 437.

New Application of Old Mechanical Device.]—The application to a new purpose of an old mechanical device is patentable when the new application lies so much out of the track of the former use as not naturally to suggest itself to a person turning his mind to the subject, but requires thought and study. The application to an oil pump of the principle of "rolling contact" was held patentable. *Bicknell* v. *Peterson*, 24 A. R. 427.

New Arrangement — *Colourable Imitation—Damages.*]—In 1877 L., a candle manufacturer, obtained a patent for new and useful improvements in candle making apparatus. In 1879 C., who was also engaged in the same trade, obtained a patent for a machine to make candles. L. claimed that C.'s patent was a fraudulent imitation of his patent and prayed that C. be condemned to pay him $13,200 as being the amount of profits alleged to have been realized by C. in making and selling candles with his patented machine, and also $10,000 exemplary damages. C. contended that his patent was valid as a combination patent of old elements; that there could be no action for infringement of L.'s patent until C.'s patent was repealed by scire facias; and also that L.'s patent was not a new invention. At the trial there was evidence that there were other machines known and in use for making candles, but there was no evidence as to the cost of making candles with such machines, or what would have been a fair royalty to pay L. for the use of his patent. And it was proved also that L.'s trade had been increasing. The superior court on the evidence found that C.'s patent was a fraudulent imitation of L.'s patent, and granted an injunction and condemned C. to pay L. $600 damages for the profits he had made on selling candles made by the patented machine. This judgment was affirmed by the court of Queen's bench (appeal side). On appeal to the supreme court of Canada:—Held, that C.'s machine was a mere colourable imitation of L.'s, based upon the same principles, composed of the same elements, and differing from it only in the arrangement of those elements, and producing no results materially different; therefore L.'s patent had been infringed, and there was no necessity in order to recover damages for infringement that C.'s patent should first be set aside by scire facias. Held, also, that in this case the profits made by the

defendants was not a proper measure of damages; that the evidence furnished no means of accurately estimating the damages, but substantial justice would be done by awarding $100. *Collette* v. *Lasnier*, 13 S. C. R. 563.

——— *Substantial Identity—Device—Improvement.*]—A patent for a horse-rake, the specification of which described as part of the invention "the construction and novel arrangement of a divided axle, with wheels firmly fastened thereon, a friction gripe for engaging with the divided axle," &c.; the description of the construction and operation stating that "the axle being divided into two parts, permits the wheels to turn in opposite directions; a piece of iron or steel wire, or cord, or chain, is coiled round each half of the axle, one end of each coil being secured firmly to the rake head, while the other ends of the coil are secured to a foot treadle," &c.; —Held, not to be infringed by a rake worked by a strap passed twice or oftener round the inner part of the hub of the wheel elongated for the purpose of receiving it, one end of the strap being attached to the axle, and the other connected with the treadle. Held, also, that the mode of using the cord was not novel, being essentially the same described in an earlier patent as consisting of "flexible metallic straps which encircle the inner extension of the hubs, one end of each strap being attached to a fixed bearing secured to the axle, and the other to the short end of the lever," &c. Semble, that neither the circle nor the coil was the subject of either invention, but only modes of using a friction band in connection with another device which was the patented improvement. *Sylvester* v. *Masson*, 12 A. R. 335.

New Combination — *Old Elements.*]—Though the number of mechanical powers are limited, their combinations may be very numerous; and a new combination of previously known implements or elements is the proper subject of a patent. *Patric* v. *Sylvester*, 23 Gr. 573.

——— *Patent for New Principle—Absence of Real Novelty—Infringement.*]—The plaintiff obtained a patent for a platform pump, constructed upon the principle and for the purpose of raising water for animals to drink from wells by their own weight and act, the specification claiming such principle as his invention. He sued for the infringement of this patent. It appeared that an inclined platform working upon a fulcrum led up to the trough, and that being depressed by the weight of the animal when near the trough, it forced down the piston rod and plunger, with which it was connected, thus driving the water up a pipe into the trough. There was nothing new in the different parts or in the principle on which they produced their effect, but the novelty, if any, was in the combination:—Held, that the patent, not being for such combination, but for the principle, could not be sustained. Semble, that the utilizing the instinct of the animal to seek water was the only novelty, and that this could not be the subject of a patent. The infringement complained of was a pump for which defendant had obtained a patent, and it was objected that this patent was an answer to the action until set aside; but, semble, clearly not. *Merrill* v. *Cousins*, 26 U. C. R. 49.

——— *Patentable Invention.*] — A patent was obtained for an improvement in the construction of carriages by the combination of a folding sectional roof joined to the carriage posts, in such a way and by such an arrangement of sections of the roof and of the carriage posts that the whole carriage top could be made entirely of sections of wood or other rigid material with glass sashes all round, and the carriage be opened in the centre into two principal parts and at once converted into an open uncovered carriage. In an action for infringement of this patent:—Held, that the combination was not previously in use and was a patentable invention. *Dansereau* v. *Bellemare*, 16 S. C. R. 180.

New Device—*Infringement.*]—C. & Co. were assignees of a patent for a check book used by shopkeepers in making out duplicate accounts of sales. The alleged invention consisted of double leaves, half being bound together and the other half folded in as flyleaves, with a carbonized leaf bound in next the cover, and provided with a tape across the end. What was claimed as new in this invention was the device, by means of the tape, for turning over the carbonized leaf without soiling the fingers or causing it to curl up. H. made and sold a similar check book with a like device, but, instead of the tape, the end of the carbonized leaf, for about half an inch, was left without carbon, and the leaf was turned over by means of this margin. In an action by C. & Co. against H. for infringement of their patent:—Held, affirming the decision in 3 Ex. C. R. 351, that the evidence at the trial shewed the device for turning over the blank leaf without soiling the fingers to have been used before the patent of C. & Co. was issued, and it was therefore not new; that the only novelty in the patent was in the use of the tape; and that using the margin of the paper instead of the tape was not an infringement. *Carter & Co.* v. *Hamilton*, 23 S. C. R. 172.

——— *Lack of Invention.*]—There is no inventive merit in making in one piece the cap-bar and protector of a washing machine, the cap-bar and protector having been previously made in two separate pieces. *Taylor* v. *Brandon Mfg. Co.*, 21 A. R. 361.

New Purpose—*Combination of Old Elements—Lack of Invention.*]—In May, 1864, one F. obtained a patent for an "improved chair for preventing bolts or nuts from becoming loose or insecure;" and the invention was by the patent itself described as consisting "in the lipped chair in combination with the heads or nuts of bolts;" and in the specifications the invention was described, partly, as follows: "The chair is constructed with a raised edge or lip, and extending over a part or the whole length of its surface. This lip is formed and made of a suitable shape and depth, so as to be in constant contact with the heads or nuts of the bolts D after they are placed in position and firmly screwed to the straps and rails, as shewn. It will be seen that the upper portion of the chair at E forms a seat or cheek for receiving the sides of the nuts or heads of the bolts, and which will entirely prevent the bolts from 'working' loose or dropping out of their places, from the vibration of vehicles passing over the rails, or from other causes;"—Held, that, although rails, chairs, fish plates, and screw

bolts, had long been in use separately on railways, still the present combination was such as to effect a new purpose, and as such formed the proper subject of a patent. *Yates* v. *Great Western R. W. Co.*, 24 Gr. 495.

Held, on appeal, that, although a most useful contrivance, the invention in this case could not be the subject of a patent, as it was wanting in the element of invention. *Yates* v. *Great Western R. W. Co.*, 2 A. R. 226.

New Result—*Combination of Old Devices.*]—An invention consisting of a new and useful combination of well known materials or devices, which produces a result not theretofore so obtained, is a proper subject for a patent. *Toronto Telephone Manufacturing Co.* v. *Bell Telephone Co.*, 2 Ex. C. R. 495.

——— *Combination of Known Elements—Trifling Change.*]—A new combination of known elements is an invention, and as such is patentable. The person who has devised such new combination has all the rights and privileges of an inventor, even if the novelty consists in a trifling mechanical change, provided, in the latter case, some economic or other result is produced in some way different from what was obtained before. *Mitchell* v. *Hancock Inspirator Co.*, 2 Ex. C. R. 539.

Old Contrivance—*New Object or Application.*]—In an action for infringement of old patent for what was described as "a new and useful improvement in the construction of steam and water saw mills," it appeared from the specifications that what the patentee claimed as his invention was "generally the simplicity of construction of the saw mill and making it portable, but especially the direct application of steam or water power by the connecting rod or shaft B to drive the circular saw." Plaintiff, the assignee of the original patentee, proved that apparently his plan was the first in which the direct application of the motive power was made to drive circular saws, by placing the saw at the end of the shaft to which the motive power was directly applied, thereby saving the use of the belt and pulleys, by which the second shaft, to which the saw had been attached, was turned, and discontinuing that shaft also. For the defence, it was shewn that the "direct action" plan had, long before the date of the patent in question, been applied to other steam engines, locomotives, and machinery, the only novelty appearing to be in the discontinuance of the second shaft in driving a circular saw. The jury were directed to inquire whether the invention was new, or whether it was a new application of an old invention to the propelling of a circular saw, and they found for the plaintiff, and that the patent was for "a new application of an old invention to the propelling of a circular saw:"—Held, that upon this direction the verdict could not be supported, and that the proper question was, whether the invention was novel and useful. Semble, that the invention or improvement claimed by plaintiff in this case was not the subject of a patent. The saving of labour and expense, and the production of a new and useful result, cannot alone support a patent; there must be some invention. The act or contrivance which is the subject of a patent must be new, and it is not sufficient that the object or application of a contrivance is new if the contrivance itself be old. *Waterous* v. *Bishop*, 20 C. P. 29.

Old Elements — *Similar Application.*]—The plaintiff claimed as his invention, for the purpose of purifying flour during its manufacture, a bolting cloth or sieve, through which a current of air was forced upwards by means of an air chamber and a fan, or substitute therefor, and, in order to keep such sieve from becoming clogged, a brush, or a number of brushes, arranged in such a manner as to traverse the under service. The air chamber and the fan combined with the bolt or sieve were admittedly old; and it appeared that one B. had patented a machine which was in use in the manufacture of semolina, in which a similar brush arrangement was in use for the purpose of keeping open the meshes of the sieve when used:—Held, that the plaintiff's invention was patentable, the united action of three elements, each of which was old, but all of which had not been previously combined, having produced new and useful results. Judgment in 7 A. R. 628 reversed. *Smith* v. *Goldie*, 9 S. C. R. 46. Special leave to appeal to Her Majesty in council was refused.

Substitution of Known Element.]—In an application for a patent the object of the invention was stated to be the connection of a spring tooth with the drag-bar of a seeding machine, and the invention claimed was "in a seeding machine in which independent drag-bars are used, a curved spring tooth, detachably connected to the drag-bar, in combination with a locking device arranged to lock the head block to which the spring tooth is attached, substantially as and for the purpose specified." In an action for infringement of the patent it was admitted that all the elements were old, but it was claimed that the substitution of a curved spring tooth for a rigid tooth was a new combination, and patentable as such:—Held, that the alleged invention, being the mere insertion of one known article in place of another known article, was not patentable. Smith v. Goldie, 9 S. C. R. 46, and Hunter v. Carrick, 11 S. C. R. 300, referred to. *Wisner* v. *Coulthard*, 22 S. C. R. 178.

Substitution of Material.]—In a suit for the infringement of a patent the alleged invention was the substitution in the manufacture of corsets of coiled wire springs, arranged in groups and in continuous lengths, for india-rubber springs previously so used. The advantage claimed by the substitution was that the metal was more durable, and was free from the inconvenience arising from the use of india-rubber caused by the heat from the wearer's body:—Held, affirming the judgments in 9 O. R. 228 and 12 A. R. 738, that this was merely the substitution of one well known material, metal, for another equally well known material, india-rubber, to produce the same result on the same principle in a more agreeable and useful manner, or a mere mechanical equivalent for the use of india-rubber, and it was, consequently, void of invention and not the subject of a patent. *Ball* v. *Crompton Corset Co.*, 13 S. C. R. 469.

Substitution of Mechanical Equivalents.]—The plaintiff obtained a patent for "a new and useful improvement in seed drills," which was particularly described in the specification attached to the patent. Subsequently the defendant procured a patent to be granted him for "Sylvester's Improved

Spring Hoe," which he made and attached to seeding machines. The plaintiff, claiming that the machines manufactured by defendant were substantially the same as those the plaintiff had obtained his patent for, sought to restrain their further manufacture by the defendant, and on the hearing the evidence shewed that the machines were substantially the same, with colourable deviations only—the chief one being the mode of attaching certain pivot connections or bars forming what are known as toggle or elbow joints, which the plaintiff attached below the junction of the draw-bar with the tubes or hoes, while the defendant attached his above; the power thus operating by compression on the defendant's bars and by tension on those of the plaintiff, and in both by tension on a gutta percha spring. The court, being satisfied that the difference was only one of mechanical arrangement or a mere substitution of mechanical equivalents, and not a difference in principle of the invention, granted the relief prayed, and ordered the defendant to pay the costs of the litigation. *Patric* v. *Sylvester*, 23 Gr. 573.

Variation — *Mechanical Equivalent—Infringement of Combination.*]—Where in an action to restrain infringement of a patent, brought against C., and one H., who had been employed as a workman by C., it appeared that the only portion of the defendants' combination which was not identical with the plaintiff's patented machine was a mere variation in arrangement, or a mechanical equivalent of a corresponding portion of the plaintiff's machine—a device containing no element of invention, but effecting the same purpose by a slightly different method:—Held, that the plaintiff was entitled to judgment for an injunction against both defendants, but to a reference as to damages only as against C. *Woodward* v. *Clement*, 10 O. R. 348.

IV. Infringement—Actions for.

1. *Costs.*

Scale of—*Certificate—Claim for Injunction—Pleading.*]—Held, that the fact that a plaintiff prays an injunction in an action in a superior court in which an injunction may be granted, is not, even after verdict for plaintiff, sufficient to entitle the plaintiff to recover superior court costs without the certificate of the Judge who tried the case, when the amount of damages recovered is clearly within the jurisdiction of an inferior court. *Emery* v. *Iredale*, *Emery* v. *Hodge*, 7 L. J. 181.

The action itself must be of such a nature, and the equitable relief sought of sufficient importance, to satisfy the Judge who tried the cause in certifying it to be a proper action to be withdrawn from the inferior and tried in the superior court. *Ib.*

There is nothing in the Patent Act (C. S. C. c. 34) to justify the presiding Judge in refusing to certify for costs merely because defendant might have defeated plaintiff entirely in his action by proper pleading, but had not done so. *Ib.*

Under the peculiar circumstances of these cases:—Held, that the first was a case proper for a certificate, but the second case not so. *Ib.*

See Patric v. *Sylvester*, 23 Gr. 573, *ante* III.

Treble Costs—*Injunction.*]—Held, that C. S. C. c. 34, s. 23, which gives to a party whose patent for an invention has been infringed, besides damages, "treble costs to be taxed according to the course and practice of the court," does not entitle a plaintiff who has availed himself of the provisions of the C. L. P. Act, and claimed an injunction, to tax treble costs of his application for the injunction. *Huntingdon* v. *Lutz*, 10 L. J. 46.

See Hunter v. *Carrick*, 28 Gr. 489, *ante* Costs, II. 3.

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2. *Damages.*

Reference — *Inquiry—Scope—Pleading.*]—In a patent action the judgment of the supreme court of Canada declared that the plaintiffs were entitled to an inquiry and to be paid the amount found due upon such inquiry for damages sustained from the making, constructing, using, selling, or vending to others to be used, by the defendants, and by the persons to whom they have sold, given, or let the same, of any of the machines, &c. The judgment gave relief beyond what the plaintiffs asked by their bill of complaint:—Held, that where the language of the decree is unambiguous, the allegations in the pleadings shall not be taken into account in the inquiry as to damages, and therefore the master was wrong in excluding evidence of damages to the plaintiffs by the use of machines by persons who had bought them from the defendants. *Smith* v. *Goldie*, 11 P. R. 24.

See Leslie v. *Calvin*, 9 O. R. 207; *Collette* v. *Lasnier*, 13 S. C. R. 563; *Woodward* v. *Clement*, 10 O. R. 348; *Toronto Auer Light Co.* v. *Colling*, 31 O. R. 18.

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3. *Evidence and Discovery.*

Examination of Defendant—*Denial of Right—Details—Transactions.*]—In an action to restrain the defendants from selling a certain drug in violation of the rights of the plaintiffs under a patent, and of the terms upon which the drug was sold to the defendants, and for damages for selling in violation of such rights and terms, and for damages for a trade-libel, the defendants admitted that they bought the drug, but not from the plaintiffs, and were selling it by their agents, and upon their examination for discovery stated fully their mode of procedure in buying and selling, but in their pleading they denied the plaintiffs' patent right:—Held, that, there being a bonâ fide contest as to that right, the defendants should not, before the trial, be compelled to afford discovery of the details and particulars of such buying and selling, so as to disclose their and their customers' private business transactions. Such discovery should be deferred until after the plaintiffs should have established their right, even if a subsequent separate trial of the question of infringement should be necessary. *Dickerson* v. *Radcliffe*, 17 P. R. 586.

——— *Grounds of Attack—Prior User.*]—The general law applicable to discovery governs in patent cases. A defendant may be properly interrogated as to the ground of his attacking a plaintiff's patent, and there should be a fair and full disclosure of the particular

lines of attack which are contemplated, but no such individualizing of the persons who are alleged to be prior users as would enable the plaintiff to fix upon the defendant's witnesses. *Smith* v. *Greey*, 10 P. R. 482.

Production of Documents—*Privilege.*]—In a suit to restrain the infringement of a patent, the plaintiffs objected to produce documents described as "professional opinions of the writers of them" (who were engineers) "as to the validity of the patent, the subject matter of this suit," claiming that they were privileged communications:—Held, that documents of this description are only protected where they have been obtained in view of or in anticipation of litigation which has actually taken place, and in which the discovery is sought. *Toronto Gravel Road Co.* v. *Taylor*, 6 P. R. 227.

In an action to restrain the infringement of a patent in which the defence was that the supposed invention had been previously patented in the United States and England, copies of American patents material to the defendant's case were procured by his solicitors of their own motion for the purposes of the action:—Held, that such documents were privileged from production. *Guelph C. Co.* v. *Whitehead*, 9 P. R. 509.

See Barter v. *Howland*, 26 Gr. 135; *Beam* v. *Merner*, 14 O. R. 412; *Toronto Auer Light Co.* v. *Colling*, 31 O. R. 18.

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4. *Injunction to Restrain.*

Interim Injunction — *Common Law Court—Affidavits—Damages.*]—In an action for an infringement of a patent, an application under the C. L. P. Act for an injunction to restrain defendant was refused, the patent being very recent, and there being conflicting affidavits as to the rights of the plaintiff to it; and it was held, that the plaintiff must establish his title at law before he would be entitled to an injunction. Semble, (1) that the application would also have been refused under the Patent Act of 1869, s. 24. (2) That, to entitle a plaintiff to an interim injunction or account, he must waive all claim to more than nominal damages at the trial. *Bonathan* v. *Bowmanville Furniture Manufacturing Co.*, 5 P. R. 195.

——— *Different Courts—Concurrent Applications.*]—Where the exchequer court was asked to grant an interim injunction to restrain an infringement of a patent of invention, and it appeared that similar proceedings had been previously taken in a provincial court of concurrent jurisdiction, which had not been discontinued at the time of such application being made, the court refused the application. *Auer Incandescent Light Manufacturing Co.* v. *Dreschel*, 5 Ex. C. R. 384.

——— *Undertaking as to Damages.*]—When a plaintiff on obtaining an injunction enters into the usual undertaking to abide by such order as the court may make as to damages, it is in the discretion of the court to grant or refuse a reference as to such damages where the injunction is afterwards not continued or is dissolved. Where, therefore, a person in the employment of the owner of a machine for which a patent had been granted, surreptitiously obtained such a knowledge thereof as enabled him to construct a similar machine for defendant, the court, although unable to continue the injunction in consequence of the invalidity of the patent, refused the defendant a reference as to damages, he having availed himself of the knowledge which he knew had been so improperly obtained. *Hessin* v. *Coppin*, 21 Gr. 253.

Perpetual Injunction — *Common Law Court—Finding of Jury—Account.*]—On the 20th June, 1857, letters patent were granted to plaintiff for an improvement in the construction of the form of the mould board in ploughs, called the "gain twist." And this action was brought for the infringement of such patent right by the manufacturing of a plough called the "Queen of the West," and an injunction was asked for to restrain the alleged infringement, &c., and that an account might be kept and taken of the profits, &c., made by defendants by such infringement during this suit, and that defendants might be ordered to pay such profits to plaintiff. An interim injunction was granted restraining the alleged infringement, which was dissolved on the undertaking of defendant L. to keep an account of all the profits made on sale of the plough. At the trial a verdict was rendered for plaintiff with 1s. damages, which the court refused to disturb. The plaintiff then moved to revive the injunction and make it perpetual; for an account and payment by defendant to L.; and to make the order on this application part of the final judgment:—Held, that the question of infringement was not open to argument on this application. 2. That the jury having found such infringement, the plaintiff was entitled to an injunction restraining defendant from manufacturing the improvement called "the gain twist." 3. That C. S. U. C. c. 23, s. 12, gives the court the power to grant an injunction restraining, &c., and ordering defendant to keep an account, give security "or otherwise," as may seem meet, but not to order an account to be taken of the profits, or to order defendant to pay. *Huntingdon* v. *Lutz*, 13 C. P. 168.

——— *Evidence on Motion for Interim Order—Following Decision.*]—Where the evidence at the hearing was the same as that given on a motion for injunction, and the Judge before whom it was made granted the injunction, the court, at the hearing, made the injunction perpetual, although doubting whether the facts, as shewn in the cause, were not sufficient to entitle the defendant to an entire rescission of the agreement, on proper proceedings being taken for that purpose. *Gillies* v. *Colton*, 22 Gr. 123.

See Emery v. *Iredale*, 7 L. J. 181; *Huntingdon* v. *Lutz*, 10 L. J. 46, *ante* 1; *Woodward* v. *Clement*, 10 O. R. 348; *Toronto Auer Light Co.* v. *Colling*, 31 O. R. 18.

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5. *Particulars.*

Defence—*Want of Novelty—Order—Notice of Objection.*]—In an action for an infringement of plaintiff's patent, upon an order that defendant should deliver to the plaintiff particulars of any objections on which he intended to rely in support of his plea that the

invention was not new but had been wholly and in part used, practised, and vended in Great Britain before the patent: — Held, that a notice that he intended to object at the trial to the patent altogether, as being granted for what was not a new invention, was sufficient. *Mills* v. *Scott*, 5 U. C. R. 360.

——— *Want of Novelty—First Inventor—Dates and Persons.*] — In an action for infringement of a patent the defendants denied (4) the novelty of the invention, and (6) that the plaintiff was the first and true inventor: —Held, affirming the decision of a Judge in chambers, a divisional court being equally divided, that the defendants should deliver particulars under these defences, shewing in what respects they deny that the plaintiffs' patent was for any new machine, &c., and the dates and occasions when, and also the names of the persons by whom, the prior user was had. Mills v. Scott, 5 U. C. R. 360, discussed. *Smith* v. *Greey*, 11 P. R. 169.

——— *Order for Particulars — Default —Excision of Pleading—Exclusion of Evidence.*]—In making an order for particulars of the defence in a patent action, the better practice is to provide merely for exclusion of evidence in case of no particulars or insufficient particulars being delivered, and not to order the excision of the defence, if good per se. And where both excision of the pleading and exclusion of evidence were provided for in an order:—Held, that the discretion of a Judge in chambers in striking out the provision for excision was rightly exercised. *Noxon Brothers Manufacturing Co.* v. *Patterson and Brother Co.*, 16 P. R. 40.

See The Queen v. *Hall*, 27 U. C. R. 146.

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6. *Parties.*

Assignee of Patentee — *Plaintiff — Amendment.*] — A patentee assigned part of his interest thereunder to the plaintiff, who alone filed a bill to restrain the infringement of the patent. At the hearing an objection was taken that the patentee was not a party to the suit; but he, by his counsel, appearing and consenting to be named as a plaintiff and to be bound by the proceedings in the cause, an amendment in that respect was directed by the decree to be made, and relief granted according to the terms of the prayer. *Yates* v. *Great Western R. W. Co.*, 24 Gr. 495.

Officers of Company — *Defendants.*] — A bill was filed against a joint stock company (limited) to restrain the infringement of a patent, to which certain officers of the company were made parties, and the bill alleged that "the defendants" were committing the acts complained of, and prayed relief against "the defendants." A demurrer on the ground that the officers were improperly made parties, was overruled with costs, these officers being personally charged with committing the acts complained of, and relief being prayed against them. *Cline* v. *Mountain View Cheese Factory*, 10 C. L. J. 45.

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7. *Pleading.*

Answer—*Declining to Admit Facts—Novelty—Denial—Evidence.*]—Where a defendant declines to admit, by stating he "does not know or admit the truth" of, certain facts alleged in the bill, it is incumbent on the plaintiff to prove such allegations, as, by declining to admit, the defendant in effect denies, them, and, if he desires to do so, may give evidence at the hearing in support of such denial. Therefore, where the object of the bill was to restrain the infringement of a patent, which the plaintiff alleged was for "a new and useful improvement," and the defendant, in his answer, having stated that he "did not know or admit" the truth thereof, at the hearing offered to give evidence of the want of novelty in the alleged invention of the plaintiff as a ground for invalidating his patent:—Held, that he was at liberty to do so. *Patrie* v. *Sylvester*, 23 Gr. 573.

Plea—*Not First Inventor.*]—The plaintiff complained of defendant having infringed his patent obtained for a new and useful mode of generating and distributing heated air in dwelling houses. Plea, that the plaintiff was not the true and first inventor of the said improvement in the said declaration mentioned, in manner, &c. Demurrer to plea, as traversing something not alleged:—Held, plea good. *Mills* v. *Scott*, 6 U. C. R. 205.

——— *Want of Novelty—Specification—Combination.*]—To an action for the infringement of a patent for the manufacture of eavetroughs of tin or galvanized iron, defendant pleaded (1) not guilty; (2) that the supposed invention was not new. The evidence proved the patent to have been a combination, partly new and partly of old inventions: —Held, that defendant, under these pleadings, could not raise the question whether the combination was claimed as being new in all its parts, or merely a combination of before-used inventions. Semble, that if he could, the specification must have been held insufficient. *Emery* v. *Iredale*, *Emery* v. *Hodge*, 11 C. P. 106.

See Barter v. *Howland*, 26 Gr. 135.

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8. *Trial.*

Jury.]—An action for the infringement of a patent should not ordinarily be tried by a jury. *Vermilyea* v. *Guthrie*, 9 P. R. 267.

Venue—*Dominion Statute.*]—In an action for the infringement of a patent, plaintiff laid the venue in Hamilton, while the defendant was a resident of Toronto:—Held, that, regarding the language of s. 24 of the Patent Act, 1872, the venue should be laid in the county where the defendant resided; and an order was made under rule 254 to change the place of trial to Toronto. *Goldsmith* v. *Walton*, 9 P. R. 10.

Held, that the word "may" in 35 Vict. c. 26, s. 24 (D.), was obligatory and not merely permissive, and that the venue in an action to restrain the infringement of a patent, must be laid at the place of sittings of the court in which the action is brought, nearest to the place of residence or business of the defendant. Held, also, that s. 24 was not ultra vires the Dominion Parliament. *Aitcheson* v. *Mann*, 9 P. R. 253, 473.

9. *Other Cases.*

Defence — *Employment of Plaintiff.*] — Held, that the plaintiff, having been employed by the defendants expressly to make or improve a machine, could not claim to be the inventor as against them. *Bonathan* v. *Bowmanville Furniture Manufacturing Co.*, 31 U. C. R. 413.

——— *License—User without Consent.*]—Plaintiffs had agreed under seal with one N. for a license to use their patented invention in erecting a certain number of mills at a fixed rate per mill. Defendant's mill was erected by N. according to the plaintiff's patent, and N. charged him a less sum, on the understanding that he was to settle the patent fee with the plaintiffs. Just before the trial, defendant paid the plaintiffs their patent fee, and on the trial claimed that the plaintiffs should be nonsuited on the ground that the infringement, if any, had been made by N.:—Held, that defendant had infringed the patent and brought himself under 14 & 15 Vict. c. 79, as having made use of the machinery of the mill without first obtaining plaintiffs' consent. *Smith* v. *Powell*, 7 C. P. 332.

——— *Patent not Set aside.*] — The infringement of the plaintiff's patent for a pump, which was complained of, was by a pump for which defendant had obtained a patent, and it was objected that this patent was an answer to the action until set aside; but, semble, not. *Merrill* v. *Cousins*, 26 U. C. R. 49.

Executors — *Action against — Actio Personalis.*]—The plaintiff sued the executors of D. D. C. for an account of all profit accrued to the estate of D. D. C., by reason of the user by him of a certain machine made by him in alleged infringement of the plaintiff's patent, which profit consisted in the saving of expense to D. D. C.:—Held, on demurrer to the statement of claim, that the plaintiff had no remedy against the executors of D. D. C. in respect of such profit accrued to him prior to his death. Phillips v. Homfray, 24 Ch. D. 439, discussed and followed. Semble, that if the statement of claim could be read to mean that by reason of the wrongful act complained of, property of a tangible character passed from the plaintiff's estate to that of D. D. C., as distinct from the saving of expense, the conclusion might be different. *Leslie* v. *Cairns*, 9 O. R. 207.

Laches.] — The defendants continued to use a combination patented from the year 1870, and they claimed to have used a similar contrivance some years prior to the patent, and no claim was ever made against the defendants in respect of such user and alleged infringement until the year 1874, when Y., to whom F. had assigned an interest in the patent, wrote to the proper officer of the defendants, making a formal demand in respect thereof, but no attention was paid to such demand, and, although the defendants continued to use the combination, no proceedings were taken to prevent them from so doing until the 8th March, 1876, when Y. filed a bill seeking to restrain the further infringement of the patent:—Held, that the delay in proceeding formed no objection to the party obtaining relief. *Yates* v. *Great Western R. W. Co.*, 24 Gr. 495.

V. Jurisdiction of Minister of Agriculture.

Decision of Disputes—*Judicial Tribunal —Dominion Statute—Prohibition.*]—Section 28 of the Patent Act of 1872, after specifying certain cases in which patents are to be null and void, provided that in case disputes shall arise under this section as to whether a patent has or has not become void, such disputes shall be settled by the Minister of Agriculture or his deputy, whose decision shall be final:—Held, that a court or judicial tribunal for the determination of the matters referred to in the section was constituted by the Act: that the constitution of such a court was not ultra vires the Dominion Parliament as infringing provincial legislation; and that it was competent for the Minister to decide as to the existence of disputes arising for his decision. Prohibition therefore was refused. *In re Bell Telephone Co. and Telephone Manufacturing Co. and the Minister of Agriculture*, 7 O. R. 605.

——— *Voiding Patent—Judicial Tribunal —Dominion Statute—Certiorari — Attorney-General.*]—On a motion for a writ of certiorari to bring up into the high court all the proceedings, &c., before the Minister of Agriculture, including his decision therein, on an application made before him to have a patent declared void for non-compliance with the provisions of s. 28 of the Patent Act of 1872:—Held, that the Minister of Agriculture, or his deputy, had jurisdiction under s. 28 to decide any dispute as to whether a patent had become void for non-observance or violation of the provisions of that section. *In re Bell Telephone Co.*, 9 O. R. 339.

Semble, that the Minister's duties are ministerial, and therefore cannot be reversed or reviewed in a court of law; but, even if judicial, this court cannot interfere on the ground of a total want of jurisdiction on the Minister's part to make the inquiry, for, so far at least as this court was concerned, this must be considered res judicata by the decisions of Smith v. Goldie, 9 S. C. R. 46, and Re Bell Telephone Co. and Minister of Agriculture, 7 O. R. 605; nor was there a partial want of jurisdiction, by reason of the neglect of the Minister to examine witnesses on oath or his refusal to issue summonses for witnesses to attend before him, because under s. 28 this was not required. Quære, whether also, if judicial, the provincial courts have jurisdiction to interfere with such a tribunal, it being, on this assumption, a Dominion court. A writ of certiorari was therefore refused. Ib.

Semble, that on an application to question a patent under the statute the intervention of the Attorney-General is not essential. *Ib.*

Exclusive Jurisdiction.]—The jurisdiction in respect to the avoidance of patents conferred upon the Minister of Agriculture by s. 28 of the Patent Act of 1872 is exclusive of that possessed by any other tribunal in the Dominion. *Toronto Telephone Manufacturing Co.* v. *Bell Telephone Co.*, 2 Ex. C. R. 524.

Forfeiture—*Breach of Conditions—Imputation — Administrative Functions.*] — The Minister of Agriculture, or his deputy, has exclusive jurisdiction over questions of forfeiture under s. 28 of the Patent Act, 1872, and a defence on the ground that a patent has become forfeited for breach of the

conditions in the said s. 28 cannot be supported after a decision of the Minister of Agriculture, or his deputy, declaring it not void by reason of such breach. *Smith* v. *Goldie*, 9 S. C. R. 46, 7 A. R. 628.

VI. Licenses, Assignments, Sales, and Royalties.

Assignment of Interest in Patent—*Failure of Consideration — Manufacture by Others.*]—The plaintiffs, being the patentees of a certain article, by memorandum in writing, under seal, reciting that they were the inventors of the article in question, assigned all their interest in the patent to the defendant for a certain district or territory, in consideration of certain royalties and sums of money therein agreed to be paid by him. In an action to recover the consideration, in which the evidence of the defendant went to shew that he knew before the first year after the making of the contract had expired that others were manufacturing the patented article, but he did not complain or repudiate the transaction, or refuse to pay, or offer to reassign, or require the alleged infringers to desist, or call upon the patentees to vindicate their patent, and that he had a profitable user of the invention to a substantial extent:—Held, that, in the absence of fraud, or warranty, or representation which induced the bargain and was falsified in the result, such a contract was simply for the purchase of an interest in an existing patent. No assumption arises, and no implication is to be made that the patent is indefeasible. The plaintiffs were therefore held entitled to judgment. Smith v. Neale, 2 C. B. N. S. 67, and Hall v. Conder, 2 C. B. N. S. 22, commented on. Hayne v. Maltby, 3 T. R. 438, and Saxton v. Dodge, 37 Barb. (N. Y.) 84, distinguished. *Vermilyea* v. *Canniff*, 12 O. R. 164.

Assignment of Patent — *Invalidity of Patent—Payment of Royalties.*] — The mere attaching of the support of the handle of a pump higher or lower in position than that formerly in use, is not the subject of a patent; but P. having obtained a patent therefor, which he assigned to the plaintiff, who again assigned to the defendant subject to certain royalties:—Held, that notwithstanding the invalidity of the patent he was entitled to recover the amounts payable to him under the agreement during the currency thereof. *Owens* v. *Taylor*, 29 Gr. 210.

——— *Rights of Assignee — Subsequent Patent—Improvement.*] — The defendant and another, who had acquired by assignment from the inventor a patent for making fuel from garbage, &c., assigned to the plaintiff one-third interest therein and all improvements and amendments thereto, it being also contemplated that the invention could and would be utilized for making gas. The defendant subsequently procured a patent for making gas from such garbage, &c., the ingredients used in the production under the second patent being the same or the equivalents of those used under the first patent, any alleged change therein being designed merely to enable the defendant to appear to employ different materials, while in substance and effect the same; his dealings also with the plaintiff, after he had procured the second patent, were on the footing that the plaintiff was to have the same interest therein as in the first patent. A claim by the plaintiff that he was entitled to the benefit of the second patent as an improvement within the meaning of the first patent under the terms of the assignment was upheld. It was not necessary that the second patent should have been an infringement of the first one to enable the plaintiff to claim it as an improvement, the word "improvement," within the meaning of the assignment, not being used in a technical sense nor as having any defined legal meaning, but according to its popular use, for the parties were dealing not with a particular composition described in the first patent but with the development of the central idea underlying it. *Watson* v. *Harris*, 31 O. R. 134.

——— *Rights of Assignee — Future Improvements — Consideration.*] — By contract under seal M. agreed to sell to B. and S. the patent for an acetylene gas machine, for which he had applied, and as to which a caveat had been filed, and also all improvements and patents for such machine that he might thereafter make, and covenanted that he would procure patents in Canada and the United States and assign the same to B. and S. The latter received an assignment of the Canadian patent and paid a portion of the purchase money, but when the American patent was issued it was found to contain a variation from the description of the machine in the caveat, and they refused to pay the balance, and in an action by M. to recover the same, they demanded by counterclaim a return of what had been paid on account:—Held, that the agreement was not satisfied by an assignment of any patent that M. might afterwards obtain; that he was bound to obtain and assign a patent for the machine described in the caveat referred to in the agreement; and, that, as the evidence shewed the variation therefrom in the American patent to be most material, and to deprive the purchasers of a feature in the machine which they deemed essential, M. was not entitled to recover. Held, further, that, as B. and S. accepted the Canadian patent and paid a portion of the purchase money in consideration thereof, and as they took the benefit of it, worked it for their own profit, and sold rights under it, they were not entitled to recover back the money so paid as money had and received by M. to their use. *Bingham* v. *McMurray*, 30 S. C. R. 159.

Assignment of Right to Manufacture—*Option to Purchase Patent Rights.*]—The patentee for the manufacture of certain machines for the extinguishing of fires, assigned to another the right to manufacture such machines, reserving a certain royalty, with the right at any time within one year on the part of the assignee to absolutely purchase all the rights of the patentee under the patent for a sum named:—Held, notwithstanding such right of purchase, that the assignee was not entitled to the exclusive right of manufacturing, and that the patentee could, notwithstanding such assignment, confer on other persons the right of manufacturing. *Fire Extinguisher Co.* v. *North Western (Babcock) Fire Extinguisher Co.*, 20 Gr. 625.

Assignment of Right to Sell—*Invalidity of Patent—Right of Assignee to Manufacture—Estoppel—Interest.*]—The holder of patents for improvements in certain agricultural implements, agreed to assign to the defendant the exclusive right to sell these implements, but not to manufacture them; and,

in certain contingencies, he also agreed to assign the patents themselves. In fact the patents were invalid, for want of novelty, and the defendant, having re-assigned any interest he had in the patents, claimed the right to manufacture the implements for his own benefit:—Held, that, owing to the agreement between the parties, and their dealings with each other thereunder, the defendant was estopped from questioning the validity of the patents. Held, also, that the effect of such agreement was not to constitute the defendant a partner, but to give him an interest in the patents, and that he was not a mere licensee of the patentee. *Gillies* v. *Colton*, 22 Gr. 123.

Contract to Assign Patent Rights—*Necessity for Deed—Pleading.*]—The declaration alleged that the defendant, being the inventor and patentee in Canada of a certain buggy seat called "Daniel Conboy's turn down seat," agreed to permit the plaintiffs for fifteen years from the 8th February, 1875, to have the exclusive right, privilege, and liberty of making, constructing, and using, in the county of Wellington, the right to manufacture and sell the said patented article; to give the plaintiffs the privilege of selling it in the Province of Ontario; and to prepare, execute, and deliver to the plaintiffs a proper and sufficient deed of assignment of the said patented invention, capable of being registered in the patent office, pursuant to the statute in that behalf, and sufficient to empower the plaintiffs to make and sell the said patented invention as aforesaid. The breach alleged was that defendant did not deliver such deed, but refused to do so. The defendant pleaded that the agreement was in writing, and set it out verbatim. By it the defendant granted and sold to the plaintiffs for fifteen years from 8th February, 1875, the exclusive right and privilege of making, constructing, and using, and vending to others to be used, the invention specified, to any one in the county of Wellington, and granted to them the privilege of selling the patented article in any part of Ontario, "and bind myself to forward to them the proper deed of invention:"—Held, on demurrer, that the plea was bad, for that the agreement as alleged in the declaration was a valid one, and that the written agreement set out supported the declaration. As to the various objections alleged:—Held, (1) that a contract to give such an assignment need not, under 35 Vict. c. 26 (D.), be in writing, though the assignment itself must; and that, if a writing was required, the declaration need not aver but would be held to import it. 2. That the agreement was not for a mere license, and need not be by deed. 3. That the defendant was bound under the agreement to do whatever was necessary to entitle the plaintiffs to hold and enjoy the rights assigned or intended to be; and, therefore, to execute and deliver a proper deed which could be registered. 4. That he was bound also to prepare such deed. *Dalgleish* v. *Conboy*, 26 C. P. 254.

Covenant to Assign Share in Invention—*Consideration—Breach — Independent Covenants — Pleading.*]—Declaration on a deed, by which, in consideration of $1, the defendant assigned to the plaintiff one-fourth share in an invention, for which he was applying for a patent in the United States, and covenanted to assign to him the same share in the letters patent to be issued; in consideration whereof the plaintiff covenanted to use his best endeavours to bring said patent into general use in the United States. Breach, that after the patent had been obtained, the defendant would not assign to the plaintiff, but wrongfully sold his whole interest to others. Plea, on equitable grounds, that the real consideration, as the plaintiff well knew, was not the $1, but the plaintiff's covenant to endeavour to bring the patent into use in the United States; that the plaintiff wholly neglected to use any exertion for that purpose, but, on the contrary, did, before the sale by the defendant of his right, undervalue and speak against the invention, and refused to allow it to be used in a railway of which he was manager; that the defendant was induced to enter into the agreement solely on account of the plaintiff's position and ability to serve the defendant by his recommendations, and his conduct as aforesaid had been very prejudicial to the invention. And so the defendant said, that before any breach on the defendant's part, and before any sale by him, the plaintiff withdrew from and broke his agreement, whereby the consideration for the defendant's agreement wholly failed:—Held, no defence, for the two covenants were independent; the plaintiff was entitled to a transfer as soon as the patent was issued, and the non-performance by him of something to be done afterwards, could not defeat his right of action. *Stovin* v. *Dean*, 26 U. C. R. 600.

License—*Disputing Validity of Patent.*]—During the existence of a license, the licensor cannot dispute the validity of a patent obtained by him, and afterwards assigned by him for value to another. *Whiting* v. *Tuttle*, 17 Gr. 454.

License to Manufacture — *Right of Licensee to Terminate.*]—The defendants were licensees of a patent under an agreement whereby they had to pay certain royalties to the patentee, and in consideration thereof were empowered to manufacture the patented machine in question, to the end of the term of the letters patent. Subsequently the defendants became possessed of an undivided one-fourth interest in the patent, and they thereupon gave notice to the plaintiff, who was the holder of the patent and entitled to the benefit of the above agreement, that they would, after a day named, terminate the agreement and make no further payments for royalties, but would manufacture the machine in question as owners of an undivided one-fourth interest in the patent:—Held, that the defendants were entitled so to do. If an interest is transferred in a patent, then it requires the consent of both parties to put an end to the transfer; but, if the transaction is merely permission on certain terms to invade the monopoly, then the licensee may, at his option, renounce the license and make at his peril the patented machine. *Noxon* v. *Noxon*, 24 O. R. 401.

Sale — *Covenant — Breach — Release — Pleading — Joinder of Causes of Action — Royalties—Joint and Several Claims.*]—The plaintiffs sold to defendant by deed the right to manufacture and sell the patent right for "Kinney's Metallic Waggon Seat," for the time in the patent mentioned. Defendant covenanted to manufacture at least twenty per day, and as many more as the demand should require, paying each of the plaintiffs one-half of a royalty of twenty-five cents on each seat, and further, to supply McK. & Co. with at least 200 seats per month at 95c. each, pursuant to an agreement between them and

the plaintiffs, paying on these a royalty of 20c. to the plaintiffs. There were other covenants by defendant to manufacture in a workman-like manner, &c., and to make use of all means to introduce the seats and make them known. The declaration set out the deed and assigned breaches of all the covenants. The third plea was, that after breach it was agreed between the plaintiffs and defendant that they should release each other from the performance of their respective covenants, and all rights of action in respect thereof, and in consideration thereof, defendant agreed to manufacture thenceforth only so many seats as would supply the demand, and the plaintiffs accepted such agreement in satisfaction of the cause of action declared on:—Held, bad, as pleaded to the whole cause of action, whereas it could only be an answer to the breaches of the covenant and not to the covenant itself, for it shewed no release, but only an agreement for one, and no satisfaction by deed; and because the satisfaction was insufficient, the new agreement being merely to manufacture a less number of the same article in the same way, and on the same terms. *McGiverin v. Turnbull*, 32 U. C. R. 407.

The fourth plea, on equitable grounds, alleged that, in consideration that defendant would release the plaintiffs from performance of said covenants on their part, and from all causes of action in respect thereof, the plaintiffs agreed to release defendant from performance of said covenants on his part, and that defendant accordingly did release the plaintiffs from the performance of said covenants on their part:—Held, bad, for not averring a release of the plaintiff from all causes of action; and because such an oral concord under these circumstances could be no defence in equity, unless the plaintiffs accepted the release or by their conduct and acquiescence led defendant to believe the first agreement at an end. The 13th plea, averring that the second agreement was made in consideration that the defendant would not avail himself of a right he possessed under the first deed to put an end to it by giving a sixty days' notice to plaintiffs:—Held, a good plea on equitable grounds. The declaration was held bad for a misjoinder of causes of action, being for royalties payable severally to the plaintiffs, and also for other royalties payable to them jointly. *Ib.*

Sale of Patent Rights—*Covenant by Vendor against Infringement—Wrong-doers—Royalties.*]—In 1875 J. R. obtained letters patent for improvements in "harvesters," and sold and assigned to the plaintiffs the exclusive right to manufacture and sell the same, and to sell such right to other persons. In the same year the plaintiffs executed a deed to the defendant, assigning to the defendant the exclusive right to manufacture and sell such "harvesters" in certain counties, he paying $10 royalty on each one to be manufactured by him. It was then covenanted by and on the part of the plaintiffs that the original patentee, J. R., would warrant and defend the defendant in the possession of the said patent within the territory thereby granted, and further agreed that if J. R. neglected or refused to protect and defend him in his peaceable possession of the said patent, then the royalty agreed to be paid by him should cease. Per Hagarty, C. J. O., and Morrison, J.A., that the plaintiffs under this covenant were liable only to the defendant in case J. R. neglected to defend him against all persons having a right to manufacture and sell the machines, not as against mere wrong-doers. Per Burton and Patterson, JJ.A., that the terms of the covenant bound J. R. to protect the defendant against all infringers, the rule of construction of covenants to "warrant and defend," as applied to lands, not having any application in cases like the present. *Green v. Watson*, 10 A. R. 113, 2 O. R. 627.

Semble, if there had been a breach of the covenant by G., the defendant would not have been liable to pay the royalty under the above agreement, though he had continued to manufacture the patented article. *S. C.*, 2 O. R. 627.

——— *Covenant to Pay Royalty—Breach—Plea of Want of Novelty.*]—Declaration, that defendant by deed covenanted with plaintiff to manufacture, within a year, at least 100 machines, and to pay to plaintiff every three months, during the first nine months of said year, $2 for every machine made and sold; and at the end of the year to pay $2 for every machine made and not sold during the first nine months of said year; averment, that all things, &c., and defendant had made 200 machines, but had not paid, &c. Plea, that by said deed it was recited that letters patent had been granted to A. for a "new and useful," &c., being the machine mentioned, of which A. claimed to be inventor; and by said deed it was recited that plaintiff was assignee of said letters patent, and the rights conferred, and plaintiff as such assignee contracted with defendant for the sale of the exclusive right of making, &c., said invention in, &c.; that by said deed plaintiff pretended to grant and assign to defendant said rights so contracted for, &c.; averment, that after making said deed defendant discovered that the invention was not new:—Held, plea bad. *Gray v. Billington*, 21 C. P. 288.

——— *Payment of Price—Plea—Change in Name of Invention—Materiality.*]—A declaration set out an agreement, by which, after reciting that the plaintiff had made an invention called "The New Dominion Stove-pipe Collar," and the agreement of the parties for the sale and purchase thereof, it was witnessed that plaintiff agreed to sell and defendant to purchase the right to use and sell, &c., the said article known as the above, in consideration of a specified sum, to be paid after the issue of the patent therefor. The declaration then averred that the patent had issued for the invention referred to in the agreement and covering the article there described, though it was described in the patent as "Wandby's Improved Stove-pipe Collar," and that all conditions had been fulfilled, &c., yet the defendant had not paid, &c. Plea, that when the agreement was made both parties contemplated that the invention should be called "The New Dominion Stove-pipe Collar," and should be so described in the letters patent, with the object, amongst others, of distinguishing it from another similar but less valuable invention theretofore manufactured and sold by the plaintiff under the name of "Wandby's Improved Stove-pipe Stone;" and that the change of name was made by the plaintiff without defendant's knowledge or consent:—Held, plea good, for that the name of the invention was a material part of the contract. *Wandby v. Hewitt*, 27 C. P. 571.

——*Renewal Terms—Representations of Vendor—Agreement—Specific Performance—Costs.*]—C. P., who had for some time been carrying on the business of pump making, in partnership with B. and C., was the holder of a patent for an improved pump, which would expire on the 19th July, 1877, but was renewable under the Patent Act for two further terms of five years each. On the 1st June, 1877, C. P. agreed to sell to the defendant P. his interest in such partnership business, together with the land and buildings in which it was carried on, for $4,500; and by the instrument evidencing the agreement executed on the 23rd June, "he agreed to assign his interest in his pump-patents to Mr. P. for the counties of," &c. After the expiry of the patent (19th July, 1877), C. P. filed a bill seeking to enforce payment of $3,000, balance of purchase money due in respect of the sale of his interest in the partnership, and of the right as before stated, insisting that all he had sold, or intended to sell, was his interest in the then current patent; one object which he had in view in so doing, it was proved, being to prevent P. and his partners, as assignees, afterwards disputing the validity of any renewal of the patent, although it was shewn in evidence that C. P., in speaking of the patent he held, said it was good for ten years. The court, being of opinion that what the defendants intended to purchase was the right for ten years, and that the belief that they were purchasing such right was induced by the representations of C. P., who knew how the fact was, and was therefore bound to specifically perform the agreement by executing such an assignment as would effectually convey the right for the counties named, whether at the time of the original contract the patent was really good for ten years, or afterwards became so, made a decree for that relief at the instance of P. and his partners in a suit instituted by them for that purpose, and ordered C. P. to pay the costs of both suits. *Powell* v. *Peck*, *Peck* v. *Powell*, 26 Gr. 322, 8 A. R. 498.

Held, by the supreme court of Canada, reversing the judgment of the court of appeal, that under the agreement and assignment plaintiffs were entitled to the extension as well as the current term. *Peck* v. *Powell*, 11 S. C. R. 494.

Sale of Right to Manufacture—*Royalties—Warranty against Infringement — Plea of Want of Novelty—Jury — Evidence—Res Judicata—Labelling—Agents.*]—Action to recover royalties alleged to be payable on threshing machines manufactured by defendant, under an indenture made between plaintiff B. and defendant, whereby the plaintiff B. sold and transferred to the defendant the right to manufacture and use a certain invention known as "Beam's Thresher;" and in consideration thereof the defendant agreed to pay a named royalty on all machines manufactured "upon or after" the principle of the invention. The plaintiff B. subsequently assigned to his co-plaintiff F. one-half share or interest in the invention, and also one-half of the moneys then, and to grow, due under the indenture. The plaintiffs' patent was for a combination, part only of which was used by defendant. The machines in question were manufactured after the assignment to F. The defendant objected that the patent was invalid on the ground of want of novelty in the invention, and that it was not the subject of a patent; and also that the machine was not manufactured on the principle of the plaintiffs' patent. Parol evidence was admitted, subject to objection, that the plaintiff B. agreed to prevent any infringement of the patent, and, if he failed to do so, he should not be entitled to any royalties. The agreement contained no such stipulation:—Held, (1) that the defendant, having used the plaintiffs' invention, could not raise the objection to the validity of the patent. (2) That whether the machines were or not manufactured "upon or after" the principle of the plaintiffs' patent, was a question for the jury on the evidence, and they having found, as they were warranted by the evidence in doing, that they were so manufactured, the finding could not be interfered with. (3) That the parol evidence was not admissible to vary the deed, following McNeely v. McWilliams, 13 A. R. 324; and also that, by a prior judgment, the matter was res judicata, and the fact that that judgment was between B. alone and defendant, could make no difference. *Beam* v. *Merner*, 14 O. R. 412.

In an action under a similar agreement, it appeared that the defendant partly manufactured a number of machines, and then sold out his establishment to a firm M. D. & Co., who completed the machines, and labelled them as required by the contract. Afterwards the defendant took M.'s place in the firm, and the firm manufactured a number of machines upon and after the principle of the plaintiffs' patent, which they labelled with another name from that required by the contract. The plaintiffs sued for the royalties, and for not labelling as required:—Held, that the plaintiffs were entitled to recover as for a manufacture and sale by defendant, for they might assume that the defendant was making the machines under the contract, and that the firm were but agents working for him. *Ib.*

See Smith v. *Powell*, 7 C. P. 332; *Yates* v. *Great Western R. W. Co.*, 24 Gr. 495; *Smith* v. *Goldie*, 9 S. C. R. 46.

VII. Prior User.

First Inventor—*Evidence.*]—Where one who says he is the inventor of anything has had an opportunity to hear of it from other sources, and especially where delay has occurred on his part in patenting his invention, his claim that he is a true inventor ought to be carefully weighed. *American Dunlop Tire Co.* v. *Goold Bicycle Co.*, 6 Ex. C. R. 223.

——*Rights of, against Prior Patentee.*]—To be entitled to a patent in Canada, the patentee must be the first inventor in Canada or elsewhere. A prior patent to a person who is not the true inventor is no defence against an action by the true inventor under a patent issued to him subsequently, and does not require to be cancelled or repealed by scire facias, whether it is vested in the defendant or in a person not a party to the suit. *Smith* v. *Goldie*, 9 S. C. R. 46.

Foreign Patent—*Independent Inventor—Disclaimer — Pleading — Evidence.*]—Where the plaintiff had, more than one year previous to his application for a patent in Canada, obtained a patent in the United States disclosing the same invention, though not containing all the claims contained in the Canadian

patent:—Held, under s. 7 of the Patent Act, 1872, that such foreign patent amounted to a publication of the whole invention in the United States, and imported a disclaimer of all parts not claimed in the foreign patent. Held, also, that such defence was sufficiently raised by the pleadings in this case. Held, also, that a patent in Canada granted to an independent inventor after the plaintiff's foreign patent, but before his application for a patent in Canada, was valid against the plaintiff's subsequent patent. Held, also, that evidence of such prior Canadian patent to an independent inventor was admissible under a general denial that the plaintiff was the first inventor. *Barter* v. *Howland*, 26 Gr. 135.

——— *Statement of.*]—It is not illegal to manufacture and sell an article in this country which has been patented in the United States, and put upon it a statement that it is so patented, as a recommendation of it, so long as there is no infringement of a valid existing patent in this country. *Kidder* v. *Smart. Kidder* v. *Smart Manufacturing Co.*, 8 O. R. 362.

——— *User before Canadian Patent—Wrong-doer—Injunction.*]—The plaintiffs were the patentees of a certain invention in the United States, and, being desirous of having the article with some improvements patented in Canada, one of them employed one of the defendants, a mechanic, to make a model, and under a pledge of secrecy placed the United States patent in his hands and imparted to him his ideas as to the improvements. It was afterwards discovered that the defendant so employed had, during his employment, taken out a patent for a similar article, under which he and the other defendants were manufacturing. In an action brought to set aside this patent and for an injunction restraining the manufacture by the defendants of the article, it was contended on the latter's behalf, that the article was not protected in Canada by the United States patent, and in fact that the idea was public property:—Held, following Morrison v. Moat, 9 Ha. 241, that the plaintiffs had the right to succeed as to the injunction, and that their title was good as against the defendants, even though they might not have a good title against the public. *Lean* v. *Huston*, 8 O. R. 521.

Foreign User.]—Action for the infringement of a patent. Plea, that the invention was not new, but had been publicly used and vended in a foreign country:—Held, a good answer. *Vannorman* v. *Leonard*, 2 U. C. R. 72.

Inventor's User before Patent.]—A machinist invented a machine in which an inclined plane was applied for a novel purpose. He contemplated further improving his invention, but meanwhile made use of it in his workshop. Five years or more afterwards he adopted or invented a contrivance which was not new, but which, in connection with the inclined plane, increased greatly the value of the machine; and he then took out a patent for the improved machine:—Held, that, notwithstanding his prior use of the original machine, the patent was valid, and that the patentee was entitled to the exclusive use of the inclined plane. *Summers* v. *Abell*, 15 Gr. 532.

Manufacture before Patent—*Consent—Rights after Patent.*]—Section 46 of the Patent Act, R. S. C. c. 61, does not authorize one who has, with the full consent of the patentee, manufactured and sold a patented article for less than a year before the issue of the patent, to continue the manufacture after the issue thereof, but merely permits him to use and sell the articles manufactured by him prior thereto. *Fowell* v. *Chown*, 25 O. R. 71.

Prior Foreign Invention—*Non-user—Non-disclosure.*]—The pneumatic tire as applied to bicycles came into use in 1890. It consisted of an inflatable rubber tube with an outer covering or sheath, which was cemented to the under surface of a U-shaped rim similar to that which had been used for the solid and cushion rubber tires which preceded it. This tube was liable, in use, to be punctured, and, as the sheath was cemented to the rim of the wheel, it was not readily removable for the purpose of being repaired. La Force's invention met that difficulty by providing for the use of a rim with the edges turned inward so as to form on each side a lip or flange, and of an outer covering or sheath to the edges of which were attached strips made of rubber or other suitable material, which fitted under such lips or flanges and filled up the recess between them. When the rubber tube is not inflated, this tire may readily be attached to or removed from the rim of the wheel; but when inflated the covering or sheath is expanded, and the outer edges of the strips attached thereto are forced under the flanges of the rim, and the whole securely held in position by the pressure of the inflated tube upon such strips. The defendant's assignor hit upon this idea in April, 1891, and in company with his brother made a section of a rim and tire on this principle in May following. On the 3rd August in the same year a patent therefor was applied for in Canada, and on the 2nd December following the defendant obtained it. In March, 1891, Jeffery, at Chicago, in the United States, conceived substantially the same device, and confidentially communicated the nature thereof to his partner and patent solicitor. On the 27th July he applied for a United States patent, and on the 12th January, 1892, such patent was granted to him. On the 5th February, 1892, he applied for a Canadian patent, which was granted to him on the 1st June in the same year. When, in May, 1891, La Force's conception of the invention was well defined, there had been no use of the invention anywhere, and the public had not anywhere any knowledge or means of knowledge thereof:—Held, that the fact that, prior to the invention of anything by an independent Canadian inventor, to whom a patent therefor is subsequently granted in Canada, a foreign inventor had conceived the same thing, but had not used it or in any way disclosed it to the public, is not sufficient under the patent laws of Canada to defeat the Canadian patent. *Regina* v. *La Force*, 4 Ex. C. R. 14.

Public User before Patent—*Inventor's Consent—Foreign User.*]—It appeared that a machine had been used for many years in the United States which performed the same work as the plaintiff's, but it was too expensive. The plaintiff had been employed in defendants' factory in bending for about three months, and was asked by the foreman "to study up an invention or apparatus for bending chair stuff." He discovered the invention

that same night, about the 1st May, and next morning explained it at the factory. The machine was constructed there, defendants supplying the materials and the blacksmith's and carpenter's work, and was used there for chairs until about the 14th July, when the plaintiff applied for a patent, many persons in defendants' employment being aware of its construction and operation. It appeared, also, that other persons in the factory as well as the plaintiff had been employed in trying to devise such an apparatus, and that when this was found successful the manager said he would patent it for the factory, to which the plaintiff did not then object. The plaintiff never informed defendants of his application for the patent, which issued in October following:—Held, that there had been a public user of the invention with the plaintiff's consent and allowance before he applied for the patent, so as to destroy his claim to it. *Bonathan* v. *Bowmanville Furniture Manufacturing Co.*, 31 U. C. R. 413.

——— *Inventor's Consent — Sale — Prior Provincial Patent.*]—To invalidate a patent of invention on the ground that the subject thereof was in public use in any of the Provinces of the Dominion for more than a year prior to the application of the inventor for a patent, such use need not be shewn to have been with the consent of the inventor; but to invalidate a patent on the ground that the subject was on sale in any of such Provinces for that time, it must be shewn to have been so on sale with the consent or allowance of the inventor. In this respect s. 6, and s. 32, s-s. 2, of the Act of 1872 (35 Vict. c. 26 (D.) correspond in their provisions. *Patrie* v. *Sylvester*, 23 Gr. 573.

An inventor had, in 1869, obtained a patent in the Province of New Brunswick, which in April, 1873, was extended over the whole Dominion under the Patent Act of 1872, but which proved inoperative by reason of an unintentional defect or insufficiency in the description and specification, and the inventor, having surrendered that patent, obtained one from the Dominion Government in 1874, in accordance with an amended description and specification, for the unexpired term of the one so surrendered:—Held, that the prior user of the invention so patented in New Brunswick (and extended) was not such a user as invalidated the patent of 1874. *Ib.*

Single Sale before Patent — *Use by Purchaser.*]—The inventor of a new machine, before taking out a patent, erected and sold a machine embodying his invention, and the purchaser had it in use for three years before the inventor procured a patent. The machine so sold was not put up for the purpose of experimenting, but was sold as a complete machine, and was placed in the premises of the purchaser in order that he might reap the profits expected from its use:—Held, that the inventor had lost his right to a patent. *Hessin* v. *Coppin*, 19 Gr. 629.

See Abell v. *McPherson*, 17 Gr. 23.

VIII. Re-issue.

Additional Claim—*Omission from Original Patent — Error — Laches.*] — Where to an action to restrain certain alleged infringements of a re-issued patent, it was objected by way of defence that the re-issued patent contained a combination not in the original patent or the application therefor, and was therefore invalid: and it appeared that the combination in question was manifested in the drawings and specifications of the original patent, but by mistake and inadvertence was not separated from the other parts of the description, and made the subject of a distinct claim, so as to be protected by the original patent:—Held, the divisional court being evenly divided, affirming the decision of the Judge at the trial, that, there being no laches, the re-issued patent was nevertheless valid. *Withrow* v. *Malcolm*, 6 O. R. 12.

Mistake in Original Patent—*Delay in Re-issue.*]—Held, that the delay (without any excuse) of a patentee for a period of a little more than a year and nine months, after full knowledge of an inadvertence and mistake in his original patent, and after professional advice on the subject, and after a re-issue of the same patent in the United States, founded upon the same alleged inadvertence or mistake (during which period manufacture had been carried on in the United States under a re-issue there), before the application for a re-issue in this country, is fatal to the validity of the re-issue here. *Kidder* v. *Smart*, *Kidder* v. *Smart Manufacturing Co.*, 8 O. R. 362.

Specification — *Change in Claim — Identity of Invention—Special Statute—Jurisdiction of Commissioner—Defect in Patent.*]—An inventor, in the specification to his first Canadian patent, after disclaiming all other illuminant appliances for burners, claimed: "An illuminant appliance for gas and other burners consisting of a cap or hood made of fabric impregnated with the substances hereinbefore mentioned and treated as herein described." In the specification the substances and the proportions in which they might be combined were stated. Eight years afterwards the owner of the original patent surrendered the same and obtained a re-issue, the specification whereof differed from that of the original only in respect of the claim, which was as follows:—"The method herein described of making incandescent devices, which consists in impregnating a filament, thread, or fabric of combustible material with a solution of metallic salts of refractory earths suitable when oxidized for an incandescent, and then exposing the impregnated filament, thread, or fabric to heat until the combustible matter is consumed:"—Held, that, although in the claim of the re-issue there were no words of reference or limitation to the refractory earths mentioned in the specification, yet the words "salts of refractory earths" occurring in the claim must be limited or restricted to such refractory earths as were mentioned in the preceding part of the specification, or to their equivalents. (2) That the re-issue was for the same invention as that which was the subject of the earlier patent. (3) The re-issue being for the same invention as the original patent, delay in making the application for the re-issue did not invalidate the same. (4) That the Act 55 & 56 Vict. c. 77, passed for the relief of Von Welsbach and Williams, the original patentees, was effective although at the time it was passed others than they were interested in the patent. (5) To give the commissioner jurisdiction to authorize the reissue of a patent it is not necessary that the patent be defective or inoperative for some one of the reasons specified in s. 23 of the Patent Act. It is sufficient to

support his jurisdiction that he deems the patent defective or inoperative for any such reasons, and his decision as to that is final and conclusive. *Auer Incandescent Light Manufacturing Co.* v. *O'Brien*, 5 Ex C. R. 243.

See Hunter v. *Carrick*, 28 Gr. 489, 10 A. R. 449, 11 S. C. R. 300.

IX. Scire Facias to Repeal Patents.

Fiat—*Attorney-General.*]—A sci. fa. to set aside a patent was issued at the instance of a private relator, without the fiat of either the attorney-general for the Dominion or for Ontario having been first obtained:—Held, that a fiat was necessary. 2. That the attorney-general for Ontario was the proper authority to grant it. *The Queen* v. *Patice*, 5 P. R. 292.

Particulars of Breaches—*Declaration—Trial.*]—The effect of C. S. C. c. 34, s. 20, s.-s. 2, enacting that the proceeding on a writ of sci. fa. to repeal a patent shall be "according to the law and practice of the court of Queen's bench in England," is to introduce the Imperial Act 15 & 16 Vict. c. 83:—Held, therefore, that leave to deliver particulars of the breaches, which should have been delivered with the declaration, could only be granted as if the declaration were delivered de novo; and that, as the jury had been sworn, and this, therefore, could not be done, a verdict was properly directed for defendant. The court, however, upon affidavit, allowed the plaintiff to deliver particulars, on terms. *The Queen* v. *Hall*, 27 U. C. R. 146.

Trial—*Right to Begin.*] — Under the general order of the exchequer court of Canada bearing date the 5th December, 1892, and the provisions of s. 41 of 15 & 16 Vict. c. 83 (Imp.), the defendant in an action of scire facias to repeal a patent for invention is entitled to begin and give evidence in support of his patent, and, if the plaintiff produces evidence to impeach the same, the defendant is entitled to reply. *The Queen* v. *La Force*, 4 Ex. C. R. 14.

See Smith v. *Goldie*, 9 S. C. R. 46; *The Queen* v. *General Engineering Co. of Ontario*, 6 Ex. C. R. 328.

X. Specifications.

Drawings Annexed.] — The drawings annexed to a patent may be looked at to explain or illustrate the specification. *Regina* v. *La Force*, 4 Ex. C. R. 14.

Sufficiency of—*New Invention.*] — The plaintiff claimed a patent for a new and useful improvement in the construction of sawmills, describing his invention thus: "What constitutes the invention is, generally, the simplicity of construction of the said sawmill, and making it portable; but especially the direct application of steam or water power by the connecting rod or shaft B to drive the circular saw." On the drawing the circular saw was attached to the end of a shaft, the other end of which was connected directly by a crank pin and the rod B with the engine. In an action for infringing this patent, the evidence shewed that in other mills a shaft had been long in use, to which the circular saw was attached; but that this shaft was turned by a belt and pulleys connected with the shaft, which by the plaintiff's invention was connected directly with the circular saw; and that the novelty therefore consisted, not in the direct application of the power to the last mentioned shaft, nor in the placing the circular saw on the end of a shaft, but in placing the saw on the shaft to which the power was directly applied, thus dispensing with the other shaft:—Held, that the patent, specification, and drawing, sufficiently shewed that the plaintiff claimed as a new invention what appeared by the evidence to be so. *Smith* v. *Ball*, 21 U. C. R. 122.

The above specification was also held sufficient in *Smith* v. *Mutchmore*, 11 C. P. 458, and in *Waterous* v. *Bishop*, 20 C. P. 29.

Uncertainty.]—A specification providing merely that a protector of a washing machine is to be arranged "at an angle" is void for uncertainty. *Taylor* v. *Brandon Manufacturing Co.*, 21 A. R. 361.

See Emery v. *Iredale*, *Emery* v. *Hodge*, 11 C. P. 106; *Patric* v. *Sylvester*, 23 Gr. 573.

XI. Miscellaneous Cases.

Delivery of Model—*Time for.*] — The statute 35 Vict. c. 26 (D.) does not require delivery of a model prior to the issue of a patent of invention. In this case, after the granting of the patent, the commissioner wrote to the applicant that the patent had been granted, and that it would be forwarded on receipt of the model, which was sent, and the patent was then forwarded:—Semble, that delivery of the model prior to the grant of the patent was dispensed with, merely requiring it to be sent before the patent would be forwarded. *The Queen* v. *Smith*, 7 O. R. 440.

Foreign Patent—*Effect of Expiration.*] —The expression "any foreign patent" occurring in the concluding clause of s. 8 of the Patent Act—"under any circumstances, if a foreign patent exists, the Canadian patent shall expire at the earliest date on which any foreign patent for the same invention expires," must be limited to foreign patents in existence when the Canadian patent was granted. *Auer Incandescent Light Manufacturing Co.* v. *Dreschel*, 6 Ex. C. R. 55, 28 S. C. R. 608.

——— *Effect of Expiration — "Cause as Aforesaid"—Jurisdiction.*]—Upon a proceeding by scire facias to set aside a patent for invention because of an alleged expiry of a foreign patent for the same invention under the provisions of s. 8 of the Patent Act:—Held, that there was so much doubt as to that being one of the clauses included in the expression "for cause as aforesaid" in cl. 2 of s. 34 of the Act, that the action should be dismissed. *The Queen* v. *General Engineering Co. of Ontario*, 6 Ex. C. R. 328.

——— *Effect of Expiration—"Exists."*]—On the 1st March, 1892, J. filed an application for a Canadian patent, and on the same day applied for a British patent and an Italian patent. The British application was accepted on the 30th April, 1892, and the patent

issued on the 12th July, but was dated the 1st March, 1892. The Italian patent was issued on the 19th March, 1892, and was granted for a term of six years. The Canadian patent was granted on the 15th October, 1892. The British patent became forfeited for non-payment of certain fees, on the 1st March, 1897. There was some doubt whether a similar default in respect of the Italian patent operated a forfeiture ipso facto under the Italian law, but there was no doubt that the patent expired at the end of the six years, when no steps were taken by the inventor for its renewal:—Held, that the Canadian patent was void. (2) That the words "foreign patent" in s. 8 of the Patent Act, R. S. C. c. 61 (as amended by 55 & 56 Vict. c. 24, s. 1), include all patents that are not Canadian. (3) That the word "exists" in s. 8 has reference to the date or time when the Canadian patent is granted, not when it is applied for. (4) That the words "shall expire at the earliest date on which any foreign patent for the same invention expires," are not to be limited to the expiration by lapse of time of the potential term of the foreign patent, but include any ending at a time earlier than the end of the term for which the patent is granted. *General Engineering Co. of Ontario* v. *Dominion Cotton Mills Co.*, 6 Ex. C. R. 357.

Promissory Note—"*Given for a Patent Right.*"]—See BILLS OF EXCHANGE, III.

Residence of Patentee—*Application for Patent—Inventor—Foreign Patent.*]—Action for infringement of a patent, by the assignee. Plea, amongst others, that the patentee was not at the time of granting of the patent a resident in this Province. The evidence shewed that the patentee had lived in the United States for many years before 1850, when he came to Canada, leaving his family behind him, and applied for the patent; he remained until about three weeks after it was obtained, and, being unsuccessful in disposing of it, he returned to the States, where he had since continued, and where he afterwards sold his right to the plaintiff. Before coming to this Province, he had obtained a patent for his invention as a citizen of the United States. A verdict was found for defendant generally, although there were other issues on which the plaintiff was clearly entitled to succeed:—Held, that it would be useless to grant a new trial, because, although the issue taken was immaterial — the statute requiring residence only at the time of making application for the patent—yet the evidence shewed clearly that the patentee was not then a resident, and defendant would be allowed to amend his plea. Semble, that the inventor must also be a resident at the time when he makes the discovery. Quere, as to the effect of the patentee having previously obtained a patent in the United States. *Driggs* v. *Band*, 13 U. C. R. 642.

Stamping Patented Articles—*License.*]—Upon an action brought for the infringement of a patent right:—Held, that 12 Vict. c. 24, s. 16 (C. S. C. c. 34, s. 28), only requires the date of the patent to be stamped on articles sold or offered for sale, and does not make such stamping per se amount to a license to use the invention. *Smith* v. *Mitchmore*, 10 C. P. 391.

PATHMASTER.

See NOTICE OF ACTION, I.—WAY, VI.

PAUPER.

See PRACTICE—PRACTICE IN EQUITY BEFORE THE JUDICATURE ACT, XVII.

PAWNBROKERS.

Conviction—*Requirements of Statute.*]—A conviction under the Pawnbrokers' Act, C. S. C. c. 61, for neglecting to have a sign over the door, as directed by s. 7, was held not to be sustained by evidence of one transaction alone; for the penalty attaches only on persons "exercising the trade of a pawnbroker." *Regina* v. *Andrews*, 25 U. C. R. 196.

Rate of Interest.]—Remarks upon the law relating to pawnbrokers. A pawnbroker, under C. S. C. c. 61, may legally charge any rate of interest that may be agreed upon between him and the pledgor. *Regina* v. *Adams*, 8 P. R. 462.

PAYMENT.

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I. PAYMENT OF MONEY INTO COURT.

1. *Defence or Plea of Payment in.*

Application to Part of Claim—*Proof of Damages.*]—Where in indebitatus assumpsit the defendant, as to all the moneys in the declaration except as to £33 14s., pleaded the general issue, and as to that sum pleaded payment of £1 1s. 8d. into court, and no damages ultra; and the plaintiff replied that he had sustained greater damages, but at the trial obtained a verdict for the difference between the sum of £33 14s., and £1 1s. 8d. paid into court, as a sum admitted on the record, without giving any evidence—the court set the verdict aside, as it was incumbent upon the plaintiff to prove damages, no specific sum being admitted on the record in this form of action. *Ross* v. *Garrison*, 6 O. S. 626.

Application to Part of Claim—*General Issue.*]—To an action of indebitatus assumpsit, defendant pleaded:—1. As to all but £106 1s. 11d. non-assumpsit. 2. As to £28 12s. 6d. parcel, &c., payment; as to £77 7s. 5d. residue, &c., payment into court. Plaintiff took issue on the first plea; traversed the payment alleged in the second; and as to the third plea, took out the money paid into court:—Held, that it was open to the plaintiff on the general issue to prove a charge not covered by the other pleas; and that the defendant, having sworn that he paid in nothing on account of that charge, was precluded from shewing that the other items which the plaintiff was entitled to would not cover the money paid into court. *Taylor* v. *Flood*, 10 U. C. R. 458.

——— *Sufficiency of Amount—Jury.*]—Declaration upon the common counts. Plea, as to goods sold and delivered, that the goods were 724 tons of coal, purchased by defendants, at $2.75 per ton, that the amount due thereon, $1,991, was payable to the plaintiff at Cleveland; also another quantity of 284 tons, for which defendants were to pay $804 of current money of Canada; and as to the money due in Cleveland they bring into court $1,314.06 of lawful money of Canada, and say the same is sufficient to satisfy the plaintiff's claim. Demurrer, because the plea admits a cause of action for a certain sum, and pleads payment of a smaller sum in satisfaction:—Held, that upon this plea the only question was, whether the sum paid into court was equal in value to the amount admitted to be due the plaintiff, and, that being a matter of fact to be tried by a jury, the defendants were entitled to judgment. *Crawford* v. *Beard*, 13 C. P. 35.

——— *Performance of Contract.*]—Debt on bond conditioned to deliver to plaintiff certain wood. Breach, non-delivery. Defendant pleaded, as to part of the breach, payment of $25 into court, and as to the remainder, performance:—Held, on demurrer, a bad plea. Thompson v. Kaye, 13 C. P. 251, distinguished. *Lowe* v. *Morice*, 19 C. P. 123.

Election to Take out—*Time—Appeal.*]—In an action to recover money for services rendered, the defendant pleaded that $325 was more than an ample and sufficient payment: that he had before action paid the plaintiff $25, and had always been ready and willing and was now ready and willing to pay him $300 more; that before action he had tendered $300 in payment of the services rendered, but the plaintiff refused to accept it; and the defendant brought $300 into court in satisfaction of all claims and demands of the plaintiff in this action:—Held, that the defence was so framed that if the plaintiff had desired to take the money out of court, he must have elected to do so before replying or before the expiration of the time for replying, as provided by con. rule 636, and must have taken it in satisfaction of all his claims in the action, and have filed and served a memorandum in accordance with con. rule 635. But, as he, instead of taking this course, proceeded with the action (in which he recovered more than $300), the defendant was absolved from his offer, and the money remained in court subject to further order; the defendant was entitled, in the absence of special circumstances, to have it remain to be dealt with when the case should be finally disposed of; and it was open to the defendant to contend upon appeal that the amount recovered should be reduced below $300, notwithstanding the payment into court, by the plaintiff's election not to take the money out at the appropriate time. *Denison* v. *Woods*, 17 P. R. 549.

——— *Time—Extension—Judgment.*]—A defendant brought money into court with his defence, under rule (1897) 419, in full satisfaction of one of the alleged causes of action. The plaintiff did not elect to take the money out of court within the time limited by rule 424, and judgment was given in favour of the defendant upon the cause of action in respect of which the money was paid in. The judgment did not dispose of the money in court:—Held, that it remained in court subject to the final order of the court after the determination of the action, and must be disposed of in accordance with such determination. The plaintiff, not having elected to take the money out within the proper time, was not entitled, after judgment, to have the time extended by an order nunc pro tunc under rule 353. *Magann* v. *Ferguson*, 18 P. R. 201.

Receipt.]—See *Miles* v. *Harwood*, 1 U. C. R. 515.

Time for Payment in.]—A summons may be taken out to pay money into court before declaration, but it must be afterwards pleaded. *Molson* v. *Monro*, 1 C. L. Ch. 97.

See Henderson v. *Bank of Hamilton*, 25 O. R. 641, 22 A. R. 414; *Davis* v. *National Assurance Co. of Ireland*, 16 P. R. 116.

See the next sub-head.

2. *Effect of Payment in.*

(a) *As an Admission.*

Trover for conversion of five cattle, as to which the defendants paid into court $52:—Held, that such payment admitted only a cause of action, not the particular cause sued for; and that defendants were entitled to a verdict, the evidence proving no conversion by defendants. *O'Rorke* v. *Great Western R. W. Co.*, 23 U. C. R. 427.

The defendant stated in his defence that in case the court should be of opinion that he was liable for the payment of the balance, &c., he, the defendant, brought into court the sum of $4,300, saying that the same was sufficient to pay in full all claims of the plaintiff in respect of the balance, &c.; and paid into court under his defence the said sum of $4,300, which was withdrawn by the plaintiff after issue and before trial. The Judge at the trial, although he held that the plaintiff was not entitled to recover, refused to order him to refund the $4,300. An appeal from such refusal was dismissed with costs, as the result of a division of opinion:—Held, by the supreme court, that the payment was a payment into court in satisfaction which the plaintiff had a right to retain, notwithstanding his action was dismissed at the hearing. *Bell* v. *Fraser*, 12 A. R. 1; *S. C., sub nom. Fraser* v. *Bell*, 13 S. C. R. 546.

The plaintiffs sued for work and labour as contractors, claiming a balance of $511. The defendant by his statement of defence denied all the allegations in the statement of claim, and also said that $300 was sufficient to satisfy the plaintiffs' whole claim, and he paid that sum into court in satisfaction of such claim. Con. rule 632 provides that "the payment into court shall not be deemed an admission of the cause of action in respect of which it is so paid:"—Held, that the plaintiffs were not entitled, before the determination of the suit, to take out the money paid into court, unless they took it in full satisfaction of their claim. *Kane* v. *Mitchell*, 13 P. R. 118.

See Ross v. *Garrison*, 6 O. S. 626, *ante* 1; *Rogers* v. *Loos*, 11 P. R. 118, *post* (b).

(b) *As to Costs.*

Where defendant, in an action of assumpsit, paid money into court and died, and the action abated; and the plaintiff afterwards sued the defendant's executors for the same cause of action, and took the money in the former suit out of court, but proved his debt to no larger an amount:—Held, that he could not retain the costs of the first action, and recover against the executors for the difference between the sum remaining and that originally paid in. *Carey* v. *Choat*, 6 O. S. 467.

The defendant brought into court with his defence a sum which he pleaded was sufficient to answer the plaintiff's claim, and the Judge at the trial, finding that it was sufficient, directed judgment to be entered for the defendant with costs:—Held, that the Judge at the trial had a discretion to deal with the question of costs, and having exercised it, the taxing officer had no alternative but to tax to the defendant his full costs incurred, as well before as after the payment into court. *Small* v. *Lyon*, 10 P. R. 223.

The statement of defence set up that the assault complained of was in self-defence, and, as an alternative defence, that, while the defendant did not admit his liability for damages, he brought into court $150 and said that the same was sufficient, &c.:—Held, that the money paid into court under this defence could not be retained there to answer the defendant's costs, if he succeeded, unless a proper case was made for ordering security for costs. *Rogers* v. *Loos*, 11 P. R. 118.

The rule as to costs before the Judicature Act was, that if money was paid into court in respect of the whole cause of action, and the plaintiff refused to accept it in satisfaction, and recovered no more at the trial, the defendant was entitled to judgment and his costs of the suit; and there is nothing in the Judicature Act to alter this rule. *Tobin* v. *McGillis*, 12 P. R. 60.

The plaintiffs claimed in this action $3,249.36, "amount of defalcation of J.," and $90.55 for certain expenses connected therewith, in all $3,339.91. The defendants paid into court $3,273, alleging by their notice of payment in, that it was sufficient to satisfy the plaintiffs' claim. There was no specific application of the money paid in to any part of the claim. The plaintiffs did not deliver a statement of claim, and, upon notice of a motion under rule 203 to dismiss the action being served by the defendants, the plaintiffs gave a notice under rule 170 of withdrawal of the balance of their claim:—Held, that the plaintiffs had no power under rule 170 to withdraw; the portion of that rule relating to the withdrawal of part of the alleged cause of the complaint is applicable only where the part sought to be withdrawn can be severed from the rest of the claim; and an order dismissing the action was proper. Semble, that the plaintiffs, not having under rule 218 accepted the money in full satisfaction of their claim, were liable to pay the whole costs of the action; but the disposition of costs by the local Judge who made the order was not interfered with on appeal. *Bank of London* v. *Guarantee Co. of North America*, 12 P. R. 499.

The defendants having paid into court twenty cents less than the correct amount due by them, the plaintiff was held entitled to full costs. *Henderson* v. *Bank of Hamilton*, 25 O. R. 641, 22 A. R. 414.

The plaintiff in an action in a county court claimed $140, the balance alleged to be due upon the sale of a chattel, and the defendant brought into court $95 in full of the plaintiff's cause of action, which the plaintiff accepted in due time. The Judge of the county court thereupon made a summary order allowing the defendant to set off his costs incurred in the county court in excess of such costs as he would have incurred in a division court against the costs of the plaintiff, and to enter judgment and issue execution for the excess, if any, of the costs of the defendant over and above the costs of the plaintiff:—Held, that the plaintiff was entitled to tax his costs of the action according to the county court scale,

irrespective of the amount paid into court and accepted by him in satisfaction of his claim; and the plaintiff being entitled to his costs by the express provision of rule (1897) 425 (which is not qualified by rule 1130), they were not subject to the discretion of the Judge. *Babcock* v. *Standish*, 19 P. R. 195.

3. *Executors, Administrators, Guardians, and Trustees.*

Infants' Moneys.]—An application for an order sanctioning the payment of a bequest in favour of infants to their father, who with the infants resided in a foreign state, and had there been appointed guardian by a surrogate court, was refused, and the executors were ordered to pay the amount of the bequest into court. Re Andrews, 11 P. R. 199, distinguished. *Re Parr*, 11 P. R. 301.

Where an infant had become entitled to a fund, the subject of an express trust in her favour under a will, and the fund was claimed in the infant's name by her guardian appointed by a surrogate court, but the infant, represented by the official guardian, opposed the claim:—Held, that it was not a case in which an order should be made under R. S. O. 1887 c. 110, s. 37, upon the application of the trustees of the will, determining the claim of the guardian; but that the trustees should be allowed to transfer the fund into court. Huggins v. Law, 14 A. R. 383, distinguished. *Re Mathers*, 18 P. R. 13.

Where infants are entitled to maintenance out of a fund in the hands of the executor of their father's will, against whose character or solvency there is no imputation, it is nevertheless their right to have the fund brought into court. *Re Humphries*, *Mortimer* v. *Humphries*, 18 P. R. 289.

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

Order for Payment — *Admission.*] — Where an administrator by his accounts admitted in his hands $112, the court refused a motion for payment of that amount into court pending the reference. *Collins* v. *Orme*, 3 Ch. Ch. 79.

——— *Jurisdiction of Referee.*]—The referee in chambers has no jurisdiction to make an order for payment into court by an executor or administrator of amounts admitted by him to be in his hands. *Re Curry*, *Wright* v. *Curry*, *Curry* v. *Curry*, 8 P. R. 340.

4. *Insurance Moneys.*

Administration — *Voluntary Payment.*]—A testator insured his life for the benefit of his wife and children. The policy provided that the money should be payable as might be directed by will. The testator by will appointed executors, and gave his wife the income of his estate for life and after death the corpus to his son. The executors renounced probate, and after revocation of a prior grant to the son, who was then a minor, administration was granted to the defendant P. The policy provided that the money might be payable to the executors or administrators. The Act 47 Vict. c. 20 (O.) provides that such policy moneys to which infants are entitled shall be payable to a "trustee, executor, or guardian." P. claimed the moneys as administrator, whereupon the insurance company, under s. 15 of the Act, and G. O. 197, and rule 541 (*a*), O. J. Act, applied to the master in ordinary in chambers for leave to pay the moneys into court. The master held (1) that voluntary applications to pay in money may be made in chambers. (2) That under rule 541 (*a*), O. J. Act, he had jurisdiction, by virtue of the administration proceedings before him, to make the order. (3) That the money was no part of the estate subject to the control of creditors, and when paid in should be "ear marked," and not mixed with the other funds of the estate. On appeal by the administrator, P., an order was made directing that the money in court be paid out to the insurance company. *Merchants Bank* v. *Monteith*, *Ex p. Standard Life Assurance Co.*, 10 P. R. 588.

Stakeholder.] — Although the rule of equity is, that money in the hands of a stakeholder held for others, whose rights are to be disposed of by the court, will usually be ordered into court; still, it must be clear that some of the parties litigant are entitled to the fund or a portion of it. Where, therefore, the proceeds of a policy of insurance which had been deposited with the attorney of a bank, to be held in trust for such bank, and with the proceeds to pay off the liabilities to the bank of the person making such deposit, had been paid to and were still in the hands of the attorney, and the depositor, without shewing what amount was due the bank, applied to have the money paid into court by the attorney, the court, under the circumstances, refused the application. *Corbett* v. *Meyers*, 10 Gr. 36.

Trustees — *Conflicting Claims.*]—On an application by a benevolent society for leave to pay insurance money into court, claimed by different parties:—Held, that s.s. 5 of s. 53 of the Judicature Act extends the benefit of the Act for the relief of trustees to such cases, and that the society was entitled to pay the money in. *Re Bajus*, 24 O. R. 397.

5. *Interest Allowed.*

Moneys in Hands of Prothonotary—*Rate Received by Him.*]—Under 31 Vict. c. 12, and 37 Vict. c. 13, the minister of public works of the Dominion of Canada appropriated to the use of the Dominion certain lands in Yarmouth county, known as "Bunker Island." In accordance with said Acts, on the 2nd April, 1875, he paid into the hands of W., prothonotary at Halifax, the sum of $6,180 as

compensation and interest, as provided by those Acts, to be thereafter appropriated among the owners of the said island. This sum was paid, at several times, by order of the supreme court of Nova Scotia, to one A., as owner, to one G., as mortgagee, and to others entitled, less $10. As the money had remained in the hands of W., the prothonotary of the court, for some time, H., attorney for G., applied to the supreme court for an order of the court calling upon W. to pay over the interest upon G.'s proportion of the moneys, which interest (H. was informed) had been received by the prothonotary from the bank where he had placed the amount on deposit. W. resisted the application on the ground that he was not answerable to the proprietor of the principal, or to the court, for interest, but did not deny that interest had been received by him. A rule nisi was granted by the court and made absolute, ordering the prothonotary to pay whatever interest he received on the amount:—Held, that the prothonotary was not entitled to any interest he received on the amount:—Held, that the prothonotary was not entitled to any interest which the amount deposited earned while under the control of the court. That in ordering the prothonotary to pay over the interest received by him, the court was simply exercising the summary jurisdiction which each of the superior courts has over all its immediate officers. *Wilkins* v. *Geddes*, 3 S. C. R. 393.

Rate of Interest — *Rate Allowed by Court — Supplementing.*] — During the progress of this action money had been paid into court by the defendants, which remained there on deposit for upwards of seven years:—Held, affirming the judgment in 12 O. R. 492, that on taking the account between the parties the defendants were liable to pay in respect of this sum the rate allowed upon the residue of the principal, and were not limited to the rate allowed by the court. *Powell* v. *Peck*, 15 A. R. 138.

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6. *Percentage and Fees of Officers.*

See Gladstone v. *French*, 9 C. P. 30; *Carrall* v. *Potter*, 3 P. R. 11.

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7. *Purchase Money of Land.*

Contest as to Incumbrance — *Conveyance—Possession.*]—Where there was a controversy as to whether a purchaser bought subject to or free from a mortgage which was on the property, and there was no suggestion of danger in respect of the purchase money, the court in a very special case refused to order payment of the amount into court pending proceedings, though a conveyance had been executed and the purchaser had gone into possession. *Mulholland* v. *Hamilton*, 15 Gr. 53.

Delay — *Investigation of Title — Possession.*]—Possession and user of the premises do not deprive the vendee of his right to have a good title shewn; but where unreasonable delay has occurred in requiring title to be adduced, the court will order the purchase money to be paid into court, pending the investigation of the title. *Crooks* v. *Glenn*, 8 Gr. 239.

Judicial Sale—*Payment to Solicitor.*]—Instalments of purchase money (not the deposits on sale) were paid by the purchasers to the solicitor of the plaintiffs, and by him paid into court:—Held, that he was not entitled to any remuneration from the estate for such services, it being the duty of the purchasers to pay their moneys into court. *Re Robertson, Robertson* v. *Robertson*, 24 Gr. 555.

Specific Performance—*Reference as to Title.*] — A person went into possession under a contract for the purchase of a lot of forest land, in order to clear and cultivate it, and thereby raise the purchase money, which was to be paid by instalments. On a bill filed by the purchaser for a specific performance of the contract:—Held, that he had not, by going into possession, waived his right to a reference as to title; and that he was bound to pay his purchase money into court, pending the inquiry before the master. *O'Keefe* v. *Taylor*, 2 Gr. 305.

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8. *Receiver.*

Default — *Attachment — Irregularities — Punishment — Claim upon Money — Specific Order for Payment.*] — An attachment lies against a receiver as an officer of the court for default in compliance with an order to pay into court money found to be in his hands as receiver. The powers of the court are not invoked nor its process issued for the purpose of recovering or enforcing payment of a civil debt or claim inter partes, but by punishing its officer, who has disobeyed its order; and ss. 6 and 11 of R. S. O. 1887 c. 67 are inapplicable. An understanding between the receiver and the solicitor of one of the parties ought not to be accepted as an excuse for non-compliance with the order to pay in, more especially when the authority to waive the order is not admitted, but denied. Nor can the receiver be permitted to discharge himself by setting up claims upon the money which, had they been put forward in the first instance, would probably have prevented his appointment. Where, upon an application in such a case to rescind an order for an attachment, no objections are taken to the regularity of the proceedings, the court of appeal should not be astute to discover them or permit them to be raised for the first time on the argument of the appeal. In this case, a letter written by the receiver, before the order for his attachment was made, stating that he was ready to pay the money into court as soon as a specific order for that purpose was made, was regarded as an answer to his subsequent application for relief against it, as shewing that the grounds urged upon appeal were a mere afterthought. Semble, that a specific order to pay over the balance is the proper course in the first instance. *Fawkes* v. *Griffin*, 18 P. R. 48.

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9. *Restoration of Fund Paid out.*

Payment out by Mistake — *Lapse of Time.*]—Statutes of limitation have relation only between subject and subject—the Crown cannot be bound by them. The supreme court of judicature for Ontario is a public trustee as to all moneys and securities in its hands.

Moneys in court are in custodiâ legis, in this case tantamount to custodia regis, and to such a fund and such a custodian the Statute of Limitations has no pertinence. Suitors and claimants are not barred by any lapse of time in their application for payment out of moneys to which they are entitled, and reciprocally they should not be protected by lapse of time from making restitution, if they have improperly or fraudulently received moneys from the court to which they have no just claim. Restitution was ordered after a period of fourteen years, without interest, as the mistake was that of an officer of the court. Where moneys in court have been improperly paid out in an action, a motion to refund the amount is the proper procedure. *Allstadt* v. *Gortner*, 31 O. R. 495.

Performance of Undertaking—*Mistake as to—Petition.*]—W. entered into a contract for the purchase of property, the price being payable by instalments, and the vendor was to give the vendee, W., a bond of indemnity in respect of a mortgage on it, which was not due. A decree was made, at the suit of the vendor, for specific performance, on the undertaking of the plaintiff, recited in the decree, to procure a release or discharge of the mortgage, and the overdue instalments were ordered to be paid into the bank, subject to the further order of the court. On a question subsequently arising as to the effect of this undertaking:—Held, that the performance of the undertaking was not a condition precedent to paying in the money, but to its being paid out. *Robson* v. *Wride*, 13 Gr. 419.

A sum of money having been paid in under the decree, an application was made by plaintiff to have it paid out, which the court declined to order without an unconditional execution of a discharge by the mortgagees. A deed sealed by the mortgagees, but which had never been delivered, was then, through some misunderstanding, submitted to the court as duly executed and delivered, and on the faith of this representation the money was paid out. On the facts being discovered by defendant and brought before the court on petition, the court ordered the restoration of the money. *Ib.*

Winding-up Act — *Receiver-General—Wrongful Payment — Jurisdiction.*]—Where the liquidators of an insolvent bank have passed their final accounts and have paid into court the balance in their hands, and that balance is by inadvertence paid out of court to a person not entitled to it, the receiver-general has such an interest in the fund that he may, even before three years from the time of payment in have expired, apply to the court for an order for repayment into court of the fund. The court has also inherent jurisdiction to compel the repayment into court of money improperly obtained out of court. *In re Central Bank of Canada, Hogaboom's Case*, 24 A. R. 470, 28 S. C. R. 192.

The judgments of the court of appeal and of the supreme court in this case (24 A. R. 470, 28 S. C. R. 192), are conclusive on the point that the moneys repaid into court in this matter, pursuant to those judgments, after having been erroneously paid out to certain applicants, being the balance unclaimed in the hands of the liquidator by an insolvent bank after passing their final accounts, were the property of the receiver-general of Canada under R. S. C. c. 129, s. 41, subject to the liability of paying it over to the persons entitled thereto. *In re Central Bank of Canada*, 30 O. R. 320.

See Bell v. *Fraser*, 12 A. R. 1, 13 S. C. R. 546; *ante* 2; *Citizens Ins. Co.* v. *Parsons*, 32 C. P. 492; *Pritchard* v. *Pritchard*, 18 O. R. 173, 178.

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10. *Seizure or Attachment of Moneys in Court.*

Attachment.] — See *Macpherson* v. *Tisdale*, 11 P. R. 261.

Execution.]—Money paid into court is not liable to seizure under execution while in the hands of the officer of the court. *Calverley* v. *Smith*, 3 L. J. 67.

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11. *Sheriff.*

Confession of Judgment—*Security—Money Realized.*]—A confession was given to secure a second set of sureties of a county treasurer, but on an arbitration it was found that defalcations had occurred under a former bond, a surety in which was also in the second. The evidence was conflicting as to whether the protection was for one set or for all. On a motion to retain in the sheriff's hands, moneys which had been made on the confession, it was ordered that the whole amount should be paid into court. *Leonard* v. *Black*, 6 Gr. 599.

Improper Payment—*Costs.*]—Where a sheriff has improperly paid money into court, a Judge will not order the sheriff to pay the costs of such payment into court, but the proper application is for the sheriff to pay over the money returned by him as made, without reference to the payment into court. *Crombie* v. *McNaughton, Warnock* v. *McNaughton*, 5 L. J. 161.

Interpleader — *Proceeds of Sale of Goods.*]—The gross proceeds of a sale of goods in an interpleader matter should be paid by the sheriff into court without deducting anything for his expenses. *Ontario Bank* v. *Revell*, 11 P. R. 249.

Moneys Realized under Executions.] —See SHERIFF.

Right to Pay.]—A sheriff has no legal right to pay into court money made upon a writ in his office. *Gladstone* v. *French*, 9 C. P. 30.

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12. *Solicitor.*

Deposit on Sale—*Payment to Solicitor—Default.*]—Where the plaintiff's solicitor made default in payment into court of the ten per cent. paid to him at the time of sale, under the conditions of sale:—Held, that the other parties entitled to the purchase money should not suffer thereby, but that the plaintiff's share should be charged with the deficiency. *Mulkins* v. *Clarke*, 11 P. R. 350.

Order for Payment in—*Payment to Solicitor.*]—Where money is ordered to be paid into court, a payment to the solicitor of

the party entitled to it is not a good one, and therefore is no ground for dispensing with payment into court. *Blackburn* v. *Sheriff*, 1 Ch. Ch. 208.

Order for Payment out—*Rescission—Default of Repayment—Contempt—Committal.*]—A solicitor in an action had obtained an order for the payment out to him of certain moneys in court, and upon such order obtained the moneys. Subsequently an order was obtained rescinding the above order and directing the solicitor to forthwith repay the said moneys into court, and to pay the costs of the application. On his non-compliance therewith a motion was made for his committal:—Held, that the order for committal should go, for what was sought by the motion was the punishment of the solicitor for his contempt in disobeying the order of the court; and that con. rule 867 had no application. *Pritchard* v. *Pritchard*, 18 O. R. 175, 178.

See Re Robertson, Robertson v. *Robertson*, 24 Gr. 555, *ante* 7.

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13. *Other Cases.*

Alimony—*Arrest—Bail Bond—Default—Payment into Court.*]—Where a party is entitled to an assignment of a bond, and to realize it for his own benefit, his rights are the same in regard to money deposited; and where in an alimony suit the statutory bond under a writ of ne exeat has been given, the plaintiff is entitled to have the money deposited as collateral security therefor, paid into court, and applied in discharging arrears of alimony. *Richardson* v. *Richardson*, 8 P. R. 274.

Where the plaintiff in an alimony suit obtains a writ of arrest, and the defendant gives bail, and a breach of the bond is committed, the plaintiff is entitled to have the amount for which the writ was marked, paid into court, to be applied from time to time in payment of the alimony and costs:—Semble, upon such payment the sureties are entitled to be discharged from their bond. *Needham* v. *Needham*, 29 Gr. 117.

Costs out of Fund—*Interpleader Issue.*]—Plaintiffs and defendants, being joint owners of a vessel, instituted a suit to have the partnership terminated. The vessel was sold under order of the court, and notes taken in part payment, and deposited with the registrar of the court. Subsequently these notes were sued on in the name of the registrar, and execution obtained, under which the vessel was seized as the property of the makers. Being claimed by certain persons, the sheriff obtained an order for an interpleader between them and the execution plaintiff, but without the leave of the court being asked by the execution plaintiff therefor, or for the litigation at law; and the claimant succeeded in the issue. On motion to have the costs of the issue paid out of the moneys in court:—Held, that the sanction of the court should have been obtained to the contest at law, if the parties meant to look to the fund in court for the costs; and, that not having been obtained, the applicant must make out a special case to get the costs out of the fund. Under the circumstances the costs at law were ordered to be paid, but only between party and party, and on terms. *Macdonald* v. *Carrodi*, 1 Ch. Ch. 145.

Directors—*Admission.*]—On a bill against the directors of an incorporated company for misappropriating the corporate funds, the defendants having answered admitting certain moneys to have been received by the directors, a motion to pay the amount into court was refused. *Hamilton* v. *Desjardins Canal Co.*, 1 Gr. 1.

Expropriation—*Award.*]—Payment into court of amount awarded for compensation of land expropriated by a municipality for a court house site. *In re Beckett and City of Toronto*, 10 O. R. 106.

How Paid in—*Bank.*]—Money ordered to be paid into court must be paid into the Canadian Bank of Commerce, as provided in Con. G. O. 352, and in no other manner. *Bloomfield* v. *Brooke*, 6 P. R. 265.

Judgment.]—See *Stevenson* v. *Sexsmith*, 21 Gr. 355.

——— *Indemnity.*]—Where judgments were recovered against the plaintiff, and he sued the defendants upon a bond of indemnity to recover the amount of the judgments, although he had not himself paid them:—Held, that the defendants should be ordered to pay the amounts into court. *Boyd* v. *Robinson*, 20 O. R. 404.

——— *Price of Goods — Possession.*]—In an action for damages for refusal to accept goods sold, judgment was given for the plaintiff for the full price of the goods as damages, and the defendant was allowed to pay the amount of the judgment and costs into court, to be paid out to the plaintiff upon his shewing that the defendant could obtain possession of the goods. *Tufts* v. *Poncss*, 32 O. R. 51.

——— *Security for Performance—Compromise.*]—A suit having been brought for the specific performance of an agreement of compromise, after amendment of the bill and a special injunction granted, on the merits confessed in answer to the original bill, restraining proceedings at law, judgment was obtained in an action brought by defendants for the recovery of the whole amount originally claimed, but which the plaintiff had always denied his liability to pay. A motion was made—amongst other things—for the payment into court of the amount of the judgment, or for security for the performance, by plaintiff, of the decree of the court. Payment into court was refused, but security ordered to be given for the performance of the articles of compromise, in the event of the same being decreed. *Merritt* v. *Tobin*, 1 O. S. 257.

——— *Set-off — Cross-action.*]—Where there were cross-actions, in one of which a sum had been reported due and a claim of set-off had been disallowed, in a subsequent action brought to recover the sum disallowed, the plaintiff was held entitled to move for judgment under rule 324. But the affidavits filed on the motion being conflicting:—Held, that the action must be entered for trial at the sittings for the examination of witnesses, but the amount found due in the first action was ordered to be paid into court, to abide the result of the second action. *Francis* v. *Francis*, 9 P. R. 209.

Mechanics' Liens—*Discharge of Owner—Costs.*]—In a mechanics' lien action a certain sum was found due from the owner to the contractor, and the latter was found indebted to other lienholders. Payment of the former sum into court was ordered and made, the amount, however, being insufficient to pay the claims of lienholders against the contractor. The latter then appealed unsuccessfully, and was ordered to pay the costs of appeal to the owner, who contended that these costs should be paid out of the moneys paid by her into court:—Held, that by the payment into court for distribution she was discharged from her liability, and the money ceased to be hers, and that she was not entitled to have the costs due to her deducted from the amount paid in. *Patten* v. *Laidlaw*, 26 O. R. 189.

Order for Payment in—*Appeal—Stay of Proceedings.*]—An order for payment of money into court, pending a reference to the master to take accounts, &c., is an order upon which the court will stay proceedings upon the perfecting of the security, in the event of the order being appealed from. *Whitehead* v. *Buffalo and Lake Huron R. W. Co.*, 7 Gr. 578.

——— *Hearing—Report.*]—Where a bill was filed to compel a railway company to carry out a contract entered into by their agent for constructing the road, and the evidence shewed that, at the prices agreed upon, which the company insisted were most exorbitant, a balance of £12,500 was due to the contractor, the court at the hearing ordered that amount into court without waiting for the master's report. *Whitehead* v. *Buffalo and Lake Huron R. W. Co.*, 7 Gr. 351.

——— *Interlocutory Motion.*]—An interlocutory order for payment into court will be made only where, upon all the evidence before it, the court is satisfied that at the hearing a decree must inevitably be made in favour of the party moving. *McClennaghan* v. *Buchanan*, 7 Gr. 92.

——— *Notice—Indorsement.*]—An order for payment of money into court is an order for payment of money within the meaning of Con. G. O. 291. Such an order does not require to be indorsed with the notice, schedule N. to the orders. *Nelson* v. *Nelson*, 6 P. R. 194.

Payment into Bank to Credit of Wrong Cause.]—See *Johnston* v. *Johnston*, 9 P. R. 259.

Protection against Incumbrances.]—See *Armstrong* v. *Auger*, 21 O. R. 98.

Surety—*Amount of Bond Given for Security for Costs.*]—See *Kelly* v. *Imperial Loan Co.*, 10 P. R. 499.

Tender — *Compensation.*] — Defence of tender without payment into court in an action to recover money as compensation for land expropriated. *Demarest* v. *Midland R. W. Co.*, 10 P. R. 640.

II. Payment of Money out of Court.

1. *Appeal Pending.*

Rehearing.]—A sum of money having been paid into court by defendant, instead of being paid to plaintiff, as directed by a decree of the court, upon depositing which proceedings against defendant were stayed, he having signified his intention of appealing from this decree—the plaintiff moved to have this money paid out to him pending the appeal. The defendant upon the motion undertook to enroll the decree at once if plaintiff would consent, and to urge on the appeal to a hearing. The court refused the application, but without costs; and on the application of the defendant the deposit on the rehearing was retained in court for two weeks to enable defendant to proceed with the appeal. *Hill* v. *Rutherford*, 1 Ch. Ch. 121.

Where a certain sum ordered to be paid to the plaintiffs under a decree had, pending a rehearing and appeal, been paid into court by arrangement between the parties, to obtain a stay of proceedings, in lieu of the security required by s.-s. 4 of s. 16 of the Act relating to appeals; and on the appeal the decree was affirmed only in part, that part directing the payment of the money being in part reversed by the amount being reduced to a comparatively small sum; a motion to pay out the money to the party who had paid it in was granted. *Lindsay Petroleum Co.* v. *Hurd*, 3 Ch. Ch. 16.

To Court of Appeal.]—About $40,000 was paid into court during the progress of the suit. The decree dismissed the bill, and ordered payment of the money in court to defendant. The plaintiff appealed, and paid $400 into court as security for costs. Subsequently an order was made by the referee staying payment out to the defendant, pending the appeal, upon the plaintiff giving additional security to the amount of $200 for the difference between the legal interest and that allowed by the court:—Held, on appeal, that such order was not ultra vires nor unreasonable. *McDonald* v. *Worthington*, 8 P. R. 554.

The plaintiffs having moved for an injunction to restrain the sale of goods under execution, the motion was enlarged and the sale permitted to proceed, the money arising therefrom being directed to be paid into court to the credit of the cause, there to abide the further order of the court. The injunction was afterwards refused:—Held, that the payment out of the fund was discretionary with the court, and that pending the appeal to the court of appeal the same should remain in court, but might be paid out on proper security being given. Held, also, no objection that the order refusing the injunction and the order for payment out had not been entered. *King* v. *Duncan*, 9 P. R. 61.

The plaintiffs, who resided in England, obtained a verdict for the price of goods in the defendants' possession. The defendant appealed to the court of appeal. The plaintiffs applied for payment out of $300 paid in by them as security for costs on commencing the action:—Held, that, as the plaintiffs were shewn to have goods in the country, and in the defendants' possession, the $300 should be paid out. But for this the plaintiffs would not have been entitled to the money, the appeal being a step in the original cause, not a new action. *Napier* v. *Hughes*, 9 P. R. 164.

Money paid into court in lieu of giving the usual bond for security for costs will not be paid out to the party paying it in, in whose

favour a decree has been made, pending an appeal to the court of appeal. *National Ins. Co.* v. *Egleson*, 9 P. R. 202.

To Privy Council.]—Right to recover in action money paid out of court on Judge's order pending appeal to privy council. See *Citizens' Ins. Co.* v. *Parsons*, 32 C. P. 492.

To Supreme Court of Canada.]—The defendants paid $400 into court as security for the costs of an appeal from an interlocutory order, and afterwards another $400 as security for the costs of an appeal from the decree at the hearing, and afterwards another $400 as security for the costs of an appeal from an order refusing a stay pending the appeal. These three appeals were all allowed, and the plaintiff then appealed to the supreme court of Canada, notwithstanding which an order was made for payment out of court of the $1,200 to the defendants:—Held, that where money has been paid into court for a specific purpose, and that purpose has been answered in favour of the person paying it in, it will be paid out to that person. *McLaren* v. *Caldwell*, 9 P. R. 118.

On the 16th November, 1881, an order was made directing D. to pay a certain sum of money into court. D. appealed from this order to the court of appeal, and for the purpose of staying execution, instead of giving security, as required by R. S. O. 1877 c. 38, s. 4, he paid this sum into court, being authorized so to do by an order in chambers. On the 27th October, 1883, the court of appeal reversed the order of the 16th November, 1881. The respondents then gave notice of appeal to the supreme court of Canada:—Held, that the money paid in by D. must be taken to have been so paid in lieu of the bond required by the statute; that when the decision in appeal was given in D.'s favour, the money had served the purpose for which it was paid; and that it ought to be repaid. *Re Donovan, Wilson* v. *Beatty*, 10 P. R. 71.

The defendants, being entitled by the judgment of the court of appeal to the costs of the action, obtained out of court for suit the bond given by the plaintiff for security for such costs. Before action on the bond, and pending an appeal by the plaintiff from the judgment of the court of appeal to the supreme court of Canada, one of the sureties on the bond obtained leave and paid into court $400, the amount due on the bond, to abide further order. Upon the application of the defendants, an order was made directing that $200 of the $400 be paid out to the solicitors, upon the solicitors undertaking to refund the amount if the supreme court of Canada should vary the disposition of costs made by the court of appeal. *Kelly* v. *Imperial Loan Co.*, 10 P. R. 499.

The defendants succeeded at the trial, in the divisional court, and in the court of appeal. Pending an appeal by the plaintiffs to the supreme court of Canada, the defendants applied for payment out of court to them of a sum paid in by the plaintiffs representing the whole subject matter of the litigation:—Held, that the application was in the discretion of the court; that that discretion should be exercised in the same way as upon an appeal to the court of appeal; and that the application should therefore be refused, following King v. Duncan, 9 P. R. 61. *Canadian Land and Emigration Co.* v. *Township of Dysart*, 11 P. R. 51.

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

The plaintiffs appealed to the court of appeal from a judgment of the high court dismissing their action with costs, and gave the security for the costs of appeal required by s. 71 of the Judicature Act, by paying $400 into court, and also gave the security required by rule 804 (4), in order to stay the execution of the judgment below for taxed costs, by paying $322.14 into court. Their appeal was dismissed with costs. Desiring to appeal to the supreme court of Canada, they paid $500 more into court, and this was allowed by a Judge of the court of appeal as security for the costs of the further appeal:—Held, that execution was stayed upon the judgments of the high court and court of appeal until the decision of the supreme court. Construction of ss. 46, 47 (e), and 48 of the Supreme and Exchequer Courts Act, R. S. C. c. 135. Semble, that payment out of the moneys in court to the defendant of his costs of the high court and court of appeal, upon the undertaking of his solicitors to repay in the event of the further appeal succeeding, could not properly be ordered. Kelly v. Imperial Loan Co., 10 P. R. 499, commented on. *Agricultural Ins. Co.* v. *Sargent*, 16 P. R. 397.

See Billington v. *Provincial Ins. Co.*, 9 P. R. 67 n.

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2. *Creditors' Claims.*

Judgment — *Consent—Parties — Costs.*]—The undertaking of the defendants having been sold by the provisional directors, free of all liens and incumbrances, for a certain sum of money, which was paid to them, and a portion of which was paid into court under an order in another action; all the provisional directors being parties to this action, and two of them submitting to the order of the court and being willing that the judgment debt should be paid out of the fund in court; an order was made, notwithstanding that the purchasers were not parties, directing payment of the plaintiff's debt and costs and of the costs of the two directors out of such fund. *Allen* v. *Ontario and Rainy River R. W. Co.*, 29 O. R. 510.

Stop Order—*Assignments—Priorities.*]—H. M. C., being entitled to certain moneys in court, obtained certain advances from A. H., and gave him a power of attorney to indorse any cheques issued to him by the court and repay himself. Subsequently H. M. C. obtained another advance from W. H., and assigned all his interest in the funds in court to W. H., which assignment was duly filed in the accountant's office and entered in the accountant's books and acted on for three years. W. H. had no notice of A. H.'s power of attorney. A. H. recovered a judgment against H. M. C. for the amount due him in December, 1883, and obtained a stop order in October, 1885. On a motion for payment out to A. H., which was resisted by W. H., who claimed all the moneys under his assignment:—Held, that the court is the custodian of the fund and not the accountant, and that notice to the accountant of an assignment of funds in court is not tantamount to notice of the assignment of a trust fund to a private trustee, and that a stop order is the proper way of perfecting such security. *Cottingham* v. *Cottingham*, 11 O. R. 294.

——— *Creditors' Relief Act—Priorities.*]—Since the coming into force of the Creditors' Relief Act, 1880, 25th March, 1884, execution creditors who obtain stop orders on funds in court do not obtain any priority thereby, but all must share ratably. As some of the provisions of the statute are to enable simple contract creditors to come in and obtain the position of execution creditors, they must have the same right with regard to funds in court as they would have with regard to funds in the sheriff's hands, and in any case where an execution creditor obtains a stop order there must be a reference to the master to ascertain if any other creditors desire to ask a share of the fund. *Dawson* v. *Moffatt*, 11 O. R. 484.

———*Judgment Creditor.*]—Where a judgment creditor petitioned for payment out to him, or that the sheriff might be permitted to seize, under writs in his hands, funds in court standing to the credit of his debtor upon which a stop order had been issued before the cheque was drawn, an order was made directing a cheque to be made out in favour of the petitioner. *Re Gilchrist, Bohn* v. *Fife*, 7 P. R. 430.

——— *Simple Contract Creditor—Creditors' Relief Act.*]—A stop order upon a fund in court to which defendant was entitled, was granted in favour of a simple contract creditor who had not obtained judgment, there being another creditor with execution in sheriff's hand against defendant. *Steckle* v. *Byers*, 10 C. L. T. Occ. N. 41.

Surplus Proceeds of Mortgage Sale—*Creditors' Relief Act—Sheriff—Distribution.*]—Where the surplus proceeds of a mortgage sale were paid into court by the mortgagees, and claimed by execution creditors of the mortgagor, whose executions were in the hands of the sheriff at the time of the sale:—Held, following Dawson v. Moffatt, 11 O. R. 484, and having regard to the provisions of s. 24 of the Creditors' Relief Act, R. S. O. 1887 c. 65, that the fund in court should be paid to the sheriff for distribution in accordance with the provisions of that Act. *Re Bokstal*, 17 P. R. 201.

3. *Infants' Moneys.*

Executors and Administrators—*Right to Money in which Infants Interested.*]—A sum of money left by a testator in his will to his daughter, who predeceased him, was paid into court by his executors. The daughter, by her will, had disposed of the moneys which she expected from her father's estate, leaving part to her husband and part to her infant children, naming her husband executor, and directing him to invest the infants' shares and expend the interest for their maintenance. It was admitted by the official guardian on behalf of the infants that there was no reason to anticipate danger to the money if paid out to the executor:—Held, that the will of the testatrix should be respected, and the infants' money paid out to the executor. *Re McDougall Trusts*, 11 P. R. 494.

The administratrix of a deceased party who had died before the Devolution of Estates Act came into force was allowed to take out of court a sum of $210, which was part of the personal estate of the deceased, notwithstanding that two infants were among the next of kin who would be entitled to share in the estate after the payment of debts, &c. Hanrahan v. Hanrahan, 19 O. R. 396, followed. *Re Parsons, Jones* v. *Kelland*, 14 P. R. 144.

Money in court belonging at the time of her death to an intestate was paid out to her administrator, notwithstanding that infants might be or might become entitled to it or a share of it. Semble, if the money belonged specifically to infants, the disposition might be otherwise. *Stewart* v. *Whitney*, 14 P. R. 147.

Guardian — *Right to Money—Maintenance.*]—Money paid into court to the credit of infants will not be paid out to their guardian appointed by a surrogate court, upon his application, as a matter of right: though, in a proper case, an allowance for their maintenance and education may be made to him out of such moneys. Re J. T. Smith's Trusts, 18 O. R. 327, followed. Huggins v. Law, 14 A. R. 383, and Hanrahan v. Hanrahan, 19 O. R. 396, distinguished. *Re Harrison*, 18 P. R. 303.

Insurance Moneys — *Foreign Tutrix — Trustee.*]—The provisions of ss. 155 and 157 of the Ontario Insurance Act, 60 Vict. c. 36, provide a special mode for dealing with the shares of infants in insurance moneys, and exclude the application of the ordinary rules of law so far as inconsistent therewith. And therefore a tutrix of infants duly appointed in the Province of Quebec is not entitled quâ tutrix to moneys of the infants paid into court under s. 157 of the Act; but she may, under s. 155, s.-s. 2, be appointed a trustee of the fund and receive it, upon giving proper security. *Re Berryman*, 17 P. R. 573.

Legacy—*Vested Interest — Assignment — Distribution.*]—Two devisees of full age having a vested interest absolute in a definite fund in court, although not divisible by the terms of the will until a third devisee attained twenty-one, having assigned their interest in the fund to a purchaser, the court, the estate having been otherwise wound up, made an order for payment out to the assignee, without waiting for the period of distribution. *Re Wartmen*, 22 O. R. 601. See also *Goff* v. *Strohm*, 28 O. R. 553.

Maintenance—*Contingent Interest—Life Insurance.*]—An order was made for payment, out of a fund in court to which an infant was contingently entitled, of an allowance for his maintenance, upon security being given by way of life insurance for the benefit of those who would be entitled upon the death of the infant under full age. Re Arbuckle, 14 W. R. 585, followed. *Re Campbell*, 18 P. R. 409.

Marriage of Infant—*Majority—Foreign Law.*]—Where a female was entitled at majority to payment out of court of a sum of money, and it appeared that, although only nineteen years of age, she was married and domiciled in a foreign country, by the laws of which a female is entitled upon marriage to receive money due her, an order was made for immediate payment out. *Kavanagh* v. *Lennon*, 16 P. R. 229.

Order for Payment out — *Judicature Act.*]—An order was made before the passing of the O. J. Act directing certain ascertained shares then in court to be paid out to certain infants as they respectively came of age:—Held, that the shares might be paid out without any further order, notwithstanding rule 424, O. J. Act. *Re Cameron Infants*, 9 P. R. 77.

See Huggins v. *Law*, 14 A. R. 383; *Hanrahan* v. *Hanrahan*, 19 O. R. 396; *Re Thompson, Thompson* v. *Thompson*, 19 P. R. 304, *post* 5.

See next sub-head.

See INFANT.

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4. *Investment of Money Paid into Court.*

Government Stock.] — Since the establishment of a government Dominion stock, the investment of infants' money by the court should, as a general rule, be in such stock, rather than, as formerly, in mortgages. *Kingsmill* v. *Miller*, 15 Gr. 171.

Legacy to Married Woman—*Purchase of Farm.*]—A legacy had been paid into court, and the will directed that it, together with a house and lot also devised to the same person, should be held for the legatee independently of her husband, she receiving the rents, interest, and profits. On a motion to have the money paid out, or that it might be invested in the purchase of a farm for the legatee's benefit:—Held, that it was in the jurisdiction of the court to make such an order, and the application was granted as to the purchase of the farm, but refused as to the paying of the money to her absolutely. *In re Trusts of Turner's Will, Ex p. Seaton*, 3 Ch. Ch. 259.

Loan — *Security — Borrower's Credit.*]—The court will not grant a loan of money except to persons of undoubted credit, apart from the question of value of security offered. Where the applicant was a young woman residing with her father, the application was refused. *Attorney-General* v. *Alexander*, 3 Ch. Ch. 301.

Mortgage Security.]—As a general rule, loans of money in court cannot be made on property on which there is any prior charge, however small, unless all parties interested consent. *Andrews* v. *Hempstreet*, 1 Ch. Ch. 347.

Primâ facie money in court should be invested in the public funds; but the court has, under C. S. U. C. c. 12, s. 72, a discretion to authorize investments on mortgages of real estate. *Re Cronan, Farrell* v. *Scanlon*, 6 P. R. 221.

Trustee Company—*Payment out to, for Investment.*]—On an application by a trustee company, and a party who was entitled for life to the income of a fund in court, which was the proceeds of the sale of certain settled estates, for the payment out of the fund for the purpose of investment by the company as trustees (they having been appointed the trustees under the will which devised the settled estates), which application was opposed by the official guardian on behalf of the remainderman:—Held, that the practice and current of authority were against what was asked by the petitioners, and that they were not entitled to it as a matter of right, and that the application must be dismissed. *Re J. T. Smith's Trusts, No. 2*, 18 O. R. 327.

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5. *Lunatics' Moneys.*

Life-tenant — *Foreign Guardian—Maintenance.*]—During the infancy of the defendant $2,000 was paid into court, to one-half of which she was entitled on attaining majority, and to the other half after the death of her mother. The defendant having come of age, but being of unsound mind, and residing abroad with her mother, who had been appointed her guardian by a foreign court, the mother applied for payment out of the whole fund, having given in the foreign court specific security for the amount:—Held, as to the half of the fund in which the applicant had a life interest, that it might be paid out to proper trustees appointed to administer and safeguard it, or it might be paid out to the applicant upon substantial security being given. Held, as to the other half, that, being actually in the hands of the court, it was subject to the jurisdiction of the court, and should be applied for the support and maintenance of the person of unsound mind, in the discretion of the court—whatever sum should be shewn to be necessary for maintenance being paid to the foreign guardian. *Re Thompson, Thompson* v. *Thompson*, 19 P. R. 304.

Maintenance.]—Money in court to the credit of a lunatic, though not so found, was directed to be paid out in annual sums for maintenance. *Re Hinds, Hinds* v. *Hinds*, 11 P. R. 5.

———*Inspector.*]—Sections 48 and 49 of the Act respecting lunatic asylums and the custody of insane persons, R. S. O. 1887 c. 245, providing that the inspector of prisons and public charities may take possession of the property of lunatics to pay for maintenance, do not apply to money in court. Where the property of the lunatic is money in court, the inspector must apply for payment out under s. 61, and must shew clearly that the person to whom the money in court belongs is a lunatic, and that the purpose for which the money is sought is to pay charges for maintenance of the lunatic in a public asylum;

but it is not necessary, having regard to s. 1, s.-s. 2, that the person shall have been, or shall be, declared a lunatic. *Re McKenzie, Re Lind, Re Campbell*, 14 P. R. 421.

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6. *Mortgage Suits.*

Application—*Costs.*] — Where defendant refused to consent to payment of the mortgage money out of court, the plaintiff obtained an order for such payment, but at his own costs. *Bernard* v. *Allen*, 2 Ch. Ch. 91.

——— *Notice.*]—The purchase money for lands sold under a mortgage was paid into court:—Held, that the mortgagor must have notice of any application to pay out to plaintiff the amount found due him by the master's report. *Smith* v. *Kerr*, 3 Gr. 609.

An order for the payment of money out of court will not be made ex parte; the party who has paid it in must be served with notice. *Bullen* v. *Renwick*, 1 Ch. Ch. 213.

The court will not grant an order on an ex parte application, unless the practice distinctly authorizes it. An application for payment out of redemption money in court, was refused. *Totten* v. *McIntyre*, 2 Ch. Ch. 462.

Mortgagee's Claim — *Amount — Reference.*]—A report had been made in a suit for the sale of mortgaged property, finding that the plaintiff (the mortgagee) was the only incumbrancer on the property, and that the amount due to him was £235 12s. 10d. The property was sold for £261, and the purchase money had been paid into court. Two years after the report, a motion for payment of the whole purchase money out of court to the plaintiff was granted, without a reference to the master to take a subsequent account, it being clear that the interest and the costs of the sale would make the plaintiff's claim larger than the amount of the purchase money paid in. *Gilmour* v. *O'Brien*, 1 Ch. Ch. 244.

Solicitor—*Payment to—Power of Attorney.*]—A power of attorney or other written authority is necessary to authorize the payment of money out of court to the solicitor, even though the parties to whom it is coming are numerous, and not resident in America. The additional circumstance of the money having been realized from the sale of property mortgaged to secure negotiable debentures, which were in the possession of the solicitor since the institution of the suit:—Held, not to dispense with the necessity of a power of attorney. *Swan* v. *Marmora Iron Works Co.*, 2 Ch. Ch. 155.

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7. *Purchase Money of Land.*

Tax Sale—*Redemption Money.*]—After a purchaser of land sold under a decree had accepted a vesting order, he ascertained that the land had been sold for taxes:—Held, that the purchaser was entitled to payment, out of the money in court, of the amount required to redeem. *Turrill* v. *Turrill*, 7 P. R. 142.

Taxes — *Interest — Repayment to Purchaser.*]—When a purchaser had paid school taxes for the year and had paid his purchase money, the plaintiff having received the rents and profits up to a time subsequent to the payment of the money into court, and subsequent to the end of the year for which the taxes had been paid:—Held, upon an application on behalf of the plaintiff to have the money paid out to him, that the purchaser was entitled to be repaid the taxes and the interest on his purchase money during the time the plaintiff received the rents and profits, the plaintiff to have the excess (if any) of such interest over the rents and profits. *Youreæ* v. *Alcombrack*, 13 C. L. J. 226.

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8. *Other Cases.*

Bill—*Dismissal.*]—Application for payment of money out of court, on plaintiff dismissing his bill, granted. *Clarke* v. *Manners*, 1 O. S. 278.

Controverted Election Trial—*Deposit — Courts.*[— A petition filed on the 6th February, 1875, against an election held in December, 1874, was intituled in the election court, which court had been abolished by 37 Vict. c. 10 (D.), passed on the 26th May, 1874, except as regarded elections held before that Act. The deposit of $1,000 was made on the same day with D., who was clerk of the election court as well as to the court of Queen's bench, and who signed a receipt for it as clerk of the election court, headed in that court:—Held, that the court of Queen's bench had no power to make an order on D. to pay out the money, he having received it as clerk of another court. *In re Kingston Election, Stewart* v. *Macdonald*, 41 U. C. R. 310.

Costs out of Fund — *Revision of Taxation.*]—See *Cousineau* v. *City of London Fire Ins. Co.*, 13 P. R. 36.

———*Sale of Vessel — Interpleader.*] — See *Macdonald* v. *Carrodi*, 1 Ch. Ch. 145.

Lien of Solicitor on Fund in Court.] —See *Re Ryan*, 11 P. R. 127; *Yemen* v. *Johnston*, 11 P. R. 231.

Moneys Paid in by Garnishee—*Disposition of.*]—Where moneys have been voluntarily deposited by a garnishee in the hands of the prothonotary, and the attachment of such moneys is subsequently quashed by a final judgment of the court, there being then no longer any moneys subject to a distribution or collocation, such moneys cannot be claimed by an opposition en sous ordre. *Barnard* v. *Molson*, 15 S. C. R. 716.

Moneys Paid in by Sheriff — *Master's Charges.*]—Where the plaintiff obtained an order to take out of court money paid in by the sheriff, on the condition that he should pay the master's charges, and was given to understand that he might either take it on these terms or sue the sheriff for it:—Held, that having availed himself of this order, he could not afterwards recover from the sheriff the fees paid to the master, on the ground that the money had been improperly paid into court. *Crombie* v. *Davidson*, 19 U. C. R. 369.

Next of Kin of Deceased Party Entitled.] — Money in court will not be paid out to the next of kin of deceased parties without a personal representative having

been appointed and made a party by revivor, except in simple cases, where the sum in court is small, and the circumstances are such that the court can see that it is safe to dispense with administration or revivor or both, in order to save costs. *Mulock* v. *Cawthra*, 13 P. R. 455.

Order of Payment out—*Jurisdiction of Master in Chambers.*]—See *Re Devitt*, 9 P. R. 110.

——— *Jurisdiction of Referee.*] — Where money is paid into court under an order giving leave to "apply at chambers" for its payment, the referee has jurisdiction to make the order for payment out. *In re Selby*, 8 P. R. 342.

Performance of Undertaking—*Condition of Payment out.*]—See *Robson* v. *Wride*, 13 Gr. 419.

Taking out Money Paid into Court with Defence.]—See *ante* I. 1.

Taking out Money Wrongfully or by Mistake—*Restoration.*]—See *ante* I. 9.

Wages and Disbursements — *Lien on Ship—Vouchers.*]—In delivering judgment in favour of a lien-holder in respect of a claim for wages and disbursements made and liabilities incurred on account of a ship, the court directed, in regard to the unpaid liabilities incurred, that vouchers of their due payment must be filed by the lienholder with the registrar before the former could receive out of court sums awarded in respect of his claim. *Symes* v. *The "City of Windsor,"* 4 Ex. C. R. 262.

III. Payment to Creditors.

1. *Generally—What Amounts to Payment.*

Arrangement with Solicitor — *Advance of Money to Insolvent Debtor—Preference—Knowledge.*]—In order to give a preference to a particular creditor, a debtor, who was in insolvent circumstances, executed a chattel mortgage upon the stock-in-trade in favour of a money-lender by whom a loan was made. The money, which was in the hands of the mortgagee's solicitor, who also acted for the preferred creditor throughout the transaction, was at once paid over to the creditor, who, at the same time, delivered to the solicitor, to be held by him as an escrow and dealt with as circumstances might require, a bond indemnifying the mortgagee against any loss under the chattel mortgage. The mortgagee had previously been consulted by the solicitor as to the loan, but was not informed that the transaction was being made in this manner to avoid the appearance of violating the Acts respecting assignments and preferences and to bring the case within the ruling in Gibbons v. Wilson, 17 O. R. 1:—Held, that all the circumstances, necessarily known to his solicitor in the transaction of the business, must be assumed to have been known to the mortgagee, and the whole affair considered as one transaction contrived to evade the consequences of illegally preferring a particular creditor over others, and that, under the circumstances, the advance made was not a bonâ fide payment of money within the meaning of the statutory exceptions. *Burns* v. *Wilson*, 28 S. C. R. 207.

——— *Mortgage — Transfer of Loan.*] — The defendant, the mortgagor, being unable to pay off plaintiff's mortgage, at the suggestion of the plaintiff's attorney borrowed the required amount from the moneys of another client in the attorney's hands, with which the attorney was to pay off the plaintiff's mortgage, the defendant giving another mortgage therefor:—Quære, whether this arrangement amounted to a payment of the plaintiff's mortgage to the attorney. *Palmer* v. *Winstanley*, 23 C. P. 586.

Debiting Customer's Account — *Bank—Cheque.*]—The plaintiff, a merchant and customer of defendants' bank, having a note payable there on the 28th January, 1873, made a cheque payable to himself or bearer, and left it with defendants to meet the note. The cheque, however, was not used for that purpose nor returned to the plaintiff, but the note was paid by defendants and charged to plaintiff's account. The cheque was afterwards, on the 31st January, 1874, presented to the defendants by some one unknown, the year having been changed from 1873 to 1874, and it was paid by defendants without noticing the alteration, and charged to the plaintiff's account. How it got out of defendants' bank was not ascertained:—Semble, that the cheque must be considered to have been paid when the note for which it was given was handed over by defendants to plaintiff, and on that ground the plaintiff could not have been made liable upon it. *Beltz* v. *Molsons Bank*, 40 U. C. R. 253.

——— *Bank—Promissory Note.*] — Defendants were the bankers of both the plaintiff and one E., and E. having given a note payable to the plaintiff at the defendants' bank, the plaintiff, about two weeks before its maturity, left it with defendants for collection, and to be protested if not paid. On the 4th December, the day of its maturity, the ledger keeper debited E.'s account and credited the plaintiff's with the amount of the note, and on the plaintiff calling at the bank next morning, he received his pass book with an entry crediting him with the amount of the note. Subsequently the manager — on the ground that the entry had been made by the clerk by mistake and without authority, as E.'s account was then overdrawn—caused the entry to be reversed, and refused to pay plaintiff the amount of it. E. stated that he always gave authority to pay each particular note, which he did not do here; and the manager stated that without such authority it was not the custom of the bank to pay any note:—Held, that the plaintiff was entitled to recover the amount of the note from the bank: that by the general law the plaintiff, by making the note payable at defendants' bank, authorized them to pay it; and that the act of the ledger keeper in charging it to E.'s account and crediting it to the plaintiff in his account and pass-book, amounted to a payment of the note, and was irrevocable. *Nightingale* v. *City Bank of Montreal*, 26 C. P. 74.

Proceeds of Discount—*Subsequent Dishonour of Bill.*]—The plaintiff held defendant's mortgage, with a condition that the whole principal should become payable if the interest was in arrear for ten days. By agreement between them, plaintiff drew on defendant for the interest (at three days' sight) a few days before it became due, which draft was discounted by plaintiff at his bank, and the proceeds placed to his credit prior to

the expiration of the ten days, and was afterwards accepted by defendant; but upon maturity was dishonoured and charged to plaintiff's account. The defendant contended that, the interest having been received by the plaintiff (by the discount) before the ten days expired, forfeiture could not be claimed:—Held, that it was in fact no payment, and that the whole mortgage money was due. *Cameron* v. *Knapp*, 7 C. P. 502.

Seizure under Execution—*Sale—Value of Goods.*] — The plaintiffs sued defendants, H., M., and S., as joint makers of a note. S. pleaded that a judgment had been obtained in this suit against all three defendants, and set aside as against S., but under the fi. fa. sued out upon it the sheriff had seized goods of H. and M. more than sufficient to satisfy the judgment and costs, and that he had made thereout £50, and still held the rest of the goods, out of which he could make the residue:—Held, that the plea was not supported, the evidence being that all the goods seized brought only £9 at the sale. Quære, whether the plea formed a good defence. *Kerr* v. *Hereford*, 17 U. C. R. 158.

Set-off — *Contra Account.*] — In a mechanic's lien action the owner of the property had an old account against the contractor for bread supplied, which account, with interest, he charged against the sums due to the contractor under the contract:—Held, upon the evidence, that the account and interest should be treated, not as a matter of set-off, but as a payment of so much of the contract price. *Truax* v. *Dixon*, 17 O. R. 366.

——— *Item of Account.*] — The plaintiff wrote to defendant, who had a demand against one C., saying that C. had asked him to settle the claim with defendant, and requested him, therefore, to charge it to his, the plaintiff's, account. It was not proved that any account had been rendered by defendant in which he took credit to himself for this as a payment on any particular account: — Held, that this must be considered merely as an item of set-off, and not as a payment. *Notman* v. *Crooks*, 10 U. C. R. 105.

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

Supposed Services — *Parties not ad Idem.*]—One M., a carter, who voted for respondent at the request of P., the respondent's agent, carried a voter five or six miles to the polling place, saying that he would do so without charge. Some days after the election, P. gave M. $2, intending it as compensation for such carriage, but M. thought it was in payment for work which he had done for P. as a carter. The candidate knew nothing of the matter:—Held, that there was properly no payment by P. to M. for any purpose, the money being given for one purpose and received for another; but that, if there was a payment, it was made after P.'s agency had ceased, and there was no previous hiring or promise to pay to which it could relate back. *In re Election for Brockville and Elizabethtown*, 32 U. C. R. 132.

Surrender of Promissory Notes.]—A. and B. formed a limited partnership, A. to be the general partner, and B. the special, contributing £750. B. held A.'s notes for that sum, which he gave up to A. by way of payment:—Held, not a payment in money within the statute. *Benedict* v. *Van Allen*, 17 U. C. R. 234.

Tender — *Railway Fare.*] — Plaintiff got upon the train without a ticket, and when asked for his fare declined paying then, as he said he had not made up his mind how far he should go. The conductor said he must decide, and afterwards, on his declining again on the same ground, stopped the train and put him out. The plaintiff at last tendered a $20 gold piece, telling the conductor to take his fare, $1.35, out of it: — Held, that the plaintiff had refused to pay his fare, within the meaning of 14 & 15 Vict. c. 51, s. 21, s.-s. 6, and that defendants' servant was justified in what he did. *Fulton* v. *Grand Trunk R. W. Co.*, 17 U. C. R. 428.

——— *Taxes.*] — Defendant, as treasurer, returned the plaintiff's land as part of a tract on which taxes were unpaid. The plaintiff tendered the amount of taxes on his own portion, which defendant refused to accept, and the land was sold:—Held, that an action would not lie against the treasurer for not accepting the redemption money, the tender to and refusal by the latter being equivalent to payment; and that therefore the plaintiff had not lost his land. *Cunningham* v. *Markland*, 5 O. S. 645.

Third Person—*Payment to on Account of Creditor—Direction.*]—The plaintiffs, N. and T., entered into a joint contract for the performance of certain work for defendants, to be paid for monthly, as it progressed. The defendants through their treasurer opened accounts and paid moneys on orders, making the cheques payable to N. & T., which cheques were indorsed sometimes by N. and sometimes by T., in the name of N. & T. Upon an action brought for a balance of $496.81, defendants pleaded a tender before action and payment into court of $256.81, and an order and payment thereunder in the following words: "Brantford, 31st July, 1858. Allan Cleghorn, Esq. Reserve $300 from the central school, payable to Ritchie & Russell, N. & T." This was signed by T.:—Held, that the payment thereunder was a payment on account of the plaintiffs, and could not be recovered again. *North* v. *Brantford School Trustees*, 10 C. P. 401.

Transfer of Account by Creditor — *Appropriation of Payments.*] — M. died in

November, 1847, indebted to the plaintiff in £35, having appointed defendant his executrix. The account was continued after his death, and was afterwards rendered to defendant and headed as against widow M., and further advances were made to her from time to time and payments made by her on account, down to August, 1849, the payments amounting to far more than the debt due from the testator. In December, 1849, a confession of judgment was obtained from defendant, as executrix of the testator. On a rule nisi to set aside the judgment entered on the confession:—Held, that the plaintiff, having transferred his claim against the estate to the individual account with the defendant, and with her assent, and having since received more than sufficient to cover the debt of the estate, could not sever the two accounts and fall back upon the estate for the amount due at the testator's death; and the judgment was set aside. *Beatty* v. *Maxwell*, 1 P. R. 85.

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2. *Appropriation of Payments.*

(a) *General Principles.*

Direction — *Option* — *Presumption.*] — Where a debtor is indebted upon two accounts, the creditor has his election to place a payment to which he pleases, unless there is a specific direction for its application, or circumstances tantamount to one. *Hagerman* v. *Smith*, Tay. 123.

Under special circumstances, however, the law will sometimes make the appropriation, and take the option out of the hands of the creditor. *Cummings* v. *Glassup*, 1 U. C. R. 364.

If a debtor pay a sum of money to a judgment creditor who has also a claim on a current account, and no directions be given, the creditor may apply such payment to the account, though the judgment were earlier in date. *Armour* v. *Carruthers*, 4 L. J. 210.

Plaintiff sued for £70 balance of accounts, and proved himself entitled to £59 19s. 5d.:—Held, that defendant could not prove payments made on the whole account, and apply the same in reduction of the balance sued for. *Wood* v. *Allen*, 1 C. P. 300.

A party receiving a cheque to be applied in a particular way, cannot afterwards apply it otherwise, even although he may not have given a receipt. *Canada Powder Co.* v. *Burley*, 9 C. P. 290

If money is not expressly appropriated by the party paying it, the party receiving it may appropriate it even upon a claim which he cannot enforce by suit. *Fraser* v. *Love*, 10 Gr. 207.

Appropriation of payments is to be made (1) as the debtor directs at the time of payment; (2) when there is no direction by the debtor, as the creditor directs; (3) when neither makes any direction, then the law will apply it to the older debt, or as may be just. *Wilson* v. *Rykert*, 14 O. R. 188.

Appropriation of payments is a question of intention; and where a creditor takes security for an existing indebtedness, and thereafter continues his account with the debtor in the ordinary running form, charging him with goods sold, and crediting him with moneys received, and crediting and charging notes on account in such a way as to render the original indebtedness undistinguishable, there is no irrebuttable presumption that the payments are to be applied upon the original indebtedness. *Griffith* v. *Crocker*, 18 A. R. 370.

(b) *Particular Cases.*

Attachment— *Sheriff.*] — Upon the evidence set out in the report of this case, the question was, whether the sheriff had not appropriated the money in defendants' hands to the attachment, without reference to the decision of the court, and the jury having found for the plaintiff, the verdict was sustained. *Carrall* v. *Montreal Bank*, 21 U. C. R. 18.

Bank—*Borrowing from Crown — Deposit Receipts—Error in Appropriation.*]—A bank borrowed from the Dominion government two sums of $100,000 each, giving deposit receipts respectively numbered 323 and 329. The bank asked for a further loan of a like amount, which was refused, but afterwards the loan was made, on O., one of the directors of the bank, becoming personally responsible for repayment, and the receipt for such last loan was numbered 346. The government having demanded payment of $50,000 on account, that sum was transferred in the bank books to the general account of the government, and a letter from the president to the finance department stated that this had been done, enclosed another receipt number 358 for $50,000 on special deposit, and concluded: "Please return deposit receipt No. 323—$100,000 now in your possession." Subsequently $50,000 more was paid, and a return of receipt No. 358 requested. The bank having failed, the government took proceedings against O., on his guarantee for the last loan made, to recover the balance after crediting said payments and dividends received. The defence to these proceedings was, that it had been agreed between the bank and O. that any payments made on account of the borrowed money should be first applied to the guaranteed loan, and that the president had instructed the accountant so to apply the two sums of $50,000 paid, but he had omitted to do so. The trial Judge gave effect to this objection and dismissed the information of the Crown:—Held, reversing the judgment in 6 Ex. C. R. 21, that, as the evidence shewed that the president knew what the accountant had done and did not repudiate it, and as the act was for the benefit of the bank, the latter was bound by it; that the act of the government in immediately returning the specific deposit receipts when the payments were made was a sufficient act of appropriation by the creditor within Art. 1160, C. C., no appropriation at all having been made by the debtor, on the hypothesis of error; and, if this were not so, the bank could not now annul the imputation made by the accountant unless the government could be restored to the position it would have been in if no imputation at all had been made, which was impossible, as the government would then have had an option which could not now be exercised. *The Queen* v. *Ogilvie*, 29 S. C. R. 289.

Bond — *General Account* — *Creditors.*] — Where the defendant gave a bond payable

at a distant period, and the plaintiffs continued their dealings with him, sending accounts which contained debits and credits, including the sum for which the bond was given, though the last of them was rendered before the time for the payment of the bond had arrived:—Quære, could the defendants treat the credits contained in these accounts as payment on the bond? *Maitland* v. *Secord*, 1 Pra. 456.

Chattel Mortgage—*Unsecured Debt—Set-off.*]—A trader carrying on business in two establishments mortgaged both stocks-in-trade to B. as security for indorsements on a composition with his creditors and for advances in cash and goods to a fixed amount. The composition notes were made and indorsed by B., who made advances to an amount considerably over that stated in the mortgage. A few months afterwards the mortgagor was in default for the advances and a portion of overdue notes, and there were some notes not matured, and B. consented to the sale of one of the mortgaged stocks, taking the purchaser's notes in payment, applying the amount generally in payment of his overdue debt, part of which was unsecured. A few days afterwards B. seized the other stock of goods covered by his mortgage, and about the same time the sheriff seized that stock under execution, and shortly afterwards the mortgagor assigned for benefit of creditors. An interpleader issue between B. and the execution creditor resulted in favour of B., who received, out of the proceeds of the sale of the goods under an order of the court, the balance remaining due on his mortgage: Horsfall v. Boisseau, 21 A. R. 665. The assignee of the mortgagor then brought an action against B. to recover the amount representing the unsecured part of his debt, which was paid by the purchase of the first stock, which payment was alleged to be a preference to B. over the other creditors:—Held, affirming the decision in 23 A. R. 250, that there was no preference to B. within R. S. O. 1887 c. 124, s. 2; that his position was the same as if his whole debt, secured and unsecured, had been overdue, and there had been one sale of both stocks of goods realizing an amount equal to such debt, in which case he could have appropriated a portion of the proceeds to payment of his secured debt, and would have had the benefit of the law of set-off as to the unsecured debt under s. 23 of the Act; and that the only remedy of the morigagor or his assignee was by redemption before the sale, which would have deprived B. of the benefit of such set-off. *Stephens* v. *Boisseau*, 26 S. C. R. 437.

Defalcations—*Earlier Items of Default—Guarantee Policy.*]—B. was a defaulter to the plaintiffs. Soon after his defalcations were discovered he died, and after his death his executrix handed over certain of his property to a trustee, who was also an officer of the plaintiffs, to realize and apply the money therefrom towards satisfying B.'s defalcations, but without indicating to what part of such defalcations it should be applied. The trustee applied it towards satisfaction of the earlier of B.'s liabilities, in respect to which the defendants, a guarantee company, were not liable, since by a condition of their policy they were not to be liable except for losses occurring within a year before notice of claim made to them:—Held, that the case was similar to payment made by a debtor to a creditor without express appropriation, in which case the creditor could appropriate it, and the defendants had no right to complain of the appropriation made in this case. *City of London* v. *Citizens' Ins. Co.*, 13 O. R. 713.

Goods Sold—*Old and New Account—Agreement—Breach.*]—Defendant employed the plaintiff, a butcher, to supply his steamer with meat. At the close of 1851 he was indebted to the plaintiff, and authorized the captain of his steamer to pay this balance out of her earnings in 1852. The defendant also agreed with the plaintiff to furnish supplies for 1852, but stipulated that if the account was allowed to run over a week at a time he would not be answerable. The captain paid sums at different times in 1852, on account of the current supplies, but the account was frequently suffered to run over a week, and little more than half of the claim for the season was paid:—Held, that defendant could not insist on such payments being applied to wipe off the balance due for 1851, on the ground that the plaintiff had forfeited his account for 1852, by allowing it to accumulate. *Winch* v. *Weller*, 11 U. C. R. 233.

——— *Separate and Partnership Accounts—Specific Appropriation.*]—Defendants McC. and McL., while in partnership, purchased goods from the plaintiff. Subsequently they dissolved partnership, McC. continuing the business and taking over the assets, which included a considerable portion of these goods, and thereafter McC. purchased goods from the plaintiff on his own behalf, and from time to time made payments to the plaintiff with moneys partly his own and partly the proceeds of the partnership goods. The plaintiff sued defendants for the balance due upon the goods furnished to the firm, and the question was whether the payments so made were to be applied on the individual or the partnership indebtedness. It was alleged that the evidence shewed that there was a specific appropriation to McC.'s individual account, in accordance with a stipulation between plaintiff and himself therefor, and that McL. was not only aware of such appropriation and assented thereto, but that he expressly agreed for valuable consideration to pay off the partnership indebtedness; and also that the partnership was indebted to McC. in a sum beyond the payments made, and that McC. could therefore properly apply the payments to his own indebtedness. The payments were made in advance of the failing due of the items of McC.'s separate account, but evidence was given in explanation of this. The jury having found for defendants, a new trial was granted to enable the facts to be more fully considered; and semble, that the plaintiff was entitled to succeed. *Fitch* v. *McCrimmon*, 30 C. P. 185.

Guarantee—*Goods Sold—New Account.*] In April, 1850, R. became security to the plaintiffs for S. to the extent of £100, and S. thereupon received goods from them to the amount of £151. In April S. desired to purchase more. R. became security for £75, and in his letter said, "I understand from S. that he has paid you £75 on account of the £100." The plaintiffs sent no answer, but supplied the goods required. The £75 had been paid by S., and in his letter enclosing it he said, "I send you £75 on account of goods bought by me, being one-half of the whole:"—Held, that R. was entitled to have this payment credited against the £151. *Lyman* v. *Miller*, 12 U. C. R. 215.

Guarantee Policy—*Earlier Items of Default.*]—Action on a guarantee policy for loss sustained by the plaintiffs through the default of one D., their secretary-treasurer. The plaintiffs made, on 1st January, 1879, their claim under the policy, which extended only to losses occurring within the period of twelve months prior to such claim being made. It appeared that at the end of 1877 the default was $674, which was increased during the first two months of 1878 to $1,261.57, but in the next four months the deficiency was reduced by payments to $292.85, after which it again increased until, at the end of 1878, it amounted to $844.22:—Held, in accordance with the general rule as to appropriation, that, in the absence of any specific appropriation, the payments must be appropriated to the earliest items of the default, thereby paying off the whole of the default due at the end of 1877, so that the whole amount of $844.22, due at the end of 1878, must be deemed to have accrued due within that year; and that the plaintiffs were entitled, if at all, to recover this amount. *Board of Education of Town of Paris* v. *Citizens' Insurance and Investment Co.*, 30 C. P. 132.

Loan — *Keeping down Interest.*] — Where defendant is making payments on a loan, the plaintiff may insist, in the absence of any agreement, that the payments be applied first to keep down the interest. *McGregor* v. *Gaulin*, 4 U. C. R. 378.

See also *Cummings* v. *Usher*, 1 P. R. 15.

Mortgage—*Future Advances—Mutual Accounts—Interest — Prior Advance.*]—Where a mortgage was to secure advances to be made from time to time, and interest thereon, and there were mutual accounts, the items of which were entered in the mortgagee's books, with the concurrence of the mortgagor, who was his clerk:—Held, that the credits given therein to the mortgagor were first applicable to the interest on all these advances, and then to the eldest of the principal sums charged. *Ross* v. *Perrault*, 13 Gr. 206.

——— *General Account — Balance—Discharge of Security.*]—The debtor of a mercantile firm, being desirous of extending his transactions with his creditors, executed to them a mortgage to secure £2,000. Subsequent transactions between the parties took place, and during one year alone the sums charged to the debtor, including the sum due on the mortgage, amounted to £30,000; and after four years' dealing between the parties from the execution of the mortgage, an account was delivered shewing a balance of £1,941 against the debtor. Upon a bill filed to foreclose for this amount:—Held, that the transactions which had taken place discharged the mortgage debt. *Buchanan* v. *Kerby*, 5 Gr. 332.

——— *General Account — Creditors — Reduction of Amount Secured.*]—Where a creditor held a security on lands of his debtor, and afterwards, in rendering his accounts, carried the amount of such mortgage into the general account, and received from the debtor, and on his account, several sums, which, as the creditor alleged, were to be credited on certain other dealings, but instead thereof they were carried to the debtor's credit generally:—Held, that this precluded any inference from their previous conduct, or from any previous agreement; and that therefore the receipts must be applied, in the first instance, to the reduction of the sum secured by the mortgage security. *Re Brown*, 2 Gr. 111.

A creditor took a mortgage for £2,000 (part of a debt of £2,414), and afterwards rendered accounts, commencing with the balance of £2,414, taking no notice of the mortgage, and crediting (without any objection by the debtor) sums received after the mortgage given, but before it fell due:—Held, that this proved an appropriation of such sums towards payment of the original debt, including that part of it secured by mortgage. *S. C., ib.* 590.

——— *General Account—Earlier Items of Default—Credits—Reference.*]—J. H. S. was a local agent for an insurance company and collected premiums on policies secured through his agency, remitting moneys thus received to the branch office at Toronto from time to time. On 1st January, 1890, he was behind in his remittances to the amount of $1,250, and afterwards became further in arrears until on the 15th October, 1890, one W. S., joined him in a note for the $1,250 for immediate discount by the company, and executed a mortgage on his lands as collateral to the note and renewals that might be given, in which it was declared that payment of the note or renewals or any part thereof was to be considered as a payment upon the mortgage. The company charged J. H. S. with the balance then in arrears, which included the sum secured by the note and mortgage, and continued the account as before in their ledger, charging J. H. S. with premiums, &c., and the notes which they retired from time to time as they became due, and crediting moneys received from J. H. S. in the ordinary course of their business, the note and its various renewals being also credited in this general account for cash. W. S. died on 5th December, 1891, and afterwards the company accepted notes signed by J. H. S. alone for the full amount of his indebtedness, which had increased in the meantime, making debit and credit entries as previously in the same account. On the 31st July, 1893, J. H. S. owed on this account a balance of $1,926, which included $1,098 accrued since 1st January, 1890, and after he had been credited with general payments there remained due at the time of trial $1,009. The note W. S. signed on 5th October, 1890, was payable four months after date with interest at 7 per cent., and the mortgage was expressed to be payable in four equal instalments of $312.50 each, with interest on unpaid principal:—Held, that the giving of the accommodation notes without reference to the amount secured had not the effect of releasing the surety, as being an extension of time granted without his consent and to his prejudice; that the renewal of notes secured by the collateral mortgage was primâ facie an admission that, at the respective dates of renewal, at least the amounts mentioned therein were still due upon the security of the mortgage; that, in the absence of evidence of such intention, it could not be assumed that the deferred payments in the mortgage were to be expedited so as to be eo instanti extinguished by entries of credit in the general account which included the debt secured by the mortgage; and that there being some evidence that the moneys credited in the general account represented premiums of insurance which did not belong to the debtor, but were merely collected by him and remitted for policies issued through his agency, the rule in Clayton's case as to the appropriation of the earlier items of credit towards the extinguishment of the earlier items of debit in the general account would

not apply, and there should have been a reference to the master to take the account. *Agricultural Ins. Co.* v. *Sargeant*, 26 S. C. R. 29.

——— *Insurance Moneys—Application by Mortgagor.*]—See *Corbam* v. *Kingston*, 17 O. R. 432; *Edmonds* v. *Hamilton Provident and Loan Society*, 18 A. R. 347.

——— *General Account—Security for Floating Balance.*]—A trader, being indebted to a wholesale merchant for goods, executed a mortgage to him securing £3,000, and the creditor having entered into a new partnership, the firm continued to make further advances for several years, during which time the debtor made several payments, much more than enough to pay off his original indebtedness; and the firm in rendering their accounts to the mortgagor did not bring in the old debt:—Held, that these circumstances were sufficient to shew that the security was intended to cover a floating balance, and was therefore not satisfied. *Russell* v. *Darcy*, 7 Gr. 13.

——— *Promissory Note—Separate Securities—Partnership—Credits.*]—One partner gave as security for half of the partnership debt a mortgage on his separate real estate, and the other an indorsed note for the remainder. Subsequently payments were made on account of the joint debt, which he credited to the creditor on the note, claiming to hold the mortgage for the entire balance:—Held, that an assignee of the mortgagor was entitled to have one-half of all sums paid out of the partnership assets on the debt credited on the mortgage security. *Moore* v. *Riddell*, 11 Gr. 69.

——— *Time for Making Appropriation.*]—An appropriation of payments on a mortgage made by the creditor for the first time on bringing the account into the master's office, and apparently on the very day on which it is brought in, is too late. *Fraser* v. *Locie*, 10 Gr. 207.

——— *Unappropriated Payments—Usurious Interest.*]—Since 16 Vict. c. 80, and before the abolition of the usury laws, a mortgage at ten per cent. cannot be enforced for more than six per cent., though as to payments made without appropriation the mortgagee can appropriate the money to the satisfaction of the usurious interest before coming into court. *Fuller* v. *Parnell*, 8 C. L. J. 85.

In part payment of the usurious mortgage another mortgage of a third party was assigned, which had not fallen due:—Held, that the amount of this mortgage could not be applied by anticipation to the payment of usurious interest not due. *Ib.*

Promissory Note — *Bond — Contra Account—Intention as to Application.*]—Action on a note for £37 10s. At the trial B., the defendant, produced an account for £20 16s. 3¾d., commencing in September, 1848, and ending in January, 1850. He also proved a receipt for £12 10s. The plaintiff then put in an annuity bond conditioned for the payment by the defendant to plaintiff of £25 per annum during his life, the first payment to be made on or before the 1st June, 1846, and the like sum on the 1st June in each succeeding year. The payment of the annuity for 1848 was proved, and that it consisted of items of an account, and was indorsed on the bond as one sum of £25; this evidence was objected to by the defendant's counsel but admitted. The Judge told the jury, "that from the evidence it appeared that more than £25 was due on the annuity bond when defendant's account was read over to the plaintiff, and that if, in their opinion, the amount thereof was intended as a payment of so much on the annuity, the plaintiff had a right so to apply it; and in that case not to allow credit for it against the note, but to deduct it if they thought there was no such understanding. As to the £12 10s., that the plaintiff had indorsed it on the bond, and had a right to do so at any time; and that, although it appeared to have been very recently done, that would make no difference." The jury found for the plaintiff the full amount of the note and interest:—Held, that the direction and verdict were right. *Miller* v. *Miller*, 1 C. P. 240.

——— *General Account—Charging against Maker—Release of Indorser.*]—Where A., the indorsee of a note, sued B., the payee, and it was proved by C., the maker, that the note was made an item in the current account between A. and C. (the maker); that it was long before charged to the maker as a debt due by him; and that when it was so charged the balance was in the maker's favour:—Held, that the note must be taken to have been paid by the maker, and that it must be so taken as soon as subsequent credits were admitted by A. sufficient to cover the note, though when the note was charged the balance was not in C.'s (the maker's) favour. *McGillivray* v. *Keefer*, 4 U. C. R. 342.

——— *Proposal for Renewal — Acceptance of Cheque—Interest in Advance.*]—At maturity of certain promissory notes made by the defendants, and held by the plaintiffs, the defendants sent the plaintiffs a proposal for a renewal in part, accompanied by a cheque for part of the amount due and two renewal notes for the balance, the total amount including a sum for interest on the renewals. The plaintiffs returned the renewal notes, but retained the cheque, and brought this action upon the original notes, giving credit for the amount of the cheque:—Held, that, although there was no obligation on the part of the creditors to assent to the debtors' proposal, yet by receiving the cheque and keeping it they must be taken to have applied it in the manner in which the debtors when tendering it stipulated, and, as it included interest in advance upon the renewals, the creditors were bound to give the debtors the benefit of the time for which the renewals were drawn. *Lowden* v. *Martin*, 12 P. R. 496.

——— *Statute of Limitations—Execution Debts.*]—By a decree it was directed that an account should be taken of all dealings between St. J., the plaintiff, and R., the defendant. The master found that $453.20 was due to the defendant by the plaintiff. The master disallowed to the plaintiff the amount of a note for $510, and interest thereon, as barred by the Statute of Limitations; and reduced the interest on a sum of $3,000 advanced, from twenty-four per cent. to six per cent., after judgment had been recovered. The note of $510 was dated 18th November, 1861, and was payable with interest at the rate of $10 per week from the 23rd November, 1861. On the 6th March, 1867, the defendant, who had been sued by the plaintiff for certain other claims, entered into an agreement with him in order to relieve him from the pressure of execution debts, paid him $2,000 on account of

his indebtedness, and got time for the balance. The plaintiff made no demand at the time to be paid this note, and did not instruct his attorney who acted for him to seek payment of it until 1870:—Held, that the evidence shewed an appropriation by the defendant of the $2,000 on account of the debts for which he was being pressed, and, as the note for $510 was not included in such debts, the master was right in treating it as barred by the Statute of Limitations. *St. John* v. *Rykert*, 10 S. C. R. 278. See *S. C.*, 26 Gr. 249, 4 A. R. 213.

——— *Unappropriated Payments—Interest—Statute of Limitations.*]—Defendant was indebted to the plaintiff and gave him several promissory notes in payment, which fell due in 1871. The interest was paid up to August, 1878. The defendant thereafter paid in 1882, $50, $40, and $100, and in 1883, $100. The first two payments were specially appropriated by the defendant to the interest, and the others were unappropriated:—Held, that the payments must be applied to the interest due on all the notes, the effect of which was to take them out of the Statute of Limitations. *Wilson* v. *Rykert*, 14 O. R. 188.

Rent—*Promissory Note—Option as to Application.*]—Defendant gave a note for his rent due up to the 1st December, 1856. He afterwards obtained a note of the plaintiff's for £28 15s., and being unable to pay his taxes, gave it to the bailiff before it fell due, telling him to ask the plaintiff to advance the sum required, and to credit the balance on the then current rent. The plaintiff's clerk advanced the money and took the note, but refused to credit the balance on the rent then accruing, saying that he would apply it on the previous note given by defendant, which remained unpaid:—Held, that there had been no acceptance of rent due after December, 1856, so as to waive the forfeiture. *McDonald* v. *Peck*, 17 U. C. R. 270.

See Beatty v. *Maxwell*, 1 P. R. 85, *ante* 1.

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3. *Bills and Notes—Payment by.*

Acceptance of Note in Satisfaction—*Question for Jury.*]—To an action against two partners for wharfage and warehouse-room of goods, defendants pleaded the delivery and acceptance of the promissory note of one of them in satisfaction of the claim. At the trial the plaintiff's book-keeper said that he presented the account, and took the note made by one defendant in settlement, writing at the foot of the account "received payment by note." The Judge thereupon directed a verdict for defendants. On a motion for judgment non obstante veredicto, or for a new trial:—Held, that the plea was good, but that it should have been left to the jury to find whether the note was accepted by the plaintiffs in satisfaction of the demand, and a new trial was ordered. *Port Darlington Harbour Co.* v. *Squair*, 18 U. C. R. 533.

——— *Construction of Contract—Question for Court—Evidence—Jury.*]—Defendant, wishing to buy an organ from the plaintiffs, signed a conditional hire-receipt which gave him the right of purchasing the organ for $128, payable as follows: a cash payment of $50, and the balance with interest in one year from date; and it stipulated that the instrument should remain the plaintiffs' property on hire at $4 a month until it was fully paid for. The defendant paid the $50 and obtained the instrument. At the end of the year he was granted an extension of time for the payment of the balance, which was followed by similar indulgences, until at last, being pressed for payment, he offered to pay $50 cash and give his note for the remainder at four months. The agent communicated this offer to one of the plaintiffs, who replied, "As we require the matter closed up, you can accept the $50, provided he gives at same time a note for balance at four months with interest." The letter also requested him to obtain the hire-receipt, which had been sent to the defendant by mistake. The defendant paid $50, sent back the hire-receipt, and gave the note as required, and received a receipt for it, "being balance of account for organ." The note was not paid at maturity, and the plaintiffs replevied the organ. The Judge left it to the jury to say whether the note was taken conditionally or on account, or was a settlement of the balance due, so that from thenceforth the organ was to be the defendant's:—Held, that the construction of the contract was for the court; and that there was no evidence that the note was given in satisfaction of the unpaid residue of the purchase money. The mere taking of a note for the purpose of closing an account is not proof that it is taken in payment. *Nordheimer* v. *Robinson*, 2 A. R. 305.

Condition—*Conflict of Evidence.*]—Action on a note. Plea, set-off for money due on a note made by plaintiffs, for freight due to defendants. Conflicting evidence as to whether note given conditionally, subject to a future settlement, or as a final settlement of the freight. Verdict for plaintiffs set aside, and new trial granted; costs to abide the event. *Mellish* v. *Wilkes*, 4 C. P. 407.

Discount of Bill—*Subsequent Dishonour.*]—The plaintiff held defendant's mortgage, with a condition that the whole principal should become payable if the interest was in arrear for ten days. By agreement between them plaintiff drew on defendant for the interest (at three days' sight) a few days before it became due, which draft was discounted by plaintiff at his bank, and the proceeds placed to his credit prior to the expiration of the ten days, and was afterwards accepted by defendant; but upon maturity was dishonoured and charged to the plaintiff's account:—Held, that this was no payment, and that the whole mortgage money was due. *Cameron* v. *Knapp*, 7 C. P. 502.

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

Partnership Debts—*Note of One Partner—Action on—Election.*]—In the absence

of express agreement to that effect, a creditor taking the note of one partner for a debt of the partnership, and suing thereon, but failing to recover the amount of the note, is not precluded from afterwards claiming the amount of the note against the partnership. *Carruthers* v. *Ardagh*, 20 Gr. 579.

Sale of Land — *Purchaser's Notes — Production of.*] — Where promissory notes had been given in payment of the purchase money of land, and several years afterwards a bill was filed by a vendee of the original proprietor against the heirs at law of the original purchaser:—Held, that the promissory notes must be produced or satisfactorily accounted for before the purchase money would be ordered to be paid, even though a good title were shewn. *Crooks* v. *Glen*, 8 Gr. 239.

Sale of Mortgage by Executor — *Purchaser's Note.*]—An executor holding a mortgage given to the testator, sold and assigned it, taking the purchaser's promissory notes payable to himself or order:—Held, upon an issue of plene administravit, that this in law amounted to a receipt of the original debt, making the executor chargeable with the mortgage as an asset in possession. *Macbeth* v. *Macbeth*, 26 U. C. R. 549.

See Benedict v. *Allen*, 17 U. C. R. 234, *ante* 1; *Fisher* v. *Ferris*, 6 U. C. R. 534, *post* 6; *Mitchell* v. *McGaffey*, 6 Gr. 361, *post* 6; *Dalton* v. *McNider*, 5 Gr. 501, *post* 6; *Nightingale* v. *City Bank of Montreal*, 26 C. P. 74, *ante* 1; *Trustees of Bank of Upper Canada* v. *Canadian Navigation Co.*, 16 Gr. 479, *post* 6.

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4. *Cheques—Payment by.*

Acceptance as Cash —*Delay.*] — Defendant bought goods from the plaintiffs, paying part in cash, and giving for the balance a bank cheque drawn by H. payable to bearer. Plaintiffs presented the cheque early next morning, but there were no funds; and at the end of a week, after repeatedly calling on H., they demanded payment from defendant:—Held, that they could not recover, for (1) the cheque must be taken to have been received as cash; and (2) the plaintiffs had, at all events, made it their own by the delay in calling on defendant. *Redpath* v. *Kolfage*, 16 U. C. R. 433.

———*Delay—Pleading—Jury.*]—The plaintiff on the 12th January, 1867, gave defendants $150 in silver, and $4.50 for the discount on it, receiving their I. O. U. for $150 in bills. Afterwards, on the same day, they gave him the cheque of one H. on a bank, payable to the defendants or bearer, but post-dated to the 16th. It was not presented till the 18th, and was refused, there having been no funds since the 16th. H. on the same day told the plaintiff he would make it all right, and the plaintiff in consequence left it at the bank; but on that evening H. made an assignment, having been insolvent for some time. Defendants' shop was closed on the 19th, Saturday, and on Monday the plaintiff returned the cheque to them as worthless, still retaining their I. O. U. The plaintiff having sued on a special count for not delivering the bills, and on the common counts and account stated, it was left to the jury to say whether there was a debt due by defendants to the plaintiff when the cheque was given, and whether it was accepted in satisfaction; and they found for the plaintiff:—Held, that the case was properly submitted and the verdict right. 2. That under a plea of payment, the defendants could not set up that the plaintiff by his laches in presentment and notice had made the cheque his own; and, semble, had this been specially pleaded, the plaintiff, on a replication of the facts excusing his delay, would have been entitled to succeed. *Smith* v. *Buchan*, 27 U. C. R. 106.

——— *Question for Jury.*]—Defendant, the drawer of a bill, applied to a broker to get it discounted for him. The broker expected to have money during the day from the proceeds of a bill maturing, which belonged to the plaintiff, who agreed to take defendant's bill. The bill coming due was not paid in money, but the broker was offered a cheque of one of the parties to it, which he refused unless marked "good:" and then the bank was closed for the day. The broker then said he would take the cheque if defendant would accept it in discount of his bill; and defendant, being applied to, took the cheque and handed the bill to the plaintiff; and, as it was for a larger sum than the bill, he paid the difference to the giver of the cheque. He also paid the broker's charges. The cheque was dishonoured; and the plaintiff having sued defendant upon his bill, the jury were directed to decide whether defendant accepted the cheque as absolute payment or not; and that if they believed the broker's account (as given above, contradictory evidence having been also adduced), they should find for the plaintiff:—Held, that the direction was right, and that the evidence warranted a verdict for plaintiff. *Geohegan* v. *Lawson*, 13 U. C. R. 495.

——— *Receipt—Division Court Clerk.*]—The defendant, clerk of the division court of York, sent a transcript of the entry of a judgment recovered therein by the plaintiff to one M., the division court clerk of Essex, with directions to remit the money by post office order or by cheque. M., having recovered the money, paid it into his private account at McG. Bros., private bankers, and sent their cheque to the defendant for the amount, as he had been accustomed to do, which the defendant acknowledged in the following words: "McLeish v. Richards: received from the D. C. clerk of Windsor, $70.40." Before the cheque was presented McG. Bros. failed, and the plaintiff sued the defendant for the money:—Held, that the cheque and receipt operated as payment between M. and the defendant, and that the plaintiff was entitled to recover the money from the defendant as money received to his use. *McLeish* v. *Howard*, 3 A. R. 503.

Acceptance as Payment — *Jury—New Trial.*]—A cheque operates as payment until it has been presented and payment refused. In this case, on the evidence set out in the report, it was held the plaintiff had received the cheque as payment; and the jury having found otherwise, a new trial was granted. *Hughes* v. *Canada Permanent Building and Savings Society*, 39 U. C. R. 221.

Acceptance "in Full of" Claim—*Evidence—Receipt.*]—A cheque of the plaintiff's, when produced at the hearing, had written on it, "in full of all his (the defendant's) claims for notes or otherwise," which words the plaintiff swore were on the cheque when sent

to the defendant, which he denied, however. Four crosses were on the face of the cheque, and some initial letters in the margin, and these the plaintiff stated were the initials of the clerk in the bank, whom he had requested to initial the words so introduced. The court refused to receive this as evidence of a receipt in full, in the absence of the bank clerk, who should have been called as a witness. *Livingston* v. *Wood*, 27 Gr. 515.

Acceptance of Cheque of Third Person — *Presentment—Notice of Dishonour—Delay.*]—Where the cheque of a third person is received from a debtor as conditional payment of an antecedent debt, the creditor must without undue delay present the cheque for payment, and, if it is dishonoured, notify the debtor of the fact and claim recourse against him on the original indebtedness. Unless this is done, the creditor will be taken to have accepted the cheque in payment of the debt, and the debtor is discharged. *Sawyer* v. *Thomas*, 18 A. R. 129.

Premium on Life Policy.]—See *Neill* v. *Union Mutual Life Ins. Co.*, 7 A. R. 171; *Ætna Life Ins. Co.* v. *Green*, 38 U. C. R. 459.

Suspension of Bank—*Delay in Presentment—"Marked Cheque."*]—The payees of a cheque took it to the bank on which it was drawn on the afternoon of the day on which they received it from the drawer and got it marked "good," the amount being charged to the drawer's account. They then took it away without demanding payment. The bank, on the evening of the same day, suspended payment, and on the following day, on presentation of the cheque, payment was refused:—Held, that the drawer of the cheque was discharged from all liability thereon. *Boyd* v. *Nasmith*, 17 O. R. 40.

Transfer of Cheque of Third Person.]—The handing by a debtor to his creditor of the cheque of a third person upon a bank in the place where the creditor lives, the maker of the cheque having funds there to meet it, is a "payment of money to a creditor" within the meaning of R. S. O. 1887 c. 124, s. 3, s.-s. 1. *Armstrong* v. *Hemstreet*, 22 O. R. 336. Overruled by the next case.

Indorsing and giving to a creditor the unaccepted cheque of a third person in the debtor's favour is not a payment of money to the creditor by the debtor within the meaning of s. 3 of R. S. O. 1887 c. 124. Armstrong v. Hemstreet, 22 O. R. 336, overruled. *Davidson* v. *Fraser*, 23 A. R. 439, 28 S. C. R. 272.

A trader in insolvent circumstances sold his stock-in-trade in good faith, and directed the purchaser to pay as part of the purchase money a debt due by the trader to his bankers, who held, as collateral security, a chattel mortgage on the stock-in-trade. The purchaser had an account with the same bankers, and gave to them a cheque on this account for the amount of their claim, there being funds at his credit to meet the cheque:—Held, that this was a payment of money to a creditor and not a realization of a security, and that the bankers were not liable, in a creditor's action, to account for the amount received. Davidson v. Fraser, 23 A. R. 439, 28 S. C. R. 272, distinguished, on the ground that the cheque never was the property of, or under the control of, the insolvent. *Gordon* v. *Union Bank of Canada*, 26 A. R. 155.

See Beltz v. *Molsons Bank*, 40 U. C. R. 253, *ante* 1.

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5. *Currency in which Payment to be Made.*

Domestic Contract—*Foreign Premises—Pleading.*]—The plaintiffs, two corporations, declared on defendants' covenant to pay them $22,500 for six months' rent, due on the 1st June, 1863. Defendants pleaded that the premises were partly in the United States; that the plaintiffs had their place of business in the States; and that on the 1st June defendants tendered to them their $22,500 in lawful currency of the States, which they refused; and the defendants brought into court $15,525 of lawful money of Canada, which they averred was on said 1st June, and is, equal in value to the said $22,500 of the lawful currency of the States. The plaintiffs replied that the deed was executed in Canada; that one of the plaintiffs was a company incorporated and having its domicile here, and the other in the States; that the rent reserved was payable in current money of this Province; and that at the execution of the deed and hitherto the said $22,500 was and had always been equal to $22,500, and not at any time to $15,525, of current money of the Province; and that the tender made of the equivalent in American currency of the last mentioned sum was not valid. On demurrer to the replication:—Held, that the contract being made in Canada, and mentioning no place for the payments, must be governed by our law; that the rent must be intended from the declaration to be payable in current money of Canada; that there was nothing in the plea to displace this intendment; and that the plaintiffs therefore were entitled to judgment. *Niagara Falls International Bridge Co.* v. *Great Western R. W. Co.*, 22 U. C. R. 592.

Place of Payment.]—Defendants resided at Toronto, Canada; and one of them, when at Cleveland, U. S., or, as plaintiff contended, at Toronto, wrote to plaintiff, resident in Cleveland, as to coal; to which letter the plaintiff replied, and addressed his letter to defendants at Toronto, agreeing to furnish coals at Cleveland at $2.75 per ton:—Held, that the place where the money is payable governs the question as to how it is to be paid; and, as the goods were to be delivered at Cleveland, it was to be presumed they were also to be paid for there on delivery; and that therefore the plaintiff must accept American currency in payment thereof. *Crawford* v. *Beard*, 14 C. P. 87. See *S. C.*, 13 C. P. 34.

——— *Value at Time for Payment—Interest.*]—Defendants in Toronto covenanted to pay $516 in New York, on 20th August, 1858, which they failed to do, and when sued here in 1865, they claimed to pay in American currency at par, though in the meantime it had become very much depreciated:—Held, however, that the plaintiffs were entitled to the equivalent of the $516 in New York on the day of payment, with interest. *Massachusetts Hospital* v. *Provincial Ins. Co.*, 25 U. C. R. 613.

A mortgage being payable in lawful money of the United States of America, the holder thereof, in seeking to foreclose, is entitled only

to claim the amount in the current money of that country, or its equivalent at the time of default made in payment, or at any time subsequently, at his option. Crawford v. Beard, 14 C. P. 87, approved of and followed. *Morrell* v. *Ward*, 10 Gr. 231.

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6. Mode and Time of Payment.

Bank Notes — *Failure of Bank—Acceptance at Par.*]—K. was trustee for sale of certain lands belonging to M. Two parcels were subject to a mortgage to the Bank of Upper Canada for more than the value thereof. The trustee agreed for the sale of these parcels to a purchaser; the bank, before becoming insolvent, assented to the sale and received the first instalment of the purchase money. The purchaser went into possession, but was in default in paying purchase money; the defendants were his assigns. By the trust deed, which the bank executed on becoming insolvent (which deed was afterwards confirmed by statute), it was made the duty of the bank trustees to accept in payment and liquidation of any debt due to the estate the notes or bills of the bank. On a bill by the bank trustees for payment:—Held, that, as the money was coming to the bank, the trustees were bound to accept payment in the notes of the bank at par. *Trustees of Bank of Upper Canada* v. *Canadian Navigation Co.*, 16 Gr. 479.

——— *Failure of Bank — Award.*] — A debtor of the late pretended bank of Upper Canada at Kingston having called upon the bank commissioners to arbitrate under 10 Geo. IV. c. 7, an award was made for £900, to be paid in notes and other securities of the bank:—Held, that the debtor had a right to pay in notes for which no certificates had been issued pursuant to the Act. *Dalton* v. *McVider*, 5 Gr. 501.

Instalments—*Contract for Work—Construction.*] — A. entered into an agreement with B. to do certain work, &c., for B., for which by the terms of the contract A. was to be paid the sum of £3,600, partly in materials, &c., and the balance "in three yearly instalments, and according as the work progressed:"—Held, that the amount of each yearly instalment to be paid to A. was limited by the amount of work done and the materials provided and delivered by him during the year. *Grant* v. *McDonald*, 9 C. P. 195.

Promissory Note — *Acceptance—Failure to Pay—Revival of Remedy.*]—The owner of land agreed to sell the growing timber thereon, and by the terms of the agreement it was stipulated that the price should be paid by the purchaser's note, indorsed by "a responsible party," renewable for half at its maturity, the delivering of such note within ten days from the date thereof to be the completion of the consideration for said agreement:—Held, that this was only a mode of paying the purchase money, and was not substituted for it; and that upon failure of payment the vendor was entitled to an injunction to restrain the felling of timber or the removal of such as had been already cut down. *Mitchell* v. *McGaffey*, 6 Gr. 361.

——— *Agreement to Accept—Non-delivery—Subsequent Tender.*] — Where a plaintiff contracts to receive for work done, at its completion, a certain sum of money, and then agrees to accept from the defendant the promissory note of B. for the sum—if the note be not delivered, he may sue for the money. *Fisher* v. *Ferris*, 6 U. C. R. 534.

If the note be not tendered at the time specified, a subsequent tender of the note and refusal will be no defence to such an action. *Ib.*

Sunday—*Date of Payment.*]—Where the day on which money is due under an agreement falls on Sunday:—Semble, that the payment must be made on Saturday. *Whittier* v. *McLennan*, 13 U. C. R. 638.

See Tanner v. *D'Everado*, 3 U. C. R. 154, *post* 10; *McDonell* v. *McKay*, 2 Ch. Ch. 354, *post* 10.

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7. Person to Whom Payment Made.

Agent of Depositor in Bank—*Person Presenting Pass-book—Rules of Bank.*]—Defendants associated themselves together to conduct a savings bank, but before they were organized under 4 & 5 Vict. c. 32, their treasurer received a deposit from B. of £75, which he swore was made by B. with the express understanding that any person producing his pass-book should be entitled to receive it. B. died, and the sum was afterwards paid to a connexion of his, who presented the pass-book. The payment, it appeared, was made in pursuance of certain rules adopted by defendants, but which were not filed according to the statute for some months after:—Held, that such payment was unauthorized, and that the defendants were liable to B.'s administrator for the money. *Hunter* v. *Wallace*, 14 U. C. R. 205.

Agent of Insurance Company — *Premium.*] — Defendant, through one B., the plaintiffs' agent, effected a life policy with the plaintiffs. B., who had authority to receive the premium, brought the policy with the receipt for the first premium, issued from the plaintiffs' head office, to defendant, who was in charge of a branch of the bank at which B. kept his account. Defendant drew a cheque on another branch of the bank, and B. requested him to place the amount to the credit of his bank account, which was done in the usual way, and the cheque charged to defendant; but B.'s account was at the time overdrawn, and he afterwards became insolvent:—Held, that the payment thus made to B. was a payment to the plaintiffs. *Ætna Life Ins. Co.* v. *Green*, 38 U. C. R. 459.

Company—*Stock Subscription — Claim of Creditor—Knowledge.*]—The plaintiff, a creditor of a railway company, having had his execution returned nulla bona, sued the defendant, a shareholder, for the amount remaining unpaid upon his stock. The defendant pleaded, that before the commencement of this suit the railway company sued him for the same moneys, and that after being served with the writ of summons in that case, and before declaration in either case, and after the commencement of this suit, he paid the company in full:—Held, no defence, as it was not averred that such payment was made in ignorance of the plaintiff's claim. *Tyre* v. *Wilkes*, 13 U. C. R. 482.

Contractor — *Partner Subsequently Admitted.*]—Where a contract was made with one person, who subsequently admitted another to share in the contract:—Held, that the payment to the original contractor was sufficient, and that no notice need be taken of the subsequent co-partnership. *Carlisle* v. *Niagara Dock Co.*, 5 O. S. 660.

Person of Similar Name—*Deposit in Savings Society — Recovery by Rightful Owner—Division Courts.*]—In an action to recover a deposit of money to the credit of the plaintiff with the defendants, it appeared that the whole amount had been innocently but wrongfully paid by the defendants into court and also directly to the creditors of another person of the same name as the plaintiff, under garnishee proceedings in a division court:—Held, that there was nothing in such proceedings to bar the plaintiff of his right to recover, or to protect the defendants against his claim, and that the judgments in the proceedings did not apply to money in their hands belonging to the plaintiff. Held, also, that s. 195 of R. S. O. 1887 c. 51 only protects a garnishee against being called upon by a primary debtor to pay over again and does not protect him against any third person. *Andrew* v. *Canadian Mutual L. and I. Co.*, 29 O. R. 365.

Solicitor for Creditor—*Retainer to Collect.*]—The retainer of an attorney or solicitor to collect a demand, and to take such proceedings as he may deem proper to effect this object, gives him authority to receive the amount before or after suit, and to discharge effectually the party making the payment. *Moody* v. *Tyrrell*, 6 P. R. 315.

Solicitor for Mortgagee.]—An authority by plaintiff to his attorney to collect the interest due on a mortgage in the plaintiff's, and not in the attorney's, possession, does not entitle the attorney to receive payment of the principal. *Palmer* v. *Winstanley*, 23 C. P. 580.

Wharfinger — *Agent of Consignor of Goods.*]—Semble, that a wharfinger is not an agent of the forwarder, to whom the consignee is authorized to make payment, after the delivery of the goods to the consignee, and after an account has been stated between him and the forwarder. *Torrance* v. *Hayes*, 2 C. P. 338; *S. C.*, 3 C. P. 274.

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8. Plea or Defence of Payment.

Admission of Amount.]—In an action on the common counts for money paid, money lent, goods sold, &c., the plea of payment admits only that something not ascertained was due in respect of the causes of action sued upon, leaving plaintiff to prove the precise amount. *Mulholland* v. *Morley*, 7 L. J. 323.

Bond — *Condition—Breach.*]—A plea of payment in satisfaction of a bond conditioned to do a collateral thing is bad, unless it aver that the payment was made after the time for performance, and after a breach. *Prindle* v. *McCann*, 4 U. C. R. 228.

Contract—*Breach—Plea to Damages.*]—Where, in a declaration on a contract for the making and delivery of a certain number of barrels, the breach alleged was that, after the delivery of a certain number of barrels, defendants refused to allow plaintiff to deliver the remainder, and the damages claimed were as well for the price of those delivered as for loss of profits on those which defendants refused to allow to be delivered, a plea of payment as to all delivered, though objected to on the ground that it was merely a plea to damages, was allowed, on the ground that it answered a substantive part of the plaintiff's cause of action. *Wingall* v. *Enniskillen Oil Co.*, 10 L. J. 216.

——— *Breach—Unliquidated Damages.*]—A. declared on an agreement with B. for the purchase by him from B. of goods, and the payment of $250 by A. to bind the bargain, and averred a tender of the balance of the purchase money, and breach by defendant in performance of the contract, but claimed no specific amount as damages. B. pleaded that after the writ and before declaration he paid $149 in full of all demands in respect of the matters set out in the declaration, which A. received:—Held, plea good, as the action was for unliquidated damages, and there was nothing to shew that the amount paid was not a reasonable amount for the breach, and that it was not received by A. in satisfaction thereof. *Gardiner* v. *Ford*, 13 C. P. 446.

Evidence—*Reduction of Damages.*]—A party pleading payment of a larger sum may give evidence of payment of a smaller sum in reduction of damages, although the issue must be found against him. *Gooderham* v. *Chalmers*, 1 U. C. R. 172.

General Counts—*Plea to.*]—Payment of a certain sum pleaded to two counts, without alleging how much of the said sum is paid on each count:—Held, good on demurrer. *Brown* v. *Ross*, 3 U. C. R. 158.

Third Person—*Custom of Payment—Notice.*]—Assumpsit on the common counts for work and labour, &c., by plaintiffs, who were common carriers by water. Plea, setting forth a delivery of the goods carried by plaintiff to a wharfinger at T., to whom defendants, according to the custom and usage of forwarders and carriers at T., paid the plaintiffs' claim:—Held, plea bad, for not averring notice of the custom to the plaintiffs. *Torrance* v. *Hayes*, 2 C. P. 338; *S. C.*, 3 C. P. 274.

Undertaking — *Breach.*] — Declaration that defendants undertook to give their promissory notes payable at certain periods for 10s. on the pound sterling of the debts due by one F. to such of his creditors as should, within two months of the date of the deed, express their consent to accept the composition. Defendants pleaded payment, without alleging before breach:—Held, bad. *Matthewson* v. *Henderson*, 13 C. P. 96.

See Montreal City and District Savings Bank v. *County of Perth*, 32 C. P. 18; *Smith* v. *Buchan*, 27 U. C. R. 106, *ante* 4.

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9. Presumption and Proof of Payment.

Acknowledgment — *Set-off—Sci. Fa.*]—Plaintiff, having sued defendant on a bond to

pay money by instalments, obtained judgment for the penalty, and execution of the first and second instalments successively. He then brought sci. fa. for the third. Defendant pleaded satisfaction by conveyance of land and set-off; and at the trial an acknowledgment was produced, signed by the plaintiff, of defendant's set-off, and that the bond had been paid in full:—Held, that it should be assumed that the payment had been made before this sci. fa. issued, and it was therefore admissible under the plea. *Shipman* v. *Henderson*, 21 U. C. R. 447.

Promissory Note—*Indorsement—Cancellation.*]—Where an indorsee suing the indorser upon a note, produces it at the trial from his own custody, with defendant's indorsement thereon cancelled, not as if by any accident, but in the most unequivocal manner, some explanation must be given to the jury for rejecting the inference that the note had been satisfied by the defendant whose name is thus cancelled. *Peel* v. *Kingsmill*, 7 U. C. R. 364.

Receipt — *Construction—Date.*]—A receipt produced at the trial as evidence of payment of a couple of sums payable on the 1st November, 1867, was in these words:—"25, Fergus, 9th Nov., 1867. Received from Mr. Robert Morice the sum of thirty-five dollars, being the amount due to him for the instalment ending 1st November, 1867, of a bond. Robert Lowe:" —Held, no evidence of payment on 1st November, for that the construction of the receipt (and the question was one of construction, and not of presumption) was an acknowledgment of payment, made on the day it bore date, of a sum of money due on the 1st November. *Lowe* v. *Morice*, 19 C. P. 123.

Statement in Sworn Answer—*Evidence.*]—C., through whom the plaintiffs claimed in ejectment, in an answer in a suit in chancery, having stated a certain sum paid by him and the facts:—Semble, that the pleadings in the suit having been put in by defendants, were some evidence as against them of such payment. *Cooley* v. *Smith*, 40 U. C. R. 543.

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10. *Other Cases.*

Action Pending—*Agreement — Set-off—Nominal Damages—Costs.*]—Plaintiff agreed with defendant, after action brought, that, if defendant would take a note which the plaintiff had given to a third person, it should be allowed for and on account of this action. Defendant did so, and by such payment and other items of set-off accruing before action brought, over-balanced the plaintiff's demand:—Held, that plaintiff was still entitled to a verdict with nominal damages, which would carry full costs. *Sherwood* v. *Campbell*, 5 O. S. 2.

Bank—*Special Deposit—Refusal to Pay—Damages—Costs.*]—See *Henderson* v. *Bank of Hamilton*, 25 O. R. 641, 22 A. R. 414.

Contract—*Part Payment—Complete Performance.*]—Upon a contract extending over several years for work and labour to be paid for by instalments, defendants admitted part performance, and pleaded general non-performance to the satisfaction of their officer named in the contract, and that complete performance was a condition precedent to payment:—Held, that by payment in part they were not barred from claiming such full performance. *Coatsworth* v. *City of Toronto*, 10 C. P. 75.

——— *Rescission—Purchase Money—Deposit—Forfeiture.*]—Where a contract for the sale of property is rescinded by the vendor for default of payment of the purchase money, he cannot afterwards recover from the purchaser the amount of a promissory note given by the latter before the default, in part payment. Semble, moneys paid by the purchaser after rescission cannot be recovered back by him. *Fraser* v. *Ryan*, 24 A. R. 441.

Legacy—*Vested Interest—Period of Payment.*]—Where a testator gives a legatee an absolute vested interest in a defined fund, the court will order payment on his attaining twenty-one, notwithstanding that by the terms of the will payment is postponed to a subsequent period. Rocke v. Rocke, 9 Beav. 66, followed. *Goff* v. *Strohm*, 28 O. R. 553.

See Re Wartmen, 22 O. R. 601.

Overpayment—*Action by Administratrix to Recover.*]—An administratrix, having given the statutory notice for creditors, after expiry of the time therein mentioned, paid money on a claim, and afterwards, new claims being raised against the estate, sought to recover a portion of the money back as on an overpayment:—Held, that she had no locus standi to maintain the action. *Leitch* v. *Molsons Bank*, 27 O. R. 621.

Pleading—*Readiness to Pay—Particular Manner.*]—Where a payment is to be a condition precedent, or a concurrent act, and is to be made in a certain manner, the plaintiff must aver readiness to pay in the precise manner stipulated. *Tanner* v. *D'Everado*, 3 U. C. R. 154.

——— *Payment at Particular Place.*]—Quære, whether when a contract is to pay at a particular place named in a declaration, the general averment that defendant did not pay, is not sufficient; and whether any statement as to the plaintiff not being at the place named to receive the money, or that defendant was there ready to pay it, must not arise by way of defence. *Becher* v. *Town of Amherstburgh*, 23 C. P. 602.

Remittance by Post—*Time of Payment.*]—Where costs collected by the sheriff had been posted on the evening of 27th November, addressed to the plaintiff's solicitor, but not received by him until after defendants had moved for a stay of proceedings, pending their appeal:—Held, under C. S. U. C. c. 13, s. 18, that the money was constructively in the possession of the plaintiff's solicitor when mailed; and a motion to refund it was refused with costs. *McDonell* v. *McKay*, 2 Ch. Ch. 354.

Trustees — *Extension of Time.*]—An extension of time for payment of money, found due by trustees and executors, appears to be granted only in cases where a forfeiture would result from its non-payment. *Lawson* v. *Crookshank*, 2 Ch. Ch. 373.

See ACCORD AND SATISFACTION, II.—BILLS OF EXCHANGE, VII. 5—CONTEMPT OF COURT —CONTRACT, III.—INFANT, II. 3—LANDLORD AND TENANT, XXIII. 4, 5, 6—LIEN, V. 8—LIMITATION OF ACTIONS, IV. 2—MANDAMUS, II. 4 (d)—MONEY, IV. 2—MORTGAGE, VII., VIII.—PARLIAMENT, I. 3 (b), (i).

PAYMENT INTO AND OUT OF COURT.

See APPEAL, IX. 4—PAYMENT, I., II.—RAILWAY, XV. 3 (c)—SHERIFF, IX. 5—SPECIFIC PERFORMANCE, V. 19 (c).

PEDIGREE.

See EVIDENCE, I. 5.

PEDLAR.

Arrest—*Licence—Pleading in Trespass.*]—In trespass for false imprisonment, a plea justifying the arrest, as a constable, without a warrant under the Hawkers and Pedlars' Act, 58 Geo. III. c. 5, for peddling without license, must shew that the plaintiff was found trading at the time of the arrest, and that defendant took him before three of the nearest justices of the peace. *Oviatt* v. *Bell*, 1 U. C. R. 18.

License—*Servant of Licensee—Conviction.*]—Quære, whether the license to a hawker and pedlar granted under the Municipal Acts of 1866 and 1873, is confined to the licensee only, or whether it extends to a servant employe? by him. Semble, that it is personal only; but, the point being doubtful, a certiorari was granted to remove the conviction of the servant in order that he might be moved against. *In re Ford* v. *McArthur*, 37 U. C. R. 542.

See MUNICIPAL CORPORATIONS, XXIX. 5.

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PENALTIES AND PENAL ACTIONS.

I. PENALTY BY CONTRACT,

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I. PENALTY BY CONTRACT.

1. *Penalty or Liquidated Damages.*

(a) *Provision Construed as Authorizing the Allowance of Liquidated Damages.*

Building Contract.]—A sum stipulated to be paid per week for delay in completion of a building:—Held, liquidated damages, not a penalty. *Gilmour* v. *Hall*, 10 U. C. R. 309.

A contract to do the excavation and mason's and plasterer's work on a dwelling house for plaintiff, within a specified time, with a penalty of £4 a week in case of default, as rent of the premises:—Held, liquidated damages, not a penalty. *Gaskin* v. *Wales*, 9 C. P. 314.

An agreement by plaintiff to do certain work specified, contained the following clause: "The whole of the work to be completed and the mill in good running order by the 15th April next, under a penalty of $10 per day from that day until completion, as and for liquidated damages, and to be deducted from the price to be paid for such work:—Held, not a penalty, but a liquidated sum. *Fisher* v. *Berry*, 16 C. P. 23.

Plaintiffs agreed to do certain iron work on a building for defendant, and to finish it on or before the 1st July, 1871, "under a forfeiture of $50, as liquidated damages, for every week the work remains unfinished after the said time:"—Held, that the $50 per week was liquidated damages, not a penalty. *Hamilton* v. *Moore*, 33 U. C. R. 109; *S. C., ib.* 520.

Plaintiff, by deed, agreed to build a house for defendant for $1,150, by a day named, and for each day that should elapse after that day until completion, defendant might deduct $5 from the contract price:—Held, that the sum of $5 per day was liquidated damages, not a penalty, and that it might be deducted from the contract price, without pleading it specially by way of set-off. *Scott* v. *Dent*, 38 U. C. R. 30. See, also, *Worthington* v. *Municipal Council of Haldimand*, 10 U. C. R. 217, *post* 2.

To an action for the balance due under a building contract, the defendant set up as a defence that by the contract the plaintiff was to build the house and have the same completely finished and ready for the defendant's occupation by a named date, "under a penalty of $5 per day," to be paid by the plaintiff to the defendant for each and every day the work of the said house remained unfinished after the said date; alleging that the work remained unfinished after the said date for a certain number of days, making an amount which the

defendant claimed to deduct from the contract price—Held, defence good: that the $5, though called a penalty, was in fact liquidated damages. *Chatterton* v. *Crothers*, 9 O. R. 683.

Under a building contract, in writing, the contractor agreed that, subject to any extensions of time by the architect, the building should be finished by a named day, and that in default he would pay $50 a week as liquidated damages. The building was not completed until more than four months after the time fixed. The architect was not asked for and did not grant any extension of time:—Held, that the contract must govern, and that the defendants were entitled to recover upon their counterclaim the sum provided by the contract as liquidated damages. *McNamara* v. *Shain*, 23 O. R. 303.

Where a building contract provided that upon non-completion by a fixed date a contractor was to pay or "allow" ten dollars a day until completion:—Held, that this authorized a deduction as liquidated damages of the amount so allowed from the contract price, even as against lienholders claiming adversely to the contractor. *McBean* v. *Kinnear*, 23 O. R. 313.

Charter of Vessel.]—By an agreement under seal between plaintiff and defendant, and under the fourth clause thereof, defendant agreed with plaintiff to continue to run his vessel between two ports named, for the period of six weeks; and at the time of the agreement plaintiff paid the defendant $2,000, which the latter was to retain, subject to his continuing to run the vessel between such ports for the said period of six weeks, and up to the 27th July then next, at his own risk and for his own benefit, and for a further period named, provided that during the six weeks the gross earnings of the said vessel should not be less than $75 per running day, with the same proviso as to the further period; and provided also, that upon plaintiff paying any deficiency in said rate of $75, at his option, he might require said vessel to continue her running during said period. On the expiration of the first week defendant ceased to run his vessel. In an action at plaintiff's suit for breach of his agreement:—Held, that the measure of damages which the plaintiff was entitled to recover, for the non-fulfilment of the agreement, was such proportion, being five-sixths of the $2,000, as would represent the five weeks not completed by the vessel, and that he was not obliged to prove his damage, as this was fixed by the agreement in question. *Thompson* v. *Leach*, 18 C. P. 141.

Composition Deed—*Condition—Revival of Original Demand.*]—Two traders, E. and R., having become insolvent, an agreement was entered into between them and their creditors, whereby it was stipulated that R. should retire from the partnership and that E. and G. should form a new co-partnership, and that the creditors of E. & R. should accept the notes of the new firm for 15s. in the pound of their claims. By the deed of composition it was expressly agreed that in the event of E. & G. becoming insolvent before the notes securing the 15s. in the pound were paid, the original debts should revive against E., G., and R., and that the creditors should be entitled to rank on the estate of E. & G. for the full amount of their respective claims against the firm of E. & R., less any sum which might have been paid them by E. & G. on account of said debts. Before the notes were all satisfied E. & G. were compelled to make an assignment in insolvency:—Held, that the creditors were entitled to prove against the estate of E. & G. for the full amount of their original claims against E. & R., giving credit for such sums as had been paid to them by E. & G. in respect of the composition notes; and that the agreement for the revivor of the original demands was not in the nature of a penalty. *Watson* v. *Mason*, 22 Gr. 180.

Hiring—*Bank Clerk.*]—Defendant entered into a written agreement whereby, in consideration of a certain salary and allowance to be paid to him by the plaintiffs, he agreed to serve them in their business as bankers for three years, and if he should leave within that period, to pay them $400, as liquidated damages. The agreement was signed by the defendant, but not by the bank:—Held, that defendant was bound by it; and that having left without excuse, he was liable for the $400, which was recoverable as liquidated damages, and not as a penalty. *Bank of British North America* v. *Simpson*, 24 C. P. 354.

Mortgage—*Increase of Interest.*]—Where a mortgage stipulated that up to a certain day the interest should be eight per cent.; and if the principal were not then paid, twelve per cent. should be thereafter charged:—Held, that the stipulation for payment of twelve per cent. was not by way of penalty, but an agreement to pay that rate from the day named. *Waddell* v. *McColl*, 14 Gr. 211.

Railway Bonus—*Breach of Condition—Liquidated Damages.*]—See *County of Halton* v. *Grand Trunk R. W. Co.*, 19 A. R. 252, 21 S. C. R. 716.

Removal of Obstructions—*Trespass to Land.*]—The defendant, who had trespassed on the plaintiff's land by placing stones and commencing to build a stone fence thereon, entered into an agreement to remove the same before the 15th December, unless, upon a resurvey, which he had the privilege of having made before the 15th November, it was found that the line run by one S., a surveyor, was not the correct line, or unless defendant should fail to have such resurvey; and he agreed "to pay to the plaintiff the sum of $200 as liquidated damages if the said stones and stone fence are not removed, as hereinbefore agreed, at the times mentioned in this agreement:"—Held, that the sum mentioned was not a penalty, but liquidated damages for the omission to perform a specific act, viz., the removal of the stones and stone fence. *Craig* v. *Dillon*, 6 A. R. 116.

Sale of Goods—*Delivery.*]—On an agreement to deliver a certain number of withes and traverses of specified qualities and dimensions, for binding and rafting timber, by the 1st March, and to pay $4 "as liquidated and assessed damages, recoverable by action of covenant or deductible from the contract money hereinafter mentioned, for each and every day after the said 1st March that the said withes and traverses, or any part thereof, shall or may be undelivered as aforesaid:"—Held, that the sum named must be treated as

liquidated damages, not as a penalty; and the stipulation for payment daily of a small sum, instead of one payment large in amount, was regarded as tending strongly to that conclusion. *McPhee* v. *Wilson*, 25 U. C. R. 169.

——— *Price — Value.*]—Declaration, in substance, that the defendant agreed under seal to manufacture into pot barley, and to store for plaintiffs, certain barley of the plaintiffs, on or before the 15th July, 1878, and on said date to purchase said barley and pay therefor the sum of $785; that it was further provided, that in case the defendant did not pay the said sum of $785 on the said date, defendant should pay the plaintiffs the sum of $100 as liquidated damages. Breach, non-payment of the $100. Defendant demurred on the ground that the $100 claimed as liquidated damages was in fact a penalty, and could not be recovered:—Held, that the declaration was good; that this question could not properly be raised by demurrer, for the plaintiffs were entitled to some damages; and that the $100 was not a penal sum or forfeiture for not paying money due, or for any ordinary debt or claim, but liquidated or agreed on damages for not buying at a named price goods of a fluctuating and uncertain value. *Knowlton* v. *Mackay*, 29 C. P. 601.

Sale of Land.]—Where in a contract for the sale of land it was agreed that in case either of the parties should retract, he "should pay to the other by way of ascertained and liquidated damages the sum of £100:"—Held, not a penalty. *Cummings* v. *McLachlan*, 16 U. C. R. 626.

The first count in the declaration in effect stated that the plaintiff, being owner of certain land subject to two mortgages, of which defendant at the time had notice, agreed to sell the same to defendant, who on his part agreed to buy for $2,300, of which $1,000 was to be paid down; under a penalty of $300, to be paid on the 19th September following by either, in case he refused to carry out the agreement. Breach, that, though the 19th September had passed, and the plaintiff had been ready, able, and willing to fulfil his part of the agreement, and to have had the mortgage discharged prior to that date if defendant had paid down the $1,000, yet defendant had not paid the $1,000. The second count stated that the instalment of $1,000 was to be paid down for the purpose of satisfying thereout and discharging the said mortgages from the land:—Held, that, inasmuch as the plaintiff was entitled to sue for the $1,000 independently of any act which he had to do in conveying or making a good title, and as nothing appeared in the pleadings to this count which shewed that there would be any circuity of action created by his recovery upon it, the plaintiff was entitled to the $300 as liquidated damages. *Koster* v. *Holder*, 17 C. P. 139, 16 C. P. 331.

Trade Agreement — *Price of Goods — Union of Manufacturers.*] — On 27th May, 1885, certain individuals forming a cigar manufacturers' association, amongst whom was the defendant, considering themselves aggrieved by the members of the cigar makers' union, who refused to lower the price of making a particular kind of cigar, entered into an agreement in writing between themselves of the first part and S. of the second part, as follows: "Whereas for the mutual advantage and protection of the parties hereto . . . it has been agreed that the parties of the first part shall become severally bound to S. in the sum of $500, liquidated damages, in case any of them shall at any time during the continuance of this agreement, either directly or indirectly, buy or sell any cigars marked . . with the labels of the cigar makers' union, or shall use . . . in connection with the manufacture of cigars by him any cigar makers' union label, . . . or shall permit . . . any cigar makers' union, or any union or set of men, to compel him to hire or employ union men only, or to dismiss any employee. Now, therefore, . . . the parties hereto of the first part severally covenant with S. each for himself that he will, in case he shall at any time hereafter violate any of the foregoing stipulations (setting them out), immediately pay to S. the sum of $500; the intention being that in case of a violation of all or any of the stipulations . . . aforesaid by any of the parties hereto of the first part, he, the said party so offending, shall immediately forfeit and pay to S. the full sum of $500, . . . because of his so offending, as liquidated and ascertained damages (and not as a penalty) to be by S. applied, &c. . . . The intention, also, being that the entire sum of $500 shall be the amount of the ascertained and liquidated damages for any violation or breach whatever of any of the stipulations . . . aforesaid on the part of any one of the parties of the first part." The defendant having broken the above agreement in all respects, S. brought this action against him to recover $500 as liquidated damages:—Held, that the sum of $500 was liquidated damages, and not a penalty. *Schrader* v. *Lillis*, 10 O. R. 358.

Where a contract contains a condition for payment of a sum of money as liquidated damages for the breach of stipulations of varied importance, none of which is for payment of an ascertained sum of money, the general rule is, that the sum named is not to be treated as a penalty, but as liquidated damages. The stipulations in this case resolved themselves into one—viz., that the defendant would not submit to the dictation of the cigar makers in carrying on his business. It was impossible to calculate the damage to the other members of the manufacturers' association by non-compliance with the agreement. The case would therefore seem to come within the rule that when the agreement is for the performance of one act, and there is no adequate means of ascertaining the damages from a violation and the parties agree upon a sum as liquidated damages, it will not be treated as a penalty. *Ib.*

(b) *Provision Construed as Penalty.*

Apprenticeship.]—Where a party bound himself in an agreement to pay the plaintiff £25, if A., an apprentice, should not fulfil all the covenants and conditions of an indenture of apprenticeship executed by him, the £25 was held to be a penalty. *McLean* v. *Tinsley*, 7 U. C. R. 40.

Building Contract.] — Plaintiff and defendant entered into an agreement, by which defendant was to build for the plaintiff a grist mill, according to certain specifications, for the sum of £1,150; "and for the true and faithful performance of all and every of the covenants and agreements above mentioned,

the parties to these presents bind themselves, each unto the other, in the penal sum of £250 cy., as fixed and settled damages to be paid by the failing party:"—Held, a penalty, not liquidated damages, and therefore not the subject of set-off. *Brown* v. *Taggart*, 10 U. C. R. 183.

Defendant contracted under seal to do all the carpenter's and joiner's work required in the erection of two dwelling houses for the plaintiff, and covenanted that the work should be ready for the lathing by the 10th October, and ready for the painter by the 10th November, and should be fully completed by the 24th November, under a penalty of $20 a week as liquidated damages for every week beyond the said time the said works should remain incomplete. The trial Judge, sitting without a jury, construed the contract as one for a penalty, and computed the damages at $14.86 a week. On motion, the court being equally divided, the rule dropped. *Archbold* v. *Wilson*, 32 U. C. R. 590.

Debt—*Forfeiture.*] — Upon the following clause at the end of an agreement, "and for the performance of this agreement each party binds himself to the other in the penalty of £50, liquidated damages, and not as a penalty, which £50 shall be forfeited by him who fails to perform this agreement, and shall be recovered the one of the other in an action of debt after one month from this date, on default made by either party," it was held that the £50 was a penalty, not liquidated damages. *Henderson* v. *Nichols*, 5 U. C. R. 398.

Improvements to Land—*Trifling Breach—Actual Damages.*]—Where the plaintiff, in debt on an agreement, lays his breach in such a manner as to make it uncertain whether he is not claiming liquidated damages by reason of a failure in some very minute particular of the agreement—as, for instance, for not clearing off all the standing timber, nor fencing certain land by a named day—the court will treat the sum mentioned in the agreement as a penalty, though the parties have expressly agreed otherwise. *Ainslie* v. *Chapman*, 5 U. C. R. 313.

Where a sum claimed in the declaration as liquidated damages, is held to be a penalty only, 8 & 9 Wm. III. c. 11 will restrict the plaintiff to the damages sustained. *Ib.*

Indemnity—*Covenant—Several Breaches—Amount.*]—The plaintiffs being indebted to defendant in $80,000, and to other persons (whether partnership or individual debts) in an amount not exceeding $2,160, by deed dated October, 1859, in consideration of a release of the $80,000 and of $4,000 paid, assigned to defendant all their stock-in-trade, book debts, and assets (except household furniture), with a covenant on defendant's part to indemnify the plaintiffs from all debts and demands not exceeding $2,160; and a further covenant by both plaintiffs and defendant for $4,000 as liquidated damages for the performance of the covenants on both sides contained in the deed:—Held, that the sum of $4,000 was not a debt due as liquidated damages upon each breach of the covenant. *Rutherford* v. *Stovel*, 12 C. P. 9.

Mortgage—*Acceleration.*] — The plaintiff held defendant's mortgage, with a condition that the whole principal should become payable if the interest was in arrear over two years:—Held, that the condition was in the nature of a penalty only, and that the court would restrain an action, brought upon such covenant, to enforce payment of the whole sum due, after default in payment of one of the gales of interest. *Knapp* v. *Cameron*, 6 Gr. 559.

Defendants, B. and S., with two others, made a mortgage to the plaintiff to secure £4,000 and interest, by which it was agreed that if default should be made in any payment of interest, for the period of one month after it should have become due "and been demanded," then the whole principal money and such unpaid interest should immediately be payable:—Semble, that such a covenant is not to be looked upon in a court of law as a penalty, but merely as fixing the credit to be allowed for the principal. *Case* v. *Burton*, 19 U. C. R. 540.

Sale of Goods—*Non-delivery.*] — Where two persons entered into an agreement, the one to deliver and the other to receive a certain quantity of hops yearly, for five years, at the end of which agreement there was the following clause: "It is further agreed that each shall be bound to the other for the faithful performance of the said contract in the sum of $200?"—Held, that the sum named must be treated as a penalty, and not as liquidated damages; and, therefore, that the plaintiff suing for non-delivery might recover beyond the $200. *Sleeman* v. *Waterous*, 23 C. P. 195.

Work and Labour — *Time—Delay.*] — Where a contract provides that an engine shall be built and placed in position by a certain date, with a penalty for each day's delay, the time of commencement is of the essence of the contract, and if, owing to the purchaser's fault, the contractor is materially delayed in commencing the work, the parties are at large so far as the penalty is concerned, the purchaser, if the work be not completed by the time fixed, being entitled only to actual damages. *Kerr Engine Co.* v. *French River Tug Co.*, 21 A. R. 190, 24 S. C. R. 703.

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2. *Other Cases.*

Bond—*Defence—Set-off.*] — To an action on a replevin bond by the assignee of the sheriff, a set-off forms a good legal defence, the penalty being considered as the debt. *McKelcey* v. *McLean*, 34 U. C. R. 635.

——— *Interest—Judgment.*]—A bond contained a stipulation that in the event of any sum being found due by M. to the bank, interest should be payable thereon from the time an account of the balance due was delivered to the parties to the bond by the bank, and judgment was given in the court below in excess of the penalty:—Held, however, as the law would not allow a verdict against the obligors for a greater sum than the penalty, interest could not be computed on that amount until after judgment. *Exchange Bank* v. *Springer, Exchange Bank* v. *Barnes*, 13 A. R. 390.

——— *8 & 9 Wm. III. c. 11—Assessment of Damages — Judgment—Execution.*]—The plaintiffs sued upon a bond for $1,000 penalty, conditioned to convey land, alleging non-performance. A verdict was rendered at the trial

for $1,000, and twenty cents for detention, no damages being assessed on the breach. A writ of execution was afterwards issued, indorsed to levy the $1,000 and costs taxed:—Held, that the bond being within 8 & 9 Wm. III. c. 11, and the plaintiffs having paid the twenty cents and costs, execution might be stayed, for the penalty could not be levied. *Greer* v. *Johnston*, 40 U. C. R. 116.

——— *8 & 9 Wm. III. c. 11—Rule 580—Assessment of Damages — Judgment.*] — See *Star Life Assurance Society* v. *Southgate*, 18 P. R. 151; *Appleby* v. *Turner*, 19 P. R. 145, 175.

——— *Maintenance — Right to Sue for Support.*]—The liability of the obligor in a bond in a fixed penal sum conditioned for the payment of future maintenance is not limited to and is not satisfied by payment of the amount of the penalty, and the obligee has the right to sue for her support as it accrues from time to time. *Baker* v. *Trusts and Guarantee Co.*, 29 O. R. 456.

Bonus to Manufacturers—*Mortgage — Security—Performance.*] — The plaintiffs under a by-law granted the defendant a bonus of $20,000 to aid him in the manufacture of steam fire engines and agricultural implements, subject to a condition in the by-law that he should give a mortgage on the factory premises for $10,000 and a bond for $10,000, to be conditioned: (1) for the carrying on of such manufactures for twenty years; (2) during that period to keep $30,000 invested in the factory; and (3) to insure the building and plant in plaintiffs' favour for $10,000. The defendant gave the bond and mortgage, the latter containing a covenant for insurance, and he invested the $30,000 as stipulated for. He also made a further mortgage on the premises to the plaintiffs for $3,000, not mentioned in the by-law. The factory was one in which eighteen to twenty-five men might have been employed, and which could have turned out 100 mowers in a year. In the course of two years only twenty mowers were constructed, and the number of persons employed dwindled down from eighteen or twenty to two or three:—Held, that the performance contemplated by the parties to the contract to carry on manufactures was one reasonably commensurate with the capabilities of the factory; and that, upon the evidence, the defendant had failed in the performance. Held, also, that the $10,000 mortgage was given as a security for any damages the plaintiffs might sustain by the defendant's default, to an extent not greater than $10,000, and not as a charge for that specific sum. Held, also, that, as the $3,000 mortgage was not authorized by the by-law, as to it the plaintiffs were not entitled to any relief. Remarks upon elements to be considered by the master in assessing the damages. *Village of Brussels* v. *Ronald*, 11 A. R. 605.

Building Contract — *Delay—New Contract — Implied Incorporation of Provision.*] —Plaintiffs on the 31st May, 1871, contracted to make and complete the iron work upon a building put up for the defendant by the 1st July, 1871, and to pay $50 a week as liquidated damages for every week the same should remain unfinished after that time. Defendant had not the building ready to receive the iron work for nineteen weeks after the 1st July, but the plaintiffs did not finish their work for more than seven weeks after they were enabled to begin:—Held, that such a special provision as that for liquidated damages would not be considered as incorporated in the new contract under which the work was done after 1st July, though the plaintiffs might be liable for the delay in an action for damages. *Hamilton* v. *Moore*, 33 U. C. R. 520.

Building Society — *By-law — Fines—Pleading.*]—The by-law of a building society provided that any member neglecting to pay his monthly dues, should be fined a specified sum per share each month, "until the end of one year, when the share or shares in default shall be declared forfeited to the society." It then directed that a month before the expiration of such year, the secretary should send a notice to the defaulter, calling his attention to the by-law; and provided that in case of the defaulter being a borrower these fines should be trebled; and that at the end of six months' default the mortgage should be liable to foreclosure, and to be declared forfeited:—Held, that the by-law, being penal in its character, should be construed strictly, and that the fines could be imposed on borrowers only for twelve, and on non-borrowers for six, months, the right to forfeit or to foreclose being then substituted. Held, also, that such fines could not be recovered on a common count, but that the declaration should set out the by-law, so that the court might judge of its legality. *Ottawa Union Building Society* v. *Scott*, 24 U. C. R. 341.

Payment of Penalty—*Doing Prohibited Acts — Injunction.*] — Defendant agreed to serve the plaintiffs in their business of milkmen, with special stipulations as to not serving customers on his own behalf, &c., and in case of any breach by him of the agreement entered into between the parties, and signed by them, that he would forfeit $50, to be recovered by the plaintiffs as stipulated damages, and not as a penalty:—Held, that this did not enable defendant, on payment of the $50, to do the prohibited acts; and in a bill seeking to enforce the agreement the plaintiffs prayed for payment of the amount of the liquidated damages, and for an injunction to restrain defendant from acting in breach of his agreement. On the motion for injunction coming on:—Held, that the plaintiffs were at liberty to waive their claim for damages, and elect to have relief by injunction. *Toronto Dairy Co.* v. *Gowans*, 26 Gr. 290.

Settlement of Action—*Payments—Default—Avoidance—Relief against—Reformation.*]—To an action for the seduction of the plaintiff's daughter, the defendant pleaded, on equitable grounds, that the plaintiff and his daughter had entered into an agreement under seal with defendant for the settlement of the suit and other matters (setting it out), by which the amount to be paid by defendant was fixed at $120, which the defendant agreed to pay by instalments of $15 at the times specified; and it was stipulated that if defendant should not make these payments punctually the agreement should be void. The plea then set out that defendant paid three instalments, but by accident omitted to pay the fourth, which he was ready and willing to pay; and he submitted that the proviso to avoid the agreement on non-payment was, on the true construction of the agreement, a penalty only, against which he should be relieved, and if not, that it differed from the intention of both parties, and should be reformed. The attorney who drew the agreement said that he put

in this proviso of his own accord, without instructions to do so, but that it was read over to the parties and executed in duplicate, each party taking one:—Held, that there was no ground for saying that the proviso was introduced by mistake; that it was not a penalty against which defendant should be relieved, being a reservation only of an existing legal right; and that it formed no defence therefore to this action. *Boland* v. *McCarroll*, 38 U. C. R. 487.

Work and Labour—*Delay—Right to Deduction—Pleading.*] — Debt for work and labour. Plea, as to part of the demand, that the work was done under a contract between the plaintiffs and defendants, by which it was agreed that in case all should not be done on the day appointed in the agreement therefor, to wit, on the 15th February, 1851, the plaintiffs would permit defendants to deduct and retain £6 per week from the money agreed to be paid for every week beyond the time allowed; that the plaintiffs did not complete the work until thirty weeks had elapsed beyond the time appointed, wherefore defendants became entitled to deduct a sum exceeding that in the introductory part of the plea mentioned:—Held, on demurrer, plea bad, for the different reasons given by the court. *Worthington* v. *Municipal Council of Haldimand*, 10 U. C. R. 217.

II. Penalty by Statute.

1. *Actions for Penalties.*

(a) *Compromise of Actions.*

See post 2.

(b) *Discovery.*

Examination of Defendant.] — See *Malcolm* v. *Race*, 16 P. R. 330.

An action brought in the high court of justice for Ontario, in the name of Her Majesty, to recover a penalty for a violation of the statute of Canada 60 & 61 Vict. c. 11, restricting the importation and employment of aliens, is an action to which the provisions of the Canada Evidence Act, 56 Vict. c. 31, apply, within the meaning of s. 2, which provides that the Act shall apply "to all criminal proceedings, and to all civil proceedings and other matters whatsoever respecting which the Parliament of Canada has jurisdiction in this behalf." In such an action, having regard to the provisions of s. 5 of that Act, as now found in 61 Vict. c. 53, the defendant can be examined for discovery before the trial. *The Queen* v. *Fox*, 18 P. R. 343.

Production of Documents.] — The double tolls imposed by s. 42 of the Timber Slide Companies Act, R. S. O. 1887 c. 160, for false statements, are imposed by way of punishment, and not as compensation; and therefore an action to recover such double tolls is an action for a penalty, in which discovery of documents will not be enforced. *Pickerel River Improvement Co.* v. *Moore*, 17 P. R. 287.

(c) *Pleading.*

Amendment of Pleadings.]—See *Fraser q. t.* v. *Thompson*, 1 U. C. R. 314, 522.

Declaration—*Claim—Informer—Crown—Form of Action.*]—In a qui tam action for penalties under the Imperial statute 6 Geo. IV. c. 114, which gives one-third of the penalty to the King, one-third to the Lieutenant-Governor, and one-third to the informer, the court refused to arrest judgment because the plaintiff claimed the penalty for himself and the King only, not naming the Lieutenant-Governor. *Jones q. t.* v. *Chace*, Dra. 322.

An action of debt will lie on that statute to recover the penalty. *Ib.*

——— *Informer — Receiver-General — Magistrate's Conviction — Jurisdiction.*]—In an action against a magistrate for not returning a conviction:—Held, no objection to the declaration that the plaintiff sued for the Receiver-General, and not for Her Majesty, inasmuch as suing for a penalty for the Receiver-General, for the public uses of the Province, is in fact suing for the Queen. Besides, C. S. U. C. c. 124 authorizes a party to sue qui tam for the Receiver-General. Held, also, that the defendant, having actually convicted and imposed a fine, could not object that the declaration did not shew that he had jurisdiction to convict. *Bagley q. t.* v. *Curtis*, 15 C. P. 366.

——— *Magistrate's Conviction—Return — Statutes—Qui Tam Action—Form of Action — Jurisdiction.*] — A declaration against a magistrate for not returning a conviction made by him with another justice, was held bad, for not alleging defendant's neglect to have been contrary to the statutes, not merely the statute, there being two statutes upon the subject, each requiring a distinct return:—Held, that the plaintiff might sue for himself only, and need not sue qui tam. Held, also, that an action would lie against each magistrate for the penalty, for, though in form, in debt, the action was in fact ex delicto. *Drake q. t.* v. *Preston*, 34 U. C. R. 257.

Quære, there being now some offences under the jurisdiction of the Dominion, and some under that of Ontario, and a different return required and a different penalty imposed, as regards each class, whether the declaration should not state the nature of the offence, and that it was within the magistrate's jurisdiction, though formerly this was not requisite. *Ib.*

——— *Non-payment.*] —Held, that after verdict it need not be averred that the defendant had not paid the penalty. *Church q. t.* v. *Richards*, 6 U. C. R. 562.

Plea—*Time for Bringing Action.*]—Where it appears upon the record in a penal action that it is brought too late, defendant may take advantage of the objection without having specially pleaded it. *Mewburn* v. *Street*, 21 U. C. R. 498.

——— *Not Guilty—Statutes.*]—In an action for a penalty for not affixing stamps under 27 & 28 Vict. c. 4, s. 5, the defendant was held not precluded from a defence, by virtue of 31 Eliz. c. 5, that the action was not brought within a year, by reason of his having marked in the margin of his plea of "not guilty" the statute 21 Jac. I. c. 4 only. *Mason q. t.* v. *Mossop*, 29 U. C. R. 500.

See, also, *Regina* v. *Aumond*, 2 U. C. R. 166; *Hart* v. *Meyers*, 7 U. C. R. 416.

(d) *Practice.*

Affidavits.]—Affidavits to be used in qui tam actions must shew the character in which the plaintiff sues. *Robertson q. t.* v. *Orchard*, 4 P. R. 23.

Judgment—*Setting aside.*] — A judgment of non pros. regularly signed in an action by a common informer for a penalty, will not be set aside. *McClenaghan* v. *McLean*, 3 P. R. 13.

Nonsuit.]—In a qui tam action the plaintiff may be nonsuited. *Stuart q. t.* v. *Bullen*, E. T. 4 Vict.; *Ranney q. t.* v. *Jones*, 21 U. C. R. 570.

Trial — *Postponement* — *Costs.*] — On putting off the trial of an information for penalties at the instance of the defendant, the court will make payment of costs a condition in the same way as in civil cases. *Rex* v. *Ives*, Dra. 440.

(e) *Security for Costs.*

Time—*Default—Dismissal of Action—Indulgence — Merits.*] — An order under Rule 1244 for security for costs in an action for a penalty may properly contain provisions limiting the time for giving security and for dismissal of the action, without further order, upon default; and such an order, not appealed against, is conclusive between the parties as to all its terms. Thompson v. Williamson, 16 P. R. 368, distinguished. The action was brought against justices of the peace to recover a penalty for non-return of a conviction of the plaintiff, the error of the defendant being merely clerical, and one not prejudicing the plaintiff:—Held, not a case in which the indulgence of extending the time for giving security should be granted to the plaintiff. *Ashcroft* v. *Tyson*, 17 P. R. 42.

See Martin q. t. v. *Consolidated Bank*, 45 U. C. R. 163; *Budworth* v. *Bell*, 10 P. R. 544.

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2. *Compounding.*

Action—*Leave—Terms—Crown.*]— Leave was given to compromise a penal action under 32 Hen. VIII. c. 8, for buying pretended titles, on paying the Crown's share into court. *May q. t.* v. *Dettrick*, 5 O. S. 87.

——— *Leave—Costs.*]—18 Eliz. c. 5 prohibits the compromise of a qui tam action without leave of the court. *Bleeker* v. *Meyers*, 6 U. C. R. 134.

Where therefore a plaintiff, who had brought such an action, agreed to discontinue it upon being paid his costs, and in a subsequent action for those costs recovered much less than he thought the jury should have given him, the court, from the nature of the transaction, refused a new trial. *Ib.*

Compounding Offence against Provincial Statute—*Provincial Crime—Powers of Legislature.*]—The Legislature of Ontario having passed an Act to regulate tavern and shop licenses, 32 Vict. c. 32, under the power given to them by the B. N. A. Act, 1867, s. 92, s.-ss. 9, 16:—Held, that they had power, under s.-s. 15, to enact that any person who, having violated any provisions of the Act, should compromise the offence, and any person who should be a party to such compromise, should on conviction be imprisoned in the common gaol for three months; and that such enactment was not opposed to s. 91, s.-s. 27, by which the criminal law is assigned exclusively to the Dominion Parliament. *Regina* v. *Boardman*, 30 U. C. R. 553.

Illegal Consideration — *Pleading.*] — Where it clearly appears on the face of the declaration, which it did not in this case, that the consideration of defendant's promise was a compromise, without leave of the court, of a penal action, brought by the plaintiff as a common informer against defendant, the consideration will be held to be illegal, and the declaration bad. *Hart* v. *Meyers*, 7 U. C. R. 416.

Indictment for Compounding Criminal Prosecution.] — Indictment for compounding a penal prosecution instituted by defendant against one F. under 29 & 30 Vict. c. 51, s. 256, for selling spirituous liquors without license. It appeared that F. had been convicted under that Act, on the information of defendant, by the police magistrate for H., and a fine of $50 imposed upon him, and that, on an appeal therefrom, defendant for $10 agreed with F. not to oppose this appeal, but consented that the conviction should be quashed, which was accordingly done:—Held, that the indictment would neither lie at common law, nor, on the authority of Rex v. Crisp, 1 B. & Ald. 282, under 18 Eliz. c. 5, s. 4; and the conviction of the defendant was therefore annulled. *Regina* v. *Mason*, 17 C. P. 534.

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3. *Particular Statutes.*

(a) *Election Acts.*

Informer—*Infant—Objection — Appeal.*] —Held, that 18 Eliz. c. 5, which enacts that an informer shall sue either in person or by attorney, is in force in this Province, and therefore the plaintiff, an infant, suing by his next friend, could not maintain an action for a penalty under the Election Act. The appellant having omitted to take this objection in the court below, this court in allowing the appeal on that ground, refused him his costs of appeal. A person who sues for a penalty given by the Election Act is a common informer. *Garrett* v. *Roberts*, 10 A. R. 650.

Misconduct of Deputy Returning Officer—*Spoiled Ballot Paper—Refusing to Give New One.*]—The word "conveniently" in s. 109 of R. S. O. 1897 c. 9, the Ontario Election Act, means "conveniently for the voter and for his wish, purpose, and intention in voting." The plaintiff, an elector, in marking his ballot at an election of a member to serve in the Legislative Assembly of Ontario, inadvertently marked it for the candidate against whom he intended to vote. He immediately and before he had left the apartment at the polling place set apart for marking ballots informed the defendant, the deputy returning officer, of his mistake, and asked for another ballot paper. The defendant said he must first see the marked ballot paper, which

the plaintiff refused to allow, but, on the scrutineer for his party recommending him to do so, he handed it to the defendant, without creasing or folding it, that it might be placed in the ballot box, in such a way that those present could not see how it was marked. The defendant looked at it, and then either shewed or placed it so that it could be and was seen by nearly all present, and, contending that it was not a spoiled ballot, contrary to the plaintiff's protest, placed it in the ballot box, and it was counted for the person against whom the plaintiff intended to vote:—Held, that the defendant by his acts in disclosing how the plaintiff marked his ballot paper, in not cancelling it, and in refusing to give the plaintiff another ballot paper on his demanding one, and by his action compelling him to vote for the candidate whom he wished to oppose, was guilty of breaches of duty which entitled the plaintiff to judgment in his favour for the penalties under the statute. *Hastings* v. *Summerfeldt*, 30 O. R. 577.

Personal Disqualification of Candidate—*Appeal.*]—In penal statutes questions of doubt are to be construed favourably to the accused, and where the court of first instance in a quasi-criminal trial has acquitted the respondent, the appellate court will not reverse his finding. *North Ontario (Prov.)*, H. E. C. 304.

Refusal of Vote.]—See *Johnson* v. *Allen*, 26 O. R. 550.

Selling Liquor on Polling Day—*Acts of Agent.*]—In an action for penalties under the statute C. S. C. c. 6, s. 81, prohibiting the selling of liquor on polling days, the Judge having told the jury that defendant was responsible for his agent's (bar-keeper's) acts, although done in direct contravention of his command, and the question of connivance on the defendant's part, notwithstanding his command to his bar-keeper, not having been left to the jury, a new trial was ordered without costs. *Hugill* v. *Merrifield*, 12 C. P. 269.

——— *Terms of Statute — Pleading.*] — C. S. C. c. 6, s. 81, enacts that every hotel shall," &c., be closed during the two days appointed for polling, and that no spirituous or fermented liquors or drinks shall be sold or given during the said period, under a penalty of $100 for either offence. In an action for penalties under this Act for both offences, claiming $100 for each, in separate counts:—Held, that the declaration should not be in the disjunctive, for not keeping the hotel or tavern closed, and giving or selling spirituous or fermented liquors, &c. *Widdifield* v. *Metcalf*, 21 U. C. R. 247; *Metcalf* v. *Widdifield*, 8 L. J. 74.

See, also, PARLIAMENT, I. 7.

(b) *Foreign Statute.*

Action on Foreign Judgment.] — The courts of this Province will not indirectly enforce the penal laws of a foreign country by entertaining an action founded on a judgment obtained in that foreign country in a penal action. The court being divided in opinion, both as to the penal nature of the judgment sued on and as to whether the law applicable to such question was that of the foreign country or of this Province, the appeal was dismissed, and the judgment in 17 O. R. 245 was affirmed. *Huntington* v. *Attrill*, 18 A. R. 136. See the next case.

To an action by the appellant in an Ontario court upon a judgment of a New York court against the respondent under s. 21 of New York State Laws of 1875, c. 611, which imposes liability in respect of false representations, the latter pleaded that the judgment was for a penalty inflicted by the municipal law of New York, and that the action, being of a penal character, ought not to be entertained by a foreign court:—Held, that the action being by a subject to enforce in his own interest a liability imposed for the protection of his private rights, was remedial, and not penal in the sense pleaded. It was not within the rule of international law which prohibits the courts of one country from executing the penal laws of another or enforcing penalties recoverable in favour of the state. Held, further, that it was the duty of the Ontario court to decide whether the statute in question was penal within the meaning of the international rule so as to oust its jurisdiction; and that such court was not bound by the interpretation thereof adopted by the courts of New York. *Huntington* v. *Attrill*, [1893] A. C. 150.

(c) *Municipal Act.*

Municipal Elections — *Actions against Municipal Clerk and Returning Officers under the Municipal Act, 1883, s. 167.*]—See *Atkins* v. *Ptolemy*, 5 O. R. 366.

——— *Returning Officer—Refusal to Deliver Ballot Paper to Voter—Liability—Penalty—Damages—Municipal Act, 1892 ss. 80, 168.*]—The plaintiff's name was properly entered on the last revised assessment roll of a municipality as a tenant of real property of the value entitling him to a vote at a municipal election under the Consolidated Municipal Act, 1892, s. 80, and was entered on the voters' list, but, after the final revision thereof, he ceased to be the tenant and to occupy the property, although he continued to reside in the municipality and was the owner of real property as a freeholder of the value entitling him to vote, and was such freeholder at the time of an election. At such election he demanded a ballot paper, and was willing to take the oath for freeholders, but the defendant, the returning officer, refused to furnish him with a ballot or to permit him to vote unless he took the oath required for tenants:—Held, that the defendant's duties were merely ministerial, and that an action for a breach thereof was maintainable without any proof of malice or negligence; that the plaintiff was entitled to vote at such election; and that the defendant's refusal to allow him to vote constituted a breach of his duty, and rendered him liable to the penalty given by sec. 168, and also to damages at common law. *Wilson* v. *Manes*, 28 O. R. 419, 26 A. R. 398.

(d) *Stamp Act.*

Time for Action—*Pleading.*]—An action for a penalty for not affixing stamps under 27 & 28 Vict. c. 4, s. 5, must, by 31 Eliz. c. 5, be brought within a year. No right of action vests in the plaintiff until the action is so

brought, and defendant, therefore, may take advantage of this latter statute under a plea of not guilty. *Mason q. t.* v. *Mossop*, 29 U. C. R. 500. See, also, *Mewburn* v. *Street*, 21 U. C. R. 498.

Void Promissory Note.]—The Stamp Act does not require an instrument to be stamped with stamps that would not be valid for some purposes; or, semble, which would not be a promissory note, draft, or bill of exchange. No penalty, therefore, can be recovered under 27 & 28 Vict. c. 4, s. 9, for not affixing stamps to a promissory note for money lost at play, for such note under the statute of Anne is utterly void. *Taylor* v. *Golding*, 28 U. C. R. 198.

(c) Other Statutes.

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

Assignments Act—*Registration of Assignment for Benefit of Creditors.*]—An instrument in writing whereby a debtor transfers all his assets to an assignee for the purpose of paying a fixed sum on the dollar to the creditors, and of securing to the debtor the enjoyment of the residue, is an arrangement by way of composition, and not an absolute assignment under R. S. O. 1887 c. 124, although stated in the instrument to be under that Act; and an action for penalties against the assignee for not advertising and registering such an instrument, pursuant to that Act, will not lie. *Gundry* v. *Johnston*, 28 O. R. 147.

Billiard Tables License—*Act Requiring.*]—Held, that an action of debt would lie for the penalty, under 50 Geo. III. c. 6, for keeping a billiard table without license. *Church q. t.* v. *Richards*, 6 U. C. R. 562.

Branding of Barrels—*Act Requiring—Liability of Seller—Magistrates—Informer.*]—The seller of flour in barrels not marked or branded under 4 & 5 Vict. c. 89, s. 23, was not liable to the penalty imposed, but only the manufacturer or packer; and magistrates had no summary jurisdiction where the accumulated penalties were more than £10. *Regina* v. *Beckman*, 2 U. C. R. 57.

Where the inspector in a corporate town was the informer, he was not entitled to half the penalty. *Ib.*

Companies Act—*Duplicate List of Shareholders—Moderation of Penalty.*]—A list of shareholders transmitted to the Provincial Secretary contained the name of a person as holding a certain amount of stock in a joint stock company, while in the list posted up in the head office of the company the shareholder's name was inadvertently deleted:—Held, that the lists were not duplicates within the meaning of R. S. O. 1897 c. 191, s. 79, the Ontario Companies Act, and that the company were liable to a penalty under the Act. Circumstances considered in moderating the amount of penalty. *Towner* v. *Hiawatha Gold Mining and Milling Co. of Ottawa*, 30 O. R. 547.

Customs Act—*Harbouring Smuggled Goods—Scienter.*]—In an information for a penalty under the Customs Acts, for knowingly harbouring smuggled goods, the scienter is a proper question for the jury; and in such an information, the particular illegal act, as that the goods were imported without the payment of duty, &c., should be specified, and the information should expressly shew that the offence charged to have been committed was contrary to the form of the statute. *Regina* v. *Aumond*, *Regina* v. *Easton*, 2 U. C. R. 166.

If a quantity of smuggled goods be purchased at one time, but seizures of them are made at different times, only one penalty for harbouring them can be recovered. *Ib.*

Fraudulent Transfer—*13 Eliz. c. 5—Action—Evidence—Privilege—Appeal.*]—An action by the party aggrieved to recover the moiety of the penalty imposed by s. 3 of 13 Eliz. c. 5, may be joined with an action to set aside a fraudulent transfer under that Act, in this case the transfer of certain promissory notes. Bills and notes are, by virtue of the legislation passed since 13 Eliz., goods and chattels within that Act. Section 28 of R. S. C. c. 173 applies only to the concluding part of said s. 3, namely, that relating to imprisonment on conviction, &c. Where a defendant at the trial raises no claim of privilege, if any such exists, to his being examined in support of a claim for the recovery of the penalty under the Statute of Elizabeth, such claim cannot afterwards be set up on appeal to a divisional court. *Millar* v. *McTaggart*, 20 O. R. 617.

Habeas Corpus—*Action against Magistrate—31 Car. II. c. 2, s. 6.*]—See *Arscott* v. *Lilley*, 11 O. R. 153, 14 A. R. 297.

Inspection of Hides—*Act Requiring—Powers of Inspector.*]—Defendant bought hides, some of which had been produced within and some without the county of Middlesex, but all without the city of London. Some were purchased by him in and some out of the county, but none within the city; and they were brought by him into the city, placed in his tannery there, and manufactured into leather. The plaintiff was an inspector of raw hides and leather, appointed under 27 & 28 Vict. c. 21, 29 & 30 Vict. c. 24, and 33 Vict. c. 37 (D.), for the city and county, having a place of inspection within the city, but not elsewhere:—Held, that his compulsory powers extended only to the city, but that his limits of inspection might extend to the area assigned to him as the district in which the city was situate, although his acting therein would be optional with him; and he might in his discretion go also into any part of the Province not within another inspector's limits.

2. That all raw hides, or green raw hides, produced within a city or town for which there is an inspector, must be inspected before being sold there; that if produced and sold without such city or town, they are exempt from inspection until brought within it; and the then purchaser must have them inspected before selling or disposing of them in any way whatever. 3. That the tanning or using the hides in his own business was not a "disposing of them in any way whatever," within the statute 29 & 30 Vict. c. 24, s. 1. Defendant, therefore, was held not liable to the penalty for not having these hides inspected. *Oliver q. t.* v. *Hyman*, 30 U. C. R. 517.

Interest—*Illegal Rate—Act Providing Penalty.*]—Before the passing of 16 Vict. c. 80, a qui tam action was commenced under 51 Geo. III. c. 9, s. 6, for taking an illegal rate of interest:—Held, that the suit could not be continued, for by the first mentioned Act the court had lost the power of giving judgment for the penalty; but, semble, that contracts prohibited by the former law must still be held void. *Jones q. t.* v. *Ketchum*, 11 U. C. R. 52.

Lottery Act—*Forfeiture of Land—Parties.*]—Where an information was filed by a common informer, under 12 Geo. II. c. 28, to forfeit lands illegally sold by defendant by lottery, the court, the plaintiff not objecting, allowed the owner of a portion of the lands, who was not in possession, and had not been served with the information, to come in and defend. Semble, however, that the interest of such owner could not have been affected by a judgment obtained against defendant. *Mewburn* v. *Street*, 21 U. C. R. 306.

Registration of Co-partnerships—*Act Requiring—Joinder of Parties.*]—In an action by several plaintiffs qui tam against two defendants for penalties for not registering their partnership under R. S. O. 1877 c. 123, of which s. 11 gives the right of action to "any person" who may sue:—Held, (1) that under the above section and the Interpretation Act, any objection to the action being brought in the name of more than one person could not prevail; (2) that the circumstance that the plaintiffs resided out of the jurisdiction could not defeat their action; (3) that the joinder of two defendants for several penalties was not a ground of demurrer. *Chaput* v. *Robert*, 14 A. R. 354.

Voters' Lists Act—*Notice of Action—Officer.*]—A clerk of a municipality is not an officer within the meaning of R. S. O. 1887 c. 73, in respect to the performance in that capacity of the duties prescribed by the Ontario Voters' Lists Act, 1889, 52 Vict. c. 3, and is not entitled, in an action for the penalties imposed for default in that regard, to the protection of the above revised statute. *McVittie* v. *O'Brien*, 27 O. R. 710.

See NEW TRIAL, IX. 6—PARLIAMENT, I. 7.

PENSION.

See CROWN.

PERFORMANCE.

See CONTRACT, IV.—COVENANT, II.—SPECIFIC PERFORMANCE—WORK AND LABOUR, V.

PERJURY.

See CRIMINAL LAW, IX. 39.

PERMISSIVE STATUTE.

See STATUTES, VII.

PERPETUATING TESTIMONY.

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PERSONA DESIGNATA.

See CONTEMPT OF COURT—COUNTY COURTS, IV. 2 (a).

PERSONAL LIABILITY.

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III. PRACTICE AND PROCEDURE, 5314.

I. IN CASES OF CONTRACT.

Breach of Contract—*Crown—Acts or Omissions of Servants.*]—It is settled law that a petition of right will lie for damages resulting from a breach of contract by the Crown. Thomas v. The Queen, L. R. 10 Q. B. 31, and Feather v. The Queen, 6 B. & S. 293, approved. It is immaterial whether the breach is occasioned by the acts or by the omissions of the Crown officials. *Windsor and Annapolis R. W. Co.* v. *The Queen*, 11 App. Cas. 607.

Counsel Fees — *Action against Crown—Retainer.*]—See *The Queen* v. *Doutre*, 6 S. C. R. 342, 9 App. Cas. 745.

Crown Patent for Land—*Contest—Remedy—Bill or Petition of Right.*]—McK., having an order in council for 100 acres of land,

executed in February, 1827, to S., a bond for a deed. The petition for a location and the bond were executed by mark, and in the bond the obligor was described as of York, labourer. In May the patent issued to McK., and was in the possession of S. shortly after its date. S. went into possession in 1828, cleared about seven acres, and after three years left it in possession of the plaintiffs, who had the benefit of it up to within a short period of the death of S., which took place in 1849. The plaintiffs, claiming as heirs-at-law of S., filed their bill to obtain a conveyance of the land, and produced the patent. The defendants, S. and McC., produced a conveyance purporting to have been made by and signed "James McKenny," now of the township of Niagara, &c., yeoman, to James Smith, dated the 7th September, 1833, and a conveyance from Smith to Shortis, dated in May, 1849, both of which were registered. Semble in a proceeding to obtain relief in such a case, the proper course of procedure is by bill and not by petition of right. *Rogers* v. *Shortis*, 10 Gr. 243.

Parliamentary Committee—*Acceptance of Tender for Printing—Breach of Contract—Liability of Crown.*]—H., in his capacity of "clerk of the joint committee of both houses on printing," advertised for tenders for the printing, furnished the printing paper, and the binding required for the parliament of the Dominion of Canada. The tender of the suppliants was accepted by the joint committee and by both houses of parliament by adoption of the committee's report, and a contract was executed between the suppliants and H. in his said capacity. The suppliants, by their petition, contended that the tender and acceptance constituted a contract between them and Her Majesty, and that they were entitled to do the whole of the printing required for the parliament of Canada, but had not been given the same, and they claimed compensation by way of damages:—Held, that the parliamentary printing was a matter connected with the internal economy of the senate and house of commons, over which the executive government had no control; and that the Crown was no party to the contract with the suppliants and could not be held responsible for a breach of it. *The Queen* v. *MacLean*, 8 S. C. R. 210.

Public Works—*Executory Contract—Prescribed Formalities—Departmental Work.*]—By his petition of right, W., a sculptor, alleged that he was employed by the Dominion Government to prepare plans, models, specifications, and designs, for the laying out, improvement, and establishment of the Parliament Square, at the city of Ottawa; that he had done so, and superintended the work and construction of said improvements for six months. He claimed $50,000 for the value of his work. 31 Vict. c. 12, s. 7 (D.), provides, that when executory contracts are in writing they shall have certain requisites, such as signing, sealing, and countersigning, to be binding; and s. 15 provides, that before any expenditure is incurred there shall have been a previous sanction of parliament, except for such repairs and alterations as the public service demands; and s. 20 requires that tenders shall be invited for all works, except in cases of pressing emergency, or where from the nature of the work it could be more expeditiously and economically executed by the officers and servants of the department:—Held, that the Crown in the Dominion cannot be held responsible under a petition of right on an executory contract entered into by the department of public works for the performance of certain works placed by law under the control of the department, when the agreement therefor was not made in conformity with the above 7th section of 31 Vict. c. 12, s. 2. (2) That under s. 15 of said Act, if parliament has not sanctioned the expenditure, a petition of right will not lie for work done for and at the request of the department of public works, unless it be for work done in connection with repairs and alterations which the necessities of the public service demanded. 3. That in this case, if parliament had made appropriations for these works and so sanctioned the expenditure, and if the work done was of the kind that might properly be executed by the officers and servants of the department under s. 20 of the Act, then no written contract would be necessary to bind the department, and the suppliant should recover for work so done. *Wood* v. *The Queen*, 7 S. C. R. 634.

——— *Extras—Engineer — Certificate.*]—The suppliant engaged by contract under seal, dated 4th December, 1872, with the minister of public works, to construct, finish, and complete, for a lump sum of $78,000, a deep sea wharf at Richmond station at Halifax, N.S., agreeably to the plans in the engineer's office and specifications, and with such directions as should be given by the engineer in charge during the progress of the work. By the 7th clause of the contract no extra work could be performed, unless "ordered in writing by the engineer in charge before the execution of the work." By letter dated 26th August, 1873, the minister of public works authorized the suppliant to make an addition to the wharf by the erection of a superstructure to be used as a coal floor, for the additional sum of $18,400. Further extra work which amounted to $2,781, was performed under another letter from the public works department. The work was completed, and, on the final certificate of the government engineer in charge of the works, the sum of $9,681, as the balance due, was paid to the suppliant, who gave the following receipt, dated 30th April, 1875: "Received from the Intercolonial Railway, in full, for all amounts against the government for works under contract, as follows:—'Richmond deep water wharf works for storage of coals, work for bracing wharf, rebuilding two stone cribs, the sum of $9,681.'" The suppliant sued for extra work, which he alleged was not covered by the payment made on the 30th April, 1875; and also for damages caused to him by deficiency in and irregularity of payments:—Held, that all the work performed by the suppliant for the government, was either contract work within the plans or specifications, or extra work within the meaning of the 7th clause of the contract, and that he was paid in full the contract price, and also the price of all extra work for which he could produce written authority, and that the written authority of the engineer and the estimate of the value of the work were conditions precedent to the right of the suppliant to recover payment for any other extra work. *O'Brien* v. *The Queen*, 4 S. C. R. 529.

——— *Extras—Engineer—Certificate—Approval of Intercolonial Railway Commissioners — Misrepresentations by Servants of Crown—Delay in Work—Penalty—Waiver—Costs.*]—On the 25th May, 1870, J. and C., contractors, entered into a contract with the

Intercolonial Railway Commissioners (authorized by 31 Vict. c. 13) to construct and complete section No. 7 of the said Intercolonial Railway for the Dominion of Canada, for a bulk sum of $557,750. During the progress of the work, changes of various kinds were made. The works were sufficiently completed to admit of rails being laid, and the line opened for traffic on the 11th November, 1872. The total amount paid on the 10th February, 1873, was $557,750, the amount of the contract. The contractors thereupon presented a claim to the commissioners amounting to $116,463.83 for extra work, &c., beyond what was included in their contract. The commissioners, after obtaining a report from the chief engineer, recommended that an additional sum of $31,091.85 (less a sum of $8,500 for timber bridging not executed, and $10,354.24 for under drain taken off contractor's hands) be paid to the contractors upon receiving a full discharge of all claims of every kind or description under the contract. The balance was tendered to the suppliants and refused. The contractors thereupon, by petition of right, claimed $124,063.33, as due from the Crown to them for extra work done by them outside of and beyond the written contract, alleging that by orders of the chief engineer additional work and alterations were required, but these orders were carried out only on the understanding that such additional work and alterations should be paid for extra; and alleging, further, that they were put to large expense and compelled to do much extra work which they were entitled to be paid for, in consequence of misrepresentations in plans and bill of works exhibited at the time of letting. On the profile plan it was stated that the best information in possession of the chief engineer respecting the probable quantities of the several kinds of work would be found in the schedules accompanying the plan, "but contractors must understand that these quantities are not guaranteed;" and in the bill of works, which purported to be an abstract of all information in possession of the commissioners and chief engineer with regard to the quantities, it was stated, "the quantities herein given as ascertained from the best data obtained are, as far as known, approximately accurate, but at the same time they are not warranted as accurate, and no claim of any kind will be allowed, though they may prove to be inaccurate." The contract provided, inter alia, that it should be distinctly understood, intended, and agreed that the said price or consideration of $557,750 should be the price of, and be held to be full compensation for, all the works embraced in or contemplated by the said contract, or which might be required in virtue of any of its provisions, or by law, and that the contractors should not, upon any pretext whatever, be entitled by reason of any change, alteration, or addition, made in or to such works, or in the said plans and specifications, or by reason of the exercise of any of the powers vested in the governor in council by the said Act, intituled "An Act respecting the construction of the Intercolonial Railway," or in the commissioners or engineer, by the said contract or by law, to claim or demand any further or additional sum for extra work, or as damages or otherwise, the contractors thereby expressly waiving and abandoning all and any such claim or pretension, to all intents and purposes whatsoever, except as provided in the fourth section of the said contract, relating to alterations in the grade or line of locations, and that the said contract and the said specifications should be in all respects subject to the provisions of the Act first cited in the said contract, intituled "An Act respecting the construction of the Intercolonial Railway," 31 Vict. c. 13, and also, in as far as they might be applicable, to the provisions of the Railway Act of 1868. The 18th section of 31 Vict. c. 13 enacts "that no money shall be paid to any contractor until the chief engineer shall have certified that the work, for or on account of which the same shall be claimed, has been duly executed, nor until such certificate shall have been approved of by the commissioners." No certificate was given by the chief engineer of the execution of the work:—Held, that, the contract requiring that any work done on the road must be certified to by the chief engineer, until he so certified and such certificate was approved of by the commissioners, the contractors were not entitled to be paid anything. That if the work in question was extra work, the contractors had by the contract waived all claim for payment for any such work. If such extra work was of a character so peculiar and unexpected as to be considered dehors the contract, then there was no such contract with the commissioners as would give the contractors any legal claim against the Crown; the commissioners alone being able to bind the Crown, and they only as authorized by statute. That there was no guarantee, express or implied, as to the quantities, nor any misrepresentations respecting them. But, even if there had been, a petition of right will not lie against the Crown for tort, or for a claim based on an alleged fraud, imputing to the Crown the fraudulent misconduct of its servants. *Jones v. The Queen*, 7 S. C. R. 570.

In the contract it was provided that if the contractors failed to perform the works within the time agreed upon in and by the said contract, to wit, 1st July, 1871, the contractors should forfeit all money then due and owing to them under the terms of the contract, and also the further sum of $2,000 per week for all the time during which said works remained incomplete after the said 1st July, 1871, by way of liquidated damages for such default. The contract was not completed till the end of August, 1872:—Held, that if the Crown insisted on requiring a decree for the penalties, time being declared the essence of the contract, the damages attached, and the Crown was entitled to a sum of $2,000 per week from the 1st July, 1871, till the end of August, 1872, for liquidated damages. The Crown subsequently waiving the forfeiture, judgment was rendered in favour of the suppliants for the sum of $12,436.11, being the amount tendered by the respondent, less the costs of the Crown in the case to be taxed and deducted from the said amount. *Ib.*

——— *Extras — Engineer — Certificate — Damages for Delay—Intercolonial Railway Commissioners—Powers of.*] — In January, 1872, the commissioners of the Intercolonial Railway gave public notice that they were prepared to receive tenders for the erection, inter alia, of certain engine-houses according to plans and specifications deposited at the office of the chief engineer at Ottawa. J. I. tendered for the erection of the engine-house at Metapediac, and in October following he was instructed by the commissioners to proceed in the execution of the work, according to his accepted tender, the price being $21,989. The work was completed and delivered to the government in October, 1884. The specifications provided as follows: "The

commissioners will provide and lay railway iron, and will also provide and fix cast iron columns, iron girders, and other iron work required for supporting roof." In September, 1873, J. I. was unable to proceed further with the execution of his work, in consequence of the neglect of the commissioners to supply the iron girders, &c., until March following, owing to which delay he suffered loss and damage. During the execution of the work J. I. was instructed and directed by the commissioners or their engineers to perform, and did perform, certain extra works not included in his accepted tender, and not according to the plans, drawings, and specifications. By his petition of right, J. I. claimed $3,705.75 damages in consequence of the delay on the part of the commissioners to provide the cast iron columns, &c., and $8,505.10 for extra works. The Crown demurred and also traversed the allegation of negligence and delay, and admitted extra work to the amount of $5,056.60, and set up the 18th section of 31 Vict. c. 13, which required the certificate of the engineer-in-chief as a condition precedent to the payment of any sum of money for work done on the Intercolonial Railway. By 37 Vict. c. 15, on the 1st June, 1874, the Intercolonial Railway was declared to be a public work vested in Her Majesty and under the control and management of the minister of public works, and all the powers and duties of the commissioners were transferred to the minister of public works, and s. 3 of 31 Vict. c. 13 was repealed, with so much of any other part of the said Act as might be in any way inconsistent with 37 Vict. c. 15:—Held, that the tender and its acceptance by the commissioners constituted a valid contract between the Crown and J. I., and that the delay and neglect on the part of the commissioners acting for the Crown to provide and fix the cast iron columns, &c., which were, by the specifications, to be provided and fixed by them, was a breach of the said contract, and that the Crown was liable for the damages resulting from such breach. That the extra work claimed for being for a sum less than $10,000, the commissioners had power to order the same under the statute 31 Vict. c. 13, s. 16, and J. I. could recover by petition of right for such part of the extra work claimed as he had been directed to perform. That s. 18 of 31 Vict. c. 13 not having been embodied in the agreement with J. I. as a condition precedent to the payment of any sum for work executed, the Crown could not now rely on that section of the statute for work done and accepted and received by the government. That the effect of 37 Vict. c. 15 was to abolish the office of chief engineer of the Intercolonial Railway, and for work performed and received on and after 1st June, 1874, to dispense with the necessity of obtaining, as a condition precedent to the payment for the same, the certificate of said engineer-in-chief, in accordance with s. 18 of 31 Vict. c. 13. *Isbester* v. *The Queen*, 7 S. C. R. 696.

——— *Extras — Engineer — Certificate—Delay — Intercolonial Railway — Commissioners — Powers of — Taking over Works—Value of Plant.*]—The suppliants agreed by contracts under seal, dated 25th May, 1870, with the Intercolonial Railway Commissioners (authorized by 31 Vict. c. 13) to build, construct, and complete sections 3 and 6 of the railway for a lump sum, for section 3 of $462,444, and for section 6 of $546,946.43. The contract provided, inter alia, that it should be distinctly understood, intended, and agreed that the said lump sum should be the price of, and be held to be full compensation for, all works embraced in or contemplated by the said contract, or which might be required in virtue of any of its provisions or by-laws, and the contractors should not, upon any pretext whatever, be entitled, by reason of any change, alteration, or addition made in or to such works, or in the said plans or specifications, or by reason of the exercise of any of the powers vested in the Governor in Council by the said Act intituled "An Act respecting the construction of the Intercolonial Railway," or in the commissioners or engineers by the said contract or by law, to claim or demand any further sum for extra work, or as damages or otherwise, the contractors thereby expressly waiving and abandoning all and every such claim or pretension, to all intents and purposes whatsoever, except as provided in the fourth section of the contract relating to alterations in the grade or line of location; and that the said contract and the said specification should be in all respects subject to the provisions of 31 Vict. c. 13; that the works embraced in the contracts should be in all respects subject to the provisions of 31 Vict. c. 13, that the works embraced in the contracts should be fully and entirely complete in every particular and given up under final certificates and to the satisfaction of the engineers on the 1st July, 1871, (time being declared to be material and of the essence of the contract), and in default of such completion contractors should forfeit all right, claim, &c., to money due or percentage agreed to be retained, and to pay as liquidated damages $2,000 for each and every week for the time the work might remain uncompleted; that the commissioners upon giving seven clear days' notice, if the works were not progressing so as to ensure their completion within the time stipulated or in accordance with the contract, had power to take the works out of the hands of the contractors and complete the works at their expense; in such case the contractors were to forfeit all right to money due on the works and to the percentage retained. The work was taken out of the hands of the contractors for not having been satisfactorily proceeded with:—Held, that by their contracts the suppliants had waived all claim for payment for extra work. 2. That the contractors not having previously obtained, or been entitled to, a certificate from the chief engineer, as provided by 31 Vict. c. 13, s. 18, for or on account of the money which they claimed, the petition of the suppliants was properly dismissed. 3. Under the terms of the contract, the work not having been completed within the time stipulated, or in accordance with the contract, the commissioners had the power to take the contract out of the hands of the contractors and charge them with the extra cost of completing the same, but that in making up that amount the court below should have deducted the amount awarded for the value of the plant and materials taken over from the contractors by the commissioners. *Berlinguet* v. *The Queen*, 13 S. C. R. 26.

——— *Provincial Lunatic Asylum—Liability of Ontario.*]—See *Macdonald* v. *The Queen*, 44 U. C. R. 239.

Statute—*Railway Aid—Lands of Crown—Claim to—Enforcement.*]—An Act of the Legislature of Canada having provided that a railway company should be entitled to 4,000,000 acres of the waste lands of the Crown

on completion of their road, and a proportionate quantity of such lands on completion in the manner specified of twenty miles of the line:—Held, that a petition of right presented to the lieutenant-governor of Ontario, addressed to Her Majesty the Queen, was the proper proceeding for the purpose of enforcing the claim of the railway company under the Act, against that Province. *Canada Central R. W. Co.* v. *The Queen*, 20 Gr. 273.

II. In Other Cases.

Erection of Dam — *Acts of Servants of the Crown.*]—In order to establish a right to damages as against the Crown for having, as alleged, obstructed the flow of water to the mills of the suppliants, it is incumbent on the suppliants to shew that less than the natural volume of water forming the stream reaches the mill on account of such alleged obstruction; therefore, where it appeared upon the evidence that certain waters alleged to have been penned back by a dam, would never have reached the mills of the suppliants, and the extreme and unprecedented dryness of the season had had an appreciable effect upon the supply of water:—Held, that the evidence did not sustain the petition, which alleged that the suppliants sustained damage by the erection of a dam across the river, above their mill. *Muskoka Mill Co.* v. *The Queen*, 28 Gr. 563.

The maxim that the Crown can do no wrong, applies to alleged tortious acts of the officers of a public department of Ontario, and a petition of right will not lie for such alleged wrongful acts under 35 Vict. c. 13 (O.), which creates no new right in the subject against the Crown, but relates rather to procedure only. The redress of a subject suffering damage from such acts, if unauthorized by statute, would be against the subject who committed the wrong, and not against the Crown. *Ib.*

Injury to Person—*Government Bridge—Non-repair—Negligence of Servant—Minister of Public Works.*]—Petition of right to recover damages for personal injuries to the suppliant by reason of a government bridge being out of repair. There was no evidence that the injury resulted from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment, so as to bring the case within s. 16 (c) of the Exchequer Court Act:—Held, that there is nothing in the Public Works Act, R. S. C. c. 36, in relation to the maintenance and repair of such a bridge which would make the minister of public works an officer or servant of the Crown under s. 16 (c) of the Exchequer Court Act. There is no duty on the part of the Crown, or any minister of the Crown, to keep a public work such as this bridge in repair for the failure of which a petition will lie against the Crown at the suit of one injured by non-repair, unless the case comes within s. 16 (c). *McHugh* v. *The Queen*, 6 Ex. C. R. 374. See, also, *Davies* v. *The Queen*, 6 Ex. C. R. 344.

Injury to Property—*Public Works—Servants of Crown — Contract — Tolls.*]—Held, that a petition of right does not lie to recover compensation from the Crown for damage occasioned by the negligence of its servants to the property of an individual using a public work. *The Queen* v. *McFarlane*, 7 S. C. R. 216.

Held, that an express or implied contract is not created with the Crown because an individual pays tolls imposed by statute for the use of a public work, such as slide dues for passing his logs through government slides. In such a case Her Majesty cannot be held liable as a common carrier. *Ib.*

Negligence—*Crown Operating Railway—Injury to Passenger—Acts of Servants.*]—See *The Queen* v. *McLeod*, 8 S. C. R. 1, *ante* Crown, III. 1.

Order in Council—*Recognition of Claim—Creation of Debt.*]—Prior to Confederation one T. was cutting timber on territory in dispute between the old Province of Canada and the Province of New Brunswick, the former having granted him a license for the purpose. In order to utilize the timber so cut, he had to send it down the St. John river, and it was seized by the authorities of New Brunswick, and only released upon payment of fines. T. continued the business for two or three years, paying fines to the Province of New Brunswick each year, until he was finally compelled to abandon it. The two Provinces subsequently entered into negotiations in regard to the territory in dispute, which resulted in the establishment of a boundary line, and a commission was appointed to determine the state of accounts between them in respect to such territory. One member of the commission only reported finding New Brunswick to be indebted to Canada in the sum of $20,000 and upwards, and in 1871 these figures were verified by the Dominion auditor. Both before and after confederation T. frequently urged the collection of this amount from New Brunswick, with the object of having it applied to indemnify the persons who had suffered by the said dispute while engaged in cutting timber, and finally, by an order in council of the Dominion Government (to whom it was alleged the indebtedness of New Brunswick was transferred by the B. N. A. Act), it was declared that a certain amount was due to T., which would be paid on his obtaining the consent of the Governments of Ontario and Quebec therefor. Such consent was obtained and payments on account were made by the Dominion Government first to T. and afterwards to the suppliant, to whom T. had assigned the claim. Finally, the suppliant, not being able to obtain payment of the balance due by the order in council, proceeded to recover it by petition of right, to which petition the defendant demurred, on the ground that the claim was not founded upon a contract and was not properly a subject for petition of right:—Held, that there being no previous indebtedness shewn to T. either from the Province of New Brunswick, the Province of Canada, or the Dominion Government, the order in council did not create any debt between T. and the Dominion Government which could be enforced by petition of right. *The Queen* v. *Dunn*, 11 S. C. R. 385.

Possession of Railway — *Restitution—Damages — Judgment — Pleading.*]—By an agreement entered into between the Windsor and Annapolis R. W. Co. and the government, approved and ratified by the governor in council, 22nd September, 1871, the Windsor Branch, N. S., together with certain running powers over the trunk line of the Intercolonial Railway, was leased to the suppliants for the period of twenty-one years from 1st January,

1872. The suppliants under the agreement went into possession of the Windsor Branch and operated the same thereunder up to the 1st August, 1877, on which date C. J. B. being and acting as superintendent of railways as authorized by the government (who claimed to have authority) under 37 Vict. c. 16 (D.), passed with reference to the Windsor Branch to transfer the same to the Western Counties R. W. Co., otherwise than subject to the rights of the Windsor and Annapolis R. W. Co., ejected suppliants from and prevented them from using said Windsor Branch, and from passing over the said trunk line; and four or five weeks afterwards said government gave over the possession of said Windsor Branch to said Western Counties R. W. Co., who took and retained possession thereof. In a suit brought by the Windsor and Annapolis R. W. Co. against the Western Counties R. W. Co. for recovery of possession, &c., the judicial committee of the privy council held, that 37 Vict. c. 16 (D.) did not extinguish the right and interest which the Windsor and Annapolis R. W. Co. had in the Windsor Branch under the agreement of the 22nd September, 1872. On a petition of right being filed by suppliants claiming indemnity for the damage sustained by the breach and failure on the part of the Crown to perform the said agreement of the 22nd September, 1871, the exchequer court held, that the taking possession of the road by an officer of the Crown under the assumed authority of an Act of parliament was a tortious act, for which a petition of right did not lie:—Held, on appeal to the supreme court of Canada, that the Crown, by the answer of the attorney-general, did not set up any tortious act for which the Crown claimed not to be liable, but alleged that it had a right to put an end to the contract and did so, and that the action of the Crown and its officers being lawful and not tortious, they were justified. But, as the agreement was still a continuous, valid, and binding agreement, to which they had no right to put an end, this defence failed. Therefore the Crown by its officer having acted on a misconception of or misinformation as to the rights of the Crown, and wrongfully because contrary to the express and implied stipulations of their agreement, but not tortiously in law, evicted the suppliants, and so, though unconscious of the wrong by such breach, become possessed of the suppliants' property, the petition of right would lie for the restitution of such property and for damages. *Windsor and Annapolis R. W. Co.* v. *The Queen*, 10 S. C. R. 335, 11 App. Cas. 607.

Prior to the filing of the petition of right, the suppliants sued the Western Counties Railway Company for the recovery of the possession of the Windsor Branch, and also for moneys received by the Western Counties Railway Company for freight or passengers on the railway since it came into their possession, and obtained judgment for the same, but were not paid. The judgment in question was not pleaded by the Crown, but was proved on the hearing by the record of the supreme court of Canada, to which court an appeal in said cause had been taken, and which affirmed the judgment of the supreme court of Nova Scotia:—Held, per Ritchie, C.J., and Taschereau, J., that the suppliants could not recover against the Crown as damages for breach of contract what they claimed and had judgment for as damages for a tort committed by the Western Counties Railway Company, and in this case there was no necessity to plead the judgment. Per Fournier and Henry, JJ., that the suppliants were entitled to damages for the time they were by the advice of the government deprived of the possession and use of the road to the date of their filing their petition of right. *Ib.*

Recovery of Land from Crown—*Mesne Profits — Prescription — Judgment.*] — See *Chevrier* v. *The Queen*, 4 S. C. R. 1.

——— *Statutory Title—Procedure—Mandamus—Petition.*]—A petition of right is an appropriate remedy for the assertion by the suppliant of any title to relief under s. 29 of 7 Vict. c. 11, and where it is in the power of a party having a claim against the Crown of such a nature as in this case, to resort to a petition of right, a mandamus will not lie, and a mandamus will never under any circumstances be granted where direct relief is sought against the Crown. *McQueen* v. *The Queen*, 16 S. C. R. 1.

See Jones v. *The Queen*, 7 S. C. R. 570; *Tylee* v. *The Queen*, 7 S. C. R. 651.

III. Practice and Procedure.

Appeal—*Right of.*]—The provisions of the Supreme and Exchequer Courts Acts relating to appeals from the Province of Quebec, apply to cases arising under the Petition of Right Act of that Province, 46 Vict. c. 27. *McGreevy* v. *The Queen*, 14 S. C. R. 735.

Costs — *Hearing—Demurrer.*]—In dealing with the question of costs upon a petition of right, the same rule will be applied as if the question was one between subject and subject: therefore, where on a petition of right the Crown, instead of demurring, went to a hearing, the court, in dismissing the petition, allowed to the Crown such costs only as would have been taxed had the liability of the Crown been raised by demurrer. *Muskoka Mill Co.* v. *The Queen*, 28 Gr. 563.

Pleading — *Petition—Demurrer.*]—N. C., the suppliant, by his petition of right claimed, as representing the heir of P. W. jr., certain parcels of land originally granted by letters patent from the Crown, dated 5th January, 1806, to P. W. sr., together with a sum of $200,000 for the rents, issues, and profits derived therefrom by the government since the illegal detention thereof. The Crown pleaded to this petition of right: 1st, by demurrer, defense au fonds en droit, alleging that the description of the limits and position of the property claimed was insufficient in law; 2nd, that the conclusions of the petition were insufficient and vague; 3rd, that in so far as respects the rents, issues, and profits, there had been no signification to the government of the gifts or transfers made by the heirs to the suppliants. These demurrers were overruled, and it was:—Held, that the objection taken should have been pleaded by exception à la forme, pursuant to Art. 116, C. C. P., and, as the demurrer was to all the rents, issues, and profits as well those before as those since the transfer, it was too large and should be overruled, even supposing notification of the transfer necessary with respect to rents, issues, and profits accrued previous to the sale to him by the heirs of P. W. jr. *Chevrier* v. *The Queen*, 4 S. C. R. 1.

Security for Costs — *Discretion—Delay in Moving.*]—Where, by a letter addressed to the suppliant, the secretary of the public works department stated that he was desired by the minister of public works to offer the sum of $3,950 in full settlement of the suppliant's claim against the department, an application on behalf of the Crown for security for costs was refused, on the ground that the power of ordering a party to give security for costs being a matter of discretion and not of absolute right, the Crown could suffer no inconvenience from not getting security, as well as on the ground of delay in making the application. *Wood* v. *The Queen*, 7 S. C. R. 631.

An application for security for costs in the exchequer court must be made within the time allowed for filing statement in defence, except under special circumstances. *Ib.*

See CROWN.

PETTY TRESPASS ACTS.

See Armour v. *Boswell*, 6 O. S. 450; *Heney* v. *Simpson*, T. T. 1 & 2 Vict. (R. & J. Dig., col. 2750); *Delong* v. *McDonell*, E. T. 2 Vict. (R. & J. Dig., col. 2750); *Regina* v. *Hussey*, 2 P. R. 194; *Wadsworth* v. *Mewburn*, 6 O. S. 432; *McDonald* v. *Cameron*, 2 U. C. R. 403.

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PLANS AND SURVEYS.

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I. CHANGE OF GOVERNMENT SURVEY.

Change in Boundaries — *Adoption of Survey—Effect of Subsequent Survey.*]—The plaintiffs held a license, dated in September, 1860, to cut timber within certain limits, commencing "at the south branch of the Indian river, at the extremity of a limit licensed to A. & Co., ten miles above the forks." In 1842 a survey had been made by the deputy inspector of woods and forests, to determine A. & Co's limits, when the upper end, where the plaintiffs began, was marked by blazed trees; and in 1844 this survey was completed by one R., under instructions from the department, and the line previously marked was then adopted, and recognized until March, 1867. In that month a surveyor was instructed by the department to determine the defendant's limits, which were the same as those of A. & Co., and he made the upper boundary not so far from the forks as the previous surveys. His plan was returned to the department, but no action taken on it. The plaintiffs then sued defendant for cutting timber on the strip between the two surveys, the trespasses complained of having been committed apparently before the last survey was made:—Held, that they could not recover, for R.'s survey having been adopted and acted on by the government, the boundary marked on the ground in accordance with it must govern until changed by competent authority. *White* v. *Dunlop*, 27 U. C. R. 237.

Change in Dimensions of Lot—*Road Allowance.*]—One R. in 1829 first surveyed part of the township of Plympton fronting on Lake Huron, and his plan returned shewed the lots fronting on the lake with an oblique line in rear, following the general course of the lake, but no allowance for road. Afterwards a plan of the whole township was compiled in the Crown land office, from surveys of three separate portions of it made by different surveyors. The descriptions of the lots were made from this plan, all the lots having been granted after it had been completed, and the distances in the descriptions contained in the deeds were according to the scale on which the plan was compiled. This plan shewed a road in rear of the front lots, and made their depth greater than in R.'s plan. There was no proof of any work on the ground shewing that R. had ever run out or posted the rear line as it appeared on his plan:—Held, that it was competent for the government to make such allowance for road, not being inconsistent with any work on the ground. Held, also,

that in order to give effect to the change made by such allowance, to avoid an irregular rear boundary for such front lots, and to reconcile the plans and the grants for one of the front lots and two gore lots in rear of it, which could not all three be carried out owing to a deficiency in the land—a proportionate reduction should be made in each of such lots. *Hagarty* v. *Britton*, 30 U. C. R. 321.

Change in Numbers of Lots — *Surveyor's Posts.*]—In regard to a survey made before 59 Geo. III. c. 14, that Act will not have the effect of necessarily confining the grantee to the land designated by the posts planted in the original survey, if the plan of survey had been altered by the government before the patent and before the statute. Therefore, where the government had added to the ends of the concessions a strip of land which the surveyor had left unsurveyed between his concessions and the adjoining townships, and in consequence of such addition had changed the numbering of the lots throughout the concession:—Held, that the grants issued in accordance with such reformed survey would cover the land which the government intended to be included within the boundaries expressed in the patent, though the number of the lots would not correspond with the posts set by the surveyor. *Doe d. Talbot* v. *Paterson*, 3 U. C. R. 431.

See Keeley v. *Harrigan*, 3 C. P. 173; *Murphy* v. *Healey*, 30 U. C. R. 192; *Regina* v. *Great Western R. W. Co.*, 21 U. C. R. 555.

II. CROWN GRANT—SUBSEQUENT SURVEY.

Ambiguity in Description — *Reference to Plan—Supplementary Survey.*]—The question in dispute was, what quantity of land was granted by the patent issued in 1797, the description in which was, "beginning about 18 chains below a small creek which empties itself into the river Thames, in lot No. 17; thence west to the eastern boundary of lot 16, two chains, more or less; thence north 45 degrees west to the north-east angle of lot 16, 28 chains, more or less; thence south 45 degrees west to the river Thames; and thence along the bank of the river against the stream to the place of beginning, being the broken fronts of 16 and 17." The lots were supposed to contain 150 acres. There were two creeks, and the point of commencement contended for by the plaintiff (the upper creek) would give him a much larger quantity of land than the defendant alleged he was entitled to, while that sought to be upheld by the defendant would reduce it to about 50 acres. An old map from the surveyor-general's office was put in evidence, under which the lot had evidently been granted; and a surveyor called for the defence stated that the ground contended for by the plaintiff corresponded best with the old map:—Held, that, as the description contended for by the plaintiff corresponded best with the oldest plan to be found in the surveyor-general's department, and with a survey since made for the purpose of tracing out or completing parts not fully surveyed before, he was entitled to recover. *Horne* v. *Munro*, 7 C. P. 433.

Semble, the Crown may grant a tract of land by a sufficient description to designate the portion meant, although the township within which the land lies has not been surveyed and laid out into lots and concessions; and the grantee will be entitled to hold it although a subsequent survey made by authority of the Crown makes it by name a different lot, or places it in a different concession, from that named in the patent, or the surveyor laying it out projects a road through it. *Ib.*

Possession under Grant—*Effect of Subsequent Survey—Road Allowance.*] — On the 8th January, 1836, a surveyor, in compliance with instructions from the government agent, laid out a road or street on the northern limit of the town of London, two chains wide, a portion of which was then, and had for some time been, in the actual possession of the Episcopal church, to which body a patent subsequently, and on the 18th January, 1836, was issued, granting to them all that parcel or tract of land "on which the Episcopal church now stands, and containing four acres and two-tenths of an acre or thereabouts." Upon an indictment for a nuisance in stopping up the highway:—Held, that this survey, although made after the grantees had gone into possession, must prevail against such possession. *Mountjoy* v. *The Queen*, 1 E. & A. 429.

See The Queen v. *Bishop of Huron*, 8 C. P. 253, from which the appeal in this case was in effect taken.

——— *Effect of Subsequent Survey — Agreement.*]—It appeared that no survey had been made on the ground of the 10th or 11th concessions of the township of Eldon north of the Portage road, but the patents had been granted according to a plan returned by the surveyor instructed to make the original survey; and by taking this plan, with the original instructions and field-notes, the lots could be found upon the ground. One D., a provincial land surveyor, made a survey in accordance with this plan, by which the plaintiff's lot, 32 in the 10th concession, contained 200 acres, and defendant W.'s lot, 32 in the 11th concession, 30 acres. While a dispute as to this line was pending, the defendant W. induced the plaintiff to sign a document under seal, agreeing that the portion of the line between the 10th and 11th concessions opposite lots 32 be surveyed upon the same bearings as that portion of said line lying south of the Portage road. Defendant W., who was a sharp, intelligent man, knew that the effect of this would be to deprive the plaintiff's lot of 50 acres and add it to his own, while the plaintiff, who was illiterate and dull, was quite ignorant of this; and defendant W. assured him that if the effect of the agreement should be to reduce his, defendant W.'s, lot to 10 acres he would be satisfied. The agreement was prepared at defendant W.'s instance, and the plaintiff signed it without taking any advice:—Held, that the plan and survey must govern, and that there was nothing in the agreement, if binding upon the plaintiff, to prevent him from asserting his title in accordance with them, or to divest him of any portion of his land. Semble, however, that under the circumstances plaintiff would not be bound by the agreement. *McEachern* v. *Somerville*, *McEachern* v. *White*, 37 U. C. R. 609.

Supplementary Survey—*Double Fronts.*] —The plaintiff claimed a piece of land as part of lot 10 in the 1st concession west of the Communication road in the township of Harwich; the defendants claimed it as part of lot

9; and the plaintiff was entitled to recover if the line between the lots was to be run as in the case of a double not a single-fronted concession. It appeared that lots 9 and 10 were described for patent by metes and bounds in 1793, and letters patent were soon after issued in accordance with this description. The original survey of that part of the township was not completed on the ground, but the surveyor laid out the Communication road as directed, and returned a plan shewing it, and, as the trial Judge found, he gave the information upon which the description for these lots and for others about the same time were prepared. The principle of survey with double fronts was not in use before 1820. In 1821 another surveyor was instructed by the government to complete the survey of this township with double-fronted concessions, and to explore and survey the road, but not to interfere with the lands ceded intersecting it. No posts on the ground were found along the Communication road pointing out the lots along it as double-fronted:—Held, that the latter survey made after the patents for these lots could not affect them; that the principle of survey with double fronts could not be applied to the grant made long before it was adopted; and that the plaintiff therefore should succeed. *McGregor* v. *McMichael*, 41 U. C. R. 128.

See Keeley v. *Harrigan*, 3 C. P. 173; *Raile* v. *Cronson*, 9 C. P. 9.

III. Double-fronted Concessions.

Side Lines — *How Run.*]—In this township the lots were originally surveyed in double fronts; but the Adjala road, which forms the northern boundary of the township, cuts lots 30 and 31 in the 7th concession diagonally, leaving the eastern halves of these lots broken, and not corresponding with the front or western halves; and no posts or monuments were placed to mark the angles of the east halves:—Held, in appeal, that the side or division road between lots 30 and 31 should not run direct from one front to the Adjala road in a direct line, but that the side road should be run from each front to the centre of the lots. *McLachlin* v. *Dixon*, 4 C. P. 307; *S. C., ib.* 71.

——— *How Run — What is a Double Front.*] — The 11th concession of Trafalgar, the last to the east, and adjoining the road allowance between Trafalgar and Toronto, is only 30 chains deep, less than half the depth of the other concessions in the same township, which are 66 chains 67 links. In the original survey posts were planted on the front or west side of this concession, to mark the lots, and also at the rear or east side, on the road between the two townships; but the lots in it were granted as broken lots, containing 90 acres, not as half lots, except lot 11, in question, which was erroneously described as containing 100 acres:—Held, not a double-fronted concession, within the meaning of the statutes; and that the side lines in it should be ascertained by running from the posts in front, parallel to the base line of the township, through to the road between the two townships, and without reference to the posts on that road. *Warnock* v. *Cowan*, 13 U. C. R. 257.

——— *How Run—What is a Double Front —Statutes—Construction of.*]—The township of Cumberland is bounded to the north by the Ottawa, and has a range of lots on the river with their rear boundaries irregular, corresponding to the course of the stream in front, the remainder of it being laid out into concessions running north and south, numbering from the east, and into lots running east and west numbering from the north. The instructions for the original survey were to leave one chain as an allowance for road between each concession, to be double posted at the distance of 50 links right and left from the centre of the road. The surveyor, however, planted only a single row of posts in rear (i. e., at the west side) of each concession, and he stated in his evidence that the west halves of lots in the concession were to be measured from these posts, and the east halves of lots in the next concession westward by beginning at the distance of one chain from each post westerly, parallel to the side line of the township. No line therefore was run or posted at the front of the 8th concession. The plaintiff sued for trespass on the west half of lot B. in the 8th concession, and the question was, how the course and starting point of his side line were to be determined. His surveyor took the line dividing Cumberland from Russell, the adjoining township to the south, as governing the course of the side line, because, though the lots numbered from the north, there was no continuous straight line at that end of the concession. He found an original monument on the rear line of the 7th concession, intended to mark the limit between lots A. and B. there, and ran the side line from a point one chain west of that monument to the rear of the 8th concession, which, if correct, shewed that the plaintiff should recover; while, if the township was to be treated as double-fronted, the line should have been run from the post at the west side of the concession, and in that case the defendant should succeed. It appeared that whole lots had been granted in several of the concessions, and the north half of two lots and the south half of one, all before 1854, but that many more grants had been made from 1821 to 1858 for the east and west halves of lots separately described:—Held, that the course of the side line was, under the facts proved, correctly ascertained, the case being within the proviso to s. 71 of C. S. C. c. 77, and the principle of McDonald v. McDonald, 11 C. P. 374. 2. That s. 85 could not apply, for no line in front of the 8th concession had ever been run or posted. As to the starting point for the side line, the precise case of this survey is unprovided for by the Act; the concessions were not single-fronted, for the lines had been run and posted in rear, not in front, and very few whole lots had been granted; and they were not within the definition of double-fronted concessions, or within s. 28, for only a single row of posts had been planted, and the grants had not all been by half lots. Held, however, looking at the instructions, the evidence of the surveyor, and the grants made, that the weight of evidence was much in favour of treating the township as one with double rather than single-fronted concessions, in which case the plaintiff's side line had not been correctly determined. Held, also, that, if it was a single-fronted concession, as the posts in the rear of the 7th were intended to govern the front angle of lots in the 8th concession, the plaintiff's line might properly begin as it did by his survey. *Holmes* v. *McKechin*, 23 U. C. R. 52.

The jury in the last case having again found for the plaintiff, the court granted a second new trial, holding that upon the facts proved

the township should clearly be treated as one with double-fronted concessions:—Held, that, as all the grants before the passing of the Survey Act, 12 Vict. c. 35, s. 37, had described the land in half lots, that feature of a double-fronted concession was established by the retrospective words of the Act; and subsequent grants, therefore, could not affect the question. There are several townships with double-fronted concessions, in which the posts have not been planted on both sides of the allowance for roads between the concessions, though the statute makes that a part of the definition of such townships. *S. C., ib.* 321.

12 Vict. c. 35, s. 37 (C. S. U. C. c. 93, s. 28), which prescribes the rule for drawing the side lines in double-fronted concessions, applies to townships theretofore surveyed. Held, following the last two cases, that the expression "the lands having been described in half lots" is made by that section part of the definition of a township with double-fronted concessions. Held, also, that the rule prescribed applies to all lands in such concessions, not to the grants of half lots only, and that it is brought into application by the granting of any half lots. Semble, however, that the section is on both points open to doubts, which it is desirable to remove by legislation. *Marrs* v. *Davidson*, 26 U. C. R. 641.

Subsequent Survey — *Authority to Change to Double Front.*]—The first five concessions of a township were surveyed in 1797, the lots being 29 chains 87 links in width. About 1813 an original post was found by a surveyor in front of the 5th concession, by which he determined the limits of the lots, and they had been settled on accordingly. In 1821 the remaining concessions were surveyed under instructions from the surveyor-general, which directed the several concession lines to be produced, beginning with that between the 5th and 6th concessions, and from the centre of each line at the distance of 50 links each way, right and left, at right angles thereto, the several lots of the width of 29 chains 37 links were to be posted. The surveyor, under these instructions, double-posted the line between the 5th and 6th concessions, making the lots 29 chains 37 links wide, and patents were afterwards granted for half lots in the concession. It was contended that this made the 5th concession double-fronted, having the lots 29 chains 87 links wide in the front and 29 chains 37 links in the rear. One of these patents, however, made the rear half 29 chains 87 links wide, and the government plans shewed no jog in the side lines of the 5th concession:—Held, that the concession was not double-fronted, for the evidence shewed that the whole of it had been surveyed as a single-fronted one in 1797, and the surveyor in 1821 had no authority to change it, if he so intended. *Murphy* v. *Healey*, 30 U. C. R. 192.

What Constitutes a Double Front—*Evidence—Estoppel.*]—The land in question was situated at the rear of the concession (the concessions running north and south and numbering from the west), and plaintiff, claiming that it was a double-front concession, had the division line run from a point on the concession line in the rear, or what he claimed to be the east front, of the concession, but there was no proper evidence of the concession having, in the original survey, been laid out as a double-front concession, and of posts being planted in the rear, while the lots were granted by the letters patent as whole, and not as half lots:—Held, that the fact of 28 and 29 having been granted as whole lots was primâ facie evidence of the concessions being single-fronted, and that the grant of half lots in the adjoining concession could not affect it. Held, also, that the fact of defendants attempting to prove a post in rear, from which they contended the line should be run, did not estop them from asserting that the concession was single-fronted. *Dark* v. *Hepburn*, 27 C. P. 357.

See McGregor v. *McMichael*, 41 U. C. R. 128.

IV. Evidence in Actions.

Admissibility of Evidence—*Entries by Surveyor—New Trial.*] — Notes of a survey made by a deceased surveyor in a book in which he kept a diary of matters private and professional, were tendered in evidence to prove the boundary between lots 3 and 4. The entry of the survey was as follows: 6th June, 1827—Got Mr. Ashbridge to shew the stake between Nos. 3 and 4, &c. And in another part of the book the following entry appeared:

June 15, 1827.—D. Bolton, Esq..	£2 16 3
At D. Bolton's house for fence..	0 4 0
	£3 0 3

There was no evidence that at or about the time of the survey B. had any interest in either lot 3 or 4; but it was shewn that he obtained a conveyance of lot 2 two months afterwards, and of lot 3 in 1830. Surveyors were not at that time under any obligation to make notes of surveys, and it was not proved that the entry was made contemporaneously with the transaction: — Held, reversing the judgment of the Queen's bench, 39 U. C. R. 597 (see also 37 U. C. R. 430), that the entry was not admissible as one made in the course of business, or in the performance of a quasi public duty. Held, also, that the notes of the survey were not sufficiently connected with the entry of payment to be read with it as an entry against interest. *O'Connor* v. *Dunn*, 2 A. R. 247.

Boundaries — *Affidavits.*]—The question at the trial being the boundary line between lots 11 and 12 in the 5th concession of Saltfleet, affidavits were offered in evidence as to the line between lots 4 and 5, and 14 and 15, in the same concession, taken by the surveyor employed by defendants to run this line in 1869, and filed with the registrar under C. S. U. C. c. 93, s. 51:—Held, that such affidavits were properly rejected. Quære, as to effect of the words in that section, "subject to be produced thereafter in evidence in any court of law or equity within Upper Canada." One affidavit went to shew that none of the side lines in this concession had been run in the original survey, owing to a large swamp:—Held, not an affidavit within the statute, for evidence "concerning any boundary" does not mean evidence that no such boundary ever existed; and on this ground, also, such affidavit was rightly rejected. *Manary* v. *Dash*, 23 U. C. R. 580.

——— *Ascertainment—Lost Surveys.*]—In an action of ejectment the question to be decided was whether the locus was situate within the plaintiff's lot No. 5 in concession 18,

or within defendant's lot adjoining, No. 24 in concession 17. The grant through which the plaintiff's title was originally derived gave the southern boundary of lot 5 as a starting point, the course being thence eighty-four chains more or less to the river. The original surveys were lost, and this starting point could not be ascertained:—Held, affirming the judgment in 14 A. R. 788 (which reversed that in 2 O. R. 614), that such southern boundary could not be ascertained by measuring back exactly eighty-four chains from the river. *Plumb* v. *Steinhoff*, 14 S. C. R. 739.

——— *True Line — Burden of Proof — Original Post.*]— In trespass quare clausum fregit, to try the boundary line between lots 28 and 29 in the 5th concession of Ops, the plaintiff described in his declaration by metes and bounds the piece of land trespassed upon, alleging it to be part of 28, to which lot his title was not disputed. The jury were asked: 1. Is the point contended for by the defendants the place where the original post stood? 2. Did the plaintiff, when he moved his fence, do so on the understanding with defendants that they acknowledged his right, or was his possession to be subject to the correct adjustment of the line? They found that the post had not been proved, and that the plaintiff was given possession by the defendants:—Held, that on the first answer the verdict should have been for defendants, for the fact that defendants had not proved the post did not relieve the plaintiff from proving the true line; and that the second question was not presented by the case. *Dark* v. *Hepburn*, 27 C. P. 357.

——— *Work on Ground.*]—It is by the work as executed on the ground, and not as projected before execution, or represented on a plan afterwards, that the boundaries are to be determined. *Ocens* v. *Davidson*, 10 C. P. 302.

See, also, *Carrick* v. *Johnson*, 26 U. C. R. 69; *McGregor* v. *Calcutt*, 18 C. P. 39.

——— *Work on Ground—Disregard of, in Subsequent Survey.*]—In questions relating to boundaries and descriptions of lands, the well established rule is, that the work on the ground governs; and it is only where the site of a monument on the ground is incapable of ascertainment that a surveyor is authorized to apportion the quantities lying between two defined or known boundaries. Therefore, where an original monument or post was planted as indicating that the north-west angle of a lot was situated at a distance of half a chain south therefrom, and another surveyor had actually planted a post at the spot so indicated, and subsequently two surveyors, in total disregard of the two posts so planted, both of which were easy of ascertainment, made a survey of the locality and placed the post at a different spot, the court disregarded the survey, and declared the north-west angle of the lot to be as indicated by the first mentioned monument. *Artley* v. *Curry*, 20 Gr. 243.

Cadastral Plans—*Entries—Admissions.*]—Statements entered upon cadastral plans and official books of reference made by public officials and filed in the lands registration offices, in virtue of the provisions of the civil code of Lower Canada, do not in any way bind persons who were not cognizant thereof at the time the entries were made. *Durocher* v. *Durocher*, 27 S. C. R. 363.

Description of Lot—*Crown Lands Department — Admissibility.*]—The description of a lot by metes and bounds from the Crown lands department is admissible in evidence to explain the patent for the lot in which it is described only by the number and concession. *Hagarty* v. *Britton*, 30 U. C. R. 321.

The description of a lot prepared for and used by the Crown lands department in framing the patent, which grants the lot by number or letter only, is admissible evidence to explain the metes and bounds of that lot. The plan of survey of record in and adopted by the Crown lands department governs on a question of location of a road, when the surveyor's field notes do not conflict with the plan, and no road has been laid out on the ground. *Kenny* v. *Caldwell*, 21 A. R. 110, 24 S. C. R. 699.

Field Notes — *Copy — Admissibility.*]—Semble, that an admitted copy of the field notes from the Crown lands office may be received in evidence. *Doe d. Strong* v. *Jones*, 7 U. C. R. 385.

A certified copy of part of the field notes of the original survey, is admissible in evidence. *Carrick* v. *Johnston*, 26 U. C. R. 69.

Field Notes of Surveyors as Evidence.]—See *McGregor* v. *Keiller*, 9 O. R. 677.

Monuments — *Road Allowance.*]—Monuments placed in compliance with the provisions of ss. 34, 35, 36, and 37 of R. S. O. 1877 c. 146 must be placed at the true corners, governing points, or off-sets, or at the true ends of concession lines, and there is nothing in these sections making a survey thereunder or the placing of the monuments conclusive, whether right or wrong, and evidence may be received in contradiction. So held on a case reserved from general sessions on an indictment for obstruction of a highway, being the town line between two counties. Tanner v. Bissell, 21 U. C. R. 533, Regina v. McGregor, 19 C. P. 69, Re Fairbairn and Sandwich East, 32 U. C. R. 573, and Boley v. McLean, 41 U. C. R. 260, distinguished. *Regina* v. *Cosby*, 21 O. R. 591.

Original Plan — *Copy—Admissibility—Road Allowance—Non-user.*]—The piece of land marked out in the original plan of a township as an allowance for a road does not lose that character because it has never been used as a road for forty years; and a copy of the original plan of the township is admissible in evidence to prove such allowance, although it does not appear by whom, nor from what materials, the plan was compiled. *Badgley* v. *Bender*, 3 O. S. 221.

Original Posts — *Knowledge of Residents.*]—A surveyor cannot act independently of 59 Geo. III. c. 14, and arbitrarily lay on one side the evidence which neighbours are ready to give from their own knowledge of the situation of original posts. *Sherwood* v. *Moore*, 3 U. C. R. 468.

Proposed Survey—*Sketch—Parol Evidence.*]—An agreement for sale of lands referred to them as certain lots in "Stretton's

survey." No survey had in fact been then made, but a rough sketch of the proposed survey was in existence:—Held, that such sketch could not be considered as the survey referred to in the agreement; and, as parol evidence was necessary to shew the particulars as to size and position, without which such sketch was unintelligible, the court refused to enforce the agreement. *Stretton* v. *Stretton*, 24 Gr. 20.

Sufficiency of Evidence—*Entries by Surveyor—Map—Work on Ground.*]—Held, that the entries in the diary of the surveyor, together with a small piece of map, also produced, supposed to be his (which was all that remained in the Crown lands office shewing the lines in question run), and the trace of a blaze for a great part of the way, were evidence of the fact of the lines having been run by him in the manner in which he was directed to run them by his instructions (which were produced), although there was no further evidence upon the ground that the original lines had been run. *Smith* v. *Clunas*, 20 C. P. 213.

——— *Evidence as to Boundaries—Method of Running Line.*]—In ejectment by the patentee of the south-east quarter of a lot, to try a disputed boundary, defendant owning the north-east quarter, the plaintiff's surveyor stated that he ran the east side line of the lot, divided it into equal halves, and drew a line across the lot on a bearing corresponding to the concession line in the rear, and that of the quarter so ascertained defendant was in possession of 11 acres. He said, however, that he did not know the quantity in the whole lot, which fronted on a river, and there was a jog in the concession line in the rear, for which he had made no allowance. By the Survey Act, C. S. C. c. 77, s. 66, every grant of an aliquot part of a lot shall be construed as a grant of such aliquot part of the whole, whether more or less than expressed in the grant:—Held, that the plaintiff had not clearly shewn his right to the land claimed, and was therefore not entitled to succeed; but a new trial was granted instead of a nonsuit. *Babaun* v. *Lauson*, 27 U. C. R. 399.

——— *Mistake at Trial—New Trial.*]—When a witness, a surveyor, founded his evidence upon the assumption of a certain monument as the correct point to start from in running a line, and the jury gave their verdict accordingly, and such witness afterwards discovered that he was in error as to the correctness of that boundary, and made affidavit of his mistake, the court granted a new trial. *Doe d. Case* v. *Magill*, 5 O. S. 56.

Witness — *Boundary—Competence.*]—A person not a licensed surveyor is a competent witness on a question of boundary. *Potter* v. *Campbell*, 16 U. C. R. 109.

Witnesses—*Bias—Weight of Evidence—Road Allowance.*]—An original government survey of part of a township made no mention of roads, and it was apparently the surveyor's intention that the roads should be taken out of the land (then wild) adjacent. The surveyor who afterwards surveyed the adjoining lands treated the road allowance as included within the lines of the original survey, whereby the plaintiff's lot would be diminished one chain in breadth. The jury having found for defendants, the court ordered a new trial, considering such verdict against the weight of evidence. The weight attached by the court to the evidence given by professional witnesses is diminished by efforts to sustain the views of the party who may call them; it should be given free from bias. *Stock* v. *Ward*, 7 C. P. 127.

——— *Original Monument—Field Notes.*]—In ejectment for part of a gore between lots 12 and 13, the plaintiffs proved by the recollection of witnesses the original monument between lots 10 and 11, and between lots 14 and 15, and claimed to have the space between these two boundaries proportionately divided according to the width of lots 11, 12, and 13, and of this gore, as designated in the field notes. Defendant gave evidence of an original monument between the gore and lot 12, which, if proved, entitled him to a verdict; but it did not appear from the field notes that any post had been planted there in the original survey. The court set aside a verdict for defendant, without costs. *Richmond* v. *Ferris*, 6 C. P. 163.

See Boley v. *McLean*, 41 U. C. R. 260.

V. LINES.

1. *Concession Lines.*

Mistake in Numbers.]—A mistake of a surveyor in marking the number of the concessions wrong on some of the posts of an original survey will not make it proper to assume the lots so marked as being in the concession numbered on the posts. *Jarvis* v. *Morton*, 11 U. C. R. 431.

Original Line—*Retracing—Evidence.*]—See *Spratt* v. *E. B. Eddy Co.*, 29 S. C. R. 411.

Re-survey — *Straight Lines—Confirmation.*]—In the first government survey of a township (Loughborough) in 1797, the lines between alternate concessions only, as the 2nd and 3d, 4th and 5th, 6th and 7th, had been run and staked out, numbering from south to north. These lines were not straight, but curved or bent southward in the centre of the township. It appeared (though not very satisfactorily) that several persons had, under government, settled according to these lines. Subsequently, in 1832, a surveyor was employed by government to run the concessions omitted in the first survey. He did so; but, instead of running them parallel to the lines formerly surveyed, he ran them in straight lines, thus cutting off part of the rear of the northerly concessions and adding them to the front of the southerly concessions. This survey was remonstrated against by petition, and was never definitely adopted or confirmed:—Held, that the last-mentioned survey could not govern, or be regarded as confirmed by 12 Vict. c. 35, as having been legally done under the former Acts. *Keeley* v. *Harrigan*, 3 C. P. 173. Followed in *Raile* v. *Cronson*, 9 C. P. 9.

Width of Concessions—*Error.*]—There is no law requiring each concession to be of the same width throughout a township; nor any principle by which an error in the survey of one concession, entirely unconnected with the actual work and survey on the ground in another, is to affect such other concession. *Johnson* v. *Honsberger*, 6 C. P. 201.

See Re Walker and Township of Burford, 15 U. C. R. 82; *Re Fairbairn and Township of Sandwich East*, 32 U. C. R. 573; *Boley* v. *McLean*, 41 U. C. R. 260.

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2. *Side Lines.*

Crown Grant — *Description — Impossibility.*]—The eastern side line of 24 in the front or 1st concession of Kingston, cannot be run as it is described in the grant from the Crown, or parallel to the western limit of the township, according to 59 Geo. III. c. 14, because that would carry the concession beyond the line which was originally run at its eastern boundary. *Doe d. Stuart* v. *Forsyth*, 1 U. C. R. 324.

Original Plan—*Fraud—Production of Side Lines.*]—In trespass defendant claimed, as part of lot 16 in the broken front of Escott, that part of Cary's point in the river St. Lawrence which would be included within the side lines of the lot, if projected from the main shore across a small bay, to and across the point to the river in front of it. In the original plan of the township the line across the point from west to east, shewing an intention to include it in the broken front, was continued only as far east as lot 14, though the point extended far enough to cover the fronts of lots 15 and 16. In scaling, the front on the river posts appeared to have been put down on the main land, but none could be traced on the point. The jury found that these posts were intended to mark the width of lots, not the front angles of lots in the broken front, and that the front of lot 16 was upon the main shore, and not on the river in front of the point:—Held, that upon the evidence the verdict was right, as no part of the point appeared to be included in the lot. *Thomson* v. *Sherwood*, 21 U. C. R. 174.

Original Survey—*Course of Boundary Line—Ascertainment of Side Line—Statutes.*]—Where the lots in a concession ranging from east to west were not numbered all the way from the boundary line of the concession on the east, but two blocks of five lots each had been laid out in the original survey fronting on and towards that line, and the remainder of the concession in blocks of five lots each, fronting as usual on the concession line, and numbering westward, beginning at No. 10:—Held, that s. 35 of 12 Vict. c. 35 would, nevertheless, apply, and that the side line of the lot in question (32) must be determined by the course of the eastern boundary line of the concession. Held, also, that the last proviso in that section would not apply, so as to make the boundary line of the block in which lot 32 was the governing line, because the township was surveyed from the 27th March, 1829. *Bell* v. *White*, 15 U. C. R. 171.

——— *Lost Post—Ascertainment.*]—On the original survey of a township a base line had been run, but the concession lines had not been run from one side of the township to the other, and the surveyor had also run the side lines, planting a post at the measured depth of each concession, to mark the concession line; but it appeared impossible the concession lines so marked could be straight, and one of the angles of a lot could not be discovered by any stake or monument; —Held, that 12 Vict. c. 35 and 18 Vict. c. 83 do not provide a rule for determining the front of any lot in a township so surveyed; and that the proper method of ascertaining the place of a lost post is by dividing the distance between the nearest known posts on the side line, as it was originally run past the lots, and not by running a straight line between the nearest posts on the concession line and dividing the distances by the number of lots; also, that the side lines originally surveyed were to be considered true and unalterable boundaries. *Davis* v. *Waddell*, 6 C. P. 442.

——— *Posts on Base Line—Ascertainment of Side Line.*]—A concession or base line had been run and posts planted on it upon a survey made on a similar principle to that referred to in the last case, but the question was, how the side line of a lot was to be ascertained:—Held, that the distance between the two nearest ascertained monuments on the base line should be measured and divided proportionately between the lots, making due allowance for roads, and that the side line required should be run from the angle of the lot so ascertained. *Culp* v. *Culp*, 6 C. P. 466.

——— *River Front—Ascertainment of Side Lines.*]—The three easterly lots only of one concession in a township (Smith, in the county of Peterborough,) were bounded in front by a river, and the line had been run in the original survey in front of such concession, up to though not past these lots, but the township itself fronted upon another township:—Held, clearly not a township bounded in front by a river, within C. S. U. C. c. 93, s. 27, so that resort might be had to the posts in the concession in rear to determine the side lines of these lots. Quære, whether such a case is provided for by the statute. *Johnson* v. *Hunter*, 25 U. C. R. 348.

——— *Subsequent Survey.*]—In the original survey of the township of K., which was made by alternate concessions, the lines in front of the 1st and rear of the 2nd concessions were run, and a single row of posts planted along the latter, to divide the space into two hundred acre lots. The line between the 1st and 2nd concessions was afterwards surveyed under instructions from government, and divided off into lots of the same size:—Held, a case within s. 36 of 12 Vict. c. 35; and therefore that the side lines of lots in the 2nd concession should be ascertained by the posts of the original survey on the line in rear of that concession, and not by those of the subsequent survey on the division line between the 1st and 2nd concessions. *McDonell* v. *McDonell*, 10 U. C. R. 530.

Subsequent Survey—*Course of Boundary Line—Ascertainment of Side Line.*]—Two surveyors, being employed to divide the gore of land marked in the plan in the statement of case, ran lines as are therein dotted and named McLaurin's and McLeod's lines. The parties apparently acquiesced in McLeod's line for a time, but subsequently disagreed, and this action was brought to contest the division:—Held, that the rule of the statute, that the course of the boundary line in each concession, on that side from which the lots are numbered, shall be the course of the division or side line, not being applicable to the case, as these lots purported to number from the east, while the gore at the east of the concession was not

numbered, the defendant was entitled to recover. *Macdonald* v. *McDonald*, 11 C. P. 374.

——— *Establishing Line.*]—Held, that upon the evidence set out in this case, the surveyor had properly proceeded to establish the side line between plaintiff's and defendant's lots. *Crosswaite* v. *Gage*, 32 U. C. R. 196.

——— *True Line — Acquiescence.*]—Trespass, to try the boundary line between the plaintiff and defendant. The former claimed title to part of the north-west part of lot 20 in the 6th concession of South Dumfries, by metes and bounds; the defendant claimed the east half. The descriptions in the deeds did not conflict. A line was originally run by B. for the prior holders of the property, one of them at the time claiming title through the original patentee, under an agreement for purchase, but was not acquiesced in by the plaintiff. In 1849 one M., a provincial land surveyor, at plaintiff's request, ran a line supposed to be acquiesced in by the defendant, but upon the erection of a fence thereon by the plaintiff the defendant objected, and it was removed. In 1863 P. ran a line, claimed by the plaintiff as the true line, which caused this dispute. P. and J., being present at the time on defendant's behalf, concurred in opinion that this line was correct. The jury having found for the plaintiff, and leave being reserved to defendant to move against the verdict:—Held, that the line originally run, and now contended for by defendant, was not binding upon the parties, and that the evidence shewed the line run by P., and acquiesced in by the defendant, to be the correct one, and therefore the verdict for the plaintiff was correct. *McNaught* v. *Turnbull*, 13 C. P. 426.

See Holmes v. *McKechin*, 23 U. C. R. 52.

See ante III.

VI. MUNICIPALITIES—SURVEYS MADE ON APPLICATION BY.

By-law of County—*Direction to Levy—Invalidity—Pleading.*]—Declaration, that the plaintiffs, pursuant to the statute, applied to the governor to have the concession lines in the defendants' township re-surveyed, which was ordered accordingly, and the expense paid by plaintiffs; that the plaintiffs thereupon directed defendants to levy and collect the money so paid; but, although they did levy part, they refused to pay the same to the plaintiffs. Plea, that the only direction was by the plaintiffs' by-law, which before suit was quashed:—Held, on demurrer, that the declaration was bad for not shewing a by-law, as the plaintiffs could proceed only in that way; and that the plea was good. Quære, whether the money can be levied before the survey has been actually made. *County of Peterborough* v. *Township of Smith*, 26 U. C. R. 40.

——— *Re-survey of Township—Expense.*]—The county council passed a by-law directing a township municipality to levy and collect from the patented and leased lands of the township a certain sum required to reimburse the expenses incurred in a re-survey of the township:—Held, that the by-law was illegal, for the statute directs that such expense shall be defrayed by the proprietors of the lands interested. Semble, that the jurisdiction to pass such a by-law should appear on the face of it, by shewing a survey such as the statute contemplates. Quære, whether the Act authorizes the re-survey of a whole township. *In re Scott and County of Peterborough*, 25 U. C. R. 453.

The by-law directed the money to be levied "on all lands patented, leased, sold, agreed to be sold, and located as free grants" in the township of Harvey:—Held, bad, following the previous case. *In re Scott and Township of Harvey*, 26 U. C. R. 32.

The same county council by a subsequent by-law directed the collection of a further sum for the purpose, to be levied on the proprietors of land in the township in proportion to the quantity of land held by them respectively in such townships. This by-law was quashed, on the grounds: 1. That the statute does not authorize the re-survey of a whole township. 2. That it directs the expense of each concession to be borne by the proprietors of land there. *In re Scott and County of Peterborough*, 26 U. C. R. 36.

By-law of Township—*Adoption of Survey—Invalidity—Acquiescence.*]—Section 6 of C. S. U. C. c. 93, authorizing the county council to apply to the governor to cause a concession line to the surveyed, applies only where such line was not run in the original survey or has been obliterated. Where, therefore, it appeared that there were in fact two lines clearly traceable, the question being which was the original line, and the surveyor decided this upon conflicting evidence:—Held, that such survey was not binding or conclusive, and that a by-law of the township adopting it must be quashed. Held, also, that the acquiescence by the applicant in the line thus adopted (which was a highway) could not be urged against the application, other interests than his, both public and private, being affected. Section 7 directs that the surveyor shall so draw the line as to leave each of the adjacent concessions of a depth proportionate to that intended in the original survey. The depth of the concession on the north side of the line in question lay from north to south, and the concessions on the south extended in depth from east to west, so that the depth of that on the north only would be affected by the position of the line:—Semble, that this would not prevent the application of the statute. *In re Fairbairn and Township of Sandwich East*, 32 U. C. R. 573.

Request of Landholders—*Absence of—Rate.*]—An application was made under 12 Vict. c. 35, s. 31, without any request of the landholders, to mark out concession lines, and under it the survey provided for in 18 Vict. c. 83, s. 8, was afterwards made, to define the boundaries of lots:—Held, that such survey was illegal. *Re Walker and Township of Burford*, 15 U. C. R. 82.

The rate to pay for a survey, made under these Acts, must be levied not upon the assessed value of the land, but in proportion to the quantity held by the respective proprietors. *Ib.*

——— *Moiety—Resolution of Council.*]—Held, the application to the corporation not being from one-half the resident landholders affected, and the resolution of the corporation thereon not being such as the statute requires to authorize an application to the government for the survey, that the survey made by the

instructions of the commissioner of Crown lands was unauthorized. *Cooper* v. *Wellbanks*, 14 C. P. 364.

——— *Petition — Sufficiency.*] — It was proved and not disputed that the necessary number of resident landholders under the Act had applied for the survey:—Held, no objection that the petition did not shew this. Held, also, as to the other objections—viz., that the petition did not shew any want or obliteration of the original survey, and that neither petition nor memorial prayed for placing monuments—that the two documents could not to be read in any other sense than as containing an application to the governor requesting the making of a survey under the Act; and if so, then that the marking by permanent stone boundaries under the direction of the commissioner of Crown lands, as prescribed by the Act, was an incident to the survey necessarily involved in the application for it; and therefore, that the petition was sufficient. *Regina* v. *McGregor*, 19 C. P. 69.

Retracing Original Line—*Invalidity—Proof of Survey.*]—A surveyor employed by the government, under C. S. U. C. c. 93, ss. 6-8, to survey a concession line alleged not to have been run in the original survey, or to have been obliterated, instead of attempting to make a survey in accordance with those sections, satisfied himself that the original line could be found and endeavoured to retrace it:—Held, following Tanner v. Bissell, 21 U. C. R. 553, that such survey was not binding under the statute; and held, on the evidence, that the line so run was not in fact the same as the original line. Semble, that, in order to prove a survey which will be conclusive under the statute, the application by the county council to the government for such survey must be shewn. *Boley* v. *McLean*, 41 U. C. R. 260.

VII. Registered Plans.

Amendment of Plan.]—See *In re Chisholm and Town of Oakville*, 12 A. R. 225; *In re Allan*, 10 O. R. 110.

———*Closing Street—"Party Concerned"—Land Titles Act.*]—All persons who buy lots according to a registered plan do not ipso facto become "parties concerned" within the meaning of s. 7 of the Land Titles Act, 52 Vict. c. 20 (O.), in every street shewn upon it. Whether they are "concerned" or not in having a particular street kept open, is a question of fact; and in this case, in the absence of any representation at the time of the sale, by the vendor, that the street should be kept open, it was held that a person owning a lot several hundred yards away, and on the other side of a highway from the street in question, could not object to its being closed. *In re McIlmurray and Jenkins*, 22 A. R. 398.

Division into Town Lots — *Replacing en Bloc.*]—Quære, whether a person who has laid out land into town or village lots for sale cannot afterwards, if he finds that he cannot dispose of them as such, or for any other reason, replace his land as it was before. *In re Allan*, 10 O. R. 110.

Sale by Plan—*Lane not in Use.*]—Abandonment of an easement may be shewn not only from acts done by the owner of the dominant tenement indicating an intention to abandon, but also from acquiescence in acts done by the owner of the servient tenement. Where, therefore, the owner of the property over which a right of way existed built, with the knowledge of the owner of the property for the benefit of which the right of way had been reserved, an icehouse upon the portion reserved, and after some years pulled down the icehouse, and with the same knowledge built a stable on the same site, and a row of shops over another part of the right of way, it was held that the owner of the dominant tenement could not then have the right of way opened. Mykel v. Doyle, 45 U. C. R. 65, considered. Semble, that a conveyance made in pursuance of the Short Forms Act, of a lot according to a registered plan upon which a lane is laid out, does not pass any interest in the lane, when it has not in fact been opened on the land, and has not been used or enjoyed with the lot in question. *Bell* v. *Golding*, 23 A. R. 485.

Sale of Lots—*Way.*]—Under the Municipal and Surveyors' Acts, by the filing of a plan, and the sale of lots according to it, abutting on a street, the property in the street becomes vested in the municipality, although they may have done no corporate act by which they have become liable to repair. *Roche* v. *Ryan*, 22 O. R. 107.

A street or road laid out upon a registered plan of a township lot, where, although houses are clustered, there is not an incorporated village, continues to be a private street or road, although the owner should sell a lot fronting on it, until the township council adopts it as a public highway, or until the public by travelling upon it has accepted the dedication offered by the proprietor. R. S. O. 1887 c. 152, s. 62, only applies to cities, towns, or incorporated villages. A person who purchases lots according to such a plan, abutting upon streets laid out thereon, acquires, as against the person who laid out the plot and sold him the land, a private right to use those streets, subject to the right of the public to make them highways, in which case the private right becomes extinguished. The right so to use a private road does not necessarily mean a right over every part of the roadway, but only to such a width as may be necessary for the reasonable enjoyment of it. *Sklitzsky* v. *Cranston*, 22 O. R. 590.

See Crown.

VIII. Special Statutes — Surveys under.

Township of Binbrook.] — Under the statutes passed to remedy an erroneous public survey in Binbrook, 1 Wm. IV. c. 8, 7 Wm. IV. c. 59, an inhabitant living in the front concession cannot be dispossessed by ejectment after a prior submission to arbitration by the husband of a married woman owning land in the adjacent township of Saltfleet, the husband not being the owner of the land, to whom alone these Acts apply. *Doe d. Crooks* v. *Ten Eyck*, *Doe d. Crooks* v. *Calder*, 7 U. C. R. 581.

Township of Cumberland.]—23 Vict. c. 101 declares the mode in which the side lines of the 1st concession of Cumberland shall be run, and provides a method by which those injured

by the change from the original plan of survey may obtain compensation:—Held, that the general statute, 20 Vict. c. 78, was thereby excluded, and that defendant was confined to this method. *Smith* v. *Sparrow*, 21 U. C. R. 523. See *Holmes* v. *McKechin*, 23 U. C. R. 52, 321.

Township of Emily.]—See *Dyell* v. *Millage*, 27 C. P. 347.

Township of Fredericksburg.] — See *Doe d. Clapp* v. *Huffman*, M. T. 5 Vict., R. & J. Dig. 1620.

Township of Hamilton.]—See *Taylor* v. *Croft*, 30 U. C. R. 573.

Township of Kingston.] — See *Murney* v. *Markland*, 6 O. S. 220.

Township of Monaghan.]—See *Otty* v. *Davis*, 12 U. C. R. 454.

Township of Niagara.]—See *Clement* v. *Clement*, 14 C. P. 146.

Township of Scarborough.]—See *Palmer* v. *Thornbeck*, 27 C. P. 291, 28 C. P. 117.

Township of Vaughan.]—See *Bernard* v. *Gibson*, 21 Gr. 195.

IX. Surveyors.

Adoption of Line.] — A line run by a subordinate and adopted by the principal (the surveyor) is the work of the latter. *Ovens* v. *Davidson*, 10 C. P. 302.

Contract — *Formal Survey—Adoption of Former Line.*]—R., who held a license from the government of New Brunswick to cut timber on certain Crown lands, claimed that S., licensee of the adjoining lot, was cutting timber on his grant, and he issued a writ of replevin for some 800 logs alleged to be cut by S. The replevin suit was settled by an agreement between the parties to leave the matter to surveyors to establish the line between the two lots, the agreement providing that the lines of the land held under said license (of R.) should be surveyed and established by (naming the surveyors) and the stumps counter, &c.:—Held, that under this agreement the surveyors were bound to make a formal survey, and could not take a line run by one of them at a former time as the said boundary line. *Snowball* v. *Ritchie*, 14 S. C. R. 741.

Liability of Township.] — Held, that the township council of Hamilton, coming in the place, under 12 Vict. c. 81, of the trustees of the Newcastle district, could not be held liable in debt to the surveyor appointed under 38 Geo. III. c. 1, to survey the township. *Roach* v. *Municipal Council of Hamilton*, 8 U. C. R. 229.

Negligence — *Duty — Contract — Damages.*]—A surveyor in making a survey is under no statutory obligation to perform the duty, but undertakes it as a matter of contract, and is liable only for damages caused by want of reasonable skill, or by gross negligence. *Township of Stafford* v. *Bell*, 6 A. R. 273.

The defendant, a provincial land surveyor, who was employed by the plaintiffs to run certain lines for road allowances, proceeded upon a wrong principle in making the survey, and the plaintiffs sued him for damages which they had paid to persons encroached upon by opening the road according to his survey:—Held, reversing the judgment in 31 C. P. 77, that the plaintiffs could not recover, as, although the survey was made by the defendant on an erroneous principle, the evidence failed to prove that the lines as run by him were not correct. *Ib.*

Remarks upon the impropriety of receiving the opinions of surveyors as experts, as to the proper mode of making a survey under a statute. *Ib.*

Private Survey — *Adjacent Land.*]—A surveyor has no power to enter upon the lands of one neighbour to make a mere private survey for another. *Turnbull* v. *McNaught*, 14 C. P. 375.

Surveyor's Report — *Boundaries—Judgment on—Acquiescence in Judgment—Chose Jugée.*]—See *Mercier* v. *Barrette*, 25 S. C. R. 94.

See Crosswaite v. *Gage*, 32 U. C. R. 196, *ante* V.; *Babaun* v. *Lauson*, 27 U. C. R. 399, *ante* IV.; *Doe d. Case* v. *Magill*, 5 O. S. 56, *ante* IV.

X. Miscellaneous Cases.

Boundaries — *Ascertainment.*] — Where there is a dispute as to the boundary line between two lots granted by patents from the Crown, and it has been found impossible to identify the original line, but two certain points have been recorded in the Crown lands department, the proper course is to run a straight line between the two certain points: R. S. Q. Art. 4155. *Bell's Asbestos Co.* v. *Johnson's Co.*, 23 S. C. R. 225.

——— *Estoppel.*]—J. McA. et al., plaintiffs' auteurs, having leased a certain portion of a lot of land for mining purposes, described in the deed by metes and bounds, with the following option: "Pourra le dit acquéreur changer la course des lignes et bornes du dit lopin de terre sans en augmenter les bornes, l'étendue, on superficie, en suivant dans ce cas la course ou ligne de la dite veine de quartz qu'il peut y avoir et se rencontrer en cet endroit, après que lui, le dit bailleur, aura prospecté le dit lopin de terre susbaillé:" adopted certain lines of a survey made by one Proulx, as containing the vein of quartz. B. et al., defendants' auteurs, leased another portion of the same lot In an action en bornage between the parties the court appointed three surveyors to fix the boundaries. Each surveyor made a separate report, and the report and plan of the surveyor Legendre, adopting Proulx's lines, was adopted and homologated by the court:—Held, that plaintiffs' auteurs having located their claim in accordance with the terms of this deed, plaintiffs were now estopped from claiming that their property should be bounded according to the true course of the vein of quartz, and that the judgment homologating the survey adopting Proulx's lines and survey was right and should be affirmed. *McArthur* v. *Brown*, 17 S. C. R. 61.

——— *Referee's Decision—Bornage—Arbitrations.*]—The owners of contiguous farms executed a deed for the purpose of settling a boundary line between their lands, thereby naming a third person to ascertain and fix the true division line upon the ground, and agreeing further to abide by his decision and accept the line which he might establish as correct. On the conclusion of the referee's operations, one of the parties refused to accept or act upon his decision, and action was brought by the other party to have the line so established declared to be the true boundary and to revindicate the strip of land lying upon his side of it:—Held, that the agreement thus entered into was a contract binding upon the parties to be executed between them according to the terms therein expressed, and was not subject to the formalities prescribed by the code of civil procedure relating to arbitrations. *McGoey* v. *Leamy*, 27 S. C. R. 545.

Boundaries—*Timber Licenses—Variations of Compass.*]—Defendant claimed under a timber license which described his limits as bounded on the south by "the continuation of a line from the head of Mud Lake on the course north 54° E., formerly the boundary between T. C. and A. R. M." The plaintiff claimed under a license which gave his northerly limit as the same line, describing it also as running N. 54° E. Both licenses were renewals of previous licenses from about 1839:—Held, that the boundary between them was the true astronomical line N. 54° E.; and that the plaintiff could not claim according to a line run in 1874 N. 54° E. magnetically, making no allowance for the variations of the compass. *Thibaudeau* v. *Skead*, 39 U. C. R. 387.

Compensation for Improvements in Consequence of Unskilful Survey.]—See *Plumb* v. *Steinhoff*, 2 O. R. 614.

Original Survey—*Private Person.*]—A survey made by a private person of an unsurveyed block granted by the Crown is the original survey, and has the same force and effect as if made by government authority. *VanEvery* v. *Drake*, 9 C. P. 478.

——— *Work on Ground—Plan.*]—Under s. 35 of c. 93, C. S. U. C., the work upon the ground, in the original survey of towns and villages, to designate or define any lot, will override any plan of such lot. *McGregor* v. *Calcutt*, 18 C. P. 39.

Specific Performance — *Varying Surveys.*]—The defendant had for some time used part of the plaintiff's land as a mill-pond, and differences existed between them in relation thereto, to put an end to which they entered into a written agreement that the plaintiff should sell to the defendant as much of the land as was or had been overflowed by the water of the mill-pond, for a price which was proved to be much beyond the intrinsic value of the piece of land so sold. To carry into effect this contract, the plaintiff had the ground surveyed, but the survey was erroneous, and the deed which the plaintiff thereupon tendered comprised, in consequence, less land than the defendant was entitled to have. The defendant refused this deed, procured a new survey to be made, and tendered a new deed for execution by the plaintiff, which deed the plaintiff refused to execute. When the first instalment of the purchase money became due the defendant tendered it, but did not pay, in consequence of the non-execution of the conveyance. The defendant continued to use the land for a mill-pond, and gave no intimation of his intention to abandon the contract; and twelve months afterwards the plaintiff filed a bill for a specific performance of the contract, which was decreed without costs. *Paul* v. *Blackwood*, 3 Gr. 394.

Stay of Proceedings—*Improvements—Conveyance.*]—Upon the facts of the case:—Held, that the court had no authority under s. 12 of 59 Geo. III. c. 14, to stay the proceedings until defendant received the value of his improvements, or until the plaintiff conveyed the land in dispute. *Doe d. Short* v. *Bass*, 8 U. C. R. 147.

See RAILWAY, XV. 1 (c)—REGISTRY LAWS, I. 3 (c)—WAY, III. 4 (a).

PLANT.

See MASTER AND SERVANT, VI. 4 (d).

PLEADING.

PLEADING AT LAW BEFORE THE JUDICATURE ACT.

I. GENERAL POINTS AND PRINCIPLES,
1. *Argumentativeness*, 5340.
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I. GENERAL PRINCIPLES.

1. *Argumentativeness.*

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2. *Certainty and Particularity.*

(a) *Alleging Contracts to be in Writing or by Deed.*

Declaration, that in consideration that plaintiff would sell and convey to defendant certain lands for £275, which were then subject to a mortgage of £700, defendant promised to pay off said mortgage, and save the plaintiff harmless therefrom, &c.:—Held, that it was unnecessary to allege the promise to be in writing. *Martin* v. *Arthur*, 16 U. C. R. 483.

A declaration that the defendants, a corporation, by their duly authorized agents in that behalf, entered into an agreement in writing with the plaintiffs to refer a matter to arbitration:—Held, good, without averring the agreement to have been under seal, for that might be matter of evidence or the subject of a plea. *Calvin* v. *Provincial Ins. Co.*, 20 C. P. 21.

A replication alleging a purchase of timber growing upon an allowance for road from a municipal council ought to shew a transfer by deed, or at least a contract of sale in writing. *Cochran* v. *Hislop*, 3 C. P. 440.

Quære, as to the sufficiency of a plea to a written contract, that before breach it was rescinded and a new contract substituted, not alleging the rescission to have been in writing. *Wingall* v. *Enniskillen Oil Co.*, 10 L. J. 216.

Where an agreement to convey land is averred in a plea to have been accepted in satisfaction of the cause of action, it must be alleged to have been in writing, for without this the plaintiff would have no remedy. *Balsam* v. *Robinson*, 19 C. P. 263.

Action for rent due on a lease. Plea, that after the lease the plaintiff "did grant and convey, by way of mortgage in fee simple," the demised premises to one M., who claimed the rent:—Held, sufficient, without averring

that the conveyance was by deed. *Perdue* v. *Hays*, 31 U. C. R. 111.

Declaration on a note. Plea, on equitable grounds, setting up an agreement between plaintiff and defendant for a dissolution of partnership, and that the debts which were to have been assigned to defendant exceeded the note, &c. It was urged by defendant that, as the plea did not aver that the agreement for the dissolution was in writing, it must be assumed not to be so, and so in equity an account would have to be taken, and on this ground the plea was supportable:—Held, (1) that, even if such an averment were necessary, the defendant could not take advantage of the defect in his own pleading; and (2) that there was no necessity for such an averment, for the distinction in this respect between the declaration and subsequent pleadings is now abolished; and where a writing is necessary it need not be averred, but must be proved in evidence. *Kilroy* v. *Simkins*, 26 C. P. 281.

See, also, *Clarke* v. *Carroll*, 17 C. P. 538; *Dalgleish* v. *Conboy*, 26 C. P. 254; *Kelly* v. *Isolated Risk Ins. Co.*, 26 C. P. 299.

(b) *Averments of Identity.*

A plea justifying the taking of A.'s goods under an execution against B., and that divers goods of B. were in the possession of A., without averring them to be the same goods, is bad on special demurrer. *Friesman* v. *Donnelly*, 5 O. S. 16.

To a count in trespass, defendants avowed under a distress for rent, alleging that the plaintiff fraudulently removed certain of his goods from the demised premises, whereupon defendant took the said goods in the second count mentioned:—Held, plea good, and not open to the objection that the goods taken were not shewn to be the goods fraudulently removed. *Hatch* v. *Holland*, 28 U. C. R. 213.

See, also, *Cameron* v. *Borrowman*, 28 U. C. R. 262.

(c) *Other Cases.*

Declarations.]—In trespass qu. cl. fr. and for taking goods, it is not an objection on general demurrer that the goods were not alleged to be the plaintiff's. *O'Brien* v. *Harahy*, 1 U. C. R. 475.

Where the declaration alleges that A., wife of B., "having a lawful right to an estate in dower," refused with B. to execute a release, it will be intended that the release was required from A. as the wife of B., and not as the wife of the former husband whom she had survived. *Hoyt* v. *Widderfield*, 5 U. C. R. 180.

Where a defendant is sued upon a promise to continue a former agreement, which at the time of the alleged promise is about expiring, the plaintiff should state in his declaration the precise terms of the former agreement, and also aver that the terms so stated composed the whole of the former agreement. *Barnes* v. *McKay*, 5 U. C. R. 246.

An uncertainty in the statement of a part of the consideration for the defendant's promise, with respect only to a part of the plaintiff's demand, does not make the declaration bad on general demurrer. *Bradford* v. *O'Brien*, 6 U. C. R. 417.

An averment of a material fact in a pleading by way of quod cum is sufficient. *Principal of Upper Canada College and Royal Grammar School* v. *Boulton*, 2 C. P. 326.

This declaration, being a special one on the case against a sheriff for breach of duty, was considered insufficient from the fault of uncertainty, not in any particular breach, but as to the number of breaches intended to be relied upon. *Reid* v. *Carroll*, 8 U. C. R. 275.

Semble, that on non est factum, if it were shewn that there was but one agreement between the parties relating to the matter, the error in the recital of it would not be fatal, and the plaintiffs might recover. *Wadsworth* v. *Townley*, 10 U. C. R. 579.

A declaration stating that defendant falsely, deceitfully, fraudulently, and wilfully represented the maker and indorser (without naming them) of a promissory note, to be good:—Held, bad, for want of sufficient certainty. *Newman* v. *Kissock*, 8 C. P. 41.

Quære, whether, when a contract is to pay at a particular place named in a declaration, the general averment that the defendant did not pay, is not sufficient, and any statement as to the plaintiff not being at the place named to receive the money, or that defendant was there ready to pay it, must not arise by way of defence. *Becher* v. *Town of Amherstburg*, 23 C. P. 602.

Action for representations by which plaintiff was induced to contract:—Semble, that the declaration was bad, it not stating what the representations were, and how departed from. *Reid* v. *Board of Agriculture for Upper Canada*, 26 U. C. R. 565. See *Armstrong* v. *Lewin*, 34 U. C. R. 269.

In declaring on a policy, guaranteeing to the extent of $20,000 the honesty and care of one W. while in the plaintiffs' employment as cashier, the plaintiffs alleged that while in their employment a sum exceeding $20,000 was intrusted to W. to be safely kept in the safe at their head office, of which $10,000 was lost owing to his negligence in regard to its custody:—Held, that the averment of W.'s neglect in the declaration was not too general. *Royal Canadian Bank* v. *European Assurance Society*, 29 U. C. R. 579.

Remarks as to the use of ambiguous language in pleading. *Macdonald* v. *Dick*, 34 U. C. R. 623.

Declaration, that the plaintiff agreed to buy and the defendant to sell 20,000 cubic feet of good merchantable board timber, of the quality and manufacture therein mentioned, to be delivered, as in the agreement set out, not later than 10th May next ensuing, the plaintiff to pay at the rate of twelve cents per cubic foot of timber so delivered at the times and in the manner in the agreement set out; that plaintiff, in pursuance thereof, paid the $300 on account; and all conditions were fulfilled, &c., yet defendant did not deliver the

said timber or any part thereof:—Held, that the declaration was defective for uncertainty in not setting out what the agreement was as to the quality and manufacture and delivery, but that the defect was cured by the plea. *Reid* v. *Robertson*, 25 C. P. 568.

Allegation in a declaration that a chose in action "was duly assigned, in the manner required by the Act:"—Held, sufficient under 25 Vict. c. 12, s. 4. *Cousins* v. *Bullen*, 6 P. R. 71.

Declaration, that D., by writing, for valuable consideration, duly assigned to the plaintiff the sum of $500, money due and to become due to D. by defendants, whereof defendants had notice in writing, and at the time of and after said assignment, and after said notice, and before action, defendants were indebted to D. in money sufficient to pay the sum so assigned to plaintiff, &c.:—Held, bad, as not setting forth any fact from which the existence of and promise to pay a debt would be implied by law. Mitchell v. Goodall, 44 U. C. R. 398, and Brice v. Bannister, 3 Q. B. D. 569, distinguished. *Smith* v. *Ancaster Township*, 45 U. C. R. 86.

Subsequent Pleadings.]—Where to a declaration in debt upon a bond, conditioned to pay money on the execution of a conveyance according to agreement, the plea stated that the plaintiffs had not made a conveyance according to the agreement, the plea was held bad for not shewing what the agreement was, although the agreement was referred to, and its contents might be collected from the condition of the bond as set out upon oyer. *McGilvray* v. *McDonnell*, Tay. 139.

A plea of the Statute of Limitations stating that the causes of action, "if any such there were, or still are," did not accrue within six years, is bad on special demurrer. *Meyer* v. *Burke*, H. T. 6 Vict. See also *Perdue* v. *Corporation of Chinguacousy*, 25 U. C. R. 65.

A plea was held not objectionable as not admitting and avoiding the plaintiff's claim, but referring to it as the plaintiff's alleged claim, if any. *Burrowes* v. *DeBlaquiere*, 34 U. C. R. 498.

In covenant against a sheriff's sureties, the breach assigned was that the sheriff arrested a debtor and afterwards allowed him to escape. Defendant pleaded that the gaol was accidentally destroyed by fire, and so the debtor escaped:—Held, bad, for not denying that the fire occurred through the negligence or default of the sheriff or his deputy. *Corkery* v. *Graham*, 1 U. C. R. 315.

Declaration charging defendant with the non-performance of a contract. Plea, that the said contract was not duly performed by the said parties, to wit, the plaintiff and defendant, in manner, &c.:—Held, bad, in leaving it uncertain which of the said parties had not performed and in what particular. *Jones* v. *Hamilton*, 3 U. C. R. 170.

Uncertainty as to time in plea:—Held, bad. *Rees* v. *Dick*, 7 U. C. R. 496.

In setting out a will in pleading, there is no necessity to aver that all the solemnities of the statute have been observed in regard to the execution of the will. The averment that the will was made and published as by law is required for the passing of real estate, is sufficient. *Walton* v. *Hill*, 8 U. C. R. 562.

To an action on a mutual insurance policy on a dwelling house and furniture, the defendants pleaded that a certain assessment was declared by defendants on plaintiff's premium note, of which assessment the plaintiff had due notice, but did not pay the same, whereby the policy became void:—Held, plea good: for that the allegation of due notice, without stating the particulars of the notice or the manner of giving it, was sufficient. *Smith* v. *Mutual Ins. Co. of Clinton*, 27 C. P. 441.

Semble, although the statute enacts that all by-laws made and passed shall be authenticated by seal, and signed by the person presiding, yet it is not necessary to set out these facts whenever a by-law is pleaded, but it is sufficient to aver that it was duly made and passed. *Wilson* v. *Town of Port Hope*, 10 U. C. R. 405.

In a justification by a landlord for evicting his tenant, relying upon a forfeiture of the term for non-payment of taxes:—Held, that it was unnecessary in the plea to set out every requisite to shew a valid rate, there being a distinction in this respect between an avowry and a justification. *Taylor* v. *Jermyn*, 25 U. C. R. 86.

See, also, *Haacke* v. *Marr*, 8 C. P. 441.

Plea justifying as poundkeeper the sale of an animal impounded—general allegation that all proceedings were lawfully had, &c.—sufficiency of. See *Rourke* v. *Mosey*, 26 U. C. R. 546.

Plea, bad for uncertainty in not shewing whether an agreement was made by an individual or a firm, and for not stating the Christian names of the members of the firm. *Murray* v. *Mountjoy*, 4 C. P. 169.

First count, debt, on the statute for double value, claiming £40. Second count, for an occupation, claiming £20. Plea, to the whole declaration, "as to £20, parcel," &c.:—Held, bad, for not shewing to what £20 it was pleaded. *Hamer* v. *Laing*, 13 U. C. R. 233.

A plea that a debenture was not issued "under the formalities required by law," because the by-law under which it was issued did not settle a special rate, and was therefore void:—Held, bad, for not averring distinctly that such debenture was issued in pursuance of a by-law, and for not pointing out wherein it was defective. *Trust and Loan Co. of Upper Canada* v. *City of Hamilton*, 7 C. P. 96.

Action upon an agreement in writing between plaintiff and defendant, by which the plaintiff was engaged as editor of a newspaper for one year at a salary payable quarterly. Defendant pleaded that the plaintiff so improperly and disobediently conducted himself, that he was obliged to dismiss him, "as he lawfully might:"—Held, plea good, though it would have been better to state the misconduct particularly. *Hunter* v. *Foote*, 12 C. P. 175.

Plea, that the plaintiff did not execute a lease when tendered him by defendant. Replication, that the plaintiff was ready and wil-

ling to execute the lease when tendered, but was prevented by the acts and misconduct of defendant, &c.:—Held, bad, for not shewing how defendant's acts and misconduct hindered and prevented plaintiff executing a lease expressly tendered to him for execution. *Walker* v. *Kelly*, 24 C. P. 174.

A plea setting up the assignment of a debt sued for before action, must state the name of the assignee or that it is unknown to defendant. *Ferguson* v. *Elliot*, 12 C. L. J. 249.

To an action for maliciously making demand for an assignment under the Insolvent Act, the defendants' third plea, after setting up a variety of dealings between the parties, shewing that the plaintiff had from time to time failed to meet his engagements with defendants, concluded that the plaintiff being indebted to the defendants in the sum of $1,400, and being unable to pay the same or to meet his engagements, and the plaintiff being also, to the knowledge of the defendants, indebted in large sums to divers other persons, creditors of the plaintiff, the defendants, bonâ fide believing the plaintiff to be insolvent within the meaning of the Insolvent Act of 1875, and amending Acts, and having reasonable and probable cause for so believing, and without malice, made a demand on the plaintiff, &c.:—Held, a good plea, although it was not expressly averred in the words of s. 4 that the plaintiff had ceased to meet his liabilities generally as they became due. Quære, whether that expression means his liabilities to the particular creditor or to his creditors generally. *Nagle* v. *Timmins*, 31 C. P. 221.

For other cases of uncertainty, see *Graham* v. *Elliott*, 2 U. C. R. 436; *Cook* v. *Mair*, 3 U. C. R. 478; *French* v. *Kingsmill*, 4 U. C. R. 215; *Dowding* v. *Eastwood*, 4 U. C. R. 217; *Tennery* v. *Stiles*, 5 U. C. R. 254; *Wilkes* v. *Clement*, 9 U. C. R. 339; *McKenzie* v. *Fairman*, 1 C. P. 50; *Jones* v. *Dunn*, 1 C. P. 204; *Williams* v. *Lee*, 2 C. P. 175; *Boice* v. *Lawson*, 6 C. P. 193; *Kerr* v. *Bearinger*, 29 U. C. R. 340; *Munson* v. *Hamilton*, 5 O. S. 118; *Black* v. *White*, 18 U. C. R. 362; *Postmaster-General* v. *Robertson*, 41 U. C. R. 375; *Canada Agricultural Ins. Co.* v. *Watt*, 30 C. P. 350; *Town of Peterborough* v. *Edwards*, 31 C. P. 231.

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3. *Colour.*

[By C. L. P. Act, c. 102, R. S. O. 1877 c. 50, express colour is unnecessary in any pleading.]

See Monaghan v. *Hayes*, 4 C. P. 1; *Boswell* v. *Ruttan*, 6 U. C. R. 199; *Thompson* v. *Breakenridge*, 3 O. S. 170.

See, also, *Millard* v. *Kirkpatrick*, 4 U. C. R. 248.

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4. *Conditions Precedent.*

The omission of an averment of a special request, where required, is matter of form only, and cannot be objected to on general demurrer. *McLeod* v. *Jackson*, 5 O. S. 381.

Declaration, that plaintiffs covenanted with defendants to do certain works within a limited period, with power to defendant on six days' notice to take the works out of plaintiffs' hands in default of sufficient progress to ensure completion of the said works within the time; but, omitting to set out the words, "It is also understood that the work is to be carried on unceasingly night and day, with sufficient force to ensure its completion within the limited time." Averment, that though plaintiffs fulfilled the conditions precedent, defendants did take the works out of the plaintiffs' hands without notice or just cause, &c., whereby, &c.:—Held, on motion for nonsuit, to be no variance, as by s. 106 of C. L. P. Act, 1856, the averment of performance by plaintiff of conditions precedent, not denied by defendants, is sufficient. *Hennessey* v. *Weir*, 11 C. P. 179.

Held, that in declaring on an agreement authorized by statute, "subject to the consent of two-thirds of the stockholders voting in person or by proxy," the general averment of the performance of all conditions precedent was sufficient, without alleging specially that the statutable consent had been obtained. *Great Western R. W. Co.* v. *Grand Trunk R. W. Co.*, 25 U. C. R. 37.

If the memorandum sued upon had shewn a sale of the land in question by plaintiff to defendant, not a lease, so that the plaintiff would have been bound to tender a conveyance:—Semble, that such tender must have been alleged in the declaration, and would not be included in the general averment that "all things happened," &c., for such averment covers only conditions precedent to be performed by plaintiff under the agreement. *Fairbairn* v. *Hilliard*, 27 U. C. R. 111.

Declaration on a deed, set out in it, by which plaintiff was to do all the work on an extension of defendants' railway. By the 17th clause of the deed defendants covenanted to provide all the rails required for the extension and works connected therewith, and further, when required by plaintiff, to supply him with engines, &c., for the purpose of ballasting, &c. By the 19th clause defendants agreed to pay plaintiff for the work and materials the scheduled prices by monthly payments in certain proportions specified, and within a time named after the giving of a certificate by defendants' engineer. The declaration averred that "the plaintiff did all things necessary on his part to entitle him to have the said contract performed by defendants, and the time for so doing has elapsed:"—Held, that the general allegation would only cover acts to be done by the plaintiff, and therefore sufficiently averred the request by the plaintiff to provide the engines, &c., but not that the engineer had granted the certificates; but that this defect was covered by defendants pleading over. *Shanly* v. *Midland R. W. Co.*, 33 U. C. R. 604.

In an action on an order made under the Companies Act, 1862, in England, in the winding-up of a company, making a call upon defendant in respect of his shares, and directing payment thereof to one of the two official liquidators appointed:—Held, that the general averment that all things happened, &c., necessary to render defendant liable to pay and entitle the plaintiff to maintain this action, sufficiently alleged, if defendant could be considered as being charged as a past member, that the court was of opinion that the present members were unable to pay, and that the call

was a debt accrued before defendant ceased to be a member. *Barned's Banking Co.* v. *Reynolds*, 36 U. C. R. 256.

In replevin for a mare, defendant justified under a by-law of the township, enacting that the pound-keeper should impound any horse for unlawfully running at large, &c., delivered to him for that purpose by any person resident within the township; and that the person distraining should deliver to him at the same time duplicate written statements of his demand against the owner, and, if required by the pound-keeper, a written agreement, with a surety, to pay all costs in case the distress should prove illegal, &c. The plea alleged that the mare being taken while at large and doing damage in the township, "was duly impounded by a lawfully authorized pound-keeper of said township," &c., and thereupon all proceedings were lawfully had, all steps taken, notices given, and time elapsed, necessary to enable the pound-keeper to sell said mare, &c.: —Held, on demurrer, plea bad, for not alleging that the mare was delivered to the pound-keeper by a resident of the township; and that this allegation was not supplied by the general averment that all proceedings were had, &c., which applied only to what took place after the impounding. Held, also, that the other requisites of the by-law, as to the statement of demand, the written agreement, and notices of sale, &c., were covered by the general allegation. *Rourke* v. *Mosey*, 36 U. C. R. 546.

See, also, *Wright* v. *County of Grey*, 12 C. P. 479; *Kelly* v. *Isolated Risk Ins. and Farmers' Fire Ins. Co.*, 26 C. P. 299; *Johnston* v. *Western Assurance Co.*, 4 A. R. 281; *Home Life Association of Canada* v. *Randall*, 30 S. C. R. 97, at p. 103.

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5. *Construction and Meaning.*

The present rule is, to maintain pleading demurred to, if it can be properly maintained. *McCulloch* v. *White*, 33 U. C. R. 338; *Kelly* v. *Isolated Risk Ins. Co.*, 26 C. P. 305.

And to give to it a meaning that will support rather than one which will destroy it. *Shannon* v. *Gore District Mutual Ins. Co.*, 37 U. C. R. 388.

The court assumes a pleading which alleges an agreement to import a valid agreement; and it is unnecessary in any pleading to aver that the contract set up is in writing. *Dalgleish* v. *Conboy*, 26 C. P. 258.

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6. *Dates.*

See Elkins v. *Evans*, 2 U. C. R. 144; *Consumers' Gas Co.* v. *Nicolls*, 7 U. C. R. 91; *Ashford* v. *Gohecn*, *ib.* 547; *Wadsworth* v. *Townley*, 10 U. C. R. 579; *Henderson* v. *Chapman*, 10 L. J. 218.

See post 10, 11, 17.

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7. *Departure.*

(a) *In Replications.*

See Smith v. *Provincial Ins. Co.*, 18 C. P. 223; *McCulloch* v. *White*, 33 U. C. R. 331; *McKenzie* v. *Dewan*, 36 U. C. R. 512; *Williamson* v. *Hand-in-Hand Mutual Fire Ins. Co.*, 26 C. P. 266; *Reiffenstein* v. *Hooper*, 36 U. C. R. 295; *Coulthard* v. *Royal Ins. Co.*, 39 U. C. R. 403; *O'Connor* v. *McNamee*, 28 C. P. 141; *Wright* v. *London Life Ins. Co.*, 5 A. R. 218; *Montreal City and District Savings Bank* v. *County of Perth*, 32 C. P. 18; *Wright* v. *County of Grey*, 12 C. P. 479; *Walker* v. *Kelly*, 24 C. P. 174; *Smith* v. *Mutual Ins. Co. of Clinton*, 27 U. C. R. 441, 446; *Brillinger* v. *Isolated Risk, &c., Ins. Co.*, 30 C. P. 9; *McMaster* v. *King*, 42 U. C. R. 409.

(b) *In Subsequent Pleadings.*

See Maxwell v. *Ransom*, 1 U. C. R. 219; *Hamilton* v. *Davis*, 1 U. C. R. 490; *Shaw* v. *Shaw*, 12 U. C. R. 432; *McKenzie* v. *Dewan*, 36 U. C. R. 512; *Brougham* v. *Balfour*, 3 C. P. 114.

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8. *Documents, Setting out.*

[*See* C. L. P. Act, ss. 89, 90, R. S. O. 1877 c. 50; con. rule (1897) 275.]

See Boulton v. *Weller*, 3 U. C. R. 372; *Thornhill* v. *Jones*, 12 U. C. R. 231; *McLellan* v. *Rogers*, 12 U. C. R. 571; *Miller* v. *Kinsley*, 14 C. P. 188; *Shier* v. *Shier*, 22 C. P. 147; *Kempster* v. *Bank of Montreal*, 32 U. C. R. 87; *Great Western R. W. Co.* v. *Corporation of Dundas*, 20 U. C. R. 523; *Dalgleish* v. *Conboy*, 26 C. P. 254; *Garland* v. *McDonald*, 41 U. C. R. 573.

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9. *Duplicity.*

See Reid v. *Carrall*, 8 U. C. R. 275; *Fulliter* v. *Moodie*, 22 U. C. R. 71; *Higson* v. *Thompson*, 8 U. C. R. 561; *Duffy* v. *Higgins*, 4 C. P. 301; *Yuill* v. *Harvey*, 2 O. S. 215; *Campbell* v. *Burr*, 5 O. S. 630; *Burrowes* v. *Washburn*, E. T. 3 Vict., R. & H. Dig. 207; *Campbell* v. *Elliott*, 3 U. C. R. 167; *West* v. *Bown*, 3 U. C. R. 291; *Bank of Montreal* v. *Humphries*, 3 U. C. R. 463; *Smith* v. *Oates*, 4 U. C. R. 185; *Cox* v. *Cox*, 4 U. C. R. 207; *Dowding* v. *Eastwood*, 4 U. C. R. 217; *Ewart* v. *Weller*, 5 U. C. R. 610; *Bank of Upper Canada* v. *Robinson*, 6 U. C. R. 23; *McKenzie* v. *Gibson*, 8 U. C. R. 100; *Hutchinson* v. *Munroe*, 8 U. C. R. 103; *Cunningham* v. *Duane*, 9 U. C. R. 274; *Williams* v. *Lee*, 2 C. P. 175; *Kerby* v. *Grand River Navigation Co.*, 11 U. C. R. 334; *Corbett* v. *Shepard*, 4 C. P. 43; *Hanscombe* v. *Macdonald*, 4 C. P. 190; *Campbell* v. *Corporation of Elma*, 13 C. P. 296; *Miller* v. *Miller*, 17 C. P. 226.

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10. *Inconsistency and Repugnancy.*

See Bown v. *Hawke*, 6 U. C. R. 275; *Whelan* v. *Fraser*, 11 U. C. R. 94; *Adams* v. *Forde*, 13 U. C. R. 485; *Doan* v. *Richardson*, 13 U. C. R. 527.

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11. *Intituling and Dating.*

See Bristowe v. *Pattenson*, 6 O. S. 107; *Richardson* v. *Ranney*, 2 C. L. Ch. 71; *Ross*

v. *Cool*, 9 C. P. 94; *Averill* v. *Cameron*, 3 O. S. 176; *Shore* v. *Shore*, ib. note; *Lemoine* v. *Raymond*, R. & J. Dig. 2755; *Carruthers* v. *Sword*, 1 C. L. Ch. 79; *Williamson* v. *Williamson*, 8 L. J. 108; *Ross* v. *Hixon*, R. & J. Dig. 2756; *Murphy* v. *Burnham*, 2 U. C. R. 261; *Day* v. *Holland*, 1 C. L. Ch. 5; *Commercial Bank* v. *Boulton*, 1 C. L. Ch. 15; *Breden* v. *Lisle*, 1 C. L. Ch. 60; *Morell* v. *Caspar*, 1 C. L. Ch. 52; *Smith* v. *Thompson*, 6 P. R. 109; *Cluxton* v. *Dickson*, 7 P. R. 3.

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12. *Materiality.*

See Flaherty v. *Mairs*, 1 U. C. R. 221; *Lount* v. *Smith*, 5 U. C. R. 302; *Perry* v. *Richmond*, 6 U. C. R. 285; *Johnston* v. *McDonald*, 1 U. C. R. 384; *Dowding* v. *Eastwood*, 4 U. C. R. 217; *Masson* v. *Hill*, 5 U. C. R. 60; *Mills* v. *Scott*, 6 U. C. R. 205; *Lemesurier* v. *Sherwood*, 7 U. C. R. 530; *Connors* v. *Great Western R. W. Co.*, 13 U. C. R. 401; *McCulloch* v. *White*, 33 U. C. R. 331; *Soules* v. *Soules*, 35 U. C. R. 334.

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13. *Profert and Oyer.*

[Abolished—see C. L. P. Act, s. 89, R. S. O. 1877 *c.* 50.]

See Moffatt v. *Loucks*, Tay. 305; *McCrae* v. *Hamilton*, 6 O. S. 159; *O'Grady* v. *McDonell*, R. & J. Dig. 2766; *Brown* v. *Robertson*, 1 U. C. R. 379; *McLean* v. *Tinsley*, 7 U. C. R. 40; *McCulloch* v. *Jarvis*, 8 U. C. R. 267; *Elliott* v. *Duggan*, 1 P. R. 147.

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14. *Signing Pleadings.*

[By C. L. P. Act, s. 99, R. S. O. 1877 *c.* 50, the signature of counsel shall not be required to any pleading.]

See Crooks v. *Davis*, 5 O. S. 141; *Lemoine* v. *Raymond*, *ante* 11.

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15. *Statutes—Statement of.*

See Huron District Council v. *London District Council*, 4 U. C. R. 302; *Johnstone* v. *Odell*, 1 C. P. 395; *Ferrie* v. *Jones*, 5 U. C. R. 504; *Lafferty* v. *Stock*, 3 C. P. 9; *Austin* v. *Snyder*, 21 U. C. R. 299; *Drake, q. t.* v. *Preston*, 34 U. C. R. 257.

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16. *Surplusage.*

See Chisholm v. *Proudfoot* 15 U. C. R. 203; *Municipal Corporation of Sandwich* v. *St. Amour*, 6 C. P. 199; *Lundsay* v. *Niagara District Mutual Ins. Co.*, 28 U. C. R. 326; *Moberly* v. *Baines*, 2 L. J. 234.

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17. *Time, Place, and Value—Allegations of.*

See Watson v. *City of Toronto Gas Light and Water Co.*, 4 U. C. R. 158; *Parsons* v. *Crabb*, 31 U. C. R. 434.

Place.]—See rule 4 of T. T. 1856; *Malcolm* v. *Rapelje*, Tay. 361; *Robinet* v. *Lewis*, Dra. 44; *Beal* v. *Field*, 3 O. S. 236.

Time.] — See *Bank of Upper Canada* v. *Lewis*, 3 U. C. R. 325; *Cuvillier* v. *Brown*, 3 U. C. R. 353; *Williams* v. *Lee*, 2 P. R. 175; *Henderson* v. *Chapman*, 10 L. J. 218; *Watson* v. *Toronto Gas Co.*, 5 U. C. R. 262.

Value.]—See *Connors* v. *Great Western R. W. Co.*, 13 U. C. R. 401; *Moberly* v. *Baines*, 2 L. J. 234.

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18. *Other Cases.*

Declaration—*Anticipation.*]—See *Bradey* v. *Western Assurance Co.*, 17 C. P. 597.

Issue on Some Pleas.]—See *Ferris* v. *Dyer*, 4 O. S. 6.

Joining Issue instead of Demurring.]—See *Tylee* v. *Hinton*, 3 A. R. 53.

New Rules.]—See *Clarke* v. *White*, R. & J. Dig. 3329.

Plea—*Absence of Undertaking.*]—See *Sifton* v. *McCabe*, 6 U. C. R. 394.

——— *Attorney.*]—See *Soper* v. *Draper*, 2 O. S. 289.

——— *Conclusion from Facts.*]—See *Cooper* v. *Watson*, 23 U. C. R. 345; *Gore Bank* v. *Eaton*, 27 U. C. R. 332; *Burton* v. *Gore District Mutual Ins. Co.*, 14 U. C. R. 342; *Smith* v. *Commercial Union Ins. Co.*, 33 U. C. R. 69.

——— *Denial of Title.*]—See *Cunningham* v. *Duane*, 9 U. C. R. 274.

——— *Non Demisit.*] — See *Cornwall* v. *Murphy*, 15 U. C. R. 263.

——— *Nullity—Irregularity.*] — See *Abell* v. *Glen*, 6 P. R. 64.

——— *Claim of Attorney.*]—See *Baby* v. *Ardin*, 6 U. C. R. 408.

——— *Corporate Capacity.*]—See *Bank of British North America* v. *Sherwood*, 6 U. C. R. 213.

——— *"Not Guilty"—Trespass.*] — See *Clute* v. *McPherson*, 6 O. S. 646.

——— *Promissory Note—Stamps.*] — See *Boyd* v. *Muir*, 26 C. P. 21.

——— *Several Counts.*]—See *May* v. *Howland*, 19 U. C. R. 66.

——— *Several Defendants.*]—See *Moore* v. *Gurney*, 21 U. C. R. 127.

——— *Waiver of Irregularity.*]—See *Simpson* v. *Matthison, Ward* v. *Ward*, 3 O. S. 305.

Reference in one Count or Plea to Another.]—See *Pegg* v. *Nasmith*, 28 C. P. 330; *Beaton* v. *McKenzie*, R. & J. Dig. 2799; *City Bank* v. *Macdonald*, 16 C. P. 215; *Eadus* v. *Dougall*, 14 C. P. 352.

Replication—*Conjunctive.*]—See *Turner* v. *Ham*, 6 U. C. R. 255; *Miller* v. *Hamilton*, 1 U. C. R. 428.

Special Plea—*General Issue.*]—See *Longworth* v. *McKay*, 6 O. S. 149.

II. Amendment of Pleadings.

1. *Generally.*

The court will not allow an amendment the effect of which would be contrary to the justice of the cause. *Corby* v. *Cotton*, 3 L. J. 50. See also *McKenzie* v. *Van Sickles*, 17 U. C. R. 226.

An amendment should not be allowed, where the effect of it is to make the pleading demurrable. *Bank of Upper Canada* v. *Ruttan*, 22 U. C. R. 451.

Semble, that it is not proper to allow amendments at the trial which end or must end in a demurrer. *Sheerman* v. *Toronto, Grey, and Bruce R. W. Co.*, 34 U. C. R. 451.

Under the C. L. P. Act, s. 222, all amendments necessary to determine the real question in controversy are imperative, without reference to the character of the action or defence. The only point for the court or a Judge to determine is, whether they are so necessary. *Bank of Montreal* v. *Reynolds*, 24 U. C. R. 381.

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2. *Adding Counts, Pleas, and Replications.*

(a) *Counts.*

See Kingsmill v. *Brown*, 5 O. S. 591; *House* v. *Inty*, 1 C. L. Ch. 96; *Brown* v. *Boulton*, 8 U. C. R. 385; *Hammond* v. *Heward*, 20 U. C. R. 3; *Sage* v. *Callaghan*, 20 U. C. R. 266; *Snyder* v. *Snyder*, 22 C. P. 361; *Gibbs* v. *Dominion Bank*, 30 C. P. 36; *Smith* v. *Gordon*, 30 C. P. 553.

(b) *Pleas.*

See Corby v. *Cotton*, 3 L. J. 50; *Scott* v. *McDonald*, 6 O. S. 238; *McDonald* v. *DeTuyle*, 6 O. S. 335; *Peel* v. *Kingsmill*, 1 C. L. Ch. 225; *Brunskill* v. *Muir*, 15 U. C. R. 213; *Rogers* v. *Deedes*, 2 P. R. 136; *King* v. *Glassford*, 11 C. P. 490; *Commercial Bank of Canada* v. *Great Western R. W. Co.*, 2 C. L. J. 103; *Campbell* v. *Kemp*, 16 C. P. 244; *Clurton* v. *Dickson*, 12 L. J. 310; *Widder* v. *Buffalo and Lake Huron R. W. Co.*, 39 U. C. R. 154.

(c) *Replications.*

See Glass v. *O'Grady*, 17 C. P. 233; *Campbell* v. *Kemp*, 16 C. P. 244.

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3. *Amendment after Judgment on Demurrer.*

See Phillips v. *Smith*, Dra. 290; *Breakenridge* v. *King*, 4 O. S. 297; *Maxwell* v. *Ransom*, 1 U. C. R. 28; *McCrae* v. *Hamilton*, M. T. 5 Vict.; *Watson* v. *Hamilton*, 6 O. S. 312; *Commercial Bank* v. *Jarvis*, 6 O. S. 320; *Tyrrell* v. *Myers*, 6 O. S. 433; *Counter* v. *Hamilton*, 1 U. C. R. 6; *Bacon* v. *McBean*, 4 U. C. R. 104; *Hamilton* v. *Davis*, 1 U. C. R. 526; *Skinner* v. *Anon.*, R. & J. Dig. 88; *Henderson* v. *Harper*, 1 U. C. R. 528; *Metcalfe* v. *McKenzie*, 2 U. C. R. 404; *Perrin* v. *Bowes*, 1 C. L. Ch. 102; *McLellan* v. *Rogers*, 12 U. C. R. 651; *Kelly* v. *Moulds*, 3 P. R. 207; *Thompson* v. *Leach*, 18 C. P. 141.

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4. *Misnomer in Pleadings.*

See Chamberlain v. *Smith*, 21 U. C. R. 103; *Ketchum* v. *Jones*, 5 U. C. R. 460; *Bank of British North America* v. *Sherwood*, 6 U. C. R. 552; *White* v. *Cameron*, 7 U. C. R. 378; *Gore Bank* v. *Case*, 1 C. L. Ch. 185.

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5. *Practice in Making Amendments.*

See Skinner v. *Anon.*, *ante* 3; *Ketchum* v. *Hamilton*, E. T. 2 Vict.; *Randall q. t.* v. *Taggart*, 4 O. S. 2; *Hart* v. *Bogle*, 6 O. S. 168; *Hutt* v. *Keith*, 2 U. C. R. 100; *Ross* v. *Kline*, 1 P. R. 91; *Dingman* v. *Keegan*, 1 P. R. 135; *Doe d. Lick* v. *Ausman*, 1 U. C. R. 399; *Maddock* v. *Corbet*, 4 U. C. R. 257; *Gore Bank* v. *Chase*, 7 U. C. R. 454; *Brown* v. *Goodeve*, 2 C. L. Ch. 158; *Taylor* v. *Grand Trunk R. W. Co.*, 6 P. R. 170.

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6. *Terms on which Amendments Made.*

See Murphy v. *Burnham*, 2 U. C. R. 261; *Madill* v. *Chilvers*, 2 U. C. R. 269; *McKenzie* v. *Gibson*, 7 U. C. R. 527; *Hooker* v. *Gamble*, 9 L. J. 44; *Higgins* v. *City of Toronto*, 9 L. J. 44; *Rogers* v. *Deedes*, 2 P. R. 136; *Dunn* v. *Dunn*, 1 C. L. J. 239.

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7. *Other Cases.*

After Judgment—*Suggestion to Declaration.*] — See *Kirchhoffer* v. *Ross*, 11 C. P. 467.

After Trial.]—See *Church* v. *Barnhart*, Dra. 443.

After Verdict—*Mistake.*]—See *Perry* v. *Grover*, 5 U. C. R. 468.

At Trial—*Assault.*]—See *Glass* v. *O'Gray*, 17 C. P. 233.

——— *Changing Form of Action.*] — See *Emrick* v. *Sullivan*, 25 U. C. R. 105.

——— *Injury to Land by Water—Real Question.*]—See *Smith* v. *Wallbridge*, 18 C. P. 180.

——— *Leave Reserved.*] — See *McFarlane* v. *Brown*, 5 U. C. R. 471.

——— *Mistake in Description.*] — See *Matheson* v. *Mallock*, 13 U. C. R. 354.

——— *Prior Order.*]—See *Hooker* v. *Gamble*, 13 C. P. 462.

Avowry in Replevin.]—See *Thompson* v. *Forsyth*, R. & J. Dig. 80; *Lender* v. *Smith*, 1 U. C. R. 366; *Edwards* v. *Holmes*, 4 U. C. R. 94.

Conformity to Writ.]—See *Ketchum* v. *Rapelje*, 1 C. L. Ch. 152.

Declaration, by Inserting a Special Averment of Loss of Bond, after Fact of Loss Found by Verdict.]—See *Ketchum* v. *Ready*, R. & J. Dig. 89.

Declaration for Malicious Prosecution, in Statement of Court where Indictment Tried.]—See *Carr* v. *Proudfoot*, R. & J. Dig. 467.

Equitable Plea, to Accord with Evidence, by Alleging Representations by Plaintiff's Agent.]—See *County of Huron* v. *Armstrong*, 27 U. C. R. 533.

Irregular Proceedings.] — See *Doe d. Burnham* v. *Simmonds*, 7 U. C. R. 598.

Joinder in Demurrer Added at Nisi Prius.]—See *Boulton* v. *Fitzgerald*, 1 U. C. R. 476.

On Appeal—*Omission of Statute.*] — See *VanNutter* v. *Buffalo and Lake Huron R. W. Co.*, 27 U. C. R. 581.

Partition Proceedings.] — See *In re Knowles and Post*, 24 U. C. R. 311.

Plea of Set-off by Claiming a Balance.]—See *Sinclair* v. *Town of Galt*, 17 U. C. R. 259.

Relation — *Status of Relator.*]—See *Regina ex rel. O'Reilly* v. *Charlton*, 6 P. R. 254.

Rescinding Order to Amend.] — See *Warnock* v. *Potter*, 8 L. J. 47.

Summons to Amend.] — See *Brown* v. *Devlin*, 1 C. L. Ch. 175; *Attorney-General* v. *McLachlin*, 5 P. R. 63.

III. Costs.

Demurrer to Part of Pleading—*Judgment — Irregularity.*] — See *Hamilton* v. *Thompson*, R. & J. Dig. 2817.

Demurrer—*Inviting.*]—See *Smith* v. *Ancaster Township*, 45 U. C. R. 86.

Unnecessarily Lengthy Pleadings.]—See *Mallock* v. *Grier*, 2 U. C. R. 113; *Canada Permanent B. and S. Society* v. *Harris*, 16 C. P. 54.

IV. Declarations.

1. *Commencement and Conclusion.*

Declaration on an award, concluding as in debt:—Held, bad, on demurrer, as an informal declaration on the bond of submission. *Simpson* v. *Mode*, 6 O. S. 511.

It is no ground of special demurrer that in the commencement of his declaration the plaintiff appears in person, and the declaration is signed at the conclusion by a person as his attorney. *Murphy* v. *Burnham*, 2 U. C. R. 261.

Declaration against executors, averring that an action had accrued to the plaintiff to demand "from defendants, executors as aforesaid, &c.," instead of "from the defendants, as executors:"—Held, good. *Ferrie* v. *Jones*, 5 U. C. R. 504.

An improper conclusion to a declaration was a good ground of special demurrer. *Hart* v. *Meyers*, 7 U. C. R. 416.

A declaration filed under and pursuant to s. 60 of C. S. U. C. c. 22, and not shewing at its commencement the date of issue of the writ as required by s. 85 of the same Act, is irregular. *Halley* v. *Staunton*, 9 L. J. 158.

Section 85 of C. L. P. Act is obligatory, and a declaration was set aside because it did not commence by shewing whether the plaintiff sued in person or by attorney. *Monck* v. *Northwood*, 2 C. L. J. 268.

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2. *Joinder of Counts.*

[Formerly counts framed in different forms of action could not be joined; but by C. L. P. Act, s. 84, R. S. O. 1877 c. 50, this restriction was done away with. See rule (1897) 132 et seq.]

One count for slander stated a cause of action accruing to the plaintiffs as partners, as being an injury to them in their joint business; other counts charged defendant with imputing forgery to the plaintiffs. The imputation of forgery not being a partnership imputation, the declaration was held, bad, for misjoinder of counts. *Morley* v. *Nichols*, 1 U. C. R. 235.

A declaration containing two counts for delivering lumber to plaintiff less in quantity and inferior in quality to that contracted for, thereby deceiving the plaintiff, was held, not objectionable for misjoinder of counts, both being either in tort or in assumpsit. *Keise* v. *Miller*, 2 C. P. 296.

Causes of action in replevin and trespass may not be joined under s. 75 of C. L. P. Act, 1856. *Great Western R. W. Co.* v. *Chadwick*, 3 L. J. 29.

In an action by a husband, one count was for a ground of action for which he could not sue alone; another count combined different causes of action, for some of which he should sue alone, and others for which the wife should be joined:—Held, that the proper course was, to arrest judgment, and not to award a venire de novo. *Smith* v. *Carder*, 11 U. C. R. 77.

For other cases under the old practice in this respect, see *Beebe* v. *Secord*, Tay. 409; *Ross* v. *Webster*, 5 U. C. R. 570; *Land* v. *Woodward*, 5 U. C. R. 190; *Quin* v. *School Trustees*, 7 U. C. R. 130; *McLeod* v. *Eberts*, 7 U. C. R. 251; *Morrison* v. *Carrall*, 1 C. P. 226; *Curry* v. *McLeod*, 12 U. C. R. 545; *Taylor* v. *Brown*, 17 C. P. 387.

Semble, that it is improper to join with a count for distraining when no rent was due, a count for the seizure and conversion of the goods. *Robinson* v. *Shields*, 15 C. P. 386.

An executor or administrator may by a submission to arbitration preclude himself from pleading plene administravit, and thus render himself personally liable; but he may, as executor or administrator, refer causes of action which arose in the lifetime of the testator or intestate, so as to bind the estate only; and therefore, the declaration being for non-performance of an award made in pursuance of such a reference, and also, on the common counts admittedly against the defendant in her representative character: — Held, that there was no misjoinder of causes of action. *Reid* v. *Reid*, 16 C. P. 247.

The plaintiff having demurred merely to the plea to the first count:—Held, that defendant could not except to the declaration on the ground of misjoinder of counts, as that objection could only arise on demurrer to the whole declaration. *Taylor* v. *Brown*, 17 C. P. 387.

Different causes of action included in the same declaration may be served and tried separately. *Fitzsimmons* v. *McIntyre*, 5 P. R. 119.

After a count by husband and wife for injury done to the wife during coverture, a second count by the husband alone—after setting out the fact that the horse and cutter in which both plaintiffs at the time were, had been precipitated over a bridge with the wife, and that she was thereby greatly injured, and laid up for a long time in consequence of the injuries sustained by her, and endured great suffering—proceeded to allege that the husband was put to great trouble and expense by reason of the loss of his wife's society and her services, and was compelled to pay, and did pay, large sums of money on account of her illness to nurses and medical men, &c., and also lost the said horse and cutter, and was otherwise put to great expense, &c. The jury having found for the plaintiffs, and assessed damages generally on both counts:—Held, that after verdict the second count must be treated as a count only for the damage of the husband, for which he alone could sue; and that, treating it as such, it was well joined with the first count, under the C. L. P. Act, though damages were sought by him for the injury to the horse and cutter, as well as for that resulting to the husband from the injury to the wife. *Campbell* v. *Great Western R. W. Co.*, 20 C. P. 345, *S. C.*, in appeal, *ib.* 563.

The declaration was held, bad, for a misjoinder of causes of action, being for royalties payable severally to the plaintiffs, and also for other royalties payable to them jointly. *McGiverin* v. *Turnbull*, 32 U. C. R. 407.

3. *Names of Parties.*

In Actions Generally.] — See *Miller* v. *Munro*, R. & J. Dig. 2773; *Hastings* v. *Champion*, R. & J. Dig. 2773; *Ham* v. *Madden*, 5 O. S. 729; *O'Donnell* v. *Hughill*, 11 U. C. R. 441; *McNamee* v. *Reilly*, 13 U. C. R. 197; *Teal* v. *Jones*, 2 P. R. 63; *Hartleb* v. *Phelan*, 5 P. R. 264; *McSherry* v. *Commissioners of Cobourg Town Trust*, 45 U. C. R. 240.

4. *Several Counts.*

[See R. G. 1, T. T. 1836, as to Pleading.]

See Johnson v. *Hunter*, 1 U. C. R. 280; *Forbes* v. *McLelland*, 4 P. R. 272; *Henderson* v. *Moodie*, 6 L. J. 254; *McKenzie* v. *Dewan*, 36 U. C. R. 512.

5. *Time for Declaring.*

See Forrester v. *Graham*, 2 O. S. 369; *Stebbins* v. *O'Grady*, R. & J. Dig. 2783; *Swift* v. *Williams*, 5 L. J. 252; *Murchison* v. *Canada Farmers' Ins. Co.*, 8 P. R. 451.

6. *Venue.*

(a) *Change of Venue.*

See TRIAL.

(b) *Laying Venue.*

(*See* rule (1897) 529.)

See Attorney-General v. *Dockstader*, R. & J. Dig. 2773; *Duffy* v. *Arnold*, 14 U. C. R. 610; *Smith* v. *Russell*, 8 U. C. R. 387; *McFarlane* v. *Allen*, 4 C. P. 438; *Dance* v. *Burrows*, 10 C. P. 172; *Regina* v. *Shipman*, 6 L. J. 19; *Ferguson* v. *Township of Howick*, 25 U. C. R. 547; *St. John* v. *Wrong*, 2 P. R. 272; *Crawford* v. *Ritchie*, Tay. 84; *Wilkes* v. *Mascear*, 1 P. R. 46; *Green* v. *Horton*, 2 L. J. 213; *Regina* v. *Shipman*, 6 L. J. 19; *Jenkins* v. *Wilcock*, 11 C. P. 505; *Moran* v. *Palmer*, 13 C. P. 450.

(c) *Mode of Taking Advantage of Wrong Venue.*

See Wilson v. *Town of Port Hope*, 10 U. C. R. 405; *Nelson, &c., Road Co.* v. *Bates*, 4 C. P. 281; *Bank of Upper Canada* v. *Owen*, 26 U. C. R. 154; *Plaxton* v. *Smith*, 1 P. R. 228; *Dance* v. *Burrows*, 10 C. P. 172; *Ferguson* v. *Township of Howick*, 25 U. C. R. 547; *Irwin* v. *Corporation of Bradford*, 22 C. P. 18; *Ferguson* v. *Township of Howick*, 25 U. C. R. 547; *Moran* v. *Palmer*, 13 C. P. 450; *Brown* v. *Shad*, 5 U. C. R. 141.

(d) *Other Cases.*

Amendment of Declaration.] — See *Brown* v. *County of York*, 8 P. R. 139.

Judgment Roll—*Default of Appearance.*] — See *Bank of Montreal* v. *Harrison*, 4 P. R. 331.

Notice of Trial—*Variance.*]—See *Brown* v. *Blackwell*, 6 P. R. 165.

Writ of Summons—*Waiver by Appearance.*]—See *Warcup* v. *Great Western R. W. Co.*, 6 P. R. 250.

See, also, *Brown* v. *Shea*, 5 U. C. R. 141.

7. *Other Cases.*

Attorney's Name.]—See *Crooks* v. *Davis*, 5 O. S. 141.

Condition Precedent.] — See *Tanner* v. *D'Everado*, 3 U. C. R. 154.

Contract—*Amendment.*]—See *Lumsden* v. *Davis*, 46 U. C. R. 1.

Contract or Tort.]—See *Re Rumble* v. *Wilson*, 5 P. R. 38.

Defective Averment — *Imprisonment*—*Insolvent Act.*] — See *Rutherford* v. *Eakins*, 27 C. P. 55; *Elley* v. *Pratt*, 41 U. C. R. 365.

Disjunctive Declaration.] — See *Widdenfield* v. *Metcalfe*, 21 U. C. R. 247; *Bain* v. *McKay*, 5 P. R. 471; *Taylor* v. *Adam*, 8 P. R. 66.

Irregularity — *Time.*] — See *McNabb* v. *Inglis*, 6 P. R. 209.

Mutual Promises.]—See *Ancil* v. *Bricher*, 3 L. J. 72.

Negligence — *Form.*] — See *Carter* v. *Hatch*, 31 C. P. 203.

Scienter.]—See *Chisholm* v. *Proudfoot*, 15 U. C. R. 203; *Harvey* v. *Wallace*, 16 U. C. R. 508.

Several Counts—*Judgment.*]—See *Dunn* v. *Jarvis*, 1 C. L. J. 273.

Variance from Proof.]—See *Colbert* v. *Hicks*, 5 A. R. 571.

Writ of Summons—*Foundation for Declaration.*]—See *Cooper* v. *Watson*, 5 P. R. 39; *Patterson* v. *McCollum*, 2 C. L. J. 70.

——— *Variance from.*] — See *Ketchum* v. *Rapelje*, 1 C. L. Ch. 152; *Sowden* v. *Sowden*, 4 P. R. 276.

V. Demurrers.

[Abolished by con. rule (1897) 259.]

1. *Amendment of.*

See Perry v. *Grover*, 5 U. C. R. 331; *Parsons* v. *Crabb*, 31 U. C. R. 434; *S. C.*, 34 U. C. R. 136; *Bell* v. *Mills*, 25 U. C. R. 508.

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2. *Cause or Ground of Demurrer.*

See Woodruff v. *Davis*, 2 U. C. R. 404; *Hayward* v. *Harper*, 4 U. C. R. 489; *McKenzie* v. *Fairman*, 1 C. P. 50; *Burns* v. *Robertson*, 8 U. C. R. 280; *Wadsworth* v. *Townley*, 10 U. C. R. 579; *Duffield* v. *Great Western R. W. Co.*, 4 L. J. 47; *Cairns* v. *Water Commissioners of City of Ottawa*, 25 C. P. 551; *Page* v. *Austin*, 26 C. P. 110; *Morrow* v. *Waterloo County Mutual Fire Ins. Co.*, 39 U. C. R. 441; *Bristowe* v. *Patterson*, 6 O. S. 107; *Murphy* v. *Burnham*, 2 U. C. R. 261.

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3. *Costs.*

See Richmond v. *Campbell*, R. & J. Dig. 2808; *Murphy* v. *Burnham*, 2 U. C. R. 261; *Fulliter* v. *Moodie*, 22 U. C. R. 71; *Stapf* v. *McCarrow*, 35 U. C. R. 22; *Kilroy* v. *Simkins*, 26 C. P. 281; *Elliott* v. *Northern Assurance Co.*, 6 P. R. 111; *Smith* v. *Township of Ancaster*, 45 U. C. R. 86.

4. *Demurrer Book and Argument.*

See Ferrie v. *Lockhart*, 4 U. C. R. 477; *Hobson* v. *Wellington District Mutual Fire Ins. Co.*, 7 U. C. R. 19; *Shouldice* v. *Fraser*, 7 U. C. R. 60; *Curry* v. *McLeod*, 12 U. C. R. 545; *Stapf* v. *McCarrow*, 35 U. C. R. 22; *Smith* v. *Muirhead*, 13 U. C. R. 9; *Brown* v. *Malpus*, 7 C. P. 185; *Martin* v. *Arthur*, 16 U. C. R. 483; *Shaw* v. *Shaw*, 21 U. C. R. 432; *Quin* v. *School Trustees*, 7 U. C. R. 130; *Taylor* v. *Brown*, 17 C. P. 387; *McLeod* v. *Eberts*, 7 U. C. R. 251; *Small* v. *Beasley*, 3 U. C. R. 40; *Elliott* v. *Northern Assurance Co.*, 6 P. R. 111.

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5. *Frivolous Demurrers.*

See Soper v. *Draper*, 2 O. S. 289; *Breden* v. *Lisle*, 1 C. L. Ch. 60; *Davis* v. *Muckle*, 2 P. R. 166; *Shaver* v. *Brown*, 1 C. L. Ch. 156; *Ancil* v. *Bricher*, 3 L. J. 72.

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6. *Judgment.*

See Rochleau v. *Bidwell*, 2 O. S. 319; *Watson* v. *Hamilton* 6 O. S. 312; *Murney* v. *Heron*, R. & J. Dig. 2807; *Fowke* v. *Lyster*, R. & J. Dig. 2807; *Waite* v. *McDonell*, 8 U. C. R. 570; *O'Neill* v. *Leight*, 2 U. C. R. 204; *Melville* v. *Carpenter*, 4 C. P. 159; *McCuniffe* v. *Allan*, 5 U. C. R. 571; *McDougall* v. *Fish*, 10 U. C. R. 602; *Gould* v. *Gzowski*, 17 U. C. R. 52; *Fulliter* v. *Moodie*, 22 U. C. R. 71; *Parsons* v. *Crabb*, 31 U. C. R. 434; *Burrowes* v. *DeBlaquiere*, 34 U. C. R. 498; *County of Frontenac* v. *City of Kingston*, 5 P. R. 298; *Consolidated Bank of Canada* v. *Henderson*, 29 C. P. 549.

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7. *Setting down.*

See City Bank v. *Eccles*, 5 U. C. R. 633; *Jones* v. *Dunn*, 1 C. P. 204; *Moody* v. *Dougall*, 3 P. R. 145.

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8. *Withdrawing.*

See Tully v. *Graham*, Tay. 41; *Bayard* v. *Partridge*, Tay. 406; *Bell* v. *Stewart*, Dra. 159; *Stocking* v. *Campbell*, R. & J. Dig. 2805; *Hutchinson* v. *Munro*, 1 C. L. Ch. 211; *Malloch* v. *Scott*, 9 U. C. R. 428; *Griffith* v. *Ward*, 20 U. C. R. 33.

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9. *Other Cases.*

Amendment — *Appeal.*]—See *Boswell* v. *Sutherland*, 8 A. R. 233.

Appeal—*Length of Pleadings.*]—See *Quinlan* v. *Union Fire Ins. Co.*, 8 A. R. 376.

Effect of as an Admission.]—See *Burton* v. *Gore District Mutual Ins. Co.*, 14 U. C. R. 342.

Joining Issue in Lieu of Demurring.] —See *Tylee* v. *Hinton*, 3 A. R. 53.

Omission from Record—*Irregularity.*]— See *Gibson* v. *Thomas*, 2 P. R. 131.

Priority over Issue of Facts.] — See *Ross* v. *Tyson*, 19 C. P. 294.

Replication — *Issue.*] — See *Gordon* v. *Cleghorn*, 7 U. C. R. 171.

Return to Mandamus.]—See *Regina* v. *Wells*, 17 U. C. R. 545.

Signature of Counsel.]—See *Lemoine* v. *Raymond*, R. & J. Dig. 2809.

Special Demurrer — *Abolition.*] — See *Chase* v. *Scripture*, 14 U. C. R. 493.

——— *Substitution for Amended Replication.*]—See *Gore Bank* v. *Chase*, 7 U. C. R. 454.

See, also, *Marsh* v. *Burns*, 1 C. P. 334; *Taylor* v. *Brown*, 17 C. P. 387.

VI. Filing and Service of Pleadings.

Affidavit of Service.] — See *McKay* v. *McDearmid*, 2 C. L. Ch. 1.

Declaration — *Necessity for Service.*]—See *Wallace* v. *Frazer*, 2 L. J. 184; *Swift* v. *Williams*, 5 L. J. 252.

Filing without Service.]—See *Watkins* v. *Fenton*, 8 C. P. 289; *McKay* v. *McDearmid*, 2 C. L. Ch. 1; *Mackinnon* v. *Johnson*, 3 O. S. 169.

Omission of Officer.] — See *Regina* v. *Gould*, 6 O. S. 26.

Place of Filing.]—See *Throop* v. *Cole*, Tay. 214.

——— *Wrong Office.*] — See *Matthie* v. *Carlyle*, 1 C. L. Ch. 177.

Place of Service — *Attorney.*]—See *Clemow* v. *Her Majesty's Ordnance*, 5 U. C. R. 458; *City Bank* v. *Mackay*, 12 C. L. J. 119.

Service before Filing — *Laches.*]—See *Proctor* v. *Young*, 1 U. C. R. 391, 2 P. R. 182.

Service by Posting—*Attorney*—*Waiver*—*Costs.*]—See *O'Neill* v. *Everett*, 3 P. R. 98.

Service of Amended Declaration.]—See *Ketchum* v. *Hamilton*, R. & J. Dig. 2810.

Service of Special Pleas.]—See *King* v. *Dunn*, R. & J. Dig. 2810.

Service on Agent.]—See *Crooks* v. *Davis*, 5 O. S. 141.

——— *Irregularity*—*Waiver.*]—See *Brown* v. *Goodeve*, 2 C. L. Ch. 158.

Service on Attorney—*Appearance.*]—See *Ryan* v. *Leonard*, 3 O. S. 307.

Service on Attorney before Appearance.]—See *Cockburn* v. *Rathbun*, 5 P. R. 276.

Time of Filing.]—See *Forrester* v. *Graham*, 2 O. S. 369.

——— *Irregularity*—*Waiver.*]—See *Ballard* v. *Wright*, 2 O. S. 218.

Variance in Copy Served.]—See *Henderson* v. *Moodie*, 6 L. J. 254; *Brown* v. *Blackwell*, 6 P. R. 165.

VII. Pleas and Subsequent Pleadings.

1. *Equitable Pleas and Defences.*

(a) *Generally.*

See Perley v. *Loney*, 18 U. C. R. 429; *Griggs* v. *Firley*, 6 L. J. 61; *Belyea* v. *Muir*, 5 P. R. 273; *Lewis* v. *Manning*, 2 C. L. J. 247; *Simpson* v. *Kerr*, 33 U. C. R. 345; *Brown* v. *Blackwell*, 35 U. C. R. 239; *Mackenzie* v. *Davidson*, 27 C. P. 188; *Smith* v. *Bank of Nova Scotia*, 8 S. C. R. 558.

(b) *Under Administration of Justice Act, 1873.*

See Brown v. *Blackwell*, 35 U. C. R. 239; *Boulton* v. *Hugel*, 35 U. C. R. 402; *Merchants' Bank* v. *Robinson*, 8 P. R. 117.

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2. *Pleading Issuably.*

See Strathy v. *Crooks*, R. & J. Dig. 2786; *King's College* v. *Hawley*, 2 U. C. R. 381; *Dickson* v. *Boulton*, 5 U. C. R. 558; *Wallace* v. *Grover*, 1 C. L. Ch. 1; *Eccles* v. *Johnson*, 1 C. L. Ch. 93; *Bank of Montreal* v. *Cameron*, 17 U. C. R. 46; *Carlisle* v. *Hoshel*, 7 L. J. 99.

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3. *Pleas in Abatement.*

(a) *Affidavit of Verification.*

See Petch v. *Duggan*, 1 C. L. Ch. 141; *Wilkinson* v. *McKee*, 9 L. J. 266; *Donnelly* v. *Reid*, 5 P. R. 51.

(b) *Another Action Pending.*

See Commercial Bank v. *Jarvis*, 6 O. S. 257; *Bain* v. *Bain*, 2 C. L. Ch. 136; *March* v. *Burns*, 1 C. P. 334; *Bain* v. *Bain*, 10 U. C. R. 572; *Grant* v. *Hamilton*, 3 C. P. 422; *Donnelly* v. *Reid*, 5 P. R. 51; *Kelly q. t.* v. *Cowan*, 18 U. C. R. 104; *Perry* v. *McCraken*, 7 P. R. 32; *Morgan* v. *Ault*, 8 P. R. 429; *Regina ex rel. McLean* v. *Watson*, 1 C. L. J. 71.

(c) *Non-joinder of Parties.*

[*See* con. rules (1897) 203, 205.]

See Yuill v. *Harvey*, 2 O. S. 215; *Briggs* v. *Bower*, 5 O. S. 672; *Brewster* v. *Davy*, H. T. 2 Vict., R. & J. Dig. 2788; *McKnight* v. *Scott*, R. & J. Dig. 2788; *Hastings* v. *Champion*, R. & J. Dig. 2788; *Corbett* v. *Calvin*, 4 U. C. R. 123; *City of Toronto* v. *Shields*, 8 U. C. R. 133; *Cook* v. *Fowler*, 12 U. C. R. 568.

(d) *Time of Pleading.*

See Grey v. *Holme*, Tay. 393; *Richmond* v. *Sewell*, 5 O. S. 673; *Eberts* v. *Larned*, 5 U. C. R. 264; *Carlisle* v. *Hoshel*, 7 L. J. 99.

(e) *Other Cases.*

See Skillington v. *Baby*, 5 O. S. 574; *Hastings* v. *Champion*, 6 O. S. 29; *Richmond* v. *Campbell*, R. & J. Dig. 2789; *March* v. *Burns*, 1 C. P. 334; *Mills* v. *McBride*, 10 U. C. R. 145; *Donelly* v. *Reid*, 5 P. R. 51; *Brown* v. *County of York*, 8 P .R. 139.

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4. *Pleas in Bar and Subsequent Pleadings.*

(a) *Commencement and Conclusion.*

For decisions under the former practice, *see Robinet* v. *Lewis*, Dra. 44; *Hall* v. *Rutton*, M. T. 2 Vict., R. & H. Dig. 351; *Burrows* v. *Washburn*, E. T. 3 Vict., R. & H. Dig. 297; *Strathy* v. *Crooks*, 1 U. C. R. 44; *Carroll* v. *Flint*, 1 U. C. R. 49; *Hamilton* v. *Davis*, 1 U. C. R. 176; *Baldwin* v. *McLean*, 1 U. C. R. 222; *Cameron* v. *Tarratt*, 1 U. C. R. 312; *Denison* v. *Donelly*, 2 U. C. R. 394; *Cook* v. *Mair*, 3 U. C. R. 478; *Dowding* v. *Eastwood*, 4 U. C. R. 217; *Gourlay* v. *Gunn*, 5 U. C. R. 566; *Bown* v. *Hawke*, 6 U. C. R. 275; *March* v. *Burns*, 1 C. P. 334; *Hall* v. *Scudlett*, *ib.* 354; *Williams* v. *Lee*, 2 C. P. 175; *Brown* v. *Ross*, 3 U. C. R. 158; *Poulton* v. *Dolmage*, 6 U. C. R. 277; *Kelly* v. *Lisk*, 18 U. C. R. 418; *Burrowes* v. *De-Blaquiere*, 34 U. C. R. 498, 506; *Ley* v. *Louden*, 10 U. C. R. 380; *Parsons* v. *Crabb*, 34 U. C. R. 136; *McKenzie* v. *McKittridge*, 24 C. P. 145.

Pleas held bad, in actions on bills and notes, as pleaded to the whole declaration, and answering only part. *Wood* v. *Rogers*, 2 U. C. R. 369; *Prout* v. *Howard*, 3 U. C. R. 38; *Rattray* v. *McDonald*, 3 U. C. R. 354; *Commercial Bank* v. *Reynolds*, 3 U. C. R. 360. *See*, also, *Waddell* v. *Gildersleeve*, 16 C. P. 565.

(b) *Disjunctive Pleas.*

See Gwynne v. *Brock*, 6 O. S. 271; *Miller* v. *Hamilton*, 1 U. C. R. 428; *Upper* v. *Hamilton*, 1 U. C. R. 467; *Wright* v. *Benson*, 5 U. C. R. 249; *Turner* v. *Ham*, 6 U. C. R. 255.

(c) *General Issue by Statute.*

[*See* Rule 21 of T. T., 1856, and see Con. Rule (1897) 287.]

A defendant in trespass for false imprisonment cannot urge that he arrested as a constable, and that the action was brought in a wrong county, if he has omitted to insert in the margin of his plea, "by statute," unless the court can say, upon the facts proved at the close of the plaintiff's case, that defendant was acting as constable. *Brown* v. *Shae*, 5 U. C. R. 141.

Where the plaintiff's evidence shews that the defendant, sued in trespass, was acting bonâ fide as a justice of the peace, and the jury so find, the plaintiff must prove notice of action; and this though defendant has pleaded only the general issue, without adding "by statute," in the margin. *Marsh* v. *Boulton*, 4 U. C. R. 354.

A marginal reference "according to statute," instead of "by statute:"—Held, sufficient. *Robertson* v. *Cooley*, 7 U. C. R. 305.

Any statute relied upon for the defence must be referred to in the margin, as well as that by which such plea is allowed. But where such a statute had been omitted in the county court, this court, on appeal, directed the court below to amend by inserting it. *Van Natter* v. *Buffalo and Lake Huron R. W. Co.*, 27 U. C. R. 581. See, also, *Belch* v. *Arnott*, 9 C. P. 68.

Held, that defendants proceeding to straighten a highway, acting as trustees of the highway under a by-law of the municipal council passed in 1848, and under proceedings in general quarter sessions in 1823, and in so doing encroaching on the plaintiff's possession, were not entitled to the protection of 50 Geo. III. c. 1. Nor could they give the special matter in evidence under the general issue. *Joy* v. *McKinn*, 1 C. P. 13.

Where a road company was sued for not keeping their road in repair: — Held, that they could not, under 16 Vict. c. 190, s. 53, plead the general issue and give any special defence in evidence, the injury complained of not being anything done by them in pursuance of the act, but a duty omitted. *March* v. *Port Dover and Otterville Road Co.*, 15 U. C. R. 138.

Semble, that in an action for not making a convenient crossing over defendants' railway, which intersected plaintiff's land, being for nonfeasance, the defendants could not plead the general issue by statute. *Reist* v. *Grand Trunk R. W. Co.*, 15 U. C. R. 355.

Action by an administratrix for an alleged breach of defendants' statutory powers in digging and opening a drain in one of the highways of the city of Ottawa, and leaving it at night uncovered, without any fencing, guard, or light, whereby the deceased, passing along the street at night, was injured, and in consequence died:—Held, that defendants were entitled to plead the general issue by statute 35 Vict. c. 80, s. 28 (O.) (their act of incorporation), for the act complained of was something done by them, i. e., digging the drain without protecting properly, not a mere omission. *Cairns* v. *Water Commissioners for City of Ottawa*, 25 C. P. 551.

A plea of the general issue by statute, where no statute is applicable, is not demurrable; but the reference to the statute may be struck out on motion. *Ib.*

A defendant was not allowed to plead special pleas in addition to the general issue, "by statute." *O'Donohoe* v. *Maguire*, 1 P. R. 131; *Dale* v. *Coon*, 2 P. R. 160.

A person acting in aid of a bailiff may plead under the statute 14 & 15 Vict. c. 54, but not if he be a mere volunteer interfering from the interest which he has in the process. *Dale* v. *Coon*, 2 P. R. 160.

In an action for taking gravel from land in a manner contrary to a special agreement:—Held, that the plaintiffs could not recover, for the defendants were not bound by the agreement; and, besides, it being entered into with the plaintiffs jointly, they could not maintain separate actions. *Pew* v. *Buffalo and Lake Huron R. W. Co.*, 17 U. C. R. 282.

Title to land does not, on mere suggestion, necessarily come in question under a plea of not guilty by statute in the county court. The general rule is, that it must not only be pleaded, but be verified by affidavit. *Ball* v. *Grand Trunk R. W. Co.*, 16 C. P. 252.

In a penal action for not affixing stamps to a note under 27 & 28 Vict. c. 4, s. 5, which must, by 31 Eliz. c. 5, be brought within a year, defendant may take advantage of this statute under a plea of not guilty; and he was held not precluded from such defence by having marked in the margin of his plea, the statute 21 Jac. I. c. 4, only. *Mason* v. *Mossop*, 29 U. C. R. 500.

An equitable defence is not admissible under the general issue by statute. *Brown* v. *Blackwell*, 35 U. C. R. 239.

(d) *General Issue—"Not Guilty."*

See Honeywell v. *Davis*, 2 U. C. R. 63; *Baird* v. *Wilson*, 22 C. P. 491; *Nigh* v. *Sowerwine*, 12 U. C. R. 67; *Rogers* v. *Hooker*, 15 U. C. R. 63; *Boucher* v. *Shewan*, 14 C. P. 419; *Sweeney* v. *Port Burwell Harbour Co.*, 17 C. P. 574; *VanNatter* v. *Buffalo and Lake Huron R. W. Co.*, 27 U. C. R. 581; *Longworth* v. *McKay*, 6 O. S. 149.

(e) *General Issue—Pleas Amounting to.*

In Actions of Contract.]—See *Truax* v. *Christy*, Dra. 213; *Bunnell* v. *Crane*; 1 U. C. R. 116; *Cameron* v. *Tarratt*, 1 U. C. R. 312; *Birdsall* v. *Darling*, 2 U. C. R. 401; *Dempsey* v. *Winstanley*, 6 U. C. R. 409; *Dorland* v. *Bonker*, 7 U. C. R. 23; *Trustees of Toronto Hospital* v. *Heward*, 8 C. P. 84; *Cunningham* v. *Duane*, 9 U. C. R. 274; *Ruttan* v. *Weller*, 14 U. C. R. 44; *Hammond* v. *Conger*, 37 U. C. R. 547.

In Actions on the Case.]—See *Nellis* v. *Wilkes*, 1 U. C. R. 46; *Adamson* v. *McNab*, 6 U. C. R. 113; *Jones* v. *Dunn*, 1 C. P. 204; *Hunter* v. *Borst*, 13 U. C. R. 210.

In Actions of Trespass.]—See *Green* v. *Hamilton*, 6 O. S. 79; *Cargill* v. *Flint*, 1 U. C. R. 49.

In Actions of Trover.]—See *Switzer* v. *Ballinger*, 1 C. P. 338; *Monaghan* v. *Hayes*, 4 C. P. 1; *Mackenzie* v. *Davidson*, 27 C. P. 188.

(f) *Negative Pregnant.*

See Denison v. *Donelly*, 2 U. C. R. 394; *Commercial Bank* v. *Reynolds*, 3 U. C. R. 360; *City Bank* v. *Kellar*, 2 C. P. 508.

(g) *New Assignment.*

[*See* C. L. P. Act, ss. 123, 124, R. S. O. 1877 c. 50. Abolished by rule (1897) 284, and amendment of statement of claim substituted.]

See Hodgkinson v. *Donaldson*, 2 U. C. R. 274; *Beasley* v. *Beasley*, 10 U. C. R. 367; *Caspar* v. *Herschberg*, 11 U. C. R. 486; *Corbett* v. *Shepard*, 4 C. P. 43; *Brown* v. *Malpus*, 7 C. P. 185; *Hall* v. *Irons*, 4 C. P. 351; *McGee* v. *Great Western R. W. Co.*, 23 U. C. R. 293; *Wilson* v. *Keys*, 15 C. P. 32; *Bain* v. *McDonald*, 32 U. C. R. 190; *Cameron* v. *McLeod*, T. T. 4 Vict., R. & H. Dig. 399; *Ross* v. *Burton*, 4 U. C. R. 357; *McDonald* v. *McKinnon*, 8 P. R. 13.

(h) *Non Assumpsit.*

See Rosse v. *Dolson*, 2 L. J. 208; *Soules* v. *Soules*, 35 U. C. R. 334.

(i) *Nunquam Indebitatus.*

See Small v. *Strachan*, 2 U. C. R. 434; *Johnstone* v. *Johnstone*, 8 L. J. 46; *Abbott* v. *Skinner*, 11 C. P. 399; *Abell* v. *Glen*, 6 P. R. 64; *Hammond* v. *Conger*, 37 U. C. R. 547; *Widder* v. *Buffalo and Lake Huron R. W. Co.*, 24 U. C. R. 222; *Fitzgerald* v. *London Co-operative Association*, 27 U. C. R. 605; *Barned's Banking Co.* v. *Reynolds*, 36 U. C. R. 256; *Northern Pacific Express Co.* v. *Martin*, 26 S. C. R. 135; *Lount* v. *Smith*, 5 U. C. R. 302.

(j) *Pleading and Demurring.*

See Derbishire v. *Feehan*, 12 C. P. 502; *Macmartin* v. *Thompson*, 26 U. C. R. 334; *Ross* v. *Tyson*, 19 C. P. 294; *Tecumseth Salt Co.* v. *Platt*, 6 P. R. 251; *Westover* v. *Brown*, 5 P. R. 215.

(k) *Replication De Injurid.*

[This replication was superseded by C. L. P. Act, s. 115, R. S. O. 1877 c. 50.]

For decisions upon it, see *Blair* v. *Bruce*, 5 O. S. 524; *Leonard* v. *Buchanan*, 6 O. S. 477; *Strathy* v. *Nicholls*, 1 U. C. R. 32; *Vannorman* v. *Leonard*, 2 U. C. R. 72; *Rattray* v. *McDonald*, 3 U. C. R. 354; *Brown* v. *Hawke*, 5 U. C. R. 568; *McCuniffe* v. *Allen*, *ib.* 571; *Macfarlane* v. *Kezar*, *ib.* 580; *Muttlebury* v. *Hornby*, 6 U. C. R. 61; *Brooke* v. *McCausland*, *ib.* 104; *Boswell* v. *Ruttan*, *ib.* 199; *Richardson* v. *Phippen*, 9 U. C. R. 255; *Parks* v. *Mayhee*, 2 C. P. 257; *Nicolls* v. *Duncan*, 11 U. C. R. 332; *Blackstone* v. *Chapman*, 3 C. P. 221; *Coleman* v. *Sherwood*, *ib.* 359; *Walker* v. *Hawke*, *ib.* 428; *Spencer* v. *Ontario Marine and Fire Ins. Co.*, 4 C. P. 454.

(l) *Several Pleas Pleaded.*

For decisions under the former practice, see *Atkins* v. *Clark*, 6 O. S. 33; *Johnson* v. *Hunter*, 1 U. C. R. 280; *O'Donohoe* v. *Maguire*, 1

P. R. 131; *Nolan* v. *Reid*, *ib.* 266; *Goldburgh* v. *Leeson*, 2 L. J. 209; *Moore* v. *Cotton*, *ib.* 211; *Thom* v. *Huddy*, *ib.* 219; *Leclaire* v. *Prudhomme*, *ib.* 219; *Rosse* v. *Cummings*, *ib.* 227; *Wilkins* v. *Blacklock*, *ib.* 232; *Garrett* v. *Cotton*, *ib.* 233; *Carruthers* v. *Dickey*, *ib.* 233; *Taylor* v. *McKinley*, 3 L. J. 10; *Taylor* v. *Carroll*, *ib.* 10; *Every* v. *Wheeler*, *ib.* 11; *Yeatman* v. *Disten*, *ib.* 51; *Watt* v. *George*, *ib.* 71; *Municipality of Sandwich* v. *Drouillard*, *ib.* 113; *Jarvis* v. *Durand*, 4 L. J. 22; *Westlake* v. *Abbott*, *ib.* 6; *McKay* v. *Burley*, *ib.* 88; *Ross* v. *Cummings*, 2 P. R. 141; *Dale* v. *Coon*, *ib.* 199; *Street* v. *Dolsen*, *ib.* 306; *McKinnon* v. *Campbell*, 6 L. J. 58; *English* v. *Henderson*, 7 L. J. 41; *Williamson* v. *Dunne*, 8 L. J. 119; *Wingall* v. *Enniskillen Oil Co.*, 10 L. J. 216; *Reid* v. *New*, 4 P. R. 25; *Hatch* v. *Holland*, 28 U. C. R. 213; *Purcell* v. *Welsh*, 5 P. R. 29; *Groves* v. *McArdle*, 9 C. L. J. 126; *Plimsoll* v. *Black*, *ib.* 126; *Brown* v. *County of York*, 8 P. R. 139.

(m) *Similiter.*

See R. S. O. 1877 c. 50; *Doe d. Anderson* v. *Todd*, 1 U. C. R. 279; *Leahy* v. *Loucks*, 2 U. C. R. 178; *Duncombe* v. *Fonger*, 4 U. C. R. 192; *Young* v. *Stockdale*, 5 U. C. R. 332; *Blue* v. *Toronto Gas Co.*, 1 C. L. Ch. 7; *Archibald* v. *Cameron*, 1 P. R. 138.

Service of, with Jury Notice.] — See *McLaren* v. *McQuaig*, 8 P. R. 54; *Hyde* v. *Carmea*, 8 P. R. 137.

(n) *Special Traverses.*

For instances, see *Strathy* v. *Crooks*, 1 U. C. R. 44; *Annis* v. *Corbett*, *ib.* 303; *Dowding* v. *Eastwood*, 4 U. C. R. 217; *Millard* v. *Kirkpatrick*, *ib.* 248; *Brunskill* v. *McGuire*, 3 C. P. 408; *Duffy* v. *Higgins*, 4 C. P. 301.

(o) *Other Cases.*

Account—*Settlement of.*]—See *Melville* v. *Carpenter*, 11 U. C. R. 132; *Beattie* v. *Hatch*, 12 U. C. R. 195.

Bond—*Destruction of Goods — Negativing Default.*]—See *Boswell* v. *Sutherland*, 8 A. R. 283.

Circuity of Action.] — See *Koster* v. *Holden*, 17 C. P. 650; *Carroll* v. *Robertson*, 15 Gr. 173.

Composition — *Consent to Accept.*] — See *Matthewson* v. *Henderson*, 13 C. P. 96.

Confession — *Absence of Avoidance.*] — See *Shields* v. *Peak*, 8 S. C. R. 579.

Debenture—*Interest—Damages— Surrender.*]—See *Montreal City and District Savings Bank* v. *County of Perth*, 32 C. P. 18.

Denial of Plaintiff's Official Character.]—See *McEdwards* v. *McLean*, 43 U. C. R. 454.

Discharge in Insolvency — *Alleged Claim.*]—See *Burrowes* v. *DeBlaquiere*, 34 U. C. R. 498.

Justification — *Time.*]—See *Watson* v. *Gas Co.*, 5 U. C. R. 262.

Quia Timet — *Mortmain.*]—See *Paine* v. *Kilbourne*, 16 C. P. 64.

See Ings v. *Bank of Prince Edward Island*, 11 S. C. R. 265.

5. *Pleas Puis Darrein Continuance.*

[See C. L. P. Act, ss. 106, 107, R. S. O. 1877 c. 50.]

See Warren v. *Kirby*, R. & J. Dig. 2800; *Shaw* v. *Shaw*, 6 O. S. 458; *Wheeler* v. *Bernard*, 6 O. S. 548; *Gordon* v. *Robinson*, 3 P. R. 366; *Pender* v. *Byrne*, 22 C. P. 328; *McKenzie* v. *Kittridge*, 24 C. P. 145; *Brown* v. *Yates*, 1 A. R. 367.

VIII. Repleader and Venire de Novo.

Repleader.]—See *Lount* v. *Smith*, 5 U. C. R. 302; *Hamilton* v. *Shears*, 5 U. C. R. 306; *Anglin* v. *Township of Kingston*, 16 U. C. R. 121; *Turner* v. *Bowerman*, 29 U. C. R. 187.

Venire de Novo.]—See *Macklem* v. *McMicking*, 4 U. C. R. 264; *Dodge* v. *Muir*, 7 U. C. R. 526; *Melville* v. *Carpenter*, 11 U. C. R. 202; *Owens* v. *Purcell*, 11 U. C. R. 390; *Manning* v. *Rossin*, 3 C. P. 89; *Stephens* v. *Stephens*, 24 C. P. 424; *Ham* v. *Beard*, 6 C. P. 516; *Decow* v. *Tait*, 25 U. C. R. 188; *Smith* v. *Carder*, 11 U. C. R. 77; *Wills* v. *Carman*, 14 A. R. 656.

IX. Setting aside or Striking out Pleadings.

1. *Embarrassing Pleas.*

The court refused to strike out several pleas on the ground that they amounted to the general issue, which was also pleaded; and, semble, the plaintiff should have demurred. *Truax* v. *Christy*, Dra. 213.

Plea set aside as being tricky, meant for delay, and not issuable. *Sherwood* v. *March*, 1 C. L. Ch. 176.

Pleas ordered to be amended as calculated to prejudice or embarrass, within s. 119 of C. L. P. Act. *Green* v. *Hurd*, 4 P. R. 336; *Cowan* v. *White*, 9 L. J. 131.

Having erroneously treated a plea as a nullity, and signed judgment, which was set aside, it was held not to prevent the plaintiff from afterwards moving to set the plea aside as irregular and embarrassing. *Abell* v. *Glen*, 6 P. R. 64.

An equitable plea to an action upon a promissory note, that the plaintiff had covenanted to pay the defendant's debts, which covenant he had broken, whereby the defendant was damnified to an amount equal to the amount of the note sued upon:—Held, bad, and struck out as embarrassing. *Griffith* v. *Griffith*, 6 P. R. 172.

Action against a married woman on a promissory note. Plea, coverture. Replica-

tion, that the note was made with respect to property which was defendant's separate property, within the meaning of 35 Vict. c. 16, s. 9 There was also a replication, on equitable grounds, that the defendant had separate estate:—Held, that the first replication must be struck out as unnecessary and embarrassing. *Quebec Bank* v. *Howe*, 6 P. R. 347.

The C. L. P. Act, R. S. O. 1877 c. 50, s. 120, empowers the court or a Judge to strike out pleas not merely where they are embarrassing, because confused in terms and so difficult to understand, but where they combine several defences in one plea, or are repetitions of a defence already pleaded, and may thus be embarrassing, or prejudice a fair trial. In this case, being an action on promissory notes, the defendant, having pleaded total failure of consideration, added other pleas repeating that defence, and setting up, besides, another agreement, not necessarily connected with the notes, and so stated as to leave it uncertain whether it was intended as a separate defence or as supporting the other defence: — Held, that such pleas were properly struck out. *Abell* v. *McLaren*, 31 C. P. 517.

See, also, *Simpson* v. *Kerr*, 33 U. C. R. 345.

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2. *False or Fraudulent Pleas.*

Even after verdict the court will order a plea of release to be taken off the files, if clearly shewn to be fraudulent. *Rowand* v. *Tyler*, 3 O. S. 630.

The court will not interfere summarily to set aside a plea on the ground of fraud, except in manifestly clear cases. *Waltenberger* v. *McLean*, 4 U. C. R. 350; *Smith* v. *Dissitt*, 5 U. C. R. 206; *Watt* v. *Buell*, 1 C. L. Ch. 103.

A Judge has power to strike out a plea false in fact, when a proper case is made out for doing so. *Bowes* v. *Howell*, 2 C. L. Ch. 134; *Bank of Upper Canada* v. *Ketchum*, 4 L. J. 69. See *Wanzer* v. *Stoutenburgh*, 13 U. C. R. 184.

To an action on a bond, the defendant's only plea was clearly no defence, but by demurring the plaintiff would be thrown over an assize. On an affidavit that the plaintiff believed the plea to be vexatious and false, it was ordered to be set aside, and defendant was allowed to plead issuably, on terms. *Bears* v. *Neville*, 1 P. R. 361.

When a plea has been struck out as false and bad in law, another plea setting up the same defence, but so worded as to make it good in law, will not in general be allowed. Pleading a second time without paying the costs of previous pleas struck out with costs, will not make the latter pleas irregular. *Bank of Upper Canada* v. *Ketchum*, 4 L. J. 69.

A plea merely for time, and admitted in a proceeding in the cause to be false in fact, will be struck out under 34 Vict. c. 12, s. 8, and leave given to sign final judgment. *McMaster* v. *Beattie*, 6 P. R. 162.

Ejectment on mortgage. Defendant appeared, but on examination under Administration of Justice Act, 1873, he admitted the execution of the mortgage, and that the defence was merely for time:—Held, that the appearance and defence could not be struck out, as defendant was entitled to possession until plaintiff should prove his case. *Metropolitan Building and Savings Society* v. *Rodden*, 6 P. R. 294.

A summons to strike out defendant's plea, as proved to be false by his examination under the Administration of Justice Act, was discharged, although there could be little doubt that the plea was false. It involved a point which required evidence for its establishment in addition to defendant's admission, and no matter how clear the case might be, there was not power to strike out the plea unless the defendant, in a proceeding of the court, admitted it to be false. Costs to be costs in the cause. *Turner* v. *Neill*, 6 P. R. 295.

Held, that defendant's admission that his defence was for time, was not sufficient evidence of the falsity of the plea to entitle the plaintiff to have it struck out; but that the further admission that he had "no real defence," supplied the defect. *Davis* v. *Code*, 7 P. R. 2.

Defendant contracted to sell and convey to plaintiff certain real estate, and covenanted to give possession within certain times specified. Defendant found it necessary, in order to recover possession of the property from a third party, to require from plaintiff an assignment of all his interest in the land. The deed of assignment was accordingly made by plaintiff to defendant, and only for the purpose of the proposed action of ejectment. Afterwards plaintiff, not having received possession of the land according to the terms of the contract, commenced an action against defendant on his covenant. Defendant pleaded that before breach, the plaintiff, by the deed already mentioned, bargained, sold, and assigned to defendant all his interest in the land. Plaintiff, with a full knowledge of the facts, in order to get down at the then approaching assizes, took issue and served notice of trial. Afterwards plaintiff obtained a summons to set aside the plea with costs, and to be allowed to sign judgment as for want of a plea, without prejudice to his notice of trial, and that such notice of trial should stand as a notice of assessment of damages, the plea being against good faith; or that the plaintiff should, without prejudice to the notice of trial, have leave to reply on equitable grounds the facts above stated. An order was made to strike out the plea, and giving plaintiff leave to sign judgment unless he preferred to take an order to add the proposed equitable replication; but, under the circumstances, the Judge refused to go further, and allow the notice of trial to stand. *Dickson* v. *Grimshawe*, 10 L. J. 192.

Upon an application to strike out pleas under the A. J. Act, leave may be granted to add a plea if supported by affidavits verifying the same. *Johnson* v. *Johnson*, 7 P. R. 288.

Pleas struck out, under the circumstances detailed in the report, as being shewn by defendant's examination to be untrue. *Ib.*

Upon his examination under R. S. O. 1877 c. 50, s. 156, the defendant swore that he did not know whether the note sued on was stamped or not when it was signed, and a co-defendant swore that it was:—Held, that the plea could not be struck out, for that can only be done under the above Act where defendant

admits it to be untrue. *Imperial Bank* v. *Summerfelt*, 7 P. R. 320.

To an action on a promissory note defendant pleaded the Statute of Limitations. Five years after the note was made defendant signed an agreement written on the note that it "should continue a good security notwithstanding the Statute of Limitations." Leave to strike out the plea was refused, but the plaintiff was allowed to put in a special replication. *Post* v. *Leys*, 7 P. R. 357.

Defendants upon their examination under R. S. O. 1877 c. 50, s. 156, admitted that their only ground for denying the plaintiffs' incorporation was, that they did not know that the plaintiffs had ever been incorporated, and acknowledged that they had joined in a bond to the plaintiffs as a company:—Held, that the plea could not be struck out, as evidence might be produced shewing that they had ceased to be a corporate body. *Queen Ins. Co.* v. *Boyd*, 7 P. R. 379.

See Pegg v. *Nasmith*, 28 C. P. 330; *Doyle* v. *Queen Sound Printing Co.*, 8 P. R. 69.

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3. *Other Cases.*

Count—*Jurisdiction.*]—Striking out count in county court suit, to meet objection as to jurisdiction. *Fitzsimmons* v. *McIntyre*, 5 P. R. 119.

County Court — *Title to Land.*] — A county court Judge, at the trial of a case, upon the application of plaintiff's counsel, struck out a count of the declaration and all pleadings relating thereto, because the pleadings thereunder ousted his jurisdiction, by bringing title to land in question:—Held, that he had the power to do so. *Fitzsimmons* v. *McIntyre*, 5 P. R. 119.

Issues of Fact—*Order—Leave to Plead.*] —A defendant will be allowed, where the plaintiff's declaration is held bad on demurrer, upon payment of the plaintiff's costs of the application and of the replication, to strike out the issues in fact upon some of the pleas, and need not move to rescind the order allowing him to plead several matters. *Westover* v. *Brown*, 5 P. R. 215.

Record Containing Plea Stricken out.]—See *Atkins* v. *Clark*, 6 O. S. 33.

Replication — *No Equitable Answer.*] — See *Jacobs* v. *Equitable Ins. Co.*, 18 U. C. R. 14.

Summons — *Amended Plea.*] — See *Edmundson* v. *Scott*, 1 C. L. Ch. 88.

X. Time for Pleading or Replying.

1. *Demand or Notice to Plead.*

[*See* C. L. P. Act, s. 101, R. S. O. 1877 c. 50.]

See Read v. *Johnson*, Tay. 489; *Bank of Commerce* v. *White*, 9 C. L. J. 191; *Moffatt* v. *Evans*, 6 P. R. 16; *City Bank* v. *Mackay*, 12 C. L. J. 119; *Lock* v. *Todd*, 8 P. R. 60; *Robinson* v. *McGrath*, R. & J. Dig. 2784; *Henderson* v. *Boulton*, 1 C. L. Ch. 38; *Ducatt* v. *Garrett*, *ib.* 46.

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2. *Rule to Plead.*

[This is abolished. See C. L. P. Act, s. 101, R. S. O. 1877 c. 50.]

For decisions on the subject, see *Mead* v. *Bacon*, Tay. 180; *Campbell* v. *Berrie*, *ib.* 381; *Smith* v. *Sumner*, *ib.* 308; *Bergin* v. *Thompson*, Dra. 1.

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3. *Other Cases.*

Amended Declaration.] — See *Fuller* v. *Hall*, H. T. 5 Vict., R. & H. Dig. 361; *Commercial Bank* v. *Boulton*, 1 C. L. Ch. 15; *Ross* v. *Kline*, 1 P. R. 91.

Computation of Time.]—See *Vrooman* v. *Shuert*, 2 P. R. 122; *Ridout* v. *Orr*, *ib.* 231; *Moore* v. *Grand Trunk R. W. Co.*, *ib.* 227; *Cameron* v. *Cameron*, *ib.* 259.

Demand of Oyer — *Computation of Time.*]—See *Elliott* v. *Duggan*, 1 P. R. 147.

New Assignment.]—See *Unger* v. *Crosby*, 3 O. S. 175; *McDonald* v. *McKinnon*, 8 P. R. 13.

Order for Costs.]—See *Craik* v. *Alleyn*, 1 C. L. Ch. 70.

Order for Further Time—*Necessity.*]—See *Small* v. *Mackenzie*, Dra. 241.

Stay of Proceedings—*Security for Costs —Computation.*]—See *Ryley* v. *Parmenter*, 2 C. L. J. 268.

——— *Summons — Computation.*] — See *Dean* v. *Thompson*, 4 P. R. 301; *Wood* v. *Nichols*, *ib.* 111; *McDonald* v. *McEwan*, 6 P. R. 18.

XI. Waiver of Defects in Pleading.

Demand for Security for Costs.] — See *Teal* v. *Jones*, 2 P. R. 63; *McNamee* v. *Reilley*, 13 U. C. R. 197.

Notice of Trial.] — See *Archibald* v. *Cameron*, 1 P. R. 138.

Plea of Justification.]—See *Watson* v. *Gas Co.*, 5 U. C. R. 262.

Proceeding with Trial.]—See *Snow* v. *Johnston*, 1 P. R. 156.

Recognition of Irregular Service.]—See *Brown* v. *Goodeve*, 2 C. L. Ch. 158.

Service—*Acceptance of.*]—See *The Queen* v. *Stewart*, 8 P. R. 297.

PLEADING IN EQUITY BEFORE THE JUDICATURE ACT.

I. General Principles.

Construction of Pleading—*Facts within Knowledge of Opposite Party.*]—It is the duty

of the court on perusing a pleading with a view of ascertaining whether or not it is sufficient on demurrer, to put a fair and reasonable construction on the pleading, to ascertain what is reasonably to be inferred from the language used; and, if, as a whole, it presents a case entitling the plaintiff to relief, to allow it to stand, and even if there be some statements which if taken alone would render the case ambiguous, yet these should be taken in connection with the remainder of the pleading so as to make, where practicable, a consistent story entitling the party to relief. A pleader when dealing with facts peculiarly not required to be as precise and particular as if the pleading were in respect of matters known to both. Where a bill alleged, with sufficient certainty, enough to shew, if true, the relation of trustee and cestui que trust to exist between the plaintiff and defendants, the court, although portions of the bill did not come up to the requirements in this respect, overruled a demurrer for want of equity. The order allowing a demurrer for want of jurisdiction, 21 Gr. 45, affirmed on rehearing. *Grant* v. *Eddy*, 21 Gr. 568.

Dower — *Express Averment.*]—Where a widow is made a defendant as being entitled to dower, it is not sufficient for the bill to allege that the husband died leaving her his widow; the bill should further expressly aver that she is entitled to dower, and that she claims to be so entitled. *Martin* v. *McGlashan*, 15 Gr. 485.

Positive Allegations.] — On demurrer ore tenus:—Held, that every material allegation in a bill must be positive. *Yarrington* v. *Lyon*, 2 Ch. Ch. 22.

Reformation of Document — *Opposite Party.*]—Semble, it does not follow because a plaintiff asks in his bill for reformation of a document that therefore a defendant is entitled to claim the same relief though he has not asked for it. *Wolffe* v. *Hughes*, 1 O. R. 322.

Stating Effect of Document.]—Where a party alleges the legal operation and effect of an instrument, he is bound by such allegation. *Foster* v. *Beall*, 15 Gr. 244.

Useless Statements—*Costs.*]—Pleadings should be in language and statement as brief and concise as possible, and neither matters of argument nor evidence should be introduced into them. Where pleadings are filed containing useless or improper statements, or admissions so restricted as to render proof necessary, the costs of such pleading will not be allowed to the party filing it; but, on the contrary, he will be ordered to bear the costs occasioned thereby. *Kennedy* v. *Lawlor*, 14 Gr. 224.

II. Answers.

1. *Amendment.*

See Guggisberg v. *Mutual Ins. Co.*, 24 Gr. 350; *Peterkin* v. *McFarlane*, 4 A. R. 25; *S. C.*, 9 A. R. 429.

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2. *Scandal and Impertinence.*

See Good v. *Elliott*, 1 Gr. 389; *Ruttan* v. *Smith*, 1 Ch. Ch. 184; *Jones* v. *Huntington*, 3 Ch. Ch. 117.

3. *Supplemental Answers.*

(a) *Application for Leave to File—When Granted.*

See Walsh v. *DeBlaquiere*, 12 Gr. 107; *McKinnon* v. *McDonald*, 13 Gr. 152; *Trust and Loan Co. of Canada* v. *Boulton*, 18 Gr. 234; *Cherry* v. *Morton*, 1 Ch. Ch. 25; *Weir* v. *Matheson*, 1 Ch. Ch. 238; *Beattie* v. *Mutton*, 14 Gr. 686; *McKinnon* v. *Macdonald*, 2 Ch. Ch. 23; *Worts* v. *Howe*, 2 Ch. Ch. 111; *Torrance* v. *Crooks*, 1 E. & A. 230; *Prince* v. *Brady*, 16 Gr. 375; *McIntyre* v. *Canada Co.*, 18 Gr. 367; *Shaw* v. *Thomas*, 19 Gr. 489; *Boyd* v. *Shouldice*, 22 Gr. 1; *Seaton* v. *Fenwick*, 7 P. R. 146; *Peterkin* v. *McFarlane*, 6 A. R. 254; *S. C.*, 4 A. R. 25; *Right* v. *Way*, 8 P. R. 326.

(b) *Application for Leave to File—Forum.*

See Attorney-General v. *Casey*, 2 Ch. Ch. 279; *Harding* v. *Harding*, 6 P. R. 95.

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4. *Swearing to.*

See Crawford v. *Polley*, 1 Ch. Ch. 8; *Gordon* v. *Johnson*, 2 Ch. Ch. 205.

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5. *Time for Answering.*

Amendment.] — See *Carter* v. *Adams*, 3 Ch. Ch. 57.

Computation of Time.]—See *Irwin* v. *Lancashire Ins. Co.*, 2 Ch. Ch. 291.

Extension of Time.] — See *Shanahan* v. *Fairbanks*, 1 Ch. Ch. 297.

Leave to Answer after Time Expired.]—See *Merrill* v. *Ellis*, 1 Ch. Ch. 268; *London* v. *London*, 2 Ch. Ch. 40; *Irwin* v. *Lancashire Ins. Co.*, 2 Ch. Ch. 293; *Ritchie* v. *Gilbert*, 3 Ch. Ch. 377; *Hamelyn* v. *White*, 6 P. R. 120.

Notice of Filing.]—See *Smith* v. *Muirhead*, 2 Gr. 395.

Service out of Jurisdiction—*Shortening Time.*]—See *Bloomfield* v. *Brooke*, 6 P. R. 205.

Substituted Service of Bill.] — See *Crookshank* v. *Sager*, 1 Ch. Ch. 202.

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6. *Other Cases.*

Compromise of Suit.] — See *Small* v. *Union Permanent Building Society*, 6 P. R. 206.

Evidence — *Effect of Admissions.*] — See *Williamson* v. *Ewing*, 27 Gr. 596.

Office Copy — *Application* — *Notice.*]— See *Stewart* v. *Richardson*, 2 Ch. Ch. 443.

Public Policy—*Illegality*—*Sufficiency of Allegation.*]—See *Langlois* v. *Baby*, 10 Gr. 358, 11 Gr. 21.

Seal of Corporation — *Mandamus.*]—*See Gildersleeve* v. *Wolfe Island R. W. and Canal Co.*, 3 Ch. Ch. 358.

Special Answer—*Petition of Review.*]—*See Robson* v. *Wride*, 14 Gr. 669.

Statute of Frauds.] — See *Butler* v. *Church*, 18 Gr. 109; *Wilde* v. *Wilde*, 20 Gr. 521.

Usury.] — See *Emmons* v. *Crooks*, 1 Gr. 159.

III. BILLS.

1. *Amendment.*

(a) *After Answer.*

See McNab v. *Gwynne*, 1 Gr. 127; *Carney* v. *Boulton*, 1 Gr. 423; *City Bank* v. *Amsden*, 7 L. J. 293; *Kemp* v. *Jones*, 1 Ch. Ch. 374; *Archibald* v. *Hunter*, 2 Ch. Ch. 277; *McGillivray* v. *McConkey*, 6 P. R. 56.

(b *After Replication.*

See Woodstock v. *Niagara*, 1 Ch. Ch. 166; *Kerr* v. *Finlayson*, 3 Ch. Ch. 497; *Jackson* v. *Robertson*, 7 P. R. 148.

(c) *At and after Hearing and after Decree.*

See Street v. *Hogeboom*, 3 Gr. 128; *Rees* v. *Wittrock*, 6 Gr. 418; *Aitchison* v. *Coombs*, 6 Gr. 643; *McCrumm* v. *Crawford*, 9 Gr. 337; *Barrett* v. *Crossthwaite*, 9 Gr. 422; *Finlayson* v. *Mullard*, 10 Gr. 130; *Cunningham* v. *Cunningham*, 10 Gr. 459; *Fraser* v. *Rodney*, 11 Gr. 426; *McIntyre* v. *Cameron*, 13 Gr. 475; *Biggar* v. *Allan*, 15 Gr. 358; *Conlin* v. *Elmer*, 16 Gr. 541; *Allan* v. *Newman*, 16 Gr. 607; *Cook* v. *Jones*, 17 Gr. 488; *Gillatley* v. *White*, 18 Gr. 1; *McIntyre* v. *Canada Co.*, 18 Gr. 367; *Forrester* v. *Campbell*, 19 Gr. 143; *McGillivray* v. *McConkey*, 6 P. R. 56; *Deisle* v. *McCaw*, 22 Gr. 254; *Foley* v. *Foley*, 26 Gr. 463; *Barrett* v. *Gardner*, 1 Ch. Ch. 344; *Laverason* v. *Buckley*, 2 Ch. Ch. 334; *Bank of Montreal* v. *Power*, 2 Ch. Ch. 47; *Porter* v. *Hale*, 23 S. C. R. 265.

(d) *Costs.*

See Emmons v. *Crooks*, 1 Gr. 558; *Applegarth* v. *Baker*, 2 Gr. 428; *McGillivray* v. *McConkey*, 9 C. L. J. 161; *Weiss* v. *Rankin*, 3 Ch. Ch. 190; *Lowe* v. *Campbell*, 3 Ch. Ch. 97.

(e) *Motion for Leave to Amend.*

See Applegarth v. *Baker*, 2 Gr. 428; *Bowen* v. *Turner*, 1 Ch. Ch. 268; *Baird* v. *White*, 1 Ch. Ch. 275; *McDonell* v. *McKay*, 2 Ch. Ch. 243.

(f) *Practice in Amending.*

See Nelson v. *Robertson*, 1 Gr. 530; *Carr* v. *Moffatt*, 9 C. L. J. 52; *Hill* v. *Hill*, 2 Gr. 692; *Connolly* v. *Montgomery*, 1 Ch. Ch. 20; *Ruttan* v. *Smith*, 1 Ch. Ch. 296; *Tyron* v. *Pears*, 2 Ch. Ch. 490; *Bolster* v. *Cochrane*, 2 Ch. Ch. 327; *Frietsch* v. *Winkler*, 3 Ch. Ch. 109; *McMurray* v. *Grand Trunk R. W. Co.*, 3 Ch. Ch. 506; *Waterous* v. *Farran*, 6 P. R. 31; *Taylor* v. *Hall*, 20 Gr. 101.

(g) *Other Cases.*

After Judgment on Demurrer—*Statute of Limitations—Trust.*]—*See McFadgen* v. *Stewart*, 11 Gr. 272.

Changing Nature of Suit.]—*See Crawford* v. *Bradburn*, 1 Ch. Ch. 280; *McGillivray* v. *McConkey*, 6 P. R. 56.

Confession and Avoidance of Answer.]—*See Cox* v. *Keating*, 6 P. R. 316.

Examination of Amending Party.]—*See Fowler* v. *Boulton*, 12 Gr. 437.

Order Nisi to Dissolve Injunction—*Amendment of Bill before Dissolution—Answer to Amendment—Costs.*]—*See Fisher* v. *Wilson*, 1 Gr. 218.

Title Acquired after Bill Filed.]—*See Adamson* v. *Adamson*, 25 Gr. 582; *Dumble* v. *Larush*, 27 Gr. 187.

Unnecessary Amendment.] — See *Wilmott* v. *Boulton*, 1 Gr. 479.

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2. *Certainty and Particularity.*

Account—*Allegation of Payment.*] — The bill alleged that tenants pur autre vie had sold and conveyed to a railway company land for their roadway. After the cesser of the life estate the parties entitled in remainder filed a bill against the vendors and the company, seeking discovery as to what estate or interest the vendors had conveyed, stating that the company alleged that they had paid the vendors the full price of the fee in land, and that they (the vendors) were liable to account for the price so paid, and prayed for an account and payment to the plaintiffs of a proper share or proportion thereof:—Held, on demurrer by the vendors, that no sufficient ground of equity was alleged against them; the plaintiffs, however, to be at liberty to amend their bill as they should be advised. *Owston* v. *Grand Trunk R. W. Co.*, 26 Gr. 93.

A railway company paid to tenants for life the full price of the land conveyed by them to the company for their line of railway, and on the cesser of the life estate the parties entitled in remainder filed a bill stating that the railway company assumed to purchase the lands for the right of way; that the company alleged that they had paid the full consideration for the land to the tenants for life; submitting that if the company did make such payment they did so in their own wrong, and asking for payment of the plaintiff's share of the purchase money: — Held, (1) that the word "assumed" was a sufficient allegation of the fact of sale and conveyance. But (2) that the statement that the company "alleged" that the purchase money was all paid to the vendors was not such a positive statement of

the fact of payment to the tenants for life as to make them proper parties to the bill, and a demurrer was allowed on this ground. *Owston* v. *Grand Trunk R. W. Co.*, 28 Gr. 428.

Damage—*Statement of.*]—In a bill filed by a mortgagor against his son, a bidder at the sale by a loan company, to which bill the company and one B. were also defendants, it was alleged that it had been agreed between the son and B. that, in consideration of the son securing to B. a debt of the plaintiff, B. would advance the deposit necessary to enable the son to buy the land at the sale; that the son should attend and buy in the land, which he accordingly did; that in consequence of B.'s refusal to make the promised advance the son was unable to carry out the sale; that the bidding of the son deterred others present from bidding; and that B. afterwards privately bought the land at a great undervalue, to the loss of the plaintiff:—Held, on demurrer, that the bill sufficiently, though inartifically, alleged that by reason of B.'s agreement and refusal to make the advance agreed upon, he had occasioned an abortive sale and profited thereby, to the loss and damage of the plaintiff. *Campion* v. *Brackenridge*, 28 Gr. 201.

Deed—*Allegation of Delivery.*]—Held, that the bill set out in the report sufficiently averred the delivery of the alleged deed, and that the defect, if any, was removed by the answer. *Smith* v. *Doyle*, 4 A. R. 471.

Dower—*Bar by Lapse of Time—Statutes.*]—In a bill seeking to obtain the benefit of a sale of land freed from the dower of the widow of the deceased owner, it was alleged that he had died at such a time as would, if true, bar the widow's right to dower, and submitted "that the defendant E. B. (the widow) is not entitled to dower:"—Held, a sufficient allegation that the defendant's right to dower was barred by the statute, though it omitted to state that this was the legal result of any particular statute. *Banks* v. *Bellamy*, 27 Gr. 342.

Positive Allegations—*Necessity for.*]—Every material allegation in a bill should be positive; and an allegation that, so far as the plaintiffs knew, an assignee had not accepted the assignment executed by an insolvent, was held insufficient. *Yarrington* v. *Lyon*, 12 Gr. 308.

An information to restrain a nuisance caused by the erection of a fence on a public highway, alleged that "the defendants or some or one of them" had put up such fence:—Held, bad, as being too uncertain an allegation as to who had committed the act complained of. *Attorney-General* v. *Boulton*, 20 Gr. 402.

By an amendment it was stated that, subsequently to the filing of the bill, the Federal Bank gave notice that they claimed a lien on A. M.'s bond to S. M. to assure payment of the purchase money as assignee of S. M., but there was no distinct allegation that a bond was given:—Held, that the defendants could not be required to answer a statement so uncertain and inconclusive. *St. Michael's College* v. *Merrick*, 1 A. R. 520.

Title—*Statement of.*] — Where a sale of railway stock and bonds was effected by a partnership, a mortgage being taken back to secure part of the purchase money, and one of the partners subsequently died:—Held, that the right to enforce payment of the unpaid purchase money remained in the surviving partner, whether the subject of sale was to be treated as realty or goods and chattels. In such a case, the plaintiff in his bill set forth that he, as well on his own behalf as that of the firm, sold to the purchaser and the purchaser bought from the plaintiff and the firm; and then alleged the death of his partner, "leaving the plaintiff sole surviving partner of the said firm; and the plaintiff is now solely entitled to all the interest of the said firm under the said agreement with the defendant," the purchaser:—Held, that this sufficiently stated the title of the plaintiff as the surviving partner of the firm. *Bolckow* v. *Foster*, 24 Gr. 333.

A bill set forth the plaintiff's title to land by mesne conveyances from the grantee of the Crown; stating that the plaintiff had gone into possession, not saying when, and not saying that any of the parties through whom he derived the title had been in possession. It alleged that the defendant pretended to be able to establish title to the land by possession as the assignee of one E. K.; and that E. K. was for a short period (not saying how long) in possession. It charged that the conveyance to the defendant was a cloud on the plaintiff's title, and prayed the usual relief. The bill was taken pro confesso:—Held, that its allegations were insufficient and too vague to entitle the plaintiff to a decree. *Carson* v. *Crysler*, 16 Gr. 490.

A bill alleged that the defendants A. had taken from their co-defendants B. their "line of railway for a certain number of years, yet unexpired, and under the said agreement the defendants A. claim to hold, run, and operate, as they are now doing, the said line of railway:"—Held, on demurrer, that this stated sufficiently the title of the defendants. *Paterson* v. *Buffalo and Lake Huron R. W. Co.*, 17 Gr. 521.

The bill stated that the plaintiff was grandson of L., who had died intestate:—Held, that this did not sufficiently state the title of the plaintiff. *Lario* v. *Walker*, 28 Gr. 216.

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3. *Cross-Bill.*

Necessity for.]—See *Buchanan* v. *Cunningham*, 10 Gr. 513.

Subject of.]—See *Direct Cable Co.* v. *Dominion Telegraph Co.*, 28 Gr. 648.

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4. *Multifariousness.*

See Young v. *Wright*, 27 Gr. 324; *Glass* v. *Munsen*, 12 Gr. 77; *Cole* v. *Glover*, 16 Gr. 392; *Goetler* v. *Eckersville*, 15 Gr. 82; *Connor* v. *Bank of Upper Canada*, 12 Gr. 43; *McKenzie* v. *Brown*, 15 Gr. 399; *McLaren* v. *Fraser*, 15 Gr. 239; *Nelson* v. *Robertson*, 1 Gr. 530; *Gillespie* v. *Grover*, 3 Gr. 558; *Pyper* v. *Cameron*, 13 Gr. 131; *Crooks* v. *Smith*, 1 Gr. 356; *Loucks* v. *Loucks*, 12 Gr. 343; *Kelly* v. *Ardell*, 11 Gr. 579; *Campbell* v. *Campbell*, 29 Gr. 252; *Gunn* v. *Trust and Loan Co.*, 2 O. R. 393.

5. *Prayer for General Relief.*

See Gaughan v. *Sharpe*, 6 A. R. 417; *Phillips* v. *Royal Niagara Hotel Co.*, 25 Gr. 358; *Gunn* v. *Trust and Loan Co.*, 2 O. R. 393; *Jessup* v. *Grand Trunk R. W. Co.*, 7 A. R. 128; *Nelson* v. *Robertson*, 1 Gr. 530; *Graham* v. *Chalmers*, 9 Gr. 239; *Clark* v. *Eby*, 11 Gr. 98.

6. *Supplemental Bills.*

See McNab v. *Gwynne*, 1 Gr. 240; *Martin* v. *Kennedy*, 2 Gr. 80.

7. *Venue.*

See Duncan v. *Geary*, 10 Gr. 34; *Fenton* v. *Cross*, 1 Ch. Ch. 25; *Baxter* v. *Campbell*, 2 Ch. Ch. 39; *Frietsch* v. *Wrinkler*, 3 Ch. Ch. 109.

See post, TRIAL.

8. *Other Cases.*

Charges in Bill—*Answer—Demurrer.*]—See *McMurray* v. *Northern R. W. Co.*, 23 Gr. 134.

Fraud — *Costs — Relief — Demurrer.*] — See *Saunders* v. *Stull*, 18 Gr. 590.

——— *Failure to Allege.*]—See *Commercial Bank of Canada* v. *Cooke*, 9 Gr. 524.

Operation of Instrument — *Allegation as to.*]—See *Foster* v. *Beall*, 15 Gr. 244.

Title—*Different Capacity.*]—See *Fisher* v. *Wilson*, 1 Gr. 218.

IV. DEMURRERS.

1. *Costs of.*

Divided Success.]—See *Paine* v. *Chapman*, 6 Gr. 338; *Kelly* v. *Ardell*, 11 Gr. 579; *White* v. *McKay*, 20 Gr. 421; *Roche* v. *Jordan*, 20 Gr. 573; *Prince* v. *Lough*, 24 Gr. 276.

Submitting to Demurrer — *Amendment.*]—See *Martin* v. *Reid*, 6 L. J. 143.

See Winstanley v. *King's College*, 1 O. S. 228.

2. *For Want of Equity.*

See Cornish Silver Mining Co. v. *Bull*, 21 Gr. 592; *City Light and Heating Co. of London* v. *Macfie*, 28 Gr. 363; *Greig* v. *Green*, 6 Gr. 240; *Scane* v. *Hartrick*, 7 Gr. 161; *Malcolm* v. *Malcolm*, 2 Ch. Ch. 200; *McLean* v. *Bruce*, 29 Gr. 507; *Attorney-General* v. *International Bridge Co.*, 27 Gr. 37; *St. Michael's College* v. *Merrick*, 1 A. R. 520.

3. *Form of.*

See Ferguson v. *Kilty*, 10 Gr. 102; *Bennett* v. *O'Meara*, 2 Ch. Ch. 167; *Walker* v. *City of Toronto*, 1 Gr. 447; *Martin* v. *Kennedy*, 2 Gr. 80; *Abbott* v. *Canada Central R. W. Co.*, 24 Gr. 579.

4. *Setting down.*

See Winstanley v. *King's College*, 1 O. S. 228; *Carroll* v. *McDonald*, 15 Gr. 329; *Stevenson* v. *Hodder*, *ib.* 542; *Baldwin* v. *Borst*, 1 Ch. Ch. 82.

5. *Time for Demurring.*

See Sanders v. *Christie*, 1 Gr. 137; *White* v. *Baskerville*, 2 Ch. Ch. 40; *Boultbee* v. *Cameron*, 2 Ch. Ch. 41; *Chamberlain* v. *McDonald*, 2 Ch. Ch. 204.

6. *Other Cases.*

Ground of Demurrer—*Pendency of Another Action.*]—See *Direct United States Cable Co.* v. *Dominion Telegraph Co. of Canada*, 8 A. R. 416, 28 Gr. 648.

Minor Relief.]—See *Mutchmore* v. *Davis*, 14 Gr. 346.

Municipal Corporation — *Settlement — By-law—Necessity for Alleging.*]—See *Village of Gravenhurst* v. *Township of Muskoka*, 29 Gr. 439.

Notice of Fraud.]—See *Kitchen* v. *Kitchen*, 16 Gr. 232.

Parties — *Alternative Relief—Appeal.*]—See *Simpson* v. *Smyth*, 1 E. & A. 9, 2 O. S. 129. See, also, *Smyth* v. *Simpson*, 5 Gr. 104, 7 Moo. P. C. 205.

Reference to Documents.]—See *Loughead* v. *Stubbs*, 27 Gr. 387.

Reference to Statutes.]—See *Kiely* v. *Kiely*, 3 A. R. 438.

Specific Performance — *Right to Declaratory Judgment.*]—See *Calvert* v. *Burnham*, 6 A. R. 620.

V. FILING PLEADINGS.

Taking off Files.]—See *Connell* v. *Connell*, 1 O. S. 232.

——— *Notice of Filing.*]—See *Lewis* v. *Jones*, 9 L. J. 133.

——— *Notice of Filing — Extension of Time.*]—See *Parker* v. *Brown*, 3 Ch. Ch. 354.

——— *Notice of Filing — Service.*] — See *Hayes* v. *Shire*, 6 P. R. 41.

——— *Notice of Filing—Solicitor.*] — See *Rathbun* v. *Hughes*, 3 Ch. Ch. 160.

——— *Want of Authority — Applicant — Status.*]—See *Quantz* v. *Smeltzer*, 6 P. R. 126.

Time of Filing — *Computation.*] — See *Wilson* v. *Black*, 6 P. R. 130.

Waiver of Irregularity.]—See *Ruttan* v. *Smith*, 1 Ch. Ch. 184.

VI. Replications.

Leave to File—*Costs.*]—See *Beckett* v. *Rees*, 1 Gr. 434.

New Matter.]—See *Cox* v. *Keating*, 6 P. R. 316.

See also *Wilson* v. *Black*, 6 P. R. 130.

VII. Miscellaneous Cases.

Dismissal of Bill—*Affidavit—Cross-examination.*]—See *Miller* v. *Start*, 10 Gr. 23.

Fraud — *Evidence of—Specific Performance—Statute of Frauds.*] — See *Wright* v. *Henderson*, 1 O. S. 304.

Usury — *Necessity for Pleading.*] — See *Proudfoot* v. *Bush*, 7 Gr. 518.

PLEADING SINCE THE JUDICATURE ACT.

I. Generally.

Admissions—*Inference.*]—When a pleading contains an answer to allegations in the opposite pleading, which is insensible if not read as admitting certain statements, those statements must be taken as admitted. *Richardson* v. *Jenkin*, 10 P. R. 292.

——— *Inference — Incidental Proceedings —Quebec Law.*]—See *Guertin* v. *Gosselin*, 27 S. C. R. 514.

Arrangement of Defences.] — The plaintiff should not be driven to spell out the defences set up in an action. He is entitled to have them set forth in such manner as will enable him, upon reading them, to form a fairly correct judgment as to their scope and meaning, and as to what is intended to be relied upon under them. *Dryden* v. *Smith*, 17 P. R. 505.

Conditions Precedent—*Performance.*]—Under the Ontario Judicature Act the performance of conditions precedent to a right of action must still be alleged and proved by the plaintiff. *Home Life Association of Canada* v. *Randall*, 30 S. C. R. 97.

Hypothetical Defences.] — Quære, whether hypothetical defences can be pleaded. *Smith* v. *Fair*, 14 O. R. 729.

Material Facts—*Absence of Denial.*]—Under the system of pleading in the high court of justice and in county courts under the Judicature Act, rules 128, 146, 147, 148, 240, where a material fact is alleged in a pleading, and the pleading of the opposite party is silent with respect thereto, the fact must be considered as in issue. Waterloo Mutual Fire Ins. Co. v. Robinson, 4 O. R. 295, approved of. *Seabrook* v. *Young*, 14 A. R. 97.

II. Amendment of Pleadings.

1. *Adding or Substituting New Claim.*

Conspiracy—*Account — Parties.*] — The action as framed was to recover damages for an alleged conspiracy between the defendants, the plaintiff's partner in a mercantile business and another, whereby they fraudulently and secretly withdrew money from the assets of the firm. The real grievance was the alleged misappropriation by the plaintiff's partner, with the assistance of the other defendant, of partnership funds, to the injury of the partnership and of the plaintiff. At the trial the plaintiff sought to amend by alleging that moneys were received by the other defendant in trust for the firm, and by adding the firm's assignee for the benefit of creditors as a party, and by claiming an account:—Held, by a divisional court, that the amendment, which had been refused, should have been granted upon proper terms as to costs. Held, by the court of appeal, that refusing the plaintiff leave to amend by adding the assignee of the firm for the benefit of creditors as a party and by claiming an account of the moneys withdrawn by the defendants, was a proper exercise of discretion by the trial Judge, which ought not to have been interfered with by the divisional court. *Smith* v. *Boyd*, 18 P. R. 76, 296.

Different Cause of Action—*Service out of Jurisdiction — Limitation of Actions.*] — Where a writ of summons in an action for a specified cause has been issued and served upon defendants out of the jurisdiction, with a statement of claim, pursuant to an order under rule 271, and the defendants have appeared, an order may properly be made allowing the plaintiffs to amend the statement of claim by adding a new claim for an entirely different cause of action, provided that it is a claim in respect of which leave to serve process out of the jurisdiction might have been obtained. Holland v. Leslie, [1894] 2 Q. B. 346, 450, followed. Held, also, that the plaintiffs should, in respect of the Statute of Limitations running against their added claim, be placed in the same position as if their action for the added claim had been brought at the date of the amendment. *Hogaboom* v. *MacCulloch*, 17 P. R. 377.

Foreclosure—*Possession.*] — The plaintiff indorsed his writ of summons and filed his statement of claim to recover possession of the land in dispute, as being the assignee of a lease made by him to the defendants, who assigned to a third party, who assigned and surrendered to the plaintiff. The defence was that the lease was in effect a mortgage, and fraud and want of consideration were alleged:—Held, that the plaintiff could not amend his statement of claim, and ask a foreclosure of the land as mortgagee. *McIlhargey* v. *McGinnis*, 9 P. R. 157.

Negligence — *Third Party—Direct Claim against.*] — An action for damages for injuries resulting from a defective sidewalk was brought against a city corporation, who, under R. S. O. 1887 c. 184, s. 531, s.-s. 4, obtained an order adding O. as a party defendant, and alleged in their defence that O. was responsible for the defects in the sidewalk, and asked a remedy over against him. O. delivered a defence denying the cause of action, and alleging that, if any accident occurred, it was through the neglect of the city corporation. At the trial the jury found that O. occasioned the accident, and gave damages to the plaintiff. The plaintiff then applied for leave to amend the statement of claim by claiming directly against O., which leave was

granted, and judgment was entered against O. for the damages awarded:—Held, that the leave to amend was properly granted, and the judgment should be affirmed. *Stillwell* v. *City of Toronto*, 20 O. R. 98.

Seduction—*Alternative Cause of Action—Surprise.*]—In an action for enticing away and having carnal knowledge of the plaintiff's daughter, the plaintiff was allowed at the close of the case to amend by setting up, as an alternative cause of action, the enticing away of the daughter and having connexion with her by force and against her will, and consequent loss of service. No application was made by the defendants to put in further evidence, nor was any suggestion made that they were in any way prejudiced by the amendment:—Held, that the amendment was properly allowed. *Cole* v. *Hubble*, 26 O. R. 279.

Specific Performance — *Inconsistent Claim.*]—At the hearing of a suit by P. to enforce performance of an agreement by the devisee of land under a will to convey it to P., he claimed to be entitled to a decree in the event of the case made by his bill failing, on the ground that the will was not registered according to the registry laws of New Brunswick, and was therefore void as against him an intending purchaser, and C. had an interest in the land he had agreed to sell to him as an heir-at-law of the estate:—Held, that on a bill claiming title under the will, P. could not have relief based on the proposition that the same will was void against him, and no amendment could be permitted to make a case not only at variance with, but antagonistic to, that set out in the bill, especially as such amendment was not asked for until the hearing. *Porter* v. *Hale*, 23 S. C. R. 265.

See Todd v. *Dun*, 15 A. R. 85; *Townsend* v. *O'Keefe*, 18 P. R. 147; *Leggat* v. *Marsh*, 20 S. C. R. 739; *Rodger* v. *Noxon Co.*, 19 P. R. 327.

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2. *Adding New Defence.*

Bills of Sale Act.]—Under rule 444 an amendment should be allowed at any stage of the proceedings, if it can be made without injustice to the other side; and there is no injustice if the other side can be compensated by costs. Steward v. North Metropolitan Tramways Co., 16 Q. B. D. 556, applied and followed, notwithstanding the difference in the English rule. And semble, a matter of mere lordship should not govern the question of granting or refusing an amendment. And where in an action to recover possession of a chattel, the defendants, who were subsequent bona fide purchasers for value without notice of the plaintiff's purchase, were at the trial refused liberty to amend their defence by setting up the provisions of the Bills of Sale Act, which amendment would have called for no additional evidence, a divisional court allowed it upon appeal. *Williams* v. *Leonard*, 16 P. R. 544. Affirmed by the court of appeal, 17 P. R. 73, and by the supreme court, 26 S. C. R. 406.

Exemption from Liability for Negligence.]—The defendants were sued as common carriers for breach of contract to carry and deliver safely the plaintiffs' goods, and, in the alternative, if the defendants had become warehousemen of the goods, for their loss and destruction by fire, caused by the defendants' negligence. The defendants denied the contract, and averred that the goods were safely carried to their destination, but that the plaintiffs left them in the defendants' hands at their own risk, and, if they were destroyed, it was without any negligence on the defendants' part. The only question at the trial was whether the fire was caused by the negligence of the defendants, and this, on the evidence, was found against them by the trial Judge. On appeal to the court of appeal the defendants for the first time sought to defend under the special conditions on the bills of lading, by which, it was contended, they were exempted from liability for loss by negligence in the character of bailees or warehousemen, and for loss by fire:—Held, that the very right and justice of the case did not require the court to permit the defendants to raise the new defence by amendment. Browne v. Dunn, 6 R. 67, applied and followed. *Sales* v. *Lake Erie and Detroit River R. W. Co.*, 17 P. R. 224. Reversed, 26 S. C. R. 663, but not on the question of pleading.

Forfeiture—*Life Insurance.*]—Action on a life policy. The application contained a number of questions and answers, and at the foot was a declaration, signed by the assured, that to the best of his knowledge and belief the foregoing statements and other particulars were true; that the declaration should form the basis of the contract; and that if any untrue averment had been intentionally made therein or in the replies to the company's medical adviser in connection therewith, the policy should be void. By the policy the declaration and "relative papers" were made the basis of the contract, with a proviso that if any fraudulent or wilfully untrue material allegation was contained in said declaration, or if it should thereafter appear that any material information had been withheld, and any of the matters set forth had not been truly and fairly stated, then the policy should be void. To the question in the application as to the name and residence of usual medical attendant, and for what serious illness had he attended, the assured answered "none;" and to the questions by the medical adviser as to what other disease or personal injury and from whom had he received professional assistance, &c., the assured answered "none." It was found that these answers were wilfully untrue, and that the information was wilfully withheld from and was material to be stated to the company:—Held, that these answers constituted a breach of the express contract between the parties, and therefore the policy was void. The pleas setting up these defences were added at the trial, and after the case had been in progress for some time. The action was commenced before the Judicature Act came in force, but the trial took place thereafter:—Held, that, whether under s. 8 of the A. J. Act, or under rule 128 of the O. J. Act, the pleas were properly added. A replication to these pleas set up that certain correspondence between the company's general manager and their local agent, but of which the assured had no notice, directing the agent to make inquiries as to the habits, &c., of the assured, upon the result of which the agent was to issue the policy, constituted an agreement that the company would rely on the judgment of the agent alone, founded on such inquiries:—Held, that the replication could not be supported, either at law or on the facts. *Russell* v. *Canada Life Assurance Co.*, 32 C. P. 256.

O. was a member of Court Maple of the defendants' order, and was insured under the endowment provisions thereof for $1,000. This court left the order in a body and joined another order of Foresters, and it was in consequence suspended. On joining the new order it was arranged that O., who was in ill-health, and had gone to California for change, should be taken and insured with the others. By the rules of the defendants' order members of suspended courts in good standing at suspension were, on application within thirty days, to the supreme secretary, and payment of a fee of $1, to receive a card of membership and be entitled to the endowment, provided they paid all assessments as they fell due, and affiliated with another lodge of the order; but if after thirty days, they must pass a medical examination. On his return from California, O., on ascertaining that the Court Maple had been suspended, within the thirty days, being then in good standing, applied to the defendants' supreme secretary for his card of membership, tendering $1 and assessments due, which was refused on the ground that a medical certificate was necessary. O., by reason of his not having the card, was prevented from affiliating, though he endeavoured to do so, with another court. By the endowment certificate the $1,000 was payable to the widow, orphans, or legal heirs of O., and by indorsement thereon O. directed the amount to be paid to the plaintiff, the widow. At the trial an amendment was asked, to set up a forfeiture of the policy by reason of O. having gone to California without a permit, which was refused by the Judge: — Held, under the circumstances, that the refusal was proper. Quære, whether the way, cause, and manner in and for which O. and the other members of Court Maple left it and joined in a body another order might not, if properly pleaded, have required some consideration. The frame and effect of the pleading in this case considered. *Oates* v. *Independent Order of Foresters*, 4 O. R. 535.

Mortgage—*Sale of Land for Taxes—Purchaser for Value without Notice.*] — Lands under mortgage were offered for sale by the municipality for arrears of taxes, and purchased by the wife of the mortgagor. The tax sale certificate was afterwards assigned to L., who obtained a deed from the municipality. In an action against the mortgagor, his wife, and L. for foreclosure, the mortgagee alleged that the purchase at the tax sale was in pursuance of a fraudulent scheme by the mortgagors to obtain the land freed from the mortgage, and the trial Judge so held in giving judgment for the mortgagee: —Held, that L. could not claim to have been a purchaser for value without notice, as such defence was not pleaded, and it was not a case in which leave to amend should be granted. *Lawlor* v. *Day*, 29 S. C. R. 441.

Stamps.]—Adding plea of promissory notes being insufficiently stamped. *Caughill* v. *Clarke*, 3 O. R. 269; *S. C.*, 9 P. R. 471.

Statute of Frauds.]—In an action by a lessor against an assignee of the lease, brought after the expiry of the lease, to recover possession of the demised premises, and for cancellation of the lease, and for relief from any claim of the defendant for renewal under a covenant in that behalf, the defendant set up in his defence the covenant to renew, and alleged that he and the plaintiff had never been able to agree upon a new rent, but that he had always been ready and willing to have it fixed by arbitration, as required by the lease, and had, since action, notified the plaintiff of the appointment of an arbitrator. In reply the plaintiff alleged that the defendant had made a written offer to renew at a named rental; that the plaintiff had accepted the offer; but that the defendant had not carried out the arrangement so made. There was no further pleading. At the trial the evidence shewed a written offer made by the defendant, but only a conditional acceptance by the plaintiff, who, however gave uncontradicted evidence of a subsequent oral renewal by the defendant and acceptance by the plaintiff of the terms of the former written offer:—Held, that by the conditional acceptance of the written offer, it was in effect refused, and had ceased to exist when the subsequent oral agreement was made; it was not necessary for the defendant to plead the Statute of Frauds in rejoinder to the reply, as he was able to shew that his offer had been refused; and when the plaintiff was allowed at the trial to give evidence of a subsequent renewal by parol of the terms of the lapsed written offer, the defendant should have been allowed to set up the Statute of Frauds; upon which he was entitled to succeed. *Elmsley* v. *Harrison*, 17 P. R. 425, 525.

Statute of Limitations.]—The defendants obtained leave to amend their statement of defence by setting up the Statute of Limitations as an additional defence in an action for waste brought by the plaintiffs as owners of the remainder in fee in certain lands of which the defendants were tenants for the lives of others:—Held, following Williams v. Leonard, 16 P. R. 544, 17 P. R. 73, that the Statute of Limitations being a defence permitted by law, and the real question between the parties being as to the right of the plaintiffs to recover by action the damages claimed by them, "the very right and justice of the case" demanded that the plaintiffs should not recover in this action if the statute afforded a bar to their right to do so. Brigham v. Smith, 3 Ch. Ch. 313, referred to, however, as laying down a more reasonable and just practice. *Patterson* v. *Central Canada S. and L. Co.*, 17 P. R. 470.

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3. *Other Cases.*

Adapting Pleadings to Proof.] — In this case, which was an action for the rescission of a contract for the sale of land:—Held, that, inasmuch as all the evidence that could throw light upon the case had admittedly been given, the fact that the issue of improvidence was not raised on the pleadings was immaterial. In such a case it is a mere matter of form to adapt the pleadings to the matters proved. *Gough* v. *Bench*, 6 O. R. 699.

Amendment of pleadings by changing an action for a breach of contract not proved into an action for breach of warranty. *Ellis* v. *Abell*, 10 A. R. 226.

Appeal — *Interference.*] — The supreme court of Canada will not interfere on appeal with an order made by a Provincial court granting leave to amend the pleadings, such order being a matter of procedure within the discretion of the court below. *Williams* v. *Leonard*, 26 S. C. R. 406.

In Master's Office.]—The master has no jurisdiction to make amendments to the plead-

ings after judgment; nor can he give leave to file a statement in his office raising a defence which ought to appear in the pleadings. *Hughes* v. *Rees*, 10 P. R. 301.
See Court v. *Holland*, 4 O. R. 688.

New Trial — *Malicious Prosecution.*]—New trial granted in action for malicious prosecution with leave to plaintiff to amend the statement of claim. *Macdonald* v. *Henwood*, 32 C. P. 433.

Possession—*Limitation of Actions.*]—In an action en déclaration d' hypothèque for the balance due on the purchase price of land, secured by a bailleurs de fonds privilege, the defendants pleaded that they had acquired the property in good faith by a translatory title, and had become freed of the hypothec by ten ten years' possession. In their declaration the plaintiffs alleged that the defendants had been in possession of the property since 9th May, 1876, but after the enquête they moved the court to amend the declaration by substituting for 9th May, 1876, the words "1st December, 1886:"—Held, reversing the judgment of the court below, that the motion should have been allowed, so as to make the allegation of possession conform with the facts as disclosed by the evidence. *Baker* v. *Société de Construction Metropolitaine*, 22 S. C. R. 364.

Venue—*Changing by Amendment.*]—See *Bull* v. *North British Canadian Investment Co.*, 10 P. R. 622, *post* XII.

III. Close of Pleadings.

Joinder of Issue.]—A cause is at issue where a joinder of issue has been delivered, or where three weeks have elapsed after statement of defence has been delivered. *Schneider* v. *Proctor*, 9 P. R. 11.

Semble, the joinder of issue referred to in rule 176, O. J. Act, is not a simple denial of a previous pleading. *Weller* v. *Proctor*, 10 P. R. 323.

The plaintiff delivered a reply which was a simple joinder of issue upon the statement of defence and counterclaim:—Held, that this closed the pleadings. *Hare* v. *Cawthrope*, 11 P. R. 353.

A defendant by simply taking issue upon the statement of claim closes the pleadings, and may then serve notice of trial. Hare v. Cawthrope, 11 P. R. 353, followed. *Malcolm* v. *Race*, 16 P. R. 330.

——— *Counterclaim.*]—A pleading delivered by the defendant to a counterclaim, in answer thereto, whether by the original plaintiff or by added defendants, which denies the allegations in the counterclaim, puts the plaintiff to the proof thereof, and submits that the counterclaim should be dismissed, is not a joinder of issue, but a statement of defence to the counterclaim; the plaintiff by counterclaim has by the rules three weeks to reply thereto; and the pleadings, at least quoad the counterclaim, are not closed until after the lapse of three weeks, or until the plaintiff by counterclaim has joined issue. Notice of trial set aside where given by the original plaintiffs after the lapse of four days from the delivery of such a pleading, no subsequent pleading having been delivered. Construction of rules 379-383. Hare v. Cawthrope, 11 P. R. 353, distinguished. Irwin v. Brown, 12 P. R. 639, overruled. Quære, whether "plaintiff" in rule 381 does not include a plaintiff by counterclaim. *Irwin* v. *Turner*, 16 P. R. 349.

——— *Order — Amendment.*] — Where a pleading is amended under an order giving leave to amend, rule 427 does not apply; and, under rule 392, when the amendments allowed by the order have been made or the time thereby limited for making them has elapsed, the pleadings are in the same position as to their being closed as they were in when the order was made. *Thompson* v. *Howson*, 16 P. R. 378.

Note — *Entry—Time.*] — The last of the eight days within which the defendants should have delivered their statement of defence, as required by con. rule 371, was a Saturday, and on that day at twenty-five minutes past two in the afternoon, no statements of defence having then been filed, or served on the plaintiffs' solicitor, the officer entered a note that the pleadings were closed:—Held, that the officer had no power to close the pleadings until the end of the day, which would be three o'clock; and therefore the note was irregular and should be set aside. Con. rules 7, 393, 398, 480, considered. *Lloyd* v. *Ward*, 13 P. R. 238.

See Garner v. *Tune*, 12 P. R. 280; *Macara* v. *Snow*, 12 P. R. 616; *Irwin* v. *Brown*, 12 P. R. 639; *Smith* v. *Boyd*, 17 P. R. 463; *Jackson* v. *Gardiner*, 19 P. R. 137.

IV. Costs.

Amendment.]—Where the original plaintiffs in an action were not entitled to any relief but by amendment, and a party was added to whom relief was granted:—Held, that the defendants were entitled to costs of the action up to the date of the amendment. *Clarkson* v. *White*, 4 O. R. 663.

Counterclaim.]—See Costs, III. 5.

Demurrer.]—Where the demurrer is partly successful and partly unsuccessful, neither party should get costs. *Attorney-General* v. *Midland R. W. Co.*, 3 O. R. 511.

Third Parties.]—See Costs, IV.

Where Party Succeeds only in Part.]—See Costs, II. 3.

V. Counterclaim and Set-off.

1. *Generally.*

Assignment of Account — *Claim for Damages Arising out of Contract.*] — Held, that to an action by an assignee of an account for the price of lumber and staves delivered by the assignor to the defendant under two certain contracts therefor, the defendant, under R. S. O. 1877 c. 116, ss. 7, 10, and the Judicature Act, ss. 11, 16, and rule 127, can set up as a defence a claim for damages for the non-delivery by the assignor to the defendant of certain other timber and staves specified in the contracts, and for the inferior

quality of those delivered. *Exchange Bank* v. *Stinson*, 32 C. P. 158.

——— *Set-off against Assignor.*] — The plaintiff sued defendant on an account assigned to him by one F. Defendant, by his counterclaim, alleged a set-off against F., and adding F. as a defendant claimed judgment against him for a balance due:—Held, that the counterclaim as against F. must be disallowed, the defendant having no right in this suit to raise an issue between himself and a third party, with which the plaintiff was not concerned. *Romann* v. *Brodrecht*, *Brodrecht* v. *Fick*, 9 P. R. 2.

Claim Arising since Action—*Set-off or Counterclaim.*]—The Judicature Act has not changed the law so as to allow of a claim arising since the commencement of the action being pleaded as a set-off, although it may be made the subject of counterclaim. Therefore, where a defence of money due to defendants by the plaintiffs, part of which accrued before and part after action brought, was pleaded by way of set-off, the order of a local Judge directing the defendants to amend by confining their pleas of set-off to those debts which accrued before the commencement of the action was affirmed. *Chamberlain* v. *Chamberlin*, 11 P. R. 501.

Contra-account—*Subject of Set-off.*]—The plaintiff in his statement of claim alleged certain transactions between him and the defendant, in the whole comprehending over $1,000, and claimed a balance of $169.72 and interest from the 1st January, 1888. The defendant by his statement of defence denied that he was indebted to the plaintiff in any sum, and alleged that the plaintiff was indebted to him for goods supplied and on certain promissory notes in the sum of $1,325.74, for which he counterclaimed:—Held, that the matter of the counterclaim was really a set-off, and, even if it were not improper to call it a counterclaim, having regard to con. rule 373, this could not change its real character. Cutler v. Morse, 12 P. R. 594, referred to. *Bennett* v. *White*, 13 P. R. 149.

Exchequer Court.]—A substantive cause of action cannot be pleaded as an incidental demand or counterclaim to an information by the Crown. *The Queen* v. *Montreal Woollen Mills Co.*, 4 Ex. C. R. 348.

Liquidated Damages.] — If a claim of liquidated damages by a defendant is pleaded by way of counterclaim, the plaintiff may reply matters arising subsequent to action brought. The plaintiff was allowed to reply that the final payment under the contract had accrued due after action brought. Aliter, if pleaded by way of a set-off. Toke v. Andrews 8 Q. B. D. 428, followed. *McNamara* v. *Skain*, 23 O. R. 103.

Mechanics' Lien.]—A defence filed by a lienholder within the period mentioned in s. 23 of R. S. O. 1887 c. 126, in an action by the owner of the property to set aside the lien, is not a "proceeding to realize the claim" within the meaning of that section, though a counterclaim, if properly framed, and a certificate thereof duly registered, might be. Observations as to the effect of registration of the lien. McVean v. Tiffin, 13 A. R. 1, considered. Semble, that the defendant in this action having commenced an independent action and registered his lien within the prescribed period, his lien was preserved, and the registration of the certificate in the other action enured to his benefit in the present one, though after judgment establishing his lien he abandoned the other proceedings. *McNamara* v. *Kirkland*, 18 A. R. 271.

Misrepresentations—*Deceit.*]—In an action on a promissory note, one member of a syndicate cannot ask to have a contract set aside by reason of misrepresentation, the other members not asking for a rescission; his remedy must be by cross-action or counterclaim for deceit. *Morrison* v. *Earls*, 5 O. R. 434.

Mortgagee — *Agreement—Indemnity.*]—In an action by the assignee of a mortgage against the mortgagor and the purchasers from him of the equity of redemption, the latter alleged that they had been induced by the mortgagee to purchase the lands by his promise to discharge the mortgage and accept in its place an assignment of another mortgage, which agreement he had failed to carry out, and had afterwards assigned the mortgage to the plaintiff, his wife:—Held, that the purchasers of the equity were not entitled to claim "indemnity" against the mortgagee within the meaning of that word as used in rule 328, as amended by rule 1313; and a third party notice served upon him was set aside. Semble, a proper case for a counterclaim against the plaintiff and the third party jointly to enforce the alleged agreement or for damages. *Moore* v. *Death*, 16 P. R. 296.

Nature of Defence.] — A counterclaim must be a defence in the action in which it is pleaded, and it is as much a part of the defence as any of the other pleas. And therefore where the plaintiff took issue on the defence, not mentioning the counterclaim:—Held, that the pleadings were closed, and a notice of trial served thereafter was regular. *Macara* v. *Snow*, 12 P. R. 616.

Parties—*Action.*]—A counterclaiming defendant is not a plaintiff in an action; nor is a counterclaim an action. *Irwin* v. *Brown*, 12 P. R. 689. Overruled by *Irwin* v. *Turner*, 16 P. R. 349, *ante* III.

Recovery of Land—*Joinder of Causes of Action—Mortgage—Leave.*]—A counterclaim for the recovery of land is an action for the recovery of land, within rule 341 as to joinder of causes of action. Compton v. Preston, 21 Ch. D. 138, followed. And a counterclaim for foreclosure and recovery of possession of mortgaged premises is within the exception contained in rule 341 (a). And where the plaintiff sought a mortgage account and redemption, and the defendant counterclaimed for foreclosure and possession: — Held, that, if leave were necessary, it was a proper case for granting it, the rights being correlative. *Hunter* v. *Stark*, 17 P. R. 47.

Relief against Co-defendant.]—A defendant asking relief against his co-defendant will not be ordered to give security for costs on the ground of residence out of the jurisdiction. Semble, such relief should not be asked by way of counterclaim. *Walmsley* v. *Griffith*, 11 P. R. 139.

But see *Molsons Bank* v. *Sawyer*, 19 P. R. 316.

See, also, *Cope* v. *Crichton*, 18 P. R. 462, *post* 2.

Relief Obtainable without Cross-action—*Costs.*]—The counterclaim of a defendant, properly so-called, is a claim by the defendant for a relief which cannot be obtained by him in the action; and calling a claim made by the defendant a counterclaim cannot make it one. The plaintiff claimed a declaration that his interest as a chargee upon land could not be sold under the power in the defendant's mortgage upon such land, and, in the alternative, that he was entitled to redeem the defendant. By her pleading in answer the defendant alleged certain facts justifying her right to exercise the power of sale, and "by way of counterclaim" claimed payment of her mortgage, sale or foreclosure, possession, costs, and damages. The action was at the trial dismissed with costs, the defendant not desiring a foreclosure, which she was offered:—Held, that the relief claimed by the defendant was obtainable by her in the action brought against her, and was not the subject of a cross-action or counterclaim; and the only costs taxable by the plaintiff against the defendant were such costs as were occasioned to the plaintiff by reason of the claim made by the defendants, treating it as a claim properly made in the action and dismissed; and such costs should be set off pro tanto against the defendant's costs of the dismissal of the action. The judgment dismissing the "counterclaim" with costs meant that such costs should be taxed as were appropriate to it in its true character. Semble, that in this Province the law as to set-off is different from the English law, and here a set-off should not be treated as a counterclaim nor be pleaded as such. *Girardot* v. *Welton*, 19 P. R. 162, 201.

Rent—*Damages for Non-repair—Distress.*]—The defendant having distrained for rent in arrear, the plaintiff asserted that the defendant was indebted to him in damages for breach of the covenant in the lease to repair and to lease to plaintiff an adjoining piece of land, and obtained ex parte an interim injunction restraining proceedings under the distress, which was dissolved on the ground of concealment of facts;—Held, that the damages claimed by the plaintiff were not a "debt" within s. 3 of 50 Vict. c. 23 (O.), so as to constitute a set-off against the rent; and although under the O. J. Act they might be the subject of counterclaim they would not justify an injunction as against a distress levied as here. *Walton* v. *Henry*, 18 O. R. 620.

Rules of Court.]—The O. J. Act, rule 17, and G. O. Ch. 647 (effete), do not apply to counterclaims. *Klein* v. *Union Fire Ins. Co.*, 3 O. R. 234.

Will—*Propounding.*]—The defendant contested the validity of a will propounded by the plaintiff, and also propounded two earlier wills, under which, in the event of the last in date being invalidated, he claimed;—Held, that this was a proper subject of counterclaim. *Appleman* v. *Appleman*, 12 P. R. 138.

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2. *Striking out or Excluding.*

Assignee's Action for Benefit of Creditor—*Claim against Creditor.*]—Where, in an action by the assignee of C. for the benefit of his creditors, under 48 Vict. c. 26 (O.), stated to be brought for the benefit of one of such creditors, the F. Bank, to set aside a mortgage made to the defendants, as fraudulent and preferential, a judgment for foreclosure of the mortgage obtained against the plaintiff was pleaded as a bar to the action, and a counterclaim was asserted for payment by the F. Bank of certain moneys alleged to be due to the defendants, a motion to strike out such defence and counterclaim was refused, and the plaintiff was left to demur. Semble, that the counterclaim was not inadmissible. *Glass* v. *Grant*, 12 P. R. 480.

Bill of Exchange—*Breach of Contract.*]—In an action by the plaintiffs as indorsees of a bill of exchange, the defendant (the acceptor) set up that the bill was part of the price of goods bought by them from H. & G., the drawers, and filed a counterclaim against the plaintiffs, and H. & G., as defendants by counterclaim, alleging that the bill was transferred to the plaintiffs after maturity, with full notice and knowledge of the facts, and claiming $10,000 damages from H. & G. for breach of contract in respect of the goods, and asking for the delivery up and cancellation of the bill, and other bills in the same transaction. Upon the application of H. & G., the master in chambers struck out the counterclaim, and the names of H. & G. as defendants. Semble, that, as against the plaintiffs, the allegations should have been made as a defence to the claim on the bill. *Torrance* v. *Livingstone*, 10 P. R. 29.

Bond—*Indemnity.*]—An action against the defendant on his bond as surety for H. & McT. for the amount due the plaintiffs by H. & McT. on their banking account with the plaintiffs. Counterclaim by the defendant against the plaintiffs and H. & McT., alleging that the defendant is liable only as such surety, and that the plaintiffs ought to resort to H. & McT. to enforce payment from them, and that H. & McT. should be ordered to pay the amount, and indemnify the defendant. As the counterclaim was not rested upon any particular agreement, but was set up as arising from the position of the parties as creditors, principal debtor, and surety, it was held bad, and ordered to be struck out. *Federal Bank* v. *Harrison*, 10 P. R. 271.

Cross-counterclaim — *Cross-Relief — Original Counterclaim—Parties.*]—A person brought into an action as defendant to a counterclaim delivered by the original defendant cannot deliver a counterclaim against such defendant. Such a pleading, not being authorized by the rules or the practice, was struck out on summary application. Construction of rules 371-383. Street v. Gover, 2 Q. B. D. 498, followed. Green v. Thornton, 9 C. L. T. Occ. N. 139, distinguished. Semble, if the company brought in here as defendants by counterclaim had been proper parties, cross-relief might have been given them, under rule 374, by staying execution upon any judgment recovered against them until they should establish their set-off in an independent action. The action was upon a promissory note. The counterclaim of the original defendants alleged that the plaintiffs took the note under circumstances which disentitled them to recover:—Held, a defence and not a counterclaim. It further asked that the plaintiffs might be ordered to deliver up the note to be cancelled:—Held, that, if that was a proper subject of counterclaim, it was one arising between the plaintiffs and the defendants as the result of the establishment of the defence, and

did not render the introduction of new parties necessary. It further asked that if the plaintiffs should be found entitled to recover upon the note, the new defendants by counterclaim should be ordered to pay it:—Held, not a matter in which the plaintiffs were concerned, and therefore, under rule 376, other persons could not be brought in as defendants by counterclaim. It further alleged that the plaintiffs and the new defendants by counterclaim conspired together with the fraudulent intention of keeping certain insurance moneys without applying them upon the note sued on; but there was no assertion that the plaintiffs received the insurance moneys, or any part of them, beyond the amount of the note; and the prayer was that the new defendants by counterclaim, and not the plaintiffs, should account for the insurance money over and above the amount of the note:—Held, that there was no excuse for joining the plaintiffs as parties liable to account with the added parties, and therefore no excuse for adding the latter. And the counterclaim of the original defendants, so far as it added new parties, was struck out. *General Electric Co.* v. *Victoria Electric Light Co. of Lindsay*, 16 P. R. 476, 529.

Injunction — *Damages—Relators.*] — In an action brought in the name of the attorney-general, upon the relation of certain persons, to restrain the defendants from collecting tolls or keeping their toll-gates closed upon their roads, the defendants alleged by way of defence certain wrongful acts of the relators, and by way of counterclaim asked damages against them:—Held, that the relators were not in any sense plaintiffs; and the allegations against them must be struck out. *Attorney-General* v. *Vaughan Road Co.*, 14 P. R. 516.

Mortgage—*False Statements as to Value.*] — A counterclaim for damages by reason of false and depreciatory statements with regard to the value of the mortgaged premises having been set up by the defendants in an ordinary mortgage action, an order striking it out under con. rule 374 was affirmed, as well on the ground of inconvenience in trying the action and counterclaim together, as on the ground that the counterclaim was filed for delay. McLean v. Hamilton Street R. W. Co., 11 P. R. 193, and Central Bank of Canada v. Osborne, 12 P. R. 160, followed. *Odell* v. *Bennett*, 13 P. R. 10.

Negligence — *Libel.*] — In an action for damages for negligence, a counterclaim for libel was excluded, on the ground of the inconvenience which would arise in trying the two causes of action together, but leave to bring an independent action was given. *McLean* v. *Hamilton Street R. W. Co.*, 11 P. R. 193.

Promissory Note — *Breach of Trust.*] — A promissory note made by the defendant had been held by the Consolidated Bank, and after its maturity the defendant transferred certain timber limits to the bank as collateral security for the payment of the note, which limits the bank sold. The plaintiffs became holders of the note for value after dishonour and after the timber limits transaction, and brought this action upon the note. A counterclaim against the plaintiffs and the bank by the defendant, setting up that the bank had sold the timber limits without authority and for an insufficient price, and were thereby guilty of a breach of trust, and claiming permission to set off so much of his claim therefor against the bank as would satisfy the balance claimed upon the note, was held bad and struck out as not being properly a counterclaim. *Canadian Securities Co.* v. *Prentice*, 9 P. R. 324.

——— *Libel and Slander.*]—To an action on a promissory note the defendant L., the indorser, pleaded that by an arrangement made with the plaintiffs, who had discounted the note, it was to be renewed from time to time, and paid out of the proceeds of a certain agency business, in which the defendant O., the maker of the note, and the defendant L. were engaged as partners; that the defendant O. had absconded; and that afterwards the plaintiffs had, by libel and slander of the defendant L., prevented him from securing the continuance of the agency business for himself, whereby he was unable to carry out the arrangement; and he also pleaded a counterclaim against the plaintiffs for the alleged libel and slander. The court struck out the counterclaim, upon an application under rule 127 (b), O. J. Act. *Central Bank of Canada* v. *Osborne*, 12 P. R. 160.

Relief against Co-defendant—*Costs—Pleading to Counterclaim—Waiver.*]—One of the defendants, in an action brought to recover possession of land and to set aside a conveyance of the land from him to his co-defendant, delivered with his statement of defence a counterclaim against his co-defendant for relief upon the covenants contained in the conveyance attacked and in a prior mortgage deed, but sought no relief against the plaintiff in that regard, and did not serve a third party notice upon his co-defendant. The latter pleaded to the counterclaim, but at the trial moved to strike it out, and, after an expression of opinion from the trial Judge, the counterclaiming defendant submitted to have it struck out:—Held, that the co-defendant was entitled as against the counterclaiming defendant to such costs as he would have been entitled to upon a successful motion to strike out the counterclaim. Held, also, that the fact of his having pleaded to the counterclaim did not militate against his rights. *Cope* v. *Crichton*, 18 P. R. 462.

VI. Delivery of Pleadings.

Default—*Dismissal.*]—See *Armstrong* v. *Toronto and Richmond Hill R. W. Co.*, 15 P. R. 449.

Vacation.]—A party to an action has the right, notwithstanding the insertion in rule 484, by rule 1331, of the words "or of the Christmas vacation," to deliver a pleading during such vacation; and a notice of trial given therein is regular. *Thompson* v. *Howson*, 16 P. R. 378.

See ante V.; *post* VII., VIII., IX., X.

VII. Demurrer.

1. *Generally.*

Ambiguity—*Prayer for General Relief—Multifariousness.*]—See *Gunn* v. *Trust and Loan Co.*, 2 O. R. 393.

——— *Remedy.*]—When a pleading is ambiguous or uncertain, the proper remedy is to apply in chambers to strike out or amend the defective matter, and a demurrer on that ground will not lie. *Attorney-General* v. *Midland R. W. Co.*, 3 O. R. 511.

Costs.]—No other or greater costs were allowed to defendants in this case than if they had successfully demurred instead of defending and going down to trial. *Hepburn* v. *Township of Orford*, 19 O. R. 585.

——— *Power Over.*]—See *Jones* v. *Miller*, 16 P. R. 92.

Effect of Decision—*Res Judicata.*]—A defence setting up non-compliance with a condition in a contract having been demurred to, and the plaintiff not having appealed against a judgment overruling the demurrer, the question as to the sufficiency in law of the defence was held to be res judicata. *Grand Trunk R. W. Co.* v. *McMillan*, 16 S. C. R. 543.

Equitable Relief—*Indirect Attack.*]—Held, that where a party seeks equitable relief to which he is not entitled, the opposite party should, unless in a very clear case, demur, instead of attacking the pleading indirectly by asking to have a jury. Bingham v. Warner, 10 P. R. 621, commented on. *Fraser* v. *Johnston*, 12 P. R. 113.

Exception—*Notice of.*]—A party whose pleading is demurred to may still serve a notice of exception to the pleading of the opposite party. *O'Donnell* v. *Duchesnault*, 14 O. R. 1.

Failure to Set down—*Practice.*]—A defendant did not, within ten days after delivery of a demurrer to a paragraph of the statement of defence, enter it for argument and give notice, nor serve an order for leave to amend, as required by rule 195 (a), O. J. Act:—Held, on an ex parte motion by the plaintiff for judgment upon his demurrer, that the proper practice in such a case is to apply to a Judge in court, upon notice to the opposite party, for an order to strike out the pleading or part of the pleading demurred to, and for a direction as to payment of costs; but on the return of the motion the party in default will have no right to be heard as to the validity of the pleading. *Livingston* v. *Trout*, 10 P. R. 493.

Frivolous Demurrer—*Pleading and Demurring.*]—Where a statement of claim sets up in different paragraphs more than one cause of action, the defendant may under rule 384 plead to one and demur to another without filing the affidavit mentioned in rule 388 or obtaining leave under rule 389. A demurrer to a claim for wrongful dismissal, which does not allege a hiring by the day, or week, or month, or otherwise, cannot be said to be frivolous. *Ross* v. *Bucke*, 14 P. R. 63.

——— *Setting aside.*]—A demurrer to a statement of claim raised the question whether in an action against a person living in Ontario, as a shareholder in a Quebec joint stock company incorporated under the Dominion Joint Stock Companies Act, 1877, it is sufficient to shew a judgment against the company and execution thereon returned unsatisfied in Quebec, or whether this must be shewn in Ontario:—Held, that the demurrer was not frivolous. *Brice* v. *Munro*, 10 P. R. 548.

Semble, the jurisdiction as to setting aside demurrers as frivolous, should rarely be exercised where the point is a new one, and is apparently raised in good faith to obtain the opinion of the court. *Ib.*

Misjoinder.]—Misjoinder of parties is, since the Judicature Act, no longer a ground for demurrer. *Young* v. *Robertson*, 2 O. R. 434.

Part Demurrer.]—In case of a demurrer to part of a pleading under rule 189, if any one or more paragraphs be demurred to, the court will look at any other paragraph or paragraphs bearing on the same matter of defence, and if the whole taken together disclose a sufficient defence, the demurrer must be overruled. *Attorney-General* v. *Midland R. W. Co.*, 3 O. R. 511.

——— *Amended Bill—Costs.*]—The defendant having filed his statement of defence, the plaintiff replied thereto by amending his claim, adding to the statement two new paragraphs which would have been demurrable if pleaded as a reply. The matters thereby set up, when separated from the rest of the statement, did not disclose any distinct cause of action. Thereupon the defendant served an amended statement of defence, and demurred to the two paragraphs which had been so added. In view of the fact that the paragraphs which had been so added did not disclose any separate or substantial cause of action, and that the demurrer, however decided, could not advance the cause, the court overruled the demurrer, but without costs, as it was the first occasion the point had arisen under the Judicature Act. *Rumohr* v. *Marx*, 29 Gr. 179.

The propriety of demurrers to parts of pleadings, which do not bring up the whole or even a substantial question between the litigants, thus tending to increase costs, considered and remarked upon. *Ib.*

Relief Prayed.]—A demurrer to the relief prayed in respect of the cause of action, and not to the cause of action itself, will not be allowed. Rule 384 referred to. *Oliver* v. *McLaughlin*, 24 O. R. 41.

What Constitutes—*Reply—Admission.*]—To an action on a foreign judgment the defendants pleaded that the order for such judgment was obtained upon a false affidavit, and that the plaintiffs obtained the judgment by fraudulently concealing from the court the true nature of the transactions between them and the defendant:—Held, a good defence. The plaintiffs, after the coming into force of rule 1322, replied that the defendant was precluded by law from raising any question as to the validity of the foreign judgment which might have been raised by way of appeal in the foreign forum:—Held, that this replication was equivalent to a demurrer under the former practice, and was an admission of the truth of the facts stated in the defence; and to such a replication rule 403 had no application. *Hollender* v. *Fjoulkes*, 26 O. R. 61.

——— *Striking out — Irregularity.*]—To an action for wrongfully taking out of possession of the plaintiff goods seized by him as a bailiff under process against the goods of an absconding debtor, the defendants set up a number of defences of fact, and also alleged that the statement of claim disclosed no cause

of action, since it contained no allegation that the goods seized by the plaintiff were the property of the absconding debtor, and stated that the defendants set up the same rights as if they had demurred:—Held, that this was a demurrer, and, as it was pleaded along with defences, without an affidavit under rule 388, or an order under rule 389, it should be struck out as irregular. Vandusen v. Malcolm, 4 C. L. T. 211, and Snider v. Snider, 11 P. R. 140, referred to. The proper procedure for the plaintiff was to move to strike out the pleading, not to set it down as a demurrer. *Mackey* v. *Bierel*, 16 P. R. 148.

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2. *Particular Cases.*

Bill of Costs — *Delivery — Omission to State.*]—In an action by a solicitor to recover the amount of a bill of costs, the fact that he does not, in his statement of claim, allege that the bill was delivered a month before action brought is not since, as it was not before, the O. J. Act, ground for demurrer, but only for defence. *Scane* v. *Duckett*, 3 O. R. 370.

Company—*Action against Shareholder—Execution.*]—See *Brice* v. *Munro*, 10 P. R. 548, *ante* 1.

Ejectment — *Defence — Expropriation—Statutes—Certainty.*]—In an action by the attorney-general upon the relation of the bursar of Toronto University, to recover possession of certain lands claimed to be vested in Her Majesty, for the benefit of the university, the defendants pleaded that the lands had been, with the assent of the university and bursar, taken possession of by them for the purposes of their railway under their statutory powers, and that they had since retained and then were in possession of them, and they also pleaded the Statute of Limitations:—Held, on demurrer, that it was not necessary to set out specifically the statutes alluded to, in the various proceedings connected with the expropriation of the land, and the defence was not objectionable, upon demurrer, on the ground of want of certainty, by reason of its merely general allegation of compliance with the statutory requirements. Held, also, that the mere allegation that the defendants were in possession afforded a good defence in law in such an action, and put the plaintiff to the proof of his cause of action, under rule 144. *Attorney-General* v. *Midland R. W. Co.*, 3 O. R. 511.

Fraudulent Preference—*Creditors' Action—Omission to State.*]—In an action to set aside a conveyance of land as a fraudulent preference, the non-averment that the plaintiffs sued on behalf of all other creditors, is not ground for demurrer, but a mere informality to be dealt with under O. J. Act, rules 103, 104. *Scane* v. *Duckett*, 3 O. R. 370.

Sale of Land—*Enforcement of Contract—Parties.*]—See *Gunn* v. *Trust and Loan Co.*, 2 O. R. 393.

Specific Performance — *Sufficiency of Contract.*]—Where a demurrer is raised to a statement of claim for specific performance on the ground of no sufficient agreement, it is enough if, in any aspect of the case, the plaintiff may be entitled to some relief. In this case it was held, on the statement of claim set out in the report, that a concluded contract was shewn, and that defendant was liable. *Young* v. *Robertson*, 2 O. R. 434.

VIII. Reply.

Further Pleading after Joinder — *Counterclaim.*]—The defence of the plaintiff to a counterclaim is technically the plaintiff's reply, notwithstanding con. rule 379, and there can, without leave, be no further pleading by the defendant, but a joinder of issue. *Irwin* v. *Brown*, 12 P. R. 639.

To a counterclaim against the plaintiff, who lived out of Ontario, seeking the recovery of a debt contracted out of Ontario, the plaintiff pleaded that the court had no jurisdiction, and the defendant replied, without obtaining leave, that the plaintiff had assets in Ontario to the value of $200:—Held, that this reply, even if leave were obtained, was bad, because s.-s. (e) of rule 45, O. J. A., has not been incorporated in the consolidated rules. *Ib.*

Inconsistency—*Refusal to Try Action.*]—By their statement of claim the plaintiffs alleged themselves to be creditors for wages of two of the defendants, and they sought relief against the third defendant only as having obtained certain assets from the other two, either fraudulently or upon a trust to pay the plaintiffs' claims. In their reply they set up that they were creditors of the third defendant himself, upon the ground that he was really the person who hired them. There was no subsequent pleading:—Held, that the reply was a direct violation of rule 419; and that the trial Judge was within his right in refusing, in his discretion, to try the action until the issues were properly presented upon the pleadings, and in directing that the costs of the postponement should be borne by the plaintiffs. No opinion expressed as to whether a divisional court had power to review such a ruling. *Hurd* v. *Bostwick*, 16 P. R. 121.

Right to Amend—*Time—Close of Pleadings.*]—The defendants by counterclaim delivered a reply, which contained more than a mere joinder of issue, to the statement of defence and counterclaim of the original defendants. No subsequent pleading having been delivered, the defendants by counterclaim, after the lapse of four days, served notice of trial:—Held, that the pleadings were not closed, and the notice of trial was therefore irregular. The plaintiffs by counterclaim were entitled under rule 180 to twenty-eight days from the delivery of the defence and counterclaim in which to amend. *Garner* v. *Tune*, 12 P. R. 280.

Time for Delivering — *Extension—Irregularity.*]—Consolidated rule 381 provides that "a plaintiff shall deliver his reply, if any, within three weeks after the defence or the last of the defences shall have been delivered, unless the time shall be extended by the court or a Judge;" and con. rule 392 provides that upon the expiry of the three weeks the pleadings shall be closed:—Held, that where, upon a motion to set aside a reply delivered after the three weeks, nothing else appears than the fact that the time has expired, the pleading should not be set aside: and, even if there is the right to move, the proper order to make upon such a motion would be one extending the time for delivery of the reply, and the moving party should have no costs. Held, also, that upon such a motion

no grounds of irregularity except those taken in the notice can be considered; referring to con. rule 534. *Wright* v. *Wright*, 13 P. R. 208.

Waiver of Forfeiture — *Necessity for Pleading.*]—A member of a benefit association died while suspended from membership for non-payment of assessments. In an action by his widow for the amount of his benefit certificate it was urged that the forfeiture was waived:—Held, that the waiver not having been pleaded it could not be relied on as an answer to the plea of non-payment. Allen v. Merchants Marine Ins. Co., 15 S. C. R. 488, followed. *Supreme Tent Knights of the Macabees of the World* v. *Hilliker*, 29 S. C. R. 397.

See Sawyer v. *Short*, 9 P. R. 85; *McNamara* v. *Skain*, 23 O. R. 103; *Hollender* v. *Foulkes*, 26 O. R. 61.

IX. Statement of Claim.

1. *Generally.*

Anticipating Defence.]—In a statement of claim, to anticipate and reply to matters of defence is a highly improper practice. *Lake Erie and Detroit R. W. Co.* v. *Sales*, 26 S. C. R. 663.

Cause of Action—*Sufficiency of Allegation—Negligence.*]—The plaintiff in his statement of claim claimed damages from the defendants for "unlawfully, negligently, and wrongfully," depressing certain streets in a town and thereby making it inconvenient and almost impossible for persons to approach the plaintiff's store for business: also for, in like manner, blocking them up, and rendering them almost impassable in the neighbourhood of the plaintiff's store, and thereby "negligently, unlawfully, and wrongfully," preventing customers or others coming thereto, and almost entirely destroying the plaintiff's business. The statement further claimed that if the depressing and blocking up should be found to be lawful, a mandamus should be granted requiring the defendants to proceed to arbitrate to ascertain the compensation payable to plaintiff; or that it be referred to the proper officer to ascertain and state such compensation:—Held, on demurrer, that the statement of claim was sufficient; for it alleged that the work was negligently done, and this gave a cause of action, even though the work itself might be lawful. *Quillinan* v. *Canada Southern R. W. Co.*, 6 O. R. 567.

Date of Adding Party.]—Where a new defendant was added in 1889 to an action begun in 1886:—Held, that the statement of claim should shew on its face the date at which defendant was made a party; and an amendment was ordered. *St. Louis* v. *O'Callaghan*, 13 P. R. 322.

Date of Writ.]—Held, that the mention of the date of issue of a writ in a statement of claim was essential, but leave was given to amend on payment of costs. *Scott* v. *Creighton*, 9 P. R. 253.

Matters Arising pending Action.]—A plaintiff cannot set up in his statement of claim matters arising pending the action. *McLean* v. *McLean*, 17 P. R. 440.

See Home Life Association v. *Randall*, 30 S. C. R. 97, *ante* I.

2. *Conformity with Writ of Summons.*

Extension of Claim—*Rule 244.*]—The writ of summons in an action by a mortgagee against a mortgagor was indorsed with a claim for an injunction to restrain waste. The statement of claim went further and claimed to recover possession of the land in respect of which the injunction was sought:—Held, that what was claimed by the pleading was an "extension" of what was claimed by the writ, within the meaning of rule 244. United Telephone Co. v. Tasker, 59 L. T. N. S. 852, and Cave v. Crew, 41 W. R. 359, 3 R. 401, distinguished. *Smythe* v. *Martin*, 18 P. R. 227.

See Sowden v. *Sowden*, 4 P. R. 276; *Huggins* v. *Guelph Barrel Co.*, 8 P. R. 170; *Lainchberry* v. *Dunn*, 9 C. L. T. Occ. N. 412; *Ross* v. *Edwards*, 15 P. R. 150; *McNab* v. *Macdonnell*, *ib.* 14; *Hogaboom* v. *MacCulloch*, 17 P. R. 377; *McLean* v. *McLean*, *ib.* 440; *Campbell* v. *James*, 11 P. R. 347; *Ketchum* v. *Rapelje*, 1 C. L. Ch. 152; *May* v. *Drummond*, 17 P. R. 21, *post* 4; *Bugbee* v. *Clergue*, 27 A. R. 96; *Rodger* v. *Noxon Co.*, 19 P. R. 327, *post* 4; *Wyman* v. *The "Duart Castle,"* 6 Ex. C. R. 387; *Edsall* v. *Wray*, 19 P. R. 245.

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3. *Filing and Delivery.*

Abridgement of Time—*Default—Dismissal.*]—Under rule 485 the court or a Judge may, in a proper case, order a plaintiff to deliver his statement of claim within a limited time shorter than that allowed by rule 369; but an order dismissing the action for failure to deliver the statement within the time so limited is not, having regard to rule 646, to be made until after default. And an order directing that the action should be dismissed for want of prosecution, if the statement of claim was not delivered within eight days, was amended so as to make it direct only that the plaintiff should deliver the statement within eight days. *Armstrong* v. *Toronto and Richmond Hill Street R. W. Co.*, 15 P. R. 449.

Extension of Time.]—An order allowing further time to file a statement of claim should not be made ex parte. *Wigle* v. *Harris*, 9 P. R. 276.

Extension of Time after Default.]—If a statement of claim is filed after the time limited by rule 158 (a) (three months from appearance entered), the action will not be dismissed for its non-delivery, but the statement is irregular and may be struck out. In this case, under the circumstances, the time for delivery was extended upon payment of costs of the motion. *Clarke* v. *McEwing*, 9 P. R. 281.

——— *Dismissal of Action.*]—An order of the 4th October, 1886, extended the time for the delivery of the statement of claim till the 12th October, but provided that, if it was not so delivered, the action should stand dismissed with costs. Upon failure to deliver in time, the defendant signed judgment dismissing the action:—Held, that, notwithstanding the dismissal of the action, an order could properly be made under rule 462 vacating the judgment and further extending the time for delivering the statement, and the master in chambers had jurisdiction to make such an order. *Newcomb* v. *McLuhan*, 11 P. R. 461.

——— *Terms — Irregularity—Waiver.*]—Upon the defendant's application to dismiss the action for want of prosecution, an order was made on the 6th May, that upon payment by the plaintiff of $20 costs within eighteen days, and upon his delivering his statement of claim within the same time, the defendant's application was dismissed. On the 26th May, after the expiry of the eighteen days, the plaintiff filed his statement of claim and delivered a copy to the defendant's solicitors, and tendered them $20, which they refused to accept. They also declined to admit service of the statement of claim, but retained it in their possession. On the 3rd June an order was made extending for one week the time for filing and delivering the statement of claim and paying the $20. This order did not provide that the statement of claim already delivered should stand. Within the week the plaintiff paid the $20, and nine days afterwards signed judgment against the defendant for default of defence, upon the statement of claim delivered on the 26th May:—Held, that, although the plaintiff was wrong in filing and serving his statement of claim before paying the costs, this irregularity was waived and the service became effective when the costs were afterwards received, they being paid under the order of the 3rd June. *Pierce* v. *Palmer*, 12 P. R. 275.

See Laidlaw v. *Ashbaugh*, 9 P. R. 6.

4. *Joinder of Causes of Action.*

Alimony — *Fraudulent Conveyance.*] — Claims on behalf of a wife for alimony and to set aside a conveyance of the husband's property as fraudulent should be joined in one action. *Snider* v. *Snider*, *Snider* v. *Orr*, 11 P. R. 140.

Fraudulent Conveyance—*Several Grantees—Parties.*]—Action by the plaintiff on behalf of himself and all other creditors of the defendant L., asking for judgment against L. upon two overdue promissory notes and seeking to obtain execution for such claim, and also a previously recovered judgment, against two several parcels of land, alleged to have been fraudulently conveyed to the other two defendants respectively. A motion was made to strike out the name of one or other of the alleged fraudulent grantees as improperly joined in the same action:—Held, that it was possible under the present practice to combine two such causes of action, which, if well founded, had a common root in the fraudulent transfer, and that here there would be no practical inconvenience in trying both on the same record. The motion was, therefore, refused. Chaput v. Robert, 14 A. R. 354, at pp. 361, 362, specially referred to. *Heaton* v. *McKellar*, 13 P. R. 81.

Fraudulent Notes and Agreement—*Setting aside—Other Claims—Several Defendants.*]—The statement of claim alleged that two of the defendants, by fraudulent representations, induced the plaintiffs to enter into an agreement for the purchase of a horse; that one of these defendants, in the name of his partner, a third defendant, having agreed to become a co-partner with the plaintiffs in the purchase, made a fraudulent profit by way of commission out of the transaction; that these three defendants transferred promissory notes, made by the plaintiffs with the intention of carrying out the transaction, to the fourth and fifth defendants, who had notice of the fraud; and claimed to have the agreement declared fraudulent and void and ordered to be cancelled; to have the notes declared void and ordered to be cancelled; or to have the first three defendants ordered to indemnify the plaintiffs against the notes; damages for the false representations; or that the defendants alleged to have received a commission should be ordered to account to the plaintiffs therefor. After the parties had been for more than six months at issue, the defendants applied to strike out the statement of claim as embarrassing:—Held, that the transaction complained of was one that should be investigated in all its parts on the one record, and that no peculiar difficulty would arise in dealing with it as a whole, and then following such details as might be pertinent. *Crerar* v. *Hobbert*, 17 P. R. 283.

Recovery of Land — *Joining Other Causes of Action with.*]—An action for assignment of dower is an action for the recovery of land. McCulloch v. McCulloch, 4 C. L. T. 252, followed. Where leave is necessary under rule 341 to join other causes of action with an action for the recovery of land, it must be obtained before the writ of summons is issued, unless under very exceptional circumstances. *McLean* v. *McLean*, 17 P. R. 440.

The plaintiff, without leave, indorsed his writ of summons with a claim for recovery of land and to set aside a conveyance. The writ was personally served, and, the defendant not appearing, the plaintiff delivered a statement of claim, and, on default of defence, moved the court for judgment. It appeared from the statement of claim that the setting aside of the conveyance mentioned in the indorsement was sought by the plaintiff as a part of what was necessary to establish his title:—Held, following Gledhill v. Hunter, 14 Ch. D. 492, that the action was to be treated as one for the recovery of land merely, in which judgment for default of appearance could have been entered without a motion; or, if not, that the plaintiff had improperly joined another claim with a claim for the recovery of land, without leave; and in either case the motion must fail. *May* v. *Drummond*, 17 P. R. 21.

Where the writ of summons was indorsed with a claim for the recovery of land and for mesne profits, but the statement of claim asked specific performance of the contract by the defendant to buy the land from the plaintiff, and in the event of specific performance not being decreed, possession, &c., and no order had been obtained for leave to join another cause of action with a claim for the recovery of land, as required by rule 116, O. J. Act, and a motion was made to set aside the writ of summons and statement of claim, or one of them:—Held, that the causes of action were improperly joined in the statement of claim without leave, but, inasmuch as the two causes of action could not conveniently be prosecuted separately, leave was given to amend the writ by adding a claim for specific performance, or the statement of claim by striking out such claim, at the plaintiff's option. *Campbell* v. *James*, 11 P. R. 347.

Trespass to Land—*Assault of Servant.*] —See *Mooney* v. *Joyce*, 17 P. R. 241.

Wrongful Dismissal — *Defamation — Company—Trial.*]—The writ of summons claimed damages against an incorporated company for wrongful dismissal and slander. The original statement of claim was confined to the former cause of action, but, after defence and before reply due, the plaintiff amended on praecipe by adding a claim for slander:—Held, that it was competent for the plaintiff to do so, under rule 389. Semble, that an incorporated company may be liable if slander is spoken by its servants or agents in direct obedience to its orders. Held, that, at all events the pleading setting up slander should not be struck out summarily, but should be adjudicated on. Leave to the defendants to have the question of law first determined. The two causes of action were properly joined; but application might be made under rule 237 to direct the method of trial. *Rodger* v. *Noxon Co.*, 19 P. R. 327.

See Goring v. *Cameron*, 10 P. R. 496; *White* v. *Ramsey*, 12 P. R. 626; *Pritchard* v. *Pritchard*, 17 O. R. 50.

See PARTIES.

X. STATEMENT OF DEFENCE.

Company — *Calls—Suspension of License —Incumbrancer.*]—In an action for calls defendants pleaded that plaintiffs' license had been suspended:—Held, on demurrer, that the defence should have alleged notice in the Gazette of the suspension of the license, pursuant to R. S. O. 1877 c. 160, s. 34, and 42 Vict. c. 25, s. 3, s.-s. 7, but an amendment was allowed, this point not having been taken. *Union Fire Ins. Co.* v. *Lyman*, 46 U. C. R. 471.

Defence Arising after Action—*Confession — Judgment—"Otherwise Order."*]—In an action against a judgment debtor and his brother to set aside a conveyance by the former to the latter as fraudulent, both defendants pleaded several defences. Afterwards the judgment debtor applied for leave to amend by adding as a defence, without abandoning his other defences, that since action the judgment had become extinguished by reason of a set-off ordered in another action:—Held, a case in which the plaintiff should not be allowed to confess the new defence and sign judgment for his costs under rule 440, but one in which the court should "otherwise order" under the last clause of the rule. Construction and history of rule 440. Harrison v. Marquis of Abergavenny, 15 L. T. N. S. 360, discussed. *Patterson* v. *Smith*, 14 P. R. 558.

Denial—*Sufficiency of Traverse—Appeal.*] —The plaintiff by his statement of claim alleged a partnership between two defendants, one being married, whose name on a rearrangement of the partnership was substituted for that of her husband without her knowledge or authority:—Held, that a denial by the married woman that "on the date alleged or at any other time she entered into partnership with the other defendant," was a sufficient traverse of the plaintiff's allegation to put the party to proof of that fact. Held, also, that an objection to the sufficiency of the traverse would not be entertained when taken for the first time on appeal, the issue having been tried on the assumption that the traverse was sufficient. *Mylius* v. *Jackson*, 23 S. C. R. 485.

Denial of Cause of Action—*Want of Notice.*]—Statement of claim claiming damages for an accident to the plaintiff by his stepping upon the covering or lid of a manhole in the sidewalk alleged to be defective, &c., through defendants' negligence. By the first paragraph of the statement of defence defendants denied the correctness of the statements contained in the statement of claim; and by the second paragraph set up that defendants had no notice or knowledge of the defect:—Held, on demurrer to the second paragraph, that the whole statement of defence must be read together; and that the second paragraph taken with the first constituted a good defence or was immaterial; that it could not embarrass the plaintiff, for if he proved actionable negligence he must prove either actual or presumptive notice. *Beasley* v. *City of Hamilton*, 9 O. R. 112.

Filing and Delivery—*Time.*]—A statement of defence, delivered after the proper time and on the same day on which the plaintiff set the action down to be heard on motion for judgment:—Held, irregular, and the court ordered that it should be struck out, and judgment granted for the plaintiff as prayed by the statement of claim, unless the defendant paid the costs of setting down the action and of the motion for judgment within a limited time. *Snider* v. *Snider*, 11 P. R. 34.

A statement of defence filed after the pleadings have been noted as closed for default of defence under rule 263, is irregular, but not a nullity, and should be regarded as evidence of an intention to defend; and where, as permitted by rule 586, a motion for judgment upon the statement of claim is made ex parte, and the fact of the defence having been filed is brought to the knowledge of the Judge, he should direct notice to be served in order to give the defendant an opportunity to make his defence regular. In this case judgment having been granted ex parte, it was ordered that there should be no costs of the defendant's motion for relief under rule 358, which was granted. *Jackson* v. *Gardiner*, 19 P. R. 137.

Foreign Judgment.] — See *Hughes* v. *Rees*, 10 P. R. 301, 9 O. R. 198.

Fraud Pleaded to Actions on Judgments.] — See *Stewart* v. *Sutton*, 8 O. R. 341; *Harvey* v. *Harvey*, 9 A. R. 91.

Matters Alleged in Mitigation of Damages.]—In an action for malicious arrest the statement of defence set up that there was a warrant in the hands of a constable for the apprehension of the plaintiff on a charge of misdemeanour; that the plaintiff was avoiding arrest; that the defendants therefore watched him, and when he endeavoured to escape detained him until the arrival of the constable, and then gave him into custody; and that the defendants did this in the bonâ fide belief that they were justified in thus aiding the arrest:—Held, that, although these facts did not constitute an answer to the action, yet they could be given in evidence in mitigation of damages, and therefore it was proper that they should appear upon the record. *Pursley* v. *Bennett*, 11 P. R. 64.

Not Guilty by Statute.]—"Not guilty by statute" cannot be pleaded to an action for specific performance of a contract; and the defence of "not guilty" irrespective of statutory authority is not admissible under the Judicature Act. *Town of Peterborough* v. *Midland R. W. Co.*, 12 P. R. 127.

Semble, the omission to give notice of action must be pleaded, or the section which requires it referred to, in the plea of "not guilty by statute." *Bond* v. *Conmee*, 16 A. R. 398.

Held, reversing the judgment in 18 O. R. 482, that evidence of contributory negligence is properly admissible under a defence of "not guilty by statute" without any special plea of contributory negligence, and at any rate in this case, even if strictly speaking the evidence were not admissible as the pleadings stood, still, it having been given without objection, the plaintiff could not afterwards complain. *Doan* v. *Michigan Central R. W. Co.*, 17 A. R. 481.

Notice of Action — *General Issue—Statutory Defences.*]—Action against a municipal corporation for not providing a proper supply of pure water for the plaintiffs' elevator according to agreement, and for negligently and knowingly allowing the water supplied by them to become impregnated with sand, which greatly damaged the elevator:—Held, that the action was one for breach of contract, and therefore the statutory defences and the defence of want of notice of action, &c., under statutes giving the same protection as that given to justices of the peace in the execution of their duties, were inapplicable. *Scottish Ontario and Manitoba Land Co.* v. *City of Toronto*, 24 A. R. 208.

——— *Negligence — Defective Sidewalk.*] — The defence of want of notice of action required by s. 13 of the Municipal Amendment Act, 1894, in an action against a municipal corporation for injuries sustained through a defective sidewalk, should be set up in the statement of defence, if the statement of claim is silent on the point, and the Judge can then go into the circumstances, if any, which excuse the want or insufficiency of the notice. And where the objection, in such a case, to the want of notice was not raised until after the evidence was closed, a motion for a nonsuit was refused. *Longbottom* v. *City of Toronto*, 27 O. R. 198.

——— *Workmen's Compensation Act—Notice of Objection.*]—The provisions of s. 14 of the Workmen's Compensation for Injuries Act, 55 Vict. c. 30 (O.), are not complied with merely by pleading that the notice of action relied on by the plaintiff is defective, or that notice of action has not been given. The defendant must give formal notice of his objection not less than seven days before the hearing of the action if he intends to rely upon it. *Cavanagh* v. *Park*, 23 A. R. 715.

Offer before Action — *Omission to Repeat—Costs.*]—Where an offer to do certain work, which would abate an injury to suppliant's property caused by a public work, was made in writing by the Crown, and its receipt acknowledged by the suppliant before action brought, but such offer was not repeated in the statement of defence (although filed subsequently pursuant to leave given), the court, in decreeing the suppliant relief in terms of the undertaking, refused costs to either party. *Fairbanks* v. *The Queen*, 4 Ex. C. R. 150.

Paragraphs — *Separate Defences.*] — Though each paragraph of a statement of defence should, under rule 128, as nearly as may be, contain a separate allegation, it need not contain a separate defence. *Union Fire Ins. Co.* v. *Lyman*, 46 U. C. R. 455.

Payment into Court.] — In an action to recover money for services rendered, the defendant pleaded that $325 was more than an ample and sufficient payment; that he had before action paid the plaintiff $25, and had always been ready and willing to pay him $300 more; that before action he had tendered $300 in payment of the services rendered, but the plaintiff refused to accept it; and the defendant brought $300 into court in satisfaction of all claims and demands of the plaintiffs in this action:—Held, that the defence was so framed that if the plaintiff had desired to take the money out of court, he must have elected to do so before replying or before the expiration of the time for replying, as provided by con. rule 636, and must have taken it in satisfaction of all his claims in the action, and have filed and served a memorandum in accordance with con. rule 635. But, as he, instead of taking this course, proceeded with the action (in which he recovered more than $300), the defendant was absolved from his offer, and the money remained in court subject to further order; the defendant was entitled, in the absence of special circumstances, to have it remain to be dealt with when the case should be finally disposed of; and it was open to the defendant to contend upon appeal that the amount recovered should be reduced below $300, notwithstanding the payment into court, by the plaintiff's election not to take the money out at the appropriate time. *Denison* v. *Woods*, 17 P. R. 549.

See Bell v. *Fraser*, 12 A. R. 1; *S. C., sub nom. Fraser* v. *Bell*, 13 S. C. R. 546.

Pending Action in Another Province.]—The fact that a suit for the same matter is pending in Quebec, cannot be urged as a plea in bar to a suit for the same cause in this Province. *Hughes* v. *Rees*, 5 O. R. 654.

Res Judicata.] — Under the Judicature Act of Ontario res judicata cannot be relied on as a defence unless specially pleaded. *Cooper* v. *Molsons Bank*, 26 S. C. R. 611.

Statute — *Necessity for Pleading.*]—The statement of claim alleged a partnership between the plaintiff and defendant, but did not aver whether the agreement was in writing or not. The defence set up a special agreement by which the defendant was to be remunerated by a share of the profits in lieu of wages or salary, but did not expressly refer to R. S. O. 1877 c. 133. It was admitted that something was due to defendant, and a reference was ordered. The master in ordinary held, following Rogers v. Ullman, 21 Gr. 139, that, as the defendant had not pleaded R. S. O. 1877 c. 133, so as to negative the plaintiff's allegation of a partnership, he could not claim the benefit of that statute to support his account, but, to enable him to properly raise the question on appeal, permitted an affidavit to be filed shewing that there was an agreement under the statute:—Held, on appeal, that the case did not come within the terms of

rule 141, O. J. Act, and that it was not necessary to plead the statute more specifically. *Neil* v. *Park*, 10 P. R. 476.

Statute of Frauds—*Necessity for Pleading.*]—The Statute of Frauds not having been pleaded nor any objection properly taken to the sufficiency of the delivery of the goods in question, either at the trial or in the order nisi, the court, without deciding that there had been a sufficient delivery, held that the objection was not open to the defendant and refused to permit an amendment. *Greenizen* v. *Burns*, 13 A. R. 481.

Tender—*No Payment into Court.*]—This action was to recover money as compensation for land expropriated, and for other relief. Defendants pleaded a defence in denial, and also a tender of $400 and interest, but did not pay the amount into court:—Held, that, the defence of tender without payment into court was a good defence under the O. J. Act, and a motion to strike out the defence, or to compel payment into court, or for judgment for the amount, with leave to proceed for a further amount, was refused. *Demorest* v. *Midland R. W. Co.*, 10 P. R. 314.

Volenti non Fit Injuria.]—Quære, whether it is not necessary to set up specially a defence arising from the maxim "volenti non fit injuria." *Le May* v. *Canadian Pacific R. W. Co.*, 18 O. R. 314.

XI. Striking out Pleadings.

(See, also, *ante*, II.)

1. *Counterclaim.*

See ante V. 2.

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2. *Demurrer.*

See Ross v. *Bucke*, 14 P. R. 63; *Mackey* v. *Bierel*, 16 P. R. 148, *ante* VII. 1.

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3. *Statement of Claim.*

Malicious Prosecution—*Observations of Judge—Damage by Publication.*]—In an action for malicious prosecution, a part of the statement of claim setting out the observations of the Judge before whom the plaintiff was tried upon the criminal charge out of which the action arose, was struck out; but a part stating damage to the plaintiff from publication of such charge in newspapers and otherwise by defendants, was allowed to stand. *Morrow* v. *Cheyne*, 12 P. R. 487.

Slander — *Particulars* — *Amendment.*]—In an action of slander the statement of claim, after alleging that the slanders had been spoken and published to certain named persons, added "and to others at present unknown to the plaintiff:"—Held, sufficient. It is also alleged that during a period of five months the defendant spoke and published various slanders to certain named persons and to others not known to the plaintiff:—Held, bad, for it did not shew which of the persons mentioned were present when the different statements were made, nor at what times and places they were made. Leave to the plaintiff to amend by adding further charges within reasonable limits. *Townsend* v. *O'Keefe*, 18 P. R. 147.

See Lauder v. *Carrier*, 10 P. R. 612; *Campbell* v. *James*, 11 P. R. 347; *McNab* v. *Macdonnell*, 15 P. R. 14; *Crerar* v. *Holbert*, 17 P. R. 283; *Rodger* v. *Noxon Co.*, 19 P. R. 327.

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4. *Statement of Defence.*

Champerty.]—To an action under Lord Campbell's Act, the defendants pleaded that it was brought and maintained under a champertous agreement which disentitled the plaintiff to sue:—Held, that this defence should not be struck out; if proved, it was for the court to say what effect should follow. *Welbourne* v. *Canadian Pacific R. W. Co.*, 16 P. R. 343.

Claiming Benefit as of Demurrer.]—Claims on behalf of a wife for alimony and to set aside a conveyance of the husband's property as fraudulent should be joined in one action. Separate actions were brought for such claims, the five defendants appearing by the same solicitors, and filing separate statements of defence. A paragraph of each of the defences submitted that "the plaintiff had made out no case entitling her to relief." This was struck out by the local master, by five separate orders to the same effect:—Held, that the paragraph was neither scandalous, nor prejudicial, nor embarrassing under rule 178, but was a mere reference to s. 44 of the Judicature Act, and should not have been struck out; and the costs of only one order were allowed. *Snider* v. *Snider*, *Snider* v. *Orr*, 11 P. R. 140.

Denial of Liability — *Tender and Payment into Court—Prejudice.*]—In an action upon an insurance policy the defendants pleaded denying their liability, and also tender before action and payment into court. The plaintiff replied that there was due to him a larger sum than that paid in. Upon a motion to strike out the defences in denial:—Held, that they did not tend to prejudice, embarrass, or delay the fair trial of the action, within the meaning of rule 423. Discussion as to the effect of the defences of tender and payment into court upon the question of costs and otherwise. Rules 632-640 considered. *Davis* v. *National Assurance Co. of Ireland*, 16 P. R. 116.

Doubtful Pleading — *Demurrer.*]—As a general rule pleadings should not be set aside on summary applications unless so plainly frivolous or indefensible as to invite excision. Where a matter is doubtful or difficult it is better to leave the objecting party to demur; and, even if the pleading appears to be demurrable, that is not a sufficient reason for expunging it from the record. And in this case a motion to strike out the defence and counterclaim (*see ante* V. 2) was refused. *Glass* v. *Grant*, 12 P. R. 480.

Embarrassment—*Prolixity.*]—The plaintiffs were a gas company, doing business in and distributing gas by their mains throughout a city; the defendant was also the owner of gasworks in the same place, from which he supplied certain buildings in the city. The statement of claim charged that the defendant laid or caused to be laid a pipe to communicate

with the pipe belonging to the plaintiffs, or in some way obtained or used the plaintiffs' gas, without their consent; and claimed the penalty given by s. 3 of the Gas and Water Companies Act, R. S. O. 1887 c. 164, and also the value of the gas alleged to have been taken. The defendant, in 13 paragraphs of his statement of defence, set out at great length various facts and circumstances, the gist of which was that the pipe mentioned in the statement of claim was so laid or caused to be laid by the plaintiffs, or by some one on their behalf, and not by the defendant; and also made therein allegations of a malicious course of conduct by the plaintiffs towards the defendant, affording reasons for the probability of the truth of the defence. The thirteen paragraphs containing these allegations were moved against by the plaintiffs as embarrassing and irrelevant:—Held, that an embarrassing pleading under rule 423 is one which brings forward a defence which the defendant is not entitled to make use of; but here the defendant was entitled to make use of the defence set up, and there was nothing in the paragraphs tending to prejudice or delay the fair trial of the action. It might be that evidence of the course of conduct of the plaintiffs alleged by the defendant could not be permitted to be given; but that was a question for the trial Judge, and not one to be determined upon a motion to strike out pleadings except in a plain case. Even if it was unnecessary to plead this course of conduct, that did not make the pleading embarrassing. The court should not hesitate to interfere with the discretion exercised in chambers, where the defendant has been thereby deprived of his right to set up a defence which he is entitled to make use of. Remarks on verbosity in pleading. Glass v. Grant, 12 P. R. 480, approved. *Stratford Gas Co.* v. *Gordon*, 14 P. R. 407.

In an action by creditors of an insolvent partnership against the assignee for the benefit of creditors, for an account and payment of dividends upon the estate, and interest, the defendant, inter alia, set out in his defence, at great length, certain correspondence between his solicitors and the plaintiffs', as to the terms upon which he should acknowledge the right of the plaintiffs to dividends, as to the securities held by the plaintiffs, the value placed thereon, and the claim of the plaintiffs for interest, and alleged that, for the sake of peace and to avoid litigation, he paid into court a sum of money, which he had tendered pursuant to the request of the plaintiffs, as shewn by the correspondence, upon conditions upon which the plaintiffs had stated they were willing to accept it, with the exception that he would not pay interest from the date fixed by them, there being, as he submitted, no right in them to receive interest, and he reserved the right to take proceedings to recover the amount overpaid in case the security of the plaintiffs should be upheld, and it should be held that they should have valued it:—Held, that these portions of the defence were properly stricken out as prolix and embarrassing. *Brock* v. *Tew*, 18 P. R. 30.

Falsity of Defence.] — In an action for damages for detention of dower, defendants pleaded: (1) that the lands in question were wild, and plaintiff was not entitled to the sum claimed for damages, if any; (2) that plaintiff had assigned her claim for damages; (3) set-off for moneys expended in respect of said lands; (4) that they did not detain, but were always willing, &c. On a motion in chambers, after issue joined, for an order directing a reference as to the damages under s. 47, O. J. Act, and upon evidence by affidavit both for and against the truth of the pleas, the master made an order striking out the 2nd and 3rd pleas, and directing a reference:—Held, that the master had no jurisdiction to make the order, and that the issues raised questions that were properly triable only at the hearing. *Ryan* v. *Fish*, 10 P. R. 187.

Inapplicable Defence.] — A defence which is wholly inapplicable may be struck out, unless amended, although it is neither scandalous nor tending to prejudice, embarrass, or delay. *Chamberlain* v. *Chamberlin*, 11 P. R. 501.

Municipal Corporation—*Notice of Action.*] — A municipal corporation is not entitled to notice of action under the Act to protect justices of the peace and others from vexatious actions, R. S. O. 1887 c. 73. Hodgins v. Counties of Huron and Bruce, 3 E. & A. 169, followed. Defence of want of such notice struck out upon summary application. *McCarthy* v. *Township of Vespra*, 16 P. R. 416.

Promissory Note—*Payment.*] — Upon a summary application under rule 1322 (387) to strike out defences on the ground that they disclose "no reasonable answer," the court is not to look upon the matter with the same strictness as upon demurrer; a party should not be lightly deprived of a ground of substantial defence by the summary process of a judgment in chambers. And in an action upon a promissory note, alleged by the defendants to have been taken by the plaintiffs after maturity, defences of payment, estoppel by conduct, and a claim for equitable protection arising out of agreement, were allowed to remain on the record. *Bank of Hamilton* v. *George*, 16 P. R. 418.

Seduction — *Cause of Action — Pleading and Demurring.*]—A pleading will not be summarily struck out merely on the ground that it is demurrable. Glass v. Grant, 12 P. R. 480, followed. Where the statement of defence in an action of seduction alleged that the cause of action was in another than the plaintiff, but did not allege that that other sought to proceed by action:—Held, that, as there was no authority expressly holding this defence to be bad, it should not be struck out: but leave was given to reply and demur. *Daley* v. *Byrne*, 15 P. R. 4.

See Attorney-General v. *Midland R. W. Co.*, 3 O. R. 511; *Switzer* v. *Laidman*, 18 O. R. 420.

XII. Venue.

(*See* also Trial.)

Change of, by Amendment.] — The plaintiff, having in his statement of claim named Toronto as the place of trial, afterwards amended it on præcipe under rule 179, O. J. Act, naming Belleville as the place of trial:—Held, on appeal, following Frietsch v. Winkler, 3 Ch. Ch. 100, that no change of the place of trial could be made by amendment of the statement of claim. *Bull* v. *North British Canadian Investment Co.*, 10 P. R. 622.

Local Venue.]—Held, that the effect of rule 254 of the O. J. Act, is to abolish all local

venues, as well those made so by statute as at the common law, except in actions of ejectment. *Legacy* v. *Pitcher*, 10 O. R. 629. See also *Ireland* v. *Pitcher*, *ib.* 631.

In an action against magistrates for malicious and illegal arrest and imprisonment:—Held, following Legacy v. Pitcher, 10 O. R. 629, that the venue need not be laid where the offence was committed. *Bond* v. *Conmee*, 15 O. R. 716.

The venue in this action was laid in the city of Toronto, and subsequently an order was made striking out the jury notice and directing the trial to take place at Port Arthur:—Held, that in view of this order the objection that the venue was improperly laid could not be sustained. *S. C.*, 16 A. R. 398.

——— *Foreclosure—Claim for Possession.*]—An action by a mortgagee for foreclosure, payment, and possession of the mortgaged premises, is not an action of ejectment within the meaning of the exception in rule 254, O. J. Act, and the venue need not therefore, in such an action, be laid in the county where the lands lie. *Seymour* v. *DeMarsh*, 11 P. R. 472.

Patent for Invention—*Infringement of Patent.*]—See *Goldsmith* v. *Walton*, 9 P. R. 10; *Aitcheson* v. *Mann*, 9 P. R. 253.

Residence of Plaintiff—*Rule 529 (b.)*]—Rule (1897) 529 provides that: *(a)* the plaintiff shall, in his statement of claim, name the county town at which he proposes that the action shall be tried; *(b)* where the cause of action arose and the parties reside in the same county, the place so to be named shall be the county town of that county:—Held, that the residence of the plaintiff at the time of the delivery of the statement of claim, and not at the time of the issue of the writ of summons, is the time referred to in rule 529 *(b)*. *Edsall* v. *Wray*, 19 P. R. 245.

Sheriff—*Party to Action.*]—In an action wherein a sheriff is plaintiff or defendant, the opposite party, if he so desire, may have the action tried in the county adjoining that in which the sheriff resides. *Brannen* v. *Jarvis*, 8 P. R. 322.

Writ of Summons—*Indorsement — Election.*]—Where in the special indorsement of his writ of summons the plaintiff names a place of trial, he is not at liberty to change by naming another place in his statement of claim. Rule 529 must be read subject to the provision of rule 138 *(2)*. *Segsworth* v. *McAinson*, 19 P. R. 178.

XIII. Waiver by Pleading.

Judgment — *Reference.*]—Where a party does not plead a prior judgment in bar by way of estoppel before the entry of a judgment directing a reference to the master, he waives it, and leaves the whole matter at large to be inquired into on the evidence. *Hughes* v. *Rees*, 10 P. R. 301. But see *S. C.*, 9 O. R. 198.

Will — *Accrual of New Rights.*] — Held, that a clause in the answer of W. S., expressing his willingness that the will should be construed by the court and the rights of the parties thereunder determined, had not the effect of waiving any right that might have accrued to him during the progress of the suit. *Archer* v. *Severn*, 12 O. R. 615.

XIV. Miscellaneous Cases.

Arbitration—*Compensation for Land.*]—D. brought an action to compel a railway company to arbitrate to ascertain the value of certain land taken for the purposes of the railway company, and after the service of the writ the company served a notice to arbitrate, and after arbitration an award was made by two of the arbitrators, but was subsequently set aside by the court as invalid. D. then proceeded with his action, and the railway company pleaded that the arbitrators had fixed a time for the making of the award, but did not make any within the time limited, and did not enlarge the time, and that, therefore, the sum of $400 offered by the railway company before proceedings taken had become the amount of the compensation. The Judge found on the evidence that no time had been fixed by the arbitrators for making the award:—Held, that, as the parties by their pleadings had placed themselves upon an issue as to whether the arbitrators had fixed a time or not, and as that issue was found in favour of the plaintiff, the sum of $400 offered had not become the compensation to be paid, and a reference back was ordered. *Demorest* v. *Grand Junction R. W. Co.*, 10 O. R. 515.

Defamation — *Trade-libel—Action on the Case.*]—An action for words written and published relating to articles of the plaintiffs' manufacture and the rights of the plaintiffs under certain letters patent by virtue of which they claimed a monopoly of the manufacture and sale of the articles, is not an action of defamation properly so called, but an action on the case for maliciously acting in such a way as to inflict loss upon the plaintiffs, and does not come within s. 109 of the Judicature Act, 1895, so as to be triable only by a jury, unless by consent. *Dickerson* v. *Radcliffe*, 17 P. R. 418.

The plaintiff, a tradesman, claimed damages for injury to his credit and business by reason of the defendant having sent certain hand-bills issued by the plaintiff, advertising his business, to various wholesale creditors of the plaintiff, and having written and published letters to such creditors falsely and maliciously charging that the plaintiff was advertising his business and unduly forcing sales with the view of selling and disposing of his goods to defeat and defraud his creditors:—Held, that the action was for libel, and not in case for disturbing the plaintiff in his calling, and the defendant was entitled to have the words of the alleged libel set out in the pleading. Flood v. Jackson, [1895] 2 Q. B. 21, and Riding v. Smith, 1 Ex. D. 91, specially referred to. *Robinson* v. *Sugarman*, 17 P. R. 419.

Notice of Exceptions.]—See *O'Donnell* v. *Duchenault*, 14 O. R. 1.

Production of Documents before Pleading—*False Representations.*]—Production of documents should not be ordered to be made by the defendant for the benefit of the plaintiff before he delivers his statement of claim, unless the Judge is satisfied that the documents called for are essential to the statement of the plaintiff's claim. In an action for damages for false repre-

sentations made by the defendants, whereby the plaintiffs were induced to supply them with goods and money, and to enter into agreements with them, to the plaintiffs' loss:—Held, that it was enough for the plaintiffs to aver in their statement of claim that the goods and money were supplied on the faith of statements, oral and written—specifying them—falsely and fraudulently made; and this they could do without the production of the defendants' balance sheets, books of account, &c. If particulars were afterwards claimed, it would then be time enough to apply for discovery. *Arthur and Co. (Ltd.)* v. *Runians*, 18 P. R. 205.

Question Raised by Plea — *Incidental Issue.*]—Issues raised merely by pleas cannot have the effect of increasing the amount in controversy so as to give the supreme court of Canada jurisdiction to hear an appeal. *Standard Life Assurance Co.* v. *Trudeau*, 30 S. C. R. 308.

Status of Plaintiff—*Special Denial—Art. 144, C. C. P.*]—See *Martindale* v. *Powers*, 23 S. C. R. 597.

Venire de Novo.]—*See Wills* v. *Carman*, 14 A. R. 656.

See ARBITRATION AND AWARD, V. 1—BILLS OF EXCHANGE, I. 4—BOND, III. 2—CHOSE IN ACTION, IV.—CONSTABLE—CONTRACT, IV. 4 (b)—COVENANT, III. 4—DAMAGES, XIV.—DEFAMATION, X. — DISTRESS, III. 3 (f) — DOWER, I. 5—EJECTMENT, VI. 16—EVIDENCE, II. 2—EXECUTORS AND ADMINISTRATORS, VIII. 3—FRAUD AND MISREPRESENTATION, III. 3 (e)—LANDLORD AND TENANT, II. 1 (a) —MALICIOUS PROCEDURE, I. 5, II. 5—MASTER AND SERVANT, III. 3—MISNOMER, II.—MONEY, II. 7, V.—MORTGAGE, IV. 2, X. 4 (c) —NEGLIGENCE, X.—NEW TRIAL, X.—PATENT FOR INVENTION, IV. 7—PENALTIES AND PENAL ACTIONS, II. 1 (c)—PRINCIPAL AND SURETY, V. 2—RELEASE, II. 4—REPLEVIN, II. 4, III. 1 (f)—SALE OF GOODS, III. 3 (b)—SEDUCTION, I. 6—SET-OFF, V.—SHERIFF, VII. 1 (d), IX. 1 (b), 8 (b), XIV. 3—SPECIFIC PERFORMANCE, V. 14, 18 (b)—TENDER, I. 4 —TRESPASS, I. 4, II. 8, III. 2 (e)—TROVER AND DETINUE, V.—TRUSTS AND TRUSTEES, V. 4—WARRANTY, I. 4—WATER AND WATERCOURSES, XII. 5, XIV. 2—WORK AND LABOUR, IV. 2.

PLEADING AT LAW BEFORE THE JUDICATURE ACT.

See PLEADING.

PLEADING IN EQUITY BEFORE THE JUDICATURE ACT.

See PLEADING.

PLEADING SINCE THE JUDICATURE ACT.

See PLEADING.

PLEAS.

See PLEADING—PLEADING AT LAW BEFORE THE JUDICATURE ACT, VII.

PLEDGE.

Assignment of Covenant—*Redemption.*]—The plaintiff transferred a covenant for the payment of $4,000, executed by four persons in his favour, to the defendant, by an absolute assignment, as security for $2,000; the defendant giving to the plaintiff a separate agreement to "re-assign" on payment of the loan and interest. On a bill to obtain a re-assignment, alleging that such loan had been repaid, the court made a decree for redemption in favour of the plaintiff with costs; the defendant having set up a claim to be entitled to hold the security as absolute purchaser thereof. *Livingston* v. *Wood*, 27 Gr. 515.

Bonds—*Fraudulent Conversion—Notice—Estoppel.*] — The Quebec Turnpike Trusts bonds issued under special Acts and ordinances (R. S. Q. 1888, sup., p. 505) are payable to bearer and transferable by delivery. Certain of these bonds belonging to the estate of the late D. D. Young, had been used as exhibits and marked as such in the case of Young v. Rattray, and having been afterwards lost, were advertised for in a newspaper in Quebec in the year 1882. About ten years afterwards W., who was the agent and administrator of the estate, and had the bonds in his possession as such, pledged them to a broker for advances on his own account, the bonds being then long past due, but payment being provided for under the above cited statutes:—Held, that neither the advertisement, nor the marks upon the bonds, nor the broker's knowledge of the agent's insolvency, were notice to the pledgee of defects in the pledgor's title; and that the owners of the bonds, having by their act enabled their agent to transfer them by delivery, were estopped from asserting their title to the detriment of a bonâ fide holder. Held, also, that a bonâ fide holder acquiring commercial paper after dishonour takes subject not merely to the equities of prior parties to the paper, but also to those of all parties having an interest therein. In re European Bank, Ex parte Oriental Commercial Bank, L. R. 5 Ch. 358, followed. *Young* v. *MacNider*, 25 S. C. R. 272.

Opposition a Fin de Charge—*Agreement—Effect of.*]—See *Great Eastern R. W. Co.* v. *Lambe*, 21 S. C. R. 431.

Railway Rolling Stock—*Non-delivery—Creditors.*]—B., who was the principal owner of the South Eastern Railway Company, was in the habit of mingling the moneys of the company with his own. He bought locomotives which were delivered to, and used openly and publicly by, the railway company as their own property for several years. In January and May, 1883, B., by documents sous seing privé, sold, with the condition to deliver on demand, ten of these locomotive engines to F. et al., the appellants, to guarantee them against an indorsement of his notes for $50,000, but reserved the right on payment of the notes or any renewals thereof to have the locomotives redelivered to him. B. having become insolvent, F. et al., by their action directed against B., the South Eastern Railway

Company, and B. et al., trustees of the company under 43 & 44 Vict. c. 49 (Q.), asked for the delivery of the locomotives, which were at the time in the open possession of the South Eastern Company, unless the defendants paid the amount of their debt. B. did not plead. The South Eastern Railway Company and B. et al., as trustees, pleaded a general denial, and during the proceedings O'H. filed an intervention, alleging that he was a judgment creditor of B., notoriously insolvent at the time of making the alleged sale to F.:—Held, that the transaction with B. amounted only to a pledge not accompanied by delivery, and, therefore, F. et al. were not entitled to the possession of the locomotives as against creditors of the company, and that in any case they were not entitled to the property as against O'H., a judgment creditor of B., an insolvent. *Fairbanks* v. *Barlow*, 14 S. C. R. 217.

Vente a Remere — *Validity—Third Persons.*]—See *Salvas* v. *Vassal*, 27 S. C. R. 68.

See Bush v. *Fry*, 15 O. R. 122.

POLICE.

See MUNICIPAL CORPORATIONS.

POLICE COMMISSIONERS.

See MUNICIPAL CORPORATIONS.

POLICE COURT.

Court of Justice—*Stealing Information.*]—Held, that the police court of the city of Toronto is a court of justice within 32 & 33 Vict. c. 21, s. 18 (D.), and that the prisoner was properly convicted of stealing an information laid in that court. *Regina* v. *Mason*, 22 C. P. 246.

Whether the police court is such a court or not, is a question of law which may be reserved by the Judge at the trial under C. S. U. C. c. 112, s. 1; and where the Judge refused to reserve such question, it cannot be considered upon a writ of error. *Ib.*

Held, that maliciously destroying an information or record of the said court, is felony within the same Act. *Ib.*

An indictment describing an offence within 32 & 33 Vict. c. 21, s. 18, as feloniously stealing an information taken in a police court, is sufficient after verdict. *Ib.*

Court of Record.]—See *O'Reilly* v. *Allen*, 11 U. C. R. 526; *Regina* v. *St. Denis*, 8 P. R. 16; *Regina* v. *Goodman*, 2 O. R. 468; *Regina* v. *Murray*, 28 O. R. 549; *Regina* v. *Gibson*, 29 O. R. 660.

See the next title.

POLICE MAGISTRATE.

I. APPOINTMENT, 5414.

II. FEES AND SALARY, 5414.

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I. APPOINTMENT.

Evidence—*Provincial Patent — Dominion Patent.*]—The court declined to hear discussed the question whether the police magistrate in this case, if appointed only by the Ontario Government, was legally or validly appointed, as his appointment should have been by the Dominion, the patent by the Ontario government only being produced, and it not appearing that no commission by the Dominion had issued to him, nor that any search or inquiry had been made at the proper office as to the fact, the only other evidence as to the appointment, besides the mere production of the Ontario patent, being the defendant's affidavit stating that the magistrate had no authority or appointment from the Crown or Governor-General of the Dominion, and that he knew this "of common and notorious report." *Regina* v. *Richardson*, 8 O. R. 651.

Provincial Government—*Right to Appoint.*]—The power to appoint police magistrates, rests with the Ontario government. *Richardson* v. *Ransom*, 10 O. R. 387.

Provincial Statute — *Intra Vires.*] — 28 Vict. c. 20, authorizing the Governor to appoint police magistrates, relates to the administration of justice, and is within the powers of the legislature of Ontario, and is still in force as continued by 31 Vict. c. 17 (O.) *Regina* v. *Reno*, 4 P. R. 281.

Held, that the appointment of police magistrates is not ultra vires the legislature of Ontario. Regina v. Bennett, 1 O. R. 445, followed. *Regina* v. *Lee*, 15 O. R. 353. See also *Regina* v. *Bush*, 15 O. R. 398.

See, also, INTOXICATING LIQUORS.

II. FEES AND SALARY.

Action for—*Statute—Debt.*]—Held, that 12 Vict. c. 81 made it not only the duty of a town council to pay their police magistrate but created a debt, the payment of which he might enforce in an action of debt, not as founded upon a contract, but on the statute, and that the action may be maintained without the aid of a by-law of the municipality to confer it. Quære, is debt the only remedy? *Wilkes* v. *Town of Brantford*, 3 C. P. 470.

Additional Fees—*Salary Paid — Police Clerk—Statutes.*]—The salary paid to a police magistrate for a city or town, under R. S. O. 1877 c. 172, s. 1, covers all cases that may come before him, arising within the city or town: so that he is not entitled to any fees except in what may be called purely country cases, e.g., where the charge arises and the parties reside out of the city or town, or where it is a local matter, as for injury to property situate out of the town or city. A town clerk, being also town treasurer, did not act as police clerk, and no appointment having been made by the municipal council, the police magistrate appointed a clerk from 1871 to 1877, which appointment the council, with full knowledge and notice thereof, never repudiated:—Held, that under these circumstances the clerk must be considered as if appointed by the council, and entitled to retain the fees given to police clerks by the statute. Held, also, that the police magistrate was not entitled to charge these fees himself, and to pay

the clerk a salary in lieu thereof. *Town of Peterborough* v. *Hutton*, 30 C. P. 455.

A police clerk of a town, remunerated by a fixed salary, paid over to the municipality, in accordance with the statute, the fees received by him, amongst them being the fees for hearing and determining cases, and for records of convictions:—Held, that the police magistrate, for the reason and except as above stated, could not claim such last named fees. Held, also, that the corporation of the town were not entitled to recover from the defendant any fees received by him. *Ib.*

Held, that s. 412 of the Municipal Act, R. S. O. 1877 c. 174, applies to cases arising both under the Dominion and Provincial Acts. *Ib.*

Attachment—*Public Policy.*]—The salary of a police magistrate appointed by the Crown, but paid by a municipality, cannot, on grounds of public policy, be attached. *Central Bank* v. *Ellis*, 20 A. R. 364.

Reduction—*Powers of Council.*]—In 1892 the plaintiff was appointed by the Provincial government, of its own motion, police magistrate, without salary, under R. S. O. 1887 c. 72, s. 5, of a town the population of which exceeded 5,000. The plaintiff then demanded a salary of $800 as his right under s. 2 (b), which was for a time conceded, but, in 1894, reduced to $400, and by resolution in 1896 withdrawn altogether by the council:—Held, that the council had a right so to do, and R. S. O. 1887 c. 72, s. 28, did not apply. *Ellis* v. *Town of Toronto Junction*, 28 O. R. 55, 24 A. R. 392.

See Regina v. *Fleming*, 27 O. R. 122, *post* III.

III. JURISDICTION.

Arrest of Witness—*Absence of Malice.*]—Where a police magistrate, acting within his jurisdiction under R. S. C. c. 174, issues his warrant for the arrest of a witness who has not appeared in obedience to a subpœna, he is not, in the absence of malice, liable in damages, even though he may have erred as to the sufficiency of the evidence to justify the arrest. Judgment below, 24 O. R. 576, affirmed. *Gordon* v. *Denison*, 22 A. R. 315.

Conviction — *Recital of Office — Justice Acting for Magistrate.*]—The prisoner had been convicted by one justice of the peace of being a vagrant, under 32 & 33 Vict. c. 28 (D.), which requires the conviction to be "before any stipendiary or police magistrate, mayor, or warden, or any two justices of the peace:"—Held, that the conviction was bad, as it did not appear that the justice was a police magistrate. Quære, whether the conviction would have been good if it had appeared in the warrant that he was acting for the police magistrate under 36 Vict. c. 48, s. 308 (O.), or whether two justices would not have been required. *Regina* v. *Clancey*, 7 P. R. 35.

Crown Case Reserved.]—A police magistrate cannot reserve a case for the opinion of a superior court under C. S. U. C. c. 112, as he is not within the terms of that Act. *Regina* v. *Richardson*, 8 O. R. 651.

Disqualification — *Interest in Fine — Salary.*]—Section 419 (a) of the Municipal Act, 1892, which provides that a magistrate shall not be disqualified from acting as such by reason of the fine or penalty, or part thereof, on conviction going to the municipality of which he is a ratepayer, includes a police magistrate. Where a police magistrate, appointed under R. S. O. 1887 c. 72, is paid a salary by the municipality instead of by fees, such salary being in no way dependent on any fines which he may impose, he has no pecuniary interest in the fines, and so is not thereby disqualified. Semble, that in such a case there would have been no disqualification at common law. *Regina* v. *Fleming*, 27 O. R. 122.

Jurisdiction of Justices of the Peace in Absence of Police Magistrate.]—See *Regina* v. *Gordon*, 16 O. R. 64; *Regina* v. *Lynch*, 19 O. R. 664; *Regina* v. *Clancey*, 7 P. R. 35.

Liquor License Act — *Right to Try County Offences.*] — The defendant was charged with a breach of the Liquor License Act, in the township of Barton in the county of Wentworth, and was tried and convicted at the city of Hamilton, situated in the said county, before the police magistrate thereof:—Held, that under s. 18 of the Police Magistrates Act, R. S. O. 1887 c. 72, the police magistrate had jurisdiction in the premises. *Regina* v. *Gully*, 21 O. R. 219.

Stipendiary Magistrate for Judicial District of Parry Sound.]—See *Regina* v. *Monteith*, 15 O. R. 290.

Summary Trial—*Dominion Statute—Intra Vires.*]—38 Vict. c. 47, giving power to police and stipendiary magistrates to try in a summary manner felonies and misdemeanours, is intra vires the Dominion Parliament. *In re Boucher, Cassels' Dig.* 325.

——— *Nature of Offence.*]—The defendant sold to C., amongst other things, a horse-power and belt, part of his stock in the trade of a butcher, in which he also sold a half-interest to C. The horse-power had been hired from one M., and at the time of the sale the term of hiring had not expired. At its expiry, M. demanded it, and C. claimed that he had purchased it from defendant. The defendant then employed a man to take it out of the premises where it was kept and deliver it to M., which he did. The defendant was summarily tried before a police magistrate and convicted of an offence against 32 & 33 Vict. c. 21, s. 110 (D.):—Held, that the conviction was bad, there being no offence against that section, and no jurisdiction in the police magistrate to try summarily. *Regina* v. *Young*, 5 O. R. 400.

Territorial Jurisdiction.]—Police magistrates have jurisdiction both in cities and counties. *Regina* v. *Mosier*, 4 P. R. 64.

The defendant was tried at Belleville before the police magistrate for the county of Hastings and convicted, for, amongst other things, supplying milk from which the cream or strippings had been taken or kept back. The factory was in Hastings, but the defendant resided and the milk was supplied in the county of Lennox and Addington: — Held, that the police magistrate for Hastings had no jurisdiction to try the offence, and the conviction must be quashed. Held, also, that certiorari has not been taken away in such cases; but, even if it had, the court would not be justified in refusing to examine the evidence to see if the magistrate had jurisdiction. *Regina* v. *Dowling*, 17 O. R. 698.

——— *Police Limits — Police Court — Notice.*]—The prisoner was convicted by the police magistrate for the city of Toronto, for that she "did on," &c., "at the said city of Toronto, keep a common disorderly bawdy house on Queen street, in the said city," and committed to gaol at hard labour for six months. On application for her discharge under a habeas corpus:—Held, no objection that the commitment did not shew that the offence was committed within the "police limits" of the city, the words used in C. S. C. c. 105, s. 14, for there was no ground for supposing any difference between these and the ordinary city limits; nor that no notice had been put up as required by s. 25 of the same Act, to shew that the court was that of the police magistrate, not of an ordinary justice of the peace, for the jurisdiction, in the absence of express enactment, could not be made to depend on the omission of the clerk to post up such notice. *Regina* v. *Munro*, 24 U. C. R. 44.

Warrant of Commitment — *Recital of Office.*]—A warrant of commitment on a conviction had before a police magistrate for the town of Chatham, in Upper Canada, under 28 Vict. c. 2, averred that on a day named, "at the town of Chatham, in said county, he, the said A. S., did attempt to procure A. B. to enlist to serve as a soldier in the army of the United States of America, contrary to the statute of Canada in such case made and provided;" and then proceeded: "And whereas the said A. S. was duly convicted of the said offence before me, the said police magistrate, and condemned," &c.:—Held, that the warrant sufficiently shewed that the magistrate was acting within his jurisdiction. *In re Smith*, 1 C. L. J. 241.

See Langwith v. *Dawson*, 30 C. P. 375; *In re Boucher*, 4 A. R. 191; *Regina* v. *Boucher*, 8 P. R. 20; *Regina* v. *Riley*, 12 P. R 98; *Regina* v. *Lee*, 15 O. R. 353.

IV. Miscellaneous Cases.

"Police Office"—*Municipal Corporation —Accommodation—Stationery.*] — The police magistrate of a town cannot require the municipal corporation to provide facilities for the transaction of business not strictly appertaining to his office of police magistrate, such as business relating to an adjoining county of which he is a justice of the peace, nor is he entitled to a private office in addition to a public one. It is sufficient if a suitable room or chamber for a police office is provided in any building belonging to the municipality (in this case the council chamber), although by providing a room which is used for other purposes the hours for the transaction of police business may be limited. A municipal corporation is liable to a police magistrate for a claim for stationery, although extending beyond a year. *Mitchell* v. *Town of Pembroke*, 31 O. R. 348.

Replevin—*Search Warrant—Stay of Proceedings.*]—A gold watch having been taken on a search warrant from a person who absconded, the plaintiff claimed title to it, and brought replevin therefor against a city police magistrate, who applied to stay proceedings under 16 Vict. c. 180, s. 6:—Held, that replevin did not come within the Act; and the application was dismissed. *Manson* v. *Garrett*, 2 P. R. 389.

Return of Convictions — *Penalty.*] — A police magistrate, acting ex officio as justice of the peace, is not subject to the provisions of s. 1 of R. S. O. 1887 c. 76, and need not make a return as therein required to the clerk of the peace. Section 6 of R. S. O. 1887 c. 77 exempts him from this duty, whether he is acting as police magistrate or ex officio as justice of the peace. *Hunt q. t.* v. *Shaver*, 22 A. R. 202.

See Constitutional Law, II. 8—Justice of the Peace.

POLL.

See Municipal Corporations, XIX. 10, 12—Parliament, I. 13 (b).

POLLUTION OF WATER.

See Water and Watercourses, XIII.

PORTION.

The proper definition of a portion considered. *Mulholland* v. *Merriam*, 20 Gr. 153.

POSSESSION.

Devise—*Acquisition of Interest.*] — A person having a power of attorney to sell certain lands, entered into possession after the death of the owner, with an intention to acquire the title, and died in possession, but before his possession had ripened into a title as against the representatives of the true owner:—Held, that he had such an interest as passed under a general devise in his will. Held, also, that the devisees were entitled to claim the property in equity as against the testator's heirs, who had gone into possession; but that a suit for the purpose could be successfully resisted by shewing sufficient length of possession by the heirs after the testator's death to give a title as against the plaintiffs. *Heward* v. *Heward*, 15 Gr. 516.

Notice of Title.]—The rule that possession is notice of the title of the party in possession considered and acted on. *Gray* v. *Coucher*, 15 Gr. 419.

Parent — *Heir—Guardian — Tenant at Will.*]—The possession of a mother will not be considered tortious as against the heir, being her own child, but will rather be treated as the possession of a guardian. *Doe d. Hoak* v. *Empey*, 3 O. S. 488.

If on the death of a tenant at will his heir enter, such entry is tortious; and if the heir die, and his heir enter, the original owner or his heir will be put to his action. *Ib.*

See Bills of Sale, VII. 2—Boundary—Crown, II. 7—Ejectment, III., V.—Landlord and Tenant, VIII.—Limitation of Actions, II. 3, 4, 9, 14, 20, 21—Mortgage, XII. 8, 9. —Quieting Titles Act, V. 4— Receiver, IV.—Registry Laws, I. 2 (b) — Trespass, I. 5, II. 9—Trover and Detinue, VI.—Trusts and Trustees, I. 3—Vendor and Purchaser, VII. 2.

POSTMASTER-GENERAL.

See CROWN.

POST OFFICE AND POSTAGE.

Postage—*Rate Chargeable.*]—Postage on a letter carried by inland navigation from one post town to another, was chargeable under 9 Anne c. 10, 5 Geo. III. c. 25, according to the distance the letter was actually carried, and not according to the distance by the post road between the two places. *Dickson* v. *Crooks*, Dra. 125.

Postmaster—*Disqualification from Voting.*]—Held, that a postmaster of a city is not liable to a penalty for voting at an election for a member of the house of commons of the Dominion of Canada. But, semble, he is not entitled to vote, and should he do so his vote might be struck off on a scrutiny. *Savage* v. *Deacon*, 22 C. P. 441.

——— *Fraud — Receiver—Indictment.*]—One D., being postmaster at Berlin, transmitted to defendant, at Toronto, several post office orders payable there, which defendant presented and got cashed, but it appeared afterwards that the moneys thus obtained had never been received by D. for defendant, and that frauds to a large extent had thus been committed. Defendant having been convicted upon an indictment for obtaining from the Queen these sums, of the moneys and property of the Queen, with intent to defraud:—Held, that the indictment was good; that s. 56 of the Post Office Act, C. S. C. c. 31, was not applicable; that the money was properly charged to be the money of the Queen, not of the postmaster; and that it was unnecessary to allege an intent to defraud any particular person. *Regina* v. *Dessaller*, 21 U. C. R. 231.

——— *Liability for Negligence.*]—An action will lie against a postmaster for not sending a letter, but the declaration must aver that the letter is the plaintiff's. *Campbell* v. *McPherson*, 6 O. S. 34; *Carey* v. *Lawless*, 12 U. C. R. 285.

——— *Proceedings by Crown against—Sureties.*]—The defendants entered into a joint and several bond to the Queen with D. and T. for the faithful discharge by S. of the duties of deputy postmaster at O. On sci. fa. against defendant on the bond, he appeared, and, upon its being set out in oyer, demurred to it on the grounds: 1. That a bond of this nature should, since the passing of the Post Office Act, C. S. C. c. 36, have been proceeded on by suit in the name of the postmaster-general, and not by sci. fa. or at the instance of the attorney-general. 2. That the proceedings should have been against the parties to the bond jointly, or it should appear why the other parties were not joined:—Held, that, though the statute may authorize the postmaster-general in such cases to sue in his official name, the words "or otherwise" contained therein, do not deprive the Crown of the right to sci. fa. on a bond taken expressly in the name of the Queen. *Regina* v. *McPherson*, 15 C. P. 17.

Held, that the Post Office Act, 1867, 31 Vict. c. 10, s. 89 (D.), does not take away from the Crown the remedy by extent upon a bond given by a postmaster. *Regina* v. *McNabb*, 30 U. C. R. 479.

The condition of a bond given by the defendants, as sureties for a postmaster, to the postmaster-general, was, that the postmaster "do not and shall not commit any theft, larceny, robbery, or embezzlement of, or lose or destroy, or commit any malfeasance, misfeasance, or neglect of duty, from which may arise any theft, larceny, robbery, or embezzlement, loss or destruction of, any money, goods, chattels, valuables, or effects, or of any letter or parcel containing the same, which may come into his custody or possession, as such postmaster," &c. The postmaster opened several letters which came into his possession as such postmaster and having taken therefrom certain cheques, forged the payees' names as indorsers thereof, and got them cashed by a bank upon guaranteeing the genuineness of such indorsements. The drawers refused to recognize these cheques, but issued duplicates to the payees and paid them, so that the bank lost the money. In an action by the postmaster-general on the bond, on behalf of the bank, to recover from defendants, as such sureties, the loss so incurred:—Held, referring to ss. 37 and 78 of the Post Office Act 1875, that defendants were not liable, for that the forgery and the postmaster's guarantee, and not the larceny, were the proximate causes of the loss, and the contents of the letters did not belong to the bank. Remarks as to form of the condition. *Postmaster-General* v. *McColl*, 31 C. P. 364.

In an action by the Crown, on the information of the attorney-general for Canada, upon a bond executed in the Province of Quebec in the form provided by the Act respecting the security to be given by the officers of Canada (31 Vict. c. 37, 35 Vict. c. 19) and the Post Office Act (38 Vict. c. 7):—Held, that the right of action under the bond was governed by the law of the Province of Quebec. Held, further, that such a bond was not an obligation with a penal clause within the application of arts. 1131 and 1135 of the civil code of Lower Canada. *Black* v. *The Queen*, 29 S. C. R. 693.

Post Office Building—*Ice on Steps—Injury—Liability.*]—The Crown is under no legal duty or obligation to any one who goes to a post office building to post or get his letters, to repair or keep in a reasonably safe condition the walks and step leading to such building. 2. A person who goes to a post office to post or get his letters goes of his own choice and on his own business, and the duty of the Crown as owner of the building, if such a duty were assumed to exist, would be to warn or otherwise secure him from any danger in the nature of a trap known to the owner and not open to ordinary observation. 3. A petition of right will not lie against the Crown for injuries sustained by one who falls upon a step of a public building by reason of ice which had formed there and which the caretaker of the building, employed by the minister of public works, had failed to remove or to cover with sand or ashes. 4. The expression "public work" occurring in s. 16 of the Exchequer Court Act includes not only railways and canals and such other public undertakings in Canada as

in older countries are usually left to private enterprise, but also all public works mentioned in the Public Works Act, R. S. C. c. 36, and other Acts in which such expression is defined. *Leprohon* v. *The Queen*, 4 Ex. C. R. 100.

Post Office Inspector—*Slander—Notice of Action.*]—A statement by a post office inspector when investigating complaints as to lost letters, to the sureties of the postmaster, that the postmaster's wife has stolen the letters in question and has given him a written confession of her guilt, is primâ facie privileged, because of the financial interest of the sureties in the investigation. Semble, such a statement to a partner of one of the sureties is not protected. The facts that the plaintiff at the trial denies having stolen the letters and having made any confession, and that the inspector does not produce the alleged confession, or in any way account for it, is some evidence that he made the accusation knowing it to be untrue, and therefore maliciously, so as to displace the primâ facie case of privilege. A post office inspector is not entitled to notice of an action to recover damages for defamatory statements made by him. Judgment in 26 O. R. 528 affirmed. *Hance* v. *Burnham*, 23 A. R. 90.

Proof by Posted Letter — *Fire Insurance.*]—A condition indorsed on a fire policy provided that any subsequent mortgage of the property insured "must be notified to the secretary in writing forthwith, otherwise the policy shall be void." The plaintiff mortgaged part of the property insured to one M., who mailed a letter to defendants' secretary, notifying him, as required by the condition, but the letter did not reach him:—Held, that the mere posting, without shewing that it reached the secretary, was not a compliance with the condition. *McCann* v. *Waterloo County Mutual Fire Ins. Co.*, 34 U. C. R. 376.

An interim receipt for an insurance premium provided that the directors should have power to cancel the contract at any time within thirty days, "by causing a notice to that effect to be mailed to the applicant," at a specified address. The general manager of the company proved that he directed a letter declining the risk to be sent to the plaintiff; that he saw it written and placed with other letters to be sent; and that one H., a clerk in the office, had charge of them, and his duty was to address them to the parties and enter them in the mailing book. The mailing book was produced, with an entry in it of this letter; and H. swore that this entry was in his writing, and that he had no reason to doubt that the letter had been mailed. The plaintiff (the insured), however, swore that he had never received it:—Held, per Hagarty, C.J., that, on this evidence, the question of mailing must have been submitted to the jury, who should have found that it had been mailed. Per Gwynne, J., that a verdict finding otherwise could not have been sustained. The case, however, was decided in defendants' favour upon another ground. *Johnson* v. *Provincial Ins. Co.*, 27 C. P. 464.

——— *Post Mark.*]—A foreign post mark on a letter is primâ facie evidence of the time when the letter was mailed. *O'Neil* v. *Perrin*, M. T. 3 Vict.

Attempting to bargain with or procure a woman falsely to make the affidavit provided for by C. S. U. C. c. 77, s. 6, that A. is the father of her illegitimate child, is an indictable offence. The attempt proved consisted of a letter written by defendant, dated at Bradford, in the county of Simcoe, purporting, but not proved, to bear the Bradford post mark, and addressed to the woman at Toronto, where she received it:—Held, that the case could be tried in the county of York. Semble, that if the post mark had been proved, and the letter thus shewn to have passed out of the defendant's hands in Simcoe, intended for the woman, the offence would have been complete in that county, and the indictment only triable there. Per Hagarty, J., that the defendant in that case would still have caused the letter to be received in York, and might be tried there. *Regina* v. *Clement*, 26 U. C. R. 297.

Transmission of Legal Documents and Money.] — Where a sheriff, on being ruled to return a fi. fa., returned it by post to the Crown office, where it was not filed because the postage was unpaid:—Held, that the sheriff was bound to have paid the postage, to make his return effectual. *Regina* v. *Moodie*, 1 U. C. R. 410.

Where A. agreed to accept as notice actually given any which B. should mail directed to A., it is a sufficient compliance with such agreement that a written notice is actually delivered to A., though not put into the post for him. *Morton* v. *Benjamin*, 8 U. C. R. 594.

Where it was agreed between the attorneys of the parties to a cause (the one resident in Whitby and the other in Collingwood) that papers should be served by mail:—Held, that the time of the service of notice of trial commenced to count from the time it was mailed by plaintiff's attorney, and not from the time of its receipt by the defendant's attorney. *Robson* v. *Arbuthnott*, 3 P. R. 313.

Semble, that where such a mode of service is agreed upon, the paper mailed, in the event of loss or miscarriage, is entirely at the risk of the attorney to whom sent. *Ib.*

Persons sending writs to the sheriff by mail which require immediate attention, must run the risk of his delay in sending to the post office. *Robinson* v. *Grange*, 18 U. C. R. 260.

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

The transfer by the defaulting treasurer of a municipality to the bankers of the municipality of the accepted cheque of a third person for the amount due by him to the municipality, cannot be impeached under the Assignments and Preferences Act, the duty to make good his wrong being sufficient to protect the transaction. The cheque was sent by the treasurer by post in a letter to the bankers, and this letter was received by the bankers in the afternoon, but the amount was not credited in the bank books to the municipality till next morning, and before this was done an assignment for the benefit of creditors had been

made by the treasurer:—Held, that the property passed as soon as the cheque reached the bankers, and that the assignment was not a revocation of the transfer. Per Ferguson, J., that the property in the cheque passed irrevocably by virtue of the provisions of the Post Office Act, R. S. C. c. 35, s. 43, as soon as the letter was posted. *Halwell* v. *Township of Wilmot*, 24 A. R. 628.

Transmission of Letters—*Loss.*]—Held, that the stage coach proprietor (who was also the contractor for carrying the mail) was not liable, under the facts of this case, for the loss of a letter containing a note. *Holman* v. *Weller*, 8 U. C. R. 202.

Held, (1) that it is not illegal to deliver a money letter to a private friend on his journey, provided such letter be delivered by such friend to the party to whom it is addressed; (2) that such friend as a gratuitous bailee would be bound to take as much care of the letter as he would of his own; (3) that if lost, where he does take such care, he is not responsible. *Tindall* v. *Hayward*, 7 L. J. 243.

POST OFFICE INSPECTOR.

See NOTICE OF ACTION, I.—POST OFFICE AND POSTAGE.

POUNDAGE.

See SHERIFF, VIII. 4.

POUNDKEEPER.

See MUNICIPAL CORPORATIONS, III. 2—NOTICE OF ACTION, I.

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See WILL, IV. 15.

POWER OF ATTORNEY.

See PRINCIPAL AND AGENT, VI. 2, 3, 4, 6, 7, VII.

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See DEVOLUTION OF ESTATES ACT—EXECUTORS AND ADMINISTRATORS, VII. 7—MORTGAGE, XIV.

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PRACTICE AT LAW BEFORE THE JUDICATURE ACT.

I. Administration of Justice Act, 1873.

1. *Amendment.*

Notice of Action—*Court*—*Variance.*]—In a penal action against a magistrate, the notice required by C. S. U. C. c. 126, stated that the plaintiff intended bringing his action in one of the superior courts, while the writ was issued in the other. On an application to amend under the Administration of Justice Act:—Held, that under the statute these forms could not be departed from, and that it could not be amended as if merely formal. *McCrum* v. *Foley*, 10 C. L. J. 105.

Relation—*Affidavit.*]—In this case the fact of a relator being a candidate, or a voter who had voted or tendered his vote, as required by s. 131 of 36 Vict. c. 48, was omitted in the relation, but was contained in one of the affidavits filed:—Held, that the fact being already before the court, the relation could be amended under the Administration of Justice Act. *Regina ex rel. O'Reilly* v. *Charlton*, 10 C. L. J. 105.

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2. *Examination for Discovery.*

Admission—*False Plea*—*Striking out.*]—Plaintiff sued on a promissory note. Defendant was examined under the Administration of Justice Act, and admitted that his plea of payment was false. The plea was struck out, under 34 Vict. c. 12, s. 8 (O.), and leave given to sign final judgment. *McMaster* v. *Beattie*, 10 C. L. J. 103.

Affidavit.]—An affidavit for an order to examine defendant under s. 29, made by the partner of plaintiff's attorney:—Held, sufficient. *Lloyd* v. *Henderson*, 10 C. L. J. 46.

So also when made by the managing clerk. *Hamilton* v. *Great Western R. W. Co.*, 10 C. L. J. 46.

In this case the affidavit for an order to examine under the Administration of Justice Act was made by the managing clerk of the

attorney, and stated, "I am familiar with all the proceedings in this suit:"—Held, that, although a managing clerk's affidavit is sufficient under the statute, still it must state that he has some particular charge of the suit. *Elmsley* v. *Cosgrave*, 10 C. L. J. 105.

See EVIDENCE, VII. 1 (a).

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3. *Right to Sue at Law as for "a Purely Money Demand" under the Act of 1873, s. 2.*

Damages for Breach of Covenants for Title.]—See *Kavanagh* v. *City of Kingston*, 39 U. C. R. 415.

Executors for Money Due under Will.]—See *Soules* v. *Soules*, 35 U. C. R. 334.

Interim Receipt.]—See *Kelly* v. *Isolated Risk and Farmers' Fire Ins. Co.*, 26 C. P. 299.

Policy of Insurance when Loss Payable to Plaintiff.]—See *Bank of Hamilton* v. *Western Assurance Co.*, 38 U. C. R. 609.

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4. *Transfer of Cause.*

See Frick v. *Moyer*, 6 P. R. 245; *Ryerse*, v. *Teeter*, 44 U. C. R. 8.

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5. *Other Cases.*

Application to Sell Land under A. J. Act, 1874, ss. 35, 36, 37—*Issue Directed under s. 37.*]—See *Ray* v. *Briggs*, 13 C. L. J. 40.

County Court Sitting—*Statutes*—"*Section.*"]—The word "section" does not necessarily mean one of the divisions of an Act numbered as such, but may refer, if the context requires it, to any distinct enactment, of which there may be several included under one numbering. Consideration of conflicting clauses in same Act. Application of the maxim, "expressio unius est exclusio alterius." *Dain* v. *Gossage*, 9 C. L. J. 193.

Equitable Issues—*Trial.*]—Under s. 16, A. J. Act, 1873, it is not incumbent on the Judge to try any equitable issues on the record himself, but he may direct them to be tried by the jury. *Shannon* v. *Hastings Mutual Fire Ins. Co.*, 36 C. P. 380.

Interpleader—"*Action.*"]—The words "action at law," in s. 24, include an interpleader proceeding. *Canada Permanent Building and Savings Society* v. *Forest*, 10 C. L. J. 78.

II. APPEARANCE.

1. *Appearance by Statute.*

[Appearance by plaintiff for defendant, which is the same thing as appearance by statute and common bail, was dispensed with by C. L. P. Act, R. S. O. 1877 c. 50, s. 63.]

See Kauntz v. *Cameron*, 2 O. S. 220; *Gourlay* v. *McLean*, 6 O. S. 79; *Courtney* v. *Bigelow*, R. & J. Dig. 2882; *Forrester* v. *Graham*, 2 O. S. 369; *Conboy* v. *Moffatt*, 5 U. C. R. 450; *Johnston* v. *Wisbrooke*, 1 C. L. Ch. 34; *Scadding* v. *Welch*, 2 C. L. Ch. 105; *Folger* v. *McCallum*, 1 P. R. 352; *Doe d. McLean* v. *McDonald*, 3 U. C. R. 126; *Bridges* v. *Case*, 4 U. C. R. 127.

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2. *Authority for Entering—Absence of.*

Where a plaintiff, without serving the defendant, accepts the appearance of an unauthorized attorney, the court will set aside the proceedings, although it is not shewn that the attorney is insolvent. *Massey* v. *Rapelje*, 5 C. P. 134.

Assumpsit against A. and B., two brothers, as maker and indorser of a note. A verdict and judgment having been obtained, and B.'s goods seized, he applied for relief, stating in his affidavit that he had never indorsed the note, and knew nothing of the action until seizure of his goods. Upon the affidavits it was uncontradicted that he had received no notice before action brought, and had been served with no writ or other papers in the cause, an attorney having appeared for both defendants by A.'s instructions; but A. swore positively to B.'s indorsement, and that he had instructed him to have such appearance entered. Under these circumstances the service of the writ of summons, and all subsequent proceedings as against B., were set aside without costs, B. undertaking to bring no action for anything done under the fi. fa. *Wright* v. *Hull*, 2 P. R. 26.

Where an appearance was entered without authority, of which defendants were aware, but made no application until after trial:—Held, too late. *Kerr* v. *Malpus*, 2 P. R. 135.

In ejectment, the defendant, being tenant, was served with the writ, which he handed to H., his landlord, and H. took it to his attorney, who, instead of getting leave for H. to defend, entered an appearance in defendant's name without his authority. A verdict having been obtained against defendant, the Judge refused to interfere, but left him to his remedy against his landlord and the attorney. *Moran* v. *Schermerhorn*, 2 P. R. 261.

C., one of several defendants, appeared by attorney, but no notice was taken of it by plaintiff's attorney, because the attorney for the other defendants had appeared and pleaded for all. C.'s attorney, having ascertained the error, notified the plaintiff's attorney that he had a defence, but did nothing more, and plaintiff took a verdict. The affidavit of C. not shewing substantial merits, a new trial was refused. *Smith* v. *Roblin*, 13 C. P. 430.

Where a defendant has been served with process, and an attorney, without authority, appears for him, the court will not interfere if the attorney is solvent. If the attorney be insolvent, the court may relieve defendant on equitable terms, if he has a defence on the merits. Where, however, it appears that the suit is brought by collusion between plaintiff and defendant to enable defendant to cheat his creditors, a Judge will not interfere summarily to remove the appearance, and thus assist the parties in the perpetration of a fraud. *Warley* v. *Poapst*, 7 L. J. 294.

In an action against three partners, upon notes signed by and for goods sold to the firm, C., an attorney, appeared on the 24th March, for all the defendants, his only instructions being, as he swore, from one of them, to defend for time. On the 29th G., another defendant, appeared by his attorney, S., who, on the 6th April, notified the plaintiff's attorney to serve the declaration and all other papers on him, or that the proceedings would be moved against. He heard nothing more, however, until after final judgment, which was entered on the 15th April, a verdict having been taken on the same day upon a consent signed by C. When the declaration was filed or served did not appear:—Held, that the proceedings against G., subsequent to the appearance entered by S. for him, must be set aside with costs. *Clark* v. *Galbraith*, 24 U. C. R. 25.

Where a plaintiff had served only one of three defendants, who, without authority, directed an appearance to be entered for all three, and the plaintiff obtained a verdict:—Held, that the verdict must be set aside. *Roissier* v. *Westbrook*, 24 C. P. 91.

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3. *Error or Irregularity in Entering.*

Where defendant appeared by attorney, but the appearance paper was mislaid in the Crown office, and the plaintiff entered an appearance per statute, and served a declaration on defendant, and proceeded to final judgment, the proceedings were set aside for irregularity. *Ryan* v. *Leonard*, 3 O. S. 307.

Where the defendant appeared by attorney, but the plaintiff, having overlooked it, entered an appearance for him per statute, and served the declaration on himself personally:—Held, that after judgment by default, and notice of assessment served on him, he was too late to object to the irregularity. *Ketchum* v. *Keefer*, 6 O. S. 56.

An appearance without a sufficient address is not a nullity. The address of a defendant appearing in person need not be stated in a separate memorandum if it sufficiently appears in the body of the appearance. *Jones* v. *Greer*, 3 L. J. 91.

Where an appearance was by mistake indorsed with the letters C. C. by defendant's attorney, and filed with the deputy clerk of the Crown, who was also the county court clerk, which indorsement misled the clerk, and caused him to file it among his county court papers, and the plaintiff finding no appearance signed judgment, the judgment was set aside on payment of costs. *Dickie* v. *Elmslie*, 3 L. J. 107.

Putting an appearance under the door of the office of the deputy clerk of the Crown during office hours, or handing it to him in the street, is not a due entry of the appearance. Such a practice is not to be encouraged under any circumstances. *Grey* v. *Stacey*, 10 L. J. 245.

An appearance entered by attorney for an infant defendant, no prochein amy having been appointed, is a nullity, not an irregularity. *Fountain* v. *McSween*, 4 P. R. 240.

As to mistakes in the Crown office, see *post* V.

4. *Judgment for Default.*

Where the writ might have been specially indorsed under s. 61, C. L. P. Act, 1856, but was not, the declaration should be filed with a notice to plead indorsed, and the judgment by default thereon should be by nil dicit. And the usual judgment by default for non-appearance to a specially indorsed writ signed under such circumstances, is irregular. *Keys* v. *Murphy*, 5 L. J. 228.

No venue need be stated in the margin of a judgment roll on default of appearance. *Bank of Montreal* v. *Harrison*, 4 P. R. 331.

The proceedings in replevin as regards appearance are regulated by the Replevin Act, not by the C. L. P. Act; and an interlocutory judgment signed as for want of a plea, without any appearance by or for defendant, is therefore a nullity. *Hart* v. *Pacaud*, 28 U. C. R. 390.

Where the defendant neglects to appear to a specially indorsed writ in an action on a promissory note, the plaintiff is entitled to sign judgment without the production of the note; and in this case a mandamus was granted to the county court to sign such judgment. *In re Oliver* v. *Fryer*, 7 P. R. 325.

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5. *Notice to Appear.*

See Forsyth v. *Hartwell*, 3 O. S. 439; *Bank of Montreal* v. *Edmunds*, 1 U. C. R. 411; *Lanark and Drummond Plank Road Co.* v. *Bothwell*, 2 L. J. 229.

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6. *Proceeding without Appearance.*

Where a declaration was served on an attorney, who had not appeared, and no appearance was entered at all, but the attorney did not deny that he was acting for the defendant, and the plaintiff afterwards signed interlocutory judgment, the court set aside the proceedings without costs, but stated that they would, on application, make the attorney pay them. *Dobie* v. *McFarlane*, 2 O. S. 285.

When there were two defendants, one of whom appeared by attorney and the other did not appear, but the declaration and other papers for both defendants were served on the attorney for the one, the court held the proceedings irregular. *Huff* v. *McLean*, 5 O. S. 69.

An interlocutory judgment signed without appearance was set aside after a year, the proceedings being void. *Lane* v. *McDonell*, 5 O. S. 335.

If there was no appearance entered for the defendant, proceedings were void, and not merely irregular. *Nichol* v. *McKelvey*, E. T. 2 Vict.

A defendant whose plea is a nullity cannot object, as a ground for setting aside an interlocutory judgment, signed after such plea, that there is no appearance entered. *Brewster* v. *Davy*, H. T. 2 Vict.

A summons specially indorsed was served on two defendants on the 7th December, an appearance entered on the 14th for one only, and

judgment signed against both on the 19th as if no appearance had been entered. A fi. fa. was given to the sheriff on the 13th January. The defendant who had appeared applied in March to set aside the judgment, &c., on affidavit that he was not aware of its having been signed until the 4th of that month. The deputy sheriff, however, in answer, swore that a few days after receiving the fi. fa. he informed this defendant, who replied that he would endeavour to arrange it:—Held, that the judgment under the facts shewn was not a nullity, and that defendant was too late in his application to set it aside. Under the old practice a judgment entered without appearance was a nullity, defendant not being in court, but, under the C. L. P. Act, he is deemed to be in court after the time for appearance has expired. *Bank of Upper Canada* v. *Vanvochis*, 2 P. R. 382.

Until after appearance a defendant has no attorney in the cause, and an affidavit by a person calling himself such is, therefore, insufficient to support an application to change the venue. *Hood* v. *Cronkrite*, 4 P. R. 279. Commented upon in *Attorney-General* v. *McLachlin*, 5 P. R. 63.

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7. *Time for Entering.*

Defendant's attorney accepting service of summons has the same time within which to appear as if the service had been on defendant himself. *Starratt* v. *Manning*, 3 L. J. 10.

An appearance is in time if filed while plaintiff is entering judgment, so that it be not fully signed. *Harris* v. *Andrews*, 3 L. J. 31.

See Marmora Foundry Co. v. *Miller*, 2 C. L. Ch. 102.

III. CHAMBERS.

1. *Clerk of the Crown and Pleas in Chambers.*

(a) *Appeals from Orders of.*

The court will not, in general, review the judgment of one of its members sitting in chambers, upon the question whether an application was made in time, but it is different under our statute and rules of court, upon an appeal from the decision of the clerk of the Crown and pleas sitting in chambers. *Hall* v. *Grand Trunk R. W. Co.*, 7 P. R. 335.

Held, that the single court was not precluded from disposing of an application to rescind an order made by the clerk of the Crown and pleas, setting aside a sidebar rule for costs of the day, on the ground that no application for the purpose had been made to a Judge in chambers within four days after the making of the order under the rule of court of Hilary term, 1870, the exception contained in s. 31 of c. 39, R. S. O. 1877, merely providing an additional or more speedy mode of appeal, and not taking away the right to resort to the court for the purpose. *Parkinson* v. *Thompson*, 44 U. C. R. 29.

Semble, that a Judge has power to extend the time for appealing against the order of the clerk of the Crown in chambers on an application for an allowance under the Indigent Debtors Act (R. S. O. 1877 c. 69), made after four days from the making of the order. *Wheatly* v. *Sharp*, 8 P. R. 189.

Held, that there is no appeal to the court in term from an order of the clerk of the Crown and pleas, made on an application to change the venue in county court cases under R. S. O. 1877 c. 50, s. 155; but the only appeal in such cases is to a Judge in chambers, under s. 31 of the Act:—Held, however, that, if an appeal did lie to the full court, it might be made direct thereto, without first going before a Judge in chambers. *Mahon* v. *Nicholls*, 31 C. P. 22.

(b) *Jurisdiction of.*

The clerk of the Queen's bench sitting in chambers has clearly jurisdiction to entertain an application to set aside proceedings against a magistrate brought before conviction quashed under C. S. U. C. c. 126. *Donelly* v. *Tegart*, 5 P. R. 225.

In an action for breach of warranty, and for false representation, on the sale of a steam vessel, as to her power and speed, the clerk of the Crown in chambers, acting under s. 18 of the Administration of Justice Act, 1873, directed the case to be tried by a Judge without a jury. On motion in term to set aside such order:—Held, that the clerk had power to make it, and that the court would not interfere with the exercise of his discretion. *Bennett* v. *Tregent*, 25 C. P. 443.

On an application to set aside executions and enter satisfaction a reference was made to a county court Judge to take an account, who found there was nothing due:—Held, that the clerk of the Crown and pleas, acting as Judge in chambers, had no power to hear an appeal from the report. *Pufford* v. *Davis*, 7 P. R. 361.

It is within the power of the clerk of the Crown in chambers to make an order for the payment of a weekly allowance to a debtor, under the Indigent Debtors Act (R. S. O. 1877 c. 69), where it can legally be made. *Wheatly* v. *Sharp*, 8 P. R. 189.

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2. *Judge in Chambers.*

(a) *Discretion in Setting aside Judgment.*

Semble, that where an interlocutory judgment has been signed and the plaintiff is preparing for his assessment of damages in an outer district, a Judge in chambers, upon an application, immediately before the assizes, will not interfere to let defendant in to plead, but will refer the parties to the Judge of assize. *Bellows* v. *Condee*, 4 U. C. R. 346.

A Judge, on an application to set aside a judgment signed for want of appearance, will not try the merits of a case on affidavit; but he may properly receive and consider explanatory affidavits, so as to be able to exercise a discretion on all the matters properly before him, and grant relief if he thinks the facts before him warrant it. *Bank of Montreal* v. *Harrison*, 4 P. R. 331.

(b) *Jurisdiction of.*

A Judge in chambers has a discretionary power as to the materials on which a summons may be issued, and is not bound to be as particular in this respect as the court would be. *Chamberlain* v. *Wood*, 1 P. R. 195.

He has no power to order the weekly allowance for prisoners charged in execution on final process. *Low* v. *Melvin*, 1 C. L. Ch. 25.

He may make an order on a deputy clerk of the Crown to refund costs improperly received. *McIntosh* v. *Pollock*, 2 C. L. Ch. 209.

The court or Judge may determine whether a case be within the Extradition Treaty, and a Judge in chambers has power to review and decide on the sufficiency of the evidence returned by the committing magistrates, or, if necessary, to hear further testimony. *Regina* v. *Tubbee*, 1 P. R. 98.

The court possesses the jurisdiction, upon the application of a subsequent judgment creditor, to inquire into the bona fides of a prior judgment obtained on a specially indorsed writ against the same judgment debtor, and to direct the trial of a feigned issue in order to inform the conscience of the court as to fraud or bona fides. *Klein* v. *Klein*, 7 L. J. 296.

A common law Judge may refer for taxation to the proper officer of the court of chancery, a bill of solicitors for services rendered in that court. *In re Wilson and Hector*, 9 L. J. 132.

Quære, can a Judge in chambers rescind his order for a habeas corpus, or quash the writ itself on the ground that it issued improvidently. *In re Ross*, 3 P. R. 301.

In ejectment, the tenant in possession neglected to notify his landlord, the defendant, and the plaintiff issued an execution and took possession. The judgment having been set aside, and the landlord let in to defend on terms by order of a Judge in chambers:—Held, that he had power to make such order. *Turley* v. *Williamson*, 13 C. P. 581.

He has no jurisdiction, at common law or under the C. L. P. Act, to discharge a defendant from custody under a ca. sa., on the ground that he had no intention to quit Canada when the ca. sa. was issued. *Bank of Montreal* v. *Campbell*, 2 C. L. J. 18.

A Judge in chambers has power to order the plaintiff to bring in the record and enter judgment, or deliver it to the defendant, when defendant is entitled to costs because the verdict is within the jurisdiction of the inferior court. *Cross* v. *Waterhouse*, 3 P. R. 281.

An attachment against an absconding debtor issued by the order of a Judge in chambers, may be set aside by another Judge. *Howland* v. *Rowe*, 25 U. C. R. 467.

Held, that the absence of any express provisions in C. S. U. C. c. 25 for setting aside a writ of attachment against an absconding debtor, does not prevent the court from doing so in the exercise of its common law power over its own process; and that such power can also be exercised by a Judge in chambers as the delegate of the court. *Jackson* v. *Randall*, 24 C. P. 87.

A county court case had been tried at the assizes under the A. J. Act, 1874, s. 54. The plaintiff got a verdict, and the plaintiff's attorney obtained the record. Defendant's attorney applied for an order to deliver it up to the court of Queen's bench, to enable him to move against the verdict. The Judge in chambers held that he had no jurisdiction to make such order. The county court Judge made an order for the delivery of it to the clerk of that court, and stayed proceedings until next term. *Burley* v. *Milne*, 7 P. R. 100.

Jurisdiction of Judge in chambers to grant interpleader order. Waiver of objection thereto by accepting the order and defending the issue. *Haldan* v. *Beatty*, 43 U. C. R. 614.

IV. Consolidating Actions.

Bond.] — Several actions having been brought on a bond to a sheriff for the gaol limits, the court granted a rule to consolidate them. *Leonard* v. *Merritt*, Dra. 190.

Identity of Parties—*Costs.*]—If a party brings two or more actions at the same time against another, on claims which might be included in one action, he may be compelled to consolidate them, with costs. *Commercial Bank of Canada* v. *Lovis*, 3 L. J. 205.

Transfer—*Chancery.*]—A suit will not be transferred to the court of chancery with the view of being consolidated with a suit pending in it between the same parties. *Frick* v. *Moyer*, 6 P. R. 245.

V. Crown Office.

Appearance — *Place for.*] — See *Grey* v. *Stacey*, 10 L. J. 245, *ante* II. 3.

Certificate.]—A certificate of a deputy clerk of the Crown in the shape of a postal card is no evidence. *Johnson* v. *Loney*, 6 P. R. 70.

Crown Officer—*Arrest — Privilege.*]—A clerk of the county court, being also ex officio deputy clerk of the crown and clerk of assize, is privileged from arrest only while engaged in his official duties, or while going to or returning from his office; and the court therefore discharged a rule to prohibit the county court Judge from issuing an order of commitment against such officer. *In re Mackay* v. *Goodson*, 27 U. C. R. 263.

Execution—*Issue—Time and Place.*]—The court refused a rule to set aside a fi. fa. because issued by the officer at his own house before office hours. *Rolker* v. *Fuller*, 10 U. C. R. 477.

Filing Papers—*Place for.*]—A deputy clerk of the Crown should not file papers at his private residence, apart from his office, and out of office hours. *Fralick* v. *Huffman*, 1 C. L. Ch. 80.

The delivery of a paper to him in the street is not filing or entering it. *Ib.*

Process—*Unauthorized Issue of.*]—An attachment was granted against a deputy clerk of the Crown for having issued serviceable process without authority; and afterwards, on his appearance in term to answer interrogatories, the court ordered him to be dismissed from his office, and to pay the costs of the proceedings. *Rex* v. *Fraser*, 3 O. S. 247.

Rule for Costs—*Power to Issue.*]—The deputy clerks of the Crown have no power, under the 120th rule of practice, to issue rules for costs of the day. *White* v. *Shire*, 7 L. J. 206.

Search for Judgments.]—A person is entitled to search at the Crown office for judgments against any number of persons named, and the clerk should allow him to make such search, if a long one, at whatever time is most convenient with respect to the other business of the office. He is not entitled to search the judgments entered during a particular period, without reference to any named parties. *In re Canada Trade Association*, 17 U. C. R. 542.

Signing Judgment — *Appearance—Mistake.*]—Where an appearance was duly filed with the deputy clerk of the Crown, but entered by him under the wrong letter, and judgment was in consequence signed, such judgment was set aside with costs. *Great Western R. W. Co.* v. *Buffalo, Brantford, and Goderich R. W. Co.*, 2 P. R. 133.

——— *Appearance — Mistake — Costs.*]—When an appearance properly intituled was filed in the office of the deputy clerk of the Crown, but was incorrectly entered in the appearance book by defendant's attorney, and plaintiff's attorney not taking the precaution of searching the files, was led to believe that no appearance had in fact been entered, the judgment was set aside, but without costs, as both parties had contributed to the mistake. *Moore* v. *Simons*, 1 C. L. J. 183.

Remarks as to the irregularity and impropriety of attorneys making entries which should be made by the proper officer. *Ib.*

Quære, as to the liability of such officer for damages arising from neglect in his duties in this respect. *Ib.*

——— *Appearance — Mistake — Stamps.*]—Where an appearance to a writ in the common pleas was filed in the office of the deputy clerk of the Crown, who was also clerk of the county court, but by mistake was put with the county court papers, and the stamp necessary for an appearance in a superior court was not affixed, the plaintiff signed judgment as in default for appearance:—Held, that the appearance was a nullity, and was absolutely void under the Stamp Act, and leave was refused to have the stamp affixed as of the day of filing, or to take the appearance off the county court files. *Bank of Montreal* v. *Harrison*, 4 P. R. 331.

——— *Holiday.*]—The Crown offices should not be opened for business on Easter Monday, and a judgment entered on that day was set aside, for irregularity, with costs. *Trust and Loan Co.* v. *Dickson*, 2 C. L. J. 166.

——— *Office Hours.*]—It is not irregular to sign interlocutory judgments in the office of the deputy clerk of the Crown in the country, at an hour when by rule of court the principal office in town is not open. *Hall* v. *Hunter*, 5 O. S. 705.

——— *Precedence.*] — Where the defendant's attorney is present at the opening of the office in the morning to file a joinder in demurrer, and the plaintiff's attorney is also present to sign judgment, the defendant's attorney is entitled to precedence. *Fralick* v. *Huffman*, 1 C. L. Ch. 80.

Taxation — *Appointment.*] — One half hour's grace is always allowed for both parties to appear under an appointment to tax. *Landon* v. *Stubbs*, 3 L. J. 70.

VI. Discontinuance.

Breach of Stay.]—Where an order for security for costs has been obtained, with a stay of proceedings, taking out a rule to discontinue is a breach of the order. *Ferguson* v. *Clarkson*, 2 L. J. 92.

County Court — *Jurisdiction.*] — The plaintiff, having sued in the county court, proved a claim beyond the jurisdiction, whereupon the jury were discharged. He then brought his action in the court of Queen's bench, and upon defendant's application an order was made staying proceedings until the plaintiff should discontinue the county court action and pay the costs of it. The order was rescinded, for, the county court having no jurisdiction, the plaintiff could not discontinue the suit there, which would be a proceeding in the cause. *Hodgson* v. *Graham*, 26 U. C. R. 127.

Executors — *Discontinuance as to One.*]—Where a plaintiff sues two or more defendants as executors, the entering a nolle prosequi and discontinuing as to one, is not a discontinuance of the action. *Mauson* v. *Hall*, 5 U. C. R. 60.

Joint and Several Bond.] — Plaintiffs, having taken a joint and several bond from defendants for a debt of £5,000, declared against them all as upon a joint bond only. One pleaded a special plea, and another demurred, and the plaintiffs' attorney, under the impression that the bond had been declared upon as joint and several, discontinued as against these defendants, and took a verdict against the others, who moved to arrest the judgment. The sum being large, on motion made in the following term, the court allowed the plaintiffs to discontinue against the last mentioned defendants, on payment of all costs, so that the claim might not be defeated. *Commercial Bank* v. *Cameron*, 17 U. C. R. 237.

Taxation of Costs.]—Unless the plaintiff, upon taking out a rule to discontinue, serve defendant at the same time with an appointment to tax costs, defendant may regard the rule as a nullity. *Perrin* v. *Eaglesum*, 4 U. C. R. 254.

The plaintiff having failed to proceed to trial upon a peremptory undertaking, the defendant moved to make absolute the original motion for judgment as in case of nonsuit. The plaintiff then obtained an order to discontinue on payment of costs, but did not take out an appointment to tax. Defendant gave notice of taxation, but not attending the

costs were not taxed. The plaintiff on this ground opposed the application for judgment, &c.:—Held, that the plaintiff should have taxed and paid the costs whether defendant attended or not; and that defendant was entitled to judgment as in case of nonsuit. *Doe d. Rogers* v. *Robertson*, 1 C. L. Ch. 150.

On a motion for judgment as in case of a nonsuit in ejectment, the plaintiff consented that the rule should be absolute if a rule to discontinue were not taken out within a month. It was taken out, and a notice of taxation served, which was enlarged. The court, under the circumstances of this case, afterwards allowed the plaintiff to withdraw his rule to discontinue, and to proceed to trial, on payment of costs and on giving additional security for costs in the action. *Doe d. Hay* v. *Hunt*, 1 P. R. 128.

Defendant, having been arrested under process of a county court, was discharged for insufficiency of the affidavit, but expressly without costs. The plaintiff then took out a rule to discontinue the county court action on payment of costs, and arrested defendant under process of the Queen's bench for the same cause. Defendant was discharged because the first suit had not been effectually discontinued, the plaintiff having taken no steps to tax or pay costs. *Ellis* v. *James*, 1 P. R. 153.

The tenants in dower having given notice of trial by proviso, the demandant served a rule to discontinue on payment of costs, with a consent on her part that if the costs were not paid within four days the tenant might sign judgment of non pros. The costs not having been paid, the tenants entered the record for trial, nonsuited the demandant, at her own election, and entered the usual judgment for the costs antecedent to and attending the nonsuit:—Held, that the service of the rule to discontinue being no stay of proceedings unless the costs taxed under it were paid, the tenants were entitled to the costs of the nonsuit, and were not obliged to have taken a judgment of non pros. under the terms of that rule. The master, on revision, having disallowed these costs, as unnecessarily incurred:—Held, that he had exceeded his discretion; the general rule being that the court awards and the master fixes the amount of the costs of suit. *Muller* v. *City of Hamilton*, 17 C. P. 514.

VII. Estoppel in Matters of Practice.

Affidavits — *Intituling.*] — In ejectment against A. and B., by consent of the plaintiff's attorney, an appearance was entered for S. as landlord, A. and B. not appearing. The notice of trial was intituled as against A. and B., and notice was served on the plaintiff's attorney warning him that this would be objected to. The nisi prius record contained no appearance, but annexed to it was an appearance by S. as landlord. The plaintiff was allowed to enter this on the record, and took a verdict, defendant not appearing. On application to set aside the verdict, the plaintiff objected that the affidavits filed by defendant, intituled as against S. alone, were wrongly intituled, and that no Judge's order was shewn allowing S. to defend:—Held, that the plaintiff was precluded from the last objection, for he had consented to S. appearing, and obtained leave to enter his appearance on the record. 2. That the plaintiff's own proceedings warranted S. in assuming that he was to appear alone, and that the affidavits were therefore rightly intituled. *Jones* v. *Seaton*, 26 U. C. R. 166.

Appeal — *Verdict Subject to Opinion of Court.*] — Where the verdict had been taken subject to the opinion of the court, and the respondents attended before a Judge to settle the case for appeal:—Held, that they were precluded from objecting that the case was not appealable. *Boulton* v. *Smith*, 18 U. C. R. 458.

Award—*Rule of Court.*] — The party on whose motion an order of reference has been made a rule of court cannot, in opposing an application to set aside the award, object that the cause is improperly styled in such rule. *Creighton* v. *Brown*, 1 P. R. 331.

Costs—*Landlord in Ejectment — Parties.*] —Defendant appeared and claimed title as tenant of one R. Two days before appearance R. had disposed of his interest in the lands to S., who, after notice of trial, applied on affidavit, setting out the conveyance and the subsequent attornment to him of defendant (now his lessee), to be admitted as landlord to defend the action, but the application, being opposed by the plaintiff, was refused. Plaintiff, having succeeded, applied for a rule ordering S. to pay the costs of the action, on the ground that the defendant was insolvent, and the conduct of S., both in making the above application and at the trial and subsequently thereto, proved him to be the real defendant:—Held, that the plaintiff was not estopped from making such an application by having opposed the prior application of S.; and the rule was made absolute. *Lutz* v. *Beadle*, 5 P. R. 418.

Discharge of Debtor — *Exceptions to Judgment.*]—A defendant, after having been discharged from custody as an insolvent debtor by order of a Judge in chambers, will not be allowed to take exceptions to the judgment previously obtained in the same cause, though if the discharge be made on the consent of the plaintiff only, it may be different. *Dexter* v. *Fitzgibbon*, 4 L. J. 43.

Notice of Trial—*Joinder.*]—A plaintiff, having given notice of trial, is estopped from objecting that issue is not joined for want of a similiter. *Archibald* v. *Cameron*, 1 P. R. 138.

Order of Court — *Acting under.*] — Where a plaintiff obtained an order to take out of court money paid in by the sheriff on condition that he should pay the master's charges, and was given to understand that he might either take it on these terms or sue the sheriff for it: — Held, that having availed himself of this order, he could not afterwards recover from the sheriff the fees paid to the master, on the ground that the money had been improperly paid into court. *Crombie* v. *Davidson*, 19 U. C. R. 369.

Prohibition — *Division Court — Taking Part in Trial.*]—An applicant for a prohibition against a Judge of a division court for excess of jurisdiction, who has appeared at the trial, cross-examined witnesses, argued the case before the Judge, and taken no exception at the time to the jurisdiction, is precluded from objecting to the jurisdiction after judgment entered and execution issued in the court below. *In re Burrowes*, 18 C. P. 493.

Signing Judgment — *Date of Filing Writ.*]—Where the plaintiff was proceeding on the 5th July to file the return of a writ of trial, and defendant, being about to move on that day to set aside the verdict and for a new trial, had need of the writ and return to make his motion in chambers, and the plaintiff allowed him to take them for such purpose before they were actually filed, to avoid the trouble of procuring a Judge's order for them (which, had they been actually filed, would have been necessary):—Held, that the writ might be considered and treated as filed on that day; and consequently, though it was not actually filed until the 8th July, and the plaintiff signed final judgment on the 12th July, the defendant was estopped from contending that the statute 8 Vict. c. 13, s. 53, had not been complied with, six days not having elapsed between the actual filing of the writ and signed judgment. *Morland* v. *Webster*, 2 C. L. Ch. 52.

See post XVI. 2.

VIII. Filing Papers.

(*See* also Pleading.)

Marking.] — No paper is properly filed, until marked "filed" by the proper officer. *Campbell* v. *Madden*, Dra. 2.

Taking off Files.]—Papers should not be taken off the files without leave of the court or a Judge. *Browne* v. *Smith*, 1 P. R. 347.

Transmission.] — Papers filed in court should not be sent away to be used as evidence at nisi prius, unless when the originals are essential, and the party applying to have them transmitted has some right in them, or the interests of public justice require their transmission; and in that case the officer sending should take a voucher from the officer receiving them. *Gaynor* v. *Salt*, 24 U. C. R. 180.

Held, that s. 193 of the C. L. P. Act permits the transmission of certified copies of depositions; an application to transmit the originals was therefore refused. *Fagan* v. *Wilson*, 6 P. R. 295.

See Cavanagh v. *Hastings Mutual Fire Ins. Co.*, 7 P. R. 111; *Frolick* v. *Huffman*, 1 C. L. Ch. 80, *ante* V.

IX. Notices to Admit and Produce.

Affidavit.]—An affidavit of notice to produce is not admissible under C. L. P. Act, 1856, s. 167, unless made by the plaintiff's attorney, or his clerk. *Patterson* v. *Morrison*, 17 U. C. R. 130.

Necessity for — *Costs of Exemplification.*]—Before a party will be allowed to tax the costs of obtaining an exemplification of judgment he must serve the opposite party with notice to admit, &c., under rule of court 28, E. T., 1842. The master, however, though he cannot allow the costs of exemplification without notice, &c., may allow the costs of procuring a copy of the roll. *Conger* v. *McKechnie*, 1 C. L. Ch. 220.

Summons.] — On a notice to admit, no summons can be taken out until the expiration of forty-eight hours from the time specified in the notice for an inspection of the documents. *Cary* v. *Cumberland*, 1 P. R. 140.

Under R. G. Prac. 29 and 30, and the C. L. P. Act, 1856, s. 165, the old practice of calling on the party by summons to admit documents, was done away with, and the notice to admit according to the form given in rule 29, substituted for it. Such a summons was therefore discharged with costs. *Da Costa* v. *Gordon*, 2 L. J. 211.

X. Proceeding at Law and in Equity.

[Administration of Justice Act, 1873.]

Claim under Will—*Equitable Demand—Retroactivity of Statute.*] — The declaration alleged that one S., by his will, appointed defendant his executor; and, after devising his farm, directed his remaining real estate to be sold and the proceeds thereof, and his money and notes, to be equally divided between his three sons, of whom plaintiff and defendant were two: that defendant proved the will and became possessed of assets more than sufficient to pay plaintiff's claim under the will, and properly applicable to the payment thereof, and afterwards promised and agreed with the plaintiff that the plaintiff was entitled to receive from him $500, and stated that sum as the plaintiff's claim under the will; and thereupon, in consideration of the premises, the defendant promised the plaintiff to pay, and the plaintiff agreed to accept the said sum of $500 as and for his claim:—Held, that the plaintiff's claim was not a "purely money demand," to which his right was an equitable one only, under s. 2 of the Administration of Justice Act, 1873; and if it were, that that section, which did not take effect till the 1st January, 1874, would not apply to this action begun on the 11th December, 1873. *Soules* v. *Soules*, 35 U. C. R. 334.

Covenant for Title — *Vendor and Purchaser — Mortgagor and Mortgagee.*] — The plaintiff sued defendants on their covenant for title in a conveyance of land to the plaintiff, alleging as the breach that at the time of the execution of the deed, one H. was possessed of part of the land under a demise from defendants, on which part was a stone wall, whereby the plaintiff was unable to build on said wall, and his premises were injured. The defendants pleaded that the plaintiff had reconveyed the land to them by way of mortgage, with the usual covenants for title, which was still in force and unpaid. The plaintiff replied, on equitable grounds, that the mortgage provided for possession by him until default, and that no default had been made:—Held, on demurrer, that the action could not be maintained, nor transferred to the court of chancery, under s. 2 of the Administration of Justice Act of 1873, not being for a purely money demand. *Kavanagh* v. *City of Kingston*, 39 U. C. R. 415.

Promissory Note—*Transfer of Shares—Offer to Transfer.*]—To a declaration against maker and indorser of a note, defendants pleaded separately, that before the making of the note the plaintiff and her husband sold all their interest and stock in a certain railway company to defendant H., for $55,000, and, in consideration that the plaintiff and her husband should assign, convey, assure, and transfer the same to H., H. agreed to pay said $55,000 on certain days, and to give his notes therefor, indorsed by the other defendant, B.,

and that until the whole of the said stock, &c., had been conveyed to H., neither H. nor the other defendant should be required to pay said notes or any part thereof; that this was one of the notes, and was made on the faith that the stock had been conveyed; and that afterwards the plaintiff and her husband refused to complete the conveyance of all their stock, and only assigned part thereof, and retained thirty shares. The plaintiff replied that, at the time of making said agreement, and from thence hitherto, she and her husband were, and still are, ready and willing and hereby offer to assign to H. said thirty shares on his request, of which he had notice, but that H. never requested such transfer:—Semble, that under the Administration of Justice Act, 1873, if all the other issues had been disposed of, the court might have allowed the plaintiff to convey the thirty shares, paying the costs of suit, and directed the defendants then to pay the note, and that the plaintiff's husband should be made a party; but, there being other issues to be tried, judgment was given for defendants on demurrer, reserving judgment on the equitable rights of the parties. *Boulton* v. *Hugel*, 35 U. C. R. 402.

Trust for Creditors—*Parties—Transfer of Action.*]—The declaration alleged, in substance, that the plaintiff was assignee of a mortgage made by one G. W. M. for $2,015, on which default had been made, by which the whole principal became due; that G. W. M. was in business in partnership with H. W. M., and becoming embarrassed they assigned all their estate, real and personal, to defendants, in trust to sell the same and distribute the proceeds ratably among their creditors, including the plaintiff; that the defendants had sold the estate, and held the proceeds in trust for the plaintiff and other creditors, and held moneys applicable to the amount due to the plaintiff, and were aware and had notice of the plaintiff's claim, but refused to pay the plaintiff any part of such proceeds; that defendants had realized all the estate, and had long been in a position to divide and pay the same among the creditors, and had in fact paid some of them; and that the greatest portion of the estate so assigned was the sole property of G. W. M.:—Held, not a proper case in which to proceed at law under the A. J. Act, 1873, 36 Vict. c. 8, s. 2 (O.), it being impossible in a court of law to administer the trust and do complete justice without having all the parties interested in the trust before the court; and the suit was therefore transferred, under s. 9, to the court of chancery. *Leys* v. *Withrow*, 38 U. C. R. 601.

For decisions in equity on this subject, see PRACTICE IN EQUITY, whether before or after Judicature Act.

XI. PROCESS.

1. *Generally.*

(a) *Mistakes in Copy.*

When the copy of non-bailable process served differed in the teste from the original, the service was set aside. *Scott* v. *Heffernan*, 5 O. S. 321.

The omission of the letters "L. S.," or of any mark to denote a seal to the copy of a writ, is not an irregularity. *Cameron* v. *Wheeler*, 6 U. C. R. 355.

Held, that the copy of the writ of summons, under 12 Vict. c. 63, not containing the name of the signer of the writ at the bottom, was not ground for setting aside the service. *Leach* v. *Jarvis*, 1 C. L. Ch. 264.

Where the copy of the writ of summons is wrong in itself, defendant may move to set aside the service, leaving the original untouched. *Ib.*

Where the name of the clerk in the Crown office issuing the summons was incorrectly transcribed in the copy:—Held, no objection. *Hopkins* v. *Haskayne*, 1 P. R. 184.

An original writ of summons at the suit of A. was issued from a county court on the 13th August, 1860. On the same day defendant was served with what purported to be a copy of the summons, but containing the name of B., as plaintiff, instead of that of A. On the 14th August an appearance was entered for defendant at the suit of B.:—Held, that the service was a mere irregularity, and the appearance a nullity. *Ross* v. *Fraser*, 6 L. J. 282.

(b) *Service.*

Application to Set aside Service.]—In moving to set aside service of process because served in the wrong district, the affidavit must state that the service was not on the confines, or that there was no dispute about boundaries. *Crysler* v. *Thompson*, M. T. 3 Vict.

Where a rule nisi was obtained to set aside service of process for defects in the notice to appear, and the defect intended to be relied on was, that the notice was to appear in the "King's bench," instead of the "Queen's bench," it was held that the rule must be discharged, as the irregularity was not sufficiently pointed out in it. *Matthie* v. *Lewis*, T. T. 5 & 6 Vict. See, also, *Teller* v. *Wilson*, 1 U. C. R. 417.

An affidavit made by a stranger, and verifying the copy of process objected to by the information and belief of deponent that the defendant was served with "the annexed copy of process in the cause, and no other," is insufficient. *Baley* v. *Brown*, 2 U. C. R. 99.

The fact that a writ of summons in ejectment in some respects varies from the præcipe on which it issued, is no ground for setting aside the writ, for the præcipe is no step or proceeding in the cause. *Grimshawe* v. *White*, 3 P. R. 320; *Cotton* v. *McCulley*, 7 L. J. 272.

Where service of process was denied by defendant, but positively sworn to by the officer, an application to set aside the service was discharged, but not with costs. *Coates* v. *Hornby*, 1 C. L. Ch. 135.

Quære, as to the right of a defendant in contempt for an appearance, but not actually arrested, to move quia timet to set aside the process issued against him. *Attorney-General* v. *McLachlin*, 5 P. R. 63.
See Metcalf v. *Davis*, 6 P. R. 275.

Mode of Service.]—Where husband and wife, executrix, are sued, service of process on the husband only is sufficient, as well as in other cases. *Shuter* v. *Marsh*, Tay. 172.

The process of the court can be served only by the sheriff or his officers. *Whitehead* v. *Fothergill*, Dra. 200.

Held, that, in the absence of any explanatory rule on the subject, under the Act 12 Vict. c. 63, service of a writ of summons could not be deemed irregular, because served by a person other than the sheriff or his deputy. *Leach* v. *Jarvis*, 1 C. L. Ch. 264.

Where at the time of service of process inspection of the original was demanded and refused, the service was set aside with costs. *Weller* v. *Wallace*, M. T. 1 Vict.

The court will not set aside the service of process for irregularity, upon the ground that it was served upon defendant while he was attending the assizes as plaintiff in a civil suit pending and entered for trial. *City of Kingston* v. *Brown*, 4 U. C. R. 117. See *Thompson* v. *Calder*, 1 U. C. R. 403.

Service abroad.]— Where a defendant served abroad appears to the writ, the plaintiff need not prove his claim under C. L. P. Act, 1856, s. 25, but may sign final judgment for default as in other cases. *Caird* v. *Fitzell*, 2 P. R. 262.

Held, following Cherry v. Thompson, L. R. 7 Q. B. 573, that under s. 44 of C. L. P. Act, the plaintiff might serve the defendants residing in England with process, and sue them in our courts, although the breach occurred in England—the contract being made in this Province. *McGiverin* v. *James*, 33 U. C. R. 203.

A writ for service within the jurisdiction was served on two of the defendants at a place out of the jurisdiction. The service was not set aside, as the plaintiff had not been in fault, the domicile of the defendants being within the jurisdiction; but leave was given to issue, nunc pro nunc, a concurrent writ for service out of the jurisdiction, amendment of the copies served to be made in accordance therewith. *Metcalf* v. *Davis*, 6 P. R. 275.

Service on Corporations.]—The court, although an affidavit was produced that there was no member of the board of works residing in Upper Canada on whom a copy of process could be served, refused to allow service to be made on an engineer employed by the board in Upper Canada, or by affixing a copy of the process in the Crown office. *Sherwood* v. *Board of Works*, 1 U. C. R. 517.

The first part of s. 17 of the C. L. P. Act applies only to corporations whose chief place of business is within Upper Canada; the remainder to foreign corporations. Where, therefore, a writ of summons against a foreign corporation was served in Upper Canada upon the president, but it was not shewn that he transacted any business of the company there, the service was held bad. *Wilson* v. *Detroit and Milwaukee R. W. Co.*, 3 P. R. 37.

The station master of a railway company, the head office of which is not in Ontario, is not an agent on whom service of a writ of summons against the company can properly be effected under that section. *Taylor* v. *Grand Trunk R. W. Co.*, 4 P. R. 309.

[But see R. S. O. 1877 c. 50, s. 22; con. rule (1897) 160.]

Waiver of Irregular Service.]—If a defendant lie by and allow plaintiff to take several steps, he thereby waives previous irregularities in the proceedings; he should have taken the earliest opportunity of excepting to them; and if he move a Judge in Chambers, he must state all the irregularities he relies on, and cannot afterwards in term resort to other irregularities which existed at the time of the application to the Judge, but were not then objected to. *Arnold* v. *Fish*, 5 O. S. 141.

A writ of summons was issued in the common pleas, and an appearance entered thereto in the same court. The plaintiff then filed his declaration in the Queen's bench, and served it with a demand of plea about the 26th June. This demand was returned by letter by defendant's attorney on the 4th July, with an acceptance of service indorsed, and no notice was taken of the discrepancy. Interlocutory judgment was signed on the 29th June, and on the 5th September notice of assessment was served, no pleas having been sent in the meantime. The plaintiff's attorney was not asked to waive the judgment, and he therefore went on and assessed damages according to his notice:—Held, on motion in the next term, that defendant's attorney, by his conduct, had waived the want of service of process, and of appearance. *Williams* v. *Rapelje*, 11 U. C. R. 420.

Where defendants' attorney received a writ of summons, and indorsed on the original "service admitted:"—Held, that he was precluded from taking advantage of technical irregularities, such as the want of an indorsement of the name and place of abode of the plaintiff's attorney, and the omission in the margin of the clerk by whom and the place where the writ was issued. *Otis* v. *Rossin*, 2 P. R. 48.

Where the copy of a specially indorsed writ served on defendant, was in the inside simply a printed form, with the blanks not filled up, but was properly indorsed, and defendant did not move against it until after judgment signed and fi. fa. issued:—Held, an irregularity only, not a nullity, and that the application was too late. *Robson* v. *McGowan*, 2 P. R. 323.

Wrong Person Served.]—Where, in an action against a father, process was served upon his son of the same name, and appearance was entered and defence made by the son:—Held, that a verdict for the defendant was correct, and that, whether there was collusion or not, the plaintiff could not recover against the son so as to charge the father. *Killens* v. *Street*, M. T. 4 Vict.

Common bail and all subsequent proceedings to notice of assessment set aside—on affidavits shewing that the defendant's brother had been served with process, and that the wife of defendant had been served with the declaration and demand of plea. *Wright* v. *Irwin*, 1 C. L. Ch. 162.

A sheriff's officer served the defendant, who informed him that the writ was intended for another person, and the officer took it back, the defendant agreeing that if he was wrong he would consider the service good, if the writ were left at the house of a third person named. The officer did not serve the other party, nor leave the writ as directed, but having made affidavit of the service, the plaintiff proceeded with the cause. The service and subsequent proceedings were set aside. *Erwin* v. *Powley*, 2 U. C. R. 270.

The writ of summons, directed to J. S., was by mistake served by the sheriff upon his son of the same name, who a few days after gave it to his father, the defendant, telling him that the sheriff had made a blunder; and defendant, at his son's request, took it to an attorney, who, upon defendant's instructions, entered an appearance, and afterwards put in pleas:—Held, that defendant was sufficiently served, and that the plaintiffs could recover against him. *Provincial Ins. Co. of Canada* v. *Shaw*, 19 U. C. R. 360.

In an action on a mortgage, the writ was served upon the mortgagor's father, who, by his son, an attorney, entered an appearance and defended the suit; and a verdict was taken against the mortgagor. The writ having been served upon the wrong person, and no notice or knowledge of the proceedings having been shewn to have reached defendant, a new trial was ordered. *Sutherland* v. *Dumble*, 14 C. P. 156.

(c) *Teste of Writ.*

A bailable ca. re. issued in vacation must be tested the last day of the preceding term. *Armstrong* v. *Scobell*, 3 O. S. 303.

A bailable ca. re. must be tested in the name of the chief justice, or in his absence, in the name of the senior puisne Judge. *Case* v. *McVeigh*, T. T. 3 & 4 Vict.

The absence of the chief justice from the Province, does not make it improper to teste a writ of capias in his name. *Brett* v. *Smith*, 1 P. R. 309.

A fi. fa. against lands was tested in the name of the then senior puisne Judge of the court:—Held, that it would be presumed to be regular until the contrary appeared. *Laney* v. *Rose*, 17 C. P. 186.

Held, that a writ of ca. sa. tested in the name of a retired chief justice after his successor has been gazetted, but before acceptance of office, by taking the necessary oaths of office, was wrong; it should be tested in the name of his successor. *Nelson* v. *Roy*, 3 P. R. 226.

A ca. sa. tested in the name of a retired chief justice is an irregularity only, which may be amended upon payment of costs. *Ib.*

Defendant was served with a writ of summons, in every respect a copy of a writ from the Queen's bench, except that it was tested in the name of the chief justice of the common pleas. A judgment on default of appearance signed in the common pleas, in which court the writ had been issued, was set aside with costs. *Grey* v. *Bolton*, 4 P. R. 309.

(d) *Other Cases.*

Issue in Blank.]—The practice of issuing writs of summons in blank by officers of the court, disapproved of. Where a ground of objection to a writ of summons is, that it was issued in blank, the facts connected with its issue must be clearly laid before the court, for nothing will be intended in favour of such an objection. *Grimshawe* v. *White*, 3 P. R. 320.

Words Struck out after Issue.] — Writs of fi. fa. were set aside, the words "executors of the last will and testament of J. M., deceased," having been unauthorizedly struck out after the issuing of the writs. *Kirkpatrick* v. *Harper*, 13 C. L. J. 325.

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2. *Writ of Summons.*

(a) *Amendment.*

Leave was granted to amend by inserting the name of the chief justice on payment of costs, and serving anew. *Cronyn* v. *Askin*, 2 L. J. 84.

Also by inserting an indorsement of the plaintiff's claim, and of the attorney's name who issued it, on terms of re-service. *Davis* v. *Carruthers*, 2 L. J. 209.

A writ of summons may, after its issue and before service, be amended on præcipe by substituting a new plaintiff, without an order; and on such amendment there is no necessity for resealing, nor need it appear on the copy served that any amendment has been made. *Worthington* v. *Boulton*, 6 P. R. 68.

Leave granted to issue nunc pro tunc a concurrent writ for service out of jurisdiction, to make good a service on a defendant whose domicil was within the jurisdiction, but who had been served out of it with a writ for service within. *Metcalf* v. *Davis*, 6 P. R. 275.

The absence of the signature of the clerk of the process upon a writ regularly sealed and issued by the deputy clerk of the Crown, is an irregularity which may be amended under the A. J. Act. *Labadie* v. *Darling*, 7 P. R. 355.

A writ of summons was issued in the common form, for a defendant residing within the jurisdiction, and personally served in a foreign country on the defendant, a British subject. On an application to set aside the writ, it appearing that the time allowed for appearance was a reasonable time, an amendment was allowed without costs, by the substitution of the form of a summons for a defendant without the jurisdiction, in lieu of the form used. *Gray* v. *O'Neil*, 7 L. J. 183.

Where a plaintiff obtains an order to amend his writ of summons, the defendant is entitled to notice of the amendment having been made, and probably to a copy of the amended proceedings, before he can be required to appear; and the plaintiff is not bound to amend, but may abandon his order. *Campbell* v. *Pettit*, 2 C. L. J. 211.

(b) *Disclosing Plaintiff's Address.*

[*See* C. L. P. Act, R. S. O. 1877 c. 50, s. 56; con. rule (1897) 143.]

Plaintiff or his attorneys must state the place of plaintiff's abode, if required, where there is good ground for believing he does not reside within the jurisdiction of the court within which the action is brought. *Houghton* v. *Great Western R. W. Co.*, 3 L. J. 70.

(c) *Return Day.*

A writ is returnable from the day of service, and the year runs from that date. *Swift* v. *Williams*, 5 L. J. 252.

A writ of summons is returnable on the day of its service. *Conroy* v. *Pearson*, 4 P. R. 199.

(d) *Service.*

Absconding Defendant.]—The writ of summons in ejectment was served upon the defendant's wife after he had left the country. An order to sign judgment against the husband was granted in default of appearance. *Trust and Loan Co.* v. *Jones*, 8 P. R. 65.

Foreign Corporations.] — The defendants were a foreign insurance company doing business in Ontario and having a head office for this Province at Toronto. The writ of summons was served on the local agent of the defendants' company at Ottawa: — Held, that the service was good. *Wilson* v. *Ætna Life Ins. Co.*, 8 P. R. 131.

Foreigner — *Temporary Residence.*] — Where a summons in the form prescribed by s. 2 of the C. P. L. Act, issued against a foreigner resident out of the jurisdiction and described as so resident, was served upon him during a temporary visit to Ontario, a final judgment in default of appearance, signed upon a special indorsement on such writ, was held regular. *Snow* v. *Cole*, 7 P. R. 162.

Service abroad—*Cause of Action.*]—Defendants, merchants in New York, telegraphed to the plaintiff, an attorney practising in Toronto, in answer to a telegram from him offering his services, to represent them in certain insolvency proceedings pending in the latter place. Plaintiff did so, and upon rendering his bill for services, which he did by letter, addressed to defendants at New York, defendants, by letter from New York, addressed to plaintiff at Toronto, refused payment:—Held, that the plaintiff could not recover, as both contract and breach arose out of the jurisdiction. *O'Donohoe* v. *Wiley*, 43 U. C. R. 350.

Held, following Spittal v. Jackson, L. R. 5 C. P. 542, that the words "cause of action" (R. S. O. 1877 c. 20, s. 49) do not mean the whole cause of action—i .e., breach and contract, but breach alone. *Ib.*

——— *Forcigner.*]—A copy of a writ of summons, instead of a notice thereof, had been served upon a defendant, not a British subject, outside of Ontario:—Held, that this was an irregularity which could not be amended, and that the copy and service of the writ should be set aside. *Henderson* v. *Hall*, 8 P. R. 353.

(e) *Signing and Sealing.*

Semble, that a writ of summons under 12 Vict. c. 63 was irregular if not sealed. *Smith* v. *Russell*, 1 C. L. Ch. 193.

A writ of summons marked in the margin as issued by "W. H. Ponter, D. C.," was held sufficiently signed. *Ib.*

A mandamus, under C. L. P. Act, s. 4, may be signed and issued by the clerk of the process. *Burdett* v. *Sawyer*, 2 P. R. 398.

The absence of the signature of the clerk of the process upon a writ regularly sealed and issued by the deputy clerk of the Crown, is an irregularity which may be amended under the A. J. Act. *Labadie* v. *Darling*, 7 P. R. 355.

Where a writ of summons, issued after the appointment of a new clerk of the process, was signed by his predecessor, and the name of the court was left blank in the copy served, an amendment was allowed, without costs. *Stevenson* v. *Williams*, 7 P. R. 358.

(f) *Special Indorsement.*

Claims which may be Indorsed.]—In actions on guarantees the writ of summons may be specially indorsed. *Jones* v. *Grcer*, 3 L. J. 91.

Accounts delivered, but not liquidated by admission of defendant, do not come within the meaning of the C. L. P. Act of 1856, s. 41, as to claims which may be specially indorsed. When such accounts have been specially indorsed and final judgment signed by defendant, a Judge will set aside the judgment without costs. *McKinstry* v. *Arnold*, 4 L. J. 68.

In an action on a merchant's account, where the special indorsement claimed interest:—Held, that defendants' non-appearance was an admission of the charge of interest. *Standing* v. *Torrance*, 4 L. J. 235.

A claim for interest on a demand for specific goods and chattels sold, indorsed on a writ of summons, is good, and cannot be disputed after judgment signed in default of appearance; but if the claim for interest is indorsed to gain an improper advantage, and judgment be signed for more than a plaintiff is entitled to, such judgment will be set aside. *Wearns* v. *Grand Trunk R. W. Co.*, 6 L. J. 62.

Semble, the indorsement for interest on a specially indorsed writ, is in general a matter of claim only. If it be correct, judgment goes rightly for it, without any inquiry, where the plaintiff claims, and the defendant does not dispute, it. *McKenzie* v. *Harris*, 10 L. J. 213.

A. and B., having become sureties for C., the receiver in a suit in chancery, who was to account yearly, were sued for C.'s default. The writ was specially indorsed, and judgment was signed for £490 16s. 10d.: — Held, that the claim was not such that a judgment upon a specially indorsed writ could be signed. *Buell* v. *Whitney*, 11 C. P. 240.

A writ of summons may be specially indorsed as for a balance due on a bill of exchange, even though some of the items forming part of the amount are unliquidated, there being a balance due on the bill itself. *Bank of Montreal* v. *Harrison*, 4 P. R. 331. See the next case.

An indorsement for the balance of an account, and for protest charges on an unaccepted draft:—Held, right as to the interest,

but not as to protest charges. *Sinclair* v. *Chisholm*, 5 P. R. 270.

Effect of Indorsement—*Particulars.*]—The particulars of claim upon a writ of summons specially indorsed to which the defendant appears do not bind the plaintiff as particulars under a declaration on the common counts, and in such a case, he must comply with a demand for particulars made by the defendant. *Huggins* v. *Guelph Barrel Co.*, 8 P. R. 170.

Sufficiency of Indorsement.]—A special indorsement on the writ of summons that the plaintiff claims a stated sum as the amount of an account rendered, is not sufficient particulars of demand. *Wilkes* v. *Buffalo, Brantford, and Goderich R. W. Co.*, 2 L. J. 230.

A subsequent judgment creditor of defendant cannot attack a prior judgment for insufficiency of the special indorsement on the writ on which it was obtained. But he may do so on the ground that it was allowed to be entered by fraud and to defeat his claim; for a judgment obtained on a writ specially indorsed is for this purpose to be looked upon in the same light as if founded upon a confession. *Wilson* v. *Wilson*, 2 P. R. 374.

An indorsement on a writ of summons as follows: "1861, December 31st. To balance of account due and owing by the within-named defendants at this date for work and labour done and performed by the plaintiff for the defendants, and at their request, and for moneys paid by the plaintiff for the defendants at their like request, $5,950.47," with the usual claim for interest from that date—was held a sufficient indorsement to entitle the plaintiff to sign judgment on default of appearance; and judgment was set aside only on payment of all costs, and giving security for the debt. *Smart* v. *Niagara and Detroit Rivers R. W. Co.*, 12 C. P. 404.

"The plaintiff claims $1,300 for debt, and $20 for costs, and if the amount thereof be paid to the plaintiffs or their attorney within eight days from the service hereof, further proceedings will be stayed. The following are the particulars of the plaintiffs' claim: 1865, June 10th. Balance of accounts due from defendant to plaintiff for goods sold and delivered and money advanced and lent, the items whereof exceeding in all five folios, $1,129.24." The plaintiffs also claimed interest, &c.;—Held, sufficient, on the authority of Hodsall v. Baxter, 1 E. B. & E. 884, and Fromant v. Ashley, 1 E. & B. 723. *McDonald* v. *Barton*, 2 C. L. J. 190.

The special indorsement set out in this case was—"To amount of machines $500," with several specified credits for cash received:—Held, sufficient. *Northern R. W. Co.* v. *Lister*, 4 P. R. 120.

If the writ is specially indorsed for interest, the notice required by C. L. P. Act, s. 15, may claim such interest without shewing the date from which it is to be calculated. *Worthington* v. *Boulton*, 6 P. R. 68.

(g) *Statement of Defendant's Residence.*

[*See* C. L. P. Act, R. S. O. 1877 c. 50, s. 5; con. rules (1897) 120, 127.]

See Hutchinson v. *Street*, 1 P. R. 367; *Uhlborn* v. *Chapman*, 2 L. J. 231; *Snow* v. *Cole*, 13 C. L. J. 223, 298.

XII. RECORDS AND ISSUE BOOKS.

1. *Amendment of Issue Books.*

See Welsh v. *O'Brien*, 29 U. C. R. 474; *McDermott* v. *Elliot*, 9 C. L. J. 259.

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2. *Amendment of Nisi Prius Record.*

See Rowland v. *Tyler*, 5 O. S. 500; *McLean* v. *Neeson*, T. T. 5 & 6 Vict., R. & J. Dig. 90; *Doe d. Corbett* v. *Sproule*, 6 O. S. 431; *Doe d. Crooks* v. *Cummings*, 1 U. C. R. 256; *Smith* v. *Shaver*, 6 U. C. R. 20; *Doe d. Bonner* v. *Burd*, 8 U. C. R. 9; *Arnold* v. *Higgins*, 1 P. R. 246; *Campbell* v. *Kemp*, 16 C. P. 244; *Grant* v. *Palmer*, 5 P. R. 301; *Wycott* v. *Campbell*, 31 U. C. R. 584.

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3. *Other Cases.*

Destruction of Record.]—See *White* v. *Hutchison*, Tay. 305.

Passing Record.]—See *Flint* v. *Spafford*, Tay. 435.

XIII. RULES.

(*See*, also, *post* XVIII.)

1. *Amendment of.*

See Ball v. *McKenzie*, T. T. 7 Vict., R. & J. Dig. 94; *Ball* v. *Mackenzie*, 1 U. C. R. 412; *Hibbert* v. *Johnston*, 1 U. C. R. 403; *Grant* v. *Taylor*, 2 U. C. R. 407; *Hunter* v. *Thurtell*, 4 U. C. R. 170; *Laurie* v. *Russell*, 1 P. R. 65; *Doe d. Burnham* v. *Simmonds*, 7 U. C. R. 598; *Re Burton*, 4 P. R. 237; *In re Allen*, 31 U. C. R. 458; *McCarthy* v. *Arbuckle*, 31 C. P. 48.

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2. *Costs.*

Rule to set aside a writ and the arrest for irregularity, and to discharge defendant out of custody, or to deliver up the bail bond to be cancelled, as the case might be, was made absolute with costs, although more was asked than could be granted, the defendant not being in custody and having given no bond. *Armstrong* v. *Scobell*, 3 O. S. 303.

Where each party failed on a material part of the rule, no costs were allowed. *Sullivan* v. *King*, 24 U. C. R. 161.

Where an application is not fully met, although sufficient be shewn for the discharge of the rule, costs will be refused. *Harvey* v. *Kay*, E. T. 2 Vict.

Where, on a motion as to a matter of practice, the affidavits are contradictory as to the facts, the rule will be made absolute or discharged without costs. *Orr* v. *Stabback*, T. T. 3 & 4 Vict.

If a rule be discharged on a preliminary objection, such as an error in the intituling of an affidavit, &c., costs will not be allowed; but otherwise if the objection be to the sufficiency of the materials on which the rule is moved. *Hughes* v. *Hamilton*, 2 U. C. R. 172. See *Teller* v. *Wilson*, 1 U. C. R. 417.

On the 1st March an order was made setting aside a judgment on payment of costs within a week. On the 8th the costs were tendered, and through error refused. On the same day the defendant, treating the judgment as set aside, filed and served his pleas, together with a demand for replication. Plaintiffs afterwards demanded the costs, and on non-payment issued execution:—Held, (1) that the tender of costs was in sufficient time; (2) that the tender was a compliance with the order setting aside the judgment on terms; (3) that the effect of the order, followed by the tender, was to set aside the judgment and execution, so as to make the filing and service of the pleas regular; (4) that where the conduct of the defendant's attorney was vexatious, this was a ground for refusing costs of the application. Plaintiffs afterwards to avoid judgment of non pros., took issue on the pleas, and then executed a power of attorney authorizing a party to demand payment of the costs, payment of which was refused on the ground that the power of attorney was not countersigned by the president of the company:—Held, (1) that the duty to pay the costs continued, notwithstanding the refusal to receive them when tendered; (2) that the filing of the replication was not, under the circumstances, a waiver of plaintiffs' right to costs; (3) that the plaintiffs were entitled to a substantive order directing the payment of the costs, and the costs of the application. Quære, as to the plaintiffs' right, under the circumstances, to costs as between attorney and client, to be paid by the attorney for the defendant, as a punishment for his vexatious conduct. *Gore District Mutual Fire Ins. Co.* v. *Webster*, 10 L. J. 190.

Where, on a question of damages, plaintiff claimed a certain amount of damages, and in addition a certain other amount of costs as part of his damages, but the Judge ruled against him as to both, reserving leave as to the damages, but not as to the costs; and the court made absolute the rule to increase the verdict as to the damages, and, unless defendant consented to add the costs, ordered a new trial without costs, and defendant consented to the addition of the costs—it was held that the plaintiff was entitled to the costs of the rule. *Stuart* v. *Mathieson*, 10 L. J. 245.

The point in this case being new, the court discharged without costs a rule nisi obtained to quash a conviction. *Regina* v. *Morris*, 21 U. C. R. 392. See also *Armstrong* v. *Stewart*, 28 C. P. 45.

Where a rule nisi to quash a conviction after return of a certiorari was not intituled in a cause, it was discharged, but, being on a technical objection, without costs. *Regina* v. *Mortson*, 27 U. C. R. 132.

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3. *Intituling.*

See McNeil v. *McNeil*, T. T. 2 & 3 Vict., R. & J. Dig. 2893; *Commercial Bank* v. *Vanorman*, T. T. 3 & 4 Vict., R. & J. Dig. 2893; *Hibbert* v. *Johnston*, 1 U. C. R. 403; *Bell* v. *Mackenzie*, 1 U. C. R. 412; *Grant* v. *Taylor*, 2 U. C. R. 407; *Heathers* v. *Wardman*, 4 U. C. R. 173.

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4. *Lapsed or Abandoned Rules.*

See Johnson v. *Durand*, Dra. 63; *Davidson* v. *Raddick*, 3 U. C. R. 82; *Ross q. t.* v. *Mewers*, 7 U. C. R. 374; *Keenan* v. *Fallon*, 1 C. L. J. 210; *Leslie* v. *Emmons*, 25 U. C. R. 243; *Jordan* v. *Gildersleeve*, 26 U. C. R. 361; *Regina* v. *Justices of Huron*, 31 U. C. R. 335; *Murphy* v. *McGuire*, 1 P. R. 33; *Heyland* v. *Scott*, 18 C. P. 52.

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5. *Reopening.*

See Palmer v. *McDonell*, 6 O. S. 158; *Stewart* v. *Davis*, 5 U. C. R. 268; *Re Chamberlain and United Counties of Stormont, Dundas, and Glengarry*, 45 U. C. R. 26.

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6. *Other Cases.*

Affidavits—*New Matter.*]—See *Gavan* v. *Lyon*, Tay. 434.

Affidavits and Papers Filed.] — See *Heaveth* v. *Ward*, 17 C. P. 667; *Dickey* v. *Mulholland*, 2 P. R. 169.

Appeal — *Rule Nisi.*]—See *Robinson* v. *Richardson*, 32 U. C. R. 344.

Date.]—See *Ward* v. *Vance*, 3 P. R. 210.

Enlargements.]—See *McDonell* v. *Farewell*, 8 C. P. 54.

Forum.] — See *Newman* v. *Niagara District Mutual Fire Assurance Co.*, 25 U. C. R. 435.

Issue of Rule Absolute.]—See *Commercial Bank* v. *Hughes*, 4 U. C. R. 167.

Issue of Rule Nisi.] — See *Brown* v. *Cline*, 27 U. C. R. 87.

Objections in.] — See *Regina* v. *Desjardins Canal Co.*, 27 U. C. R. 374.

Parties to Rule—*Persons not Served.*]—See *Commercial Bank* v. *Hughes*, 4 U. C. R. 167.

Rule Nisi to Quash By-law—*Who may Shew Cause.*]—See *Re Mace and County of Frontenac*, 42 U. C. R. 70; *Re Gilchrist and Township of Sullivan*, 44 U. C. R. 588.

Stay of Proceedings.]—See *City Bank* v. *Eccles*, 5 U. C. R. 633; *Hastings* v. *Champion*, 6 O. S. 29.

Verbosity.]—See *Re Nash and McCracken*, 33 U. C. R. 181.

XIV. Second Application.

Adjudicated Cause.]—The court fully recognizes the English rule of H. T. 3 Jac. I., which orders that no cause once argued and determined, shall again be brought before the court. *Boulton* v. *Randall*, Tay. 127.

Application not Disposed of.]—Where a rule to set aside a judgment was enlarged from practice court to a day after term in chambers, to afford an opportunity of correcting a defect in the service, and was not then disposed of, as the service could not be completed in time:—Held, that the defendant might apply again in the following term. *Huff* v. *Cameron*, 1 P. R. 255.

By Leave—*Costs.*]—Where the summons to shew cause why a judgment should not be set aside, was discharged with costs, and leave granted to make a second application for the same purpose, the second summons was made absolute only on the terms of paying costs of the judgment and of both applications. *Watts* v. *Little*, *Watts* v. *Loney*, 6 L. J. 233.

Change in Forum.]—Semble, that where an application, cognizable in chambers, has been made to the court and discharged, but not on the merits, it may be afterwards renewed in chambers. *Crooks* v. *Dickson*, 15 C. P. 528.

Discovery of New Fact—*Costs.*]—A second application for the same cause will not in general be entertained in chambers, unless it be sworn that some new fact has, since the former application, been discovered, and which if known to the Judge who disposed of the former application would probably have changed his opinion. Where the second application was entertained upon the supposition that the new fact was of sufficient importance to alter the aspect of the case, and, after argument, it did not appear to have any such effect, the application was refused with costs. *Pratt* v. *Jones*, 10 L. J. 271.

Insufficiency of First Summons — *Costs.*]—Where defendants called upon plaintiff to shew cause why defendants should not have leave to plead several pleas, and one of them was uncertain, as to it the leave was refused, and leave to amend it by severing it and making two good pleas was also refused, because the summons was merely to shew cause why the plea, as it was originally proposed to be pleaded, should not be pleaded. Defendants obtained a second summons, calling upon plaintiff to shew cause why the pleas should not be pleaded in the amended form, and that summons was made absolute; and as what was asked in the second application should have been made part of the first, the second summons was made absolute only on payment of costs. *Wingall* v. *Enniskillen Oil Co.*, 10 L. J. 216.

Irregularity of First Summons.]—A summons having been obtained for the trial of a contested election, the relator, finding his proceedings irregular, notified defendant not to appear, and that it was his intention to proceed de novo: — Held, the objection urged against the election being a material one, that the relator was not precluded from a second application. *Regina ex rel. Metcalf* v. *Smart*, 10 U. C. R. 89.

Previous Application not Disposed of —*Abandonment.*]—Defendants obtained a rule nisi in practice court to set aside a judgment in ejectment and hab. fac. poss. issued thereon, which was enlarged into chambers and then into the full court, the enlargements being obtained to enable defendants to file affidavits shewing the relief given them by the court of chancery against said judgment, on a contemplated application there. These affidavits, it was agreed by plaintiff's counsel, might be used to support the rule already issued, though necessarily sworn subsequent to it; but, notwithstanding this, he afterwards insisted to defendants' counsel that the affidavits could not, either by the practice or under the agreement, be used by the defendants. Defendants thereupon moved a new rule in similar terms to the other, in order that the affidavits referred to might come before the court, stating at the same time all the facts connected with the case, and the reasons for making the second application:—Held, on motion to set aside this rule as vexatious, that it did not in its facts come within the cases in which a second application was held to be wrong, as neither the court nor any Judge had disposed of the defendants' application up to the time of moving the second rule, and the facts of the case had all been mentioned on the motion for the same. Held, also, that the statement made by defendants' counsel, on moving the second rule, as to the course he was taking and his reasons for taking it, in effect amounted to an abandonment of the original rule. Semble, that the special application to set aside the rule was unnecessary, as the objection taken could have been urged on shewing cause to it. Quære, whether the affidavits in question could, under the agreement referred to, have been read in support of the original rule. *Heyland* v. *Scott*, 18 C. P. 52.

Previous Order — *Abandonment* — *Grounds.*]—On an application to set aside a judgment of non pros.:—Held, that, even if the judgment were void, and the plaintiff not concluded by his laches, his once obtaining an order to set aside the judgment, which order he virtually abandoned, precluded him from again applying; and semble, that parties should not be harassed with repeated applications on the same grounds; and if on different grounds known at the time of the first application, such grounds cannot be urged in a subsequent application. *Herr* v. *Douglas*, 4 P. R. 102.

Rescission of Discharge of Previous Rule.]—A demurrer was set down by the plaintiff before the opening of the court on the first day of Michaelmas term for argument on the second paper day, and afterwards, about twelve o'clock on the same day, it was set down by the defendant for argument on the first paper day. During the same term, in practice court, a rule to strike out the demurrer entered by defendant was discharged, on the ground that the plaintiff's entry was improperly made before the court had met. The court, however, heard the cause on the day for which it had been entered by the plaintiff, holding that he had a right to set it down before the opening of the court. A motion in practice court in Easter term following to rescind the discharge of the previous application there, was refused as being contrary to established practice, but without costs, as the Judge who made the first order wished it to be moved against, and, if possible, rescinded. *Moody* v. *Dougall*, 3 P. R. 145.

XV. Service of Papers.

(*See* also *ante* XI.)

1. *Acceptance, Admission, or Agreement.*

Acceptance.]—Notice of assessment was sent to the sheriff for service, and was returned by him to the plaintiff's attorney with the following indorsement: "Received a copy of the within, for defendant," signed by "E. & G.," attorneys, in the handwriting of G. For the plaintiff it was shewn that E. & G. were constantly in the habit of accepting service for defendant; but G. stated that he only consented at the bailiff's request to hand such notice to defendant as soon as he should see him, and that the indorsement was intended not as an acceptance of service, but as shewing a willingness to hand the notice to the defendant. There was no denial that E. & G. were in the habit of accepting service for defendant, nor any assertion that G. told the bailiff what he intended by the receipt indorsed: — Held, a sufficient service. *Rutledge* v. *Thompson*, 1 P. R. 275.

A defendant accepted service of notice of action, adding, "and agree to accept the same as a sufficient notice of action to me under the statute:"—Held, that he could not rely on a defect therein. *Donaldson* v. *Haley*, 13 C. P. 87.

Admission.] — A defendant, after admitting service of an attorney's bill, cannot question the genuineness of the signature of the attorney on the copy he received. *Berry* v. *Andruss*, 3 O. S. 645.

An admission of service indorsed on the copy of the bill of costs sued for by the defendant's attorney for the purposes of trial, must be taken to admit an effectual service. *Ib.*

Agreement between Attorneys.] — Where it was agreed between the attorneys of the parties to a cause (the one resident in Whitby and the other in Collingwood), that papers should be served by mail:—Held, that the time of the service of notice of trial commenced to count from the time it was mailed by plaintiff's attorney, and not from the time of its receipt by defendant's attorney. Semble, where such a mode of service is agreed upon, the paper mailed, in the event of loss or miscarriage, is entirely at the risk of the attorney to whom sent. *Robson* v. *Arbuthnot*, 3 P. R. 313.

Plaintiff's and defendant's attorneys had an arrangement between themselves by which papers in the suit should be sent by mail. The notice of trial was posted the day before the last for giving notice, but reached defendant's attorney one day too late. It was shewn that the practice of both attorneys had been to admit service as of the day of receipt:—Held, that the notice of trial must be set aside. Robson v. Arbuthnot, 3 P. R. 313, distinguished. *McDonough* v. *Alison*, 9 P. R. 4.

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2. *Person Served.*

Agent of Attorney.]—The service of a summons to compute on the agent of the defendant, an attorney, is sufficient. *Spragge* v. *McMartin*, T. T. 1 & 2 Vict.

Semble, that service upon the agent of an attorney, who is himself the defendant in the action, and not representing another, is good. *Bank of Upper Canada* v. *Robinson*, 7 U. C. R. 478.

Delivery of a copy of the rule nisi to discharge a clerk from his articles, the attorney having absconded, to the town agent of the attorney, and leaving copies at his last place of residence and at his office:—Held, sufficient service. *Re McGregor*, 15 C. P. 54.

A summons cannot be taken out by an agent for one attorney and served on himself as agent for another attorney. *Ontario Bank* v. *Fisher*, 4 P. R. 22.

Attorney—*No Retainer.*]—Defendant was arrested and gave bail, who to relieve themselves put in special bail. The attorney for the bail gave notice, and signed himself "defendant's attorney," and all the subsequent papers in the cause were served on him. Judgment was obtained, and defendant arrested on ca. sa., when it was shewn that defendant had never employed the attorney. The court set aside the whole proceedings. *McMartin* v. *McKinnon*, 5 O. S. 72.

——— *Service away from Home.*]—It is not irregular, under C. L. P. Act, s. 61, to serve a declaration in Toronto on a country attorney; and ten days' notice to plead is not necessary under such circumstances. *City Bank* v. *McKay*, 6 P. R. 298.

——— *Wife of Party — Personal Service Necessary—Party Abroad.*]—Where an order for payment of costs is sought which may, under C. S. U. C. c. 24, s. 19, be followed by execution, the service of the summons must, in general, be personal. The court may, under special circumstances, dispense with personal service. Where defendant is abroad, or it is known where he lives, personal service will not be dispensed with; perhaps not even if it be made to appear that defendant is keeping out of the way to evade service. Service on the attorney on the record, and on defendant's wife, it not being shewn that the defendant was keeping out of the way to avoid service, was held insufficient, though it was shewn that he had left Upper Canada and gone to reside in the United States. *Regina* v. *Simpson*, 3 P. R. 339.

Attorney-General.] — In an action defended by the Crown, notice of trial was served on the attorney-general, who had previously been raised to the bench:—Held, that such notice was a nullity. *Doe d. McMillan* v. *Duane*, 5 O. S. 676.

Clerk of Attorney.] — Papers are not regularly served by being delivered to the clerk of the attorney at a distance from the attorney's residence, when the clerk is casually at the place of service. *Tiffany* v. *Bullen*, 5 O. S. 137.

Defendant Personally—*Appearance by Attorney.*]—Where the defendant had appeared by attorney, and the plaintiff after declaration signed interlocutory judgment and served notice of assessment of damages on the defendant himself, and assessed damages upon that notice—the court held the assessment irregular, and that it was not necessary that any notice should be given to the plaintiff of the defendant's intention of moving to set

aside the proceedings for such irregularity. *Bishop* v. *Lindsay*, 6 O. S. 264.

See, also, *Ferrie* v. *Tannahill*, Dra. 327.

Partner of Attorney.]—Where an attorney, residing and practising in the county where the action was brought, after appearing there for defendant, formed a partnership with another attorney carrying on business there, and than changed his actual residence to another county, leaving his name in the proper books in Toronto as still of the former county, and occasionally afterwards attended and did business in the former county, service of notice of trial on his partner there was held to be good service, notwithstanding a private arrangement that the partner should only attend to new business. *Baby* v. *Langlois*, 1 C. L. J. 209.

Servant of Attorney.]—Notice of trial for 3rd April, and issue book, were handed to a servant of defendants' attorney on the evening of 26th March. The next day they were given by her to her master:—Held, that their service only dated from the 27th,and was therefore set aside as irregular. Quære, as to the proper mode of taking the objection. *Hogg* v. *Turner*, *Wright* v. *Perkie*, 2 C. L. J. 207.

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3. *Place of Service—Where not Personal or on Attorney.*

(*See* con. rule (1897) 329 *et seq.*)

Attorney's Private House.]—Held, that service of a notice of trial on a servant girl, at the private house of an attorney, is good, and that the service counts from the time the papers are left, and not from the time they come into possession of the attorney. *Murray* v. *Great Western R. W. Co.*, 6 P. R. 211.

Attorney's Vacant Office.]—It is not a sufficient service of notice of trial to leave it at the attorney's office, no person being there. *Brewer* v. *Bacon*, 5 O. S. 343.

Leaving a notice of trial at an attorney's office is not a service, unless it is sworn to have been given to some person there. *Consumers' Gas Co.* v. *Kissock*, 5 U. C. R. 542.

Held, that the service of a notice of trial by putting the paper under the door of the attorney's office, the attorney swearing that he was absent from home at the time, and did not return till the day of the assizes, when he first heard of such service, was irregular; and that the verdict must be set aside, but without costs, as the attorney should not have absented himself on the eve of the assizes. *Grand River Navigation Co.* v. *Wilkes*, 8 U. C. R. 249.

A notice of trial was put under the door of the office of the defendants' attorney (the door being locked) about half past five on the last day of service. It did not come into hands of the defendants' attorney until the next morning:—Held, that the service did not count until the latter period. *McCallum* v. *Provincial Ins. Co.*, 6 P. R. 101.

A clerk, on the last day of notice of trial, while on his way to serve it, met the defendant's attorney's partner, who told him to go to the office and serve it there. When he arrived no one was in; he put it under the door, and it was not received until next day. The Christian name of defendant was wrong in the style of cause:—Held, that the manner of service was good, on the ground that the partner of the attorney refused to receive the papers, but that the style of cause being wrong, the notice must be set aside. *Carnegie* v. *Rutherford*, 6 P. R. 102.

Defendant's Place of Abode.]—The affidavit of service of a rule nisi to compute, must shew (if a personal service be not effected), that the copy was served at the defendant's place of abode on some grown up person connected with his household. *Mittleberger* v. *Whitehead*, M. T. 1 Vict.

Defendant's Outside Premises.]—The serving a notice of assessment, by taking it to defendant's house and throwing it over his fence into his yard door, telling his son who was present that it was a notice of assessment for his father, is an insufficient service, where the son refused to have anything to do with it, and where the father, who was absent from home, knew nothing of it till after the assizes. *McGuin* v. *Benjamin*, 1 C. L. Ch. 142.

Defendant's Last Place of Residence.]—An affidavit of service on a grown up person, naming her, at defendant's last place of residence, without shewing that she was in any way connected with defendant, or resident on the premises:—Held, insufficient. *Carlisle* v. *Orde*, 7 C. P. 456.

Defendant's House—*Nailing on Door.*]—It is not essential to the due service of the notice made necessary by s. 1 of 20 Vict. c. 23, that it should be made in the manner prescribed by that Act. Where, therefore, the sitting member removed himself and his family so as to avoid a personal service, and continued absent or concealed for the fourteen days allowed by the statute for personal service or service at his residence upon a grown up person of his family, service by nailing a copy of the notice on the door of his house, and by leaving a copy with his brother, who was also his agent, was held sufficient. *In re Essex Election*, 4 L. J. 70.

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4. *Posting in Crown Office.*

District.]—A copy of a notice can only be affixed in the office of the deputy clerk of the Crown in the district in which the action is brought. *Chase* v. *Gilmour*, 6 U. C. R. 604.

Personal Service of Declaration—*Subsequent Proceedings Posted.*]—Defendant in a county court suit appeared in person, but gave no address for the service of papers, as required by ss. 52 and 53 of the C. P. L. Act, and C. C. rule of court No. 131. The declaration was served on him personally and pleas filed. The person who served the pleas for him refused to receive the issue book, notice of trial, &c., and they were stuck up at the office of the clerk of the court. The plaintiff took a verdict on the 20th April, defendant not appearing, and defendant was informed of it on the 27th. No steps were taken by him to stay proceedings, and final judgment was entered on the 5th May. Defendant in Easter term following moved for a new trial:—Held, that the plaintiff's proceeding was

warranted by the rule of court, notwithstanding the declaration had been personally served. Semble, that if it were irregular, the defendant, on being aware of the verdict, should have moved to stay the plaintiff's proceedings, and that at all events he should have done so if he wished to move upon the merits. O'Neill v. Everett, 3 P. R. 98, distinguished. *Covert* v. *Robertson*, 31 U. C. R. 256.

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5. Time of Service.

Computation.]—Held, that the "two clear additional days to the time now allowed by law" for service on the agent of a country attorney, under 34 Vict. c. 12, s. 12, (O.), means the insertion of two days between the day of service and the day of the happening of the event to which the notice relates. A service of notice of trial on the Toronto agent of a country attorney on Saturday for Monday week would be sufficient. *Nordheimer* v. *Shaw*, 6 P. R. 14.

Holiday.]—Service of a notice on Good Friday is good. *Clarke* v. *Fuller*, 2 U. C. R. 59.

Short Service.]—Service of a summons on a Saturday after three o'clock p.m., returnable on Monday following, is not good service, being in effect service of a summons on the day on which it is returnable, which is unreasonable. *Ball* v. *Crowdley*, 3 L. J. 131.

Held, that service on the defendant's attorney at his house at 9.30 p.m. on Saturday of an order and appointment to examine the defendant at 2 p.m. on the following Tuesday, was irregular, the notice not being sufficient. Held, also, that rule of court 135 applies to the service of orders and appointments to examine, and that this service must be treated as if made on the following Monday. *Senn* v. *Hewitt*, 8 P. R. 70.

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6. Other Cases.

Affidavit of Service.]—Affidavit of service of rule for attachment and allocatur for costs is good, though it state the service as made on the day of a certain month, instant, without stating the year. *Regina* v. *Tomb*, 4 U. C. R. 177.

Fact of Service—*Conflicting Affidavits.*]—A rule nisi to set aside interlocutory judgment, &c., was granted on defendant's affidavit, stating that he had been served with no papers since the writ of summons, nor had any come to his knowledge, or been left for him at his house or place of business. This was met by affidavits swearing positively to service of declaration and notice of assessment, but not shewing how the service was made:—Held, sufficient, and that the rule must be discharged with costs. *Harper* v. *Branton*, 1 P. R. 267.

Original Served.] — An order may be made on a verified copy of a Judge's summons, where the original is served by mistake. *Tift* v. *Wallace*, M. T. 2 Vict.

True Copy.]—In general there must be a true copy of a summons served; at least there must be nothing calculated to mislead in the copy served. *Woolley* v. *Tweedle*, 3 L. J. 185.

XVI. Setting aside Proceedings for Irregularity.

1. Applications to Set aside.

Evidence on Applications.] — Where proceedings are objected to as defective in form, copies must be produced in support of the application. *Smart* v. *Demerce*, 3 O. S. 440.

Where a defendant moved to set aside an alias writ for want of an original to warrant it, and in his affidavit did not shew that no original writ had issued, his rule was discharged with costs. *Hughes* v. *Hamilton*, 2 U. C. R. 172.

In an application of strict technical right to set aside proceedings for irregularity, the court will not conjecture circumstances in favour of the applicant, who should support his case by the best and fullest evidence, and not, as in this case, with defective materials. *Leslie* v. *Foley*, 4 P. R. 246.

In such an application it will not be assumed by the court that the affidavit made by "the agent" of the person, is the professional Toronto agent of such person, and that such person is a practising attorney. *Ib.*

When an application is made to set aside or amend a writ or other proceeding, by reason of anything contained therein or omitted therefrom, such writ or other proceeding, or a copy of it, must be brought before the court; but if the application be to set it aside because obtained irregularly, then it is sufficient to shew the facts upon affidavit. *Attorney-General* v. *McLachlin*, 5 P. R. 63.

Intituling of Papers.] — Where in a cause the parties' names had been stated in different ways by the attorneys on both sides in the affidavits and proceedings, the court discharged a rule for setting aside the proceedings which was not intituled in the true style of the cause. *Grant* v. *Taylor*, 2 U. C. R. 407.

Where defendant moved to set aside a ca. sa. for a variance between the writ and the judgment, by the insertion of the initial letter of a Christian name of the defendant in the writ which was not in the judgment, and used affidavits in the title of which the initial letter was also inserted:—Held, that they could not be read, and as without them the writ did not appear to have issued in the cause, the rule was discharged. *Williamson* v. *McDonell*, T. T. 7 Vict.

Notice of Motion.]—The notice of motion to set aside a writ of trial under 8 Vict. c. 13, s. 54, must specify the day on which the party will apply. *Bank of Montreal* v. *Denison*, 3 U. C. R. 136.

Pointing out Irregularity—*Necessity for.*]—Where a notice is required to be given of any irregularity, and the notice does not describe what the irregularity is, if the proceedings be set aside, costs will not be allowed. *Henderson* v. *Jones*, H. T. 3 Vict.

Any irregularity complained of must be specifically pointed out in the rule, or so clearly referred to as contained in the affidavits filed as not to be mistaken, otherwise the rule will be discharged. *Thompson* v. *Zwick*, 1 U.

C. R. 338; *Hamilton* v. *Howcutt, Hibbert* v. *Johnson*, 1 U. C. R. 403; *Gordon* v. *Carrick*, 2 U. C. R. 379.

Where a defendant moved to set aside the service of a writ of ca. re., and it appeared that the process served was a testatum and not an original writ, the rule was discharged with costs. *Tool* v. *Low*, 2 U. C. R. 95.

Where a rule nisi is moved to set aside the service of process on grounds disclosed in affidavits filed, and the irregularity complained of is in the copy of process annexed to the affidavits, and does not appear in the affidavits alone, the rule should be discharged. *Bates* v. *McMahon*, 2 U. C. R. 178; *Luster* v. *Boulton*, 5 U. C. R. 632.

Where the rule was moved for improperly allowing the amendment of the venire, and it appeared it was the jurata and not the venire that was amended, the rule was discharged. *Jarvis* v. *Thompson*, 2 U. C. R. 271.

A rule nisi to set aside a verdict because notice of trial was served too late was discharged, because it was not stated in the rule that any affidavits were filed. *McKay* v. *McDiarmid*, 1 P. R. 58.

The court discharged with costs a rule nisi to amend a Judge's order, because the pleadings, on which the rule purported to have been moved, were not in fact before the court, nor were they disclosed by the affidavits filed, and it was impossible rightly to decide the case without reference to them. *Crooks* v. *Dickson*, 15 C. P. 528.

It is not a sufficient compliance with the rule requiring irregularities intended to be moved against to be shewn in the summons, that it can be collected from the affidavits filed and referred to in the summons what the irregularities are. *Smith* v. *Smith*, 4 P. R. 354.

Where the irregularity pointed at in the summons was, that an alias writ against lands had issued without a suggestion or revival of judgment, or an order for the issue of the execution, or other pre-requisites of the C. L. P. Act, and the irregularity pointed at in the affidavit was the issue of an alias writ without the return of the original:—Held, that the summons did not sufficiently point out the irregularity. *Ib.*

See Arnold v. *Fish*, 5 O. S. 140; *Matthie* v. *Lewis*, T. T. 5 & 6 Vict., R. & J. Dig. 2874.

Regularity.]—A party moving to set aside the proceedings of another for irregularity must be strictly regular in his own. *Hunter* v. *Thurtell*, 4 U. C. R. 170.

Status of Applicant — *Contempt.*]—Quære, as to the right of a defendant in contempt for non-appearance to a subpœna issued in an information of intrusion, but not actually arrested, to move quia timet to set aside the process issued against him. *Attorney-General* v. *McLachlin*, 5 P. R. 63.

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2. *Waiver of Irregularities.*

[See R. G. Prac. T. T. 1856, No. 106; con. rule (1897) 311.]

By Admission in Affidavit.]—The affidavits for an attachment against an absconding debtor must state that defendant is a resident of the Province, and possessed of property. Quære, whether the fact of a defendant stating in an affidavit used as an application to set aside the writ, that he was a resident and possessed of property, cured the defect. *Hart* v. *Ruttan*, 23 C. P. 613.

By Appearance.]—A summons in the nature of a quo warranto not tested on the day it is issued, is irregular; but entering an appearance waives the irregularity. *Regina ex rel. Linton* v. *Jackson*, 2 C. L. Ch. 18.

A rule nisi to quash a by-law, obtained near the end of term, was made returnable eight days after service. Defendants appeared, and objected that the rule should have been to shew cause on a day certain:—Held, that this objection, if fatal, was waived by the appearance. *Perry* v. *Town of Whitby*, 13 U. C. R. 564.

Where in an application to set aside proceedings (as in the case of an action against a justice of the peace for acts done under a conviction which had not been quashed) the facts relied upon would be a pleadable bar to the action, laches will not be imputed to defendant because he does not apply before entering an appearance, though it might if he waited until after the expiration of the time for pleading had expired. *Donelly* v. *Tegart*, 5 P. R. 225.

A summons to set aside a declaration (the venue being laid in the proper county), on the ground that the writ issued in a local action in the wrong county, was discharged, the defendant having duly appeared to the writ. *Warcup* v. *Great Western R. W. Co.*, 6 P. R. 250.

By Appearance at Trial.]—A defendant, having appeared and examined witnesses on an assessment of damages carried down to a district court by writ of trial from the Queen's bench, under 8 Vict. c. 13, s. 54, waived any irregularity in the prior proceedings in the Queen's bench. *Small* v. *Beasley*, 3 U. C. R. 141.

Where the defendant is represented at the trial and has made his defence, the court will not set aside the proceedings on the ground that no notice of the execution of the writ of inquiry had been given to him. *Farrish* v. *Shields*, 7 U. C. R. 525.

By Appearance on Motion.]—An attaching order had been served by leaving a copy at the store and residence of the garnishee. Service of a summons to pay over was accepted for him by a practising attorney, and this summons, with such acceptance indorsed, was afterwards served in the same way as the order. On the return of it another attorney appeared for the garnishee, and objected that the acceptance was given without authority, and that the service was insufficient:—Held, that personal service of the summons and order was not indispensable, but that the service in this case, if moved against would have been insufficient, as it was not shewn that personal service could not have been effected, or that the papers had come to the knowledge of the garnishee. *Ward* v. *Vance*, 3 P. R. 130.

Held, also, that in this case, no such application having been made, the acceptance should be held sufficient, and that any defect in the service of the attaching order was thus cured. *Ib.*

Held, that the appearance of the garnishee by another attorney duly authorized, was a waiver of any objection to the service of the summons to pay over. *Ib.*

By Arguing Demurrer.]—A plaintiff, apprehensive that he may have signed interlocutory judgment too soon, cannot cure his irregularity, by filing and serving a replication and notice of trial conditionally, to take effect in case the judgment should be set aside. Semble, however, that the defendant, by arguing the conditional replication on a demurrer, may waive its irregularity. *McPherson* v. *Dickson*, 5 U. C. R. 476.

By Bail.]—The defendant does not, by putting in special bail, waive objections not of a technical nature. *McGuffin* v. *Cline*, 4 P. R. 134.

Defendant putting in bail after application made to set aside an arrest for irregularity, waives the application. *Racey* v. *Carman*, 3 L. J. 204.

By Delay.]—Irregularity in signing interlocutory judgment held cured by defendant's laches. *Brown* v. *Rose*, 1 C. L. Ch. 182.

An application made after six years, to set aside proceedings as contrary to good faith, was refused. *Gore Bank* v. *Gunn*, 1 P. R. 323.

Where an appearance is entered in due time, and judgment for want of appearance is signed, and defendant is guilty of laches, and files an affidavit of merits, the judgment will not be set aside. *Bank of Upper Canada* v. *Van Voorish*, 4 L. J. 232.

The plaintiff's attorney having conducted his proceedings with little care, the defendant's rule to set his irregular proceedings aside, though moved too late, was discharged without costs. *Harrington* v. *Fall*, 15 C. P. 541.

Held, that an application on the part of an attorney, resident in the country, to set aside a notice of trial served on his Toronto agent as irregular, and made within eight days after such service, is not too late. *Anderson* v. *Culver*, 10 L. J. 159.

Held, that a defendant complaining of an insufficient service of notice of trial in a cause pending in a superior court, but sent to a county court for trial under 23 Vict. c. 42, s. 4, may, without waiving the irregularity, apply within four days after the trial to the county Judge for a stay of proceedings till the fifth day of the following term of the superior court of law. 2. That he may, within the like period, make a similar application to a Judge of one of the superior courts of law sitting in chambers. Quære, if he delay for seven days after the verdict without making an application of any kind, has he not thereby waived the irregularity? Proceedings on the execution were stayed till the fifth day of the term to enable the defendant to take the opinion of the full court on the latter point. *Fisher* v. *Green*, 2 C. L. J. 14.

When in a notice to proceed one of the plaintiffs named was omitted:—Held, notwithstanding Doe d. Read v. Patterson, 1 P. R. 45, not a nullity but merely an irregularity, and that such irregularity had been waived by the defendant's laches, he having taken no objection until over a year afterwards. *Kirkpatrick* v. *Harper*, 13 C. L. J. 325.

A notice of trial in a suit against two defendants, with the name of only one defendant therein, is a nullity, and the rule to set aside the nonsuit for not confessing lease, entry, and ouster must be absolute. *Doe d. Read* v. *Paterson*, 1 P. R. 45.

Held, that a defendant has eight days to move to set aside a declaration for irregularity. *Hall* v. *Grand Trunk R. W. Co.*, 7 P. R. 335.

Defendant precluded both by delay and acceptance of service of the writ from moving to set aside proceedings. *Regina* v. *Stewart*, 8 P. R. 297.

By Enlargement.]—Preliminary or formal objections to affidavits filed on an application for a writ of trial, which has been enlarged until the last day for obtaining such writ, should not in general be allowed to prevail after such enlargement. *Taylor* v. *McNeil*, 3 L. J. 131.

By Moving for Leave to Defend.]—Where the judgment in ejectment is irregular, and the landlord when first applying to a Judge in chambers to be admitted to defend as landlord, takes no notice of the irregularity, it is waived. *Doe d. Henderson* v. *Roe*, 4 U. C. R. 366.

By Moving for Time to Plead.]—The plaintiff entered common bail for defendant, without having filed an affidavit of the service of process; declaration was served and plea demanded. Defendant moved for further time to plead and to change the venue:—Held, that the entry of common bail was an irregularity only, which the defendant had waived. *Bridges* v. *Case*, 4 U. C. R. 127.

By not Excepting to Previous Irregularities.]—If a defendant lie by and allow plaintiff to take several steps, he thereby waives previous irregularities in the proceedings. He should take the earliest opportunity of excepting to them; and if he move a Judge in chambers, he must state all the irregularities he relies on, and cannot afterwards in term resort to other irregularities which existed at the time of the application to the Judge, but were not then objected to. *Arnold* v. *Fish*, 5 O. S. 140.

Where the defendant appeared by attorney, but the plaintiff, having overlooked it, entered an appearance for him according to the statute, and served the declaration on the defendant personally:—Held, that, after judgment by default and notice of assessment served on the defendant, he was too late in applying to a Judge in chambers to set aside the proceedings. *Ketchum* v. *Keefer*, 6 O. S. 56.

Where defendant had been arrested and discharged from custody for non-payment of the weekly allowance without entering appearance, and the plaintiff entered an appearance for him, as if on serviceable process, and filed and served a declaration, and signed interlocutory

judgment, the court considered the appearance entered by the plaintiff a nullity; but, as defendant did not move promptly against the next proceeding, the interlocutory judgment was set aside without costs, defendant having filed an affidavit of merits. *Homer* v. *Brousseau*, E. T. 4 Vict.

A defendant, after plea, obtained an order to stay proceedings until security was given for costs, and the plaintiff delivered him a bond for such security, and at the same time gave notice of trial, and defendant signed an agreement to admit documents at the trial, but afterwards returned the bond, and gave notice that he would move to set aside plaintiff's proceedings if he went to trial; the plaintiff, however, tried his cause:—Held, that defendant had waived any irregularity or insufficiency in the bond. *Doe d. Leonard* v. *Myers*, 2 U. C. R. 382.

Where an action against an absconding debtor had been carried to judgment and execution against his lands, and he moved to set aside the execution for a variance between it and the judgment, and the plaintiff was allowed to amend:—Held, that he was afterwards too late to object to irregularities in earlier proceedings, as he should have brought them forward on his first motion. *Dougall* v. *Lewis*, T. T. 5 & 6 Vict.

A motion to set aside proceedings under the writ of trial, when the irregularity is in the writ itself and not in the subsequent proceedings, is bad. *Bank of Montreal* v. *Denison*, 3 U. C. R. 136.

Where the objection is to the service of the writ of summons, an application to set aside the interlocutory judgment afterwards signed, is wrong; the first irregular proceeding must be moved against. But, as defendants had not appeared in consequence of the exception, they were relieved on bringing into court the amount of the damages assessed, and paying costs. *Cingmars* v. *Equitable Fire Ins. Co.*, 2 P. R. 207. See *McDonnell* v. *Ketchum*, 2 P. R. 326.

Where the service of the notice of trial is irregular, an application to set aside the verdict, not the notice of trial or the service, is correct. *Grand River Navigation Co.* v. *Wilkes*, 8 U. C. R. 249.

On an application to set aside the service of a declaration, on the ground that no copy of the writ of summons had been served on defendant, the application must be to set aside the declaration filed, for this is the first proceeding, and that being set aside the service falls with it. Quære, as to the delay in making the application. *Patterson* v. *McCollum*, 2 C. L. J. 70.

A party must object to irregular or defective proceedings, by immediate application to have them amended at the expense of him whose proceedings they are; for if he allow a fresh step to be taken in the cause without doing so, he will have waived the irregularities. *Harrington* v. *Fall*, 15 C. P. 541.

In the writ of summons and declaration the defendant was described as "Joseph Aloysius Donovan," and in the affidavits for a rule to attach for not answering questions on an examination and in the rule as "Joseph A. Donovan." But in the order for his examination, and the appointment made under it, he was also described as "Joseph A. Donovan," and it was admitted that he attended upon them and was examined, and stated that he was the defendant, the depositions being intituled in the same way:—Held, that the objection, which would otherwise have been fatal, had been waived. *O'Donohoe* v. *Donovan*, 41 U. C. R. 591.

See Covert v. *Robertson*, 31 U. C. R. 256.

By Notice of Trial.]—The plaintiff accepting a plea and giving notice of trial, cannot afterwards object that an appearance has not been entered for defendant. *McLean* v. *McDonald*, 3 U. C. R. 126.

By Offer to Arbitrate.]—The offer by defendant to refer the case to arbitration, cannot be considered as a waiver of an irregularity in the service of notice of trial. *Grand River Navigation Co.* v. *Wilkes*, 8 U. C. R. 249.

By Pleading.]—Where, pending a motion to set aside pleadings for irregularity, defendant pleaded, in consequence of which the plaintiff proceeded to trial, the court refused to set aside the verdict or otherwise to interfere, though no defence made, no actual merits being disclosed on affidavit. *Simpson* v. *Matthison*, *Ward* v. *Ward*, 3 O. S. 305.

By Previous Demand.]—A notice to proceed to trial given by the defendant to the plaintiff under the statute, is a waiver of any objection to a notice of trial regularly given thereafter and pursuant thereto. *Becket* v. *Durand*, 6 L. J. 15.

In Pleadings.]—See *Ballard* v. *Wright*, 2 O. S. 218; *Richardson* v. *Ranney*, 2 C. L. Ch. 71; *Ross* v. *Cool*, 9 C. P. 94; *O'Neill* v. *Everett*, 3 P. R. 98; *McNabb* v. *Inglis*, 6 P. R. 209; *Jones* v. *Ruttan*, 6 C. P. 402.

See Tyre v. *Wilkes*, 2 P. R. 265; *Conolly* v. *McCann*, 2 L. J. 27.

See, also, LACHES.

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3. *Other Cases.*

Costs—*Submission to Motion.*]—Where an irregular proceeding is moved against, and the irregular party then gives notice of the waiver of such proceeding, the party moving will have his rule made absolute, unless his costs were paid or tendered with the notice. *Kelly* v. *Bleecker*, 2 U. C. R. 377.

Costs of Previous Application Unpaid.]—It is no ground for setting aside a new proceeding in a cause, that the costs of setting a previous irregular proceeding aside have not been paid as ordered. *Regina* v. *Crooks*, E. T. 3 Vict.

Nullity or Irregularity.]—Where there is a doubt as to whether a proceeding is irregular or a nullity, the defect is to be viewed as an irregularity merely. *Herr* v. *Douglass*, 4 P. R. 102.

To an action in covenant defendant pleaded never indebted:—Held, not a nullity, but merely an irregularity. *Abell* v. *Glen*, 6 P. R. 64.

Treating a pleading as a nullity does not prevent its afterwards being attacked as an irregularity. *Ib.*

Proceedings before Removal of Cause.]—Where proceedings in a court of inferior jurisdiction had been removed into the Queen's bench, a rule nisi to set aside the proceedings had in such court for irregularity was granted. *English* v. *Everett*, 1 U. C. R. 276.

Settlement of Action.]—Where, after process served, the parties settled, and the plaintiff agreed to pay his own costs, but, notwithstanding, the attorney went on, thinking that the defendant should pay the costs, the proceedings were set aside for irregularity. *Parent* v. *McMahon*, 4 O. S. 120.

——— *Setting aside Nonsuit.*]—Two writs of replevin were sued out by the plaintiff against defendant, one in the Queen's bench, for lumber situate on the east side of the river Moira, the other in the common pleas, for lumber on the west side, and both records were entered for trial at the same assizes at Belleville. One cause was tried, the evidence given at the trial relating to the lumber on the east side of the river; but the verdict was recorded on the record in the common pleas. A new trial was moved for and obtained on that verdict subsequently. An agreement was then entered into by which the subject matter in dispute in this action was settled. Plaintiff then gave another notice of trial, but found out his mistake and did not enter the record. Defendant's attorney, however, made up a record and entered it, and when the cause was called on, defendant's counsel appearing, and no one being present for plaintiff, he was nonsuited. The court upon application set aside the nonsuit without costs, holding that the matters in dispute, having been settled by agreement, could not again be litigated without waiving or annulling that agreement. *Canniff* v. *Rogers*, 7 C. P. 81.

XVII. Special Cases.

Amendment—*Further Evidence.*]—When a case has, by consent of parties, been turned into a special case, and the Judge's minutes of the evidence taken at the trial agreed to be considered as part of the said special case, the court has no power to add anything thereto, except with the like consent, and has no power to order any further evidence to be taken. *Smyth* v. *McDougall*, 1 S. C. R. 114.

Pleadings.]—The court should not be asked, upon a case stated without pleadings, to answer questions which could not be raised upon proper pleadings. *Taylor* v. *Campbell*, 33 U. C. R. 264.

Unnecessary Matter.]—Remarks upon the introduction of unnecessary matter in the special case. *Bank of Montreal* v. *Munro*, 23 U. C. R. 414.

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

XVIII. Staying Proceedings.

Commencement of Stay.]—Proceedings are stayed from the time of making not serving the rule to stay proceedings. *Patterson* v. *Attrill*, 4 U. C. R. 395.

Costs of Application.]—Held, that the costs of a chambers application to stay proceedings until term in a superior court case tried at the county court under the Law Reform Act of 1868, are taxable under a rule for a new trial upon payment of costs, the county court Judge having refused to stay the proceedings. *Merchants Bank* v. *Ross*, 6 P. R. 215.

Ejectment—*Repayment of Advance.*]—Where A. conveyed absolutely land to B., to secure money lent by him to A., and B. gave a bond for its reconveyance on payment of the loan on a certain day, on ejectment brought by B. after a lapse of eight years, the court ordered that proceedings should be stayed on payment of the principal, interest, and costs, and refused to allow the plaintiff to include a simple contract debt incurred on the security of the bond, because there was no writing respecting it, and the Act did not extend to it. *Doe d. Shuter* v. *McLean*, 4 O. S. 1.

Equitable Grounds.]—See *Bates* v. *Mackey*, 1 O. R. 34.

Insolvency of Plaintiff.]—Where the causes of action under two counts passed to the plaintiff's assignee in insolvency, but the third did not:—Held, that the action might be stayed on the third count till security for costs was given, leaving the action to proceed on the other counts. *Smith* v. *Commercial Union Ins. Co.*, 33 U. C. R. 529.

Joint Action—*Release by One Plaintiff—Remedy.*]—After issue joined, one of two plaintiffs gave to the defendant a release under seal of all actions and demands. The defendant thereupon moved to stay all proceedings in the suit:—Held, that the defendant

should plead the release, and that he was not entitled to a stay of proceedings, and the remaining plaintiff was allowed to strike out the name of the other plaintiff. *McAlpine* v. *Carling*, 8 P. R. 171.

Joint Liability—*Release of One Defendant—Remedy.*]—The plaintiff sued H., M., and S. as joint makers of a note; H. and M. did not appear, and judgment was signed by mistake against all, but afterwards set aside as against S., who pleaded:—Held, that if by taking judgment against two defendants not appearing, the plaintiffs, under C. L. P. Act, s. 99, had lost their remedy against S., that objection could not be taken at the trial, but the proper course was to move to stay proceedings. *Kerr* v. *Hereford*, 17 U. C. R. 158.

Leave to Amend.]—Held, that where in an order to join issue and demur, leave is granted to amend within a certain time, without any express stay of proceedings, such leave operates as a stay until the expiration of such time. *Taylor* v. *Grand Trunk R. W. Co.*, 6 P. R. 170.

Return of Conviction before Action.]—In an action brought against a justice of the peace for not returning a conviction:—Quære, whether the court, if promptly applied to, would have stayed the proceedings, the action being brought after the defendant had returned the conviction. *O'Reilly q. t.* v. *Allan*, 11 U. C. R. 411.

Rule Absolute—*Payment of Costs.*]—A rule was made in term, that, on payment of a certain sum and costs, further proceedings should be stayed on a verdict. The rule was served on the plaintiff's attorney during the second Friday in term, with an appointment to tax costs:—Held, that the rule did not stay proceedings till the money was paid or tendered, and that the plaintiff was not irregular in entering his judgment on the following day, being the last day of term. *Forster* v. *Hodgson*, 6 U. C. R. 16.

Rule Nisi.]—Where a rule nisi, with a stay of proceedings, to set aside a verdict for irregularity, had been taken out and served, a notice of argument of demurrer, and the setting down the demurrer for argument, subsequently to the rule, was set aside with costs. *City Bank* v. *Eccles*, 5 U. C. R. 633.

Scope of Stay—*Judge's Order—Attachment—Costs.*]—A plaintiff, having taken out a rule for the payment of costs, &c., erroneously intituled, gave defendant's attorney notice of a waiver of the rule, and proceedings under this rule were stayed by a Judge's order until the fourth day of next term. The plaintiff after that day issued the rule properly intituled, and, having obtained an order for an attachment, arranged with defendant's attorney to allow certain costs to be set off against the costs for the non-payment of which the attachment was ordered, and that the attachment should only be proceeded with for the balance. The defendant, on the 21st November, obtained a rule to set aside the rule, or the attachment thereon issued, on the ground that the plaintiff's attorney had issued the rule properly intituled without authority, and during the time the proceedings were stayed by the Judge's order. Against this rule it was shewn that on the 18th November the plaintiff's attorney served a notice on defendant's attorney, abandoning the second rule and the attachment issued thereon:—Held, that the Judge's order only stayed proceedings upon the rule erroneously intituled, not in the cause; and that the arrangement made by defendant's attorney with the plaintiff's attorney as to setting off costs after the attachment had been ordered, precluded defendant from going back to object to proceedings antecedent to the granting of the attachment, and as, in addition to this, notice of abandonment of the attachment had been served before defendant's attorney took out this rule, that such rule should be discharged with costs. *Murphy* v. *McGuire*, 1 P. R. 33.

Summons.]—An interlocutory judgment signed in the country after the return of a Judge's summons in town, which operated as a stay of proceedings, but of which the attorney could not have been made aware, was set aside as irregular, but without costs. *Carlisle* v. *Niagara Harbour and Dock Co.*, M. T. 1 Vict.

A summons is no stay of proceedings, unless so expressed, until returnable. *Sovereen* v. *Rapelje*, 1 C. L. Ch. 11.

A summons to dismiss an action for breach of an order to examine, generally implies a stay of proceedings; but where the Judge who granted the summons struck out the part relating to a stay, and the summons was afterwards enlarged without any mention of a stay, a notice of trial served while the summons was pending, was held to be regular. *Merchants Bank* v. *Pierson*, 8 P. R. 129.

XIX. Summonses and Orders.

(*See* also *ante* XIII.)

1. *Enlarging.*

Preliminary or formal objections to affidavits filed on an application for a writ of trial which has been enlarged until the last day for obtaining such writ, should not in general be allowed to prevail after such enlargement. *Taylor* v. *McNiel*, 3 L. J. 131.

Irregularities in technical applications, where there are no merits, cannot in general be remedied. An enlargement of a summons will not be granted for the purpose of remedying them. *Woolley* v. *Tweedle*, 3 L. J. 185.

In ejectment, defendant, on 15th September, obtained an order for the landlord to appear and defend, inadvertently containing a stay of proceedings. On the 20th September defendant wrote for delay, and promised that plaintiff should not be affected thereby; on the 6th October he wrote to say he would require to put in a double defence, and probably apply to put off the trial; on the 7th October he obtained a summons for that purpose, which was served in Toronto and enlarged till the 10th October, "without a stay of proceedings," and was on the 11th October, the commission day of the assizes, again enlarged till the 15th October, and subsequently abandoned:—Held, that it was the same under the circumstances as if never obtained, and that a verdict obtained by plaintiff during the pendency of the stay was regular. But leave, on terms, was given to defendant to defend on the merits. *Field* v. *Livingstone*, 1 C. L. J. 210.

A county court Judge, on the 4th September, granted a summons calling on a judgment debtor to shew cause why he should not be committed to the county gaol of Middlesex, for not satisfactorily answering as to his estate and effects, &c., on an examination before a commissioner appointed by the Judge. This summons having been enlarged until the 26th September, and no one attending on either side on that day, the Judge, on the following day, on the plaintiff's application, enlarged it, by indorsement, until the 11th October, of which the defendant had no notice. On the 11th September the Judge had made another order for the debtor to attend before him and be further examined on the 11th October, but defendant, having lost this order, and believing it to be only a summons for further examination, on which an order would be afterwards made, did not attend upon it. On the 11th October the Judge made an order upon the summons of the 4th September, for defendant's committal to the county gaol of Lambton, in which county he had resided since before the date of that summons. Defendant, having been committed, applied for his discharge to the Judge of the county court, who refused, unless defendant would undertake to bring no action; and an order was signed for his discharge on these terms, which he declined to accept. The prisoner having been brought up by habeas corpus, it was objected: (1) that the summons, having lapsed on the 26th, could not be enlarged; (2) that the summons was to commit to the county gaol of Middlesex, and the order to that of Lambton; (3) that the order of the 11th September, for further examination, was a waiver of the previous summons to commit:—Held, that such enlargement, under all the circumstances, could not entitle defendant to his discharge; that the second objection could have been available only on the return of the summons; and that the order was no abandonment of the previous summons. The defendant was therefore remanded. *Re Munn*, 25 U. C. R. 24.

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2. *Intituling.*

See King's College v. *Gamble*, 1 C. L. Ch. 54; *Brown* v. *Rose*, 1 C. L. Ch. 182; *Chamberlain* v. *Wood*, 1 P. R. 195.

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3. *Papers Filed—Reference to.*

Where leave is given, on an application for a summons, to use the affidavits filed on a former application, which was unsuccessful, such affidavits must either be refiled or specifically referred to in the summons. *Dougall* v. *Yager*, 1 C. L. J. 133.

When a summons is drawn up on reading papers filed, papers which were filed on a former application, and refiled on the subsequent application, may be read, though not referred to as papers filed on the former application. *Buchanan* v. *Bettes*, 2 C. L. J. 71. See also *Small* v. *Eccles*, 3 P. R. 189; *Re Allen*, 31 U. C. R. 458.

A summons to shew cause not referring to the papers filed upon which it was founded, was allowed to be amended. *Re Barton*, 4 P. R. 237.

4. *Rescission of Orders—Motions to Rescind and Appeals.*

(a) *Materials on Motion.*

The affidavit on a motion to rescind a Judge's order stated that certain papers in the suit had not been served on the deponent, but did not further shew his connection with the cause either as party or attorney:—Semble, that the affidavit was bad. *Wilkes* v. *McMillan*, 10 U. C. R. 292.

One Judge may rescind the order of another Judge, even on the same materials that were before the first Judge, but whether he will do so or not will always be a question for himself, according to the nature of the facts. *Demill* v. *Easterbrook*, 10 L. J. 246.

The court discharged with costs a rule nisi to amend a Judge's order because the pleadings upon which the rule purported to have been moved were not in fact before the court, nor were they disclosed by the affidavits filed, and it was impossible rightly to decide the case without reference to them. *Crooks* v. *Dickson*, 15 C. P. 528.

Where a Judge in chambers discharged a summons to set aside a final judgment:—Held, that an application to the court for the same purpose must be by way of appeal from the order, not as an original motion, and that all the papers filed on the application in chambers must be brought before the court. Quære, as to the right to file additional affidavits. *Waddell* v. *Corbett*, 26 U. C. R. 243.

Where a rule nisi in full court did not disclose the fact that it had been obtained on an affidavit previously used in chambers to obtain a summons for the same purpose, and the leave of the court to take such affidavit off the files was not shewn:—Held, irregular, and the rule was discharged with costs. *Small* v. *Eccles*, 3 P. R. 189.

A rule to rescind a Judge's order was drawn up "upon reading the affidavits and papers filed," not specifying that the papers used in chambers were refiled, or that they were brought up by leave of the court:—Held, that, though it is better to specify this, the objection could not prevail here, for the rule shewed plainly that it was by way of appeal from proceedings in chambers, the affidavits and papers filed there were expressly mentioned, and they were in fact refiled, as appeared by an affidavit filed in shewing cause. Held, also, that if the objection had prevailed the rule might have been at once amended. Held, also, that in such cases the leave of court to use the papers in chambers is unnecessary. *Re Allen*, 31 U. C. R. 458.

See Heyland v. *Scott*, 18 C. P. 52.

(b) *Order Issued Improvidently.*

A Judge may open again an order granted by himself, or even rescind it before it has been carried into effect, upon his discovering that he has made it inadvertently, or has been surprised into making it by any perversion or concealment of facts, or from the misconception on his part of the law or facts. *Shaw* v. *Nickerson*, *Gillespie* v. *Nickerson*, 7 U. C. R. 541.

Quære, can a Judge in chambers rescind his order for a habeas corpus, or quash the writ itself, on the ground that it issued improvidently. *Re Ross*, 3 P. R. 301.

The time for appearance to a writ of ejectment expired on the 2nd May. On that day the plaintiff searched the appearance book, but found none. The next day an appearance was entered with a notice of title, which notice was served on the plaintiff on the 7th May. On the 14th May plaintiff made affidavit of the search of the 2nd May, but suppressed part of the facts, upon which an ex parte order was made:—Held, that this order must be set aside, as the appearance could not be treated as a nullity, and as the order was made ex parte, without all the facts having been made known or considered. *Van Norman* v. *McLennan*, 2 C. L. J. 207.

Where an ex parte order is complained of, an application should be made to the Judge, upon summons, to rescind his own order, before appeal; but the Judge, sitting in banc, may assent to his own order being moved against in the first instance. Such rule does not apply where the jurisdiction of the Judge making the order is questioned. *Hesketh* v. *Ward*, 17 C. P. 667.

(c) *Time for Moving—Terms.*

See Byard v. *Read*, Tay. 413; *Re Glass and Macdonald*, 13 C. P. 419; *Ross* v. *Grange*, 27 U. C. R. 396; *Buffalo and Lake Huron R. W. Co.* v. *Hemmingway*, 22 U. C. R. 562; *Bank of Montreal* v. *Harrison*, 19 C. P. 276; *Moody* v. *Dougall*, 3 P. R. 145; *Smith* v. *Commercial Union Ins. Co.*, 33 U. C. R. 529.

(d) *Other Cases.*

Appeal — *Irregularity.*] — The court will very rarely entertain an appeal against an order declining to give effect to a motion for irregularity. *Gilmour* v. *Wilson*, 4 U. C. R. 154.

Ca. Sa.]—On an application by way of appeal from a Judge's order for the issue of a writ of ca. sa., the court in term has power to review such order; but, semble, that an application made after the lapse of the succeeding term is too late. *Kidd* v. *O'Connor*, 43 U. C. R. 193.

Costs—*Appeal as to.*]—Where proceedings are set aside in chambers on defendant's application, on payment of costs, the court will not interfere merely as regards costs except in a very strong case; and defendant having taken out the order cannot be heard to set it aside. *Martin* v. *McCharles*, 25 U. C. R. 279.

Costs of Motion.]—Costs of applying to rescind a Judge's order to allow county court costs were held not to be costs in the cause. *Cameron* v. *Campbell*, 1 P. R. 170.

Custody of Infants.]—Held, that an appeal would lie to the court from a Judge's order, under C. S. U. C. c. 74, with regard to the custody of children under twelve years of age. The cases in, and the principles upon which, an appeal is or is not allowed, reviewed. *In re Allen*, 31 U. C. R. 458.

Forum.]—Where an order directing a reference to the master to determine the amount due from an attorney to his client, has been made in chambers, and the reference completed under it, an application for relief therefrom must be made to the court. *In re Attorney*, 8 P. R. 102.

Order pro Confesso.]—A defendant notified failed to attend, and a verdict pro confesso was taken out against him, the Judge declining to hear evidence in support of the plea. Quære, however, whether the evidence should not have been received, and whether the court has power under this statute to review the decision of the Judge at nisi prius. *McCann* v. *Keyes*, 12 U. C. R. 429.

Terms of Order—*Rescinding Part.*] — The court will sometimes grant relief against an order in chambers, by rescinding any part of it which may be unjust or irregular, but will not add to the terms of a conditional order already acted upon. The court refused to alter the terms of an order on which a trial had been put off on payment only of the costs of the application, so as to compel the defendant to pay the plaintiff's costs of preparing for trial while in ignorance of it, though of opinion that it would have been more fair to have exacted the payment of such costs on granting the order. *McKenzie* v. *Stewart*, 10 U. C. R. 634.

Unauthorized Order — *Stay of Proceedings.*]—Where the causes of action under two counts passed to the assignee in insolvency, but not under the third:—Held, that an order staying proceedings as to the third count should not have been made; that, being made without authority, it might be rescinded as to that count, notwithstanding the delay in moving against it until the term after that in which it was made; and that the action might be stayed on one count, leaving it to proceed on the others. *Smith* v. *Commercial Union Ins. Co.*, 33 U. C. R. 529.

See, also, *Bank of Montreal* v. *Cameron*, 17 U. C. R. 46.

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5. *Stay of Proceedings.*

See Sovreen v. *Rapelje*, 1 C. L. Ch. 11; *Crooks* v. *Dickson*, 14 C. P. 83; *Merchants Bank* v. *Pierson*, 8 P. R. 129.

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6. *Waiver or Abandonment.*

Where an order is such that no one is prejudiced by delay in serving it, such delay is no ground for setting the order aside. *Wilkes* v. *McMillan*, 10 U. C. R. 292.

When an order to refer bills of costs in chancery to the proper officers of that court by a common law Judge in chambers is waived or abandoned by the party who obtains it, it is unnecessary to move to set it aside. *Re Wilson and Hector*, 9 L. J. 132.

Defendant signed judgment of non pros. against a plaintiff in ejectment, for not proceeding to trial in accordance with a twenty days' notice given by defendant. The plaintiff, on the 3rd April, 1866, obtained a summons to set aside such judgment, which on the 16th

June was made absolute, but the order was not taken out until the 22nd October following, nor served until the 27th:—Held, that the order was waived by such delay, and must be set aside, whether the judgment was void or only irregular. *Herr* v. *Douglas*, 26 U. C. R. 357.

Where plaintiff in September, 1862, obtained an order allowing him to add a count to his declaration on payment of costs, in October served a copy of the order, in December obtained an appointment to tax the costs under the order, in February, 1863, had the costs taxed, in the autumn of the same year entered his record for trial without adding the count, and the trial not having taken place owing to pressure of business, afterwards, in February, 1864, tendered to the agents of defendants' attorney the costs taxed under the order, it was held that the plaintiff must be taken by his laches to have abandoned the order, and it was accordingly rescinded. *Morley* v. *Bank of British North America*, 10 L. J. 128.

A party is not precluded from proceeding on a summons because one had been already taken out and served on the opposite party for the same purpose, but owing to a defect had been abandoned. *McKay* v. *McDearmid*, 2 C. L. Ch. 1.

A summons that has lapsed is in the same position as one that is abandoned by notice or otherwise. *Hood* v. *Nichols*, 4 P. R. 111.

A party taking out an order to examine, and failing to appear on an appointment thereunder, loses the benefit of the order, and must obtain a new one. *Ferguson* v. *Elliott*, 7 P. R. 7.

See Re Munn, 25 U. C. R. 24.

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7. *Other Cases.*

Amendment — *Specification.*] — A summons to amend the declaration need not specify the amendment required. It is sufficient if the ground of amendments be mentioned in the notice of the intended application. *Brown* v. *Devlin*, 1 C. L. Ch. 175.

Compliance with Order.]—If there be any objection to the mode of compliance with an order, application should be made to the Judge who made it. *Ross* v. *Grange*, 4 P. R. 180.

Costs.]—A summons moved with costs, if discharged, is discharged with costs. *Becket* v. *Durand*, 6 L. J. 15.

Death of Party — *Date of Order.*] — A summons to pay over having been opposed, the Judge took time to consider, and before the order was granted the garnishee died:—Held, the delay being that of the Judge, that the order was not void, but might be amended and dated as of the day of argument. Quære, whether in strictness all orders should not be thus dated. *Ward* v. *Vance*, 3 P. R. 210.

Examination — *Pending Motion.*] — To obtain an order to examine a person who has refused to make an affidavit when required to do so, under s. 188 of the C. L. P. Act, the affidavit on which the application is made, need only state that the person sought to be examined can give valuable information, and has refused to make an affidavit when required. *Re Attorneys*, 7 P. R. 2.

Injunction.]—See *Warren* v. *Munroe*, 2 L. J. 209.

Making Rule of Court.] — Under the rule of practice No. 129, service of a Judge's order on the agent of the attorney, with an affidavit that the same has been disobeyed, is sufficient to entitle the party who obtained the order to make the same a rule of court, and on these materials he is entitled to a rule of court, absolute in the first instance, with costs. *Martin* v. *Stinson*, 7 L. J. 184.

Order not Reversed.]—So long as a Judge's order stands unreversed by the court, a Judge in chambers will assume that neither party is dissatisfied with it. *Hall* v. *Brown*, 3 P. R. 293.

Prohibition—*Order Obtained by Applicant.*]—Where a Judge makes an order on the trial of a cause, which, though possibly erroneous in itself, is made at the request of one of the parties and is acted upon, a prohibition at the request of such party will be refused. *Richardson* v. *Shaw*, 6 P. R. 296.

Setting aside Judgment—*Filing Order—Carriage of.*]—The defendants obtained an order setting aside a final judgment, on the ground that it should have been interlocutory only, whereupon the plaintiff, on the same day, issued a duplicate of such order, and immediately filed it in the office of the deputy clerk at Sarnia, where the final judgment was signed, and entered interlocutory judgment. The judgment roll had been forwarded to Toronto:—Held, that the mere filing of the order was not sufficient to set aside the judgment, as an entry thereof on the roll is also required. Held, also, that the defendants, having obtained the order, were entitled to the carriage of it, and so long as they were guilty of no laches, the plaintiff could not intervene and take charge of it. *Cavanagh* v. *Hastings Mutual Fire Ins. Co.*, 7 P. R. 111. See, also, *Gore District Mutual Fire Ins. Co.* v. *Webster*, 10 L. J. 190.

See Crombie v. *Davidson*, 19 U. C. R. 369.

Vacation.]—See *Masson* v. *McQueen*, T. T. 2 & 3 Vict., R. & J. Dig. 2885.

Wording of Summons.]—See *Edmundson* v. *Scott*, 1 C. L. Ch. 88.

XX. Term's Notice.

See Doe d. Lick v. *Ausman*, 1 U. C. R. 399; *Baker* v. *Garrett*, 2 O. S. 211; *Culver* v. *Moore*, Tay. 451; *Doe d. Young* v. *Hinman*, *Doe d. Young* v. *Smith*, H. T. 2 Vict., R. & J. Dig. 2905; *Bain* v. *Boulton*, 1 P. R. 14; *McCormick* v. *McCrea*, 1 P. R. 358; *Huston* v. *Wallace*, 12 C. L. J. 149; *Bishop of Toronto* v. *Cantwell*, 11 C. P. 371; *Russell* v. *Miller*, H. T. 3 Vict., R & J. Dig. 2905; *Baby* v. *Langlois*, 1 C. L. J. 209; *Staats* v. *Reynolds*, 4 O. S. 5; *McLennen* v. *Lewes*, 6 P. R. 211; *McCleary* v. *Morrow*, 8 P. R. 12; *Yates* v. *Carney*, 3 O. S. 31; *Henderson* v. *McCormick*, Tay. 412; *Anderson* v. *Culver*, 10 L. J. 159; *Bank of Montreal* v. *Foulds*, 8 P. R. 182, 236; *Gavan* v. *Lyon*, Tay. 452; *Tyre* v. *Wilkes*, 2 P. R. 265.

XXI. Vacation.

[See R.S.O. 1877 c. 39, ss. 13, 20-24; c. 50, s. 95; con. rules (1897) 114, 115, 351-354, 413.]

Attachment.] — An attachment for not obeying an order to appear and be examined as to debts, cannot be issued in vacation. *Greene* v. *Wood*, 2 P. R. 165.

Charging in Execution.] — A vacation succeeding a term is not to be considered for the purpose of charging a defendant in execution as a part of the preceding term. *Reid* v. *Drake*, 4 P. R. 141.

The same rule governs in this respect in county courts as superior courts. *Ib.*

Term Motion.] — A county court Judge arranged with the bar of his county "to transact all term business in vacation," and, acting under such arrangement, set aside a verdict and judgment after the term succeeding the assizes in which the verdict was rendered. An appeal from his decision was allowed with costs, such arrangement being contrary to the express words of the statute. *Smith* v. *Rooney*, 12 U. C. R. 661.

XXII. Verdict and Postea.

Amendment.] — A verdict taken for the penalty of a bail bond to the limits, was amended by the Judge's notes by reducing it to the sum indorsed on the ca. sa., with interest and sheriff's fees. *Callagher* v. *Strobridge*, Dra. 158.

Where there is a general verdict for plaintiff on several counts, one of which is bad, but it appears the plaintiff elected to proceed on a good count at the trial, the court will allow the verdict to be amended after motion in arrest of judgment, without costs. *Gouldrich* v. *McDougall*, 2 O. S. 212.

So where the evidence was applicable to a good count only. *Beasly* v. *Darling*, 2 O. S. 214; *Chadwick* v. *McPherson*, 2 U. C. R. 379.

So if the evidence at the trial apply equally to the good and bad counts, the amendment may be made. *Baldwin q. t.* v. *Henderson*, 4 U. C. R. 361.

But where, in case for waste, the first two counts were for voluntary waste, and the fourth in trover, the third being for permissive waste by a tenant at will, an application to amend the postea by entering the verdict on the first, second, and fourth counts alone, was refused, evidence having been given on the third count. *Drummond* v. *Carthew*, T. T. 3 & 4 Vict.

Where the notes shew that the verdict has been erroneously entered for the plaintiff on both counts, instead of for defendant in one, this may be amended by the Judge's notes. *City Bank* v. *Eccles*, 5 U. C. R. 633.

Where a verdict has been erroneously entered on one count, the record may, at any time afterwards, by leave of the Judge who tried the cause, be altered, and the entry made on another count. *Moore* v. *Boyd*, 16 C. P. 513.

The court will amend a postea by the Judge's notes, and a judgment by the postea, after appeal allowed, and reasons of appeal assigned, the verdict being general for the plaintiff on points reserved, and the postea framed as if the general issue only had been pleaded, without noticing several other special pleas. *Rochleau* v. *Bidwell*, 2 O. S. 319.

Where a verdict has been given in a district court for a sum beyond its jurisdiction, the plaintiff may cure the defect by entering on the record a remittitur for the excess. *Thomas* v. *Hilmer*, 4 U. C. R. 527; *Jordan* v. *Carr*, 4 U. C. R. 53.

Where a verdict was taken by mistake for £100 too little, and a levy made under execution, the court refused to interfere, the defendant opposing the application. *Bank of Upper Canada* v. *Corbett*, 21 U. C. R. 65.

Where by mistake a verdict for a certain amount is entered on the record, and the foreman of the jury, before the jury separate or leave the box, points out the error, the Judge is right in correcting it. *Moore* v. *Boyd*, 15 C. P. 513.

XXIII. Miscellaneous Cases.

Affidavits — *Amendment.*] — Amendment allowed by insertion of names in jurat of two persons sworn to same affidavit. *Fisher* v. *Thayer*, 5 O. S. 513.

In Christian names of plaintiffs in affidavits. *Rose* v. *Cook*, 1 U. C. R. 5; *Grant* v. *Taylor*, 2 U. C. R. 407; *Beauchamp* v. *Cass*, 1 P. R. 291.

The affidavit of service of notice of motion for a certiorari to remove a conviction, must identify the magistrates served as the convicting magistrates. But an affidavit defective in this respect was allowed to be amended, the time for moving for the certiorari not having expired. Such an objection was held not to be waived by the attorney having accepted service for the convicting justices, and undertaken to shew cause. *Re Lake*, 42 U. C. R. 296.

Demurrer—*Point of Practice.*] — Where to a declaration against a shareholder of a joint stock company for recovery against him, to the amount of his unpaid stock, upon an unsatisfied judgment against the company, he demurred on the ground that an action on the case and not a sci. fa. was the proper remedy: —Held, that the point was one of practice and not of pleading, and was not thereiore open on demurrer. *Page* v. *Austin*, 26 C. P. 110.

English Rules.] — All English rules of practice were adopted up to the date of the rule of court of M. T. 4 Geo. IV. *Doe d. Burger* v. ———, Tay. 269.

Forms of Action.]—See *Clark* v. *Anderson*, E. T. 3 Vict., R. & J. Dig. 26; *Moore* v. *Malcolm*, Tay. 273; *Kilborn* v. *Forester*, Dra. 332; *Eastwood* v. *Hellwell*, 4 O. S. 38; *Kendrick* v. *Lee*, 6 O. S. 27; *Lister* v. *Warren*, 6 O. S. 256; *Nellie* v. *Wilkes*, 1 U. C. R. 46; *Cameron* v. *Playter*, 3 U. C. R. 138; *Tait* v. *Atkinson*, 3 U. C. R. 152; *Consumers' Gas Co.* v.

Nicolls, 7 U. C. R. 91; *Higsen* v. *Thompson*, 8 U. C. R. 561; *Hunt* v. *McArthur*, 24 U. C. R. 254; *Emrick* v. *Sullivan*, 25 U. C. R. 105; *Edsall* v. *Hamell*, 16 C. P. 93; *Ridout* v. *Harris*, 17 C. P. 88; *Brunskill* v. *Harris*, 1 E. & A. 322; *Towers* v. *Dominion Iron and Metal Co.* 11 A. R. 315.

Objection by Court.]—The court will not raise an objection against the merits not taken by defendants' counsel. *McGregor* v. *Daly*, 5 C. P. 126.

Postponement of Trial.]—The plaintiff brought an action against two townships for not repairing a road, and while it was pending before the court of appeal, he issued a writ against the defendants for the same cause, to prevent the Statute of Limitations running against him, in case it should be held that the townships were not liable. A notice to proceed to trial having been served on the plaintiff, the time for trial was enlarged until after the decision of the court of appeal. *McHardy* v. *County of Perth*, 7 P. R. 101.

Reference—*Sending Report back to Master.*]—In ejectment it was ordered in Hilary term, 1879, that a verdict should be entered for the plaintiff, but no execution to issue until the value of the improvements was ascertained and the amount thereof paid to the defendant, and that it be referred to a master in chancery, to ascertain such value. The master made his report on the 30th October, 1879, merely finding the value of the improvements, without making any allowance for the rents and profits. In Easter term, 1880, the plaintiff moved to refer back the report to the master to make such allowance:—Held, reversing the decision below, 31 C. P. 227, that the reference was to the master as an officer of the court, and that there was nothing in any of the sections of the C. L. P. Act, R. S. O. 1877 c. 50, relating to arbitrations, which interfered with the right of the court, under the circumstances, to review the act of their officer, and to send the matter back for his reconsideration. The matter was therefore referred back to the master to make such allowance. *McCarthy* v. *Arbuckle*, 31 C. P. 405.

Trial on Affidavits.]—The court will not try matters of fact on affidavits. Where, therefore, the plaintiff moved upon an affidavit of a material fact which was distinctly denied by the defendant, the court discharged the rule. *Lemarand* v. *Whipple*, 4 O. S. 12.

Venue.]—Held, that under 23 Vict. c. 42, s. 4, to warrant a Judge of the superior courts in referring a cause for trial to a Judge of a county court, the writ must not only be issued from, but venue laid in, the county to which the reference for trial is required. *Boulton* v. *Ruttan*, 7 L. J. 151.

No venue need be stated in the margin of a judgment roll on default of appearance. *Bank of Montreal* v. *Harrison*, 4 P. R. 331.

PRACTICE IN EQUITY BEFORE THE JUDICATURE ACT.

I. Abatement of Suits.

Assignment of Interest in Part.]—Where a plaintiff had assigned in part his interest in the subject matter of the suit, an objection that the suit had abated was overruled. *McDonell* v. *Upper Canada Mining Co.*, 2 Ch. Ch. 400.

Death of One Plaintiff.]—A suit does not abate by the death of one of the plaintiffs, if others remain on the record having similar interests, and capable of maintaining the suit. *Alchin* v. *Buffalo and Lake Huron R. W. Co.*, 2 Ch. Ch. 45.

Death of Plaintiff—*Subsequent Proceedings.*]—The solicitor of the plaintiff, in ignorance of the plaintiff's death, had, after that event, taken certain proceedings in the cause. On a motion to confirm these proceedings:—Held, that no order could be made except by consent. *Graham* v. *Davis*, 2 Ch. Ch. 187.

——— *Time for Redemption.*]—The suit became abated between the date of the report and the time fixed by it for payment by subsequent incumbrancers. An application for a final order of foreclosure was refused, and a new day was appointed allowing the incumbrancers an additional time for payment equal to the time the suit remained abated. *Biggar* v. *Way*, 8 P. R. 158.

Insolvency.]—Bankruptcy of a sole plaintiff causes an abatement of a suit. *Cameron* v. *Eager*, 9 C. L. J. 263.

——— *Subsequent Proceedings.*]—Where a suit becomes defective by the insolvency of the plaintiff, subsequent proceedings are not wholly void; but, on the fact being brought before the court, such order will be made as may be just. *McKenzie* v. *McDonnel*, 15 Gr. 442.

See post III. 1.

II. Administration of Justice Act, 1873.

See Victoria Mutual Fire Ins. Co. v. *Bethune*, 23 Gr. 568, 1 A. R. 398; *Attorney-General* v. *Walker*, 25 Gr. 233; *McLean* v. *Burton*, 24 Gr. 134; *Wark* v. *Moulton*, 7 P. R. 144; *Falls* v. *Powell*, 20 Gr. 454; *Sawyer* v. *Linton*, 23 Gr. 43.

See post XX.

III. Bills.

1. *Dismissal for Want of Prosecution.*

(a) *Abatement of Suit.*

Death of one Defendant.] — A defendant is entitled to an order to dismiss the plaintiff's bill, notwithstanding the death of a co-defendant. *Hall* v. *Green*, 2 O. S. 42.

Where a suit is partially abated by the death of one of the defendants, the other defendants cannot move to dismiss the bill: the proper course is to move that the plaintiff do revive within a limited time. *Bank of Upper Canada* v. *Nichol*, 1 Ch. Ch. 294.

One of the surviving defendants may properly move to dismiss, though the suit has become abated by the death of another defendant. *Kelley* v. *Macklem*, 2 Ch. Ch. 132.

In a redemption suit, where one of the two defendants had died, a motion was made on the part of his executors and of another defendant to dismiss; the same solicitor appearing for both. Notwithstanding some delay on the part of the plaintiff, which was not fully accounted for, the order was made in the alternative, that he revive and go to hearing on terms, or be dismissed:—Held, in accordance with the last case, that a defendant is not obliged after replication filed, to set the cause down for hearing in order to have the bill dismissed, but that he may apply in chambers for an order to dismiss for want of prosecution. Semble, where a suit abates by the death of one of the defendants, the defendant may move to dismiss for want of prosecution without moving that the plaintiff revive; but, if deceased defendant and the surviving defendant be both represented by the same solicitor, the order will be to revive or bill dismissed. Semble, also, a motion to dismiss will be entertained even after replication filed. *Rice* v. *George*, 2 Ch. Ch. 74.

Bill against two executors and others. One of the executors died. A motion by the surviving defendant, including co-executrix of deceased defendants, to compel plaintiff to revive, or in default dismissal, was refused:—Held, that the proper parties to move were the representatives of deceased defendant, and that the surviving defendant might move to dismiss in the usual way. *Watson* v. *Watson*, 6 P. R. 229.

Where after demurrer the plaintiff obtained leave to amend in fourteen days, and did not do so, but served an ex parte order of revivor, the demurring defendant having died after the fourteen days for amendment:—Held, that the bill was not by such failure to amend out of court without a further order, but it was open to defendant to move to dismiss. *Carr* v. *Moffat*, 9 C. L. J. 52.

Insolvency of Defendant.]—A sole defendant, by whose insolvency the suit has abated, may nevertheless move to dismiss the bill for want of prosecution. *Riddell* v. *Ritchie*, 6 P. R. 205.

Insolvency of Plaintiff.]—A motion by a defendant to dismiss after an abatement caused by the bankruptcy of a sole plaintiff and before revivor, was refused; his proper course being to serve the assignee of the plaintiff in insolvency with notice to revive within a limited time. *Cameron* v. *Eager*, 6 P. R. 117.

See ante I.

(b) *Answer to Application to Dismiss.*

Absence of Witness—*Collateral Sale—Non-production.*]—In a suit to set aside a conveyance of the equity of redemption in certain lands as fraudulent as against creditors, one sitting of the court having been lost, a defendant, the grantee of the equity of redemption, moved to dismiss the bill for want of prosecution. More than two weeks before the sittings commenced, the plaintiff's solicitors were notified to file a replication, and proceed to a hearing, but did not do so. The excuses offered by the plaintiff were, that the defendant was a material witness, and was absent prior to the hearing, and that the property had been sold under a power of sale contained in one of the mortgages, and little or no surplus remained after paying the mortgages. It appeared that no effort had been made to find the defendant in order to subpœna him as a witness at the hearing, and that the sale of the land did not take place until a month after the sittings at which the cause might have been heard:—Held, that the delay was not excused, and the bill should be dismissed. Held, also, that the failure of the defendant to comply with an order to produce did not, under the circumstances of the case, deprive him of the right to move to dismiss. *Elliott* v. *Gardner*, 8 P. R. 409.

Semble, that a plaintiff cannot, in answer to a motion to dismiss, ask to have the bill dismissed without costs, but must make a substantive motion for that purpose. *Ib.*

Costs of Demurrer Unpaid.]—Where, on a motion to dismiss, the only objection made was that the costs of a demurrer overruled had not been paid, the court dismissed the bill with costs, the costs of the demurrer to be set off, and execution to go for the balance in favour of the party entitled thereto. *Bigelow* v. *Thompson*, 1 Ch. Ch. 307.

Costs of Previous Motion Unpaid.]—A motion to dismiss had been refused with costs:—Held, that another motion to dismiss could not be made until the costs of the prior one were paid, though it appeared that plaintiff's solicitor had not taken out his certificate. *Harvie* v. *Ferguson*, 1 Ch. Ch. 218.

Error in Judgment.]—On a motion to dismiss it appeared that the case had not been brought to a hearing through an error in judgment of the plaintiff's solicitor:—Held, that it was proper to take into account such error in considering the application in connection with the other circumstances of the case. *McFeeters* v. *Dixon*, 3 Ch. Ch. 84.

Examination of Defendant.]—Examination of defendant is not a step in the cause, and forms no answer to a motion to dismiss. Where there had been great delays, both before and since the examination, plaintiff was held accountable for both. *Mulholland* v. *Brent*, 2 Ch. Ch. 31.

Filing Replication Pending Motion—*Statute of Limitations—Mistake of Solicitor.*]—Held, that filing a replication pending a motion to dismiss is no answer to the motion, the practice here being different from that which prevails in England; nor the mere fact that the plaintiff's claim will be barred by the Statute of Limitations if the bill be dismissed. Held, also, that such delay is not sufficiently explained by shewing that it occurred through the mistake of the solicitor. *Finnegan* v. *Keenan*, 7 P. R. 385.

Inability to Serve Bill — *Knowledge of Applicant.*]—Where it appeared that a defendant who was in a position to move to dismiss was aware of the residence of a co-defendant whom the plaintiff could not (though using reasonable diligence, of which defendant moving was aware) find to serve with the bill, a motion to dismiss by such defendant was refused with costs. *Shaver* v. *Allison*, 1 Ch. Ch. 203.

Laches of Defendant.]—The court will exercise a discretion in granting or refusing

an order to dismiss, and consider the peculiar circumstances of the case. Where, therefore, the defendants had been dilatory in obeying the order to produce, and refused to go down to hearing by consent, when plaintiff, being too late to go down otherwise, applied for a consent, an order to dismiss was refused; and under the same circumstances an order to open publication, and for leave to set down cause for the following examination and hearing term, was granted. *Jeffs* v. *Orr*, 2 Ch. Ch. 273.

Where the proceedings in the suit have been conducted in a loose manner on both sides, without regard to the strict practice of the court:—Held, that delay on the part of the defendant, and acquiescence by him in delay on the part of plaintiff, rendered it inequitable to allow defendant suddenly to determine the dilatory method of conducting the suit and insist upon a strict compliance by the plaintiff with the practice of the court; and a motion to dismiss was therefore refused. *Waters* v. *Burrill*, 6 P. R. 269.

The bill was filed on the 9th June, 1877, the venue being laid at Ottawa. On the 20th August, 1878, the defendant filed his answer; and the plaintiff obtained an order to amend on the 18th September following, which was not served till after a notice of motion to dismiss the bill for want of prosecution on the 23rd September. The sitting at Ottawa was on the 18th September:—Held, that the defendant had by filing his answer condoned any delay on the plaintiff's part before that date, and that there had been no such delay subsequently thereto as to justify a dismissal of the bill or changing the venue. After an order of the referee changing the venue, and prior to appeal therefrom, defendant answered the amendments:—Semble, that the defendant thereby waived his right to dismiss for any previous default. *Cotton* v. *Rodgers*, 7 P. R. 423.

Non-production by Defendant.]—The plaintiff had served an order to produce upon defendant, who had thereupon filed an affidavit on production, a copy of which had been demanded by the plaintiff, but had not been served. Under these circumstances, a motion by the defendant to dismiss was refused with costs. *Proudfoot* v. *Thompson*, 1 Ch. Ch. 367.

The fact that a defendant has put in an insufficient affidavit on production, is no bar to his moving to dismiss the bill. *Gillespie* v. *Gillespie*, 2 Ch. Ch. 267.

Delay on the part of defendant in making production is no excuse for the non-prosecution of the suit by the plaintiff, where the plaintiff has delayed taking steps to compel production. *Wilson* v. *Black*, 6 P. R. 130.

Objection to Style of Cause.]—Where the plaintiff's bill of complaint was dismissed against one of the defendants only, and a motion to dismiss for want of prosecution was subsequently made by the other defendants, a technical objection that the style of the cause of the notice of motion was incorrect (the name of the defendant as against whom the bill was dismissed appearing therein) was overruled. *Upper Canada Mining Co.* v. *Attorney-General*, 4 C. L. J. 78.

Order to Amend.]—An order to amend having been obtained and served after service of a notice of motion to dismiss, was deemed a sufficient answer to such motion. *Hill* v. *Hill*, 2 Gr. 692.

Pendency of Another Suit.]—The pendency of another suit in which the plaintiff could obtain the relief he seeks in a bill, was considered no answer to a motion to dismiss. *Guthrie* v. *Macdonald*, 3 Ch. Ch. 99.

The pendency of another suit, which would give the relief desired, but in which no decree has been obtained, is not a sufficient answer to a motion to dismiss. *Bain* v. *McConnell*, 6 P. R. 113.

Pending Appeal in Another Suit.]—The prosecution of a suit was, upon the advice of counsel, delayed pending an appeal to the privy council in a suit previously instituted, upon the result of which appeal the second suit depended:—Held, on a motion to dismiss, that under the peculiar circumstances of the case the excuse of not proceeding with the suit was sufficient. Mode of procedure to obtain discovery of documents from a corporation, considered. *Lindsay Petroleum Co.* v. *Pardee*, 6 P. R. 140.

Pending Motion to Amend.]—A motion to amend is no answer to a motion to dismiss. *McNab* v. *Gwynne*, 1 Gr. 127.

A motion by plaintiff for leave to amend having been refused, the plaintiff had moved to discharge the order refusing leave to amend:—Held, that a motion to dismiss, pending the motion to discharge the order, was irregular. *Cameron* v. *VanEvery*, 1 Ch. Ch. 217.

Setting Cause down.]—After notice of motion to dismiss had been served, plaintiff set the cause down to be heard by way of motion for decree, and served notice on defendant:—Held, a sufficient answer to the application, but that defendant was entitled to his costs. *Towers* v. *Foot*, 1 Ch. Ch. 32.

——— *Defendant's Duty.*]—The fact that a replication has been filed, and that defendant himself is therefore in a position to set the cause down for examination and hearing, is no bar to a motion to dismiss. *Spawn* v. *Nelles*, 1 Ch. Ch. 270.

(c) *Evidence on Motion to Dismiss.*

Certificate.]—In moving to dismiss it is not sufficient for the certificate of the registrar to state only that no replication has been filed; it must also state that no further proceedings have been had, and it must be shewn when the office copy of the answer was served. *Thompson* v. *Buchanan*, 3 Gr. 652.

Notice of Answer.]—When a motion is made to dismiss the bill, the party moving must shew that notice of having put in an answer has been duly served. *Kay* v. *Sanson*, 1 Ch. Ch. 71.

Specifying Evidence.]—Held, that it is not necessary, in a notice of motion to dismiss, to specify the evidence to be read on the hearing of the motion. *Hodgson* v. *Bank of Upper Canada*, 8 L. J. 328.

(d) *Time—Reckoning of, against Plaintiff.*

Delay by Defendant — *Next Friend—Production.*]—On a motion to dismiss the bill of a married woman, the court refused to count against her time which had been lost in consequence of an order obtained by the defendant requiring her to name a new next friend. The court will not hold a plaintiff bound in every case to prepare for hearing before the defendant has made production under the order to produce, where that order has been taken with promptitude. Where, therefore, the defendant having anticipated the time for answering, an insufficient affidavit on production was filed just in time to leave the plaintiff a single day before giving notice, supposing no amendments required, the court refused a motion to dismiss. *Poole* v. *Poole*, 2 Ch. Ch. 475.

New Defendants—*Motion by.*]—Where a motion to dismiss was made by certain defendants who had been made parties by amendment at a comparatively recent date, delay having occurred previously in the conduct of the cause they were not permitted to shew such delay as a ground of dismissal; and an order to dismiss made by the secretary, whose attention had not been called to the fact of the parties moving having become parties at a recent period, was reversed, but with costs against the plaintiffs, they having been guilty of the delay. *Upper Canada Mining Co.* v. *Attorney-General*, 2 Ch. Ch. 207.

Replication — *Commencement of Sittings.*]—Semble, if the time when the plaintiff should join issue is not three weeks before the next hearing term at the place where the venue is laid, defendant cannot succeed on a motion to dismiss, founded on the plaintiff's omitting to set the cause down for hearing at that term. *Wilson* v. *Black*, 6 P. R. 130.

Where the time for filing replication expires less than three weeks before the commencement of the sitting at the place where the venue is laid, defendant cannot succeed on a motion to dismiss for not proceeding to a hearing at that sittings. Semble, it is not open to plaintiff to countermand a notice of hearing once given. *Richardson* v. *Bilton*, 6 P. R. 280.

Service of Bill.]—Where a bill had been filed and a lis pendens registered, but no office copy served within the twelve weeks allowed for service, the bill was ordered to be dismissed with costs. *Somerville* v. *Kerr*, 2 Ch. Ch. 154.

If a bill is filed and no office copy served within the period limited for service (three months), the bill will on application be dismissed. It is no answer to a motion to dismiss under such circumstances, that the bill was filed previous to 1864, when the order limiting the time was passed. *Moore* v. *Roseburgh*, 2 Ch. Ch. 406.

(e) *Other Cases.*

Applicant in Default—*Dual Capacity.*]—Where one of the defendants had answered, and the time for replying had expired, a motion was made to dismiss the bill as against him, but, it appearing that such defendant was president of an incorporated company, whose answer had not yet been filed, the motion was refused with costs. *Rees* v. *Jacques*, 1 Gr. 352.

Compromise of Suit.]—A compromise of a suit having been entered into before answer, defendant may set up the compromise in his answer, and pray, by way of cross-relief, that it be specifically performed; and if plaintiff does not diligently proceed with the suit, defendant is enabled to move to dismiss for want of prosecution. *Small* v. *Union Permanent Building Society*, 6 P. R. 206.

Irregular Replication — *Amendment.*]—A plaintiff, having filed an irregular replication, afterwards obtained by consent an order to amend the same, but did not do so, and a defendant moved to dismiss for want of prosecution, when the court, treating the irregular replication as no replication, ordered a replication to be filed within two months, or the bill should stand dismissed. At this time two of the defendants had not answered, and on the 12th of the month the replication was amended. Four days afterwards the plaintiff obtained an order pro confesso against the two defendants who had not answered. Under these circumstances a motion to remove the replication from the files, and to dismiss the bill, was granted with costs. *Lewis* v. *Jones*, 1 Ch. Ch. 120.

Motion to Dismiss — *Notice.*]—Where defendant moved to dismiss and plaintiff asked for time, and failed to proceed within the time given:—Held, that the defendant could move ex parte for the order to dismiss. *Burns* v. *Chisholm*, 2 Ch. Ch. 88.

Notice of Hearing—*Countermand.*]—A plaintiff, having set down his cause to be heard, subsequently countermanded the notice of hearing which had been served on defendant. A motion to dismiss was, under the circumstances, refused without costs. *Richardson* v. *Moser*, 1 Ch. Ch. 18. See *Richardson* v. *Bilton*, 6 P. R. 280, *ante* (d).

Petition—*Non-service—Treating as Bill.*]—It is unnecessary and irregular to file a petition before it is heard. The proper proceeding, in order to bring it before the court, is to serve a copy with notice of a day for hearing indorsed. This practice is applicable to petitions under the Insurance Companies Act, 31 Vict. c. 48. But, as by this Act no special procedure is provided for making application under it to the court, where proceedings were initiated by a petition which had been filed but not served upon the respondents, nor brought to a hearing, after a lapse of fourteen months, the petition was treated as a bill, and ordered to be taken off the files for want of prosecution. *Re Western Insurance Co.*, 6 P. R. 86.

Service of Notice of Motion—*Solicitor—Parties.*] — A bill was filed by churchwardens, and during the progress of the suit the churchwardens were changed at the vestry meeting; the new churchwardens were not made parties. The suit not being brought to a hearing within the time required by the practice, it was held that a motion to dismiss the bill served on the plaintiffs' solicitor was regular. Quære, whether it was necessary to make the new churchwardens parties. *McFeeters* v. *Dixon*, 3 Ch. Ch. 84.

Terms as to Hearing—*Costs.*]—Upon a motion to dismiss, where the only complaint is that the replication has not been filed within the time limited for so doing, and no sitting of the court has been lost, the plaintiff may be put on terms to go down to a hearing at the next sittings at the place where the venue is laid, but the defendant will not be awarded costs of the application, unless he has, by letter or otherwise, required the plaintiff's solicitor to proceed and file replication, and the latter has neglected to do so. *McGillivray* v. *McConkey*, 6 P. R. 114.

Terms — *Payment into Court—Costs.*]—After an order dismissing a bill had been obtained upon notice, the plaintiff applied to discharge that order, alleging his intention of prosecuting the suit, and that he had not received any personal notice of the motion to dismiss. The application was granted on payment of costs, and paying into court certain instalments alleged to be due to defendant. *Campbell* v. *Ferris*, 1 Ch. Ch. 50.

Undertaking.]—A solicitor undertook to put in an answer, which was not insisted upon, and plaintiff's solicitor undertook to go down to examination, but failed to do so. A motion made by the defendant to dismiss was refused, but, under the circumstances, without costs. *Cotton* v. *Cameron*, 1 Ch. Ch. 122.

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2. *Dismissal on Plaintiff's own Application.*

Dismissal not on Merits.]—A cause having been brought on to be heard, it was found that a pro confesso note against one of the defendants had been waived by amending the bill. The plaintiff thereupon moved to dismiss the bill as against such defendant, without the dismissal being equivalent to a dismissal on the merits; and the court, under the circumstances, granted the motion, and made a decree saving the rights of the defendant. *Waddle* v. *McGinty*, 15 Gr. 261.

Leave to File New Bill.]—The court will not, upon motion, dismiss a bill without prejudice to the plaintiff's filing another bill. *Gwynne* v. *McNab*, 2 Gr. 124.

Where a cause has been set down for hearing, the plaintiff is not entitled, as of course, to an order dismissing his bill, with leave to file another bill. *Gardner* v. *Brennan*, 4 Gr. 199.

Praecipe.]—After a cause has been heard and is standing for judgment the plaintiff cannot dismiss his bill on praecipe, but only on special motion. *Smith* v. *Port Hope Harbour Co.*, 6 L. J. 189.

——— *Costs.*] — Where defendant serves a notice of motion, but before the return thereof the plaintiff takes out on praecipe and serves an order to dismiss his bill, the defendant cannot bring on his motion, but he is entitled to tax his costs thereof, under the order to dismiss, as costs in the cause. *Purdy* v. *Ferris*, 1 Ch. Ch. 303.

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3. *Dismissal where Lis Pendens Registered.*

Where a fictitious suit is brought for the purpose of registering a lis pendens, an application to remove the bill will be refused unless there is a direct admission of the nature of the suit by the plaintiff; but where the affidavits clearly shew this, an order will be made directing an early hearing. *Jameson* v. *Laing*, 7 P. R. 404.

See Somerville v. *Kerr*, 2 Ch. Ch. 154, *ante* 1 (d); *Finnegan* v. *Keenan*, 7 P. R. 385, *ante* 1 (b).

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4. *Dismissal—Other Cases.*

Conflicting Evidence.]—Where the evidence of a marriage is conflicting, the court will give the option of obtaining more satisfactory evidence, or direct an issue, or dismiss the bill. *Baker* v. *Wilson*, 4 L. J. 260.

Consent—*After Decree.*]—A bill cannot be dismissed even by consent after a decree has been made in the cause. *Ontario Bank* v. *Campbell*, 2 Ch. Ch. 458; *Groves* v. *Ryves*, 1 Ch. Ch. 272.

Default of Production—*Previous Order—Ex Parte Motion.*]—Where an order directed that a better affidavit on production should be filed by the plaintiff within six weeks, and in default that the bill be dismissed:—Held, that upon default being made an ex parte motion to dismiss was regular, notwithstanding that on the motion the fact was not disclosed that the hearing had, by consent, been postponed because the sitting for which the cause was set down was to be held before the expiration of six weeks. *Dunn* v. *McLean*, 6 P. R. 156.

Dismissal against one Defendant—*Style of Cause.*]—After a bill has been dismissed against one defendant, the style of cause as it originally was should be continued. It is not necessary to omit the name of the defendant against whom the bill has been dismissed, and the retention of the name is not irregular. Quære, would it be irregular if the name was omitted? *Upper Canada Mining Co.* v. *Attorney-General*, 2 Ch. Ch. 185.

Dismissal on Merits—*Leave to Amend—Costs.*]—Upon a bill filed by an infant claiming a conveyance from the defendant, on the ground of his having acted as agent for the ancestor in obtaining the title, the evidence tended to establish the fact that the property had been purchased by the defendant for his son, and received payments from him, with the understanding that he should obtain a deed when his payments were completed. The court, at the hearing, offered the plaintiff an issue as to the question of agency, or leave to amend the bill upon payment of the costs of the day and the proceedings that would be thus rendered useless, and, if this was refused, ordered that the bill should be dismissed without costs, the defendant's answer having been falsified. *Jackson* v. *Jackson*, 7 Gr. 114.

——— *Leave to Amend—New Record.*]—In a suit by an administrator with the will annexed, upon a mortgage, defendant produced a release for the mortgage money given by the testator, whereupon the plaintiff asked to proceed against defendant as a creditor of the estate; but, as this amendment would create an entirely different record, the court refused such permission, and dismissed the

bill with costs. *Barrett* v. *Crosthwaite*, 9 Gr. 422.

——— *Leave to File New Bill.*]—It appearing on the evidence, though not mentioned in the pleadings, that the purchaser of land at a sheriff's sale for taxes was a mortgagee of the property:—Held, in dismissing a bill filed to set aside the purchase on the ground of undue practices at the sale, that it was unnecessary to reserve liberty to file a bill impeaching the sale on the ground that the purchaser was disqualified as mortgagee to effect the purchase for his own benefit. *Schofield* v. *Dickenson*, 10 Gr. 226.

——— *Misleading Letter—Costs.*]—Where a party's own letter was such as to create a misapprehension of facts, and a suit was instituted in consequence, the court, though it refused relief, dismissed the bill without costs. *Anderson* v. *Cameron*, 6 Gr. 285.

Purchase by Defendant of Plaintiff's Claim—*Costs.*]—On an application to dismiss the bill as against defendant L., on the ground that he had purchased the judgment on which the bill was filed, it was urged that L. was still indebted to the plaintiff's solicitor for costs, and also the costs of this application. Bill dismissed, it being held that the costs were provided for in the assignment of the plaintiff's claim. *McNab* v. *Morrison*, 2 Ch. Ch. 133.

Subject Matter Gone—*Costs.*]—An order will not be granted to stay proceedings or dismiss the bill in a suit merely because the subject matter of it has gone; the plaintiff has a right to proceed to a hearing to shew himself entitled to costs. *Wallace* v. *Ford*, 1 Ch. Ch. 282.

Trifling Amount Involved—*Costs.*]—The rule and policy of the court is to discourage trifling and vexatious suits. Where therefore a bill was filed in respect of a sum not exceeding $10, including interest, the court at the hearing, without reference to the merits, dismissed the bill; but without costs, as the defendant ought, under the circumstances, either to have demurred or moved to take the bill off the files. *Westbrooke* v. *Brocett*, 17 Gr. 339.

Undertaking—*Breach—Solicitor's Slip.*]—Where a defendant moved to dismiss the plaintiff's bill, the plaintiff having failed to comply with an undertaking, such failure having arisen through a slip of the plaintiff's solicitor, the application to dismiss was refused. *Devlin* v. *Devlin*, 3 Ch. Ch. 491.

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5. *Restoring.*

Delay.]—A motion to restore a bill for want of prosecution refused, where great delay had taken place on the part of the plaintiff. *Davy* v. *Davy*, 2 Ch. Ch. 26.

Losing Cause of Suit.]—A bill dismissed for want of prosecution will not be restored unless it can be shewn that the plaintiff's cause of suit will be lost by the dismissal. *Dunn* v. *McLean*, 6 P. R. 156.

Merits—*Discretion.*]—When a plaintiff swears to a good case on the merits, the court will, in its discretion, give him an opportunity to have his case heard on the merits, even after an order to dismiss has been properly granted. *Rees* v. *Attorney-General*, 2 Ch. Ch. 300.

A bill properly dismissed for want of prosecution will only be restored under strong and special circumstances. Where an injunction bill, filed to restrain proceedings at law, had been dismissed, and judgment at law had been confessed in obtaining the injunction, and afterwards, on the dismissal of the bill, money paid under the pressure of the judgment, which it was now alleged was in excess of any due, a motion to restore the bill and take accounts between the parties was refused. *Hodgson* v. *Paxton*, 2 Ch. Ch. 398.

See Bank of Montreal v. *Wilson*, 2 Ch. Ch. 117; *Campbell* v. *Ferris*, 1 Ch. Ch. 50, *ante* 1 (e).

See next sub-head.

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6. *Undertaking to Speed Cause.*

Filing Replication—*Time.*]—Under the 12th order of this court, the plaintiff is bound to file a replication within one week from the date of entering into the undertaking to speed, whether a commission to examine witnesses shall be required by him or not. *McNab* v. *Gwynne*, 1 Gr. 151.

An undertaking to speed is an undertaking to set the cause down on bill and answer, or to file a replication within three weeks. The fact that there is ample time to go to a hearing at the next sitting of the court, is no excuse for not filing the replication within the time mentioned. *Burnham* v. *Burnham*, 1 Ch. Ch. 394.

——— *Unexplained Delay.*]—On a motion to dismiss after great delay, it is now the practice, with a view to enforce diligence in the prosecution of suits, to refuse an undertaking to speed where no explanation of the delay is given, and also to refuse to allow the motion to be intercepted by the filing of replication, anything to the contrary in the practice in England notwithstanding. *Ruttan* v. *Burnham*, 1 Ch. Ch. 191.

First Motion to Dismiss.]—Held, in opposition to Ruttan v. Burnham, 1 Ch. Ch. 191, that, on a first motion to dismiss for want of prosecution, it is the settled practice of the court to accept an undertaking to speed, without regard to the delay which has taken place. *Thompson* v. *Hind*, 1 Ch. Ch. 247.

It is the settled practice of the court (until altered by general order) to accept an undertaking to speed, upon a first motion to dismiss, and in cases where it would have been accepted prior to the establishment of hearing circuit. *Mallock* v. *Plunkett*, 1 Ch. Ch. 298.

Relief against Undertaking.]—The plaintiff undertook, upon a motion to dismiss his bill, to bring the cause down to the then next sittings at Guelph. From some correspondence it appeared that if the plaintiff had set the cause down for the then next

Guelph sitting, a postponement would have been asked for and granted, on the ground of the attendance at the house of commons of a member who was a defendant. The plaintiff offered to bring the cause down to the then next sitting at Toronto, to which a conditional consent was given; but the cause was not set down:—Held, that the plaintiff was relieved from his undertaking to bring the cause down at Guelph, and that he was under no obligation to bring the cause down at Toronto; and, as no intentional delay was shewn on the part of the plaintiff, the bill was restored. *Petrie* v. *Guelph Lumber Co.*, 9 P. R. 52.

IV. Consolidation of Suits.

After Decrees.]—The court cannot order the decrees in two original suits to be consolidated. *Brown* v. *Kingsmill*, 1 O. S. 229.

Effect of Order Consolidating—*Stay of One Suit.*]—By a decree made in DeBlaquiere v. Armstrong, it was ordered that that suit be consolidated with the suit of Armstrong v. Deedes. One of the parties had a different solicitor in each suit:—Held, that the subsequent proceedings must be carried on in DeBlaquiere v. Armstrong, the suit in which the decree was made, and that the solicitor in that suit was the proper solicitor to be served with notice of further proceedings, and not the solicitor in the suit of Armstrong v. Deedes, the consolidation being held to operate as a stay of proceedings in that suit. *DeBlaquiere* v. *Armstrong*, *Armstrong* v. *Deedes*, 6 P. R. 122.

Suits for Same Relief—*Different Plaintiffs—Objection to Status.*]—A bill having been filed by one of the cestuis que trust of a settlement, to enforce the trusts, defendant denied that the plaintiff had any interest under the settlement. Thereupon, by the advice of counsel, a bill was filed for the same purpose by another of the cestuis que trust, against whom the objection did not apply, and, he being an infant, the plaintiff in the first suit was named as his next friend. Both suits proceeded to a hearing, when the court consolidated them, making one decree as prayed, and giving the plaintiff in the second suit his costs. *Roseburgh* v. *Fitzgerald*, 13 Gr. 386.

V. Costs.

Abortive Hearing — *Common Error.*] — Where a cause was carried to a hearing in a defective state through an error common to all parties, diverse interests of infants being represented by one guardian and one counsel, no costs of that hearing were given to either party on the final disposition of the cause. *Munro* v. *Smart*, 26 Gr. 310.

Charging Fraud.]—The plaintiffs claimed to be partners of the defendant, and the defendant, in resisting a bill filed for the purpose of enforcing such claim, charged the plaintiffs with fraud, but no evidence was adduced either in support or rebuttal thereof, in consequence of the court expressing the view that the plaintiffs were not entitled to succeed; and, as it did not appear that the costs had been increased thereby, the court, on dismissing the bill, ordered defendant to be paid his costs. *Samson* v. *Haggart*, 25 Gr. 543.

Common Mistake—*Tribunal.*]—A decree had been made on consent, referring the question whether or not the defendant had performed certain work for the plaintiff at a specified rate, to a master, who reported that the defendant had not. On appeal, the court, considering that this was a question that should have been disposed of by the court, set aside the report and directed a trial to be had upon that issue, reserving the costs of the proceedings before the master and of the appeal:—Held, on further directions, that these costs having been incurred in a proceeding consented to under a common mistake of parties as to the proper tribunal to decide the question, each party should pay his own costs. *Dalby* v. *Bell*, 29 Gr. 336.

Disclaimer—*Master's Office.*] — Where a person who is made a party to a suit in the master's office appears and disclaims, he is not entitled to any costs, as by remaining inactive the same end will be attained as by his disclaiming. *Batt* v. *Park*, 6 Gr. 553.

——— *Proper Party.*]—A creditor filed a bill to set aside a deed as fraudulent against creditors, and the grantee by his answer disclaimed, and alleged that the deed was executed without his knowledge or consent, and that when he became aware of it he had repudiated it:—Held, that the grantee, having been properly made a defendant, was not entitled to his costs. *Shuttleworth* v. *Roberts*, 11 Gr. 257.

Divided Success.]—The court, being of opinion that all the grounds of defence other than that of want of jurisdiction had signally failed, on dismissing the bill refused the defendant his costs. *Dunnet* v. *Forneri*, 25 Gr. 199.

Where an insurance company set up several defences, some of which they failed to substantiate, the court on dismissing the bill did so without costs. *Hawke* v. *Niagara District Mutual Fire Ins. Co.*, 23 Gr. 139.

Event.]—The rule of the court is that costs should follow the event, unless very special circumstances are shewn. *Downey* v. *Roaf*, 6 P. R. 89.

Evidence.] — What evidence may on a question of costs be used on further directions. See *Downey* v. *Roaf*, 6 P. R. 89.

Motion—*Submission to—Tender of Costs.*] —Where a defendant had obeyed an order to produce, after receiving a notice of motion to commit, and tendered a sufficient sum for the costs of the notice, which the plaintiff's solicitor refused: the defendant was given his costs of motion, less the sum tendered. *Franklin* v. *Bradley*, 2 Ch. Ch. 444.

Next Friend—*Liability.*]—A person alleged that he was induced by the plaintiff's solicitor to allow his name to be used as "next friend," on the assurance that he would not be rendered liable to costs. The solicitor denied that. It was considered that such a fact could not be esfablished by ex parte affidavits. *Burgess* v. *Mumu*, 2 Ch. Ch. 43.

Objection to Suit—*Answer—Hearing on Question of Costs—Offer to Settle.*]—Where

new trustees of a corporation are made parties to a suit for specific performance, with a surviving trustee, who alone is liable on the covenants contained in the instrument, the former in order to obtain costs against the plaintiff must take the objection by their answer, or at all events before the cause is brought to a hearing; and where the object for which a bill was filed has been obtained during the progress of the cause, it should not be brought to a hearing on the mere question of costs, without an offer to settle that question otherwise. *O'Sullivan* v. *Clurton*, 26 Gr. 612.

Pauper—*Costs of Indulgence.*]—The rule is, that where a plaintiff sues in formâ pauperis he will not be ordered to pay costs of any indulgence granted him during the progress of the cause. Where, therefore, such a plaintiff brought to a hearing a suit which was defective for want of parties, the court ordered it to stand over to add them, and directed that the question of costs of this indulgence should stand over and be disposed of on the hearing of the cause. *Parr* v. *Montgomery*, 22 Gr. 176.

Quantum of Costs—*Unnecessary Trial.*]—At the hearing a decree was pronounced in favour of the plaintiff with costs generally, but on moving to vary the minutes, statements and admissions in the answer were pointed out, to which the attention of the court had not been drawn at the hearing, which would have enabled the plaintiff to have obtained the same decree on bill and answer. The court varied the decree by directing that only such costs should be taxed as would have been incurred by a hearing on bill and answer. *Johnson* v. *Howard School Trustees*, 26 Gr. 294.

Setting aside Tax Sale—*Cross-claims for Improvements.*]—In a suit by the owner of land impeaching a tax sale deed as a cloud on title, defendant disputed the right of the plaintiff, which was decided in his favour. The court ordered defendant to pay the costs of the suit, notwithstanding that the amount to which defendant was found entitled as compensation for improvements was estimated at double the value of the land, which the court ordered the plaintiff to pay in the event of his preferring to take back the land rather than allow the defendant to retain it, paying its value; although, had the defendant submitted on the question of title, and claimed only compensation under the statute, the costs would have been apportioned. *Aston* v. *Innis*, 26 Gr. 42.

Settlement of Suit—*Summary Application—Consent.*]—The claim for which a suit had been brought having been compromised, the question by whom the costs of the suit should be borne was determined by the referee in chambers, on a summary application by consent of parties. Upon appeal, the court refused to interfere with the discretion exercised by the referee. *Garforth* v. *Cairns*, 9 C. L. J. 212.

——— *Summary Application—Consent—Mortgage.*]—The rule of the court, that when the subject matter of a suit is settled by defendant before decree, the question of costs cannot be disposed of on a summary application by plaintiff, unless the defendant consents, applies to mortgage suits. A defendant in such a case may insist on the suit going to hearing, as there may be grounds on which he may be relieved from costs. Where under such circumstances the referee refused an application by plaintiff for the payment by defendant of the costs of the suit, an appeal from such order was dismissed with costs. *McLean* v. *Cross*, 3 Ch. Ch. 432.

Stakeholders.]—When a building society by their answer stated a sum of money to be in their hands as stakeholders, which was smaller than at the hearing they were willing to admit, the court refused them their costs of suit. *Graham* v. *Toms*, 25 Gr. 184.

VI. DECREE.

(*See* also *post* VII., XVI.)

1. *Carriage of.*

Change—*Delay.*] — Where any unreasonable delay occurs on the part of the plaintiff in carrying on a creditors' suit, the court will order the carriage of the decree to be given to another of the creditors, upon his indemnifying the plaintiff against future costs. *Patterson* v. *Scott*, 4 Gr. 145.

Where a plaintiff had been guilty of delay in bringing a decree into the master's office; and, after taking out warrants to consider, procured two postponements, and did not attend the third appointment, the master, on a subsequent day, transferred the carriage of the decree to defendant, and granted him a warrant to hear and determine:—Held, not irregular. *Stephenson* v. *Nicolls*, 14 Gr. 144.

It is irregular to deliver a decree to any party not entitled to the carriage thereof without an order to that effect; but where the plaintiff, who was primâ facie so entitled, was guilty of great delay in proceeding under a decree pronounced, and a defendant beneficially interested applied for and obtained the decree from the registrar, which he carried into the master's office, a motion to give the carriage thereof to the plaintiff was refused with costs. *Steers* v. *Cayley*, 1 Ch. Ch. 165.

Where a decree referring a matter to the master is not, within fourteen days after such decree is pronounced, brought into the master's office by the party having the carriage thereof, any other party may apply under the general order of 1853, No. 42, s. 1, without first having the decree drawn up and entered. *Emes* v. *Emes*, 1 Ch. Ch. 385.

Application in chambers by defendant for carriage of decree, the plaintiff, who was entitled to it, not having gone on within the fourteen days, &c. *S. C.*, 2 Ch. Ch. 54.

No order is necessary under No. 211, consolidated orders, to authorize defendant to take the carriage of a decree out of the plaintiff's hands. *Smith* v. *Henderson*, 2 Ch. Ch. 304.

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2. *Enrolling.*

See Anon., 1 Gr. 168; *Hill* v. *Rutherford*, 1 Ch. Ch. 121.

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3. *Entry.*

Nunc pro Tunc.]—See *Drummond* v. *Anderson*, 3 Gr. 150.

Passing and Entry.]—See *Drummond* v. *Anderson*, 3 Gr. 150.

4. *Motion for.*

Abandonment.] — See *McLaughlin* v. *Whiteside*, 7 Gr. 515, 1 Ch. Ch. 56.

Effect of—*Admission.*]—See *Neil* v. *Neil*, 15 Gr. 110.

Evidence.]—See *Mathers* v. *Short*, 14 Gr. 254.

Setting down.]—See *Clarke* v. *Hall*, 7 Gr. 339.

5. *Review.*

Affidavits in Answer.]—Where a petition of review is filed on the ground of new matter, the respondent may file affidavits without leave as in the case of other petitions. *Robson* v. *Wride*, 14 Gr. 606, 15 Gr. 565.

Discovery of New Evidence — *Knowledge—Diligence.*]—In applications to open up proceedings by way of review, on the ground of newly discovered evidence, it is necessary for the party applying to establish: (1) that the evidence is such that, if it had been brought forward at the proper time, it might probably have changed the result; (2) that the time he might have so used it neither he nor his agents had knowledge of it; (3) that it could not with reasonable diligence have been discovered in time to have been so used; and (4) that the applicant has used reasonable diligence after the discovery of the new evidence. *Dumble* v. *Cobourg and Peterborough R. W. Co.*, 20 Gr. 121.

Where a railway company in the construction of their road took possession of and built their road across a plot of land of the plaintiff, who instituted proceedings to compel payment therefor, and under the decree a sum of $1,800 was found to be the value of such plot, which sum, together with interest and costs, was paid by the company in order to prevent the land being purchased by a rival company; and three years afterwards they applied on petition to have a portion of such purchase money refunded, on the ground that another railway company, whose rights had been assigned to them, had previously paid a prior owner of the land for a portion thereof; the court refused the relief asked with costs on the ground, amongst others, that the company, had they exercised due diligence in the matter, might have become aware of such prior purchase and payment. *Ib.*

Petition—*Leave to File.*]—It is not necessary to file a petition for leave to present a petition in the nature of a bill of review; one petition under the general orders answering the double purpose of the bill of review, and of the motion for leave to file it under the former practice. *Duggan* v. *McKay*, 1 Ch. Ch. 380.

Re-opening Whole Case — *Mortgage—Delay—Affidavits.*]—Mortgagees, under their power of sale, sold to M. for $7,800, and gave him possession. M. paid a deposit of $600, and gave his promissory note for $600 more, which he duly paid. He also executed a mortgage for $4,000, which was duly registered, but did not pay the residue of the purchase money, $2,600. The mortgagees executed a deed, but retained it in their possession. Their solicitor also did some acts as if the sale was complete; but the court, being satisfied that the parties regarded the transaction as still in fieri:—Held, that the mortgagees were not responsible to a subsequent incumbrancer for the $2,600, or chargeable with more than they had received. The bill of a subsequent incumbrancer stated a completed transaction. The mortgagees through oversight allowed the bill to be taken pro confesso, and a decree was made accordingly. The plaintiff, desiring more extensive relief, filed a petition in the nature of a bill of review. The mortgagees, in their answer to this, set up the facts which shewed the transaction to be not completed. The court considered the whole case to be re-opened by this petition, and decided that the sale to their vendee did not affect the rights of the mortgagees, and that they were chargeable only with the amount actually received from the purchaser. *Bank of Upper Canada* v. *Wallace*, 16 Gr. 280.

To support an application after the time limited for leave to file a petition of review, the longer the delay has been and the less satisfactorily it is explained, the stronger the case should be on the merits; and where, after five months' delay, an application was made to impeach the will on which the decree was founded, and the application was supported by affidavits of belief only, in addition to statements which though uncontradicted would not be sufficient to avoid the will, the court refused the application with costs. *Ib.*

6. *Service.*

Absence from Jurisdiction—*Order.*]—It is unnecessary to obtain an order to serve an office copy of the decree out of the jurisdiction, as No. 7 of the orders of 10th January, 1863, applies to the service of all proceedings in the cause. *Wood* v. *Brock*, 1 Ch. Ch. 235.

Dispensing with.] — Personal service of a copy of decree under G. O. 114, may be dispensed with. *Alguire* v. *Mattice*, 7 P. R. 403.

——— *Absence from Jurisdiction.*]—Where in an administration suit the interest of one of the next of kin appeared to be very trifling indeed, and he resided out of the jurisdiction, on an application for service on him by mailing, the secretary made an order dispensing with service on him altogether. *Re Hare, Carpenter* v. *Kelly*, 2 Ch. Ch. 417.

——— *Class of Parties.*]—Where the parties who would become interested under a decree as next of kin of a testator are very numerous, and difficult to serve, the court will, in its discretion, dispense with service on them, or some of them, and direct one of a family or class to be served. *Anderson* v. *Kilborn*, 2 Ch. Ch. 408.

Incumbrancers.] — In proceeding under the orders of February, 1858, to make incumbrancers parties to the cause, the plaintiff must serve the incumbrancers with office copies of the decree, duly stamped. *Elliott* v. *Hellwell*, 1 Ch. Ch. 6.

7. *Varying or Correcting.*

Absence of Party—*Petition.*]—Where a decree is settled and issued in the absence of one of the parties, without providing for relief to which he is entitled, and which would have been given him if brought to the attention of the court, the proper mode of having the error corrected is to move upon petition; it is not necessary to rehear for that purpose. *Simmers* v. *Erb*, 21 Gr. 289.

Leave to Rehear—*Petition — Delay.*] — A bill was filed by a creditor against his debtor, to obtain the benefit of a vendor's lien, and the decree declared the lands (four parcels) subject to the lien for unpaid purchase money, and directed an account to be taken of what was due to the vendor and also to the plaintiff and other incumbrancers. It appeared that to one of the four parcels the vendor had not any title; and that the purchase had been of all at a gross sum of £2,000. After the accounts had been taken, one of the purchasers filed a petition praying for a reference back with a view of obtaining an abatement of the purchase money on account of such defect; but, as this would have been in effect a varying of the decree, which could only be obtained upon a rehearing, the relief was refused: and quære, whether, after the delay that had occurred and the proceedings that had been taken, it would have been proper to grant leave to rehear. *O'Donohoe* v. *Hembroff*, 20 Gr. 350.

Making Decree Conform to Decision Pronounced.] — The decree declared that an assignment of a bond was by way of security only; that the plaintiff was entitled to certain credits; and referred it to the master to take the accounts. In proceeding with the accounts the defendant was hampered by this declaration in the decree, as the master felt bound by it, whereupon the defendant moved upon petition to amend the decree so as to make it conform to the judgment:—Held, that the judgment was directed solely to the fact that the bond was assigned as a security only, and that the view taken as to the credits was a ground for so holding, and was not a substantive part of the judgment, and therefore that the declaration as to the credits was unauthorized, and should be struck out of the decree upon payment of costs of the application and of all additional costs incurred or to be incurred in the master's office, caused by the decree not having been properly drawn in the first instance. *Livingston* v. *Wood*, 29 Gr. 157.

Omission — *Costs.*] — At the hearing the defendant was found answerable to the plaintiff for a breach of duty in respect of shares of stock bought by the plaintiff through his agency, and subsequently the court, on motion, added to the decree a direction that defendant should indemnify the plaintiff against future calls on such stock, but refused costs of the application to either party: to the plaintiff because the relief would have been granted at the hearing if then asked; and to the defendant because he resisted that to which the plaintiff was clearly entitled. *Machar* v. *Vandecar*, 26 Gr. 319.

——— *Entry—Petition.*]—Where a necessary direction is omitted in a decree, the court will amend it, although the decree has been passed and entered. In such a case the proper proceeding is by petition. *Moffat* v. *Hyde*, 6 L. J. 94.

——— *Supplemental Order — Costs — Forum.*]—Where the decree by oversight contained no direction as to giving up possession, a supplemental order directing it was made, but on payment of costs. A motion for such an order was considered more properly a motion for court than chambers. *Mason* v. *Seney*, 2 Ch. Ch. 30.

Praecipe Decree—*Petition.*] — Where a party is dissatisfied with the manner in which the registrar takes the account between the parties and desires to have the decree drawn up by the officer on præcipe varied, it is not necessary to rehear the cause; the proper mode is to present a petition to the court for that purpose. *Nelles* v. *Vandyke*, 17 Gr. 14.

Striking out Improper Declaration.] —At the hearing a decree was pronounced declaring a deed void to the extent of the interest reserved in favour of the grantor and his wife, and the children of a daughter of the grantor, but in drawing up the decree the deed was declared void as to the children of an intended marriage of the son of the grantor. Under this decree a sale of the trust estate was had at the instance of the plaintiff, a creditor who had filed the bill impeaching the deed as fraudulent. The court, under these circumstances, refused to carry out the sale, and ordered the decree to be corrected, and a new sale had, in which the interests of the children of the marriage should be protected. *Thompson* v. *Dodd*, 26 Gr. 381.

Time—*Added Party.*]—The court has jurisdiction in a proper case to entertain an application by a party served with an office copy of the decree, under the general orders of June, 1853 (No. 6, rule 6), after the expiration of the fourteen days thereby limited. *Stewart* v. *Hunter*, 2 Ch. Ch. 265.

See Sovereign v. *Freeman*, 25 Gr. 525; *Johnson* v. *Howard School Trustees*, 26 Gr. 204.

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8. *Other Cases.*

Acceptance of — *Election.*] — Where a cause is heard on bill and answer, the plaintiff has the right of electing to pay the costs of the day, and file replication and go to hearing in the usual way. And even in a case where he had accepted the decree made on bill and answer, and on coming to settle minutes was dissatisfied with it, he was allowed the same option, on the ground that he could have exercised it on a rehearing or an appeal. *Russell* v. *Breeken*, 2 Ch. Ch. 253, 265.

Acting on — *Failure to Disclose Material Facts.*]—A final decree of foreclosure had been obtained in a suit where the true position of parties was not disclosed or material facts had been misrepresented, and a bill was subsequently filed to enforce a claim against the party beneficially interested as plaintiff in that suit. The court refused to make a decree other than would have been proper had the true position of the parties to that suit been stated. *Wilson* v. *Hodgson*, 14 Gr. 543.

Consent Decree — *Acting on—Neglect to Draw up.*]—The plaintiff claimed dower: a

decree was made less extensive than she claimed; the master made his report in pursuance of the decree; the solicitor on the same day signed a consent to a decree on further directions being made in certain terms stated in the consent; these terms were in accordance with the decree and report; they provided also that, in lieu of dower, plaintiff should be paid a certain annual sum named; the decree was not drawn up, but the agreement which it embodied was acted on for eight years:—Held, that the plaintiff was bound by it, and that she could obtain no relief on the ground that the original decree should have been more favourable to her. *Sills* v. *Lang*, 17 Gr. 691.

Death of Party.]—It is regular after the death of a defendant to draw up a decree which was previously pronounced. *Galbraith* v. *Armstrong*, 1 Ch. Ch. 33.

Declaratory Decree — *Consequent Relief.*]—The court will not make a declaratory decree simply, without directing any relief to the plaintiff. Therefore, where the plaintiff was liable to pay to one W. $2,000 one year after the death of plaintiff's mother, who was alive, and the plaintiff had paid a large portion of such legacy to W., who had made an assignment thereof, the court refused to make any decree declaring the rights of the parties, or restraining an assignment of the legacy; the right to recover the legacy being a mere chose in action, any person accepting an assignment thereof took it subject to all equities, and took it for no more than the amount that was actually due in respect of it. *Cogswell* v. *Sugden*, 24 Gr. 474.

Erroneous Decree.]—The court will not assist in carrying on or perpetuating error, by enforcing an erroneous decree. *Mitchell* v. *Strathy*, 28 Gr. 80.

Offer Made at Hearing—*Embodiment in Decree.*]—Where at the hearing of a suit to enforce a purchase made by a testator, against the trustees under his will, it was made to appear that there were not funds of the estate wherewith to pay the amount of the purchase money due, and the widow of the testator offered to purchase, in her own name, at a price which was considered beneficial for the estate, a direction to that effect was inserted in the decree, in order to avoid the necessity of a petition being presented to the court for that purpose, after the usual decree should have been made. *Delisle* v. *McCaw*, 22 Gr. 254.

Subsequent Proceedings — *Decree not Absolute*—*Waiver.*]—Proceedings under a decree which is not absolute are invalid. *Clarke* v. *Ellis*, 6 P. R. 115.

The purchaser at a sale, under such a decree, was refused a vesting order, though offering to waive all objections to the proceedings, it being considered that it was only the defendants who could waive such an objection. *Ib.*

Summary Decree.] — A plaintiff is not entitled, as of course, to a decree before the time for answering the bill has expired. Some special ground must be shewn to induce the court to grant it. *Davidson* v. *McKillop*, 4 Gr. 146.

Time for Proceeding on.] — The fourteen days given to proceed on a decree count from the pronouncing, not the entering. *Emes* v. *Emes*, 2 Ch. Ch. 21.

Undisclosed Principal — *Personal Decree.*]—Where a purchase was made by a person in his own name, but in reality for the benefit of another, a personal decree against both, for the payment of the purchase money, was held to be correct. *Sanderson* v. *Burdett*, 18 Gr. 417.

Vacating Decree as against one Defendant—*Effect of.*] — A decree which had been made against several defendants, one of them, A., being administrator ad litem of the estate of a defendant who had died before answer, was vacated as to the defendant B., and leave was given to him to file a supplemental answer and have a new hearing of the cause. Subsequently C., who had, since the decree and before the appeal, been appointed administrator in place of A., who died after decree, applied for leave to file an answer setting up defences which his predecessor had omitted. It was shewn that he had been appointed pro formâ to represent the estate; that no proceedings in appeal had been served upon him; and that no further relief was sought against the estate:—Held, that the vacating of the decree as against B., did not, under the circumstances, open up the decree as against the deceased defendant's estate, and that the referee had, therefore, no power to allow C. to file a supplemental answer. *Peterkin* v. *McFarlane*, 6 A. R. 254.

See Dalby v. *Bell*, 29 Gr. 336, *ante* V.

VII. Decree and Order pro Confesso.

(*See* also *ante* VI., *post* XVI.)

[By 104 of the G. O. C. (1868), orders pro confesso were abolished and notes were ordered to be entered when the service was personal and within the jurisdiction.]

1. *Ex Parte Motions.*

(a) *Against Absent or Absconding Defendants.*

See Gilmour v. *Matthews*, 4 Gr. 376; *McCarty* v. *Wessels*, 1 Ch. Ch. 5; *Kerr* v. *Clemmow*, 1 Ch. Ch. 14; *Anon.*, 1 Ch. Ch. 204; *Goodfellow* v. *Hambly*, 1 Ch. Ch. 62; *Hare* v. *Smart*, 1 Ch. Ch. 350; *McMichael* v. *Thomas*, 14 Gr. 249; *Patrick* v. *Ross*, 2 Ch. Ch. 459; *Sefton* v. *Lundy*, 4 Ch. Ch. 33.

See, also, *post* XXII.

(b) *Other Cases.*

Company — *Service — Direction.*] — See *Cameron* v. *Upper Canada Mining Co.*, 4 C. L. J. 77.

Defunct Company.] — See *Furness* v. *Metropolitan Water Co.*, 1 Ch. Ch. 369.

Service on Attorney—*Affidavit of Service.*]—See *Cameron* v. *Phipps*, 1 Ch. Ch. 4.

Solicitor—*Undertaking — Breach.*] — See *Shaw* v. *Liddell*, 4 Gr. 352; *Peterborough* v. *Conger*, 1 Ch. Ch. 18.

Time—*Vacation.*]—See *Grange* v. *Conroy*, 1 Ch. Ch. 70.

2. *Notice of Motion.*

Default after Appearance.] — See *Anderson* v. *Henderson*, 2 Gr. 134.

Lapse of Time after Bill Served.]—See *Brown* v. *Baker*, 1 Ch. Ch. 7; *Heward* v. *Watson*, 1 Ch. Ch. 203; *McClary* v. *Durand*, 1 Ch. Ch. 233.

Lapse of Time after Order.] — See *Cryne* v. *Doyle*, 1 Ch. Ch. 1.

Order 144.]—See *Richards* v. *Richards*, 2 Ch. Ch. 283.

Solicitor—*Acceptance of Service.*] — See *Ross* v. *Hayes*, 6 Gr. 277.

——— *Service on.*] — See *Webster* v. *O'Closter*, 6 Gr. 278.

3. *Setting aside.*

Case to be Shewn.]—See *Bank of Montreal* v. *Wallace*, 2 Ch. Ch. 17.

——— *Defence—Strictissimi Juris.*] — See *Dixon* v. *Mills*, 2 Gr. 647.

——— *Præcipe Decree.*]—See *Mitchell* v. *Crooks*, 2 Gr. 123.

Defective Affidavit of Service.] — See *Gordon* v. *Johnson*, 2 Ch. Ch. 210.

Erroneous Decree.] — See *Switzer* v. *Ingham*, 14 Gr. 287.

Forum.]—See *Kline* v. *Kline*, 3 Ch. Ch. 79.

Laches — *Plea to Jurisdiction.*] — See *Hamelyn* v. *White*, 9 C. L. J. 363, 6 P. R. 120.

Leave to Defend—*Terms—Costs.*]—See *Redford* v. *Todd*, 6 P. R. 154.

Terms of Order Setting aside — *Failure to Comply with.*]—See *Williams* v. *Atkinson*, 1 Ch. Ch. 34.

4. *Other Cases.*

Corporations.]—See *Counter* v. *Commercial Bank*, 4 Gr. 230.

Discretion.]—See *Perrin* v. *Davis*, 3 Gr. 161.

Intervention of Defendant after Orders.] — See *Strachan* v. *Murney*, 6 Gr. 284.

Irregularity — *Order* — *Note.*] — See *Cameron* v. *Upper Canada Mining Co.*, 2 Ch. Ch. 215.

Motion—*Evidence on.*] — See *McCann* v. *Eastwood*, 1 Ch. Ch. 233.

Negotiations for Settlement—*Entry of Note pending.*] — See *Bolster* v. *Cochrane*, 2 Ch. Ch. 327.

Non-attendance for Examination.] — See *McAvilla* v. *McAvilla*, 6 P. R. 311.

Parties in Jurisdiction — *Note.*] — See *Procter* v. *Dalton*, 2 Ch. Ch. 470.

Parties out of Jurisdiction.] — See *Marshall* v. *Balfour*, 2 Ch. Ch. 69.

Refusal to Depose on Foreign Commission.] — See *Prentiss* v. *Bunker*, 4 Gr. 147.

Several Defendants — *One Hearing.*] — See *Fuller* v. *Richmond*, 2 Gr. 24.

Subsequent Proceedings.]—See *Perrin* v. *Davis*, 3 Gr. 161.

Terms of Decree—*Security for Lost Instruments.*] — See *Abell* v. *Morrison*, 23 Gr. 109.

Time — *Computation.*] — See *Boulton* v. *McNaughton*, 1 Ch. Ch. 216.

Traversing Note — *Removal* — *Leave to Proceed.*]—See *Tylee* v. *Burtchardt*, 3 Gr. 449.

VIII. Disputing Note.

Ex Parte Order to Produce.]—A disputing note is not equivalent to an answer so as to entitle a defendant to obtain ex parte an order to produce. *Richardson* v. *Beaupré*, 2 Ch. Ch. 54.

Mistake in Entering—*Leave to Answer —Statute of Limitations.*] — An application was made to vacate a præcipe decree taken into the master's office, and to allow, instead of a disputing note, an answer to be filed setting up the Statute of Limitations. The application was held to be properly made in chambers, and was granted, it being shewn that the note was filed through the mistake of a solicitor in supposing that the defence of the statute was available under it. Under a note disputing the amount of the plaintiff's claim, filed in a mortgage suit, questions as to the correctness of the account alone can be entered into. The Statute of Limitations cannot be set up as a defence in this way, but must be pleaded. *Cattanach* v. *Urquhart*, 6 P. R. 28.

Statute of Limitations—*Arrears of Interest — Taking Accounts.*] — Held, reversing the decision in 24 Gr. 457, that it is unnecessary to plead the Statute of Limitations in mortgage suits to prevent the recovery of more than six years' arrears of interest in taking the accounts before the master, as the filing of a disputing note is sufficient. *Wright* v. *Morgan*, 1 A. R. 613.

IX. Filing Papers.

Affidavit Verifying.]—On a motion for a summary reference, the affidavit verifying the bill must be filed before notice of the motion is served, and referred to by the notice. *Crawford* v. *Wilkinson*, 2 Gr. 406.

Bill.]—Where a bill had been filed not complying with the orders, the dates not being expressed in figures, although the bill was printed, and not being in pica type, nor of the usual size, as required by the orders, the service of a copy of it was set aside; the fact of the deputy registrar receiving and filing it not being deemed a bar to the motion. *Cossey* v. *Bucklow*, 2 Ch. Ch. 227.

Officer — *Ministerial Act — Motion — Appeal.*]—When a deputy registrar or other officer, whose duty it is to file papers, receives and files a paper duly presented to him for that purpose, he does a ministerial act, and leaves the regularity of the proceeding on the part of the person presenting the paper to be objected to by any who may have an interest in objecting. *Waterous* v. *Farran*, 6 P. R. 31.

An application to the referee impeaching the propriety of the filing is not an appeal or in the nature of an appeal from the deputy registrar, or other officer, so as to deprive the referee of jurisdiction under 34 Vict. c. 10, s. 2 (O.) *Ib.*

——— *Irregular Filing.*]—A paper mailed or delivered to a deputy registrar or other officer, elsewhere than at his office, to be filed, cannot be treated as a filing; but if he afterwards file the paper in his office, previous irregularities in its delivery to him are, generally speaking, cured. *Hayes* v. *Shier*, 6 P. R. 41.

X. HEARING.

1. *Entry or Setting down.*

Costs.]—See *Armour* v. *Noble*, 3 Ch. Ch. 99.

Further Directions—*Delay.*]—See *Poole* v. *Poole*, 2 Ch. Ch. 379.

——— *Notice.*]—See *Cook* v. *Gingrich*, 12 Gr. 416.

Irregularity — *Striking out — Costs — Objection—Delay.*]—See *City of Toronto* v. *McGill*, 1 Ch. Ch. 16.

Irregularity — *Striking out — Costs — Objection—Waiver.*]—See *Killaly* v. *Graham*, 2 Gr. 281.

Order pro Confesso — *Decree.*] — See *Glass* v. *Moore*, 4 C. L. J. 228.

Time—*Computation.*]—See *Beard* v. *Gray*, 3 Ch. Ch. 104.

See Prentiss v. *Bunker*, 4 Gr. 147, *ante* VII. 4; *Cryne* v. *Doyle*, 1 Ch. Ch. 1, ante VII. 2.

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2. *New Hearing.*

Absence of Defendant at Hearing—*Solicitor's Slip — Merits—Petition—Forum.*]—Where defendant's solicitors, through the neglect of their clerk, were not aware until after the hearing that the cause had been set down or notice of hearing served, and the question raised by the answer was as to defendant's liability on a judgment recovered against him by his solicitor, the court allowed a new hearing after the decree was drawn up and entered, on payment of costs. The application for such a purpose should be by petition to the court, and not by motion in chambers. *Donovan* v. *Denison*, 2 Ch. Ch. 284.

Surprise—*Evidence.*]—A defendant knew precisely the question to be tried at the hearing, but took no steps to adduce any evidence on his behalf, and a witness whom he would have called was called by the plaintiff, and gave evidence which the defendant swore was different from what he had anticipated he would give:—Held, that this was not such a case of surprise as entitled the defendant to have the cause reopened, in order that there might be a new hearing, and a motion made for that purpose was refused with costs, although the defendant swore that the evidence given by the witness had taken him by surprise, and that the same was incorrect, and would be contradicted by the wife and son of the defendant. *Sherritt* v. *Beattie*, 27 Gr. 492.

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3. *Notice of Hearing.*

Countermand.]—Quære, has a plaintiff a right to countermand a notice of hearing, and if he does so, cannot a defendant proceed with the hearing notwithstanding. *Richardson* v. *Moser*, 1 Ch. Ch. 18.

Irregularity—*Costs.*]—Where a notice of hearing is irregular in form, and the opposite party does not take the objection until the cause is called on, he is not entitled to costs. *Stevenson* v. *Hodder*, 15 Gr. 542.

Style of Cause.]—It is sufficient in a notice of hearing to name in full the first plaintiff and first defendant; the words "and another," or "and others," after the name, are sufficient. *Stevenson* v. *Hodder*, 15 Gr. 542.

Time—*Past Day—Terms—Leave to Renew Motion.*]—Where a notice of hearing had been given, and by a mistake in naming the month it was for a day past, the court allowed it to stand, putting the parties on terms as to costs, and changing the venue for the convenience of going to hearing. *Scott* v. *Burnham*, 3 Ch. Ch. 399.

Where such notice had been moved against before the referee, and the affidavits failed to negative the receipt of any other notice, and the motion consequently was refused, but leave was given to renew it:—Held, that the giving time to renew the motion was an unwise exercise of discretion, and that it was open to the Judge on appeal to ignore or reverse it. *Ib.*

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4. *Postponement or Adjournment.*

Absence of Witnesses—*Costs.*]—Where a cause is withdrawn on account of the absence of a necessary witness for the plaintiff, and he shews that he has made diligent efforts to secure the attendance of such witness, who is residing within the jurisdiction, but fails to secure it, the costs of putting off the examination will, as a general rule, be costs in the cause. In all other cases the costs will be disposed of according to circumstances and in the discretion of the Judge. *Pattison* v. *McNab*, 12 Gr. 483.

A motion was granted for postponing the hearing and examination of a cause, on the grounds of the absence of a material witness,

after notice of hearing had been given, although the cause had been at issue for some months previous. The costs of such a motion are costs in the cause. *Graham* v. *Machell*, 2 Ch. Ch. 376.

It is the practice to make the costs of postponing the hearing of a cause, where sufficient grounds are shewn for such postponement, costs in the cause. The engagements of a witness, who was a senator of the Dominion and a member of the executive council, at his duties at Ottawa, where the senate was in session, were deemed sufficient excuse for not procuring his attendance, and good grounds for putting off the hearing. *Rees* v. *Attorney-General*, 2 Ch. Ch. 386.

Addition of Parties — *Further Evidence.*]—Where after the evidence at the hearing was closed on both sides, the court ordered the cause to stand over to add a party, further evidence between the original parties was held to be inadmissible at the adjourned hearing. *Attorney-General* v. *Toronto Street R. R. Co.*, 15 Gr. 187.

Delay in Executing Commission.] — Where a commission to take evidence abroad could not be executed in time, by reason of the illness of the commissioner, the plaintiff was allowed further time to set the cause down for examination and hearing. *McIntyre* v. *Canada Co.*, 2 Ch. Ch. 464.

Further Evidence.]—Where the plaintiff, suing on behalf of himself and the other next of kin of an intestate, alleges in his bill, but does not prove, that the next of kin are too numerous to be made parties by name, that some are resident out of the jurisdiction and others unknown, the court will either allow the cause to stand over to supply this proof, or will direct an inquiry by the master as to the next of kin. *Musselman* v. *Snider*, 3 Gr. 158.

Where a cause was brought on to be heard, at the suit of the Attorney-General, for the repeal of a grant of land alleged to have been issued in mistake, and the evidence adduced did not sufficiently establish the mistake, the court directed the cause to stand over to adduce further evidence. *Attorney-General* v. *Garbutt*, 5 Gr. 181.

A defendant having by his answer set up several matters of defence, which, through oversight, he had omitted to give evidence of, the court, at the hearing, directed the cause to stand over, with liberty to both parties to give evidence upon those points. *Northey* v. *Moore*, 5 Gr. 609.

A. held a bond for the conveyance of property, and assigned it absolutely to B., but for the purpose of security only. B. sold the property to C., and C. sold to others. C., before his purchase, had no notice that the bond to B. was a security merely. A. having become bankrupt, his assignee applied to redeem, and was held entitled, in the absence of any evidence that C. was a purchaser for value; but the court directed the cause to stand over, with liberty to C. to give such evidence upon payment of costs; unless the plaintiff should desire also to give evidence, in which case the cause was to stand over without costs. *Cherry* v. *Morton*, 8 Gr. 402.

Time of Application.] — A motion to postpone the hearing of a cause made before the secretary on the day on which the cause was to be heard in an outer county, was refused. *McEwan* v. *Orde*, 2 Ch. Ch. 280.

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5. *Rehearing.*

Amendment of Decree—*Set-off.*]—See *Robertson* v. *Meyers*, 2 Gr. 431.

Deposit.]—See *Great Western R. W. Co.* v. *Desjardins Canal Co.*, 9 Gr. 503, 523.

Effect of Reversal of Decree — *Lis Pendens.*]—See *Graham* v. *Chalmers*, 2 Ch. Ch. 53.

Extension of Time.]—See *Winters* v. *Kingston Permanent Building Society*, 1 Ch. Ch. 214; *Dickson* v. *Burnham*, 2 Ch. Ch. 436; *Stevenson* v. *Nichol*, 2 Ch. Ch. 183; *Fleming* v. *Duncan*, 3 Ch. Ch. 53; *Romaces* v. *Fraser*, 3 Ch. Ch. 53; *Cameron* v. *Wolf Island Canal Co.*, 3 Ch. Ch. 54; *Brigham* v. *Smith*, 3 Ch. Ch. 313; *Re Mullarky*, 6 P. R. 95; *Winnett* v. *Renwick*, 6 P. R. 233; *Robertson* v. *Robertson*, 7 P. R. 418.

Petition for—*Grounds—Confinement to.*] —See *McMaster* v. *Campton*, 5 Gr. 549.

Setting down—*Time—Notice.*]—See *In re Miller*, 12 Gr. 73.

Several Defendants—*Parties to Rehearing.*]—See *Hiscox* v. *Lander*, 24 Gr. 250.

——— *Rights of Non-applicants.*]—See *Black* v. *Black*, 9 Gr. 403.

Several Rehearings.] — See *Cook* v. *Walsh*, 1 Gr. 209, *S. C.*, 2 Gr. 625.

——— *Parties.*]—See *Paterson* v. *Holland*, 8 Gr. 238.

Status of Applicants—*Creditors.*]—See *Mulholland* v. *Hamilton*, 12 Gr. 413.

Stay of Proceedings.]—See *Campbell* v. *Edwards*, 6 P. R. 159.

——— *Security.*]—See *Stovel* v. *Coles*, 10 C. L. J. 342.

Waiver—*Acting on Decree.*]—See *Keith* v. *Keith*, 25 Gr. 110.

See *O'Donohoe* v. *Hembroff*, 20 Gr. 350.

XI. Indorsement of Papers.

See Campbell v. *Tucker*, 7 P. R. 135; *Aikins* v. *Nelson*, 3 C. L. J. 69; *Redman* v. *Brownscombe*, 9 C. L. J. 161, 6 P. R. 83; *Coates* v. *Edmonson*, 2 Ch. Ch. 439; *Bennett* v. *O'Meara*, 2 Ch. Ch. 167; *McDonell* v. *Upper Canada Mining Co.*, 2 Ch. Ch. 400.

XII. Irregularity.

Estoppel — *Counter-irregularity.*] — The fact that a party objecting to an irregularity

has himself committed a similar irregularity, which in a measure led to that objected to, does not estop him from taking the objection. *Denison* v. *Denison*, 4 C. L. J. 45.

Motion against—*Status of Applicants—Parties.*]—Two defendants moved to set aside a notice of hearing, and to strike the cause out of the list, on the ground that the answer of some co-defendants had been filed without authority from them, and therefore the litigation might be re-opened by them:—Held, that the parties whose names were improperly used were the only persons who could move to set aside proceedings. The defendants whose names had been so used subsequently moved to set aside the proceedings. The application was adjourned by the referee before the Judge at the hearing, who ordered the cause to be struck out with costs. *Quantz* v. *Smelzer*, 6 P. R. 126.

——— *Strictissimi juris.*]—Where a party seeks to set aside a proceeding on technical grounds, his own case will be judged strictissimi juris; and if he move on insufficient materials, he does so at his own risk, and the court will not aid him. The court will not encourage the taking advantage of an error which is obviously a mere slip, and does not mislead, and is not calculated to mislead. *Scott* v. *Burnham*, 3 Ch. Ch. 399.

——— *Time.*]—A party complaining of an irregularity must come promptly and move against it either within a reasonable time, or the time limited in the order or notice complained of. Thus where a party was directed to pay a certain sum of money within eight days, but did not move against an irregularity in the order for several weeks afterwards:—Held, that he came too late to complain. *Miller* v. *Miller*, 9 L. J. 132.

Notice of Motion—*Grounds.*]—A notice of motion to set aside proceedings on grounds of irregularity, should state the grounds of the alleged irregularity. *Poole* v. *Poole*, 2 Ch. Ch. 379.

A notice of motion to set aside any proceeding for irregularity must state the grounds relied on. *Donelly* v. *Jones*, 4 Ch. Ch. 48.

Pleading—*Taking off Files.*]—Held, that where a party files a pleading without serving notice thereof on the opposite party, such pleading may be taken off the files for irregularity with costs. McDougall v. Bell, 9 L. J. 133, not followed. *Lewis* v. *Jones*, 9 L. J. 133.

It is irregular to move in chambers to take a bill off the files because the prayer is unintelligible. Although the registrar or deputy registrar may have filed a bill not printed in compliance with the orders of court, a motion to take such bill off the files for such non-compliance is regular. *Cossey* v. *Bucklow*, 4 C. L. J. 17.

Relieving against.]—The court has jurisdiction to relax its general as well as its special orders, and will in its discretion do so to further the ends of justice so as to relieve a suitor against difficulties occasioned by a solicitor. *Devlin* v. *Devlin*, 3 Ch. Ch. 491.

Waiver—*Asking for Time.*]—When defendant's solicitor, on asking the solicitor of the plaintiff, a married woman, for further time to answer, handed him the affidavit on which he intended to move, which stated that it would be necessary to apply to have a next friend appointed to the plaintiff before answering, but omitted to call the attention of the plaintiff's solicitor to this statement, who without reading the affidavit indorsed a consent for ten days' further time to answer:—Held, that he had waived his right to object to the bill as being filed by the plaintiff without a next friend. *Mallory* v. *Mallory*, 7 P. R. 446.

——— *Demand.*]—Where, after an irregularity of service, the party having the right to insist on it, serves a demand which it would put the other party to expense to fulfil, he waives the irregularity. *Carpenter* v. *City of Hamilton*, 2 Ch. Ch. 282.

——— *Step in Cause—Notice.*]—Though a party may search the papers filed in a suit, yet unless it is shewn that he has actually seen the pleading complained of as irregular, he may move after the next step in the cause to have it taken off the files. *Lewis* v. *Jones*, 9 L. J. 133.

The rule in the court of chancery is similar to that in common law, that a party to a cause who takes a fresh step in the cause after notice of an irregular proceeding on the part of his opponent, thereby waives the irregularity. *Manning* v. *Birdey*, 2 C. L. J. 332.

See Brigham v. *Smith*, 2 Ch. Ch. 257.

XIII. Judge or Referee in Chambers.

1. *Judge.*

Adjournment before a Judge.]—When a party moving desires to have his application heard before a Judge, it does not entitle him to have it heard at a future day, but it may be heard at once. *Lachlan* v. *Reynolds*, *Monk* v. *Waddell*, 2 Ch. Ch. 454.

The court will not encourage the hearing of a motion before a Judge, where the object of doing so is obviously to gain time after it has been refused by the secretary. *Ib.*

Under order 562 the referee will order such matters only as can regularly be brought on before him in chambers to be heard before a Judge, if he think proper. *Lapp* v. *Lapp*, 3 Ch. Ch. 234.

Adjournment into Court.]—A Judge in chambers has a discretion to refuse to adjourn any matter to be heard in court. *Walsh* v. *DeBlaquiere*, 12 Gr. 107.

Commission de Lunatico.]—A Judge in chambers granted an application for a commission de lunatico inquirendo; the orders of June, 1853, giving to him authority to act in such a matter. *Re Stuart*, 4 Gr. 44.

Court Motion — *Consent.*]—A motion which is strictly and properly a court motion, will not be taken in chambers by the consent of parties. A motion so made in chambers was refused, but without costs. *Thompson* v. *Freeman*, 4 Ch. Ch. 1.

Habeas Corpus.]—A Judge sitting in chambers pursuant to the orders of 1853, is

authorized to grant a writ of habeas corpus. *Re Paton*, 4 Gr. 147.

Restriction to Chambers.]—The court held, that whatever applications can, under the new orders, be made in chambers, must be so made. *Moffatt* v. *Ruddle*, 4 Gr. 44.

See Dudley v. *Bercey*, 2 Ch. Ch. 460.

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2. *Referee or Secretary—Appeal from Decision of.*

A party cannot use affidavits not used before the secretary, or make a new case on an appeal; nor will the court entertain a motion to reinstate a bill based on grounds which might have been shewn in resisting a motion to dismiss. A solicitor should not treat with a party to a cause in the absence of the solicitor of such party. *Bank of Montreal* v. *Wilson*, 2 Ch. Ch. 117.

On an appeal from the referee the case will be confined strictly to that made on the original motion, and only such pleadings or other documents as were then read can be used. The court will inform itself of what these were, and take notice of its own records and proceedings when necessary. When a question arose as to what pleadings had been read on a motion, the court sent for the referee's notes, and was guided by them. *Perrin* v. *Perrin*, 3 Ch. Ch. 452.

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3. *Referee—Jurisdiction of.*

Appointment of Administrator ad Litem.]—A motion under R. S. O. 1877 c. 49, s. 9, to appoint an administrator ad litem of the estate of a deceased person, may be made before the referee, as that section merely extends a jurisdiction already possessed by him under G. O. 56. *Collver* v. *Swayzie*, 8 P. R. 42.

Directing Reference to Master.]—One H. filed a bill for redemption, which was dismissed with costs. H. remained in possession, and some time afterwards, in a suit to wind up a partnership, on a motion for an order requiring H. to attorn to the receiver, it was referred to the master to ascertain whether he held as tenant or was in possession as mortgagor and still entitled to redeem, and a day appointed for that purpose. On motion before the referee to set aside this order, the referee made an order referring the matter again to the master. On appeal this order was set aside, for the reason that it was not within the jurisdiction of the referee to order a reference to a master to ascertain such a matter, and the original order was also rescinded for the same reason. *Brown* v. *Dollard*, 9 C. L. J. 313, 6 P. R. 113.

Leave to Appeal from Report.] — A motion for leave to appeal from a report after the time has expired, need not be made before a Judge. *Russel* v. *Brucken*, 3 Ch. Ch. 488.

Payment into Court.] — The referee in chambers has no jurisdiction to make an order for payment into court by an executor or administrator of amounts admitted by him to be in his hands. *Re Curry, Wright* v. *Curry, Curry* v. *Curry*, 8 P. R. 340.

Payment out of Court.]—See *In re Selby*, 8 P. R. 342.

Reference to Master.] — See *Queen* v. *Smith*, 7 P. R. 429, *post* XIV. 1 (c).

Striking out Interrogatories.] — The referee has no jurisdiction to strike out interrogatories for impertinence. *Williams* v. *Corby*, 8 P. R. 83.

XIV. Masters and References.

1. *Appeals from Reports.*

(a) *Costs of.*

The report settled the priorities of incumbrancers as they appeared, without determining whether the prior one had not lost his right in consequence of his conduct, leaving it to the party aggrieved to have the report set right on appeal. The court gave the appellants their costs of appeal. *Huntingdon* v. *Van Brockin*, 8 Gr. 421.

Where, on an appeal, some objections are allowed with costs and some disallowed with costs, the appellants are entitled to all the costs of the appeal that are exclusively applicable to the objections allowed, and to a share of those costs common to all the objections, according to, not the mere number of the objections as stated in the notice, but to the really distinct grounds of appeal. The same rule applies to the respondent's costs. *Bank of Montreal* v. *Ryan*, 13 Gr. 204.

Where an appeal from the report of the master in a foreclosure suit failed on the main point and succeeded only in respect of a small sum, the court gave the respondents the costs of appeal. *Brownlee* v. *Cunningham*, 13 Gr. 586.

Where it was considered that the finding was a fit subject for discussion, the court dismissed an appeal without costs. *Secord* v. *Terryberry*, 14 Gr. 172.

Where an appeal was dismissed on a ground raised for the first time on the appeal, and not taken in the master's office, the court refused costs. *Heward* v. *Wolfenden*, 14 Gr. 188.

The plaintiff appealed from the report of the master, stating eleven objections thereto. On the argument he abandoned one, two were found in his favour, and the remaining eight were decided against him, but they embraced only four distinct questions. Under the circumstances, the court, instead of giving one set of costs to the plaintiff and another to the defendant, directed the costs of the appeal generally to be taxed to the defendants, deducting therefrom one-fourth in respect of the partial success of the plaintiff. *Ferguson* v. *Frontenac*, 21 Gr. 188.

Where executors have appealed, infants in the same interest need not appear, and will not be allowed costs if they do. In such a case where they had appeared and contested, the guardian was allowed only an attending fee without brief. *McLaren* v. *Coombs*, 2 Ch. Ch. 124.

On petition, an order was made referring it back to the master to tax the costs of each executor of an appeal dismissed with costs, where the master had refused to tax any but the costs of one executor, they having severed in their defence. *Stinson* v. *Martin*, 2 Ch. Ch. 86.

(b) *Dismissal or Allowance of.*

On Questions of Fact.]—Where the evidence before a master is conflicting, his judgment on it is, in general, accepted by the court as correct, and not to be reversed on appeal. *Day* v. *Brown*, 18 Gr. 681.

Although the rule is, that the court will not readily interfere with the finding of the master upon a question of fact, and that where there is a balance of evidence causing the determination of questions of fact to be determined altogether on the credit to be given to particular witnesses, it is almost impossible for the court to overrule the decision of the master, still, if the court finds a balance of direct testimony, and the circumstances of the case point strongly against the conclusion at which the master has arrived, there is no reason why the court should not review the evidence and reverse the master's finding. *Chard* v. *Meyers*, 19 Gr. 358.

Although the rule is, that if the decision of a question of fact depends altogether on the credit to be given to direct testimony of conflicting witnesses, the court will adopt the finding of the master; still, where the evidence of the mortgagor and mortgagee differed as to an arrangement that a mortgage, which had been satisfied, should be allowed to continue as collateral to notes held by the mortgagee, and the mortgage deed had been allowed to remain in the hands of the mortgagee undischarged, and the mortgagee had also retained possession of the title deeds, the court considered these circumstances as strongly confirming the direct evidence of the mortgagee, and reversed the decision of the master, who had found against the fact of such an agreement having been made between the parties. *Morrison* v. *Robinson*, 19 Gr. 480.

The parties to a cause are entitled, as well on questions of fact as on questions of law, to demand the decision of an appellate court, and that court cannot excuse itself from the task of weighing conflicting evidence, and drawing its own inferences and conclusions, though it will always bear in mind that it has neither seen nor heard the witnesses, and will make due allowance in this respect. *Armstrong* v. *Gage*, 25 Gr. 1.

Where the evidence against the plaintiff could at most only raise a case of suspicion, the court overruled the master's finding, the effect of which was to shew the plaintiff guilty of forgery or other criminal offence. *Ib.*

Although the rule of the court, as stated in Daily v. Brown, 18 Gr. 681, is not to overrule the master upon a question of credibility of evidence, still, where upon a careful examination of the evidence adduced in support of the master's finding, and that in contradiction of it, it was clear that the master had erred in the proper weight to be attributed to the evidence, and it did not appear that he had proceeded on the manner or demeanour of the witnesses, the court reversed the finding of the master, although upon a question of fact. *Ib.*

Circumstances under which the finding of the master upon questions of fact will be reversed. *St. John* v. *Rykert*, 4 A. R. 213.

Upon the evidence, the finding of the Judge that $3,000 was advanced by the plaintiff to the defendant upon a mortgage for that amount, instead of $500 as contended by the defendant, was affirmed, but the master's finding, which the Judge had adopted, that a note for $510 had not been paid, was reversed. *Ib.*

On a question of rent, there was a conflict of evidence as to the amount thereof. On appeal from the master's finding: — Held, that the witnesses having been examined before the master, he was a better judge than the court as to the weight to be given to the testimony of the respective witnesses; and the question as to the proper sum to be allowed for rent, was one with which the master was quite as competent to deal as the court could be. *Little* v. *Brunker*, 28 Gr. 191.

The defendant was the assignee of a policy of assurance on his brother's life, in trust to pay himself certain moneys and expend the residue in the support and maintenance of the assured's family, and having made further advances on the advice of his brother, who was a practising barrister, he took a second assignment of the policy absolute in form. On the death of the assured, the defendant, asserting a right to obtain payment of the policy, went to the head office of the company in the United States, in order to hasten the payment, pending a dispute with the plaintiffs—the family of the assured—as to his rights. In taking the accounts between the parties, the master found that the defendant acted bonâ fide in so doing, and allowed his expenses, although the company, at the instance of the plaintiffs, refused to pay him, and sent the proceeds of the policy to their solicitors in Toronto, to be paid over to the party entitled:—Held, that, as the defendant was under either assignment entitled to possession of the fund—either as trustee or individually—and as the master, under all the circumstances, thought fit to allow such expenses, and it did not appear clear to the court that such allowance was wrong, the item should be allowed. Held, also, that the master had properly allowed to the defendant in his accounts a fee of $10 paid by him to counsel for advice as to his action in respect of the two assignments. *Hayes* v. *Hayes*, 29 Gr. 90.

On an appeal from the master on a question of the weight of evidence, the court, though not satisfied as to what was the actual truth of the case, could not say that the master was wrong, and therefore dismissed the appeal with costs; liberty being given to the appellant, however, to examine the witnesses again at the next sittings before the Judge who heard the appeal so as to enable him to dispose of the matter with greater satisfaction to himself, in which case costs would be reserved. *McArthur* v. *Prittie*, 29 Gr. 500.

(c) *Entertaining of Appeal.*

Allowance of Commission and Disbursements.]—Where a master in his discretion fixes the commission to be allowed to parties under G. O. 643, and settles the disbursements in the suit, there is an appeal to a Judge in chambers from his finding. The

disbursements should be submitted to the master in ordinary for revision, like other bills of costs. *Campbell* v. *Campbell*, 8 P. R. 159.

Cesser of Interest.]—Parties who have no further interest in the matter to which the report relates cannot appeal from it. *Thompson* v. *Luke*, 10 Gr. 281.

Findings of no Importance.]—Parties cannot appeal against mistaken findings which are not of practical importance to them, though they may affect other parties inter se. *McCargar* v. *McKinnon*, 17 Gr. 525.

Incumbrancer — *Priorities.*]—Where an incumbrancer, who objected to the order of priority in which he was placed, appealed from the finding of the master, the court considered this the more convenient course, although he might have moved to discharge the master's order. *McDonald* v. *Rodger*, 9 Gr. 75.

Question Arising on Further Directions.]—The master by his report found that the executors had paid to some of the children of the testator, all of whom were equally entitled under the will, different amounts, and to one of them nothing, the estate proving insufficient:—Held, not a ground for appealing from the master's report; but that the question whether the executors were estopped from denying the sufficiency of the estate to make payment to all the children equally, or whether those paid were bound to refund, was one proper to be discussed on further directions. *McMillan* v. *McMillan*, 21 Gr. 369.

Regularity of Proceedings in Master's Office.]—The master overruled certain objections raised before him as to the regularity in point of form of certain proceedings in his office. On appeal the court considered that it would have been proper to allow the objections, but refused to interfere with his ruling, and dismissed the appeal, but without costs. *Sculthorpe* v. *Burn*, 12 Gr. 427.

Report on Reference back.]—Where a party appealed against the master's report, and some of the grounds were allowed and the report referred back to be reviewed:—Held, that an appeal against the further report thereon would not lie for matters disposed of by the first report, and not objected to on the first appeal. *Ross* v. *Perrault*, 13 Gr. 206.

Report under Void Order of Reference.]—The referee has no jurisdiction to make an order under s. 35 of the A. J. Act, 1873, referring it to the master to determine whether a conveyance made by a judgment debtor is fraudulent; and the chancellor refused to hear an appeal from the master's report, holding that all proceedings under such order were null and void. *Queen* v. *Smith*, 7 P. R. 429.

See Brown v. *Dollard*, 6 P. R. 113, *ante* XIII. 3.

Ruling on Evidence.]—There may, in a proper case, be an appeal from a master's ruling, as to the inadmissibility of evidence, before he makes his report. *McDonald* v. *Wright*, 12 Gr. 552.

Second Appeal—*Parties.*]—Three parties made purchases before suit, and two of them only being charged by the master with compound interest in respect of their respective purchase money, they appealed unsuccessfully against the charge, and they afterwards appealed against the charge of simple interest only to the third party:—Held, that such appeal was regular. *Denison* v. *Denison*, 17 Gr. 306.

Trifling Amount.]—The court will not entertain an appeal when the matter involves only a very trifling amount. *McQueen* v. *McQueen*, 2 Ch. Ch. 344.

(d) *Forum.*

See Gould v. *Burritt*, 1 Ch. Ch. 250; *Ledyard* v. *McLean*, *Fitzgerald* v. *Upper Canada Building Society*, 1 Ch. Ch. 183; *Graham* v. *Godson*, 2 Ch. Ch. 472; *Bently* v. *Jack*, 2 Ch. Ch. 473; *Jay* v. *Macdonell*, 2 Ch. Ch. 71; *Grahame* v. *Anderson*, 2 Ch. Ch. 303; *O'Donohue* v. *Hembroff*, 9 C. L. J. 312.

(e) *Time for Appealing.*

See Mitchell v. *Mitchell*, 22 Gr. 23; *Hayes* v. *Hayes*, 8 P. R. 546; *Dudley* v. *Berezy*, 3 Ch. Ch. 81; *Caisse* v. *Burnham*, 6 P. R. 201; *Thompson* v. *Luke*, 10 Gr. 281; *Cozens* v. *McDougall*, 1 Ch. Ch. 29; *Cade* v. *Newhall*, 1 Ch. Ch. 200; *Thompson* v. *Walker*, 1 Ch. Ch. 266; *Coates* v. *McGlashan*, 2 Ch. Ch. 218; *McQueen* v. *McQueen*, 2 Ch. Ch. 417; *Dickson* v. *Avery*, 3 Ch. Ch. 222; *DeBlaquiere* v. *Armstrong*, *Armstrong* v. *Deedes*, 9 C. L. J. 363; *Chard* v. *Meyers*, 3 Ch. Ch. 120; *Russel* v. *Brucken*, 3 Ch. Ch. 488; *Nash* v. *Glover*, 6 P. R. 267; *Rowe* v. *Wert*, 13 C. L. J. 326; *Finkle* v. *Date*, 7 P. R. 413; *Brigham* v. *Smith*, 3 Ch. Ch. 313; *Mitchell* v. *Mitchell*, 22 Gr. 23; *Grimshaw* v. *Parks*, 6 L. J. 142; *Jackson* v. *Gardner*, 15 Gr. 425, 2 Ch. Ch. 385; *Larkin* v. *Armstrong*, 1 Ch. Ch. 31.

(f) *Other Cases.*

Account Retaken on Appeal.] — Upon an appeal the court, instead of referring the case back to the master, or directing a re-argument, considering the great delay and expense to which the parties had been already subjected, undertook the settlement of the account, and made an order varying the finding of the master to suit the true state of the accounts between the parties, so far as the evidence would enable them to do so. *Saunders* v. *Christie*, 7 Gr. 149.

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

Correction of Report by Order.] — Where the correction to be made in the master's finding is simple, the alteration can be made by the order drawn up on the appeal, without a reference back. *Teeter* v. *St. John*, 10 Gr. 85.

Disqualification of Master—*Ground of Appeal*—*Waiver.*]—See *Cotter* v. *Cotter*, 21 Gr. 159.

Exceptions to Report.] — Under the order abolishing exceptions to the master's report, the appellant stands as under the old practice he would have done before the master on bringing in objections, and with that single restriction the whole case is open to him on the appeal. *Davidson* v. *Thirkell*, 3 Gr. 330.

Judgment on Appeal—*Future Application of.*]—Where the judgment on an appeal from the report enunciates a principle which is applicable to other parties and other points, the master should so apply it in the further prosecution of the reference. *Denison* v. *Denison*, 17 Gr. 360.

Motion while Appeal Pending.]—The master's report is primâ facie evidence of what it contains, unless appealed from. No motion founded on such report can be entertained while the appeal is unheard. *Nichols* v. *McDonald*, 6 Gr. 594.

Next Friend of Married Woman.]—On an appeal against the report of the master by a married woman and her husband, defendants in the suit, it is not necessary that the married woman should have a next friend; such case differing from an application by a married woman alone. *Hancock* v. *McIlroy*, 18 Gr. 209.

Notice of Appeal.]—It is not necessary to state in the notice of motion, the points on which the party desires to appeal; provided they appear in the papers filed in support thereof. *Romancs* v. *Herns*, 2 Ch. Ch. 363.

Objection not before Master.]—An objection based on the Statute of Limitations cannot be made by an appellant against the master's report without having been taken before the master. *Brigham* v. *Smith*, 18 Gr. 224.

Omission from Report — *Reference back.*] — After the advertisement of sale, it was discovered that the report had omitted to include two items of interest:—Held, that there was no necessity for appointing a new day for payment; and it was referred to the master to take a fresh account of plaintiff's claim, and to amend his report; and leave was given to fix a new upset price and to postpone the sale if necessary. *Bessey* v. *Graham*, 9 L. J. 82.

Order on Appeal.]—In an order made on appeal from a master's report, the grounds of appeal should be recited. *Downey* v. *Roaf*, 6 P. R. 89.

Parties to Appeal.]—By the report executors were found indebted to the estate, one of whom gave notice of appeal to the plaintiff, but not to the other executor:—Held, irregular. The fact that the interest of the party not served was the same as that of the party appealing, made no difference in respect to his right of being present. *Larkin* v. *Armstrong*, 1 Ch. Ch. 31.

See Bickford v. *Grand Junction R. W. Co.*, 1 S. C. R. 696, *post* 2.

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2. *Jurisdiction of Masters.*

Discretion—*Conduct of Reference.*]—By the general order No. 42 of 1853 the master here has been given a greater discretion as to the conduct of references before him than the masters in England have. *Sculthorpe* v. *Burn*, 12 Gr. 427.

——— *Examination of Witness—Fees.*]—The master is bound equally with the court to allow a witness to be cross-examined on the whole case, without regard to his examination in chief; but in some cases the master may exercise a discretion as to who should pay the fees of the examination. *Crandell* v. *Moon*, 6 L. J. 143.

Evidence — *Direction to Take in Outer County.*]—The master at Toronto has jurisdiction to direct evidence proposed to be used on an inquiry before him to be taken before a master in an outer county, though not consented to. *In re Casey, Biddell* v. *Casey*, 1 Ch. Ch. 198.

Interference with—*Delivery of Books.*] —The master has jurisdiction in matters in his own office, and will not be interfered with on a motion in chambers. An order to be directed to him to deliver up books, &c., in his hands, was refused. *Nelson* v. *Gray*, 2 Ch. Ch. 454.

Special Report—*Allowance not Directed by Decree.*]—The master has no authority to make an allowance not directed by the decree, however reasonable it may appear to him to be. His proper course is to report the circumstances specially, and the party claiming to be entitled can apply to the court on further directions. *Fielder* v. *O'Hara*, 2 Ch. Ch. 255.

Validity of Mortgage—*Inquiry into.*]—Under the pleadings and decree the objection that the mortgage was ultra vires was not open in the master's office, or on appeal from his report. *Bickford* v. *Grand Junction R. W. Co.*, 1 S. C. R. 696.

See Crooks v. *Street*, 1 Ch. Ch. 78.

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3. *Proceedings in Master's Office.*

(a) *Accounts.*

Application of General Order.]—The 42nd of the general orders (s. 13) applies to all cases where accounts are directed to be taken before the master. *Carpenter* v. *Wood*, 10 Gr. 354.

Death of Accounting Party—*Decree.*] —Held, that there is no authority to take an account in the master's office, after the death of the party who is bound to pay. It is regular however to draw up a decree pronounced before death after the death of defendant. *Galbraith* v. *Armstrong*, 1 Ch. Ch. 34.

Evidence Admissible.]—See *Court* v. *Holland, Ex parte Holland and Walsh*, 8 P. R. 219.

Executor — *Statute of Limitations — Vouching Accounts.*]—The executor of an estate, which was small, permitted the widow of the testator to receive the moneys of the estate and expend them in the support of herself and children, and on the eldest son coming of age in 1852 the executor pointed

out to him the clause in the will directing a distribution of the personal estate, but the only estate the executor then had was some household furniture. In 1867, the widow having set up a claim for dower, rejecting an annuity provided for her by the will, the heir at law filed a bill against the executor for an account:—Held, that the Statute of Limitations did not bar the relief: but, inasmuch as the executor had had reason to believe he would never be called on for an account, the court thought the master, in proceeding under the decree, should act liberally upon the rule of court giving the master a discretion as to the mode of vouching accounts in his office. *Walmsley* v. *Bull*, 15 Gr. 210.

Insufficient Accounts—*Order Nisi—Warrant.*]—Where, on an application against parties who had been ordered to bring in accounts in a master's office, for an order nisi on the ground that the accounts were insufficient, it appeared that the insufficiency consisted in the items of the accounts being undated, the order nisi was refused. In such a case, before applying for an order nisi, a warrant should be obtained from the master calling on the parties to bring in better accounts. *Merkeley* v. *Casselman*, 1 Ch. Ch. 292.

Interest.]—Where a principal was found indebted to his agent, on the taking of accounts, the court in its discretion allowed interest on the amount from the time of filing the declaration, which contained a count for interest, in an action at law brought by the agent, and to restrain which the bill was filed. *Ridley* v. *Sexton*, 19 Gr. 146.

Mortgage Suits.]—See MORTGAGE.

Order in Appeal—*Effect of.*]—Where a decree directing accounts to be taken in the master's office is afterwards varied on appeal, the master in his subsequent proceedings under such decree is bound to observe the principles enunciated by the order in appeal, although such order does not in terms refer to the party against whom the decree had directed such accounts to be taken. *Gilbert* v. *Jarvis*, 20 Gr. 478.

Partnership Matters.]—See PARTNERSHIP.

Report—*Evidence—Reference back—Further Directions.*]—Where both parties had assumed that the evidence before the master, on taking the accounts under the decree, would be before the court on further directions, and had in consequence allowed mutual claims of interest and commission to be submitted by the master to the court, without his setting forth sufficient to enable the court to dispose of them; and the report was, besides, so expressed as to render defendants chargeable with sums for which it did not appear to have been intended to make them liable, the court on further directions referred the case back to the master to review his report. *Gould* v. *Burritt*, 11 Gr. 234.

Stated Account.]—A stated account set up in the answer may be insisted on in the master's office, although no evidence was given of it at the hearing; being a matter of account which under the general orders the master has a right to investigate without special reference. *Edinburgh Life Assurance Co.* v. *Allen*, 23 Gr. 230.

Trustee—*Compensation—Keeping Books.*]—The rule of decision in equity which requires that the expenses incurred by a trustee in the execution of his office shall be satisfied before the cestui que trust or his assignee can compel a conveyance of the trust estate, applies to the commission or allowance to a trustee for his care, pains, and trouble under 37 Vict. c. 9 (O.) *Life Association of Scotland* v. *Walker*, 24 Gr. 293.

Where, on a reference to a master to take an account of a trustee's dealings with an estate, that officer omitted to ascertain the amount of the trustee's charges, costs, &c., a reference back to ascertain it was directed at the hearing on further directions; and the fact of the master having reported that the trustee had omitted to keep any regular set of books shewing a debtor and creditor account of his dealings with the estate, but not stating that for that reason he had been unable to ascertain the amount, was not considered a sufficient reason for his having omitted to find the amount of such claim. *Ib.*

(b) *Costs.*

Disclaimer.]—Where a person who is made a party to a suit in the master's office appears and disclaims, he is not entitled to any costs, as by remaining inactive the same end will be attained. *Hatt* v. *Park*, 6 Gr. 553.

Estate—*Parties—Further Directions.*]—Where the costs of certain proceedings were allowed by the master against the estate of a deceased person not a party to the suit at any time, without shewing why they were so allowed, the court at the hearing on further directions, notwithstanding that the report had not been appealed from, refused to carry out that portion of the master's finding, and directed the question to be spoken to and additional information furnished to the court. *Taylor* v. *Craven*, 10 Gr. 488.

Of the Day—*When Granted.*]—See *Re McDonnell*, 4 Ch. Ch. 69.

Offer.]—Where a defendant would have been entitled to costs up to the hearing, but for an offer which plaintiff made by letter after the answer was filed:—Held, that the circumstances did not entitle the plaintiff to have the costs reserved until the taking of the account. *Covert* v. *Bank of Upper Canada*, 3 Gr. 246.

Settlement of Conveyance—*Infants.*]—Where, in consequence of some of the defendants being infants, a conveyance which might otherwise have been settled by the parties was necessarily referred to a master, the costs of such reference were ordered to be borne by the testator's estate. *Rodgers* v. *Rodgers*, 2 Ch. Ch. 241.

Taxation—*Two Suits for Same Object.*]—Where there were two suits by a solicitor for the same object, the master refused, in one of the two suits, without a special order, to tax as between party and party more than part of the costs, and it appearing that as between solicitor and client no part of that bill could have been recovered, the court refused to interfere with the taxation. *Spence* v. *Clemow*, 15 Gr. 584.

(c) *Other Cases.*

Advertisement for Creditors—*Dispensing with.*]—The fact that an intestate whose estate is being partitioned, has been dead for forty-five years does not warrant a master in dispensing with the usual advertisement for creditors. *Biggar* v. *Biggar*, 8 P. R. 488.

Allowance not Directed by Decree.]—The master has no authority to make an allowance not directed by the decree, however reasonable it may appear to him to be. His proper course is to report the circumstances specially, and the party claiming to be entitled can apply to the court on further directions. *Fielder* v. *O'Hara*, 2 Ch. Ch. 255.

Compelling Party to Proceed.]—An application to compel a party having the carriage of an order made on an appeal from the master's report to proceed with the inquiry in the master's office, should be made to the master who is seised of the case, and not to a Judge in chambers. *Miller* v. *McNaughten*, 1 Ch. Ch. 206.

Dower—*Mortgage—Special Circumstances—Report—Settling.*]—When a bill was filed by a first mortgagee for a sale of the mortgaged premises, there being also a second mortgage, the mortgagor's wife having barred her dower in the first mortgage, but not in the second mortgage, and the master, on a warrant being taken out after the sale for the purpose of taking accounts, in his report thereon found the widow entitled to dower as against the second mortgagee:—Held, that under G. O. 220 the master had power to entertain the question of dower, and in his final report, report thereon as a "special circumstance," and that the second mortgagee was not entitled to notice that this point would be considered in settling the report. *Rouce* v. *Wert*, 13 C. L. J. 326.

Evidence.]—On an appeal from the master's report:—Held, that where one defendant obtains an order and examines one of his co-defendants, and the other party to the suit cross-examines such co-defendant, he is thereby made a good witness in the cause. 2. That where evidence affecting the amount represented as due under the second mortgage, is taken in the absence of the personal representative of the mortgagee, it cannot be read against the equitable holder of such mortgage, although such equitable holder was a party to the suit when the evidence was taken, and cross-examined the co-defendant whose evidence affected the mortgage. *Grimshaw* v. *Parks*, 6 L. J. 142.

Ex Parte Proceedings.]—Although proceedings in the master's office may, under the general order, be taken ex parte against a defendant who has allowed a bill to be taken pro confesso against him, that mode of proceeding is irregular where an administration order has been obtained upon notice without bill filed. *In re Pattison, Jackson* v. *Matthews*, 12 Gr. 47.

Leave to Prove Claim—*Costs.*]—A creditor who, through a mistake, had not come into the master's office to prove his claim, was allowed to do so upon payment of costs of and subsequent to the report, including costs of application—the master's report not having been confirmed. *Cotton* v. *VanSittart*, 9 C. L. J. 212.

——— *Motion for.*]—Where an incumbrancer has neglected to appear in the master's office to prove his claim within the proper time, and applies to the court for leave to come in, the application is more properly made on notice of motion than by petition. *Anon.*, 1 Ch. Ch. 292.

Notice to Parties—*Warrant.*]—In proceeding upon a decree pro confesso, the master should exercise a discretion in requiring notice to be given to defendants of such proceedings, or dispensing with notice. As a general rule the defendant should have notice, although it may be that it is not requisite to serve him with all warrants issued by the master. *Robinson* v. *Whitcomb*, 20 Gr. 415.

Parties—*Relief — Discovery — Witness.*]—In proceeding upon a reference under a decree, the master cannot under general orders 244, 245, order a person to be made a party to the suit against whom any relief is sought; and where in proceeding under a decree for the administration of a testator's estate, the master directed one D., who had been in partnership with the testator up to the time of his death, to be made a party, and requiring him with the executors to bring in under oath an account of the partnership dealings, against which D. appealed:—Held, that the object of making D. a party was for the purpose either of relief or discovery, and in either view the plaintiff could not obtain it in this mode of proceeding, as D., so far as discovery was concerned, could only be regarded as a witness. *Hopper* v. *Harrison*, 28 Gr. 22.

Proceeding de Die in Diem.]—It is the bounden duty of masters to observe to the letter the general orders of the court requiring references to be proceeded with in their offices de die in diem. *Falls* v. *Powell*, 20 Gr. 454.

Solicitor—*Contempt.*]—Improper conduct by solicitors in master's office:—Held, a contempt of court. *Nicholls* v. *McDonald*, 4 L. J. 259.

Staying Proceedings pending Appeal.]—See *Butler* v. *Standard Fire Ins. Co.*, 8 P. R. 41.

Transmission of Papers—*Præcipe.*]—It is not necessary to obtain an order for the transmission to a local master by the master in Toronto of papers brought into his office, as the master will do so upon the præcipe of the party requiring the papers to be transmitted. *Michin* v. *Buffalo*, 1 Ch. Ch. 24.

Vacation.]—It is irregular to proceed with references, unless by consent, during the long vacation. *Anderson* v. *Thorpe*, 12 Gr. 542.

Warrant.]—The master will proceed upon his warrant, though the order of reference obtained ex parte be not served, so long as the warrant is not moved against. *Re McDonnell*, 4 Ch. Ch. 69.

——— *Proceedings not Specified in.*]—A warrant should be so underwritten as to explain clearly what proceedings are intended to be taken under it; and if proceedings are taken of which the warrant gives no notice, or which are inconsistent with the underwriting, in the absence of parties interested, and who might, if present, have opposed them, such

proceedings will be set aside, and the benefit of them refused to the parties so irregularly proceeding. *Denison* v. *Denison*, 3 Ch. Ch. 349.

Where a warrant was underwritten, "to settle advertisement for sale of the balance of the unconverted assets of the estate," and without further warrant the accountant directed that an offer for certain bonds of the estate be accepted, and the purchaser, a party interested under the will, made a profit on such purchase—the master, upon the question being submitted to him, declared such profits of the sale to belong to the general estate. *Ib.*

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4. *Reference.*

(a) *In What Cases Ordered.*

Damages — *Injunction — Undertaking — Discretion.*]—Where a plaintiff, on obtaining an injunction, enters into the usual undertaking to abide by such order as the court may make as to damages, it is in the discretion of the court to grant or refuse a reference as to such damages where the injunction is afterwards not continued, or is dissolved. Where, therefore, a person in the employment of the owner of a machine for which a patent had been granted, surreptitiously obtained such a knowledge thereof as enabled him to construct a similar machine for the defendant, the court, although unable to continue the injunction in consequence of the invalidity of the patent, refused the defendant a reference as to damages, he having availed himself of the knowledge which he knew had been so improperly obtained. *Hessin* v. *Coppin*, 21 Gr. 253.

For Information of Court.] — When plaintiffs and defendants mutually leave particulars in the dark which it is necessary the court should be informed of, a reference on these points will be made to the master. *Bethune* v. *Caulcutt*, 1 Gr. 81.

Preliminary Reference—*Ascertainment of Heir.*]—Where a bill was filed to obtain the opinion of the court as to the validity of certain bequests in a will, and the heirship of one of the defendants, who claimed to be heir and next of kin, was not admitted by other defendants, who claimed the bequests, a preliminary reference was directed to the master to inquire who was heir and next of kin; and further directions and costs were reserved. *Elmsley* v. *Madden*, 11 Gr. 232.

Summary Reference—*Injunction.*]—Under the 77th order of May, 1850, the court would decree a reference without prejudice to an injunction previously obtained. *Prentiss* v. *Brennan*, 1 Gr. 434.

——— *Practice.*]—The practice directed to be pursued by the 48th order of May, 1850, does not apply when the cause has been summarily referred under the 77th order. *Wellbanks* v. *Fegan*, 3 Gr. 643.

——— *Trustee.*]—Where a bill was filed against a trustee and executor for an account, and the bill also sought to have the trustee removed for misconduct, the court refused an order for a summary reference to the master. *Christie* v. *Sanders*, 2 Gr. 395.

Trial of Issues of Fact—*Election.*]—Where a receiver of partnership property had been appointed, and certain chattels had been seized under a sequestration against the defendant for contempt of the injunction, and the chattels so seized were alleged to be the property of the defendant and his co-partner, but it appeared that third persons claimed an interest therein—the plaintiff having moved to sell this property, a reference was directed on such motion (on which the claimants had appeared), to inquire as to their interests, and any further order on the motion was reserved, the parties to the motion electing to have a reference instead of issues to try the questions in dispute. *Prentiss* v. *Brennan*, *Re Brennan*, 2 Gr. 274.

Trial of Issue Raised by Pleadings—*Tolls.*]—Where a question is directly raised by the pleadings, and is distinctly presented to the court for its decision, and evidence has been given upon it in order to obtain the judgment of the court, it will not be referred to the master for his decision; and in this case it was not proper to refer to the master the inquiry as to the reasonableness of the tolls charged. *International Bridge Co.* v. *Canada Southern R. W. Co.*, *Canada Southern R. W. Co.* v. *International Bridge Co.*, 7 A. R. 226. See *S. C.*, 8 App. Cas. 723.

(b) *Place of Reference and Person of Referee.*

Adding Master as Party.]—Where it becomes necessary in the course of a suit to add as a defendant the master to whom the cause stands referred, a change of reference will be made on the ex parte application of the plaintiff. *Weldon* v. *Templeton*, 1 Ch. Ch. 360.

Damages—*Issue of Fi. Fa. at Law—Reference to Officer in Chancery.*]—Proceedings under a fi. fa. at law having been set aside, and an action brought against the master in whose name the fi. fa. had been sued out, an injunction was issued restraining proceedings:—Held, that the application for an injunction in the original cause in the court of chancery was regular; and that the officer of that court was the proper person to whom should be referred the question as to the amount of damage sustained by reason of the proceedings which had been set aside. *Fisher* v. *Glass*, 9 Gr. 46.

Disqualification — *Previous Opinion — Mistrust.*]—A master of the court, while in practice at the bar, had given an opinion upon the construction of a will, with a view to a settlement, at the request of the plaintiff in this suit, and both on behalf of the plaintiff himself and on behalf of all the other persons interested under the will. A settlement not having been arrived at, this suit was instituted for partition, and in the suit the construction of the will was declared by the court, which construction was more favourable to the defendant J. B. than that contained in the opinion of the master. The decree ordered a reference to the master to make partition among the parties in proportions specified. A motion was thereupon made by J. B. for the removal of the reference from before the master, on account of his having given an opinion in the case as above stated. The application was opposed by all the other parties interested, except one, but was granted, on the ground that the administration of justice should be above suspicion, and should not be exposed even to

groundless mistrust. *Bigelow* v. *Bigelow*, 6 P. R. 124.

——— *Waiver—Appeal.*]—Where a reference was made to a local master who had, prior to his appointment, been the counsel of one of the litigants, neither party objecting to his taking the reference, and the master certifying that he acted in the reference at the pressing instance of both parties, the court held that the other party, against whom the master reported, could not raise that objection on an appeal from the report, having taken the chance of the master finding in his favour. *Cotter* v. *Cotter*, 21 Gr. 159.

Place of Reference.]—The plaintiff has primâ facie a right to have the reference directed to the master resident in the county wherein the bill is filed. *Macara* v. *Gwynne*, 3 Gr. 310.

The plaintiff has, in the absence of any expression of the court, a right to take the reference to the place where the bill was filed. *Watson* v. *Henderson*, 2 Ch. Ch. 370. See *McNab* v. *McInnis*, 4 Ch. Ch. 53, *infra*.

——— *Change of.*]—Upon an application by a defendant to change a reference, upon the analogy of applications at common law to change venue, the balance of convenience in favour of the change must be great and obvious, must be made to appear upon the affidavits, and upon a consideration of the plaintiff's as well as the defendant's witnesses and costs. *Jackson* v. *Harriman*, 9 C. L. J. 29.

In an administration suit, after delay on plaintiff's part, the conduct of the reference was given to a solicitor representing certain creditors of the estate. The plaintiff's solicitor, with the consent of defendant's solicitor, but without notice to the solicitor of the creditors, or informing the court that such solicitor had the conduct of the reference, applied in chambers, and obtained an order to change the reference from Goderich to Stratford. Such order was on application set aside with costs. *McConnell* v. *McConnell*, 3 Ch. Ch. 122.

A plaintiff is entitled primâ facie to have the reference to the master who resides in the county in which the bill is filed; but this primâ facie right may be rebutted by shewing sufficient grounds for the court directing the reference to the master at some other place. *McNab* v. *McInnis*, 4 Ch. Ch. 53.

Where an application of this kind is rested on the ground of expense, the difference in expense must in general be considerable; and where the application is rested on the ground of convenience, a slight or doubtful balance of convenience is not sufficient to deprive the plaintiff of his primâ facie right; a reasonably clear case of preponderating convenience must be established by defendant. *Ib.*

A man in extensive business, or a trustee, is not entitled, when a defendant, to have the reference to such place as suits him best, if there is no other strong ground for the change from the place selected by plaintiff. *Ib.*

Practising Solicitor — *Partnership.*]—Local masters and deputy registrars of the court are not at liberty to practise in partnership with solicitors practising in the court of chancery, although they may not actually share in the emolument of suits. *McLean* v. *Cross*, 3 Ch. Ch. 432.

5. Report.

(a) *Amendment.*

When the correction to be made in the master's finding is simple, a reference back to him for that purpose need not be directed; the necessary alteration can be made by the order drawn up on the appeal. *Teeter* v. *St. John*, 10 Gr. 85.

The court will, at almost any stage of a cause, make a special order for the correction of slips in a master's report. *Morley* v. *Matthews*, 12 Gr. 453.

In taking an account of mortgage money and interest, the master computed interest up to the 19th March, but by some error in his report the money was appointed to be paid on the 19th January. Upon plaintiff's application ex parte, this was corrected. *White* v. *Courtney*, 1 Ch. Ch. 11.

After advertisement for sale it was discovered that the report had omitted to include two items of interest:—Held, there was no necessity for appointing a new day for payment, and it was referred to the master to take a fresh account of plaintiff's claim, and to amend his report, and leave was given to fix a new upset price and to postpone the sale if necessary. *Bessey* v. *Graham*, 9 L. J. 82.

A clerical error in a master's report will be amended. *Watson* v. *Moore*, 1 Ch. Ch. 266.

A motion to correct such error should be on notice, unless on consent. *Simpson* v. *Ottawa*, 2 Ch. Ch. 12.

See Crooks v. *Street*, 1 Ch. Ch. 78, *post* (d).

(b) *Confirmation and Filing.*

Where the plaintiff had proceeded under the 75th order, and had obtained a decree pro confesso and the master's report—all the proceedings taken in the master's office having been ex parte and without any notice served on the defendant—the court refused to confirm the master's report absolutely in the first instance, notwithstanding that it had been the constant practice of the court to do so even since the making of the order referred to. *Buchanan* v. *Tiffany*, 1 Gr. 98.

See, to the same effect, *Walsh* v. *Bourke*, *ib.* 105, which decision was afterwards approved on appeal in *Hawkins* v. *Jarvis*, 1 Gr. 257, 1 E. & A. 246.

Such reports as are from their nature final, do not require to be filed fourteen days before proceedings may be taken on them. *In re Yaggie*, 7 L. J. 263.

The report must be filed before the day appointed for payment. *Mills* v. *Dixon*, 2 Ch. Ch. 53.

A report requiring confirmation does not become absolute until thirty days from the making and fourteen days from the filing thereof have elapsed. *Re Eaton, Byers* v. *Woodburn*, 8 P. R. 289.

Where a decree ordered payment forthwith after the making of a report, an execution issued before the report had been filed, was set aside with costs. Semble, the report did not require confirmation, under the wording of the decree. *Jellett* v. *Anderson*, 8 P. R. 387.

(c) *Form of.*

Default—*Absence of Finding.*]—Under a decree for account, it is the duty of the master to find whether a defendant is, or is not, chargeable as for wilful default, if the question arises, without any direction in the decree to that effect. Where, therefore, a master reported only that rents and profits had come to the hands of the defendant, and after stating a number of facts submitted to the court whether he should or should not be charged, the matter was referred back to him to complete his report. It is not competent to a master to abstain from deciding any question properly coming before him for his decision. *Walmsley* v. *Bull*, 2 Ch. Ch. 344.

Incumbrancer — *Priority — Finding.*]—Where the master is directed to inquire as to incumbrances, and there is a dispute between two or more persons as to who are entitled to one of the incumbrances, it may, according to circumstances, be his duty to decide the question himself, or to report the incumbrance, its priority as respects other incumbrances, and the dispute between the claimants, so that the court may give proper directions for determining the question. *McDonald* v. *Wright*, 12 Gr. 552.

Legacies — *Interest — Payments on Account.*]—Where it appears by the will of a testator that the legacies are payable with interest, and the order in which they are payable, it is not necessary for the master to state those facts in his report; but he should state whether any payments have been made on them. *Clouster* v. *McLean*, 10 Gr. 576.

Moneys Received—*Default—Costs.*]—In order to enable the court better to deal with the question of costs, on further directions, the masters should in their reports distinguish between sums received and sums which, but for wilful neglect and default, might have been received, by the parties chargeable therewith. *Moodie* v. *Leslie*, 12 Gr. 537.

Reasons — *Results — Evidence — Verbosity.*]—Where a decree directs a master to state his reasons, they should be stated briefly. *McCargar* v. *McKinnon*, 15 Gr. 361.

A report, like a decree in equity, or the entry of a judgment at law, should state results only, and should not set forth the evidence, arguments, or reasons on which the conclusions are arrived at. *Ib.*

Masters are bound to see that their reports are not of unnecessary length. *S. C.*, 17 Gr. 525.

It is inconvenient and objectionable for a master to set forth the evidence in his report, instead of adjudicating thereon. *Sovereign* v. *Sovereign*, 15 Gr. 559.

Title—*Objections.*]—Where a reference is made as to title, and objections are brought in thereto, the master should not report either for or against the title; his proper course is to mark each objection "allowed" or "disallowed," as the case may be. *Cockenour* v. *Bullock*, 12 Gr. 73.

(d) *Other Cases.*

Certificate after Report.] — After the closing of his report, a master should not certify as to any matters before him in the course of the inquiry upon which he has reported, unless called upon to do so by the court. After report, any certificate, unless called for by the court, is irregular and improper. *Rosebatch* v. *Parry*, 27 Gr. 193.

Dating Report—*Revision of Costs.*] — A local master in making his report is not at liberty to date it until the costs taxed by himself have been finally revised and settled by the master in ordinary under the general orders. *Waddell* v. *McColl*, 14 Gr. 211.

Evidence of Contents.] — The master's report is primâ facie evidence of what it contains, unless appealed from. No motion founded on such report can be entertained while the appeal is unheard. *Nichols* v. *McDonald*, 6 Gr. 594.

Reference of Report back — *Further Evidence.*]—Where a reference back to review the report is directed, the master is, as of course, at liberty to receive further evidence. *Morley* v. *Matthews*, 12 Gr. 453.

Where the court on a reference back does not mean that the master shall take further evidence, the order contains a direction to that effect, unless the reference back is expressed to be for a purpose on which further evidence could not be material. *Ib.*

Scope of Report.] — Held, that, as the matter in question upon a petition to amend the decree had been referred to the master by the decree, which was for specific performance, it should have been disposed of in his office under G. O. 226. *Stammers* v. *O'Donohoe*, 29 Gr. 64.

Special Report — *Powers of Master — Costs.*]—The master, at the request of the defendant, reported specially in his favour as to many matters not particularly referred to him, but which formed the subject of charges of fraud made in the bill of complaint:—Held, that the master had power to report specially any matters he deemed proper for the information of the court, and that it was his duty to so report any matter bearing on the question of costs. *Hayes* v. *Hayes*, 29 Gr. 90.

Subsequent Report—*Correction of Former Report.*]—Where the master, in taking an account under decree on further directions, finds he has made a mistake in taking the accounts under the original decree, he is not at liberty to correct such mistake by his subsequent report; and where this had been done:—Held, that the master exceeded his jurisdiction, and that the objection being apparent on the face of the report, the objecting party was not driven to appeal. *Crooks* v. *Street*, 1 Ch. Ch. 78.

Vacation—*Nullity—Notice.*]—A master's report made during long vacation in contravention of G. O. 425, is, as against a defendant having no notice of the proceedings on which the report is founded, entirely null and void. *Fuller* v. *McLean*, 8 P. R. 549.

Void Order of Reference — *Report under.*] — See *Queen* v. *Smith*, 7 P. R. 429; *Brown* v. *Dollard*, 6 P. R. 113.

Warrant — *Certificate of Default.*] — A warrant requires two days' clear service. A master's certificate of default should follow as nearly as possible the accustomed form, and where it does not it will be assumed that the master means to report specially. *Sutherland* v. *Rogers*, 2 Ch. Ch. 191.

XV. Motions.

1. *Affidavits for Use on.*

In Answer—*Enlargement.*]—An affidavit, in answer to affidavits filed in reply, filed after an enlargement of the motion, was held regularly filed, and allowed to be read, the court offering to give the other party time to reply to it, if he required to do so. *Dewar* v. *Orr*, *Dewar* v. *Spurling*, 3 Ch. Ch. 224.

New Affidavits on Appeal.] — A party cannot use affidavits not used before the secretary, or make a new case, on appeal from the secretary's order. *Bank of Montreal* v. *Wilson*, 2 Ch. Ch. 117.

Office Copies of — *Demand—Costs.*]—If office copies of affidavits are demanded, the parties filing the affidavits must furnish them; and the costs of any delay occasioned by his not doing so falls on the party in default. *Burrows* v. *Haney*, 2 Ch. Ch. 186.

Scandal—*Application to Take off Files.*] —Held, that an application for leave to take off the files of the court, or refer to the master, an affidavit for scandal as to the plaintiff's solicitor, and for impertinence as to the plaintiff, may be made by motion, without the special leave of the court. Semble, also, that such an application might be also made against the clerk of the defendant's solicitor who swore to the affidavit. *Sadlier* v. *Smith*, 7 P. R. 409.

Swearing—*Partner of Affiant.*]—A., B., and C. were partners, doing business as solicitors in chancery. A., B., and D. were partners, doing business as attorneys at common law. An affidavit tendered by C. on an application in chancery, was rejected, it having been sworn before D. *Dunn* v. *McLean*, 6 P. R. 95.

See post 2 (c).

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2. *Notice of Motion.*

(a) *Costs.*

Where after a notice of motion, under the 33rd order of May, 1850, is served, and before the motion day, the answer is filed, the plaintiff is entitled to his costs of the motion. *Anon.*, 1 Gr. 423.

Costs of motion may be given, though not asked for by the notice. *Sanders* v. *Christie*, 1 Gr. 137.

A party upon whom a notice of motion has been served is not precluded from appearing on the return day and claiming his costs of an abandoned motion, notwithstanding notice of countermand served, unless the party serving the notice or countermand offers, at the time of service, to pay any costs the other may have incurred in preparing to answer the motion. *Ross* v. *Robertson*, 2 C. L. J. 331.

When a party unnecessarily served with a notice of motion appears thereon, he will be allowed his costs. *Robertson* v. *Grant*, 3 Ch. Ch. 331.

(b) *Necessity for.*

Clerical Error.]—It was held that a motion to correct a clerical error in a report should be on notice, unless on consent of all parties. *Simpson* v. *Ottawa*, 2 Ch. Ch. 12.

Final Order of Foreclosure.]—After a lengthy period has elapsed since the day appointed for payment, it is necessary to give notice of the motion for an order of foreclosure. *Kirchoffer* v. *Stafford*, 2 Ch. Ch. 52.

Leave to Prove Claim.]—Where an incumbrancer has neglected to appear in the master's office to prove his claim within the proper time therefor, and applies to the court for leave to come in, the application is more properly made by notice of motion than by petition. *Anon.*, 1 Ch. Ch. 292.

Leave to Read Deposition.]—A motion to read the deposition taken in another cause between other parties must be made on notice. A motion for such an order made ex parte was refused. *Dunlop* v. *Corporation of York*, 2 Ch. Ch. 417.

(c) *Reference to Affidavits.*

Affidavits cannot be used on a motion, where no intention to read affidavits thereon is mentioned in the notice of motion. *Farish* v. *Martyn*, 1 Gr. 300.

In giving notice of motion and that the party moving will read certain affidavits, if the same are filed at any time before the date of the notice, the notice must state the day of the filing thereof, otherwise the affidavits cannot be used on the motion. *Fraser* v. *Fraser*, 13 Gr. 183.

Where an affidavit refers to a document, and notice of reading such affidavit is given, the document (in this case the indorsement on the office copy of a bill) may be read without special reference to it in the notice. *Johnson* v. *Ashbridge*, 2 Ch. Ch. 251.

A notice of motion referring to an affidavit should state the day on which it was filed. *McMartin* v. *Dartnell*, 2 Ch. Ch. 322.

(d) *Return Day.*

Where a notice of motion had been given for Good Friday, the court refused to entertain the motion at the next sitting. *Fitzgerald* v. *Phillips*, 3 Gr. 535.

A notice of motion given for a day which is not a regular court day, unless leave of the court be obtained for that purpose, is a void

proceeding, and the party served need not attend thereon. *Stevenson* v. *Huffman*, 4 Gr. 318.

Where an injunction is granted to a particular day, which is not a motion day, and the writ is served, together with a notice of motion for that day to extend the injunction, the notice is not irregular, though it omit to mention that such notice is given by leave of the court. *Johnson* v. *Cass*, 11 Gr. 117.

(e) *Service of.*

Irregularity — *Waiver—Appearance for Costs.*]—A party appearing to ask costs on a notice irregularly served does not thereby waive the irregularity. *Fisken* v. *Smith*, 3 Ch. Ch. 74.

Publication.]—Leave may be obtained to serve by publication a notice of motion to confirm a decree or substitute a new decree. *McTaggart* v. *Merrill*, 7 P. R. 405.

Residence of Party.]—The service on a grown up person must be at defendant's residence, and such person served must be a resident there. *Elliott* v. *Beard*, 2 Ch. Ch. 80.

Short Notice — *Service abroad.*] — The court will, in a proper case, grant leave to serve short notice of motion out of the jurisdiction. *In re Babcock, Moore* v. *Gould*, 1 Ch. Ch. 233.

Solicitor's Agent.]—D., a country solicitor, employed McN. and H. as his booked chancery agents in Toronto; H. being the one who conducted the chancery business of the firm. McN. and H. dissolved partnership:—Held, that a notice served upon a clerk in the office of McN., after the dissolution, was not a good service upon D. *Hind* v. *Little*, 1 Ch. Ch. 355.

Time—*Computation.*]—There must be two clear days between the service of a notice and the day for hearing the motion, and in the computation thereof Sunday is not to be reckoned. Sprague v. Henderson, 1 Ch. Ch. 213, overruled. *In re Crooks*, 1 Ch. Ch. 304.

Where notice of motion had been given of an application to commit for not bringing in accounts in the master's office, and four days intervened between the service and the motion, one of which was Good Friday, during which the master's office had been closed, the secretary refused the application without costs. *Wilson* v. *Gould*, 2 Ch. Ch. 236.

——— *Hour of Day—Admission.*]—Where a notice of motion was served after four o'clock, and service was admitted as of that day, no objection having been taken until the motion was made in chambers:—Held, that the admission of service precluded the party served from raising the objection. Held, also, that when the motion is for a better affidavit on production, two days' notice is sufficient. *Alexander* v. *Watson*, 13 C. L. J. 224.

(f) *Other Cases.*

Amendment.]—An amendment was allowed in a notice of motion for a summary administration order, where an unimportant mistake had been made in the name of the deceased, which had misled no one, and the right person had been served; and an enlargement on account of such amendment was refused. *Re Fraser, Fraser* v. *Fraser*, 2 Ch. Ch. 457.

For Alternative Order.] — When in a notice of motion an order is applied for in the alternative, in the following words, "for such other order as shall seem just," the court will not make an order specifically distinct from that asked for. *Graham* v. *Chalmers*, 2 C. L. J. 269.

Indorsement.]—A notice of motion need not be indorsed with the name and address of the party taking the proceeding. *Campbell* v. *Tucker*, 7 P. R. 135.

Misdescription in.] — The next friend was termed a plaintiff in the notice of motion:—Held, that the misdescription was not such as to mislead, and that therefore the motion ought not to fail upon that ground. *VanWinkle* v. *Chaplin*, 3 C. L. J. 44.

Recital—*Leave—Judge.*]—It is no objection to a motion made by leave of a Judge that the name of the Judge granting leave is not given in the notice of motion. *Lindsay Petroleum Co.* v. *Hurd*, 2 Ch. Ch. 387.

See, also, *Harris* v. *Myers*, 16 Gr. 117.

3. *Other Cases.*

Costs of Former Motion Unpaid.]—Non-payment of the untaxed costs of an unsuccessful application in a former suit is no bar to a motion for a like purpose in another suit between the same parties. *Erie and Niagara R. W. Co.* v. *Galt*, 15 Gr. 567.

Where an application has been refused with costs, and a motion is made for leave to make a new application of the same nature on further evidence, the new evidence must be produced, and the costs of the former application paid. *Anon.*, 1 Ch. Ch. 196.

Enlargement to Sustain Motion.] — Where a party moving is not in a position to sustain his motion, the court will not grant an enlargement so as to enable him to place himself in a position to sustain it; the motion must lapse. *Ruttan* v. *Smith*, 1 Ch. Ch. 286.

Wrong Forum—*Costs.*]—Where a party moves in court for what should properly be moved for in chambers, the court will not allow the party so moving any costs of the application, even if the motion be granted. *Murney* v. *Courtney*, 10 Gr. 52.

XVI. Orders.

(*See* also *ante* VI., VII.)

1. *Appeal from.*

Chambers — *Intituling.*]—An order by a Judge on an appeal from an order of the secretary is a chambers order, and if costs or further directions are reserved, they should be disposed of before a Judge in chambers, and

the order made thereon intituled "In chambers." *Dudley* v. *Bercsy*, 2 Ch. Ch. 460.

Discretion.]—Where a Judge in chambers grants or refuses an application in a matter purely within his discretion, the court will not entertain an appeal from his judgment. *Scoble* v. *Henson*, 9 L. J. 131; *Chard* v. *Meyers*, 3 Ch. Ch. 120.

Issue of—*Necessity for.*]—Before an appeal will lie from the secretary's decision, the order thereon must be drawn up and entered. *Gibb* v. *Murphy*, 2 Ch. Ch. 132.

Material on.]—A party cannot use affidavits not used before the secretary, or make a new case on an appeal. Nor will the court entertain a motion to reinstate a bill based on grounds which might have been shewn in resisting a motion to dismiss. *Bank of Montreal* v. *Wilson*, 2 Ch. Ch. 117.

Setting down — *Wrong Day.*] — An appeal from an order made in chambers was set down to be heard for a day falling within the time appointed for examination and hearing term:—Held, irregular, and the case was struck out of the paper with costs. *Armstrong* v. *Cayley*, 13 Gr. 558.

Stay of Proceedings.]—A defendant appealed from an order directing his committal for breach of an injunction, and moved this court to stay proceedings under the order, pending the appeal, which was refused. *Gamble* v. *Howland*, 3 Gr. 281.

An application to stay proceedings pending an appeal from an order overruling a demurrer, is in the discretion of the court. *McMurray* v. *Grand Trunk R. W. Co.*, 3 Ch. Ch. 125.

Where allowing plaintiff to proceed would so prejudice the defendant as virtually to defeat the appeal, proceedings will be stayed; but where defendant fails to shew that he would be prejudiced, a stay will be refused. *Ib.*

In a case where the stay moved for was refused, the court ordered that any answer put in should be without prejudice to the appeal from the order overruling the demurrer. *Ib.*

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

Time for.]—A motion by way of appeal from an order made in chambers, must be actually made within the fourteen days limited by the consolidated orders, and it is not sufficient to give the notice within the fourteen days. Aliter, in the case of an appeal from the master's report. *Jackson* v. *Gardner*, 15 Gr. 425; *S. C.*, 2 Ch. Ch. 385.

The fourteen days count from the entering of the order, not from its date. *Harvey* v. *Boomer*, 3 Ch. Ch. 11.

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2. *Consent Orders.*

Evidence as to Execution of Consent.]—Where, on an application for an order, a consent of a party to the cause is produced as a ground for making the order, it must be shewn that the effect of signing such consent was explained to the party, and was understood by him. *Trueman* v. *Fen School Trustees*, 1 Ch. Ch. 256.

Where an order is moved for on the consent of parties in person, the consent must, as a general rule, be executed in the presence of a solicitor; and an affidavit from such solicitor must be produced verifying the execution and shewing that he read over and explained the consent to the parties before they signed it, and that they understood, or that the deponent believes they understood, its meaning and effect. *Thornton* v. *Hooke*, 1 Ch. Ch. 325.

Relief against Consent — *Terms* — *Forum.*]—In a partition suit, a gentleman who was not a solicitor, nor a clerk of any solicitor in the cause, was employed by defendant's solicitor to attend to the case for defendant, and gave a consent in good faith, but inconsiderately, and without the knowledge or authority of, or communication with, the defendant or his solicitor, to a mode of partition suggested by the opposite party:—Held, that the consent might be relieved against on terms, it not appearing that the plaintiff would thereby be prejudiced. Held, also, that an application for relief against the consent, and to set aside the report, was properly made in chambers, and not in court. *Rolfe* v. *Coote*, 1 Ch. Ch. 308.

Relief against Consent by Solicitor.]—Ordinarily the client is bound by any consent or arrangement which his solicitor in good faith enters into with a view to the client's benefit, although without instructions or consultation. But in an extraordinary case a client might be relieved. *Bailey* v. *Bailey*, 2 Ch. Ch. 58.

See Thompson v. *Freeman*, 4 Ch. Ch. 1.

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3. *Ex Parte Orders.*

Application for—*Objection.*]—On an ex parte application for an order the court will not listen to any objections from the other side. *Henry* v. *McKeown*, 1 Ch. Ch. 264.

Direction to Execute Deed.]—An application for an order to compel a party to execute a deed directed to be executed, should be on notice, and will not be granted ex parte. *Westmacott* v. *Cockerline*, 2 Ch. Ch. 442.

Entry.]—An ex parte order will not be set aside because it is not entered. *McEwan* v. *Orde*, 2 Ch. Ch. 278.

General Rule.]—The court does not favour the granting of ex parte orders, except where the practice clearly authorizes them. *Stewart* v. *Richardson*, 2 Ch. Ch. 443.

——— *Payment Out of Court.*] — The court will not grant an order on an ex parte application, unless the practice distinctly authorizes it. An application for payment out of redemption money in court was refused. *Totten* v. *McIntyre*, 2 Ch. Ch. 462.

Limiting Time for Act.]—Where an order to do a certain act does not limit the

time therefor, an order for that purpose will be granted ex parte. Form of such order. *Mckay* v. *Reed*, 1 Ch. Ch. 196.

Office Copy of Answer.]—An application to compel defendant's solicitor to deliver an office copy of the answer was refused, because made ex parte. *Stewart* v. *Richardson*, 2 Ch. Ch. 443.

See Dunlop v. *Corporation of York*, 2 Ch. Ch. 417.

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4. *Other Cases.*

Alternative Order.] — See *Graham* v. *Chalmers*, 2 C. L. J. 269, *ante* 2 (f).

Irregular Order.]—If an order is complained of as irregular, it is not competent to the opposite party to move to amend or alter it. His course is to move to set it aside, and this must be done within the time limited by the orders regulating the practice. *Brigham* v. *Smith*, 2 Ch. Ch. 257.

Mistake—*Costs — Supplementary Order.*]—Held, where costs of interlocutory motions were reserved "until the hearing or other final disposition of the cause," and on a demurrer being allowed, the order drawn up directed plaintiff to pay the costs thereof, "together with the further costs of this cause, forthwith after taxation thereof"—that, whether or not such interlocutory costs would fall within the definition of further costs in the cause, the omission to provide for them in the order allowing the demurrer was "a mere mistake;" and that under the general order 186 the parties had a right to apply without liberty for that purpose being reserved. Viney v. Chaplin, 3 De G. & J. 281, considered and acted on. *St. Michael's College* v. *Merrick*, 26 Gr. 216.

Praecipe Orders — *Place for.*]—Where the bill is filed in an outer office, the order for production and other orders of course are properly obtainable at such office and not from the registrar. *Dougall* v. *Wilburn*, 1 Ch. Ch. 155.

Re-opening Order.]—As a general rule, where a person having received notice of a motion does not attend upon it, the order made thereon should not be interfered with. But where a party who had so neglected to attend, came in twenty-four hours after to reopen the matter, it was considered that he was entitled to be heard to shew that the order made was one which it was not proper to make. *Price* v. *Bailey*, 6 P. R. 256.

Service—*Enforcing Obedience.*] — Where the order limits a time to do an act, the order must be served before the time limited has expired, otherwise the party required to do the act will not be committed for disobedience. *Wagner* v. *Mason*, 6 P. R. 187.

XVII. Pauper.

(See Municipal Corporations, I. 2.)

Poverty as Excuse for Delay.]—The plaintiff, a squatter on Crown lands, made an assignment thereof to the defendant to enable him to obtain the patent for the plaintiff. There was no writing shewing the trust, and defendant, having procured the patent to be issued in his own name, induced the plaintiff to release his interest in the estate for less than half its value. There was great inequality between the parties in respect of their business capacity and otherwise; and defendant failed to shew that he had given the plaintiff all the information he was entitled to, or that the plaintiff had made the assignment without pressure and influence. The court held, that the plaintiff was entitled to redeem, on payment of the amount of defendant's advances, although seven years had elapsed before the plaintiff filed his bill impeaching the transaction—the excuse assigned for the delay being his poverty; it appearing that the parties could be restored to their original positions without loss to defendants. *Brady* v. *Keenan*, 14 Gr. 214.

Poverty is no excuse for delay in making an application to the court, as in such a case the party can apply in formâ pauperis. *Harris* v. *Myers*, 1 Ch. Ch. 229.

A party's poverty is not of itself a sufficient excuse for delay, although the court will not exclude it from consideration, but it will receive such a plea with caution. *Duff* v. *Barrett*, 3 Ch. Ch. 318.

Suing in Forma Pauperis — *Costs.*]—Where a party sues or defends in formâ pauperis, the masters and deputy registrars, being officers of the court, are not entitled to receive any fees from the pauper. *Chambers* v. *Chambers*, 1 Ch. Ch. 238.

A plaintiff suing in formâ pauperis is not liable to have his suit stayed until he has paid the costs at law, or of a former suit in chancery, touching the same subject matter, unless it can be shewn that the proceedings are vexatious. Where, therefore, a plaintiff had been ordered to give security for prior costs at law, and by another order the time for giving security had been limited and in default the bill ordered to be dismissed, and the plaintiff was afterwards admitted to sue in formâ pauperis, the two orders for giving security were set aside. *Casey* v. *McColl*, 3 Ch. Ch. 24.

Where costs are given to a plaintiff suing in formâ pauperis, they are, in general, and unless otherwise ordered, dives costs. *Ib.*

The rule is, that where a plaintiff sues in formâ pauperis he will not be ordered to pay costs of any indulgence granted him during the progress of the cause. Where, therefore, such a plaintiff brought to a hearing a suit which was defective for want of parties, the court ordered it to stand over to add them, and directed that the question of costs of this indulgence should stand over and be disposed of on the hearing of the cause. *Parr* v. *Montgomery*, 22 Gr. 176.

Two defendants allowed a bill to be taken pro confesso against them because they had not the means to employ a solicitor to defend the suit, and a pro confesso decree was obtained. An application to vacate the decree and for leave to answer was granted upon payment of costs, a primâ facie good defence on the merits being shewn. *Redford* v. *Todd*, 6 P. R. 154.

Costs of evidence to disprove the merits of the defence set up must not be incurred without consideration, and will not be allowed as of course. *Ib.*

XVIII. Personal Representative — Appointment of.

Death of Party—*Interest.*]—The court will not appoint an administrator ad litem of the estate of a deceased party where such party had a substantial interest in the suit. *Bank of Montreal* v. *Wallace*, 1 Ch. Ch. 261.

Where the interest, if any, of a deceased party is very small, the court will not require a personal representative to be appointed. *Montgomery* v. *Douglas*, 14 Gr. 268.

An application under order 56 for the appointment of a person to represent the estate of a deceased party was refused where it was considered that the deceased could not be said to be "interested in the matters in question in the suit," or that the personal representative, if appointed, would be merely a formal party. *Leonard* v. *Clydesdale*, 6 P. R. 142.

Dispensing with—*Formal Parties.*]—By order No. 30 of 1853, the court may proceed without any personal representative of a deceased person where none has been appointed; or may appoint some person to represent the estate for the purpose of the suit. This does not apply to cases where parties have a beneficial or substantial interest, but only to cases of mere formal parties. *Sherwood* v. *Freeland*, 6 Gr. 305.

Petition.]—A personal representative can only be appointed on petition. *In re Lee and Waterhouse*, 5 L. J. 256.

See Colleer v. *Swayzie*, 8 P. R. 42, *ante* XIII. 3.

XIX. Petitions.

Construction of Will.]—On a petition to obtain the opinion of the court on the construction of a will under 29 Vict. c. 28, s. 31:—Held, that the court could not give any opinion on such a point upon petition, and the court declined to make any order saying whether a bill would be proper. *In re Cæsar's Will*, 13 Gr. 210.

Fiat of Judge.] — The signature of a Judge to a fiat on a petition is not an affirmation by him that the case is a proper one for petition. *Arnold* v. *Hurd*, 1 Ch. Ch. 246.

Order Nisi — *Stranger to Suit.*] — The court will not grant an order nisi against a person not a party to the suit. Where an order against such a person is required, the proper practice to obtain it is by notice of motion or petition. *Harris* v. *Meyers*, 1 Ch. Ch. 262.

Petitioners—*Description of.*]—A petition should set out the addition and description of the petitioners in the same manner and with the same certainty as a bill of complaint. *Hunter* v. *Mountjoy*, 2 Ch. Ch. 90.

——— *Misjoinder—Amendment.*]—Where there is a misjoinder of petitioners in a petition for stay of proceedings, the court has jurisdiction at the hearing of the petition to allow the same to be amended by striking out a name. *Gilbert* v. *Jarvis*, 16 Gr. 294.

Service — *Filing—Notice—Want of Prosecution.*]—It is unnecessary and irregular to file a petition before it is heard. The proper proceeding, in order to bring it before the court, is to serve a copy with a notice of a day for hearing indorsed. *Re Western Ins. Co.*, 6 P. R. 86.

This practice is applicable to petitions under the Insurance Companies Act, 31 Vict. c. 48. But, as by this Act no special procedure is provided for making application under it to the court, where proceedings were initiated by a petition which had been filed but not served upon the respondents, nor brought to a hearing, after a lapse of fourteen months, the petition was treated as a bill, and ordered to be taken off the files for want of prosecution. *Ib.*

Setting out Facts.]—Where the facts on which a petition is founded are of such a nature that they cannot be sworn to, they should be set out fully so as to make the respondents aware of what they are called on to answer. It will not suffice to use the ordinary form. *Crooks* v. *Crooks*, 1 Gr. 57.

XX. Right to Proceed at Law and in Equity.

1. *Election.*

See McLean v. *Beaty*, 1 Ch. Ch. 84; *Carpenter* v. *Commercial Bank of Canada*, 2 E. & A. 111; *Morrison* v. *McLean*, 7 Gr. 167; *Boulton* v. *Cameron*, 9 Gr. 297; *Ausman* v. *Montgomery*, 5 Gr. 175; *Woodside* v. *Dickey*, 1 Ch. Ch. 170; *Winter* v. *Hamburgh*, 1 Ch. Ch. 123; *Arnold* v. *Allinor*, 16 Gr. 213, 15 Gr. 375; *Craig* v. *Gore District Mutual Fire Ins. Co.*, 10 Gr. 137; *Crabb* v. *Parsons*, 18 Gr. 674; *Falls* v. *Powell*, 20 Gr. 454; *Great Western R. W. Co.* v. *Desjardins Canal Co.*, 1 Ch. Ch. 39.

2. *Under Administration of Justice Act, 1873.*

See St. Michael's College v. *Merrick*, 1 A. R. 520; *Cochrane* v. *Franklin*, 13 C. L. J. 91; *Kennedy* v. *Bown*, 21 Gr. 95; *Imperial Loan and Investment Co.* v. *Boulton*, 22 Gr. 121; *French* v. *Taylor*, 23 Gr. 436; *Knox* v. *Travers*, 23 Gr. 41; *Standly* v. *Perry*, 23 Gr. 507; *Paterson* v. *Stroud*, 22 Gr. 413; *Curtis* v. *Wilson*, 23 Gr. 215; *Falls* v. *Powell*, 20 Gr. 454; *Frick* v. *Moyer*, 6 P. R. 245; *Westgate* v. *Westgate*, 28 C. P. 283; *Demorest* v. *Helme*, 22 Gr. 433; *Casey* v. *Hanlan*, 22 Gr. 445; *Henderson* v. *Watson*, 23 Gr. 355; *Victoria Mutual Fire Ins. Co.* v. *Bethune*, 23 Gr. 568; *S. C.*, 1 A. R. 398.

For decisions at law on this subject, see *ante*, Practice at Law before the Judicature Act, X.

XXI. Sequestration.

1. *Effect of Writ.*

As to Choses in Action.]—A creditor has a right, under a writ of sequestration, to

compel payment by a third party of a debt which he owes to defendant, against whose estate the writ issued. *McDowell* v. *McDowell*, 1 Ch. Ch. 140, 10 L. J. 48.

Until either the sequestrator or the party claiming under the writ takes steps to obtain payment of the money, the chose in action is not bound by reason of the writ being in the sheriff's hands. *Ib.*

Writs of execution bind moneys or choses in action, or rather securities for money, only from the time of actual seizure by the sheriff, or of some act symbolical therewith or tantamount thereto. *Ib.*

A chose in action can be reached by sequestration, but the right or interest of a surety in regard to the money for the payment of which he is surety, cannot be reached by that process. Where, therefore, a mortgagee filed his bill against the assignee of the equity of redemption, to enforce by this means payment of the deficiency arising on a sale of the mortgaged premises, it was held that the right of the mortgagor to call upon his assignee to discharge the mortgage debt, could not be reached. *Irving* v. *Boyd*, 15 Gr. 157.

The claim of a debtor to compensation for misrepresentations of parties in obtaining a patent of land is not liable to be seized, attached, or sequestered, before the amount is determined by decree or otherwise. *Roberts* v. *City of Toronto*, 16 Gr. 236.

As to Lands.]—The effect of a sequestration in regard to lands considered. *Meyers* v. *Meyers*, 19 Gr. 185.

In case of a debtor dying leaving insufficient assets to pay all his debts, execution creditors whose writs are in the sheriff's hands do not lose their priority; nor does a creditor who has a sequestration in the hands of the sequestrators lose the advantage of it. *Ib.*

While the law respecting the registration of judgments was in force, two judgment creditors registered their judgments; the second in point of time proceeded with a suit to enforce his lien; the other did not, although he had also filed a bill in time, but he proved his claim in the master's office in the suit instituted by the other creditor, who in that proceeding had sued out a sequestration, under which proceedings had been taken to obtain payment of his claim:—Held, affirming the judgment in 20 Gr. 185, that the creditor who had first registered had not, by refraining from proceeding with his suit, lost the priority obtained by him by virtue of his prior registration; that to enforce such claim it was not, under the circumstances, necessary for him to revive his own suit, which had abated meantime by reason of the death of some of the parties; and that the plaintiff in the suit in which he had proved his claim having sued out a writ of sequestration, under which the sheriff had acted, had not the effect of changing the rights of the parties under their registered judgments. *S. C.*, 21 Gr. 214.

A writ of sequestration, whether upon mesne or final process, is not in any sense an execution against lands, but is simply a means of compelling obedience to the order of the court. *Ib.*

Lands cannot be sold under a writ of sequestration. *Nelson* v. *Nelson*, 6 P. R. 194.

As to Leases and Rent.]—The tenant of a party against whom a writ of sequestration has issued, will be ordered to pay to the commissioner rent shewn to be due, and also to attorn and pay the accruing rents. *Jackson* v. *Jackson*, 1 Ch. Ch. 115.

Rent to accrue due is not a chose in action, and a tenant in respect to it may attorn; but where the tenant, having been notified by the sequestrator, promised to pay him the rent in future, and afterwards on being indemnified paid it to a party claiming it as assignee, he was ordered to pay it over again to the sequestrator. *Harris* v. *Meyers*, 2 Ch. Ch. 121.

Sequestrators can lease for any period during which the rents would be less in the aggregate than the amount for which sequestration issued. *S. C.*, 3 Ch. Ch. 89.

When a sequestration had issued to compel payment under a decree, and there appeared to have been considerable delay in enforcing the payment of rents, during which period the defendant had died, and one of the heirs had received sundry sums for rent, a motion that such rents be paid over again to the sequestrators by the tenants was refused, and the tenants ordered to attorn as to future rents only. *S. C.*, *ib.* 107.

B. was a registered judgment creditor of M., after whose death T. obtained a decree for a debt due by M. T. issued a sequestration for this debt, under which lands were seized, and let under the authority of the court to tenants: — Held, that B.'s charge having priority over T.'s, B. was entitled to set aside the leases on paying the tenants for their labour in putting in fall crops and preparing the land for fall and spring crops; and to have the land sold free from the leases. *Meyers* v. *Meyers*, 19 Gr. 541.

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2. *Issue of Writ.*

Corporation—*Order Nisi.*] — In proceeding against a corporation to enforce obedience to a decree or order, it is not necessary to sue out a writ of distringas; the proper proceeding is by orders nisi and absolute for a sequestration. *Attorney-General* v. *Brantford*, 1 Ch. Ch. 26.

Insufficiency of Lands—*Interest in, not Exigible.*]—Before resorting to a writ of sequestration under G. O. 291 for non-payment of money, a writ of fi. fa. goods should be issued; then, if that fails, an order attaching debts; and a writ of sequestration should only issue (1) where the lands are insufficient to satisfy the debt, and it therefore becomes important to realize the profits during the year that must elapse before the lands can be sold under a fi. fa.; or (2) where the interest of the debtor is of such a nature that it cannot be taken under a fi. fa. This rule does not interfere with the power of the court to order a sequestration instead of a fi. fa., if occasion should require. An order for payment of money into court is an order for payment of money within the meaning of G. O. 291. Such an order does not require to be indorsed with the notice, schedule N. to the consolidated orders. *Nelson* v. *Nelson*, 6 P. R. 194.

Service of Order—*Affidavit.*]—A writ of sequestration cannot properly be issued on præcipe. The order for the payment of the

money must be served, and an affidavit of such service and of the non-payment filed. A writ issued on præcipe was set aside, but without costs. *Fisken* v. *Wride*, 2 Ch. Ch. 212.

——— *Affidavit — Absence of—Waiver.*]—Although, as was held in the last case, a copy of the decree or order directing the payment of the money should be shewn to have been served, and a demand of payment of the money made, before a writ of sequestration can properly issue—yet where, as frequently has been done, a writ was issued without an affidavit filed shewing such service and demand, and the defendant had been aware of it for upwards of a year, and had appeared on a motion to compel a tenant to attorn:—Held, that he had waived any objection. *Harris* v. *Myers*, 2 Ch. Ch. 248.

——— *Affidavit—General Order.*]—To entitle a party to the writ for non-payment of money it is not necessary, since G. O. 291, to shew that the order for payment and a demand thereunder have been personally served on the party ordered to pay. The last two cases commented upon. *Long* v. *Long*, 6 P. R. 137.

Sheriff's Return—*Affidavit.*]—Upon the sheriff's return of non est to a warrant for the committal of a party, and an affidavit to the effect required by the 188th of Vice-Chancellor Jamieson's orders, a sequestration will issue at once. *Prentiss* v. *Brennan*, 1 Gr. 497.

3. *Reviving.*

Decree—*Mesne Process.*]—Where a sequestration to compel the performance of a decree had been issued against a person who subsequently died:—Held, that the writ could be revived against his heirs. Semble, that sequestration issued on mesne process can not be revived. *Turley* v. *Meyers*, 3 Ch. Ch. 102.

Irregular Order of Revivor.] — A sequestration had been taken out in a cause in which an order to revive had issued against the parties who would have represented the estate of a supposed intestate, had he been such; but a will had been subsequently found, and the revivor, it was contended, was irregular. A motion to set aside the sequestration on this ground, and on the grounds that the defendant had proved under the decree in the suit said to be thus irregularly revived, and that there were prior creditors to him, was refused with costs. Semble, the proper course, under such circumstances, would be to move against the order of revivor. *Meyers* v. *Meyers*, 4 Ch. Ch. 41, 8 C. L. J. 82.

See Meyers v. *Meyers*, 21 Gr. 214.

4. *Third Persons—Claims of.*

Inquiry as to—*Reference—Examination of Claimant.*]—Where, after the appointment of a receiver or the issuing of a sequestration, a question arises on an interlocutory application with persons not parties to the suit as to the right of property claimed by the receiver or sequestrators, the court may either dispose of the matter at once upon the affidavits filed, or, if the matter is not ripe for discussion, direct such proceedings to be had as appear on the whole best fitted for the determination of the question of right. *Prentiss* v. *Brennan, Re Peterson*, 2 Gr. 582.

The court may order a reference to the master to inquire whether a claimant has any and what right to property sequestrated. But where an order was drawn up in that form without reference to the court, the court, on application of the claimant, directed the order to be modified by adding a direction that the claimant should be examined before the master. *Ib.*

——— *Reference — Sale of Property.*]—Where a receiver of partnership property had been appointed, and certain chattels had been seized under a sequestration against defendant for contempt of the injunction, and the chattels so seized were alleged to be the property of defendant and his co-partner, but it appeared that third persons claimed an interest therein, the plaintiff having moved to sell this property, a reference was directed on such motion (on which the claimants had appeared) to inquire as to their interests; and any further order on the motion was reserved, the parties to the motion electing to have a reference instead of issues to try the questions in dispute. *Prentiss* v. *Brennan, Re Brennan*, 2 Gr. 274.

Transfer of Security — *Bona Fides — Leave to File Bill—Notice of Motion—Substituted Service.*]—In a suit in which a receiver of partnership effects had been appointed and a sequestration issued against defendant for contempt, the court retained a motion against third persons for delivery or payment to the receiver or sequestrators of a promissory note, the property of the partnership, transferred subsequently to the issuing of the injunction and sequestration, but before the note became due by the defendant, in a foreign country, the affidavits as to the bona fides of such transfer being contradictory, the court giving leave to file a bill against such third persons. *Prentiss* v. *Brennan, Re Bunker*, 2 Gr. 322.

Where, after the issuing of an injunction and sequestration in a partnership suit, against the defendant, a transfer was made of a promissory note, part of the assets of the partnership, and the plaintiff filed affidavits impugning the bona fides of the transfer, the court gave leave to the plaintiff to serve a notice of motion to compel the delivery or payment of the note to the receiver or sequestrators in the cause, upon the party to whom the note had been transferred out of the jurisdiction; and such party having appeared upon and opposed the motion, substitutional service of the subpœna to answer was ordered to be made on his solicitor or agent in a suit afterwards brought against him, by leave of the court for the same purpose. *Ib.*

5. *Other Cases.*

Appeal—*Stay pending.*]—By an order of the court of error and appeal the Hamilton and Milton Road Company were ordered to remove a bridge constructed by them, which impeded the navigation of the Desjardins Canal, against which the road company appealed to the Queen in council:—Held, that under the statute the circumstance of the road company having perfected the security required by the orders of the privy council, was a sufficient answer to a motion for sequestration for non-compliance with the order requiring the removal of the bridge; and the

road company having applied to the court for a stay of proceedings under the order pending their appeal to the privy council, both motions were refused, but under the circumstances without costs to either party. *Dundas* v. *Hamilton and Milton Road Co.*, 19 Gr. 455.

Contempt — *Motion against Writ.*] — Quære, whether a party whose committal has been ordered for breach of an injunction, and against whom a writ of sequestration has been granted for the same contempt, can move against the writ before clearing his contempt. *Prentiss* v. *Brennan*, 1 Gr. 497, 428.

Order for Sale—*Notice.*] — Notice must be given of an application for an order to sell property seized by sequestrators. *Forbes* v. *Connolly*, 1 Ch. Ch. 6.

XXII. Service of Papers.

1. *Bill.*

(a) *Absconding Defendants.*

Service by Publication.] — A party having absconded from this Province, as alleged, to avoid service of proceedings in chancery, and it being shewn upon affidavits that within a few months he had been resident at several different places, and that it was impossible to say with any degree of certainty in which of them he could be served with process —the court directed an advertisement to be inserted in a newspaper published at the place of residence of the party in this province, and that a copy of the several papers containing the advertisement should be sent to his address at each of the places named. *Stimson* v. *Stimson*, 6 Gr. 379.

On an application to advertise a defendant, it was sworn that the defendant had absconded to Michigan, but it was not stated that any endeavour had been made to ascertain his residence:—Held, that an affidavit should be produced shewing that defendant could not be found in Michigan. *Lipsey* v. *Cruise*, 1 Ch. Ch. 2.

An order for substitutional service on an absconding defendant, or to advertise him, where the affidavit stated that the deponent had made inquiries and exertions to serve defendant, but had been unable to do so, was refused, as the affidavit ought to shew what exertions had been made, that the Judge may determine whether the defendant is absconding, or whether it is proper to dispense with personal service. *Murney* v. *Knapp*, 1 Ch. Ch. 26.

On moving for an order to serve an absconding defendant by publication, it must be shewn where defendant last resided, and whether he has any relations within the jurisdiction, and, if so, that inquiries have been made of them as to his whereabouts. *Irving* v. *Streit*, 1 Ch. Ch. 185.

Where an application is made to advertise an absconding defendant, the affidavits must shew whether he has any relations in the country; if he has any, one or more of them should, generally speaking, be examined as to their knowledge of his residence before the order is applied for. *McMurrich* v. *Hogan*, *Perkins* v. *Plebs*, 1 Ch. Ch. 307.

Substituted Service.]—Where a bill had been filed for foreclosure, and the defendant, the official assignee of the mortgagor, absconded before the bill was served, an order was granted allowing substitutional service on one of the two inspectors of the insolvent's estate. *London and Canadian Loan and Agency Co.* v. *Thompson*, 8 P. R. 91.

Where the defendant in a suit had absconded to the United States before the filing of the bill, and two months after the filing of the bill an assignee in insolvency was appointed by the creditors of the defendant, and the assignee was served with the bill, but not within the time limited by the general orders, an order was made allowing the service as good, though made fourteen months after the bill was filed:—Held, that the defendant having absconded was a sufficient reason for not proceeding with greater diligence. *Godcrich* v. *Brodie*, 8 P. R. 486.

See ante VII. 1 (a).

(b) *Absent Defendants and Defendants out of the Jurisdiction.*

Actual Service abroad.]—When an application is made to serve a defendant out of the jurisdiction, and correspondence is relied upon to shew the party's residence, the affidavit must shew at what time the last communication was received from the defendant. *Farry* v. *Davis*, 1 Ch. Ch. 7.

An application for an order to serve a defendant out of the jurisdiction, at Iowa, was refused: the affidavit on the motion merely stating that letters had been received from defendant dated at that place, but not shewing that he was resident there. *Kingston* v. *Monger*, 1 Ch. Ch. 18.

It is not sufficient proof of the identity of a party served out of the jurisdiction, that the deponent to the affidavit of service swears that he served "the above-named defendant." The affidavit should shew the means of knowledge. *Armour* v. *Robertson*, 1 Ch. Ch. 252.

A written admission of service, and that the party making it was the defendant in the bill, made by a defendant served in Montreal, was received as sufficient proof of service, on an affidavit being filed of a party within the jurisdiction proving the handwriting. *Erle* v. *Hunt*, 2 Ch. Ch. 395.

See Exchange Bank v. *Springer*, 29 Gr. 270.

Dispensing with Service.]—The residence out of the jurisdiction of a party having a substantial interest is not now a sufficient reason for proceeding in his absence, where it would have been so, when persons out of the jurisdiction could not in England be served with process; it must also be shewn now to be impossible to effect service upon such absent party. *Le Targe* v. *De Twyll*, 1 Gr. 227.

The mere fact of a defendant residing in England is not sufficient reason for dispensing with personal service of an office copy of the bill. *Everest* v. *Brooks*, 2 Ch. Ch. 445.

Service by Mail.] — The plaintiff's solicitors had written to a defendant out of the

jurisdiction, and received letters in reply. They had also mailed him an office copy of the bill, and received a letter that he had received the bill. The chancellor granted an order allowing the service, but directed a copy of it to be mailed to defendant. *Woodside* v. *Toronto Street R. W. Co.*, 2 Ch. Ch. 24.

See, also, *Cameron* v. *Baker*, 2 Ch. Ch. 281.

Service by Publication.]—On an application to take the bill pro confesso against a defendant served by advertisement four months after the time for answering expired:—Held, that it should be shewn that the defendant had not returned within the jurisdiction, and that the plaintiff was still ignorant of his whereabouts, and unable to serve him. *McCarty* v. *Wessels*, 1 Ch. Ch. 5.

Section 8 of the 9th general order of June, 1853, does not apply to any cases other than those for foreclosure or specific performance of an agreement. *Bank of Montreal* v. *Hatch*, 1 Ch. Ch. 57.

In a suit which is not for foreclosure or specific performance, the court cannot order service of the bill by publication on defendants who have been out of the jurisdiction for more than two years before the filing of the bill. *Berkis* v. *Nichols*, 1 Ch. Ch. 232.

The court will permit service of a bill by publication (under s. 8 of order 9) upon a defendant in a foreclosure suit, who has left the jurisdiction, though the defendant sought to be advertised is merely an incumbrancer by virtue of a subsequent mortgage. *Robson* v. *Recsor*, 1 Ch. Ch. 280.

Where an absent defendant is an infant, the court has like powers as to granting an order for service by publication as in case of an adult; but semble, the notice published should not state that in default of answer the bill will be taken pro confesso. The court will also, in exercise of the discretion given to it by 28 Vict. c. 17, s. 12, call upon such defendant by the same order to shew cause why a solicitor of the court should not be appointed his guardian ad litem. *Duffy* v. *O'Connor*, 1 Ch. Ch. 393.

Where a sole defendant had been absent from the jurisdiction and not heard of for fourteen years, a motion for service of the bill upon him by publication was refused, notwithstanding 28 Vict. c. 17, s. 12. *Shaw* v. *Acker*, 1 Ch. Ch. 395.

So where absent seven years. See *Kelly* v. *Macklem*, *ib.* 396 note.

The court will not order service by publication on parties out of the jurisdiction, who cannot be found, on the affidavit of the plaintiff alone. ——— v. *Corcoran*, 3 Ch. Ch. 398.

The defendant in a foreclosure suit having been served by publication, a decree was pronounced under which the master took the accounts, &c. After three years had elapsed an order was made under G. O. 116 confirming the proceedings had thereunder, and making absolute the decree. Clariss v. Ellis, 6 P. R. 115, not followed. *Roblin* v. *Grecly*, 7 P. R. 126.

Where a defendant is served by publication under G. O. 100, in order that a præcipe decree may be obtained, the notice should contain the special indorsement in schedule G. to order 436, otherwise the cause must be set down to be heard pro confesso. *Pherrill* v. *Forbes*, 8 P. R. 408.

Substituted Service.] — Where some or all of the parties to be served are out of the jurisdiction, substituted service of the bill may be effected on partners or agents, where there is clear proof of agency with reference to the subject matter of the suit. *Allan* v. *Pyper*, 5 L. J. 118.

On its being shewn that the defendant could not without delay and difficulty be served personally out of the jurisdiction, that he had a branch business in Toronto in charge of an agent, and that the subject matter of the suit had reference to such agency, service of bill on such agent, and that a copy be mailed to the defendant at New York (nine weeks being given to answer), was ordered. *Cupples* v. *Dorston*, 2 Ch. Ch. 31.

Where a mortgagee made a party to a suit in respect to his mortgage was out of the jurisdiction, service upon his solicitor, who had always held the mortgage, was allowed. *Young* v. *Wilson*, 2 Ch. Ch. 56.

Where several trustees of a religious society were defendants, as owning the equity of redemption, and one of them had left the country, substitutional service for him, on one of the other trustees, was allowed. *Somerville* v. *Joyce*, 1 Ch. Ch. 358.

28 Vict. c. 17 gives the court larger powers as to proceeding against absent defendants whose residence is unknown, and the court will grant orders for substitutional service in cases where it would not under the practice before the Act dispensing with advertising where it would be useless. *Cooper* v. *Lane*, 1 Ch. Ch. 363.

Substitutional service will not be allowed under 28 Vict. c. 17, unless it is shewn that it would be very expensive or very difficult to effect a service. *Pearson* v. *Campbell*, 2 Ch. Ch. 25.

The administrator of a deceased mortgagee having filed a bill against his heirs-at-law, one of whom lived abroad, in some unknown place, it was ordered that service of the bill on a sister of the absent defendant, and posting to him a copy of the order, addressed to the place where he had been last heard from, be deemed good service. *Cameron* v. *Baker*, 2 Ch. Ch. 281.

Where a mortgagee filed a bill for foreclosure against a mortgagor who resided out of the jurisdiction, and whose residence was unknown, whilst the security was scanty, service was ordered on the mortgagor's wife. *McDonald* v. *McMillan*, 2 Ch. Ch. 282.

Substitutional service of the bill upon an absent defendant allowed where the affidavits stated that "none of the parties in this country were aware of the residence of the defendant; that the plaintiff's solicitor had made diligent inquiry and could not find out where the defendant resided; and that deponent was informed that the defendant led a wandering life; that she had been in Rochester about a month before, but that she then intended

shortly to make a move." *Gordon* v. *Hanna*, 6 P. R. 266.

See Monro v. *Keiley*, 1 Ch. Ch. 23, *post* (f).

See ante VII. 1 (a).

(c) *Affidavit of Service.*

Amended Bill—*Presumption.*]—Where a bill had been amended, and the affidavit was of the service of "the bill," the court presumed the bill served was the bill as it stood at the time of service. *Bolster* v. *Cochrane*, 2 Ch. Ch. 327.

Costs.]—Where separate affidavits of service of bill are made by one person, the costs of one only should be allowed. *Boulton* v. *McNaughton*, 1 Ch. Ch. 216.

Describing Copy Served.]—The affidavit of service of an office copy of the bill should shew that the copy so served was stamped with the stamp of the registrar's or deputy registrar's office in which the bill is filed. *Cameron* v. *Upper Canada Mining Co.*, 4 C. L. J. 77.

Irregularity — *Effect of.*] — Held, that a plaintiff who filed an irregular affidavit of service on noting a defendant pro confesso, was responsible for the consequences; and the note pro confesso was set aside. *Pringle* v. *McDonald*, 7 P. R. 45.

Place of Service.]—In applying for an order pro confesso after six months from the service of the bill, the affidavit of service of the notice of motion should shew that the notice was served within the jurisdiction. *McClary* v. *Durand*, 1 Ch. Ch. 233.

Swearing to abroad.]—It is unnecessary to issue a commisssion to authorize the taking of the affidavit of service in a foreign country. *Snyder* v. *O'Lone*, 4 Gr. 148.

See Armour v. *Robertson*, 1 Ch. Ch. 252, *ante* (a).

(d) *Companies and Corporations.*

Corporation Aggregate.]—The order permitting the service of a bill upon the agent of a corporation aggregate does not authorize service upon agents of corporations within Upper Canada. *Campbell* v. *Taylor*, 1 Ch. Ch. 2.

Defunct Company.]—Where a company is virtually defunct before bill filed, the proper course to effect service is to apply to the court for an order therefor, otherwise an order pro confesso cannot be obtained. *Furness* v. *Metropolitan Water Co.*, 1 Ch. Ch. 369.

Foreign Company.]—A foreign company having an office in Montreal and another in Toronto, an office copy of the bill, with an indorsement to answer in four weeks, was served on the agent in Toronto:—Held, sufficient service. *Irwin* v. *Lancashire Ins. Co.*, 2 Ch. Ch. 291.

(e) *Time for Service.*

Before Orders of 1865.]—See *Tylee* v. *Strachan*, 1 Ch. Ch. 319.

Expiry of Time—*Allowance after.*]—See *Munn* v. *Gass*, 1 Ch. Ch. 337; *Brooke* v. *Nimeas*, 2 Ch. Ch. 461.

——— *Dismissal for Non-service.*] — See *Harvey* v. *Davidson*, 3 Ch. Ch. 495; *Poulton* v. *Lee*, 7 P. R. 415.

——— *Setting aside.*]—See *Ray* v. *Maas*, 13 C. L. J. 225.

(f) *Other Cases.*

Admission of Service.]—See *Stilson* v. *Kennedy*, 1 Ch. Ch. 236.

Attorney of Judgment Creditor.]—See *Monro* v. *Keiley*, 1 Ch. Ch. 23.

Attorney of Plaintiff at Law.]—See *Crawford* v. *Cooke*, 1 Ch. Ch. 57.

Copy for Service.]—See *Cameron* v. *Upper Canada Mining Co.*, 2 Ch. Ch. 215; *Cossey* v. *Ducklow*, 2 Ch. Ch. 227.

Effect of Service.] — See *Meyers* v. *Meyers*, 21 Gr. 214.

Infant Defendants.]—See *Weatherhead* v. *Weatherhead*, 9 P. R. 96.

Married Woman.] — See *Bunn* v. *Barclay*, 1 Ch. Ch. 254.

Service on Inmate of Dwelling House.]—See *Elliot* v. *Beard*, 2 C. L. J. 332.

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2. *Subpœna.*

Absent Defendant—*Substituted Service—Solicitor or Agent.*]—See *Prentiss* v. *Brennan*, *Re Bunker*, 2 Gr. 322; *Canniffe* v. *Taylor*, 2 Gr. 617; *Doremus* v. *Kennedy*, 2 Gr. 657; *Legge* v. *Winstanley*, 3 Gr. 106; *Sefton* v. *Lundy*, 4 Ch. Ch. 33.

See post XXIV.

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3. *Other Papers.*

Irregularity of Service — *Waiver.*]— Where, after an irregularity of service, the party having the right to insist on it serves a demand which it would put the other party to expense to fulfil, it waives the irregularity. *Carpenter* v. *City of Hamilton*, 2 Ch. Ch. 282.

Person Served—*Solicitor's Agent.*]—Service on the agent of the solicitor who had acted in the cause for defendant, was held good service, although the solicitor had been changed, but no order for changing the solicitor had been taken out. *Brown* v. *Burgar*, 2 Ch. Ch. 446.

When a pleading is filed in a deputy registrar's office in a county in which the solicitor

for the opposite party does not reside, service of notice of filing must be effected according to order 43. Service on the Toronto agent is irregular. *Hayes* v. *Shier*, 6 P. R. 41.

A Toronto agent for one country principal cannot serve himself as agent for another country principal. *Horseman* v. *Coulson*, 6 P. R. 263.

Service by Parties.]—The court will permit service of pleadings to be effected by parties to the suit, and will allow the same fees upon taxation as if served by third persons. *McClure* v. *Jones*, 6 Gr. 383.

Time of Service.]—Service of a paper effected after four o'clock, by putting it under the door of a solicitor's office, is not a good service for that day, unless it be shewn that the paper came to the hands of the solicitor or his clerk on that day, during the hours at which the one or the other might be served personally. When Sunday is an intermediate day, it is reckoned in the computation of the time for service of papers. *Sprague* v. *Henderson*, 1 Ch. Ch. 213. But see *In re Crooks*, 1 Ch. Ch. 304.

Where a solicitor promptly repudiated his acceptance of a paper served after hours, which he admitted without knowing its nature, the service was held bad. *McTavish* v. *Sympson*, 7 P. R. 145.

Notice of examination and hearing was served at a few minutes past four, on the last day for giving notice, on solicitors of one defendant, who admitted service, but on the same day, discovering that the notice had been served too late, they wrote to the plaintiff's solicitors repudiating their admission, and saying that they would move to set aside the notice. On a motion it was not shewn that there was no other service or notice than as above mentioned, and the application was thereupon refused. Scott v. Burnham, 3 Ch. Ch. 402, followed. Semble, that the acceptance of service would not be binding, having been so soon repudiated. *Wright* v. *Way*, 8 P. R. 328.

XXIII. Staying Proceedings.

Appeal—*Staying Reference.*]—Where a decree had been made declaring the plaintiff to be entitled to insurance moneys, and directing a reference to ascertain the amount, and payment forthwith after the making of the report, an order staying proceedings in the master's office was refused pending an appeal from the decree. *Butler* v. *Standard Fire Ins. Co.*, 8 P. R. 41.

——— *Terms—Security for Costs.*]—Security for costs in appeal, as well as that of the court below, will be required to be given before proceedings in the court below will be stayed pending an appeal. *Heward* v. *Heward*, 2 Ch. Ch. 245.

Application for Mandamus.]—Where a stay of proceedings was asked to enable defendants to apply at law for a mandamus to compel the head of a corporation to affix the corporate seal, but it was not shewn that the majority of shareholders approved of the answer, the application was refused with costs. *Gildersleeve* v. *Wolfe Island R. W. and Canal Co.*, 3 Ch. Ch. 358.

Contempt.]—It would seem that a plaintiff prosecuting his decree is entitled to do so, notwithstanding that he may have been placed in contempt for disobedience to an order of the court for payment of money. In such a case defendant must obtain an order staying proceedings until the contempt is purged. *Hurd* v. *Robertson*, 1 Ch. Ch. 3.

Insolvency of Plaintiff.]—Where a suit was commenced in the name of a person who had previously assigned his interest to a creditor by way of security, and the plaintiff became insolvent before decree, but the cause proceeded to a hearing without any change of parties, and a decree for the plaintiff was pronounced, the court, at the instance of defendants, stayed proceedings until all proper parties should be brought before the court. *McKenzie* v. *McDonnel*, 15 Gr. 442.

Next Friend—*Appointment of.*]—A married woman must sue by her next friend, where it does not appear on the face of a bill filed by her that the property in question is her separate property. Held, also, that a motion to stay proceedings until a next friend is appointed was properly made in chambers, and that defendant need not demur to the bill. *Pruyn* v. *Soby*, 7 P. R. 44.

Pending Action at Law.]—Where a bill was filed by an execution creditor to impeach a conveyance by the debtor, and it did not appear that the action at law had been commenced after the passing of the A. J. Act, a demurrer on the ground that the plaintiff ought to have obtained relief in the suit at law, was overruled. *Sawyer* v. *Linton*, 23 Gr. 43.

Pending Foreign Action.]—Where there is a suit pending out of Ontario between the same parties and for the same cause of action, and it can be more conveniently tried in such other place, proceedings will be stayed here until the determination or discontinuance of the suit there. It is immaterial which suit was commenced first. *Howell* v. *Jewett*, 7 P. R. 69.

Rehearing — *Conditional Payment—Repayment.*]—Pending the rehearing, a sum of money, which before suit had been tendered by defendants to the plaintiff on account of salary, was ordered to be paid by defendants to the plaintiff as a condition of staying proceedings under the decree already pronounced. On rehearing this decree was affirmed, whereupon the defendant appealed to the court of error and appeal, when the decree was reversed, the bill ordered to be dismissed, and the cause remitted to the court below to carry out that order:—Held, that the plaintiff was bound to repay the money so paid to him by the defendants, the duty of the court below being, in carrying out the order made on appeal, to place the defendants in the same position, as far as possible, as if the bill had been dismissed at the hearing. *Weir* v. *Mathieson*, 12 Gr. 299.

——— *Staying Reference.*]—A notice to rehear by the party who has the carriage of the decree does not, in the absence of special circumstances, entitle him to stop the prosecution of the decree in the master's office. *Stephenson* v. *Nicolls*, 14 Gr. 144.

While the plaintiff was proceeding to take the accounts directed by the decree in the

master's office, defendant presented a petition of rehearing, which was ordered, and the cause set down in the usual manner. A motion to stay proceedings in the master's office, until after the cause had been reheard, was refused. *Campbell* v. *Campbell*, 1 Ch. Ch. 30.

——— *Terms — Security.*] — The court will not, as a matter of course, stay proceedings pending a rehearing. It is in the discretion of the court to stay proceedings, and the court will impose terms according to the circumstances of each case, granting a stay more readily than formerly, if it be shewn that there is a danger of loss unless proceedings be stayed. *Walker* v. *Niles*, 3 Ch. Ch. 418.

Where in an interpleader suit a large sum of money was ordered to be paid over to a claimant resident in the United States, and the plaintiff who purposed to rehear, and had made his deposit, asked to have proceedings stayed; the claimant was directed to give security to abide by any order the court might make upon the rehearing, and to repay the money if so directed, before the money was ordered to be paid to him. *Ib.*

Subject Matter Gone—*Costs.*]—An order will not be granted to stay proceedings or dismiss the bill in a suit, merely because the subject matter of it has gone; the plaintiff has a right to proceed to a hearing to shew himself entitled to costs. *Wallace* v. *Ford*, 1 Ch. Ch. 282.

XXIV. SUBPŒNAS.

(*See ante* XXII. 2.)

1. *For Costs.*

See Saul v. *Cooper*, 4 Gr. 61; *Peel* v. *Kingsmill*, 2 Gr. 272.

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2. *To Answer.*

See Meyers v. *Robertson*, 1 Gr. 55; *Rolph* v. *Cahoon*, 2 Gr. 623.

XXV. TRIAL OF ISSUE AT LAW.

See Macaulay v. *Proctor*, 2 Gr. 390; *Boulton* v. *Robinson*, 4 Gr. 109; *Fish* v. *Carnegie*, 7 Gr. 479; *Baker* v. *Wilson*, 6 Gr. 603.

XXVI. MISCELLANEOUS CASES.

Declaration of Right.]—See *Macklem* v. *Cummings*, 7 Gr. 318.

Estoppel by Plea in Action at Law.]—See *Carpenter* v. *Commercial Bank of Canada*, 2 E. & A. 111.

Foreign Action—*Company—Liquidation—Conflict between Courts.*] — The holder of bonds of a joint stock company (limited), after instituting proceedings in the court of chancery in England, for the sale of the partnership property, which was situated in Canada, and after the appointment of a receiver in England of the estate in England and Canada, filed a bill here for the like purpose, and the court appointed the agent of the receiver, receiver here; after which it appeared that the company went into liquidation, the liquidator being the same person who had been appointed receiver in England. The plaintiff, after an amendment of his bill stating these proceedings, moved for a decree in the terms of the prayer of his bill; but the court refused to make any decree until it was shewn what the position of matters was in England, and the steps about to be taken there, so as to avoid any conflict between the two courts, and to mould the order here to give the appropriate relief without interfering with the steps which were being taken in England for the same object. *Louth* v. *Western of Canada Oil Lands and Works Co.*, 22 Gr. 557.

Office Copy of Pleadings.]—*See Totten* v. *Macintyre*, 2 Ch. Ch. 80.

Status of Plaintiff—*Determination of.*]—Where in the course of a cause a question is raised whether the plaintiff is entitled to institute proceedings, the court will in a proper case decide that question without compelling the parties to proceed to a hearing. *Light* v. *Woodstock and Erie R. W. and Harbour Co.*, 7 Gr. 172.

——— *Shareholder of Bank.*]—The plaintiff, in order to qualify himself to sue as a shareholder of a bank, purchased one share of the stock thereof, which he swore he paid for with his own money and bought of his own motion, for the purpose of testing the legality of a transaction into which the bank was about to enter:—Held, that this gave him a locus standi in court, although the circumstances were suspicious, the rule being that where in such a case the plaintiff is shewn to have a substantial interest, the court will not refuse relief, although there may be room to suppose he may have other objects in view which would not be approved of. *Jones* v. *Imperial Bank of Canada*, 23 Gr. 262.

Stop Order.]—The court has power to issue a stop order at the instance of a party entitled to funds in court. Lee v. Bell, 2 Ch. Ch. 114, commented upon. *Wilson* v. *McCarthy*, 7 P. R. 132.

Transmission of Papers.]—The usual practice, in applications to allow depositions and evidence taken in the court of chancery to be used in other courts, is, to send an officer of the court there with the papers. *Thompson* v. *Ward*, 5 L. J. 41.

Vacation—*Liberty.*]—The court will entertain applications affecting the liberty of the subject during the long vacation. *Harris* v. *Meyers*, 1 Ch. Ch. 229.

Vendor's Lien — *Payment into Bank — Final Order of Sale.*]—The order of 29th June, 1861, directing money ordered to be paid, to be paid into some bank, does not apply to a suit by a vendor to enforce his lien for purchase money. In a suit of this nature, in applying for the final order of sale, it is not necessary that the affidavit of the plaintiff as to non-payment should negative the fact of possession, or the receipt of rents and profits. *Sawdon* v. *Heasty*, 1 Ch. Ch. 254.

Warrant—*By Accountant, to Settle Advertisement for Sale — Requisites of.*] — See *Denison* v. *Denison*, 3 Ch. Ch. 349.

PRACTICE SINCE THE JUDICATURE ACT.

I. Generally—Effect of Judicature Act.

Conflict Between Law and Equity.]—Where in matters of practice there was a conflict between common law and equity as to matters not provided for by the Judicature Act, the practice which is most convenient is to be followed. Section 19, s.-s. 10, relates to matters of substantive law, not of mere practice. *Friendly* v. *Carter*, 9 P. R. 41.

Decentralization.] — The policy of the Ontario Judicature Act is to decentralize business, and send local matters to local masters. *Aitken* v. *Wilson*, 9 P. R. 75.

Rehearing — *Pending Business.*] — Although the decree was pronounced before the Judicature Act, and might have been reheard under the former practice, yet the cause not having been set down to be reheard before the coming into force of the Act, it could not, under the provisions of the Act respecting pending business, be reheard. *Trade* v. *Phœnix Ins. Co.*, 29 Gr. 426.

Term's Notice Abolished.] — Where neither party has taken any proceedings in a suit for a year, a term's notice to proceed, which was required under the common law practice, is not necessary under the Judicature Act. *Beaver* v. *Boardman*, 9 P. R. 239.

II. Appearance.

Default of—*Noting Pleadings Closed.*]—See *Morse* v. *Lamb*, 15 P. R. 9.

Ejectment.]—See *Goring* v. *Cameron*, 10 P. R. 436.

Foreclosure — *Limited Defence — Statement of Claim.*]—In an action for foreclosure the defendant entered an appearance under rule 68, O. J. Act, limiting his defence to one item in the particulars indorsed on the writ of summons. The appearance did not state that the defendant did not require the delivery of a statement of claim:—Held, that after such appearance a statement of claim was unnecessary, and a judgment signed upon it, for default of a statement of defence, was set aside with costs. *Peel* v. *White*, 11 P. R. 177.

Gratis Appearance—*Lis Pendens.*]—The plaintiff issued a writ of summons, and registered a certificate of lis pendens upon the land of the defendant, who, not having been promptly served with the writ, and being anxious to get rid of the suit, entered an appearance gratis:—Held, that there is nothing in the Judicature Act or rules which interfere with the well recognized practice that a defendant has a right to appear voluntarily, and to anticipate the service of actually issued process. Especially should his privilege to appear gratis be preserved in a case where his property is directly and prejudicially affected by the commencement of the action and the registration of its pendency. *McTaggart* v. *Toothe*, 10 P. R. 261.

——— *Notice of.*]—Where a defendant not served with a writ enters an appearance gratis, notice of such appearance is necessary. *Vigeon* v. *Northcote*, 12 C. L. T. Occ. N. 101.

Special Appearance.]—Where there is a grave question as to jurisdiction of the courts of this Province in an action on a contract entered into in a foreign country, a special appearance under protest or conditionally may be permitted under con. rule 286, and the defence of want of jurisdiction may be subsequently raised by the pleadings. *Howland* v. *Insurance Co. of North America*, 16 P. R. 514.

Action upon a foreign judgment. Both plaintiff and defendant resided out of the jurisdiction; neither of them was a British subject; and the cause of action upon which the judgment was recovered arose out of Ontario. The plaintiff's right, if any, to sue in this Province depended upon s. 124 of the Judicature Act, 1895. The defendant entered a special appearance, and raised, by pleading, the question of jurisdiction. Upon an appeal from an order affirming an order refusing summary judgment under rule 739:—Held, that, although the defendant failed to shew that he had a good defence to the action on the merits, and disclosed no facts that would have entitled him to defend in an ordinary action, yet the discretion exercised below should not be interfered with, having regard to the special nature of the jurisdiction conferred by sec. 124, and the provision requiring, even where no appearance is entered, the plaintiff's claim to be proved before he obtains judgment. *Campau* v. *Randall*, 17 P. R. 243.

Time for Appearance—*Judgment.*]—See *Bank of British North America* v. *Hughes*, 16 P. R. 61.

——— *Judgment — Default—Tender—Notice.*]—Until the law stamps have been attached to or impressed upon the paper upon which a judgment is drawn up, there is no complete, effective, or valid judgment; and an appearance tendered after all the work of signing judgment for default has been completed, except the attaching of the stamps, should be received and entered. Where an appearance, though tendered before, is not entered by the officer until after judgment, it cannot become an effective appearance until after the judgment has been set aside; and therefore the defendant cannot be said to be in default for not giving notice of appearance on the day on which it is entered, pursuant to rule 281. Where the plaintiffs insist upon the regularity of a judgment as a judgment in default of appearance, they are not in a position to take the alternative and inconsistent course of moving for judgment under rule 739, treating the appearance as regular. Where an appearance is entered after the last day for appearance but before judgment, the defendant has the whole of the day on which it is entered to give notice of the appearance under rule 281. Decision in 17 P. R. 121 reversed. *Smith* v. *Logan*, 17 P. R. 219.

——— *Shortening.*]—The effect of rule 275 (*a*) is to supersede s. 7 of 47 Vict. c. 14 (O.), and to incorporate its provisions into the rules, and the former practice, being inconsistent with the rules, is superseded by the provisions of rule 3; and therefore there is power, under the provisions of rule 485, to abridge the time for appearance to a writ of summons issued in the district of Algoma

or Thunder Bay. *Kendell* v. *Ernst*, 16 P. R. 107.

——— *Shortening — Order for.*] — See *Sparks* v. *Purdy*, 15 P. R. 1.

Unauthorized Appearance — *Partnership Action.*]—See *Mason* v. *Cooper*, 15 P. R. 418.

Waiver of Irregularity.]—See *McNab* v. *Macdonnell*, 15 P. R. 14.

Waiver of Objection to Jurisdiction.]—See *Sears* v. *Meyers*, 15 P. R. 381, 456.

III. Consolidation of Actions.

Application of Common Defendant.]—Where the issues in several actions are not the same, there cannot be a consolidation of them. Where several actions were brought against a municipal corporation by different plaintiffs for damages for injuries to their respective lands occasioned by the alleged negligent construction by the defendants of several drains without providing a proper outlet for the waters brought down by such drains:—Held, that, it being necessary for each plaintiff to prove that the negligent conduct of the defendants resulted in an injury to his own particular land, the issues in the several actions were not the same; and this quite apart from the fact that, in any case, there would have to be several assessments of damages. Quære, whether a common defendant can obtain a consolidation order against the will of the several plaintiffs. *Williams* v. *Township of Raleigh*, 14 P. R. 50.

Two separate actions, in which the defences were the same, including contributory negligence, were brought by a husband and wife against the same defendant for damages for injuries received by each of the plaintiffs owing to the alleged negligence of the defendant in permitting a pair of horses to run away, and run into a vehicle in which both plaintiffs were seated, causing them to be thrown out and trampled on:—Held, upon an application by the defendant, that both claims should have been joined in one action; and an order was made consolidating them. Smurthwaite v. Hannay, 10 Times L. R. 649, Westbrook v. Australian, &c., Navigation Co., 23 L. J. N. S. (C. P.) 42, Williams v. Township of Raleigh, 14 P. R. 50, distinguished. *Noyes* v. *Young*, 16 P. R. 254.

Claims Improperly Separated.]—The plaintiffs in their first action claimed from the defendants a sum of $200,000 as the balance due upon a construction contract, and in this action, begun some time after the first, they claimed from the same defendants a sum of $3000, the amount of an account for goods sold and delivered. The cause of action herein arose before the commencement of the previous action. The first action had been practically consolidated with the action of the defendants against the plaintiffs in the chancery division:—Held, that the two claims should have been made in the one action, and that it was a proper exercise of discretion to leave the claim in this action to be tried with the claim to which it should originally have been joined. *Consee* v. *Canadian Pacific R. W. Co.* (*No. 2*), 11 P. R. 222.

Conduct of Consolidated Action.]—In determining which party is to have the conduct of a consolidation of two cross-actions the main indicia to be regarded are: Which action was first begun? Upon whom does the chief burden of proof lie? Which action is the more comprehensive in its scope? And where G. first sued B. for cancellation and delivery up of four promissory notes made by G. and S. jointly to B., and also for cancellation of an agreement in relation to which the notes were given, and B. afterwards sued G. and S. upon three of the four notes in question, and substantially the same issues were raised in both actions, the making of the notes being admitted by G. and S. in the pleadings, the actions were consolidated and G. was allowed to proceed with his action, S. being added as a party to it. *Girvin* v. *Burke*, *Burke* v. *Girvin*, 13 P. R. 216.

Cross-actions—*Counterclaim — Stay.*]—The defendant applied to have this action consolidated with an action brought by the defendant in the chancery division against these plaintiffs, on the ground that the plaintiffs' counterclaim in the chancery division action disclosed the same cause of action as shewn in the statement of claim in this action. The action in the chancery division was commenced on the 17th May, 1882, and this action on the 10th June, 1882:—Held, that, though the case presented was not technically within the terms of rule 395, O. J. Act, there is an inherent right in the court to prevent an undue use of its process; and this action was stayed until that in the chancery division was determined, no special reason to the contrary being shewn by the plaintiffs. *Taylor* v. *Bradford*, 9 P. R. 350.

Joint Application of Different Defendants.]—Twelve actions brought by a municipality against the different sureties of the municipal treasurer, to recover amounts alleged to have been received by the treasurer and not accounted for, were consolidated and proceedings in them were stayed pending the determination of an action against the treasurer himself to recover the same amounts. *County of Essex* v. *Wright*, 13 P. R. 474.

Four actions were brought by the same plaintiffs against different defendants for damages for trespass in refusing to pay toll and forcing past the toll gates. The pleadings were identical, and the main issue was common to all the actions, but it was admitted that if the plaintiffs had a substantial cause of action, there must be a separate assessment of damages in each case. Upon a motion by the defendants to consolidate the actions:—Held, that one of the actions should be tried as a test for all, and that proceedings in the other actions should be stayed till the test action should have been determined, after which the assessments should proceed according to the result on the main question; or, if the defendants would each submit to pay the largest amount of damages that might be awarded in the test action, that all proceedings should be stayed in all actions, except that in which the plaintiffs expected to recover the largest amount, and such action should be alone litigated. *Vaughan Road Co.* v. *Fisher*, 14 P. R. 340.

——— *Identity of Issues.*]—The plaintiffs brought four actions, each against a different person, alleging that the defendant in each case

entered into a separate agreement with the plaintiffs to purchase and pay for certain grape vines and to allow the plaintiffs certain future benefits to be derived from the possession and cultivation of the vines, and claiming payment, an account, and damages. The statements of defence were practically the same in all the actions, the defendants setting up among their defences that by the fraud of the plaintiffs certain promises and warranties on their part were omitted from the written agreement, and that the defendants were induced to enter into the agreement by fraud and misrepresentation on the part of the plaintiffs, and claiming rectification and damages. The sales to the several defendants were entirely separate and distinct transactions made at different times and under different circumstances, but the form of agreement made use of with each defendant was the same. An order was made in chambers under con. rule 652, on the application of the defendants in all the actions, staying proceedings in all but one, which was to be treated as a test action, the defendants agreeing to be bound by the result of it, but the plaintiffs being allowed to proceed to trial in the other actions after the trial of the test action, if they deemed proper:—Held, that actions will only be stayed where the questions in dispute are substantially the same; and in this instance they were not the same, because the questions raised by the defendants upon their defences of fraud and misrepresentation would necessarily be different in each case, the negotiations for each agreement being distinct; and the order was set aside. *Niagara Grape Co.* v. *Nellis*, 13 P. R. 179.

An order to consolidate, strictly so called, is a matter of discretion, and is made as a favour to and for the benefit of the defendants, the object being that a single trial may decide that which is in fact only a single question, and thus save costs and expense. No such order ought to be made unless the questions in each case are substantially the same, and the evidence would be substantially the same if they were all tried. Leave to appeal from the decision in 13 P. R. 179 was refused. *S. C., ib.* 258.

Joint Application of Different Plaintiffs.]—In two actions where the plaintiffs were different, the defendants different, and the relief sought entirely different, though part of the evidence in the one action might be available in the other, an application by the plaintiffs conjointly for an order consolidating the two actions, was refused. Semble, the defendants would be entitled to an order to have the actions tried together in case the plaintiffs were bringing them on at different courts. *Ryan* v. *Cameron*, *Attorney-General for Canada* v. *Ontario and Western Lumber Co.*, 16 P. R. 235.

References—*Jurisdiction of Master.*]—The master in ordinary has no jurisdiction to consolidate actions in which judgments have been entered, and in which references are pending in his office. *Boswell* v. *Grant*, 11 P. R. 376.

Summary Proceedings — *Forum.*]—An application to consolidate two motions for administration and partition pending before a local master should be made to him, and not to a Judge in chambers. *Lambier* v. *Lambier*, 9 P. R. 422.

IV. DISCONTINUANCE.

Effect on Pending Appeal.]—A motion by a defendant to vacate the registration of a lis pendens upon his lands was dismissed in chambers, and the defendant appealed to a Judge. The plaintiff then served a notice of discontinuance, and upon the return of the notice of appeal objected that there was no jurisdiction to hear the appeal:—Held, that the plaintiff by giving a notice of discontinuance could not take away a right which the defendant had acquired. Conybeare v. Lewis, 13 Ch. D. 469, distinguished. *Robertson* v. *Laird*, 8 C. L. T. Occ. N. 124.

Issue—*Action — Costs.*]—An interpleader proceeding is not an action; and rule 341 (c), which enables the court to "order the action to be discontinued," upon terms as to costs, does not apply to interpleader issues. Hamlyn v. Betteley, 6 Q. B. D. 63, and Re Dyson, 65 L. T. N. S. 488, followed. Semble, that the execution creditor can abandon the seizure or the prosecution of the issue, but only on the terms of answering all costs. *Hogaboom* v. *Gillies*, 16 P. R. 402.

Notice—*Taxation of Costs.*]—Where the plaintiff serves a notice of discontinuance under rule 641, the defendant is entitled to a reasonable time within which to apply for an appointment to tax his costs, and until after the lapse of that time an appointment will not be granted to the plaintiff, even where he is entitled upon the final taxation to tax interlocutory costs which may exceed the defendant's general costs. Under rule 641 it is not necessary for the plaintiff to ascertain the amount of defendant's costs and pay them, to make the notice of discontinuance effectual. *Barry* v. *Hartley*, 15 P. R. 376.

Withdrawal of Part of Claim.]—The plaintiffs claimed in this action $3,249.36, "amount of defalcation of J.," and $90.55 for certain expenses connected therewith, in all $3,339.91. The defendants paid into court $3,273, claiming by their notice of payment in, that it was sufficient to satisfy the plaintiffs' claim. There was no specific application of the money paid in to any part of the claim. The plaintiffs did not deliver a statement of claim, and, upon notice of a motion under rule 203 to dismiss the action being served by the defendants, the plaintiffs gave notice under rule 170 of withdrawal of the balance of their claim:—Held, that the plaintiffs had no power under rule 170 to withdraw; the portion of rule 170 relating to the withdrawal of part of the alleged cause of complaint, is applicable only where the part sought to be withdrawn can be severed from the rest of the claim; and an order dismissing the action was proper. *Bank of London* v. *Guarantee Co. of North America*, 12 P. R. 499.

The Exchange Bank of Canada, in an action instituted by them against G., filed in open court, a withdrawal of a part of their demand, reserving their right to institute a subsequent action for the amount so withdrawn. The court acted on this retraxit, and gave judgment for the balance. This judgment was not appealed from. In a subsequent action for the amount so reserved:—Held, that the provisions of art. 451, C. C. P., are applicable to a withdrawal made outside, and without the interference of, the court, and cannot affect the validity of a withdrawal made in open

court and with its permission. (2) That it was too late in the second action to question the validity of the retraxit upon which the court had in the first action acted and rendered a judgment which was final and conclusive. *Exchange Bank of Canada* v. *Gilman*, 17 S. C. R. 108.

V. Dismissing Actions.

1. *Absence of Authority.*

Costs — *Dispute — Enlargement — Judgment—Creditors.*]—An action was brought on behalf of the plaintiffs and all other creditors of V. to obtain from the defendant, the assignee of V. for the benefit of creditors, an account of all moneys received by him from the estate of V., and for payment of what might be found due. Judgment was pronounced in favour of the plaintiffs, directing a reference to take the accounts and reserving further directions and costs. The judgment was not issued, and after it was pronounced the defendant and the plaintiffs' solicitor both died. The executrix of the defendant obtained from a local Judge a summons to compel the plaintiffs to revive the action, or to dismiss it with costs. On the return of the summons counsel for the plaintiffs stated that they would consent to an order dismissing the action without costs, but, if that were not agreed to, that they desired an enlargement to shew that the plaintiffs had never authorized the bringing of the action and that they had no knowledge of it until the service upon them of the summons now in question. The local Judge, however, made an order dismissing the action with costs:—Held, on appeal, that the local Judge would have been justified in dismissing the action without costs if it had been shewn to him that it was brought without the authority of the plaintiffs, and that he should have granted an enlargement for that purpose, and if he had after the enlargement been satisfied of the truth of the plaintiffs' statements, he should have discharged the summons; for a party should not be required against his will to continue in his name an action which he never authorized to be begun. *Mackay* v. *Macfarlane*, 12 P. R. 149.

The old chancery rule that an action can be dismissed, on the application of a plaintiff who has not authorized his name to be used, only on payment of costs, is not now in force, but the plaintiff is now entitled to an order to stay the proceedings without payment of costs. Reynolds v. Howell, L. R. 8 Q. B. 398, and Nurse v. Durnford, 13 Ch. D. 764, followed. *Ib.*

Held, also, that an action of this kind should not have been dismissed after judgment pronounced, for the creditors other than the plaintiffs should not have been deprived of the benefit of the judgment. *Ib.*

See Sarnia Agricultural Implement Manufacturing Co. v. *Hutchinson*, 17 O. R. 676.

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2. *Default.*

(a) *In Delivery of Statement of Claim.*

Excuse for Delay—*Terms.*]—An action by solicitors to recover the amount of a bill of costs was begun and the defendant appeared in February, 1883. No further step was taken till February, 1892, when the plaintiffs delivered a statement of claim. The plaintiffs' reason for the delay was that the defendant had no means to pay during the period of delay. Upon motion by the defendant to dismiss and cross-motion by the plaintiffs to validate the delivery of the statement of claim:—Held, that the action should be allowed to proceed. Terms imposed upon the plaintiffs. *Finkle* v. *Lutz*, 14 P. R. 446.

——— *Undertaking to Speed.*]—The filing of a statement of claim and an undertaking to speed is not a sufficient answer to a motion to dismiss. The delay must be sufficiently explained. In this case, being an action for a large sum against sureties, the plaintiffs not having in the opinion of the court sufficiently explained or offered excuse for a delay of nearly two years, or shewn a probability of proceeding speedily, the action was dismissed with costs. *Napanee, Tamworth, and Quebec R. W. Co.* v. *McDonell*, 10 P. R. 525.

Shortening Time for Delivery.]—Under rule 485 the court or Judge may, in a proper case, order a plaintiff to deliver his statement of claim within a limited time shorter than that allowed by rule 369; but an order dismissing the action for failure to deliver the statement within the time so limited is not, having regard to rule 646, to be made until after default. And an order directing that the action should be dismissed for want of prosecution if the statement of claim was not delivered within eight days, was amended so as to make it direct only that the plaintiff should deliver the statement within eight days. *Armstrong* v. *Toronto and Richmond Hill R. W. Co.*, 15 P. R. 449.

(b) *In Furnishing Security for Costs.*

Excuse for Delay — *Appeal.*]—The fact that the plaintiff has lodged an appeal against an order for security for costs is "sufficient cause," within the meaning of rule 1246, to exempt him from having his action dismissed for failure to comply with the order, pending the appeal. And if a motion to dismiss is made, the better practice is to enlarge it before the appellate tribunal, to be dealt with after the main question has been determined. *Bennett* v. *Empire Printing and Publishing Co.*, 15 P. R. 430.

Order Limiting Time.]—A dismissal of the action, in the event of security not being given within a limited time, is authorized by con. rules (1888) 1243 and 1246, rules (1897) 1198 and 1202. *Lea* v. *Lang*, 18 P. R. 1.

——— *Necessity for Further Motion.*]—On the 5th November, 1885, an order was made requiring the plaintiff to give security for costs within four weeks, and in default that the action should be dismissed with costs, unless the court or Judge on special application for that purpose should otherwise order. Within the four weeks the plaintiff obtained a summons, with a stay of proceedings, for "further time to perfect security for costs," and on the 10th December, 1885, an order was made extending the time till the 23rd December, 1885, but not providing that the dismissal of the action should be the result of non-compliance with its terms. Security was not furnished within the time so extended, and it

was contended that after that the action was dead, and there was no jurisdiction to make an order in it:—Held, that the action never became dismissed under either of these orders, and that a motion to dismiss was regular and necessary. Whistler v. Hancock, 3 Q. B. D. 83, King v. Davenport, 4 Q. B. D. 402, distinguished. *Bank of Minnesota* v. *Page*, 14 A. R. 347.

Waiver of Dismissal.]—Where an order for security for costs directs that unless security be given within a limited time the action shall be dismissed, and security is not given within the time limited, the action is to be regarded as dismissed, unless the defendant treats it as still alive. Carter v. Stubbs, 6 Q. B. D. 116, followed. Rule 1251 does not give a plaintiff any further time for or relieve him from the obligation of putting in his security for costs; it only enables him to remove the stay effected by the order, for the sole purpose of making a motion for judgment under rule 739; and if he does not succeed in that motion, he must obey the order by putting in the full security. But where the defendant, after the time for giving security under the order had expired, opposed a motion for judgment under rule 739, and appealed to a Judge in chambers and afterwards to a divisional court from the order made upon such motion, without taking the objection that the action was at an end:—Held, that he had waived the objection; and a bond filed after the time limited was allowed. Upon appeal, decision varied by extending, pursuant to rule 485, the time for giving security. *Hollender* v. *Ffoulkes*, 16 P. R. 225, 315.

(c) *In Proceeding to Trial.*

Answer to Motion — *Undertaking—Discretion.*]—An undertaking to speed the action is not in all cases a sufficient answer to a motion to dismiss under rule 255, O. J. Act. By G. O. Chy. 276, a Judge had discretion under all the circumstances of the cause to dismiss or not, and the parties not being interfered with remains as before the O. J. Act, by ss. 12 and 52 of that Act. Under the circumstances of this case an order to dismiss was rescinded. *Bucke* v. *Murray*, 9 P. R. 495.

Excuse for Delay—*One Defendant not Served with Process.*]—A motion by two of the defendants to dismiss the action as against them for the plaintiff's default in not proceeding to trial was refused, where it appeared that one of the defendants, a necessary party, had for apparently sufficient reasons not been served with a writ of summons, while the action had proceeded against the other defendants, and as against them was ripe for trial; —Semble, that it is the duty of an applicant to apply to the plaintiff's solicitor for information as to the state of the cause in regard to the other defendants before making such a motion. *Foley* v. *Lee*, 12 P. R. 371.

——— *Slip—Undertaking.*]—If the plaintiff without good excuse neglect to proceed with the action, the court will not, as of course, on his mere undertaking to speed the action and paying the costs, refuse to dismiss; but where defendant's solicitor had refused to accept notice of trial a few hours late, an order refusing to dismiss and permitting the plaintiff to proceed, was affirmed. *Carter* v. *Barker*, 11 P. R. 1.

Failure to Enter after Notice.]—Where the plaintiff fails to enter the action for trial at a sittings for which he has given notice of trial, the action cannot be dismissed for want of prosecution under con. rule 647; the defendant's remedy is to enter the action himself under con. rule 663. Crick v. Hewlett, 27 Ch. D. 355, distinguished. *McDougald* v. *Thomson*, 13 P. R. 256.

Where the plaintiff was in default for not giving notice of trial for the autumn assizes, but the defendant did not move to dismiss the action, and the plaintiff gave notice of trial for the winter assizes, but neither party entered the action for trial:—Held, that the action could not be dismissed for want of prosecution under con. rule 647. McDougald v. Thomson, 13 P. R. 256, followed. *Simpson* v. *Murray*, 13 P. R. 418.

Frivolous Action.]—The plaintiff sued for damages for false testimony, alleging that he had failed in a prior action by reason of such testimony given therein by the present defendant:—Held, that the action would not lie, and the plaintiff being in default by reason of not having given notice of trial the action was dismissed. *Clarke* v. *Creighton*, 13 P. R. 113.

Order of Dismissal—*Bar to Subsequent Action.*]—An order made at chambers under rule 255, O. J. Act, dismissing the action for want of prosecution where issue had been joined, but the case had not been set down for trial nor notice of trial given:—Held, not a dismissal on the merits, and not a bar to a subsequent action for the same cause. *Roberts* v. *Lucas*, 11 P. R. 3.

Second Trial — "*Next Sittings.*"]—Issue was joined on the 16th December, 1880, and on the 22nd the cause was tried, and a nonsuit entered, which by consent was set aside, and the case again entered for trial at the sittings held in March, 1881, but remained over until the following sitting, when it was struck out by consent. After the Judicature Act came into force, a motion to dismiss for want of prosecution was made, and the plaintiffs' solicitors, though alleging that they did not intend to proceed, would not consent to the dismissal of the action:—Held, that an order dismissing the action was right: that the words in rule 255 "for the next sittings of the court," were not confined to the first sitting after issue joined; and that the fact that the plaintiff had already taken the cause down to trial did not prevent the defendant from moving to dismiss for not going to trial again. *Chapman* v. *Smith*, 32 C. P. 555.

Setting down and Proceeding.]—Rule 434 provides that "in actions in the county of York, to be tried without a jury, if the plaintiff does not set down the action for trial within six weeks after the pleadings are closed and proceed to trial as provided in rule 542, the action may be dimissed for want of prosecution:"—Held, that unless there is default both in setting down and proceeding to trial, an action cannot be dismissed. *Toronto Type Foundry Co.* v. *Tuckett*, 17 P. R. 538.

(d) *In Service of Writ of Summons.*

Action to Recover Statutory Penalties—*Special Provision as to Delay.*]—See *Miles* v. *Roe*, 10 P. R. 218.

VI. Divisional Courts.

1. *Appeals from Judgments of.*

Case Heard by Consent.]—Where the Judge presiding at the trial of an action directs it to stand over to have parties added, and both parties apply to a divisional court to set aside this direction, and, by consent and without prejudice to the right of appeal, ask the divisional court to hear the case on the merits, either party may, without leave, appeal to the court of appeal for Ontario from the judgment of the divisional court. *Payne* v. *Caughell*, 24 A. R. 556.

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2. *Appeals to.*

(*See* County Courts, Division Courts, Surrogate Courts.)

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

Extension of Time—*Forum.*]—A motion to extend the time for moving before a divisional court against the judgment of the trial Judge should not be made to a Judge in chambers, but to the divisional court itself. *Imperial Loan Co.* v. *Baby*, 13 P. R. 59.

Judgment on Further Directions.]—This action was not tried, but was referred to the master, further directions and costs being reserved. After report made the case was heard on further directions by a Judge:—Held, that the case could not be reheard before a divisional court, as the proceedings taken could not be regarded as the trial of an action within the meaning of rules 317 and 530, O. J. Act. *Wansley* v. *Smallwood*, 10 P. R. 235.

Order on Appeal from Master's Certificate.]—An appeal does not lie to a divisional court from the decision of a Judge in court upon an appeal from a master's report. The certificate of a master is a report, and is subject to the same rules as to appeal as an ordinary report. *Re Molphy, Beckes* v. *Tiernan*, 17 P. R. 247.

Railway Act—*Order of Judge—Persona Designata.*]—A Judge making an order under s. 165 of the Dominion Railway Act, 51 Vict. c. 29, for payment out of court of compensation moneys, acts, not for the court, but as persona designata by the statute; and no appeal to a divisional court lies from his order. Canadian Pacific R. W. Co. v. Little Seminary of Ste Thérèse, 16 S. C. R. 696, followed. *Re Toronto, Hamilton, and Buffalo R. W. Co. and Hendrie*, 17 P. R. 199.

Security on.]—Rule 825, providing that no security for costs shall be required on a motion or appeal to a divisional court, does not preclude a defendant from obtaining an order for security for costs where the plaintiff has taken up his residence abroad after a judgment dismissing his action without costs, from which his appeal to a divisional court is pending. Arnold v. Van Tuyl, 30 O. R. 663, distinguished. *Tanner* v. *Weiland*, 19 P. R. 149.

Setting down—*Striking out.*]—When a case is improperly set down to be reheard, a substantive motion should be made to strike it out. *Wansley* v. *Smallwood*, 10 P. R. 233.

——— *Time.*]—An appeal made at the first sittings of the court:—Held, not too late under rule 414, though more than eight days had elapsed and the time had not been extended. *Hewson* v. *Macdonald*, 32 C. P. 407.

An objection that a notice of motion given for a sittings of the divisional court, and served in time to be set down during that sittings, could not be set down in the following sittings, was overruled. *Brassert* v. *McEwen*, 10 O. R. 179.

Short Notice—*Stay of Proceedings.*]—A divisional court has jurisdiction to allow an appeal from the judgment of a trial Judge to be set down upon short notice of motion, and to stay proceedings pending the appeal. *Todd* v. *Rusnell*, 17 P. R. 127.

Winding-up Act—*Ruling of Master.*]—By virtue of 52 Vict. c. 32, s. 20 (D.), a divisional court has jurisdiction to entertain an appeal from the ruling and decision of the master in ordinary, on a reference to him under that section. *In re Central Bank of Canada*, 30 O. R. 320.

See Ball v. *Cathcart*, 16 O. R. 525, *post* VIII. 6.

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3. *Special Case.*

Reservation of—*Motion for Judgment.*]—Under the O. J. Act, s. 25, s.-s. 2, a Judge sitting elsewhere than in a divisional court is to decide all questions properly coming before him, and is not to reserve any case, or any point in a case, for the consideration of a divisional court. *Till* v. *Till*, 15 O. R. 133.

On the trial of an action, the pleadings were admitted to state the facts, and what was called "a special case on the pleadings," was reserved for the opinion of the Judges of the common pleas division. On the case coming before a divisional court of that division, it was held that the special case as such could not be entertained; but the application was directed to be turned into a motion for judgment under rule 323, or on the pleadings and admissions under rules 315 and 321. *Ib.*

See High Court of Justice.

VII. Divisions of High Court.

1. *Intituling of Proceedings.*

Interpleader Order — *Several Executions.*]—Where an interpleader order is intituled in two actions, in different divisions of the high court, there being two executions in the sheriff's hands, an appeal from the order may be entertained in either division, although one of the execution creditors has been barred by the order, from which there is no appeal on that ground. *Hogaboom* v. *Grundy*, 16 P. R. 47.

Wrong Division — *Amendment.*]—The action was in the Queen's bench division; but the plaintiff, in applying with respect to the costs of writs of fi. fa. and a set-off of costs, intituled his proceedings in the chancery division and "in the matter of certain orders made in the action:"—Held, that this was formally wrong; but an amendment was allowed on payment of costs. *Clarke* v. *Creighton*, 14 P. R. 34.

See Re Olmstead v. *Errington*, 11 P. R. 366, *post* X.

2. *Registrars of Divisions.*

Affidavit—*Power to Receive.*]—The registrar of a division of the high court has power to receive evidence by affidavit to shew that an order of court has not been obeyed, and to enforce the order by striking out paragraphs of the defence. *Hamilton Road Co.* v. *Flatt*, 10 P. R. 581.

Signing Order.]—Where an action in the Queen's bench division or common pleas division of the high court of justice is, under rule 590, set down for trial at a sitting for trial of actions in the chancery division, any order made in such action by the Judge presiding at such sitting should be signed by the officer who acts as registrar at such sitting, and not by the registrar of the division to which the action belongs. *Waghorn* v. *Hawkins*, 12 P. R. 145.

3. *Transferring Causes from one Division to Another.*

Jury—*Expediting Trial.*]—Where a plaintiff brings an action in the chancery division which is proper to be brought there, he will not be allowed to transfer either on the ground that he wishes it tried by a jury, or that a transfer would expedite the trial. *Vermilyea* v. *Guthrie*, 9 P. R. 267.

Notice of Transfer — *Judgment.*]—The action was transferred from the chancery division to the common pleas division of the high court by an order of the Judges, but the plaintiff, not having notice of the transfer, signed judgment in the chancery division. An order was made retransferring the case to the chancery division, and allowing the judgment entered to stand and be in force from its entry, without costs. *Patterson* v. *Murphy*, 9 P. R. 306.

Reason for Transfer.]—Since rule 545, O. J. Act, an action is not to be transferred from one division of the hight court of justice to another, except on very strong grounds. *Masse* v. *Masse*, 10 P. R. 574. But see next case.

Held, that rule 545, O. J. Act, was not intended to and does not interfere with the power of transferring actions from one division of the high court to another. *Pawson* v. *Merchants Bank of Canada*, 11 P. R. 72; *Herring* v. *Brooks*, *ib.* 15.

See High Court of Justice.

4. *Other Cases.*

See Brigham v. *McKenzie*, 10 P. R. 406, *post* VIII. 6; *Laidlaw Mfg. Co.* v. *Miller*, 4 P. R. 335, *ib.*; *Re Christie*, *Christie* v. *Christie*, 12 P. R. 15, *post* IX. 5 (a).

VIII. Judges and Masters.

1. *Judge at the Trial.*

Power to Vary Judgment — *Costs.*]—The judgment of the trial Judge, not drawn up or entered, but indorsed upon the record, was in favour of the plaintiffs against all three defendants with costs, but was afterwards reversed as to two defendants by a divisional court. Subsequently, the other defendants moved the trial Judge to vary his judgment against them as to costs in accordance with what they considered should have been the judgment, had it been against them alone, and in favour of the other defendants, they being administrators, and an administration order having been made before the trial. The judgment, as pronounced, expressed precisely what the trial Judge intended; there was no clerical error, inadvertence, or oversight:—Held, that the Judge had no power to vary his judgment. *Port Elgin Public School Board* v. *Eby*, 17 P. R. 58.

See Till v. *Till*, 15 O. R. 133, *ante* VI. 3; *Sarnia, &c., Co.* v. *Perdue*, 11 P. R. 224, *post* 2 (b).

2. *Judge in Chambers.*

(a) *Appeals from Orders of.*

Extension of Time for.]—The decision appealed from was given on the 14th, and the notice of appeal on the 26th November, the first day of Michaelmas sittings being the 17th November:—Semble, that the motion was by way of appeal, and not a substantive motion to rescind, and if so, and rule 414 was to govern, the appeal was too late; but that the court would extend the time, as the merits were with the appellant. *McLaren* v. *Marks*, 10 P. R. 451.

See Sarnia Agricultural Implement Manufacturing Co. v. *Perdue*, 11 P. R. 224; *Pierce* v. *Palmer*, 12 P. R. 308.

(b) *Jurisdiction of.*

Administration Orders.]—See *In re Muncie*, 10 P. R. 98.

Appeal—*Final Report—Mechanics' Lien Proceeding.*]—See *Wagner* v. *O'Donnell*, 14 P. R. 254.

Certificate of Taxing Officer—*Motion to Set aside.*]—See *Harding* v. *Knust*, 15 P. R. 80.

Contempt of Court—*Motion for Attachment.*]—See *Southwick* v. Hare, 15 P. R. 239, 331.

Costs—*Action—Settlement.*]—See *Knickerbocker* v. *Ratz*, 16 P. R. 30, 191.

——— *Demurrer.*]—See *Jones* v. *Miller*, 16 P. R. 92.

Extending Time for Appeal.]—A motion to extend the time for moving before a divisional court against the judgment of the trial Judge should not be made to a Judge in chambers, but to the divisional court itself. *Imperial Loan Co.* v. *Baby*, 13 P. R. 59.

To give leave to appeal from report of referee. See *Re Dingman and Hall*, 13 P. R. 232.

Habeas Corpus.]—Powers of Judge in chambers with reference to writs of habeas corpus. See *Regina* v. *Arscott*, 9 O. R. 541; *In re Sproule*, 12 S. C. R. 140.

Order for Jury Trial.]—In an action brought to set aside a conveyance:—Held, that while under the Act respecting the Court of Chancery (R. S. O. 1877 c. 40, s. 90) the court might direct an action to be tried by a jury upon notice and for good cause, yet this could only be done by the court, and not by a Judge or the master in chambers. *Thurlow* v. *Beck*, 9 P. R. 268.

Order for Set-off.]—Quære, when a judgment, as in this case, has been framed without directing a set-off, whether a Judge in chambers has power to direct it to the prejudice of the solicitor, so as to vary the decree of the court. *Brown* v. *Nelson*, 11 P. R. 121.

Order of Reference.] — A Judge has jurisdiction under s. 48, O. J. Act, to make a compulsory order referring not only questions of account, but also all the issues of fact in any action to an official referee. Ward v. Pilley, 5 Q. B. D. 427 followed. *Shields* v. *MacDonald*, 14 A. R. 118.

Order made at Trial—*Venue.*]—An official referee, sitting for the master in chambers, refused an application by the defendant to change the place of trial from Sarnia to Stratford, but gave leave to bring on an appeal from his order, or a substantive motion to change the place of trial before the Judge at the Sarnia assizes, who entertained the motion, which was made according to the leave given, and made the order changing the venue to Stratford. The order was drawn up as made by a Judge at the assizes, and was signed by the local registrar at Sarnia:—Held, that, having regard to rule 254, O. J. Act, and to the leave given and the character of the motion, the order of the Judge was to be regarded as that of a Judge and not of the high court, and could therefore be reviewed by a divisional court. *Sarnia Agricultural Implement Manufacturing Co.* v. *Perdue*, 11 P. R. 224.

There is nothing to prevent a Judge sitting at the assizes hearing a chambers motion, if he is disposed for the purpose to treat the court room as his chambers. Such an application as this, however, should not be made at the trial on account of the inconvenience and detriment to the public interest arising from the delay of other business appropriate to the assizes, and on account of the injustice to parties to the cause who have prepared for trial; and it is too late when the assizes have begun to consider the question of the balance of convenience; and therefore, while the court did not see fit under the circumstances to restore the venue to Sarnia, they varied the order by making the costs of the day at Sarnia, and of the several motions to change the venue, costs to the plaintiff in any event. *Ib.*

Rescission of Order.]—See *Flett* v. *Way*, 14 P. R. 123.

Rescission of Order for Ca. Sa.]—A Judge in chambers has no power to rescind his own order for a writ of ca. sa. or to discharge the defendant from custody after the order has been acted upon. *McNabb* v. *Oppenheimer*, 11 P. R. 214.

Rescission of Order for Costs.]—A motion made to the master in chambers on the 27th October, 1886, to rescind his own ex parte order of the 13th October, 1886, allowing the executrix of the plaintiff to issue execution for the costs of a motion for prohibition, was referred to a Judge in chambers. The motion was made after execution had been issued and placed in the sheriff's hands:—Held, that neither the master nor the Judge in chambers had the power to rescind the order; and the motion was too late to be treated as an appeal. McNabb v. Oppenheimer, 11 P. R. 214, followed. Stanior v. Evans, W. N. 1885, p. 210, considered. *Re Doyle* v. *Henderson*, 12 P. R. 38.

Speedy Judgment.]—A Judge sitting in chambers has no jurisdiction to order judgment to be signed under rule 324 (a), but a motion for judgment thereunder must be made to the court. *Morrison* v. *Taylor*, 46 U. C. R. 492.

Venue—*Change of—County Court—Appeal.*]—See *McAllister* v. *Cole*, 16 P. R. 105.

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3. *Judge in Court.*

Quashing By-laws.]—See *In re Funston and Tilbury East*, 11 O. R. 74; *Landry* v. *City of Ottawa*, 11 P. R. 442.

Reviewing Findings of Referee.]—Held, that a single Judge, sitting as the court, has power to review the findings of an official referee upon a reference under s. 48, O. J. Act. *Hill* v. *Northern Pacific Junction R. W. Co.*, 11 P. R. 103.

Setting aside Default Judgment.]—The Judge who presides at the trial and pronounces judgment by default for the defendant in the absence of the plaintiff, has power under rule 270, O. J. Act, when afterwards sitting as the court at Toronto, to set aside

such judgment. *Ross* v. *Carscallen*, 11 P. R. 104.

Setting aside Order for Ca. Sa.]—A Judge in court has power to set aside an order of a local Judge made without jurisdiction directing the issue of a ca. sa. *Waterhouse* v. *McVeigh*, 12 P. R. 676.

See ante 2.

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4. *Local Judges and Masters.*

(a) *Appeals from Orders of.*

New Material on Appeal.]—Leave was given to the defendants to read new affidavits upon their appeal from an order of a local master obtained ex parte by the plaintiff. *Taylor* v. *Sisters of Charity of Ottawa*, 11 P. R. 496.

Order Refusing to Rescind—*Time.*]—An ex parte order for the production of a document was made by the local master at Belleville on the 17th August, 1885, and an order was made by the same officer on the 9th September, 1885, refusing to rescind his former order. The defendants appealed from the latter order:—Held, that the appeal was, in effect, an appeal from the original order, as the result, if the appeal were successful, would be to rescind that order, and the appeal was therefore dismissed as too late, under rule 427, O. J. Act. *Jamieson* v. *Prince Albert Colonization Co.*, 11 P. R. 115.

Time for Hearing—*Dies non—Motion to Strike out.*]—An appeal from an order made by a local master on Saturday the 17th April, was set down to be heard on Monday the 26th April, which was Easter Monday, a dies non. The appeal was put on the paper for the following Monday:—Held, that this course was proper and convenient, and also that the proper mode of objecting to the appeal was by a motion to strike it off the list as improperly set down. *McCaw* v. *Ponton*, 11 P. R. 328.

——— *Vacation—Extension.*]—Christmas vacation is not to be excluded in reckoning the eight days within which an appeal from the master or local Judge or master in chambers is to be brought on under rule 427, O. J. A. As such appeals are not heard in vacation, the time for appealing will be extended as a matter of course upon an ex parte application. *Snowden* v. *Huntington*, 12 P. R. 1.

See Ryan v. *Canada Southern R. W. Co.*, 10 P. R. 535; *Locomotive Engine Co.* v. *Copeland*, 10 P. R. 572; *Waterhouse* v. *McVeigh*, 12 P. R. 676.

(b) *Jurisdiction of.*

Allowance of Taxed Costs in Partition Matter.]—Held, that a local master has no jurisdiction to make an order under con. rule 1187 allowing the parties to an action or proceeding for administration and partition taxed costs instead of the commission provided for by the rule, "unless otherwise ordered by the court or a Judge." This was an action in which a judgment for partition and administration was pronounced by a Judge in court:—Held, that more especially in this case a local master had no power to interfere, for by ordering taxed costs instead of commission he was varying the judgment. *Hendricks* v. *Hendricks*, 13 P. R. 79.

Ca. Sa.—*Discharge from Custody.*]—A local Judge of the high court has no power to order the discharge of a defendant held in custody under a ca. sa. issued out of the high court of justice. *Cochrane Manufacturing Co.* v. *Lamon*, 11 P. R. 351.

——— *Issue of.*]—The Judge of a county court has no power either as such Judge or as a local Judge of the high court to order the issue of a ca. sa. in an action in the high court. Cochrane Manufacturing Co. v. Lamon, 11 P. R. 351, followed. A Judge of the high court sitting in "single court," has power to set aside such an order. *Waterhouse* v. *McVeigh*, 12 P. R. 676.

Order for Examination de Bene Esse.]—Held, following the former chancery practice, that a local Judge may make an ex parte order for the examination of a witness de bene esse, on the ground that he is dangerously ill, and not likely to recover. *Baker* v. *Jackson*, 10 P. R. 624.

Order of Reference.]—Local masters and county court Judges acting under rule 422, O. J. Act, have no jurisdiction, under ss. 47 and 48, O. J. Act, to order references in opposed cases. *White* v. *Beemer*, 10 P. R. 531.

Local masters have no greater powers in matters coming before them in chambers under the jurisdiction given them by the Ontario Judicature Act and 48 Vict. c. 13, s. 21 (O.), than those conferred upon the master in chambers, and from these powers the power of referring causes under the Common Law Procedure Act is excepted. A local master has, therefore, no power to make an order to proceed against an absconding debtor, upon default, after service of the writ of attachment, where such order contains a clause directing a reference under s. 197 of the Common Law Procedure Act. *Bank of Hamilton* v. *Baine*, 12 P. R. 418.

It is intended by ss. 8 and 9 of the Absconding Debtors Act that only one order shall be made under which the plaintiff may proceed to judgment, and, therefore, where an order of reference is necessary, the order to proceed must be made by a Judge, who has jurisdiction to refer causes. *Ib.*

The expression "the referring of causes under the Common Law Procedure Act" is not restricted to causes which have been begun by writ of summons. *Ib.*

See Union Loan and Savings Co. v. *Boomer*, 10 P. R. 630.

Partition or Sale—*Lands in Several Counties.*]—Where lands are situate in different counties, a local master has no jurisdiction to make an order for the partition or sale thereof, and such an order and the proceedings thereunder, even as to lands within the county in which he is master, are wholly void. *Queen* v. *Smith*, 7 P. R. 429, followed. *Nichol* v. *Allenby*, 17 O. R. 275.

Proceedings for the Winding-up of Companies.]—See COMPANY.

Rescission of Order — *Appeal.*] — The plaintiff's solicitors lived at Sandwich, and the defendant's solicitors at Toronto. The local Judge at Sandwich in November, 1884, made an ex parte order for leave to the plaintiff to amend the writ of summons before service, and subsequently set aside his own order on the defendant's application, on notice to the plaintiff and after argument by counsel on behalf of both parties. The plaintiff appealed from the second order to a Judge in chambers at Toronto:—Held, that the local Judge had no power to make the rescinding order under rule 422, O. J. Act. Subsequently the defendants made a substantive motion before the same Judge in chambers at Toronto, to set aside the original order of the local Judge:—Held, that, save as excepted, a local Judge of the high court in proceedings in the high court having the same power in chambers as a Judge of the high court in chambers as to the matters referred to in the Judicature Act rules, he is a Judge of co-ordinate jurisdiction with a Judge of the high court in chambers. A Judge of the high court has, therefore, no power to review the decision of a local Judge, save by way of appeal in the manner provided by the Judicature Act rules; and that this motion could not be treated as an appeal, as it was too late under rule 427, O. J. Act. *Ryan* v. *Canada Southern R. W. Co.*, 10 P. R. 535. But see *Jamieson* v. *Prince Albert Colonization Co.*, 11 P. R. 115, *supra*.

Summary Procedure to Enforce Mechanics' Liens.]—See LIEN, V. 10.

Territorial Jurisdiction—*Residence of Defendants—Solicitor.*]—Two of the defendants lived in Chicago, Ill., and had no solicitor in the county where the action was begun:—Held, that the local Judge of the county in which the action was begun had no jurisdiction under rule 422, O. J. Act, to make an order for substitutional service of process on these defendants. *Locomotive Engine Co.* v. *Copeland*, 10 P. R. 572.

——— *Residence of Solicitors.*]—Rule 422, O. J. Act, and its s-s. (a), must be read together, and hence the limitation in the subsection of the jurisdiction of the county Judges in certain cases curtails that of local masters in similar cases. The local master at Hamilton, in the county of Wentworth, gave leave to sign final judgment under rule 80, O. J. Act, in an action in which the solicitor for the defendant had his place of residence and office at St. Catharines, in the county of Lincoln, and no office in Hamilton:—Held, that under rule 422, O. J. Act, the local master had no jurisdiction to make the order. *Freel* v. *Macdonald*, 10 P. R. 170.

Writ of Summons—*Renewal of.*]—See *St. Louis* v. *O'Callaghan*, 13 P. R. 322.

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5. *Local Master of Titles.*

See LAND TITLES ACT.

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6. *Master or Referee in Chambers.*

(a) *Appeals from Orders of.*

Ex Parte Order—*Stay.*]—Where a stay was granted on an ex parte application, it was held that an appeal might be had direct to a Judge in chambers, without applying to the master to rescind his order. *Grand Trunk R. W. Co.* v. *Ontario and Quebec R. W. Co.*, 9 P. R. 420.

Forum—*Divisional Court.*]—A divisional court has no jurisdiction to hear an appeal direct from the master in chambers, or a substantive motion to set aside a judgment by default of appearance. *Ball* v. *Cathcart*, 16 O. R. 525.

——— *Divisions of High Court.*]—No objection to his jurisdiction was taken before the master:—Held, that the application having been entertained, an appeal to a Judge in chambers of the chancery division, instead of to a Judge of the common pleas or Queen's bench division, was proper under R. S. O. 1877 c. 39, s. 31, and rule 427, O. J. Act; the effect of the O. J. Act being to abolish all distinctions between superior courts of law and equity. *Brigham* v. *McKenzie*, 10 P. R. 406.

Appeals from the master in chambers may be brought on for hearing before a Judge of the high court sitting in chambers without reference to the division in which the action is commenced. *Laidlaw Manufacturing Co.* v. *Miller*, 11 P. R. 335.

Order Reviewing Pending Taxation.]—An appeal lies to a Judge in chambers from the decision of the master in chambers, under rule 544, O. J. Act, upon appeal from a pending taxation. *Re Monteith, Merchants Bank* v. *Monteith*, 11 P. R. 361.

Rule of Court Governing.]—Held, that appeals from the master in chambers are governed by rule 427, and not by rule 414, O. J. Act, which applies to appeals to a divisional court. *Lowson* v. *Canada Farmers' Ins. Co.*, 9 P. R. 185.

Time—*Commencement — Pronouncing.*]—The eight days for appealing from an order of the referee under rule 427 (c) of the O. J. Act, count from the making of the decision, not from the entry of the order, as formerly. Where the plaintiff's solicitors, owing to a misapprehension on this point, allowed the eight days to elapse, further time was granted. *Dayer* v. *Robertson*, 9 P. R. 78.

——— *Extending—Ex Parte Direction.*]—A writ of summons was indorsed specially for $910, the amount of a bill of exchange, and also to have certain conveyances, &c., set aside as fraudulent. The master in chambers made an order for judgment under rule 80, O. J. Act, on 11th January. On an ex parte application of the defendant for leave to bring on an appeal from the master's order on the 17th January, the appeal was directed by a Judge to be set down for Monday 21st January:—Held, that the appeal was properly brought. *Standard Bank* v. *Wills*, 10 P. R. 159.

(b) *Jurisdiction of.*

Administration Orders.] — See *In re Munsie*, 10 P. R. 98.

Amending and Striking out Pleadings.]—See PLEADING.

Changing Venue.]—See *Brigham* v. *McKenzie*, 10 P. R. 406; *Milligan* v. *Sills*, 13 P. R. 350.

Certificate of Taxing Officer—*Motion to Set aside.*]—See *Harding* v. *Knust*, 15 P. R. 80.

Consent Judgment.] — The master in chambers has jurisdiction to pronounce judgment by consent in any case. *Ladies' Tailoring Association* v. *Clarkson*, 27 C. L. J. 501.

Costs.]—The master in chambers has no jurisdiction to entertain an application for costs under rule 264, O. J. Act. *Hopkins* v. *Smith*, 9 P. R. 285.

——— *Action—Settlement.*]—See *Knickerbocker* v. *Ratz*, 16 P. R. 30, 191.

——— *Demurrer.*]—See *Jones* v. *Miller*, 16 P. R. 92.

Discretion — *Review.*]—The master's discretion exercised under R. S. O. 1877 c. 39, s. 29, and rule 420, O. J. Act, is open to review by an appeal to a Judge in chambers under rule 427, O. J. Act. See *Christie* v. *Conway*, 9 P. R. 529.

Liberty of the Subject.] — On motion for an order for the committal of a defendant for non-production of documents under rule 420, O. J. Act, which vests in the master in chambers the powers of the referee in chambers, of the court of chancery:—Held, that matters relating to the liberty of the subject having been excepted from the jurisdiction of the clerk of the Crown and pleas under the former practice, are still beyond his jurisdiction by rule 420, O. J. Act. *Keefe* v. *Ward*, 9 P. R. 220.

Municipal Election — *Validity of — Trial.*]—Held, that the master in chambers had, by the combined effect of rule 30 and 51 Vict. c. 2, s. 4 (O.), all the powers of a Judge to determine the validity of the election of the defendant, and that his determination was final; and it was within the competence of the provincial legislature to clothe the master with such powers. Held, following the principle of the decision in Re Wilson v. McGuire, 2 O. R. 118, that the provincial legislature had power to invest the master with authority to try controverted municipal election cases. *Regina ex rel. McGuire* v. *Birkett*, 21 O. R. 162.

Reference to District Judge — *Unorganized Territory Act.*]—In an action brought for damages to the plaintiff's house situated in a provisional judicial district, an order was made by the master in chambers, assuming to act under the Unorganized Territory Act, R. S. O. 1887 c. 91, directing that issues of fact be referred to the district Judge, reversing further directions and questions of law arising at the trial for the disposal of a Judge in court. Notice of trial was given for the district court, and the case was heard by the district Judge, who made certain findings of fact, assessed the damages, and directed judgment to be entered for the plaintiff. The plaintiff moved for judgment on such findings before a Judge in court, the defendant at the same time appealing from the judgment or report, whereupon the Judge disposed of both motions, directing judgment to be entered for the plaintiff for the amount found by the district Judge. On appeal to a divisional court: — Held, that, apart from the question of jurisdiction of the master to make the order, as the parties had treated it as valid, and the subsequent order of the Judge in court remained unreversed and not appealed from, the court would not interfere; that if the question of the jurisdiction of the master were involved, the appeal should have been to the court of appeal. *Fraser* v. *Buchannan*, 25 O. R. 1.

Rescission of Order.] — See *Flett* v. *Way*, 14 P. R. 123.

Sale of Infant's Lands—*Payment out of Court—Confirmation.*]—On a motion by petition for the sale of an infant's estate under the Chancery Act and for the application and distribution of the proceeds, the referee in chambers granted the order and directed the application and distribution of the moneys to be realized by the sale, subject to the order being confirmed by a Judge in chambers so far as it exceeded his jurisdiction. The Judge in chambers held that the master in chambers, or the referee sitting for him, should continue to exercise the jurisdiction formerly vested in the referee in chancery chambers in such matters, subject only to the confirmation of so much of the order as directed the distribution and payment out of court of the moneys to be realized, and made the confirming order. *Re Devitt*, 9 P. R. 110. See con. rule 30.

Setting aside Judgment.]—After judgment has been entered against an absconding debtor pursuant to the finding of a county court Judge on a reference under R. S. O. 1877 c. 68, s. 9, the master in chambers has no jurisdiction to set aside the judgment at the instance of another creditor who wishes to be let in to defend. *Wills* v. *Carroll*, 10 P. R. 142.

The plaintiff not appearing at the trial, which took place at the Picton Assizes, judgment was directed to be entered for the defendant, with costs. Application was subsequently made to the Judge at the same assizes to set aside the judgment and reinstate the case on the list. This was refused, the plaintiff not being then ready to go on. Application was then made by the plaintiff to the master in chambers under rule 270, O. J. Act, to set aside the judgment entered at the trial. This motion was enlarged before a Judge in chambers, who:—Held, that rule 270, O. J. Act, does not give jurisdiction to the master or a Judge in chambers in such cases. *Hilliard* v. *Arthur*, 10 P. R. 281, 426.

Stay of Proceedings—*Motion for, after Judgment.*]—See *Lee* v. *Mimico Real Estate Co.*, 15 P. R. 288.

Vacating Mechanic's Lien.]—The master in chambers has jurisdiction to entertain a motion under R. S. O. 1877 c. 120, s. 23, to annul the registry of a mechanic's lien when the amount in question is over $200. Re Cornish, 6 O. R. 259, followed. *Re Moorehouse and Leak*, 13 O. R. 290.

Venue—*Change of—County Court.*] — See *McAllister* v. *Cole*, 16 P. R. 105.

IX. Masters and References.

1. *Directing Reference.*

(a) *In What Cases.*

Account—*Liability—Discretion — Person of Referee—Consent.*] — The plaintiff's claim

was upon an oral agreement entitling him to one-half of certain commission received by the defendant; and his case depended upon his being able to prove the agreement, and to shew that he performed the services which were to form the consideration for it; if the plaintiff succeeded in establishing the agreement and the performance, the taking of an account would necessarily follow. The defendant filed a counterclaim, as to which there was no question that it would be proper to direct a reference either to arbitration or to an official referee. Two days after the action was commenced, the defendant's solicitor wrote suggesting that all accounts between the parties should be settled by arbitration. The plaintiff subsequently made a motion to refer to an official referee under s. 48, O. J. Act, and the defendant moved to refer to a named arbitrator, or to some other arbitrator to be named by the court. The affidavit filed in support of the defendant's motion stated the belief of the deponent that the whole matter could be settled by a reference to an arbitrator to be appointed by the court, who would have authority to decide as to the validity of the alleged agreement. The court, being of opinion that the real contest was as to the person to whom the reference should be made, refused to interfere with the discretion exercised in referring the action to the referee, though made without the consent of the defendant. *Shields* v. *MacDonald*, 14 A. R. 118.

——— *Municipal Treasurer — Sureties — Costs.*] — In an action against a municipal treasurer a reference was directed to ascertain what was due from him, and an order was made permitting the sureties to appear upon the reference and contest the claims of the municipality. This order was varied by making provision for awarding costs as between the municipality and the sureties. *County of Essex* v. *Wright*, *County of Essex* v. *Duff*, 13 P. R. 474.

Damages—*Breach of Contract—Hiring.*] —Reference directed to determine the amount of damages sustained by the plaintiff under an agreement to serve defendant as manager of a tannery for six years, the agreement reciting that plaintiff was to manage the works and the defendant was to furnish the capital, for failure of the defendant to perform his part of the agreement, and for the dismissal of the plaintiff. *Blake* v. *Kirkpatrick*, 6 A. R. 212.

——— *Breach of Contract—Sale of Goods.*] —The plaintiff sued for alleged breach of a contract to sell and deliver a quantity of hay to be inspected. The plaintiff gave evidence of shortage and defective quality, and asked for a reference as to damages; but the Judge who tried the case refused the reference, and gave judgment for the defendant:—Held, that the matters in question were proper for trial by a Judge, and that the plaintiff was not entitled to give prima facie evidence of a breach of contract and then have a reference as to damages. *Cook* v. *Patterson*, 10 A. R. 645.

——— *Discretion—Appeal.*]—The right of the trial Judge to refer the question of damages, as a question arising in the action, under s. 101 of the Judicature Act, is indisputable, at all events as a matter of discretion and subject to review; and it is for the party objecting to the reference to shew that the discretion has been wrongly exercised. And where, in an action for damages for injury to the plaintiff's land on the bank of a navigable river and to his business as a boatman, by the acts of the three several defendants, who owned saw-mills higher up on the stream, in throwing refuse into it, it appeared that the plaintiff's title to relief and the liability of the defendants had been established in a former action, and the trial Judge heard the case only so far as to satisfy himself that the plaintiff had established a primâ facie case on the question of damages, and directed a reference to assess and apportion them among the defendants, reserving further directions and costs:—Held, that there was no miscarriage, and the discretion of the trial Judge should not be overruled. *Ratte* v. *Booth*, 16 P. R. 185.

——— *Injunction — Undertaking — Discretion—Appeal.*]—The jurisdiction to award an inquiry as to or to assess damages without a reference, where an injunction has been granted and an undertaking as to damages given, is a discretionary one, to be exercised judicially and not capriciously. Where, in an action to set aside a sale of goods as fraudulent, a claim for damages by reason of an injunction was set up in the defence, and the trial Judge was, on the evidence, of opinion that no damage was proved occasioned by the injunction as distinct from the detriment arising from the litigation, and no additional evidence having been given, a divisional court, under the circumstances of this case, where the defendant was given his costs, although his conduct had been such as properly to evoke legal inquiry, refused to award a reference as to damages. *Gault* v. *Murray*, 21 O. R. 458.

Failure of Consideration — *Delivery of Goods—Inquiry.*]—The defendant, having delivered ties to a railway company, in excess of his contract, as he alleged, arranged that such ties should be returned as received by the company on a contract with the plaintiff. In anticipation of such returns, and of payment therefor, the plaintiff paid the defendant $1,000, and brought this action to recover the same, alleging that he never was able to procure returns or payment from the railway company, and that the consideration for the $1,000 had therefore failed. It was shewn in evidence that the plaintiff had, in a claim against the railway company for 19,883 ties, included 3,260 delivered by the defendant, and that, the railway company disputing such claim, a settlement had been effected, the plaintiff accepting $1,000 in full of his claim, and giving the company a formal release of all demands:—Held, that, to the extent to which the ties were delivered by the defendant on plaintiff's account, the latter could not, in view of the circumstances, allege failure of consideration; but that he was not bound by the settlement to pay for ties that were not delivered, and therefore that the determination of the action depended upon the result of the inquiry directed as to the number of ties delivered by defendant; and an appeal from the judgment directing such inquiry was accordingly dismissed. The objection that the Judge at the trial should have himself decided the issue as to failure of consideration, instead of directing an inquiry before the master, is not one that the court will entertain. *Featherstone* v. *Van Allen*, 12 A. R. 133.

Liability—*Damages—Special Referee.*]—Except by consent, the court has no power to order a reference under s. 101 of the Ontario

Judicature Act, R. S. O. 1887 c. 44, to any person other than an official referee or the Judge of a county court. Where the question of the defendant's liability in an action is expressly raised on the pleadings, such question should be determined before a reference of all the questions of fact in controversy, including the amount of damages, is ordered. *Fewster* v. *Township of Raleigh*, 14 P. R. 429.

Mortgage—*Sale by Mortgagee — Scope of Pleadings—Judgment.*]—A judgment directed that the master should take the usual accounts for redemption or foreclosure of mortgaged premises, and should also take the accounts in respect to certain other matters set out in the pleadings. Under this the defendant contended that the master should take into account a certain sale by the plaintiff, as mortgagee, to a person who, it appeared, had not paid his purchase money. There was no specific mention of this sale in the pleadings or judgment:—Held, that the proposed inquiry was not within the scope of the pleadings or the judgment or of con. rules 56 and 57; and the questions which it would raise were questions which ought to have been raised by the pleadings and determined by the court, and not delegated to the master. Bickford v. Grand Junction R. R. W. Co., 1 S. C. R. at p. 725, McDougall v. Lindsay Paper Mill Co., 20 C. L. J. 133, Wiley v. Ledyard, *ib.* 142, referred to. *Rowland* v. *Burwell*, 12 P. R. 607.

(b) *Jurisdiction to Refer.*

Judge — *Compulsory Order — Issues of Fact.*]—A Judge has jurisdiction under s. 48, O. J. A., to make a compulsory order referring not only questions of account, but also all the issues of fact in any action to an official referee. Ward v. Pilly, 5 Q. B. D. 427, followed. *Shields* v. *Macdonald*, 14 A. R. 118.

Judicial Officer—*Reference to Another.*]—A judicial officer cannot delegate the discharge of his judicial functions to another unless expressly empowered so to do. The various kinds of references to judicial officers under the Ontario Judicature Act commented upon. *In re Queen City Refining Co.*, 10 P. R. 415.

Master in Chambers.] — The master in chambers, and local masters and county Judges, acting under rule 422, O. J. Act, have no jurisdiction under ss. 47 and 48, O. J. Act, to order references in opposed cases. *White* v. *Beemer*, 10 P. R. 531.

Held, following White v. Beemer, 10 P. R. 531, that the master in chambers has no jurisdiction to order a reference under s. 47, O. J. Act. An appeal from the master's order directing a reference was treated as a substantive motion, and a reference was directed, under rule 323, O. J. Act. *Union Loan and Savings Co.* v. *Boomer*, 10 P. R. 630.

See Fewster v. *Township of Raleigh*, 14 P. R. 429, *ante* (a).

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2. *Jurisdiction of Master or Referee on Reference.*

Administration — *Insurance Money — Payment into Court.*]—As to power of master in ordinary to order payment of insurance money into court in a case where the administration of the testator's estate had been referred to him. See *Merchants Bank* v. *Monteith, Ex parte Standard Life Assurance Co.*, 10 P. R. 588.

——— *Validity of Will.*]—The jurisdiction of the master's office is not co-extensive with that of the court in inquiring into and adjudicating upon the validity of documents; and there is no authority to support any implied or assumed delegation of the functions of the court to the master. Nor is there any practice in the master's office which allows parties to obtain a reference to the master so as to evade the ordinary judicial functions of the court, and then invoke those judicial functions in a tribunal of delegated and subordinate jurisdiction. *In re Munsie*, 10 P. R. 98.

The plaintiffs, when taking accounts before the master under the ordinary chambers order for the administration of personal estate, sought to have it declared that a bequest to R., who was one of the witnesses to the will, was valid:—Held, that the master had no jurisdiction, under such order and on oral pleadings, to adjudicate upon the validity of the will. 2. That, even if there was such jurisdiction, it could not be exercised in the absence of a personal representative of R.'s estate. *Ib.*

Foreign Commission.]—Where an application for a commission to examine a witness in New York, was made before an official referee, and referred by him to a Judge:—Held, that matters coming within the jurisdiction of any officer of the court should be disposed of by him in the usual way, and the parties might then appeal from such decision. *Hughes* v. *Rees*, 9 P. R. 86.

See Brooks v. *Georgian Bay Saw-Log Salvage Co.*, 16 P. R. 511, *post* 4 (b).

Mortgage—*Reference for Redemption or Sale—Validity of Mortgage—Execution Creditors—Added Parties.*]—The plaintiff, as mortgagee of the defendants by an instrument dated 30th January, 1883, purporting to be duly executed by the defendants, commenced an action for the sale of the mortgaged property. The writ issued duly indorsed under rule 17, O. J. Act, and default being made, judgment was obtained under rule 78, O. J. Act, referring it to a master to make and take the inquiries and accounts as prescribed by G. O. Ch. 441. The master gave certain execution creditors, who had been made parties in his office and proved their claims, priority over the plaintiff on the ground that the instrument in question was invalid, the terms of s. 85 of the Canada Joint Stock Companies Act of 1877, which requires the sanction of a two-thirds vote of the shareholders, not having been complied with:—Held, that under the decree the master had no power to adjudicate upon the validity of the instrument in question as a mortgage, and the execution creditors, not having moved against the judgment by virtue of which they were made parties, were also bound by the decree. *McDougall* v. *Lindsay Paper Mill Co.*, 10 P. R. 247.

Partition — *Validity of Lease—Fraud—Issue.*]—Held, that on a chambers reference for partition or sale of lands, made by the master in chambers, the master in ordinary has no jurisdiction to try the question of the validity of a lease under seal from the intestate, set up as a ten years' lease by one of

the heirs-at-law, who claimed that the lands should be sold subject to his lease, some of the other heirs-at-law disputing the validity of the lease, and alleging that it was either a five years' lease, or that there had been a fraudulent alteration of the sealed instrument, there being an alteration in a material part apparent on the face. The reference was adjourned till after the trial of the question raised, and an issue was directed by a Judge in chambers under rule 256, O. J. Act, to be tried at the next sitting for the trial of actions in the chancery division; the lessee to be plaintiff in the issue. *Re Rogers, Rogers* v. *Rogers*, 11 P. R. 90.

Proceedings for the Winding-up of Companies.]—See COMPANY.

Scope of Reference.]—A decision of the supreme court of Nova Scotia confirming the report of a master on a reference reversed, on the ground that the master had exceeded his authority and reported on matters not referred to him. *Doull* v. *McIlreith*, 14 S. C. R. 739.

Solicitor's Lien.]—See *Bell* v. *Wright*, 24 S. C. R. 656, *post* 4 (b).

See Re Queen City Refining Co., 10 P. R. 415, *ante* 1 (b); *Clarke* v. *Langley*, 10 P. R. 208; *Hughes* v. *Rees*, 10 P. R. 301; *Boswell* v. *Grant*, 11 P. R. 376; *Bank of Hamilton* v. *Baine*, 12 P. R. 418; *Carnegie* v. *Federal Bank*, 8 O. R. 75; *Hannum* v. *McRae*, 17 P. R. 567; *Corry* v. *Lemoine*, 18 P. R. 482, *post* 4 (b).

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3. *Place of Reference and Person of Referee.*

Administration — *Proper Place.*] — The testator lived and died in the county of S.; the defendant executor lived there; and one of the two parcels of land which made up the real estate of the testator was in that county. The other and smaller parcel of land was in the county of Y., and the plaintiff's solicitors practised there:—Held, that the reference for administration should be to the master at the county town of S. *Re Armstrong, Armstrong* v. *Armstrong*, 18 P. R. 55.

Arbitrator Appointed by Court—*Consent.*]—See *Shields* v. *MacDonald*, 14 A. R. 118, *ante* 1 (a).

Changing Reference.]—Where the business of the partnership in question in this suit had been carried on in the county of Simcoe, and the parties resided there, and it was found that the master in ordinary could not proceed with the reference directed for two months, the place of reference was changed to Barrie. *Aitkin* v. *Wilson*, 9 P. R. 75.

Local Registrar.]—See *Kennedy* v. *Haddow*, 19 O. R. 240, *post* 5.

Special Referee—*Consent.*]—See *Fewster* v. *Township of Raleigh*, 14 C. P. 229, *ante* 1 (a).

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4. *Proceedings on Reference.*

(a) *Taking Accounts.*

Amendment.]—Where an amendment in a matter of account, as stated in the pleadings, would be allowed before decree, a similar amendment should also be allowed, if asked for, in respect of the accounts filed after decree, in the master's office. *Court* v. *Holland*, 4 O. R. 688.

Carriage of Proceedings—*Executor.*]—An accounting party should not have the carriage of the proceedings in the master's office, especially where there is a competition between an executor and beneficiaries as to who should be first in obtaining an administration order. Such an order, obtained ex parte on the application of an executor, was varied by giving the conduct of the reference to two of the legatees, where the Judge had not been referred to the course of practice, and so had exercised no discretion to prevent the interference of the court. The order should not have been made without notice to the legatees, who were named as parties defendant in the proceedings taken by the executor. *Re Curry, Curry* v. *Curry*, 17 P. R. 69.

Interest.] — The circumstances under which interest on a claim ought to be allowed or refused in the master's office, considered and acted on. *Re Ross*, 29 Gr. 385.

——— *Executor—Rests—Report—Further Directions—Appeal.*]—The master has authority to take the account with rests, under the ordinary reference, as against an executor, but where he declines to charge the executor in this way, if it is intended to appeal, he should be required to report the facts to enable the court to determine on the propriety of his decision. Quære, whether it is not the more proper course to bring the matter up on further directions with all the materials for consideration spread out on the report, rather than to appeal in such a case. *Sievewright* v. *Leys*, 1 O. R. 375.

Occupation Rent.]—Manner of taking accounts in fixing an occupation rent to be charged against one who had occupied land under mistake of title. *Munsie* v. *Lindsay*, 11 O. R. 520.

Verification — *Affidavit* — *Vouchers* — *Cross-examination*— *Notice* — *Re-opening Account.*]—The person bringing into the master's office an account, verified by affidavit, is obliged to vouch the payment of the amounts included in it, and is liable to cross-examination upon his affidavit, notice being first given him of the items upon which it is proposed that he shall be cross-examined. Where no such notice was given, and the executor was not cross-examined, although ample opportunity was offered for the purpose and the accounts were in no way objected to until the reference had been closed so far as the evidence was concerned, the master properly considered that the affidavit verifying the accounts under rule 63 and the vouchers had sufficiently proved the accounts. Wormsley v. Sturt, 22 Beav. 398, Re Lord, L. R. 2 Eq. 605, McArthur v. Dudgeon, L. R. 15 Eq. 102, Meacham v. Cooper, L. R. 16 Eq. 102, Bates v. Eley, 1 Ch. D. 473, followed. Upon an application to re-open an account of $55,129.54, comprised in upwards of 1,600 items of disbursements, one or two items were pointed out as primâ facie to be of such a character as might have been objected to:—Held, not sufficient to justify opening up the whole account, especially in view of other facts appearing. *Re Curry, Curry* v. *Curry*, 17 P. R. 379.

See Carnegie v. *Federal Bank of Canada*, 8 O. R. 75; *In re Munsie*, 10 P. R. 98.

(b) *Other Cases.*

Adding Parties in Master's Office for Discovery.] — See *Hopper* v. *Harrison*, 28 Gr. 22.

Admissions.] — Admissions made before the master in the course of a reference should be put into writing and signed by the party making the same. *Foster* v. *Allison*, 11 P. R. 233.

Amendment of Pleadings.]—The master has no jurisdiction to make amendments to the pleadings after judgment; nor could he give leave to file a statement in his office raising a defence which ought to appear in the pleadings. *Hughes* v. *Rees*, 10 P. R. 301.

Delay—*Warrant.*]—The object of rule 51 is to protect the court and its officers from undue delay in the prosecution of references. Where there has been undue delay in the prosecution of a reference, the party having the conduct of it should not be refused a warrant to proceed, if he applies therefor before any action has been taken by the master under rule 51, and there is nothing but delay to interfere with the granting of it. *Re Cannon, Oates* v. *Cannon*, 14 P. R. 502.

Dividing Evidence—*Liability—Damages — Contract—By-law — Amendment.*] — On a reference of the matters in question in an action, unless the line between the questions of law and fact is clear and distinct, it is inadvisable to divide up the reference by first directing the evidence to the legal liability, leaving the quantum of damages and all other matters to be afterwards disposed of. An objection as to the want of proof of a by-law authorizing a contract for the erection of municipal buildings, raised for the first time at the close of the proceedings before a master on a reference in an action to recover a balance alleged to be due, was overruled, where the existence of the contract was alleged in the statements of claim and defence, and the contract was identified by the mayor on the application for the reference by the defendants and made part of the defendants' material, and treated as the contract throughout the whole reference, and on which large sums of money had been paid under by-laws passed therefor. Leave to amend so as to set up such objection refused. *Ryan* v. *Village of Carleton Place*, 31 O. R. 639.

Evidence—*Depositions on Former Proceeding in Same Cause.*]—In a mortgage action there was a reference to a master for sale, &c. After sale and satisfaction of the plaintiff's claim out of the proceeds, a balance remained in court, which R. G. applied to the master to have paid out to her. Upon such application R. G. was examined before the master, who refused the application. An order was afterwards made by a Judge referring to the master to ascertain who was entitled to the fund, and to settle priorities. Upon such reference the master ruled that the depositions of R. G. taken upon the former application could be read:—Held, that the depositions could be read, subject to the right of A., an opposing claimant of the fund, to cross-examine R. G. upon them; R. G. to attend for such cross-examination upon payment of conduct money by A. *Maclennan* v. *Gray*, 12 P. R. 431.

——— *Reasons for Report.*] — Held, that the master was the final judge of the credibility of the witnesses, and his report should not be sent back because some irrelevant evidence may have been given of a character not likely to have affected his judgment, especially as no appeal was taken from his ruling on the evidence. On a reference to a master, the latter, provided he sufficiently follows the directions of the decree, is not obliged to give his reasons for, or enter into a detailed explanation of, his report to the court. *Booth* v. *Ratté*, 21 S. C. R. 637.

——— *Subpœna—Local Manager of Bank —Production of Bank Books.*]—Upon a motion by the plaintiff to commit the local manager of a chartered bank, who was subpœnaed to attend before a master upon a reference, and there to produce the books of the bank and give evidence, for his contempt in not complying with the subpœna:—Held, that a subpœna may properly be issued to compel the attendance of a witness before a master, who has jurisdiction by rule 484. 2. That it was unreasonable to expect the witness to take from the bank the books that were in use, and attend during banking hours for the purpose of an examination in a matter in which he had no interest except as a witness; and it would therefore be proper for the master to take the evidence at the banking offices after banking hours. *Hannum* v. *McRae*, 17 P. R. 567, 18 P. R. 185.

Foreign Commission — *Jurisdiction of Referee.*]—A referee upon a reference under s. 102 of the Judicature Act, R. S. O. 1887 c. 44, has jurisdiction to order the examination of foreign witnesses under a commission. Rule 34-37, 52, 58, 59, 73, 552, considered. Semble, the provisions of rule 590 are embraced by inference in rule 35 so as to enable the referee, by express terms, to grant certificates for the issue of foreign commissions. But the mere form, whether by certificate or order, is immaterial, having regard to rules 441, 442. Hayward v. Mutual Reserve Association, [1891] 2 Q. B. 236, and Macalpine v. Calder, [1893] 1 Q. B. 545, followed. *Brooks* v. *Georgian Bay Saw-Log Salvage Co.*, 16 P. R. 511.

Raising Issue Not in Pleadings.]—In his pleadings, in an action for an account the plaintiff set up that on 23rd April, 1878, he transferred to the defendant 160 shares of a certain bank, as a security for a loan, and that pending the loan the defendants had sold the said stock and realized more than the indebtedness, whereof he claimed an account, and the parties went to trial on admissions that the bank stock was in the defendants' hands at the said date. In the master's office the plaintiff sought to raise an issue as to whether the defendants actually did hold the bank stock on that date, or whether, having held it previously as security for another loan, they had not parted with it before the said date, and falsely represented to the plaintiff that they still held it, and whether they were not liable to be charged with its market value as of that date:—Held, affirming the decision of the master in ordinary, that the plaintiff could not be allowed thus to set up a different state of facts and cause of action

from that spread upon the record. *Carnegie* v. *Federal Bank of Canada*, 8 O. R. 75.

Service of Warrant—*Dispensing with.*]—Upon an application in chambers for an order dispensing with service of a warrant and all subsequent proceedings in the master's office upon certain absent defendants, other defendants in the same interest being represented:—Held, by Meredith, J., that rule 467 did not apply to the case, and, as the matter was one in the master's discretion, the order should not be made. Leave being given to renew the application:—Held, by Boyd, C., that, in accordance with rule 3, the practice should be regulated by analogy to rule 467, and the order should be made. *Smith* v. *Houston*, 15 P. R. 18.

——— *Dispensing with — Substituted Service.*] — Where, in a proceeding for partition or sale of lands, begun by summary application, a person interested in the estate, not originally made a party, had been long unheard of, and there was uncertainty whether he were living or dead, an order was made by a Judge, under ss. 16 to 20 of the Partition Act, R. S. O. 1897 c. 123, which are expressly made applicable by s. 33 of the Judicature Act, R. S. O. 1897 c. 51, appointing a guardian and directing that he be served with an office copy of the judgment or order for partition, and notice, for the absentee. Semble, that the master to whom a reference is directed by the judgment or order has power to dispense with service of his warrant or of an office copy of the judgment; rules 263, 659. Smith v. Houston, 15 P. R. 18, discussed. Semble, also, that the court or Judge has power to make an order for substituted service of an office copy of a judgment or order. *Re Hynes, Hodgins* v. *Andrews*, 19 P. R. 217.

Settlement pending Reference—*Finding—Report—Opening up—Costs.*]—Pending a reference to take accounts, a settlement was made between the parties, in the absence of their solicitors, but there was a dispute as to the terms. The master, on the suggestion of the plaintiff, gave the parties the alternative, either to proceed so as to determine whether the settlement did in fact end the matters in litigation, or to go on with the accounts as if there had been no settlement. The defendants, however, refused to take any further part in the proceedings in the master's office. The master found the fact of a settlement, and also that the defendants had agreed to pay the plaintiff's costs as part of the settlement, which the defendants disputed:—Held, on appeal from the master's report, that it was competent for him to deal with the question whether there was or was not a settlement, and report according to the result. The course taken by him was according to the proper practice and within the scope of his jurisdiction. The decisions as to staying proceedings, upon summary application, in case of a compromise, are not necessarily applicable to a compromise arrived at pending a reference; see rule 667. The defendants, however, should not be prejudiced by their having withheld before the master any evidence to support the settlement in the terms which they asserted; and therefore the report should be opened up on payment of costs. *Corry* v. *Lemoine*, 18 P. R. 482.

Solicitor's Lien — *Disallowance.*]—A referee before whom administration proceedings are taken has no authority to make an order depriving a solicitor of his lien for costs on a fund in court on the ground that adverse parties have a prior claim on such fund for costs which the said solicitor's client has been personally ordered to pay, the administration order not having so directed the referee, and there being no general order permitting such an interference with the solicitor's prima facie right to the fund. *Bell* v. *Wright*, 24 S. C. R. 656.

Title—*Leave to File Supplementary Objections.*]—By an agreement for the sale of certain land, the vendor was to give a good marketable title, of which the purchaser was to satisfy himself at his own expense, and was not to call for any abstract of title, deeds, or evidences of title other than those in the vendor's possession. Subsequently, on a reference in a suit by the vendor for specific performance, the defendant filed three objections to the title having reference to a small portion of the land, which were answered by the plaintiff, and the reference was proceeding when the defendant applied and obtained from the master leave to file other objections:—Held, that the master in ordinary had no jurisdiction to grant such leave, but on a subsequent application to the court, the leave was granted on terms. *Clarke* v. *Langley*, 10 P. R. 208.

See In re Munsie, 10 P. R. 98, and *Re Rogers, Rogers* v. *Rogers*, 11 P. R. 90, *ante* 2.

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5. *Report.*

(a) *Appeal from.*

Forum — *Chambers — Court — Costs.*] — Where, after the argument in chambers of an appeal from the master's report, counsel for one of the parties asked that the appeal might be treated as though argued in court, and any order made thereon issue as a court order; or, at all events, that costs should be allowed as of a court motion:—Held, that, although the appeal would, on account of its nature, have been adjourned into court, if such adjournment had been asked before the argument of it, the present application was too late, and the court had no power to grant it. *Re Fleming*, 11 P. R. 272.

——— *Divisions of Court.*]—Having regard to the provisions of 44 Vict. c. 5, s. 25 (O. J. Act), the setting down of an appeal from a report in an action in the chancery division, to be heard at a sitting of chambers in another division, is a nullity. *Re Christie, Christie* v. *Christie*, 12 P. R. 15.

——— *Interlocutory Ruling.*]—General O. Ch. 642 provided for an appeal to a Judge in chambers against any decree, order, report, ruling, or other determination of any master; but this order has been abrogated, and the provisions for appeals from masters and referees are now contained in con. rules 848-850, in which there is no provision for an appeal from a ruling or certificate, but from a report only. A party to any reference has a right to come to the court, at any stage, with any well founded complaint against the conduct of the referee, either personal misconduct or error in receiving or rejecting evidence, or otherwise; and con. rule 39 shews the intention to permit interlocutory rulings to be

considered; but a Judge in chambers has no longer any jurisdiction, and the appeal must be to a Judge in court. Conmee v. Canadian Pacific R. W. Co., 16 O. R. 639, 641, 642, 657, referred to. *Markle* v. *Ross*, 13 P. R. 135.

Quære, whether upon a reference to a local master, quâ master, an appeal from an interlocutory order would lie under con. rule 846. *Ib.*

——— *Single Judge.*]—Held, that a single Judge sitting as the court has power to review the findings of an official referee upon a reference under s. 48, O. J. Act. *Hill* v. *Northern Pacific Junction R. W. Co.*, 11 P. R. 103.

Local Registrar—*Master.*]—Where, in a consent judgment in the usual form in lien cases, a reference was made to a local registrar of the court:—Held, that an appeal lay from his report, it appearing from the whole judgment that the reference was to him as master. *Kennedy* v. *Haddow*, 19 O. R. 240.

Necessity for Appeal—*Amount.*]—There should be no alteration in the amount found due by the master when such amount has not been appealed against. Judgment in 11 O. R. 611 upheld in part. *Gordon* v. *Gordon*, 12 O. R. 593.

Question of Fact.]—In an action for wages, there was a dispute as to the nature of the agreement for hiring; there was evidence at the trial which would have supported a finding for either party. The question was wholly one of fact, and of the credibility of witnesses. The jury found in favour of the plaintiff; but the Judge set the verdict aside, and sent the case to a referee, who found substantially as the jury had done. Upon motion the Judge made an order sending the case back to the referee with instructions to find against the plaintiff on one branch of the case:—Held, that the case was one specially proper for the decision of a jury, and that neither the verdict nor the finding of the referee should have been interfered with. *Logg* v. *Ellwood*, 14 A. R. 496.

Question of Law and Fact—*Reasons for Findings.*]—The report of a referee is equivalent to the verdict of a jury. It should state the referee's conclusions; and he need not give the reasons for his findings. *Faweett* v. *Winters*, 12 P. R. 232.

The referee, who was a barrister, found that there was a want of reasonable and probable cause for the defendant proceeding criminally against the plaintiff. It was objected that this was a finding of law, and not of fact:—Held, that this was equivalent to a verdict for the plaintiff rendered by a jury under instructions by a Judge of what would be evidence of want of reasonable and probable cause; and on the evidence the findings could not be interfered with. *Ib.*

Special Findings—*Notice of Appeal.*]—Held, that objections to special findings in a report must be raised by notice of motion. *Lancy* v. *Essery*, 10 P. R. 285.

Time—*Date of Ruling—Evidence—Objection—Estoppel.*]—An appeal from the ruling of a master in the course of a reference should be brought on within a month from the date of the ruling, irrespective of the date of the certificate of such ruling. Held, in this case, that the appellant was estopped from appealing from the master's ruling that depositions taken on a former application would be read as evidence, by reason of the appellant not having objected at a particular stage of the proceedings. *Maclennan* v. *Gray*, 12 P. R. 431.

——— *Dower—Term—Vacation.*]—The report in an action for dower was filed on 29th May, during the Easter sitting of the court. A motion was made against it within the first four days of the Michaelmas sitting:—Held, that the motion was too late, for it should have been made to a vacation Judge under rules 482 and 483. *Giles* v. *Morrow*, 4 O. R. 649.

——— *Extension of—Ex Parte Order.*]—An order extending the time for appealing from a report of an official referee under O. J. Act, s. 47, should not be made ex parte. *Hamilton* v. *Tweed*, 9 P. R. 448.

——— *Cross-appeal.*]—According to the true meaning of rule (1897) 769, each party is precluded from appealing against the report or certificate of a master unless he serves his notice of appeal within the fourteen days mentioned in the rule; and notice of appeal given in proper time by one party does not prevent the report from becoming absolute as regards another party. *Stewart* v. *Ferguson*, 19 P. R. 21.

———*Extension — Judgment on Further Directions.*]—Held, that after the report of a referee has become absolute and a judgment on further directions founded thereon has been pronounced, drawn up, and entered, a Judge in chambers has no jurisdiction to entertain an application for leave to appeal; nor could any appeal be entertained unless the judgment on further directions were set aside; and that could not be done even by a Judge in court, but only by the proper appellate tribunal. *Re Dingman and Hall*, 13 P. R. 252.

——— *Extension of—Vacation.*]—An appeal was not made within the time required by rule 461, O. J. Act, as it was supposed that Christmas vacation did not count. On the facts stated in the judgment leave to appeal was given on payment of costs. *Scivewright* v. *Leys*, 9 P. R. 200.

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

See Sievewright v. *Leys*, 1 O. R. 375; *Snowden* v. *Huntington*, 12 P. R. 1; *Re Gabourie, Casey* v. *Gabourie*, 12 P. R. 252.

See the next sub-head.

(b) *Confirmation and Filing.*

Execution before Confirmation.]—A decree directed a reference to a local master to ascertain such sums as would be sufficient to satisfy the damages complained of, awarded

costs, and directed payment to be made forthwith after the making of the report:—Held, that the report did not require confirmation, and therefore that executions issued under it by the plaintiff were valid; but pending an appeal from the report the executions were stayed in the sheriff's hands. *Lewis* v. *Talbot Street Gravel Road Co.*, 10 P. R. 15.

Where a reference is directed to the master to ascertain and state the amount of alimony which the defendant should pay, execution may be issued for the amount found by his report before confirmation thereof. Lewis v. Talbot Street Gravel Road Co., 10 P. R. 15, approved and followed. *Boeck* v. *Boeck*, 16 P. R. 313.

Interim Certificate.] — A certificate given by a master that certain accounts filed under his order are not sufficient in substance and form, comes within G. O. 642, and cannot be enforced by attachment until confirmed by the lapse of a month. *Foster* v. *Morden*, 9 P. R. 70.

Necessity for—*Reference under s. 101 of Judicature Act — Motion for Judgment.*]—Where the court at the trial of a partnership action, after declaring that a partnership existed and adjudging that it be dissolved and wound up, ordered that all other matters in dispute in the action be referred for inquiry and report to a master under s. 101 of the Judicature Act:—Held, that the report of the master under such reference was not subject to the provisions of con. rule 848 as to confirmation by filing and lapse of time; but that any time after it was made, a motion for judgment upon it was in order under con. rule 753, and upon such motion the court could adopt it wholly or in part, and any party dissatisfied with it might, before or on the return of the motion for judgment, move to set it aside or vary it. *Raymond* v. *Little*, 13 P. R. 364.

The statute and rules applicable to references should not and need not be so read as to produce the result of two distinct lines of practice in reference to reports of masters and referees. The well-settled procedure in the case of the ordinary report is extended to the statutory reports of referees under s. 101 of the Ontario Judicature Act, R. S. O. 1887 c. 44. And a motion to vary a report upon a reference under that section, although made at the same time as a motion for judgment on the report, cannot be entertained unless made within the time limited by rules 848 and 849. Raymond v. Little, 13 P. R. 364, not followed. *Freeborn* v. *Vandusen*, 15 P. R. 264.

In an action by V. against a municipality for damages from injury to property by the negligent construction of a drain, a reference was ordered to an official referee "for inquiry and report pursuant to s. 101 of the Judicature Act and rule 552 of the high court of justice." The referee reported that the drain was improperly constructed, and that V. was entitled to $600 damages. The municipality appealed to the high court from the report, and the court held that the appeal was too late, no notice having been given within the time required by con. rule 848, and refused to extend the time for appealing. A motion for judgment on the report was also made by V. to the court, on which it was contended on behalf of the municipality that the whole case should be gone into upon the evidence, which the court refused to do:—Held, that the appeal not having been brought within one month from the date of the report, as required by con. rule 848, it was too late; that the report had to be filed by the party appealing before the appeal could be brought, but the time could not be enlarged by his delay in filing it; and that the refusal to extend the time was an exercise of judicial discretion with which the court would not interfere. Held, also, that the report having been confirmed by lapse of time and not appealed against, the court on the motion for judgment was not at liberty to go into the whole case upon the evidence, but was bound to adopt the referee's findings and to give the judgment which those findings called for. Freeborn v. Vandusen, 15 P. R. 264, approved of and followed. *Township of Colchester South* v. *Valad*, 24 S. C. R. 622.

Notice of Filing—*Service.*]—The provision of con. rule 769 that notice of filing a master's report is to be served upon the opposing party is a prerequisite to the report becoming absolute. Where the report is upon a claim to rank on the assets of an insurance corporation in compulsory liquidation under the Ontario Insurance Act, R. S. O. 1897 c. 203, notice of filing the report given in the Ontario Gazette and other newspapers, pursuant to s. 193 of that Act, is not tantamount to personal service. *Re Supreme Legion Select Knights of Canada, Cunningham's Case*, 29 O. R. 708.

Order Confirming—*Consent—Forum.*]—Unless by consent a report cannot be confirmed until after the lapse of the time limited by con. rule 848. It is an undesirable practice for an officer to make an order confirming his own report. *Patterson* v. *Gilbert*, 12 P. R. 652.

(c) *Other Cases.*

Drawing—*Settling—Notice.*]—A judicial officer charged with a reference should himself draw his report, and not delegate it to the solicitor for the successful party. Any ex parte communication with a litigant as to the decision to be given should be avoided, and both parties should have equal facilities of knowing the result, and of being present at the drawing or settling of the report. *Knarr* v. *Bricker*, 16 P. R. 363.

Issue of—*Payment of Fees.*]—Upon a reference under s. 102 of the Judicature Act, the referee apportioned the amount of his fees between the plaintiffs and defendants according to the time occupied by each upon the reference. The plaintiffs paid their share, but the defendants did not:—Held, that the referee should issue his report to the plaintiffs without further payment by them, and look to the defendants for their share of his fees. *Brooks* v. *Georgian Bay Saw-Log Salvage Co.*, *Rumley* v. *Georgian Bay Saw-Log Salvage Co.*, 17 P. R. 34.

Reference under s. 47, O. J. A., 1881—*Necessity for Specific Findings.*]—At the trial of this action a compulsory order of reference was made, referring "all questions arising upon the pleadings of this action between the parties, including all questions of account (if any)," to an official referee "for

inquiry and report:"—Held, that this was a reference under s. 47 of the Judicature Act, and not one under s. 48, and the referee having made a general finding by his report, the case was referred back to him to give specific findings. *Luney* v. *Essery*, 10 P. R. 285.

X. Motions and Orders.

1. *Correction of Orders.*

Accidental Slip or Omission—*Carelessness—Delay—Terms.*]—One of several defendants in ejectment by a mortgagee disclaimed title and denied possession, and the plaintiff's action was dismissed at the trial. A divisional court reversed the decision at the trial, and ordered judgment to be entered for the plaintiff with all costs, the disclaiming defendant not appearing on the argument, although duly notified and served with the minutes of the order, upon which judgment was entered and execution issued:—Held, upon a motion to amend or vary the order as to costs, made after some months' delay, that the court, being satisfied that his defence was made out at the trial, in the exercise of its inherent powers over its records or the powers conferred by rule 780, could now correct an error arising from an accidental slip or omission in its order, and make the order as to the applicant's costs which would have been made originally. Held, also, that he was entitled to relief under rule 536, as amended by rule 1454, as a party who, through mistake, had not been represented upon the argument of the appeal. Held, also, that the carelessness and delay of the applicant did not disentitle him to relief, though they afforded ground for imposing upon him the terms set out in the judgment. *Cousins* v. *Cronk*, 17 P. R. 348.

Mistake—*Time.*]—A Judge may always correct anything in an order which has been inserted by mistake or inadvertence; and an order will be corrected even after the lapse of a year. *McMaster* v. *Radford*, 16 P. R. 20.

Varying Minutes.]—On a motion to vary minutes, nothing can be done at variance with the order as granted, but additions or variations may be made so as to carry out the intention of the court in pronouncing it. *Hendrie* v. *Beatty*, 29 Gr. 423.

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2. *Ex Parte Orders.*

Examination of Plaintiff Abroad.]—See *Thomas* v. *Storey*, 11 P. R. 417.

Execution.]—Orders should not be made ex parte allowing issue of execution against goods of a testator or intestate in the hands of an executor or administrator. *In re Trusts Corporation of Ontario and Bochmer*, 26 O. R. 191.

Extension of Time for Service of Writ.]—See *Gilmour* v. *Magee*, 14 P. R. 120; *Howland* v. *Dominion Bank*, 15 P. R. 56, 22 S. C. R. 130; *Cairns* v. *Airth*, 16 P. R. 100.

Power to Rescind.]—A Judge or the master in chambers has power to reconsider a matter which has been brought before him ex parte, on the application of an opposing party; and he can also open up a matter in respect of which an order has been made after notice and upon default to shew cause, if he is satisfied that opposition was intended and that any injustice has arisen. Semble, that if necessary the words "ex parte order" in rule 536 may be read so as to cover cases going by default, where through some slip cause has not been shewn. *Flett* v. *Way*, 14 P. R. 123.

Taxation of Costs.]—All ex parte orders are periculo petentis. Præcipe order for taxation of costs set aside. *Re McCarthy, Pepler, and McCarthy*, 15 P. R. 261.

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3. *Notice of Motion.*

Countermand — *Withdrawal of Admissions—Leave—Motion for Judgment.*]—After all parties had agreed upon a statement of facts, and the plaintiff had served notice of motion for judgment thereon, he delivered a statement of claim and served on the defendants a notice withdrawing the statement of facts and countermanding the notice of motion. One of the defendants then moved for judgment on the statement of facts, which had not been filed:—Held, that it was not necessary for the plaintiff to make an independent motion to be relieved from his admissions contained in the statement of facts, which had not been acted upon or brought before the court after the filing of the statement of claim and the notice of withdrawal, it was not competent for the defendant to get judgment on the statement of facts; and if the sanction of the court were needed for the course taken by the plaintiff, it might be given upon the defendant's motion. *East* v. *O'Connor*, 19 P. R. 301.

Defective Notice — *Appearing on — Costs.*]—Where the defendant's solicitor was served with a short notice of motion which was admitted to be defective:—Held, that defendant was not entitled to the costs of counsel attending on the motion merely to shew that the notice was irregular. *Waller* v. *Claris*, 11 P. R. 330.

Dispensing with.]—Dispensing with service of notice of motion for judgment. *Dominion Bank* v. *Doddridge*, 12 P. R. 655.

Intituling — *Prohibition — Divisions of High Court—Amendment.*]—Where a defendant, upon being sued in the first division court in the county of Middlesex, filed a notice disputing the jurisdiction and served a notice of motion, returnable before a Judge in chambers, for an order directing the issue of a writ of prohibition to the division court, to prohibit the Judge thereof and the plaintiff from proceeding with the suit in that division court, on the ground of want of jurisdiction in that court to hear and determine the same, but did not intitule his notice of motion, nor the affidavit filed in support of the motion, in any division of the high court of justice:—Held, not a fatal objection, but one which could and should be amended under rule 474, O. J. Act. *Re Olmstead* v. *Errington*, 11 P. R. 366.

Necessity for.]—No order of any moment should be made ex parte, except in a case of emergency. *Thomas* v. *Storey*, 11 P. R. 417.

Return of — *Wrong Day — Leave.*] — Upon the proper construction of con. rule 800 a notice of motion to a divisional court must be made returnable on the first day of the sitting. But where, although the notice of motion had been made returnable on the fifth day of the sitting, it appeared that there had been a bonâ fide intention to move ten days before the sitting, when the notes of evidence were ordered, leave was given to set the motion down, costs being given against the party moving. *Sierichs* v. *Woodcock*, 13 P. R. 260.

Service out of Jurisdiction.]—See *Re Confederation Life Association and Cordingly*, 19 P. R. 16, 89; *Harris* v. *Bank of British North America*, *ib.* 51.

Specifying Grounds — *Amendment.*]—A notice of motion to a divisional court against the verdict and judgment at the trial, on the ground of non-direction, should shew how and in what matter there was non-direction. The court may allow an amendment of the notice in a proper case; but it declined to assist the defendant by doing so where the non-direction was not material in view of other facts and findings, and the rule of law invoked by the defendant would have operated against a meritorious claim of the plaintiff. Pfeiffer v. Midland R. W. Co., 18 Q. B. D. 243, followed. *Furlong* v. *Reid*, 12 P. R. 201.

Specifying Irregularities.]—Irregularities relied on, need not be stated in a notice of motion if they are set out in affidavits, filed on the motion, and referred to in the notice. *Blain* v. *Blain*, 9 P. R. 269.

A notice of motion for irregularity should shew or refer to affidavits shewing what the irregularity is. *Dominion Savings and Investment Co.* v. *Kilroy*, 12 P. R. 19.

Time of Service — *Setting down.*] — An objection that a notice of motion given for a sitting of a divisional court, and served in time to be set down during that sitting, could not be set down in the following sitting, was overruled. *Brassert* v. *McEwen*, 10 O. R. 179.

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4. *Other Cases.*

Consent Order—*Initialling.*]—Held, that after an order has been pronounced, the initialling of it, as drawn up, by the solicitor for the party opposed to the party having the carriage of it, does not make it a consent order, but merely assents to it as being the understanding of the party of what was ordered by the Judge. *McMaster* v. *Radford*, 16 P. R. 29.

Counsel — *Number of.*] — Upon an interlocutory application the court will not hear more than one counsel for any party. *Langdon* v. *Robertson*, 12 P. R. 139.

Delay in Issuing Order — *Service* — *Setting aside Judgment.*] — An order to set aside proceedings must be served forthwith; otherwise the opposite party may treat it as abandoned. Where final judgment was cut down to interlocutory judgment by order of a master, granted on the 9th July, but not issued or served till the 19th November:—Held, that the delay was fatal, and the master was wrong in allowing the stale order to be used against the judgment as originally signed. *Molsons Bank* v. *Dillabaugh*, 13 P. R. 312.

Enforcement of Order—*Action.*]—Prohibition granted to restrain the enforcement of a judgment in a division court in an action brought upon an order of a Judge in an action in the high court ordering the defendant in the division court action to pay certain costs arising out of his default as a witness. Notwithstanding the broad provisions of rule 934, an order of the court or of a Judge is not for all purposes and to all intents a judgment; and no debt exists by virtue of such an order as was sued on here. Rule 866 means that an order may be enforced in the action or matter in which it is, as a judgment may be enforced, and does not extend to the sustaining of an independent action upon the order. *Re Kerr* v. *Smith*, 24 O. R. 473.

Enlargement — *Affidavits* — *Terms.*] — Where a party obtains an enlargement of a motion for the purpose of procuring further affidavits, but does not comply with the terms on which the enlargement was granted, he is not entitled to read the affidavits. *Campbell* v. *Martin*, 11 P. R. 509.

Multiplicity of Orders.] — Remarks upon the multiplication of orders and summonses in actions. *Snider* v. *Snider, Snider* v. *Orr*, 11 P. R. 140.

See Re Cosmopolitan Life Association, Re Cosmopolitan Casualty Association, 15 P. R. 185.

Setting down—*Neglect* — *Costs.*]—The defendant served upon the convicting magistrates notice of a motion by way of appeal from an order of a Judge in chambers refusing a certiorari to remove his conviction, returnable before a divisional court in Michaelmas sitting, but did not set the motion down for hearing before the sitting or take any steps after serving the notice of motion to bring it to a hearing during the sitting. The court ordered the defendant to pay to the magistrates their costs of appearing to shew cause against the motion. *Regina* v. *Armstrong*, 13 P. R. 306.

Signing Orders.]—Con. rule 544 provides that all orders made by a Judge of the high court in chambers shall be signed by the clerk in chambers:—Held, that an order for the arrest of the defendant signed by the Judge who made it, and not by the clerk, was not properly issued. *St. Croix* v. *McLachlin*, 13 P. R. 438.

Winding-up Act—*Order of Court of Another Province—Production of Copy—Entry.*] —Execution may be issued under s. 85 of the Winding-up Act, R. S. C. c. 129, upon the order of a court of another province, without making such order a rule of court, or obtaining the direction of a Judge, upon the mere production to the officer of the high court of a properly certified copy of such order. Re Companies Act and Hercules Ins. Co., 6 Ir. R. Eq. 207, followed. Re Hollyford Copper Mining Co., L. R. 5 Ch. 93, and Re City of Glasgow Bank, 14 Ch. D. 628, not followed. In such cases the settled practice of the high court is to have the order entered in the proper book as a judgment or order. *Re Dominion Cold Storage Co., Lowrey's Case*, 18 P. R. 68.

XI. Originating Notices.

Validity of Gift — *Declaration—Rule 938.*]—A testator bequeathed a sum of money to his "sister Anastasia Cummings." He had only two sisters, Catharine Kelly, to whom he bequeathed a like sum, by her proper name, and Maria Cummings:—Held, that the gift took effect in favour of Maria Cummings. Held, also, that a declaration to that effect could properly be made upon an originating notice under rule 938. In re Sherlock, 18 P. R. 6, followed. *Re Whitty*, 30 O. R. 300.

See Re Sherlock, 18 P. R. 6; *S. C.*, 28 O. R. 638.

XII. Second Applications.

Affidavits.] — Upon a motion to commit the defendant the court refused to allow the plaintiffs to read affidavits filed upon a previous application, the date of their filing not having been stated in the notice of motion; and also refused to allow the plaintiffs to read an affidavit filed after the service of the notice. *Mackenzie* v. *Carter*, 12 P. R. 544.

Indulgence—*Merits—Supplying Defects.*] —It is only by the indulgence of the court that a second application is permitted or entertained where the first application has been refused. And where the defendants' applications for orders nisi to quash convictions were refused on the ground of non-compliance with the statute and rule requiring a recognizance and affidavit of justification to be filed, and the court upon such applications was not favourably impressed by what was urged as to the merits of the applications:—Held, that the indulgence of the court ought not to be extended in favour of fresh applications made by the defendants upon new material supplying the defects. *Regina* v. *Richardson*, *Regina* v. *Addison*, 13 P. R. 303.

Leave to Appeal — *Winding-up Act.*]— Where an application for leave to appeal to the court of appeal from a decision in a matter under the Winding-up Act, R. S. C. c. 129, has been made under s. 74, and refused by a Judge, a fresh application will not be entertained by another Judge. The cases in which successive applications to successive Judges have been favoured are not pertinent to a case where the right to appeal, upon leave, is sought under a special statute. *Re Sarnia Oil Co.*, 15 P. R. 347.

Summary Judgment — *Material—Supplying Defects.*]—Where the plaintiff's motion for judgment under con. rule 739 was dismissed because he had not observed the practice under con. rule 1251 of partly complying with an order upon him for security for costs by paying $50 into court, and he subsequently paid the money in and renewed the application upon the same material:—Held, that the dismissal of his first application was no bar to the second one. Semble, it would have been otherwise had the plaintiff failed in his first application by reason of defects in his material, and made a second one upon new material supplying the defects. *Payne* v. *Newberry* (No. 2), 13 P. R. 392.

Writ of Attachment.] — *See Bank of Hamilton* v. *Baine* (2), 12 P. R. 439.

See Hilliard v. *Arthur*, 10 P. R. 426; *Maclennan* v. *Gray*, 12 P. R. 431; *Roberts* v. *Donovan*, 16 P. R. 456; *Attorney-General for Ontario* v. *Attorney-General for Canada*, 1 Ex. C. R. 184.

XIII. Service of Papers.

Affidavits.]—Where a motion to commit is made, it is not necessary to serve with the notice of motion copies of the affidavits on which it is based. Decision in 17 P. R. 567 affirmed. *Hannum* v. *McRae*, 18 P. R. 185.

Dispensing with Service.]—See *Smith* v. *Houston*, 15 P. R. 18; *Jones* v. *Miller*, 24 O. R. 268.

Posting up Copies.]—Where service of a statement of claim and notice of motion for judgment was effected, under rule 1330, by posting up a copy of each in the office in which the proceedings were conducted:—Held, that the posting up of one copy only for two defendants was not to be deemed service on either; and a judgment founded thereon was set aside as irregular. *Haacke* v. *Ward*, 17 P. R. 520.

The defendants in this case not having appeared, the plaintiffs filed and posted up copies of a statement of claim, without filing the writ of summons and affidavit of service:—Held, that the posting of the statement could not, having regard to rule 574, be treated as a service upon the defendants. But, even if it could be so treated, a motion for judgment thereon and an assessment of damages would be necessary. *Appleby* v. *Turner*, 19 P. R. 145.

Solicitor's Agent.]—Service of papers on a Toronto agent for an outside solicitor is not good, unless accompanied with a statement of the name of the solicitor for whom the agent is served. *Prettie* v. *Lindner*, 11 P. R. 313.

Service of papers on a solicitor as agent for another solicitor is not good service unless the solicitor served is the booked agent of the other, even though he has acted as agent in the same suit. *Robinson* v. *Robinson*, 13 P. R. 51.

Solicitor's Clerk.] — The service of a paper upon the clerk of the solicitor in the cause, elsewhere than at the office of the solicitor, is of no avail; it can only be effective, if at all, from the moment when it reaches the solicitor himself. *Hermann* v. *Mandarin Gold Mining Co. of Ontario*, 18 P. R. 34.

Substitutional Service.] — Where a judgment debtor had absconded, and his place of abode could not be ascertained, substitutional service upon him of a summons to set aside fraudulent conveyances made by him, was allowed. *Dobson* v. *Marshall*, 9 P. R. 1.

An order will not be made for substitutional service upon an officer of a litigant corporation of a subpœna and appointment for his examination for discovery. *Mills* v. *Mercer Co.*, 15 P. R. 281.

A witness is not liable to attachment for disobedience to a subpœna served substitutionally pursuant to an order authorizing such

service. Mills v. Mercer Co., 15 P. R. 281, applied and followed. *Barber* v. *Adams*, 16 P. R. 156.

See post XXI.

XIV. Settlement of Actions.

Creditors — *Compromise — Estoppel.*]— Where certain creditors and the administrator were parties to an order in chambers compromising an action respecting certain assets of the estate:—Held, that they were bound by such compromise, and could not impeach in this administration proceeding the validity of securities which had been in question in the action compromised. *Merchants Bank* v. *Monteith*, 10 P. R. 467.

Cross-actions — *Costs.*] — The plaintiff and defendants, having actions respectively pending against one another, agreed to settle the same upon certain terms, the written memorandum whereof stated that the plaintiff, in consideration of defendants' payment of $1,150 and all costs of the two suits, discharged the defendants from the suit pending against them and all claims whatever, and concluded that it was distinctly understood that defendants should pay all costs incurred by the plaintiff for witness fees and disbursements in connection with the two suits. Defendants alleged that when the memorandum was drawn up there was inserted after the words all costs of the two suits the words, "except the lawyer's expenses of the said party of the first part" (the plaintiff); that these words had been struck out by the plaintiff or on his behalf after execution; and that under the agreement defendants could only be called upon to pay the witness fees and disbursements: — Held, that the erasure took place prior to execution, but that the memorandum did not contain the true agreement of the parties, for that such agreement was that the plaintiff was to be paid all the costs of the two suits except the counsel fees. The plaintiff was therefore held entitled to such costs, which the master was directed to tax, and for which the plaintiff was to have a verdict. *Mason* v. *Burrows*, 29 C. P. 138.

Default.]—Settlement of suit for a sum payable by instalments, but to be void if not punctually paid — Default in fourth instalment—Right to bring the suit—Relief. See *Boland* v. *McCarroll*, 38 U. C. R. 487.

Married Woman.] — A married woman can compromise an action brought in her own name against her husband. *Vardon* v. *Vardon*, 6 O. R. 719.

Notice by Solicitor to Parties—*Costs — Collusion.*]—Where a compromise of the action has been effected between the parties without the intervention of the solicitors, in order to entitle the plaintiff's solicitor to enforce his lien for costs upon the fruits of the litigation, by means of an order upon the defendant, collusion must be shewn, or the act complained of must have been done after notice from the solicitor complaining. And where the parties made such a compromise, and the plaintiff's solicitor gave notice to the defendant's solicitor after the agreement but before payment of the money agreed upon:—Held, that this was sufficient notice. *Sandige* v. *Ireland*, 14 P. R. 29.

It is competent for a client to settle his action behind the back of his solicitor, notwithstanding that the solicitor has given notice to the client and to the opposite party not to settle except with the solicitor's consent. The equitable interference of the court cannot be invoked on behalf of a solicitor in an action settled in such a manner, unless there are fruits arising from such settlement upon which the solicitor's lien can attach; for there is no lien on the action. Upon such a settlement, unless where collusion between the parties to defraud the plaintiff's solicitor of his costs is clearly shewn, a defendant will not be ordered to pay the costs of the plaintiff's solicitor. *Bellamy* v. *Connolly*, 15 P. R. 87.

After judgment had been recovered by the plaintiff against the defendants for $550 damages and for costs, and while an appeal was pending, the plaintiff and defendants, without the knowledge of the plaintiff's solicitors, made an agreement for settlement of the action upon the plaintiff being taken into the defendants' employment and paid $150 in full of damages and costs. The plaintiff's solicitors asserted a lien for their costs, which were unpaid, and gave notice thereof to the defendants before any money was actually paid over to the plaintiff:—Held, that the compromise made was not a collusive one, and the solicitors were therefore not entitled to an order upon the defendants for the payment of their costs; but, such costs amounting to more than $150, that they were entitled to have that sum, for which the action was compromised, and which was to be treated as the fruits of the litigation, paid over to them in respect of their lien. Held, also, that a question arising between the plaintiff and his solicitors, as to whether they were entitled to taxed costs as between solicitor and client, or to a percentage upon the amount recovered, could not be determined upon the motion to enforce payment by the defendants of the plaintiff's solicitors' costs, but had to be determined in another proceeding before the determination of such motion. *Walker* v. *Gurney-Tilden Co.*, 18 P. R. 274.

Settlement by Counsel or Solicitor—*Repudiation.*]—Where counsel, acting upon the instructions of the plaintiff's solicitor, effected a compromise of the action not authorized by the plaintiff and contrary to the express instructions given by her to the solicitor, the compromise was set aside and the plaintiff allowed to proceed to trial, but as the plaintiff and defendant were innocent parties, without costs to either against the other. Stokes v. Latham, 4 Times L. R. 305, followed. *Benner* v. *Edmonds*, 19 P. R. 9.
See Solicitor, IV. 1—Trial, XVI. 8.

Terms—*Dispute as to — Reference.*] — See *Corry* v. *Lemoine*, 18 P. R. 482, *ante* IX. 4 (b).

Validity — *Summary Trial.*]—The court has jurisdiction to stay proceedings in any action which has been compromised, where no terms of the compromise go beyond what is in controversy in the action. And where, in an action of slander, the plaintiff excused his non-prosecution by alleging that an agreement had been entered into between himself and the defendant by which the action was to be dropped and $10 costs to be paid by the defendant, which agreement was denied by the defendant, an order was made directing a summary trial, or the trial by an issue upon oral evidence, of

the question of the validity of the settlement; if the result should be a valid settlement, proceedings to be stayed perpetually and costs paid by defendant; if settlement invalid, action to be dismissed with costs to defendant. *Rees* v. *Carruthers*, 17 P. R. 51.

——— *Trial—Issue.*]—An assignee for the benefit of creditors under a statutory assignment, having brought an action for damages for breach of a contract made by his assignor with the defendants, made a compromise settlement with the defendants, before the delivery of pleadings, while he was in gaol, and without reference to the inspectors or creditors. A new assignee appointed in his stead applied for an order directing the trial of an issue to determine whether the settlement was valid:—Held, that it was not necessary to bring another action to vacate the settlement, and it was more convenient to revive the action in the name of the new assignee as plaintiff and let him continue it, leaving the defendants to move summarily to stay it, or to plead the settlement in bar, than to direct the trial of an issue. Rees v. Carruthers, 17 P. R. 51, distinguished. Johnson v. Grand Trunk R. W. Co, 25 O. R. 64, and Haist v. Grand Trunk R. W. Co., 22 A. R. 504, followed. *Davidson* v. *Merritton Wood and Pulp Co.*, 18 P. R. 139.

See post XVI.

XV. Special Cases.

Alteration — *Consent.*]—Held, that, except by consent, affidavits cannot be received to alter or modify a special case stated by consent; the only relief open to a party complaining that a case has been misstated, is to apply to amend or vacate it; and quære, whether it could be amended after judgment. *Cousineau* v. *City of London Fire Ins. Co.*, 15 O. R. 329.

Reservation of — *Divisional Court — Motion for Judgment.*]—By the O. J. Act, 1881, s. 28, s.-s. 2, a Judge, sitting elsewhere than in a divisional court, is not to reserve any case for a divisional court. On the trial of an action the pleadings were admitted to state the facts, and what was called "a special case on the pleadings" was reserved for the opinion of the Judges of the common pleas division. A divisional court of that division refused to entertain the case, but turned it into a motion for judgment under rule 323, O. J. Act, 1881, or rules 315 and 321. *Till* v. *Till*, 15 O. R. 133.

Succession Duty Act—*Forum—Declaration of Right.*] — When the provincial treasurer and the parties interested do not agree as to the succession duty payable, the question must be settled by the tribunal appointed by the Act, namely, the surrogate registrar, with the right of appeal given by the Act. The high court has no jurisdiction to decide the question in a stated case. The court of appeal refused, therefore, to entertain an appeal from the judgments in 27 O. R. 380 and 28 O. R. 571. Questions of law which cannot properly arise in or as incidental to an action, or other proceeding in court, cannot be made the subject of a special case under rule 372 in order to obtain the opinion of the court thereon. Where a special forum is created by statute for determining rights of parties, a declaration of right will not be made by the court under s. 57, s.-s. 5, of the Judicature Act, in an action which the court has no jurisdiction to entertain. *Attorney-General* v. *Cameron*, 26 A. R. 103.

See Payne v. *Caughell*, 24 A. R. 556; *East* v. *O'Connor*, 19 P. R. 301.

XVI. Staying Proceedings.

1. *Till Costs of Former Proceedings Paid.*

Identity of Former Proceeding with Action.]—In 1879 the Grand Junction Railway Company obtained from the court of Queen's bench a rule for a mandamus to enforce the delivery of bonds by the defendants to the amount of $75,000, pursuant to a by-law of the defendants to aid in the construction of the plaintiffs' road. On appeal to the court of appeal this rule was discharged, and on appeal to the supreme court of Canada, the court of appeal's judgment was affirmed, with costs against the plaintiffs. Since then the road had been completed, but the costs of the above proceedings had not been paid. This action was brought in the names of the Grand Junction Railway Company and the Midland Railway Company to recover the aforesaid sum of $75,000 in money. Upon motion to stay all proceedings in this action till the costs of the former proceedings should have been paid:—Held, notwithstanding that new circumstances had arisen, and that the proceeding was not the same as the first proceeding, nor grounded upon exactly the same facts, and notwithstanding that the Midland Railway Company were now joined as plaintiffs, the attempt to proceed in this action without first paying the costs of the former action was vexatious, and the order asked for must be made; following Cobbett v. Warner, L. R. 2 Q. B. 108. *Grand Junction R. W. Co.* v. *County of Peterborough*, 10 P. R. 107.

Interlocutory Costs in Same Action.]—In equity, if interlocutory costs payable by the plaintiff remained unpaid, the court might, but was not bound to, stay proceedings, and would not if it were not equitable to do so. At common law, while non-payment of such costs was not a ground for staying proceedings, yet if it appeared equitable to stay proceedings until they were paid, the court in the exercise of its inherent jurisdiction might direct a stay. The common law practice is the more convenient one, and should now be followed. *Stewart* v. *Sullivan*, 11 P. R. 529.

Where the plaintiff served in succession four notices of trial for the same assizes, all of which were set aside as irregular, with costs against him, and he was in default for non-payment of such costs, the action was stayed until they should be paid. *Ib.*

Where the plaintiff is acting in good faith, his action should not be stayed for non-payment of interlocutory costs; and an action of trespass is in that respect in no way different from any other. Stewart v. Sullivan, 11 P. R. 529, followed. *Wright* v. *Wright*, 12 P. R. 42.

New Rules — *Change in Practice.*]—The practice by which, when the defendant's costs of a former action for the same or substantially the same cause were unpaid, the defendant was entitled to have the later action

stayed until they should be paid, is superseded by the effect of rule 3, the defendant's only remedy being to apply under rule 1243 for security for costs in the second action. *Campbell* v. *Elgie*, 16 P. R. 440.

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2. *Other Cases.*

Abuse of Process of Court.] — H. & Bro., being the owners of certain lumber in the hands of the defendants as warehousemen, sold it to L., who gave his promissory note for the purchase money, and pledged the lumber to the plaintiff's testator for an advance of money, and the defendants agreed to hold it to the order of the testator. L. having become insolvent, H. & Bro. notified the defendants not to deliver the lumber to L. or to the testator, and the testator demanded the delivery of the lumber to him. The defendants then interpleaded, and an order was made, upon the consent of the testator, directing a sale of the lumber and payment of the proceeds into court, and the trial of an issue between the testator and H. & Bro. to determine which of them was entitled to the lumber or the proceeds thereof. That issue was determined in favour of H. & Bro. The plaintiff then brought this action for conversion of the lumber, the alleged conversion being the non-delivery by the defendants to the testator of the lumber which they agreed to hold to the order of the testator:—Held, by a divisional court, that this action was vexatious and an abuse of the process of the court; and an order was made staying it with costs. Held, reversing the order of the divisional court, that this was not a case in which the exceptional power of the court to refuse to allow its process to be abused by a frivolous action, could be properly exercised. *Ross* v. *Edwards*, 14 P. R. 523, 15 P. R. 150. See *Ross* v. *Edwards*, 11 R. 574.

Appeal Bond—*Action on—Further Litigation.*]—An action against the sureties upon a bond given by the defendants in the action of McLaren v. Canada Central R. W. Co., upon the appeal of the defendants to the court of appeal in that case. The defendants in that case appealed from the court of appeal to Her Majesty in council, and in that appeal security had been given and allowed, including security for the whole amount recovered, and execution had been stayed in consequence:—Held, that proceedings must also be stayed in this action. *McLaren* v. *Stephens*, 10 P. R. 88.

Counterclaim—*Delay.*]—Where counterclaim filed in a mortgage action for the purpose of delay. *O'Dell* v. *Bennett*, 13 P. R. 10.

Cross-actions — *Consolidation.*]—On the 4th February, 1885, an insurance company commenced an action in the chancery division to set aside a policy of insurance. On the 13th May, 1885, M. and others brought an action to recover the amount of the policy, and on the 23rd May moved to stay proceedings in the former action:—Held, following the rule laid down in Thomson v. South Eastern R. W. Co., 9 Q. B. D. 320, that there is no hard and fast rule in cases of cross-actions, that the one commenced last should be stayed. The court should take the circumstances into consideration, and exercise its discretion as to what is the fairest mode of settling the dispute, and give the conduct of the litigation to the party upon whom the substantial burden of proof rests. On appeal, the Judge in chambers declined to make any order. Subsequently, on the 27th June, 1885, the defendants in the first action moved for a stay of proceedings in it, and the master made an order accordingly. On appeal, on 22nd October, the Judge in chambers declined to interfere at present, as the second action had been tried and a verdict given for the plaintiffs, but reserved leave to renew the motion if the verdict should be set aside, and varied the order of the master by consolidating the two actions. *Miller* v. *Confederation Life Association*, *Confederation Life Association* v. *Miller*, 11 P. R. 241.

Default of Plaintiff—*Examination.*]—Upon failure of the plaintiff to attend for examination the action should not be stayed until he does attend; it is sufficient to impose a stay for a definite time. *Comstock* v. *Harris*, 12 P. R. 17.

Execution.]—See EXECUTION.

Interpleader Issue.] — An interpleader proceeding is not an action; and rule 641 (c), which enables the court to "order the action to be discontinued," upon terms as to costs, does not apply to interpleader issues. Hamlyn v. Betteley, 6 Q. B. D. 63, and Re Dyson, 65 L. T. N. S. 488, followed. Semble, that the execution creditor can abandon the seizure or the prosecution of the issue, but only on the terms of answering all costs. *Hogaboom* v. *Gillies*, 16 P. R. 402.

Judgment—*Motion to Set aside.*]—When a motion to a divisional court to set aside the judgment pronounced at the trial, but not yet entered, has been set down for hearing, there is a stay of proceedings upon such judgment ipso facto, unless it should be otherwise ordered. *Western Bank of Canada* v. *Courtemanche*, 16 P. R. 513.

——— *Satisfaction—Motion.*]—A motion by the defendants, after judgment in an action, to stay proceedings therein, after satisfaction of the plaintiff's claims, should be made in chambers, not in court. Where such a motion was made in court, it was enlarged into chambers, and costs were ordered against the applicants. *Lee* v. *Mimico Real Estate* Co., 15 P. R. 288.

——— *Stay of Entry—Effect of.*]—Where an interim injunction was obtained by the plaintiffs restraining the defendants from doing certain acts until the trial or other final disposition of the action or until further order, and by the judgment pronounced after the trial the action was dismissed, but the entry of the judgment was stayed until the fifth day of the next sittings of a divisional court:—Held, that the effect of the stay was to leave the whole matter in statu quo until the defendants should become entitled to enter judgment, and by so doing to put an end to the injunction in accordance with its terms. *Carroll* v. *Provincial Natural Gas and Fuel Co. of Ontario*, 16 P. R. 518.

Order to Postpone Trial.]—See *Allen* v. *Mathers*, 9 P. R. 477.

Prior Action Pending—*Parties.*]—In this action the plaintiffs sought to recover

from the defendants a large sum of money, being the portion assessed upon the defendants of the cost of certain works constructed and paid for by the plaintiffs. In a previous action against the same defendants, the plaintiffs therein, who were landowners in the defendants' township and assessed for a portion of the sum now sued for, sought a declaration that the defendants' by-laws purporting to impose this assessment upon the plaintiffs therein, and all the proceedings upon which they were founded, were void, and an injunction to restrain any proceedings for the collection of the amount for which the plaintiffs therein were assessed. In that action judgment had been given in the defendants' favour, but the plaintiffs had an appeal to the supreme court of Canada pending when the present action was brought:—Held, that the present action should not be stayed until after the determination of the appeal in the other. *Township of Tilbury West* v. *Township of Romney*, 19 P. R. 242.

Proceeding Pending for Same Cause —*Scope.*]—The plaintiffs having agreed to lease to the defendants a certain property for successive terms of fifty years, during all time then to come, at a fixed rental, an order was made, by consent, under the Vendors and Purchasers Act, directing the plaintiffs to deliver to the petitioners an abstract of title of the property, "and that it be referred to J. S. C., referee; and that all matters as to time of delivery of the abstract, the sufficiency thereof, and all subsequent questions arising out of or connected with the title to the said site, and the carrying out of the said agreements respecting the making of title to and the conveying of the said alternative site, be from time to time determined by the said referee, including the costs of the said reference, subject to appeal." While the reference was pending this action was brought to recover the rent of the property from the time at which it was agreed the first term should begin:—Held, that the order directed a reference of all questions and matters arising out of the agreements and the carrying of them into effect; that the settlement and payment of the rent was one of the matters virtually, if not expressly, embraced in the reference; that it was a matter in respect of which an order might be made under s. 4 of the Vendors and Purchasers Act, R. S. O. 1897, c. 134; that the plaintiffs could not, without the leave of the court, single out one of the matters so pending and bring and sustain a separate action in regard to it; and therefore this action should be perpetually stayed. *City of Toronto* v. *Canadian Pacific R. W. Co.*, 18 P. R. 374, 451.

Security for Costs.]—Held, that a præcipe order for security for costs is a stay of proceedings while it exists, and a motion for judgment made simultaneously with the motion to set aside the præcipe order for security for costs was refused. *Doer* v. *Rand*, 10 P. R. 165.

Settlement of Action.]—The order of the master in chambers (9 P. R. 229) staying proceedings on the ground that this action had been settled by the plaintiff's solicitor was reversed because the evidence shewed that the settlement was a provisional one, and that the plaintiff himself had not adopted it. *McDonald* v. *Field*, 12 P. R. 213.

The court has jurisdiction to stay proceedings in any action which has been compromised, where no terms of the compromise go beyond what is in controversy in the action. And where, in an action of slander, the plaintiff excused his non-prosecution by alleging that an agreement had been entered into between himself and the defendant by which the action was to be dropped and $10 costs to be paid by the defendant, which agreement was denied by the defendant, an order was made directing a summary trial, or the trial by an issue upon oral evidence, of the question of the validity of the settlement; if the result should be a valid settlement, proceedings to be stayed perpetually and costs paid by defendant; if settlement invalid, action to be dismissed with costs to defendant. *Rees* v. *Carruthers*, 17 P. R. 51.

Stranger — *Application of — Judicature Act, 1895, s. 52 (9).*] — The jurisdiction to stay proceedings given by s. 52 (9) of the Judicature Act, 1895, at the instance of any person, whether a party to the action or not, is only to be exercised where the action is an improper one, or where under the former practice the court of chancery might have enjoined its prosecution, and only where the stranger is one who seeks to intervene and can properly be added as a party. *Fawkes* v. *Griffin*, 17 P. R. 473.

Transfer of Right Pendente Lite—*Non-substitution of Transferee as Plaintiff.*] —See *Murray* v. *Wurtele*, 19 P. R. 288.

Trial—*Appeal from Order Directing New Trial.*]—See TRIAL.

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

See Taylor v. *Bradford*, 9 P.R. 350; *Grand Trunk R. W. Co.* v. *Ontario and Quebec R. W. Co.*, 9 P. R. 420; *Hughes* v. *Hand-in-Hand Ins. Co.*, 7 O. R. 615; *Niagara Grape Co.* v. *Nellis*, 13 P. R. 179; *Corry* v. *Lemoine*, 18 P. R. 482.

XVII. STYLE OF CAUSE.

Crown—*Action against.*]—The action was instituted against the Government of the Province of Quebec, but when the case came up for hearing on an appeal to the supreme court of Canada, the court ordered that the name of Her Majesty be substituted. *Grant* v. *The Queen*, 20 S. C. R. 297.

Intituling of Papers—*County Court—High Court.*]—Where a motion is made to a Judge of the high court or the master in chambers under rule 1260 to change the venue in a county court action, the papers should not be intituled in the high court of justice, but in the county court. *Ferguson* v. *Golding*, 15 P. R. 43.

Partnership Name — *Amendment.*]—A person carrying on business alone, in a name denoting a partnership, cannot bring an action in that name. Where, however, such

name consisted of his surname, prefaced by the initials of his Christian names, and followed by the words "and Co.:"—Held, that these words in the style of cause in an action were mere surplusage, or, if not, they should be struck out; and, as the mistake was trifling, and no one was misled or affected by it, an amendment at the trial should have been granted as of course. Mason v. Mogridge, 8 T. L. R. 805, distinguished. *Lang* v. *Thompson*, 16 P. R. 516.

See ante VII.

XVIII. Subpœna.

Setting aside.]—In an action against an incorporated company to recover a money demand, the defence was that the indebtedness, if any, was not that of the company, but of the president in his private capacity. Upon an application for a better affidavit on production of documents from the company, it had been determined that the company had no documents to be produced:—Held, that a subpœna served upon the president calling upon him to produce documents or books which had been determined not to be in possession of the company, should not be set aside, for the affidavits shewed that the accounts of the defendant company were kept in the books of the president; and the practice of setting aside a subpœna, as laid down in Steele v. Savory, [1891] W. N. 195, was one to be followed only in exceptional cases, while in ordinary cases it would be better that the question of production of documents should be raised before the examiner. *Alexander* v. *Irondale, Bancroft, and Ottawa R. W. Co.*, 18 P. R. 20.

XIX. Vacation.

Appeal.]—The term "vacation" in G. O. Chy. 642, means Christmas as well as long vacation, and hence the former is not to be counted in the time within which an appeal from a master's report may be had under that order. Notice of appeal from a report dated 29th November, 1883, given on the 31st December, 1883, for the 7th January, 1884, is valid. *Blake* v. *Building and Loan Association*, 10 P. R. 153.

Christmas vacation is not to be excluded in reckoning the eight days from which an appeal from the decision of the master or local Judge or master in chambers is to be brought on under rule 427, O. J. A. As such appeals are not heard in vacation, the time for appealing will be extended as a matter of course upon an ex parte application. *Snowden* v. *Huntington*, 12 P. R. 1.

Upon the true construction of rule 484, the period of long vacation is not to be reckoned in the time allowed by s. 71 of the Judicature Act for filing and serving notice of appeal to the court of appeal. *Hespeler* v. *Campbell*, 14 P. R. 18.
See Sieveright v. *Leys*, 9 P. R. 200.

Examination for Discovery.]—Where a special examiner issues an appointment for the examination for discovery during vacation of a party to an action, such party, if duly subpœnaed, is bound to attend for examination. A special examiner, although an officer of the supreme court of judicature for Ontario, in the sense of being subject to its control and direction, has no office in connection with the court that comes under any rule requiring it to be kept open or closed during any particular period of the year. Decisions in 15 P. R. 23 reversed. *Hogaboom* v. *Cox*, 15 P. R. 127.

Pleading—*Notice of Trial.*]—Pleadings may be delivered and notice of trial given in Christmas vacation. *Thompson* v. *Howson*, 16 P. R. 378.

Reference — *Official Referee.*] — Every legal proceeding which may properly be taken out of vacation may with equal propriety be taken during vacation, unless something to the contrary can be found in some statute or rule of court. An official referee may proceed with a reference during vacation. *Marples* v. *Rosebrugh*, 17 P. R. 104.

Report.]—A master's report made during long vacation in contravention of G. O. 425, is, as against a defendant having no notice of the proceedings on which the report is founded, entirely null and void. *Fuller* v. *McLean*, 8 P. R. 549.

Settling Judgment.]—A direction to the registrar to settle in long vacation the minutes of a judgment pronounced on 30th June, was refused. *Miller* v. *Spencer*, 13 P. R. 478.

Taxation of Bills of Costs.]—See *Cousineau* v. *City of London Fire Ins. Co.*, 13 P. R. 36.

XX. Waiver of Irregularities.

Foreign Commission—*Opening.*]—Held, that when a foreign commission had been opened before trial for the convenience of parties, it was too late at the trial to object to the mode of its execution. *Walton* v. *Apjohn*, 5 O. R. 65.

Jurisdiction of Court—*Submission to by Answer.*]—Held, that the objection to the jurisdiction would have prevailed if properly taken, as the parties to the submission had agreed upon their forum; but the defendant, having submitted to the jurisdiction by his answer, and himself asked the intervention of the court, could not now be heard to object. *Moore* v. *Buckner*, 28 Gr. 606.

Notice of Trial — *Laches in Moving against.*]—See *Whitney* v. *Stark*, 13 P. R. 129.

Order — *Acceptance of Costs under.*]—Leave was given to the plaintiff to amend by setting up the Statute of Limitations upon payment of costs, which were paid to and accepted by the defendant. Upwards of a year afterwards the defendants objected that such order had been improperly made:—Held, that it was then too late to object that the order had been made in error. *Court* v. *Walsh*, 9 A. R. 294.

——— *Enlargement of Time for Acting under.*]—By an order of a Judge in chambers (12 P. R. 275), a motion by the defendant to set aside a judgment for irregularity was refused, but the defendant was let in to defend

upon paying into court or securing $700 within a month. The defendant moved for and obtained an order extending the time for paying the money in, and then appealed from the part of the order refusing to set aside the judgment for irregularity:—Held, that the defendant had waived his right of appeal from the order by obtaining an enlargement of the time for complying with it. *Pierce* v. *Palmer*, 12 P. R. 308.

Pleading.]—See *Hughes* v. *Rees*, 10 P. R. 301.

Service of Process — *Appearance.*]—The defendants appeared to the writ of summons, and set up in their statement of defence that the high court of justice had no jurisdiction; that the cause of action arose in Winnipeg, the defendants' head office was at Montreal, and the service of process was on their agent for local purposes at London:—Held, that there was nothing in these facts to shew want of jurisdiction; and that the appearance had precluded all question as to the sufficiency of the service. *Dart* v. *Citizens' Ins. Co.*, 11 P. R. 513.

See, also, *Sears* v. *Meyers*, 15 P. R. 381, 456, and *Heath* v. *Meyers*, 15 P. R. 381, *post* XXI. 5 (b).

——— *Taking Part in Trial—Division Court.*]—Held, that the service of the summons in this action on the station master of the defendants at Bowmanville was void, but the defendants having appeared at the trial and after their objection to the jurisdiction had been overruled having proceeded with the defence and cross-examined witnesses, &c.:—Held, that they had thereby precluded themselves from objecting to the jurisdiction. *In re Guy* v. *Grand Trunk R. W. Co.*, 10 P. R. 372.

XXI. Writ of Summons.

1. *Amendment.*

Character of Parties.]—Where parties are before the court quâ executors, and the same parties should also be summoned quâ trustees, an amendment to that effect is sufficient, and a new writ of summons is not necessary. *Ferrier* v. *Trépannier*, 24 S. C. R. 86.

See McNab v. *Macdonnell*, 15 P. R. 14.

Re-service of Writ.] — See *Guess* v. *Perry*, 12 P. R. 460, *post* 2.

Shortening Time for Appearance — *Judgment.*]—A writ of summons issued for service out of the jurisdiction required an appearance thereto to be entered within eight weeks after service, inclusive of the day of service. The plaintiffs obtained an order shortening the time for appearance to ten days, not specifying whether inclusive or exclusive of the day of service, and amended the writ under order by merely substituting "ten days" for "eight weeks." The writ as amended was served, and the order with it, on the 27th January. On the 6th February following, judgment was signed for default of appearance:—Held, that the judgment was irregular; for the writ was not amended in accordance with the order, and the latter must govern; and according to its terms, having regard to rule 474, the ten days were to be reckoned exclusively of the day of service, and the defendants had the whole of the 6th February to appear. *Bank of British North America* v. *Hughes*, 16 P. R. 61.

Time — *Judgment* — *Description of Mortgaged Lands.*] — Under the liberal powers of amendment now given by rules 444 and 780, the writ of summons and all subsequent proceedings may be amended after judgment. And where the plaintiff by mistake omitted from the description of lands in the writ of summons in a mortgage action, a parcel included in the mortgage, an order was made, after judgment and final order of foreclosure, vacating the final order, directing an amendment of the writ and all proceedings, and allowing a new day for redemption by a subsequent incumbrancer who did not consent to the order; and in default the usual order to foreclose. *Clarke* v. *Cooper*, 15 P. R. 54.

See Hewgill v. *Chadwick*, 18 P. R. 359, *post* 3.

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2. *Indorsement.*

Amendment of—*Re-service of Writ.*]—The writ of summons was specially indorsed with a money demand, besides which the indorsement claimed damages for waste, &c. The plaintiff obtained an ex parte order amending the indorsement by striking out the claim for damages:—Held, that judgment by default could not be entered after the amendment without re-serving the writ on the defendant. *Guess* v. *Perry*, 12 P. R. 460.

Character of Parties — *Irregularity — Waiver—Amendment.*] — The writ of summons was indorsed only with a claim for damages for negligence and breach of trust on the part of the defendants in the investment of moneys upon mortgage. There was no indorsement of the character of parties. The defendants appeared, and the plaintiff thereupon delivered a statement of claim in which it was set forth that the plaintiff was the administrator of one who was in her lifetime entitled to the moneys invested by the defendants. It was shewn that one of the defendants was fully aware of all the facts of the case, and of the capacity in which the plaintiff sued. Upon a motion by the defendants to strike out the statement of claim as embarrassing in that it did not follow the writ:—Held, that the defendants by entering an appearance, instead of moving against the writ, had waived the irregularity of the plaintiff in not stating the character of the parties, as required by rule 224. Held, also, that as the statement of claim shewed the character in which the plaintiff was suing, it was not necessary to amend the writ. *McNab* v. *Macdonnell*, 15 P. R. 14.

Lis Pendens.]—When a plaintiff seeks to register a lis pendens, he should be more precise in respect to the indorsement on his writ than in ordinary cases, and should define generally the grounds of his claiming an interest in the lands. *Sheppard* v. *Kennedy*, 10 P. R. 242.

Residence of Plaintiff.] — A writ of summons not indorsed with a statement of the plaintiff's residence as set out in Form 1, O. J. Act, is irregular. *Sherwood* v. *Goldman*, 11 P. R. 433.

Several Defendants—*No Claim against One.*] — The writ of summons was issued against three defendants, O., A., and R. The indorsement claimed to have set aside a deed from A. to O., and a deed from O. to A. No claim whatever was made against R., and he was not mentioned in the indorsement:—Held, that the indorsement was sufficient, and a motion by R. to set aside the service upon him was refused. *Gilmore* v. *Township of Orford*, 11 P. R. 457.

Ship-owners—*Account—Dispute.*]—Semble, that in an action by the managing owner of a ship against his co-owner, the indorsement on the writ need not shew that there was any dispute as to the amount involved. *Hall* v. *The Ship "Seaward,"* 3 Ex. C. R. 268.

Special Indorsement.]—See JUDGMENT, X. 2.

See PLEADING—PLEADING SINCE THE JUDICATURE ACT, IX. 2.

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3. *Issue of.*

Provisional Judicial Districts.]—The indorsement on a writ of summons, issued in the district of Thunder Bay after the passing of 57 Vict. c. 32 (O.), shewed that the claim was for cancellation of a lease of a mining location in the district of Rainy river, for possession of the location, and for an injunction restraining the defendant from entering thereon:—Held, that the action was not one of ejectment within the meaning of rule 653, and therefore the venue was not local, and it was not necessary that the writ should be issued by the local Registrar at Rat Portage under s. 3 of the Act. *Kendell* v. *Ernst*, 16 P. R. 197.

A document purporting to be a writ of summons stated on its face that it was "issued from the office of the deputy clerk of the district court of the provisional district of Thunder Bay and Rainy River at Rat Portage, in and for said district," and was tested in the name of F. F., "Judge of our said court, at Port Arthur," the 14th April, 1898. It is provided by s. 90 of R. S. O. 1897 c. 109 that when a provisional judicial district is composed, as here, of two territorial districts, the Lieutenant-Governor in council may by proclamation declare that the junior district shall be detached and erected into a separate provisional district. By proclamation dated the 21st February, 1898, it was declared that on and after the 4th April then next the district of Rainy River should be detached from Thunder Bay and erected into a separate district. The writ was, in fact, issued by the person who was, before the 4th April, the deputy clerk of the district court at Rat Portage, but at the time of the issue no Judge or officers had been appointed for the district court of the new district. The defendants entered a conditional appearance, pleadings were delivered intituled in the district court of Rainy River, the defendants in theirs objecting to the jurisdiction; and the case came on for trial before the Judge of the district court at Thunder Bay, at Rat Portage, who, the defendants again objecting, directed all amendments to be made to get rid of the objections, and, after a trial with a jury, gave judgment for the plaintiff:—Held, on appeal, that the writ was a nullity and incapable of amendment so as to make it good; that the defect was such as could not be waived by the defendants; it was a complete defect; and the proceedings should be stayed in toto, and the plaintiff ordered to pay the defendants' costs from the beginning. *Hewgill* v. *Chadwick*, 18 P. R. 359.

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4. *Renewal of.*

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

———*Local Judge — Jurisdiction—Expiry of Time.*]—A local Judge has jurisdiction, by the combined effect of con. rules 238 and 485, to make an order for the renewal of a writ of summons, even at a time when such writ has actually expired. Re Jones, Eyre v. Cox, 46 L. J. N. S. Ch. 316, followed. Where a local Judge in 1887 and again in 1889 made orders renewing a writ of summons issued in 1886, and such orders were not appealed against:—Held, that the writ must be treated as having been properly renewed by such orders. *St. Louis* v. *O'Callaghan*, 13 P. R. 322.

——— *Necessity for—Discretion—Service.*]—A writ of summons cannot be renewed without a Judge's order, and to satisfy the terms of rule 238 leave to serve the writ after the lapse of a year should also be obtained. But where an order for renewal was obtained and the writ was renewed pursuant thereto and was served without any order for leave to serve, it was dealt with under rule 442, and the service was confirmed. Inconsistency in rule 238 and Forms Nos. 92 and 124 pointed out. Where the delay in serving the writ arose from the pendency of an appeal in an action between the same parties, the decision of which would affect the plaintiff's course, and service was not made till that appeal was decided:—Held, that a local Judge's discretion in extending the time for service should not be interfered with. A local Judge has jurisdiction under rule 238. St. Louis v. O'Callaghan, 13 P. R. 322, followed. *Gilmour* v. *Magee*, 14 P. R. 120.

Rescission of Ex parte Order—"*Good Reason*"—*Statute of Limitations.*] — Where an order has been made, on the ex parte application of the plaintiff, under rule 238 (a), extending the time for service of the writ of summons, it is open to the defendant to move against it within the time or extended time prescribed by rule 536, and to shew, if he can, that there was no good reason for making it, even though the result of setting it aside may be that the action will be defeated altogether by the operation of the Statute of Limitations. The master in chambers, where he has made such an order, has jurisdiction under rule 536 to reconsider and rescind it. The reason offered by the plaintiffs for an extension of the time for service of the writ was that until they should ascertain, by the result of the reference in another pending proceeding, that there

had been a fund in the hands of one of the defendants, in respect of which it would be worth while to prosecute this action, it would be advisable to delay the service of the writ, as, in the event of there being no fund, this action would be useless. There had been delay in prosecuting the reference in the other proceeding, the plaintiffs having the conduct of it. The master in chambers, upon the application of the defendants, set aside his own ex parte order extending the time for service of the writ, and his decision was affirmed by a Judge in chambers and a divisional court:—Held, that the three tribunals could not be said to have been wrong in holding that no good reason was shewn for extending the time. *Howland* v. *Dominion Bank*, 15 P. R. 56. Affirmed by the supreme court of Canada, 22 S. C. R. 130.

——— *Time—Merits—Statute of Limitations.*] — An action upon a promissory note payable on the 4th November, 1885, was begun on the 31st October, 1891. The writ of summons not having been served, an order was made on the 28th October, 1892, on the ex parte application of the plaintiff, under rule 238 (a), that service should be good if made within twelve months. The writ together with this order and an order of revivor—the original plaintiff having died in the meantime—was served on one of the defendants on the 2nd August, 1893. On the 12th September, 1893, the defendant who had been served moved before the local Judge who made the order of 28th October, 1892, to set it aside, which he refused to do:—Held, that the time for moving under rule 536 had expired and had not been extended; and certain correspondence relied on as shewing an agreement to extend the time, had not that effect. The validity of the ex parte order did not depend solely upon whether the affidavit upon which it was made was sufficient to support it; the motion to set it aside was a substantive motion supported by affidavits; and the plaintiff was at liberty to answer the motion by shewing new matter in support of the original order. And upon the material before the local Judge his refusal to set aside his order was right upon the merits. *Cairns* v. *Airth*, 16 P. R. 100.

——— *Withholding of Evidence — Statute of Limitations.*] — Where orders were made from time to time renewing a writ of summons, and it appeared that the plaintiff all the time knew, but did not disclose, where the defendant could be served, and the Statute of Limitations had, but for the renewals, barred the plaintiff's claim, the orders were rescinded, upon an application by the defendant under rule 558, after the orders had come to his knowledge. Doyle v. Kaufman, 3 Q. B. D. 7, 340, and Hewett v. Barr, [1891] 1 Q. B. 98, followed. *Mair* v. *Cameron*, 18 P. R. 484.

Service of Renewed Writ.]—A writ of summons, dated the 17th April, 1879, was, after several renewals, finally renewed on the 6th April, 1881, and served on the 27th December, 1881:—Held, that no declaration having been delivered, the case was governed by rule 493, O. J. Act, and that by rule 31, the writ continued in force for one year from the date of the last renewal, and service on the 27th December, 1881, was good. *Mackelcan* v. *Becket*, 9 P. R. 289.

Time for Renewal.]—The time allowed for renewal of a writ of summons is, upon the proper construction of rule 132, to be reckoned inclusive of the date of issue or of a former renewal. Black v. Green, 15 C. B. 262, 3 C. L. R. 38, and Anon., 11 W. R. 203, 32 L. J. N. S. Ex. 88, 7 L. T. N. S. 718, followed. Where the original writ of summons was issued on the 5th November, 1898, and was renewed on the 4th November, 1899, the renewal ran out on the 3rd November, 1900, and service thereafter was of no effect. *Laird* v. *King*, 19 P. R. 307.

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5. *Service of.*

(a) *Jurisdiction over Foreign Corporation Served in Ontario.*

Business within Ontario — *Servant—Agent—Rule 159.*]—Held, that a writ of summons may be served in Ontario upon a foreign corporation in a case where service out of Ontario is not authorized by the rules; but in such a case it must appear that the corporation are carrying on business in Ontario in such manner as to render them subject to be deemed resident within Ontario; and the words of rule 159, "a person who transacts or carries on any of the business of, or any business for, any corporation," mean, at the least, some person who is an agent of the corporation, who transacts or carries on here, or controls or manages for them here, some part of the business which the corporation profess to do and for which they were incorporated. And in this case the defendants were not, at the time of service of the writ, carrying on any of their business in this Province in such a manner as to warrant a finding that they were then resident here; nor was the person served with the writ such a person as is described in the part of the rule quoted. Decision of the court below, 18 P. R. 3, reversed, and order of a Judge in chambers, *ib.*, restored. *Murphy* v. *Phœnix Bridge Co.*, 18 P. R. 495.

Injury to Land in another Province — *Local Action.*] — The plaintiff complained that the defendants, by negligent use or management of their line of railway, allowed fire to spread from their right of way to the plaintiff's premises, whereby his house and furniture were burnt. These premises were alleged to be in the Province of Manitoba, where the plaintiff himself resided, and in which the defendants were legally domiciled, and actually carried on business. The defendants denied the plaintiff's title to the land upon which the house and furniture were situate:—Held, that the action, as regards the house, was in trespass on the case for injury to land through negligence, and this form of action was, like trespass to land, local, and not transitory, in its nature. The action, therefore, so far as the house was concerned, could not be entertained by the Ontario court; but aliter as to the furniture, on abandonment of the claim for destruction of the house. Companhia de Mocambique v. British South Africa Co., [1892] 2 Q. B. 358, [1893] A. C. 602, followed. Campbell v. McGregor, 29 N. B. Reps. 644, not followed. *Brereton* v. *Canadian Pacific R. W. Co.*, 29 O. R. 57.

Negligence in another Province—*Railway.*]—A writ of summons in an action to recover damages against a railway company for negligence alleged to have occurred in British Columbia, was issued out of the high court of justice for Ontario, and was served on the

defendants' claims agent in Toronto, Ontario. The head office of the railway, incorporated by Dominion legislation, was in the Province of Quebec, but the company carried on business in Ontario, through which its railway ran, and where large numbers of its officers and servants resided:—Held, that the action was properly brought in Ontario, and the service of the writ therein was valid. *Tytler* v. *Canadian Pacific R. W. Co.*, 29 O. R. 654, 26 A. R. 467.

Special Appearance.]—Where there is a grave question as to jurisdiction of the courts of this Province in an action on a contract entered into in a foreign country, a special appearance under protest or conditionally may be permitted under con. rule 286, and the defence of want of jurisdiction may be subsequently raised by the pleadings. *Howland* v. *Insurance Co. of North America*, 16 P. R. 514.

(b) Service out of the Jurisdiction.

Alimony—*Domicil.*]—In an action for alimony the writ of summons was served upon the defendant out of the jurisdiction, and upon a motion to set aside the service it appeared that the plaintiff and defendant were married in Ontario in 1889, where the defendant had resided for forty years prior to 1886; that in that year he had been appointed to a permanent position in the North-West Territories, and had then sold his dwelling-house in Ontario and gone to reside in the North-West, where his daughter and her husband and children lived, and where he had ever since remained, only visiting Ontario on a few occasions. He swore that he had no intention of returning to Ontario to live. It also appeared that the plaintiff, shortly after the marriage, accompanied the defendant to his home in the North-West, and lived with him for about nine months, when she left him and proceeded to Ontario for business purposes; that she never returned to the defendant, and had since resided chiefly in the United States of America, and since the commencement of this action had stated on oath, in another cause, that she resided in the United States:—Held, that the defendant had acquired a domicil in the North-West Territories, and that the plaintiff had not acquired a distinct domicil in Ontario since she left her husband; and, therefore, it was not a case in which service of the writ of summons was permissible under rule 271 (c) or (e). *Allen* v. *Allen*, 15 P. R. 458.

——— *Law Courts Act, 1895, s. 28.*]—The right to alimony is not based on contract, but on the special statutory provisions found in s. 29 of the Judicature Act, R. S. O. 1887 c. 44. Alimony, when granted, is not to be classed either as "debt" or "damages," terms which define the scope of s. 28 of the Law Courts Act, 1895, providing for the allowance of service out of the jurisdiction of a writ of summons where the plaintiff has a good cause of action upon a contract, and the defendant has assets in Ontario: it is that allowance to which a married woman is entitled upon separation from her husband. Magurn v. Magurn, 3 O. R. 579, Keith v. Keith, 25 Gr. 113, and Hooper v. Hooper, 2 Sw. & Tr. 256, followed. Service of writ of summons out of the jurisdiction in an action for alimony disallowed. *Wheeler* v. *Wheeler*, 17 P. R. 45.

Assets in Ontario.]—Debts owing to the defendant from persons living in Ontario are assets in Ontario which may be rendered liable to the judgment within the meaning of rule 45 (e), O. J. Act. *Purves* v. *Slater*, 11 P. R. 507.

Breach of Contract.] — The defendants in British Columbia by letter offered to sell the plaintiff in Ontario a car load of lumber, according to a sample previously furnished, at a certain price, free on board cars at Toronto. The plaintiff accepted the offer by letter, and it was agreed between the parties that the lumber was to be shipped at Vancouver and delivered at Toronto, upon which being done the price was to be paid by means of a draft. When the lumber arrived at Toronto the plaintiff inspected it and refused to accept it or the draft, on the ground that it was not up to the sample. He then brought this action for damages for breach of the contract:—Held, that the plaintiff had the right to make inspection of the bulk at Toronto before accepting or paying; and the contract was one which, according to its terms, ought to be performed within Ontario; and therefore service out of the jurisdiction of the writ of summons ought to be allowed under rule 271 (e). *Fisher* v. *Cassady*, 14 P. R. 577.

The defendants, resident in the Province of Quebec, there wrote and posted to the plaintiff in Ontario a letter putting an end to a contract of hiring entered into in Quebec between the parties:—Held, in an action for wrongful dismissal, that the breach of the contract occurred in Quebec, the receipt of the letter by the plaintiff not being the breach, but only evidence of it; and service of the writ of summons on the defendants in Quebec could not be allowed under rule 271 (e). Cherry v. Thompson, L. R. 7 Q. B. 573, followed. *Offord* v. *Bresse*, 16 P. R. 332.

The plaintiff, in London, Ontario, wrote to the defendant in Quebec, offering to take a quantity of empty oil barrels. The defendant, by letter posted in Quebec, accepted the offer, saying he would ship them, but some time afterwards wrote again, refusing to do so:—Held, that this contract was made in Quebec, and, in the absence of an express agreement to the contrary, was to be performed there by delivery of the goods to carriers to be carried to London; and the cause of action was, therefore, not one in respect of which service of the writ of summons out of the jurisdiction could properly be allowed under rule 271 (e). *Empire Oil Co.* v. *Vallerand*, 17 P. R. 27.

——— *Undertaking—Affidavit.*]—In an action for damages for breach of contract by the defendants, a corporation in England, in not delivering certain machinery at the railway station nearest to Ottawa, the writ and statement of claim were served on the defendants' agent in Montreal, and under rule 48, O. J. Act, the plaintiffs applied for an order allowing the service under rule 45. The affidavit of the plaintiff's solicitor stated that the action was brought to recover damages for breach of contract on the part of the defendants in not delivering machinery at the railway station nearest to Ottawa under the terms of the contract. But the affidavit did not state that the deponent knew the fact, either of his own knowledge or on information and belief, nor that the defendants ever entered into a contract with the plaintiff, and

undertook to deliver the machinery at the railway station nearest to Ottawa. The bill of lading containing the contract in question provided, inter alia, "that the machinery in question is to be delivered at the port of Montreal unto the G. T. R. Co., by them to be forwarded upon the conditions above and hereinafter expressed, thence per railway to the station nearest to Ottawa, and at the aforesaid station delivered to order . . . freight . . . to be paid by the consignees." "That the goods are to be delivered from the ship's deck, when the shipowner's responsibility shall cease. Through goods sent forward by mail are deliverable at the railway station nearest to the place named hereinafter." "That any loss, damage, or detention of goods on this through bill of lading for which the carrier is liable must be claimed against the party only in whose possession the goods were when the loss, damage, or detention occurred:"—Held, (1) that the affidavit did not afford the proof required under rule 48; (2) that the bill of lading shewed no contract on the part of the defendants to deliver at Ottawa, or the nearest station to Ottawa, nor any contract, the breach of which was made in Ontario, because if there was such a contract in the bill, force and effect could not be given to the stipulations in it that the shipowner's responsibility should cease when the goods were delivered from the ship's deck, &c., and hence, though leave would be given to file further affidavits, such leave was therefore unnecessary. And, again, if there was a contract, and its terms expressly exempted the defendants from any and all liability for damage for any loss, &c., arising beyond their line, no damage for a breach in this Province would result to the plaintiff, and though technically within rule 45 (c), discretion should (if any exist) be exercised in refusing to allow the service. In cases of this kind an order allowing service should not be made on an undertaking of the plaintiff's solicitor to prove a cause of action, &c., within the jurisdiction, as it shifts the onus of proof to the plaintiff and requires him to conduct possibly a long and expensive litigation to procure a decision on a point properly raised at the commencement of the action. *Perkins* v. *Mississippi and Dominion Steamship Co.*, 10 P. R. 198.

Where a contract of hiring is made within the Province of Ontario, and the work thereunder is to be done there, the commission therefor will be payable there. Hoerler v. Hanover, &c., Works, 10 Times L. R. 22, and Robey v. Snaefell Mining Co., 20 Q. B. D. 152, referred to. If the contract is ended by letter sent from another Province, quære whether this indicates that the breach complained of was out of the Province. And where, upon a motion to set aside service of a writ of summons on defendants resident out of the jurisdiction in an action for breach of such contract of hiring, there was conflicting evidence as to whether the discharge of the plaintiff from the defendants' service was by letter or by the act of an agent of the defendants within the Province, the plaintiff was allowed to proceed to trial upon his undertaking to prove at the trial a cause of action within rule 271 (c). *Bell* v. *Villeneuve*, 16 P. R. 413.

——— *Undertaking—Amendment.*] — The plaintiff, desiring to bring an action against an incorporated company having its head office outside of this Province, for breach of a contract, obtained, ex parte, from a local Judge, an order for leave to issue a writ of summons for service out of the jurisdiction. The particular breach upon which the plaintiff relied was not set out either in the affidavit upon which the order was granted, nor in the writ when issued, nor in the statement of claim which accompanied it when served on the company abroad, and, looking at the terms of the contract, which was made an exhibit to the affidavit, there were two possible breaches upon which the plaintiff might have relied, viz., the agreement of the defendants to pay a sum of money at a place in this Province, or their agreement to allot certain shares, which might have been performed outside the Province for all that was provided to the contrary:—Held, that, if the former were the breach relied on, the action was properly brought in this Province; if the latter, it was not. An order having been made by a Judge in chambers setting aside the order of the local Judge and the writ and service, the plaintiff appealed to a divisional court, which permitted him to file a further affidavit making out a prima facie case of a breach in this Province entitling him to sue here, and make a substantive order allowing the service, upon proper terms as to amendment and costs, and an undertaking by the plaintiff to shew at the trial a breach of the contract within Ontario, or be nonsuit. *Franchot* v. *General Securities Corporation*, 18 P. R. 291.

Effect of—*Order to Proceed.*]—Where a defendant has been served out of the jurisdiction, and the service is allowed, but the defendant does not appear, no order to proceed is necessary. Rule 45 (e) is not to be extended to all the cases under the rule. *Martin* v. *Lafferty*, 9 P. R. 300.

Foreign Judgment — *Equitable Execution.*]—The plaintiff, a foreigner, sued the defendant, also a foreigner, upon a foreign judgment, and, alleging that the defendant was the owner of lands in Ontario, also claimed relief by way of equitable execution against such lands and an interim injunction restraining the defendant from dealing therewith:—Held, by the master in chambers, not a case in which service of the writ of summons out of the jurisdiction could be allowed under any of the provisions of rule 271. *Sears* v. *Meyers*, *Heath* v. *Meyers*, 15 P. R. 381.

Fraudulent Conveyance — *Promissory Note.*]—Action by an alleged creditor of one of the defendants to set aside a conveyance of land in Ontario by that defendant to another, as fraudulent. The plaintiff claimed to be a creditor in respect of a promissory note made and payable, and the makers of which resided out of the jurisdiction, but he did not seek judgment upon the promissory note:—Held, a case in which, under rule 271 (b), service of the writ of summons effected out of the jurisdiction was allowable. The different subrules of rule 271 are disjunctive; and under (b) it is not necessary that the whole subject-matter of the action should come within its provisions. Semble, also, that the case came within sub-rule (g); for, although the defendant alleged to be within the jurisdiction had not been served, it was not necessary (assuming that service within the jurisdiction is requisite to bring the case within the sub-rule) that she should be served first, but only that the service without should not be allowed until the service within had been effected, and an

adjournment for the purpose might be granted. *Livingstone* v. *Sibbald*, 15 P. R. 315.

Infant.]—Service of process on infant out of jurisdiction. *Rew* v. *Anthony*, 9 P. R. 545.

Mechanics' Liens—*Statement of Claim—Time for Delivering Defence.*]—An order permitting service out of the jurisdiction of the writ of summons should also authorize service of the statement of claim at the same time and fix a time for delivery of the statement of defence. Young v. Brassey, 1 Ch. D. 277, followed. Where the order makes no provision as to the statement of claim or defence, the defendant should have eight days from the last day of appearance within which to deliver his statement of defence, and the pleadings cannot be noted closed before the expiry of such eight days. *McIver* v. *Crown Point Mining Co.*, 19 P. R. 335.

Residence in Ontario—*Evidence.*]—Action by a foreign company upon a contract made in a foreign country against two defendants, one of whom resided in Manitoba, and was there served with process. Upon a motion by this defendant to set aside the service, it was contended by the plaintiffs that the other defendant was ordinarily resident or domiciled in Ontario, within the meaning of con. rule 271 (c), and therefore that the court had jurisdiction. It appeared that at the time of the motion the latter defendant was an employee of the government of the Province of Quebec; that prior to 1883, his domicil was in Quebec, whence he removed to Manitoba, where he resided until 1886; that he went to Australia; that in 1887 or 1888 he returned to Canada, and resided part of the time in Toronto, and part of the time in Winnipeg, until September, 1889, when he returned to Quebec; that he remained while in Toronto for only three months at a time; that his wife had recently gone to Europe and did not intend to return to Toronto; that his family were still in Toronto, but his intention was to keep them there only until he got something to do; that Toronto was never looked upon as a permanent home for the family; and that it was the intention of the family to go to him as soon as he should send for them:—Held, that he was neither "domiciled nor ordinarily resident within Ontario;" and the service was set aside. *Wanzer Lamp Co.* v. *Woods*, 13 P. R. 511.

Tort — *Conspiracy — Undertaking.*] — Where the alleged cause of action was a joint conspiracy by the defendants, two of whom resided within the jurisdiction, and a third, who was a foreigner, was implicated, service on the foreigner out of the jurisdiction of a notice in lieu of the writ of summons:—Held, properly allowed under rule 271 (g). Massey v. Heynes, 21 Q. B. D. at pp. 334, 335, and Indigo Co. v. Ogilvy, [1891] 2 Ch. 31, specially referred to. Such an order should not be made unless the Judge is reasonably satisfied as to the bona fides of the plaintiff in joining the foreign defendant; and as an evidence of such bona fides the plaintiff in this action was required to undertake to submit to a nonsuit if he failed to prove a joint cause of action at the trial as against the foreign defendant. Thomas v. Hamilton, 17 Q. B. D. at p. 597, specially referred to. *Simpson* v. *Hall*, 14 P. R. 310.

——— *Malicious Prosecution — Arrest.*]—Criminal proceedings begun in the Province of Quebec, under which the plaintiff was arrested in the Province of Ontario and taken to Montreal, where he was discharged, constitute, in effect, one entire tort; and service of a writ out of this Province in an action therein for malicious prosecution, founded thereon, will not be allowed under rule 1309, amending rule 271 (e). *Oligny* v. *Beauchemin*, 16 P. R. 508.

——— *Transfer of Goods — Fraudulent Preference.*]—An action by an assignee under R. S. O. 1887 c. 124 against persons residing in the Province of Quebec to set aside a transfer of goods effected in this Province, as a fraudulent preference, which goods have afterwards been removed to Quebec, is founded on a "tort committed within the jurisdiction," within the meaning of rule 271 (e), as amended by rule 1309. *Clarkson* v. *Dupré*, 16 P. R. 521.

Waiver of Objections to Allowance—*Appearance.*] — A defendant, by entering an appearance in an action, submits himself to the jurisdiction of the court, and waives his right to move against an order permitting service of the writ of summons to be made upon him out of the jurisdiction. Upon a motion by the defendant for leave to appeal:—Held, by the court of appeal, that the defendant, by appearing, had submitted to the jurisdiction, and the justice of the case consisted in allowing him to remain in the position in which he had placed himself; and there was no reason for giving leave to appeal. *Sears* v. *Meyers*, 15 P. R. 381, 456.

See Dart v. *Citizens' Ins. Co.*, 11 P. R. 513.

——— *Intention—Proceedings.*]—Where a defendant does not really intend to waive his objection to the jurisdiction, he does not, by obtaining an order for security for costs and opposing a motion for speedy judgment, estop himself from moving against an order permitting service of the writ of summons to be made upon him out of the jurisdiction. *Heath* v. *Meyers*, 15 P. R. 381.

See Robertson v. *Mero*, 9 P. R. 510, *post* (c); *Sparks* v. *Purdy*, 15 P. R. 1; *Milne* v. *Moore*, 24 O. R. 456; *Re Confederation Life Association and Cordingly*, 19 P. R. 16, 89; *Harris* v. *Bank of British North America*, *ib.* 51.

(c) *Substituted Service.*

Defendants Abroad.]—The plaintiff had some years previously in an action of ejectment against these defendants served them personally, and they had defended by the same solicitor. It was shewn that one defendant, the father of the other two, who resided in a foreign country, corresponded with them. An application under rule 4, O. J. Act, for an order permitting substitutional service on the father for the other two defendants, was refused, it not being shewn that prompt personal service could not be effected. *Robertson* v. *Mero*, 9 P. R. 510.

Foreign Corporation.]—Service of process must be, if possible, personal, or, in the case of a corporation, upon the duly constituted agent; the substitutional method is to

be followed only when prompt personal service appears by affidavit to be unavailable. Rule 146 regulates substituted service of process. Rule 167 covers miscellaneous proceedings in the progress of litigation, but it is not to be used so as to nullify the special rule applicable to writs of summons. And where the plaintiff shewed that he knew where the head office of the defendants, a foreign corporation, was, and that they had no office or definite place of business within Ontario, and there was nothing to shew that they could not be easily served at the head office, an order for substituted service was vacated. *Young* v. *Dominion Construction Co.*, 19 P. R. 139.

See Dobson v. *Marshall*, 9 P. R. 1; *Weatherhead* v. *Weatherhead*, 9 P. R. 96; *Locomotive Engine Co.* v. *Copeland*, 10 P. R. 572.

(d) *Other Cases.*

Judgment of Quebec Court.]—Service requisite to make judgment recovered in Quebec conclusive under R. S. O. 1877 c. 50, s. 145. *Court* v. *Scott*, 32 C. P. 148.

Leaving by Bailiff for Defendant.]—No entry of default for non-appearance can be made, nor ex parte judgment rendered, against a defendant who has not been duly served with the writ of summons, although the papers in the action may actually have reached him through a person with whom they were left by the bailiff. *Turcotte* v. *Dansereau*, 27 S. C. R. 583.

Partnership.] — Blakeslee, Brown, & O. carried on business in partnership under the name of Blakeslee & Co. Blakeslee absconded, and the business continued. O. assigned his interest to Brown, and after such assignment, but before it had been made public, the plaintiff served his writ of summons against the firm on O.:—Held, that the service was good. *Bank of Hamilton* v. *Blakeslee*, 9 P. R. 130.

Wrong Person Served — *Costs.*]—A person of the same name as the defendant served by mistake with the writ was:—Held, entitled to his costs of opposing a motion for judgment under rule 324, O. J. Act. *Lucas* v. *Fraser*, 9 P. R. 319.

6. *Other Cases.*

Ante-dating Writs—*Terms—Statute of Limitations.*]—Upon the defendants' application, in a case of misjoinder of plaintiffs, under rule 324, the usual order is that all proceedings be stayed till election is made as to the plaintiff who shall proceed, and that the names of the others be struck out. But there is no power to direct that the rejected plaintiffs shall be allowed to issue writs of summons for their respective causes of action against the defendants nunc pro tunc as of the date when the writ in the original action was issued, there being no power to alter the date of the process. Clarke v. Smith, 2 H. & N. 753, Nazer v. Wade, 1 B. & S. 728, and Doyle v. Kaufman, 3 Q. B. D. 7, 340, followed. Nor can a term be imposed that in the new actions the defendants be restrained from setting up the Statute of Limitations. Smurthwaite v. Hannay, [1894] A. C. 494, 506, specially referred to. *Huthnance* v. *Township of Raleigh*, 17 P. R. 458.

Copies.]—A writ of summons is a "pleading or other document" within the meaning of rule 395, and more than four copies cannot be taxed. *Sparks* v. *Purdy*, 15 P. R. 1.

Joinder of Causes of Action—*Leave.*]—Where leave is necessary under rule 341 to join other causes of action with an action for the recovery of land, it must be obtained before the writ of summons is issued, unless under very exceptional circumstances. *McLean* v. *McLean*, 17 P. R. 440.

XXII. Miscellaneous Cases.

Abatement of Action — *Misrepresentation—Death of one Defendant.*]—The plaintiffs, formerly owners of a line of steamers, brought this action against the defendants, who were formerly owners of another line of steamers, alleging that by certain misrepresentations on the part of the defendants as to certain contracts alleged by them to be held in connection with their line, they, the plaintiffs, were induced to enter into an agreement with the defendants for the amalgamation of the two lines and the formation, in connection with the defendants, of a joint stock company to own and run the same, and seeking damages in respect of such misrepresentations. One of the defendants died after issue joined:—Held, that the action could be proceeded with against the surviving defendants. *Beatty* v. *Neelon*, 9 O. R. 385. See *S. C.*, 12 A. R. 50, 13 S. C. R. 1.

——— *Negligence—Death of Plaintiff.*]—P. brought an action against a conductor for injuries received in attempting to board a train, alleged to be caused by the negligence of the conductor in not bringing the train to a standstill. After the trial and before any order for a new trial P. died, and a suggestion of his death was entered on the record:—Held, that under Lord Campbell's Act, or the equivalent statute in New Brunswick (C. S. N. B. c. 86), an entirely new cause of action arose on the death of P., and the original action was entirely gone and could not be revived. *White* v. *Parker*, 16 S. C. R. 699.

——— *Seduction — Death of Plaintiff.*]—Semble, that under O. J. Act, rule 383, an action of seduction abates by the death of the plaintiff. *Udy* v. *Stewart*, 10 O. R. 591.

Counsel — *Interlocutory Application.*]—Upon an interlocutory application the court will not hear more than one counsel for any party. *Langdon* v. *Robertson*, 12 P. R. 139.

——— *Position of Junior.*] — Junior counsel are not at liberty to take positions in argument which conflict with the positions taken by their leaders. *International Bridge Co.* v. *Canada Southern R. W. Co.*, *Canada Southern R. W. Co.* v. *International Bridge Co.*, 7 A. R. 226. But see 19 C. L. J. 358.

See Appeal, VI., IX.—Arbitration and Award, V. 2 (b)—Arrest, I. 2, II. 2—Attachment of Debts, III. — Bankruptcy

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(Abolished by 40 Vict c. 8, s. 3; R. S. O. 1877 c. 50, s. 281).

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III. REHEARING BY FULL COURT.

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PRINCIPAL AND AGENT.

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I. Agency Generally.

1. *Agent Acting for Opposite Parties.*

Account—*Jury.*]—Plaintiff, in support of a claim for $547.35, in an action against an administratrix, put in an account rendered by an agent of intestate, shewing a balance of $200.16, after crediting $317.19. There was also evidence from which the jury might have found the same agent to have been the agent of the defendant:—Held, that the question of agency should have been submitted to the jury, and if they found that the account in question had been delivered by the agent of defendant, it must be considered that plaintiff proved every part of his particulars, debits, credits, and balance. *Waddell* v. *Gildersleeve*, 16 C. P. 565.

Commission.]—If an agent employed on commission to purchase real estate receive or agree to receive from the vendor any remuneration or commission contingent on the sale of the property, he acts in contravention of his duty to his principal, and forfeits his right to commission from the latter. *Kersteman* v. *King*, 15 C. L. J. 140.

Tortious Act of Common Agent.]—Plaintiffs sued on a contract with defendants to perform certain works, to be paid for monthly in debentures made by defendants, on the estimate of their engineer, payments to be made by orders on the debentures, or proceeds thereof to be deposited in the hands of B. F. & Co., London, England. The third breach of the declaration was that though plaintiffs completed their work, and defendants delivered to the plaintiffs orders to the amount of the certificates of the engineer, &c., upon B. F. & Co., in whose hands defendants alleged the debentures had been deposited; yet defendants did not deliver, &c., but B. F. & Co., being their agents, wrongfully refused for an unreasonable time to deliver the debentures or proceeds, &c. Defendants pleaded that B. F. & Co. were the agents of the plaintiffs as well as of the defendants, and not of defendants alone:—Held, a good defence, for neither party could be liable to the other for the tortious acts of their common agents. *Wilson* v. *United Counties of Huron and Bruce*, 10 C. P. 498.

See Gore Bank v. *County of Middlesex*, 16 U. C. R. 595; *Ewart* v. *Steven*, 18 Gr. 35, 16 Gr. 193; *Wright* v. *Rankin*, 18 Gr. 625; *Culverwell* v. *Campton*, 31 C. P. 342; *White* v. *Curry*, 39 U. C. R. 569.

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2. *Appointment—Necessity for Seal or Writing.*

Receipt of Moneys under Bond.]—*See Regina* v. *Sucider*, T. T. 3 & 4 Vict., R. & J. Dig. col. 2991.

Sale of Lands—*Company.*] — It is not necessary that the seal of a building society should be affixed to an authority to its agent to sell; the entry in the books of the society is sufficient. *Osborne* v. *Farmers' and Mechanics' Building Society*, 5 Gr. 326.

Subscription for Shares.] — Defendant had taken shares in a road company, for which he subscribed his name, and the secretary called to solicit a further subscription. Defendant told him he would take another £100, and the secretary afterwards, in the defendant's absence, put down his name for these shares:—Held, not sufficient to charge defendant. *Ingersoll and Thamesford Gravel Road Co.* v. *McCarthy*, 16 U. C. R. 162.

The authority to take shares should be in writing; but, semble, that authority by parol would be binding. *Ib.*

See Dominion Bank v. *Knowlton*, 25 Gr. 125; *Wright* v. *Rankin*, 18 Gr. 625, *post* III.

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3. *Delegation of Authority.*

Clerks.]—The general rule is that clerks of an agent are not agents of the principal. *Hope* v. *Dixon*, 22 Gr. 439.

Receipt of Moneys — *Award.*] — Where money by an award is to be paid to the plaintiff or to the plaintiff's attorney, the attorney

cannot substitute another attorney under him to receive the money. *Masecar* v. *Chambers*, 4 U. C. R. 171.

——— *Bank.*]—The local agents of a bank cannot grant powers of attorney to third parties to receive money ordered to be paid to the bank by a decree of the court. *Bank of British North America* v. *Rattenbury*, 1 Ch. Ch. 65.

Survey—*Line.*]—Held, that a line run by a subordinate, and adopted by the principal surveyor, is the work of the latter, and must be treated as such. *Owens* v. *Davidson*, 10 C. P. 362.

4. *Proof of Agency.*

Affidavit in Another Cause.]—The action being for goods sold, the question was the authority of one McA. to bind defendants, as their agent:—Held, that an affidavit made by McA. describing the nature of his agency, and filed by defendants on motion for a new trial in another suit brought by this plaintiff against them, was clearly admissible against defendants. *Thayer* v. *Street*, 23 U. C. R. 189.

Agreement—*Statute of Frauds.*]—Where it was shewn by evidence that the defendant had agreed to attend and buy in a property, offered for sale by auction, as the agent of the plaintiff and for his benefit:—Held, notwithstanding that the Statute of Frauds had been set up as a defence, and there was not any writing evidencing the agreement, that the plaintiff was entitled to a decree to carry out the agreement. *Ross* v. *Scott*, 22 Gr. 29, 21 Gr. 391.

Property of the plaintiff's husband having been offered for sale under mortgage, she agreed orally with the mortgagee's solicitors to purchase it, but, not having the means to make the cash payment required, she saw one of the defendants, who agreed to lend her for a year the necessary money, and to take a deed of the property as security, and he gave to the solicitors a written offer to purchase on the terms arranged by the plaintiff, which offer was by the solicitors orally accepted. The property was however in fact conveyed to the other defendant, who was the daughter of her co-defendant: — Held, per Hagarty, C. J. O., and Maclennan, J.A., that, on the evidence, the conveyance to the daughter was the result of a fraudulent conspiracy between her father and herself to deprive the plaintiff of her bargain; that therefore the daughter stood in no better position than her father; and that he was an agent for the plaintiff whose agency might be proved by oral evidence notwithstanding the Statute of Frauds. Held, per Burton and Osler, JJ.A., that, on the evidence, the purchase by the daughter was not a collusive one, but was one for her own benefit, and could not be impeached. The court being equally divided, the judgment at the trial was affirmed. Upon appeal to the supreme court of Canada, the opinions of Hagarty, C. J. O. and Maclennan, J. A., were adopted. *McMillan* v. *Barton*, 19 A. R. 602, 20 S. C. R. 404.

Bank — *Sale of Grain by Consignee.*] — Plaintiff shipped grain from P., consigned to his agent at O., directing the consignee to hold it subject to defendants' order. The local agent of defendants at P. concurred therein, but no advance was made on account of the grain, nor any bill of lading indorsed to defendants, nor other transfer of title made. The consignee obtained advances at O. on the grain, and it was sold to repay them:—Held, that the defendants were not liable for such a sale to plaintiff, for there was no evidence to shew the consignee their agent, and they had acquired no control over the goods. *Wilson* v. *Bank of Montreal*, 20 C. P. 411.

Company—*Acceptance of Bill.*]—Where a bill is drawn by a person signing as agent of a company, the acceptance admits the signature and authority of the agent, and precludes any technical objections as to the composition or description of the company, or their ability to draw the bill. *Bank of Montreal* v. *DeLaire*, 5 U. C. R. 362.

——— *Acceptance of Services — Payment.*]—Held, under 34 Vict. c. 48, the Act incorporating the Ontario and Quebec R. W. Co., and the Railway Act of 1868, that the defendants were empowered to appoint an agent to negotiate for and obtain municipal aid, and that for that purpose a resolution of the board of directors, or any entry or minute in their record of proceedings, would have been sufficient, without the formality of a by-law or the seal of the company. The plaintiff sued defendants for services performed by him as their agent in obtaining bonuses from the different municipalities through which the defendants' railroad was to pass, and the only evidence of his appointment was a letter written by one of the directors, stating that at a meeting of the board he was directed to make arrangements with the plaintiff to work up the bonuses, and requesting him to proceed forthwith. It was shewn also that the president had recognized and adopted his services and partially paid therefor:—Held, that this was not sufficient proof of the plaintiff's engagement, or of the acceptance of his services by the company; but a new trial was granted without costs, to enable him to supply proper evidence if possible. *Wood* v. *Ontario and Quebec R. W. Co.*, 24 C. P. 334.

Contradictory Evidence — *Directing Issue*—*Account.*]—A bill was filed charging defendant with having purchased certain lands as plaintiff's agent and with his money, and praying to have defendant declared trustee of the land for the plaintiff. The evidence on the point of agency or no agency being contradictory, issues were directed to be tried as to the agency, and as to the payment of the amount of purchase money having been made out of moneys belonging to plaintiff, or having been charged against him in account by defendant. *Macaulay* v. *Proctor*, 2 Gr. 390.

An assignment of certain property was made to defendant as agent for plaintiff; and defendant refusing to account therefor, the plaintiff filed a bill for an account. The court, upon the facts set out in the case, without directing an issue, decreed an account with costs, although defendant denied his agency, and swore that a receipt produced by the plaintiff was a forgery; and the evidence upon the point was conflicting. *Rosenberger* v. *Thomas*, 4 Gr. 473.

General Authority—*Knowledge of Limitation.*]—In an action for not accepting goods, alleged to have been purchased by one P., as

defendant's agent:—Held, that there was evidence for the jury that P. had a general authority to act for the defendant, defendant having spoken of him in his letter as our Mr. P., and there being evidence of his purchasing for defendant on other occasions; and that plaintiff could not be affected by telegrams, of which he was ignorant, which passed between P. and defendant, limiting P.'s authority as to price. *Murphy* v. *Thompson*, 28 C. P. 233.

Partnership — *Admissions — Bills and Notes.*]—In an action against a member of a joint stock company, his admissions that he was a partner are sufficient to prove his liability, without producing the partnership deed; and when a company is formed for purposes which do not render the drawing and accepting of bills and notes necessary, it will be sufficient to establish the liability of a partner on bills or notes drawn or accepted in the name of the company by their secretary, that while he was a partner the secretary was in the habit of so drawing and accepting bills, which were afterwards paid with his concurrence and admission of liability. *Lee* v. *Macdonald*, 6 O. S. 130.

Payment of Wages.]—Defendants agreed to advance money to the plaintiffs to enable them to procure a steamer, which was to run in connection with defendants' railway, and guaranteed them against loss up to a specified sum. The earnings of the vessel were to be shared as provided for; and it was agreed that defendants should name and pay a person to act as purser, and keep an account of the receipts and expenditure. He was to be subject to their authority, and to mess with the captain at the plaintiffs' expense:—Held, that defendants were not liable to account to the plaintiffs for moneys received by him and not paid over, for he was accountable to the plaintiffs. *Vanevery* v. *Buffalo and Lake Huron R. W. Co.*, 20 U. C. R. 630.

Power of Attorney—*Scope of Agency.*]—Upon the insolvency of J. B., who carried on business under the name of B. & Co., his wife purchased the estate from his assignee, the business was continued under the same name, and was entirely managed and controlled by J. B. and his wife, who authorized him by power of attorney to manage the same, and to make promissory notes in and about her said business. Being pressed for payment of notes which he had given for a debt due before his insolvency, he gave his creditor notes signed "per pro. B. & Co. J. B." Subsequently he was sued on these notes, when he swore they were his wife's notes, and made with her authority, whereupon the holder sued the wife. In the action against her she swore that she had separate estate and that she had purchased her husband's estate with it; but, on the advice of her counsel, she declined to give any information concerning it. She swore that J. B. had no authority to give the notes in question, but it appeared that he frequently discussed his own affairs with her, and she would not swear that he did not tell her that he had given these notes:—Held, that, notwithstanding the power of attorney, the real scope of J. B.'s agency could be ascertained from any admissible evidence, and that there was sufficient to justify the finding of the Judge that J. B. had authority to sign the notes. *Cooper* v. *Blacklock*, 5 A. R. 535.

Presumption—*Similar Acts.*]—The fact that a man employed another to do a specified act for him at a particular time—e.g., to accept service of papers—raises no presumption whatever that the person so employed has authority to do a similar act at a different time. *Smith* v. *Roe*, 1 C. L. J. 154.

Prima Facie Case — *Displacement — Costs.*]—A bill was filed against defendant claiming the difference between £75 paid and £300 received by him for a share in a joint stock company, on the ground that in the matter of the purchase he had acted as agent of the plaintiff. The defendant by his answer positively denied all agency in the matter, and asserted that he had inadvertently made use of the words, "secured a share," which tended to support the claim instead of "sold a share," and the evidence in the cause was to the same effect. The court dismissed the bill, but, as the letter of defendant had tended to create a misapprehension of the facts, without costs. *Anderson* v. *Cameron*, 6 Gr. 285.

Principal or Agent.]—Upon a sale of hides:—Held, upon the evidence, that the defendants were acting as principals, not as agents of the plaintiffs, the purchasers, and therefore could not charge commission. *Macklem* v. *Thorne*, 30 U. C. R. 464.

One C. entered into agreements with several persons to carry freights for them at certain named prices to be paid to the defendant, not mentioning any particular vessels in which the same were to be carried, and then agreed with the defendant as part owner and master of vessels in which the plaintiffs had an interest, at rates considerably below the sums agreed upon. The defendant and C. both swore that the arrangement had not been made by C. as agent of the defendant, but for his own benefit:—Held, that the fact of the defendant having rendered an account in his own name and also sued for a portion of the freight, though aided by the other circumstances mentioned in the judgment, was not sufficient to countervail the positive denials of the defendants and C., that the contracts had not been made in behalf of and as agent for the defendant, freight being, prima facie, payable to the master of a vessel, and the cargo need not be delivered by him until the freight is paid, although in any other transaction such conduct would have been strong evidence that the defendant was the principal contractor. *Merchants Bank* v. *Graham*, 27 Gr. 524.

Question for Jury.] — The question of agency is a question of fact for the jury, there being some evidence to go to them, of which the Judge must decide. *De Blaquiere* v. *Becker*, 8 C. P. 167.

——— *Extent of Agency.*]—In an action on a replevin bond against principal and sureties, the breach assigned was the non-return of a portion of the timber replevied, for which the defendants in replevin, the now plaintiffs, obtained judgment. It appeared that the timber, when replevied, was on the banks of a river some distance above the point where it was intended to be shipped, and by directions of F., the plaintiff in replevin, it was put in the possession of one L., who was F.'s general agent for looking after his land in that part of the country. L. authorized the defendant in replevin to take it down to the shipping

point, where it was again taken possession of for F., by a person appointed by L. to receive it there, and shipped for F. L. had been forbidden by F. to permit this removal to the shipping point, but the defendant in replevin was not aware of it, and such removal was to the benefit of whoever might be the owner:—Held, that the receipt of the timber at the shipping point by F. was a ratification on his part of the removal, though such removal was in violation of his orders. *Patterson* v. *Fuller*, 32 U. C. R. 240.

Held, also, that it was properly left to the jury to say whether L., from the nature of the property and its situation, and being appointed agent to receive possession, had reasonable authority to arrange that it should be taken to the shipping point for the benefit of all concerned; and that they were fully warranted in finding that he had. *Ib.*

Reputation—*Collection of Money—Knowledge.*]—In an action for demurrage, the shipping bill of certain staves, forming the contract on which the plaintiff relied, was signed "E. W. Atkinson, agent;" and the only evidence to prove his agency was that of a witness who swore that he (A.) had been the generally reputed agent of defendant in the stave business at the port of shipment for several years, and once collected money from the witness for defendant, but neither this nor any other act of agency was shewn to have come to defendant's knowledge:—Held, not sufficient to go to the jury, and that the plaintiff was properly nonsuited. *Myles* v. *Thompson*, 23 U. C. R. 553.

Sale of Goods.]—In an action for the non-delivery of certain groceries sold:—Held, upon the evidence that K., by whom the sale was made, was shewn to be the defendants' agent authorized to sell on their behalf. *Ockley* v. *Masson*, 6 A. R. 108.

Sale of Land — *Receipt of Mortgage Money.*]—A. had authority to collect rent and to contract for the sale of property and to receive the down payments:—Held, that such authority did not entitle him to receive payments on a mortgage given for unpaid purchase money. *Grecnwood* v. *Commercial Bank of Canada*, 14 Gr. 40.

Where such an agent had at one time, without authority, received some payments on such mortgage, which the principal did not publicly repudiate, and another mortgagor, who did not appear to have had notice of these payments, made a payment to the agent on his mortgage, fourteen months after the agent had ceased to receive any mortgage money, such payment was held to be not a good payment. *Ib.*

School Corporation — *Notoriety — Appointment.*]—If a person acts notoriously as the officer of a corporation, and is recognized by it as such officer, a regular appointment will be presumed, and his acts will bind the corporation, although no written proof is or can be adduced of his appointment. *School Trustees of Township of Hamilton* v. *Neil*, 28 Gr. 408.

Set-off—*Inference of Admission — Reception of Evidence.*]—In an action by the plaintiff for wages earned as a lumberman, the dispute being whether the person hiring him was the defendant's agent, the defendant pleaded a set-off, and at the trial attempted to prove under it that the plaintiff had received goods from the store at the shanty:—Held, that no inference could be drawn from this as an admission by the defendant of his liability for the plaintiff's wages. 2. That statements made by two persons under the circumstances set out in the case were properly received. 3. That it was allowable to prove by persons working with the plaintiff that they had been paid by defendant on application to him, and that in suits brought by them against him he had paid money into court; and that the judgments in such suits were also admissible, though unnecessary. 4. That a memorandum in defendant's writing, unsigned, and attached to a bill of sale relating to the timber, was also admissible. *Stewart* v. *Scott*, 27 U. C. R. 27.

Ship — *Owners — Supplies — Steward — Knowledge.*]—Action for provisions furnished by plaintiffs to steamboats belonging to and run by defendants. It appeared that the steward of each boat was bound by contract with defendants to furnish these supplies, but there was contradictory evidence as to the plaintiffs' knowledge of this arrangement, and as to the circumstances under which the goods were ordered and furnished. The jury having found for the plaintiffs:—Held, that upon the evidence a new trial was properly granted. 2. That no absolute rule can be laid down as to the liability of ship owners in such matters, but each case must depend on its own facts; and that here the jury should be asked, upon all the evidence and considering the nature of the business, to whom was the credit given, were the persons ordering the supplies the defendants' agents for that purpose within the ordinary rules as to principal and agent, and was the natural inference of defendants' liability sufficiently rebutted by the plaintiffs' knowledge of the true arrangement? *Cloy* v. *Jacques*, 27 U. C. R. 88.

Subpoena—*Agent of Absent Defendant.*]—Where a plaintiff desires to effect service of a subpœna by serving the agent of an absent defendant he must shew that the person to be served is the agent of the defendant in relation to the subject matter of the suit, to such an extent as to satisfy the court that the acceptance of a subpœna by such agent will fall within the authority conferred upon him by his principal. Where, therefore, a motion for such an order was made grounded on an affidavit which stated that the agent at present conducted the defendant's business of land agent, and had "acted for the defendant in reference to the mortgage which was the subject matter of the suit," the application was refused. *Passmore* v. *Nicolls*, 1 Gr. 130.

Tenants in Common—*Expenditure of—Mortgagee.*]—The plaintiff and several others, including one W., were tenants in common of certain oil lands, on which an oil well was sunk. In 1875 W. conveyed his interest to the defendant by way of mortgage for a loan, and defendant received from time to time from the plaintiffs, who, as they alleged, had at the request of the several co-owners acted as their agents, the amount of W.'s share of the proceeds of the sale of oil. The plaintiffs, having incurred heavy liabilities in sinking new wells, and claiming that in so doing they had acted as the defendant's agents, brought an action against the defendant to recover her proportion thereof:—Held, that the evidence failed to establish any such agency. Held, also, that the defendant did not by reason of the mortgage to her, and of the receipt of the proceeds of the oil, assume any liability which

W. was under in respect to his co-owners; but, even if she did, her position would be that of a partner, and she would be entitled, before an action would lie against her, to have the partnership accounts taken, and the balance ascertained or admitted to be due. Held, also, that the plaintiff's claim was not a purely money demand, so as to be recoverable as such at law under the A. J. Act. *Hope* v. *Ferris*, 30 C. P. 529.

See Williams v. *Corby*, 5 A. R. 626, 7 S. C. R. 470; *Kitchen* v. *Dolan*, 9 O. R. 432.

See, also, *post* VI.

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5. Ratification of Agency.

Distress.]—A distress made by an agent for the benefit of his principal in his own name instead of his principal's, and subsequently ratified by the principal:—Held, legal. *Grant* v. *McMillan*, 10 C. P. 536.

Forwarding Goods—*Deviation — Knowledge.*]—It is no defence for a forwarder deviating from his instructions, that after the deviation he told the plaintiff's agent he had done so and no objection was made by the agent. Aliter, if he told the agent of his intention before the deviation, and could shew that the agent had any discretion in the matter. *Fowler* v. *Hooker*, 4 U. C. R. 18.

Lease — *Finding of Jury.*] — Plaintiff's agent, without authority under seal, by deed leased to defendant for seven years certain land belonging to plaintiff. The evidence shewed that the lease when signed was delivered to plaintiff, and that he several times requested the agent to go and see whether defendant had performed his covenants under it; that he had never objected to the lease, but had been on the lot, and had had it surveyed after defendant took possession of it. The jury found that the plaintiff had adopted the lease, and re-delivered it as his deed:—Held, that their finding was right, and that the lease was binding upon the plaintiff. *Pettigrew* v. *Doyle*, 17 C. P. 34.

——— *Heir-at-Law — Account.*]—One E. was left in charge of the estate of N., who promised to leave the same by will to E. N. afterwards left this country and died abroad intestate, and E., acting on the presumption that N. had died without heirs, made a building lease in his own name of a portion of the estate, and the lessee entered into possession and erected valuable buildings thereon. Afterwards the heir of N. established his right to the estate, and refused to recognize the lease; whereupon a bill was filed seeking to bind the heir with this lease, or that he should pay the value of the improvements, on the ground of a ratification of the lease. The court refused to grant either branch of relief asked; and a suit by the heir in the court of chancery against the lessor for an account of the rents, &c., received by him from the estate of the intestate, was held not such a proceeding as could properly be considered a ratification of E.'s acts. *Moffatt* v. *Nicholl*, 9 Gr. 446.

Mortgage — *Bank — Repudiation—Subsequent Ratification.*]—H. and I., being indebted to a bank, arranged with the plaintiff T., the bank's agent at H., where the debt arose, that in order to secure the same a mortgage should be given to him and the other plaintiff, the bank's general manager in Canada. T. had no express power to bind the bank to take this security, and his co-plaintiff was at the time absent from the country, and ignorant of the transaction. A mortgage was accordingly drawn up, dated 22nd June, 1867, and purporting to be made between H., I., and S., of the first part, and the plaintiffs, as trustees for the bank, of the second part, reciting that the parties of the first part were indebted to the bank in certain bills of exchange, and witnessing that H., in consideration, &c., assigned to the plaintiffs the household furniture in his residence, with a proviso that the mortgage was to be void on payment by the parties of the first part of the bills of exchange. On the court of directors in England being apprised of the transaction both by T. and his co-plaintiff, in a report made to them by the latter in condemnation of it, they at once repudiated it, and on 22nd August following wrote T. distinctly to that effect: and when their letter reached him, on the 5th September, the goods were still in H.'s possession, and nothing had been done under the mortgage beyond recording it. On the 7th September T. resigned his position in the bank, and on 16th September defendant's execution against the goods of H. and I. was placed in the sheriff's hand. In the following October the bank instructed T.'s successor to realize the security:—Held, that the bank by their repudiation of the mortgage had let in defendant's execution, and that their subsequent ratification of T.'s acts and adoption of the security could not defeat the writ. *Taylor* v. *Ainslie*, 19 C. P. 78.

——— *Equitable Mortgage—Notice—Lapse of Time.*]—In detinue for a mortgage, it appeared that the plaintiff and his father were executors and trustees under the will of one C., the plaintiff being also residuary legatee; and that in April, 1864, the plaintiff, who was then residing in England, having written to his brother to send him some money, the brother, who had access to or possession of the mortgage as agent of the father, since deceased, procured a loan for the plaintiff from the defendant of £25 stg., on his depositing the mortgage with defendant as collateral security, not only for this amount, but for a further sum of $270, previously obtained by the brother, and then due, shewing defendant C.'s will, and promising to notify plaintiff of the deposit and obtain his consent thereto. The plaintiff was so notified but did not repudiate the transaction, either prior to his return to Canada, in 1867, or until the autumn of 1875, when he served the plaintiff with a demand, and in May, 1876, commenced this action:—Held, that the plaintiff could not recover, for under the circumstances he must be assumed to have authorized the deposit, which he, as executor and residuary legatee, had power to make. *McLean* v. *Hime*, 27 C. P. 195.

Payment — *False Representations.*] — Where payment is obtained from a debtor by one who falsely represents that he is agent of the creditor, upon whom a fraud is thereby committed, if the creditor ratifies and confirms the payment, he adopts the agency of the person receiving the money and makes the payment equivalent to one to an authorized agent. The payment may be ratified and the agency adopted, even though the person receiving the

money has, by his false representations, committed an indictable offence. *Scott* v. *Bank of New Brunswick*, 23 S. C. R. 277.

Purchase of Land—*Company — Directors.*]—A company was formed in England with limited liability to carry on business at Oshawa in this Province. The majority of the directors were resident in England. The managing director at Oshawa, without authority, contracted for the purchase of real estate for the use of the company at Oshawa, and signed the contract as "managing director." For convenience the conveyance was made to the director personally, and he executed a mortgage for the unpaid purchase money, and went into possession and used the property for the purposes of the company. The purchase was immediately communicated by him to the English directors, and they disapproved thereof, but did no act repudiating the purchase; on the contrary, they directed the buildings to be insured:—Held, that this conduct was an adoption of the contract by the directors: that they had power to adopt it, and had the power of binding the company; and that the company were liable to the vendor for the purchase money. *Conant* v. *Miall*, 17 Gr. 574.

II. Duty of Agent.

Bank—*Acceptance of Bill—Custom.*]—The plaintiffs, a bank at Milwaukee, sent to defendants, a bank at Toronto, for collection, a bill drawn by A. at Milwaukee on B. at Toronto, payable forty-five days after date, together with a bill of lading indorsed by A. for certain wheat consigned by A. to B.:—Held, that, in the absence of any instructions to the contrary, defendants were not bound to retain the bill of lading until payment of the draft by B., but were right in giving it up to him on obtaining his acceptance. Evidence having been given as to the custom of merchants in such cases, both in the United States and Canada:—Held, that the latter only could be material. *Wisconsin Marine and Fire Ins. Co. Bank* v. *Bank of British North America*, 21 U. C. R. 284, 2 E. & A. 282.

Defence of Action—*Insurance Company—Chattels—Recovery of Moneys.*]—It is the duty of an agent to defend an action improperly instituted against his principal. Where, therefore, an insurance company, having ceased to carry on business in this country, paid off a clerk, who was immediately employed by a firm of which the agent of the company was a member; notwithstanding which the clerk sued the company for his salary, and the agent allowed judgment to go by default, and paid to the plaintiff in the action the amount of the judgment:—Held, that the agent was not entitled to credit for the amount so paid on taking an account of his receipts and payments on behalf of the company: that the utmost for which he could be entitled to credit, was the excess of the salary at which the clerk had been engaged by the company over and above what he received in his new employment. *Jay* v. *Macdonell*, 17 Gr. 436.

Where, on an insurance company quitting business, a quantity of office furniture was in the possession of the agent which was not forthcoming:—Held, that it was the duty of the agent to have made proper entries shewing what had become thereof; and in the absence of such proof that his estate was properly chargeable with its value. *Ib.*

A paid agent whose duty it is to receive from other agents moneys due to the principal, is bound to take steps for the recovery thereof, unless he shews that, had he taken proceedings to enforce payment, or that there was reasonable ground for believing that, if proceedings had been taken, they would have proved ineffectual. *Ib.*

III. Liability of Agent to Principal.

1. *Benefit Acquired by Agent.*

Fraudulent Misappropriation of Money—*Interest.*]—Where it appeared that an agent had received large sums for his principal, and had used them for many years in his own business, instead of remitting them, as he might and should have done, to his principal, he was charged with six per cent. interest and annual rests. *Landman* v. *Crooks*, 4 Gr. 353.

——— *Purchaser of Land for Value.*]—The plaintiff, being owner of land, after having mortgaged it, emigrated to Australia, and subsequently remitted money to his agents here to pay off the incumbrance; but they applied the money to their own use. Subsequently the assignee of the mortgage proceeded to foreclose, in which suit an answer was put in on behalf of the plaintiff, but without his knowledge or consent, admitting the allegations of the bill, and that the full amount of principal and interest was due; whereupon a final order of foreclosure was, in due course, obtained; and the plaintiff in that suit conveyed to defendant A. for $1,002, the value of the property; and on the same day defendants M. and S., as attorneys for the plaintiff, conveyed the premises to A., who was ignorant of any fraud in the matter. The plaintiff, having returned to this country, and ascertained the frauds which had been practised upon him, filed a bill against his agents and the purchaser, A.:—Held, that the plaintiff, so far as the purchaser was concerned, was bound by his answer, and was not entitled to relief as against him; that the fact of the purchaser having heard before his purchase that the plaintiff had remitted money to pay the mortgage was not sufficient to charge him with notice that the foreclosure was wrongful; but, in view of the fraudulent conduct of the attorneys, the court made a decree against them for the amount realized on the sale of the land, and directed them to pay the costs of the suit, including the costs of the purchaser. *McLean* v. *Grant*, 20 Gr. 76.

Mixing Goods — *Following.*]—When an agent purchases goods for his principal with money supplied by the latter, there is a trust impressed upon the goods in the principal's favour, and this trust is enforceable against the agent's assignee for the benefit of creditors, even though the agent has, while purchasing for the principal, also purchased goods of the same kind for himself and has not set aside specific portions of the goods to answer the principal's claim. Harris v. Truman, 9 Q. B. D. 264, applied. *Long* v. *Carter*, 23 A. R. 121. See the next case.

If an agent is intrusted by his principal with money to buy goods, the money will be

considered trust funds in his hands, and the principal has the same interest in the goods when bought as he had in the funds producing it. If the goods so bought are mixed with those of the agent, the principal has an equitable title to a quantity to be taken from the mass equivalent to the portion of the money advanced which has been used in the purchase as well as to the unexpended balance. Affirming the previous case. *Carter* v. *Long*, 26 S. C. R. 430.

Purchasing in Agent's Name — *Parol Contract.*]—The plaintiff agreed with J. to purchase a mining lease for their joint benefit, the consideration for which was to be the testing of the ore at the crushing-mill of the plaintiff, and at his expense. In pursuance of this arrangement, J. did arrange for the lease, but took the agreement therefor in his own name. The ore was, as agreed upon, tested at the crushing-mill of the plaintiff, and at his expense, but J. attempted to exclude the plaintiff from any participation in the lease, asserting that he had obtained the same for his own benefit solely:—Held, that the true agreement could be shewn by parol; and that the plaintiff was entitled to the benefit of the agreement. *Williams* v. *Jenkins*, 18 Gr. 536.

Purchasing Property of Principal.]—One H., a clerk in the office of the bursar of King's College (where all business connected with the sale of lands of Upper Canada College was transacted), procured a contract to be executed by the University for the sale of certain of such lands to J. Defendants alleged that H. had acted as J.'s agent in the matter, but the court was satisfied that J.'s name had been used by H. for his own benefit, and that the contract was in breach of H.'s duty as such clerk as aforesaid, and therefore ordered the contract to be rescinded with costs. *Upper Canada College* v. *Jackson*, 3 Gr. 171.

In 1843 the plaintiff, W. J. T., before leaving Canada, conveyed certain lands, in which he had an interest as assignee of a contract to purchase, to his brother, G. T., one of the defendants. In April, 1851, G. T., in anticipation of a suit which was afterwards brought by one C. against W. J. T., in relation to the lands in question, without the knowledge of his brother re-assigned the property to him, and having paid the balance of the purchase money, a deed of the lot issued at G. T.'s request to W. J. T., as such assignee. In October following, a power of attorney was sent to and executed by W. J. T., who was then in California, in favour of G. T., to enable him (G. T.) to "sell the land in question, and to sell or lease any other lands he owned in Canada." In 1856 G. T. conveyed the property to W., the respondent, who had acted as solicitor for W. J. T., and had full means of knowing G. T.'s position and powers, for an alleged consideration of $1,000, and W. immediately re-conveyed to G. T. one-half of the land for an alleged consideration of $200. In 1875 W. J. T. returned to Canada, and in January, 1874, filed a bill impeaching the transactions between his brother and W., seeking to have them declared trustees for him:—Held, reversing the judgment of the courts below, 23 Gr. 496, 1 A. R. 245, sub nom. Taylor v. Taylor, that W. J. T. was the owner of the lands in question; that he was not debarred by laches or acquiescence from succeeding in the present suit; and that the transaction between G. T. and W. should be set aside. *Taylor* v. *Wallbridge*, 2 S. C. R. 616.

The rule of equity which prevents an agent acquiring a benefit for himself in any dealings with the estate of the agency, acted upon where an agent had been employed to sell or exchange certain lands of the principal, which, however, the agent had been unable to effect, and the property was shortly afterwards offered for sale by auction under a power of sale in a mortgage, when the agent bid, and became the purchaser. The court, in a suit impeaching the purchase, declared the agent a trustee for the principal; but, as the plaintiff made several unfounded charges of fraud and other misconduct, the relief asked was given without costs. *Thompson* v. *Holman*, 28 Gr. 35.

The defendant had for some years acted for the plaintiff in looking after his lands, and paying the taxes; but in 1874 they had some difficulty, and from that time the plaintiff ceased to correspond with the defendant, and employed one H. to pay the taxes, and look after the property. H., without any instructions from the plaintiff, on one occasion wrote to the defendant requesting him to ascertain the amount of the taxes, and to draw on him therefor, with which request the defendant complied, but nothing further occurred to change the relative position of the parties before the sale:—Held, per Burton, J.A., that under these circumstances the confidential relations which had previously existed must be held to have ceased, and that the defendant was not precluded from purchasing the plaintiff's land at a sale for taxes. Per Proudfoot, J., that what took place could not have the effect of determining the fiduciary relationship between them, and the defendant could not purchase the plaintiff's land to his prejudice. *Fleming* v. *McNabb*, 8 A. R. 656.

Sale to agent of land bought by him in contemplation of a sale at an advanced price to persons whom he misrepresented to the principals as having withdrawn from the position of purchasers. *Walmsley* v. *Griffith*, 10 A. R. 227.

Purchase of mortgaged premises sold under power of sale by agent of mortgagee. *Ingalls* v. *McLaurin*, 11 O. R. 380.

The attorney under an irrevocable power from the owner for the sale or other disposition of certain lands, and entitled in the event of sale to a share of the proceeds after payment of charges, agreed to pay out of the owner's share of the proceeds, when received, the amount of a further charge made by the owner, and subsequently purchased the lands himself:—Held, that he was not personally liable to pay the amount of the charge. Judgment in 27 O. R. 511 reversed. *Armstrong* v. *Lye*, 24 A. R. 543.

See Culverwell v. *Campton*, 31 C. P. 342.

See, also, TRUSTS AND TRUSTEES.

Secret Profits in Service — *Costs—Jus Tertii.*]—Profits acquired by the servant or agent in the course of or in connection with his service or agency fall to the master or principal. The manager of a cold storage company, at the request of the company, undertook to advise a meat company as to some changes in their plant, and used his position as adviser to influence the purchase by the meat company of a new plant from the defendants, who promised him a commission on any order they might receive through his assistance. This was not disclosed to his employers or the meat company:—Held,

that the transaction was one in connection with his service as manager of the cold storage company, and he could not recover a commission from the defendants. The defendants having at first conceded the plaintiff's right to recover, and then paid the money to the cold storage company, taking a bond of indemnity, the action was dismissed without costs. *Jones* v. *Linde British Refrigeration Co.*, 32 O. R. 191.

Selling Land to Principal at Profit.] —A person agreed with the owners of oil lands for the purchase of certain lots at stipulated prices, and was to have a certain time to accept. The purpose was to form a company to buy at an advance. To facilitate this, the real prices were to be concealed; one of the vendors was to write a letter purporting to offer the whole at an advanced price, which he named; the interest of the other, whose judgment in such matters persons would be likely to rely on, was not to appear, and he was to write a letter recommending the transaction. The project was successful; the property was bought, conveyed, and paid for. The shareholders before completing the transaction had notice that something was wrong, but they carried out the purchase notwithstanding, and did not object to the transaction until after oil lands had greatly fallen in the market:—Held, reversing in this respect the order of the court below, 16 Gr. 147, that it was too late to rescind the purchase; but that the company was entitled to a decree for payment of the agent's profit, first against the agent himself, and in default of his paying, then against the other parties. *Lindsay Petroleum Oil Co.* v. *Hurd*, 17 Gr. 115. On appeal to the Privy Council it was held that the contract must be wholly rescinded, the price repaid, and the land reconveyed. *S. C.* L. R. 5 P. C. 221.

A resident abroad sent funds to an agent here to invest in lands; the agent bought land for £900, took the conveyance in his own name, asserted to his principal that he had paid £1,000 for it, made a conveyance to his principal, and charged him that sum in account. Some years afterwards the principal discovered the truth and filed a bill for relief. The court decreed him entitled to the land for £900, and directed a reference to the master to take an account of the dealings between the principal and agent. *Arthurton* v. *Dalley*, 2 Gr. 1.

W. was the owner (subject to a mortgage) of property which M. wished to buy. R., becoming aware of this, entered into friendly negotiations with both, and bargained with W. to take $3,500, and with M. to give $5,600 for the property. R. concealed this difference from the parties. W. conveyed to M. On her signing the deed, R.'s attorney paid to her the $3,500 (less the mortgage debt,) and on the deed being delivered to M. she (M.) paid to R.'s attorney $5,600. The facts afterwards coming to the knowledge of W., she filed a bill against R., claiming the balance of the $5,600; and it appearing that in the negotiations R. had given W. to understand that he was acting in her interest, and had no personal interest of his own, the plaintiff was held entitled to a decree against R. for such balance, with interest and costs. *Wright* v. *Rankin*, 18 Gr. 625.

There may be agency, and its duties and liabilities, without express words of appointment or acceptance; and where a party, in negotiating between two persons, the one desiring to sell, the other to buy, certain land, gave the former to understand that he was acting in her interest:—Held, that she was entitled to the full price which he obtained for the land, though it exceeded the amount which he had obtained her consent to accept. This case was affirmed in appeal. *Ib.*

Selling Stock to Principal—*Withholding Information.*] — An agent authorized to purchase cannot buy from himself without disclosing the fact. Accordingly, where an agent, authorized to invest in bank stock, appropriated to his principal some shares of his own, and rendered an account as if he had purchased so many shares for her, his principal, years afterwards, on the fact coming to her knowledge, was held entitled to repudiate the transaction, without any inquiry as to the fairness of the rate which she had been charged for the shares. *Harrison* v. *Harrison*, 14 Gr. 586.

When a person sells property of his own, and acts as the agent of his vendee in procuring other property of the same kind, different considerations apply as to the amount of information the agent is bound to give his principal in the two transactions. The plaintiff having expressed to defendant, who was the local agent of an insurance company, a desire to purchase fifty shares of the stock, defendant said he owned thirty shares which he would sell him, and the plaintiff requested the defendant to ascertain what the stock could be purchased for. The defendant wrote to the head office for information, and the manager answered stating that the stock had always sold at a premium. This the defendant communicated to the plaintiff; but did not disclose the further information, communicated by the manager that the company had during the then past year lost $32,000 over and above receipts. The plaintiff, believing the price to be as stated, directed defendant to procure him twenty shares, and took from him a transfer of his own thirty shares at par. In reality the stock was valueless:—Held, that the defendant, having withheld information which might and probably would have affected the plaintiff's determination as to entering into the speculation at all, was guilty of such a concealment as rendered him liable to make good the loss sustained on the twenty shares; but, as to his own thirty shares, he was only bound to communicate truthfully the information he had been directed to procure, namely, the price at which the stock could be purchased. The plaintiff, before intimating any intention of becoming a purchaser of stock, asked defendant as to the standing of the company, and defendant spoke of it as being in a good position:—Held, that this could not be treated as a representation binding on the defendant. *Machar* v. *Vandewater*, 26 Gr. 83.

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2. Negligence of Agent.

Delivery of Goods without Payment.] —Action against defendant as broker and commission agent, for negligence in delivering goods to the purchaser without the price being paid, and for not using due care that the purchaser was solvent. Evidence — Verdict for plaintiff—New trial granted on payment of costs. *Deady* v. *Goodenough*, 5 C. P. 163.

Disobedience of Instructions — *Damages—Set-off.*]—Action by agent against principal: — Held, that the defendant, upon the special facts stated in the report, had no right to a set-off against the plaintiff upon the common counts, neither could he support a plea of payment, or accord and satisfaction; but that, if he had any remedy at all against the plaintiff (and the court thought none existed), he should have brought a special action for negligence in not obeying his instructions. *Sword* v. *Carruthers*, 7 U. C. R. 313.

Duty to Insure.]—The plaintiff intrusted defendants, as commission agents, with a quantity of flour either to sell for him at Toronto, or to send it to be sold at Quebec or other places, as circumstances might require. He directed that the flour should be insured, and defendants effected an insurance with the British America Assurance Company. The flour was shipped by defendants at Fort Credit, consigned to G. & Co., Quebec. Owing to the negligence and want of skill of the captain, and of a pilot who was taken in at Kingston, the vessel was stranded in the St. Lawrence, and the cargo lost. The policy contained an express stipulation that the company would not be liable for any loss occasioned by the want of ordinary care or skill in the navigation of the vessel, and the plaintiff therefore failed to recover on it; but it appeared that this was the ordinary form of policy, and that the defendants could not have procured any other:—Held, that the plaintiff could maintain no action against the defendants for taking such a form of policy; and that, in the absence of any ground for suspicion, it was not their duty to inquire into the skill and experience of the captain and crew of the vessel. And semble, that, if an insurance might have been effected on more favourable terms, the defendants would have been justified in insuring as they did, having received no special instructions, and the company being one with which such insurances were usually effected by the trade. *Silverthorne* v. *Gillespie*, 9 U. C. R. 414.

Defendants, at Hamilton, having undertaken the disposal of certain teas belonging to plaintiffs, who lived at Montreal, and not having succeeded, were directed by them to return the teas to Montreal. Defendants shipped the teas on a steamboat to Montreal, without effecting any insurance thereon. The steamboat was lost on her voyage, but defendants did not advise the plaintiffs of such shipment till after the goods had been lost:—Held, that the defendants were not liable to damages for not having given the plaintiffs earlier advice, so as to enable them to have insured the teas. *Maitland* v. *Tylee*, 7 C. P. 335.

In an action by a principal against his agent for neglect in insuring his property (a stock of goods) in such a manner that, a loss occurring, the insurance company, on being sued for the insurance, obtained a verdict on the ground that the goods had been insured at an overvalue, the declaration alleged the value to be $5,000, of which defendant had notice, to which the defendant, amongst other pleas, pleaded that plaintiff had not, at the time of making application to insure, nor at any time thereafter, goods in his store to the value of $5,000, and the jury found for defendant on these pleas:—Held, reversing the judgment in 13 C. P. 115, that the traverse of value in the declaration was an immaterial traverse, and that the plaintiff was entitled to judgment non obstante veredicto. *McGuffin* v. *Ryall*, 2 E. & A. 415.

The plaintiff sued defendant, as the agent of an insurance company, alleging that the plaintiff had employed defendant to effect an insurance on his property, according to the rules of the company, but that defendant had so carelessly and negligently effected such insurance, that a loss by fire having occurred the plaintiff was prevented, by reason of such conduct of defendant in effecting the insurance, from recovering the amount thereof, and was put to trouble and expense in bringing an action therefor. Defendant pleaded an assignment of the policy by plaintiff to one G. before the fire. On demurrer to this plea, and exceptions taken to the declaration:—Held, that the plea was clearly bad, for plaintiff, notwithstanding the assignment, was the proper person to sue. 2. That the declaration (set out above), being for a misfeasance, did not require an allegation of a consideration or reward to support the action; but the defendant, having undertaken to do and having done an act gratuitously, was liable for his misfeasance in the performance of his undertaking. 3. That the defendant, after pleading over, could not object to the want of an allegation of the amount or duration of the insurance. 4. That defendant was entitled to judgment for the insufficiency of the count, because negligence generally, which was charged, is different from negligence to insure according to the rules of the company, which was what defendant was employed to do. *Johnston* v. *Graham*, 14 C. P. 9.

Investment of Money.] — The plaintiff intrusted $500 to defendant, who signed a receipt stating that it was to be lent, with $300 of his own, to one H., "being secured on the said H.'s storehouses," and in defendant's name, and bearing interest at nine per cent., payable to defendant, who would, on receipt of the interest, pay to the plaintiff her interest, $45 per year, and at the expiration of two years defendant to pay over to plaintiff both principal and interest; but defendant not to be responsible for the money except as paid by H. to him. Defendant, who acted gratuitously, and, as he stated, under the advice of a solicitor, finding that H. had not yet obtained the patent, advanced the $800 to H. on the security of a bond, not registered, conditioned that H. should give him a mortgage on the property within a month after receiving the patent, or pay the money in two years; but H., after the patent issued, gave a prior mortgage to another person, and became insolvent. The declaration alleged that defendant promised to invest the money on the security of a mortgage on the storehouses, and defendant admitted that he was gratuitous bailee only, and not shewn to have been guilty of negligence: — Held, that it was a case of contract founded upon good consideration, the intrusting him with the money, and that having broken it he was liable. Upon appeal this judgment was affirmed. The defendant, it appeared, without the plaintiff's authority, took a second mortgage upon the property, nearly two years after the bond, extending the time of payment for three years for the principal and accrued interest:—Held, that this was clearly such a breach of his agreement, and such a dealing with the plaintiff's money, as to make him liable. Held, also, that the

plaintiff should recover interest at nine per cent. for two years only, and at six per cent. thereafter. Semble, that defendant, not being an attorney, would not have been liable, if, having undertaken gratuitously to invest the plaintiff's money in a mortgage, he had instructed a competent attorney to attend to the matter, and relied upon his advice. *Holmes* v. *Thompson*, 38 U. C. R. 292.

Held, that it is a breach of duty in a person intrusted with money to invest in real estate, to invest on the security of a second mortgage, unless with the sanction of the lender, which such person must prove, and which the evidence in this case failed to establish. The value of the property herein was about $1,000; the first mortgage being for $325, and the second for $400, taken to the plaintiff. The borrower was a respectable mechanic in receipt of good wages, occupying the property himself, which was situated in the place where all the parties resided and carried on business. The Judge at the trial found that the defendant was not guilty of negligence so far as the value was concerned, and the court refused to interfere. Remarks as to the proper form of declaration in such a case, where the defendant was not paid by the lender but by the borrower. Upon the conflicting evidence set out in the case, the Judge at the trial found that the plaintiff had not been informed of the first mortgage, under which the property was sold, leaving only about $60 applicable to the second mortgage. The court refused to set aside this finding, and sustained the verdict for the plaintiff. *Carter* v. *Hatch*, 31 C. P. 293.

An agent employed to purchase lands is not authorized to purchase lands which are subject to mortgage. Where, however, the principal was made aware of the incumbrance and still agreed to accept two lots out of ten lots alleged by the agent to have been bought for himself and his principal, this was deemed a waiver of the objection to the act of the agent and to the right of the principal to demand a return of the money placed in his agent's hands. But the principal having ascertained that the two lots offered to him fell short in quantity, of which fact the agent was aware when offering them:—Held, under these circumstances, that the principal's right of action revived, and that he was entitled to enforce payment from the agent of the principal money and interest. *Butterworth* v. *Shannon*, 11 A. R. 86.

Financial brokers who invest money for a client are his agents in the transaction if they profess to be acting for him and in his interest, though their remuneration may come from the borrower. An agent who invests moneys for his principal without taking proper precautions as to the sufficiency of the security is guilty of negligence, and if the value of the security proves less than the amount invested he is liable to his principal for the loss occasioned thereby. The measure of damages in such a case is not the amount lent with interest, but the difference between that amount and the actual value of the land. *Lowenburg* v. *Wolfe*, 25 S. C. R. 51.

Presentment of Promissory Note — *Failure to Notify Indorser.*]—Upon a contract with an express company to carry and present promissory notes for payment, where the company delivered them to a notary, who failed to notify the indorser of non-payment:—Held, that the company were not liable. *McQuarrie* v. *Fargo*, 21 C. P. 478.

Valuator.]—See NEGLIGENCE.

Withholding Information — *Costs.*] — An agent had not answered for some months urgent letters received from his principal in England. The principal, being alarmed, employed solicitors here to see to his interests; but the agent, although repeatedly applied to by them during three weeks, gave them no information, nor even an interview, and they consequently filed a bill for an account and injunction:—Held, that defendant, by reason of his neglect, must pay the costs up to the hearing, though the court was satisfied that his neglect did not proceed from dishonesty or any intention of withholding information from his principal. *Douglass* v. *Woodside*, 11 Gr. 375.

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3. *Other Cases.*

Account—*Costs.*]—A principal filed a bill for an account against his agent, who alleged by his answer that the principal was indebted to him. A balance being found against the agent of $282, the court ordered him to pay the costs of the suit. *Smith* v. *Henderson*, 17 Gr. 6.

——— *Hotel Manager.*]—The plaintiff was the manager of the defendants' hotel, and each evening went over the receipts and disbursements and entered a summary thereof in the cash book, taking over the money which constituted the balance on hand, which he subsequently deposited with the defendants' bankers. During the day the money was kept in a safe in the office, to which others had access. When any money was taken out, a slip was put in shewing the amount so taken and the purpose. The plaintiff, while admitting the accuracy of the balance up to a specified date, contended that he was not responsible thereafter, by reason of his not being then able, through overwork, to actually count the money taken over by him:—Held, that, under the circumstances, and in the absence of a positive statement shewing the inaccuracy of the balance which the cash book shewed to be on hand, the plaintiff was bound to account therefor. *Clayton* v. *Patterson*, 32 O. R. 435.

——— *Stated Accounts.*] — Accounts were delivered in 1862 and 1865 by a trustee and agent to his principal, and the confidential relationship existed for upwards of two years after the latter account had been rendered:—Held, that these accounts were not binding on the principal as stated accounts. *Smith* v. *Redford*, 19 Gr. 274.

Advances—*Breach of Contract—Damages—Consideration—Loss of Goods.*] — Declaration, that in consideration that the plaintiff, at defendants' request, had consigned and shipped certain wheat to Messrs. C. & B. at Oswego, defendants promised to advance him a certain sum thereon, and to sell it for him within thirty days, and pay over the proceeds, less the advance and charges, &c.; that the defendants did make the advance, but did not sell the wheat:—Held, bad, on demurrer to the pleas, as not shewing a sufficient consideration. Held, also, that if the promise had been binding, it would be a good defence that the

wheat was lost before it came into defendants' possession. See the pleas set out in the case, and the opinion of the court upon them, though their validity is not expressly decided. *Mariatt* v. *Gooderham*, 14 U. C. R. 221.

——— *Breach of Contract — Damages — Mortgage.*]—Quære, as to the measure of damages recoverable on a breach of contract by defendants, commission merchants, to advance money to plaintiff, a miller, for the purpose of carrying on his business upon the security of flour consigned by him to defendants for sale. *Hyde* v. *Gooderham*, 6 C. P. 21.

Held, under the facts proved in this case, that the mortgage by plaintiff to defendants of his mill, to secure advances on his flour to be made by defendants as commission merchants, was not to be treated as superseding the parol agreement for such advances, or as shewing a different agreement from that evinced by the letters. *Ib.*

Held, also, that the defendants were entitled, subject to plaintiff's choice of market, to reimburse themselves for advances already made by the sale of all such flour as they had obtained delivery orders for from plaintiff. *Ib.*

Collection of Rents—*Power of Attorney —Repudiation.*]—A power of attorney was prepared and executed by two of four tenants in common, appointing an agent to receive the rents and profits of the estate, and was transmitted to the agent, who had undertaken to procure its execution by the other owners. The power never was executed by them, and the agent, more than a year afterwards, declined to act in the matter, alleging that such execution was necessary to enable him to receive the rents. The court, however, held him liable for the rents and profits received, or which but for his wilful default might have been received by him, from the time of the power being sent to him until his repudiation of the character of agent. *Bradburne* v. *Shanly*, 7 Gr. 569.

Indemnity — *Indorsement.*]—Held, that, standing in the position of a surety in respect of certain promissory notes indorsed by the agent under a power of attorney, the principal was entitled to a decree for indemnity in respect of his liability as indorser thereof, against his agent and the subsequent indorser, without waiting to take an account of all the transactions between the parties. *Dick* v. *Gordon*, 6 Gr. 394.

Money—*Direction of Principal as to Disposal.*]—Where in assumpsit for money had and received defendant pleaded that he had received the money as agent of the plaintiff, and had paid it over by his directions to a person to whom the plaintiff was indebted; and the plaintiff replied that he countermanded the direction before payment; to which defendant rejoined that before countermand or any notice thereof he had given notice to the plaintiff's creditor that he held the money for his use:—Held, that the rejoinder was a good answer. *Coates* v. *Lloyd*, 3 U. C. R. 51.

——— *Mixing with that of Others—Robbery.*]—Defendant being the agent of plaintiffs, and having received large sums of money, as such agent, on account of plaintiffs, and having deposited the same, mixed with his own and other persons' moneys, in a safe in his office, which was broken into and the money stolen, a verdict having been rendered for defendant at nisi prius:—Held, that there should be a new trial, with costs to abide the event, on the ground that it did not appear with sufficient certainty on the evidence that there was a sufficient amount in the safe at the time of the robbery to satisfy plaintiffs' claim; and also, on the ground that the plaintiffs were entitled to nominal damages, at all events, on the counts for money lent, money paid, &c., to which there was no answer on the record. *Gore Bank* v. *Hodge*, 2 C. P. 359.

Non-return of Goods — *Action for Price.*]—"Received of ——— six boxes of axes, to be sold for him on commission, and when sold, I agree to account to him for those sold at the rate of, &c., and to return the remainder unsold, on demand:"—Held, that an action for goods sold and delivered would not lie for any of the axes not returned. *Dodds* v. *Durand*, 5 U. C. R. 623.

Sale of Goods.]—Held, upon the evidence that the defendant, who had acted as agent for the plaintiff in selling trees, could not be held liable on the common counts for the trees sold, but must be sued specially for not accounting. *Leslie* v. *Morrison*, 16 U. C. R. 318.

——— *Failure of Brokers.*]—H., a miller, employed G. & Co., commission merchants, to dispose of his manufactured flour, upon the sale of which he paid them a commission. He also exercised a control over the market in which the flour was to be sold, and in Boston and certain other markets allowed G. & Co. the charge for agency for effecting sales there, in addition to their usual commission:—Held, that, although G. & Co. were not factors with a del credere commission, they and not H. were liable for a loss occasioned by the failure of brokers whom they employed, and who had received the proceeds of sales of H.'s flour at Boston. *Gooderham* v. *Hyde*, 6 C. P. 341.

See Markle v. *Thomas*, 13 U. C. R. 321; *Ross* v. *Scott*, 22 Gr. 29, 21 Gr. 391.

IV. Liability of Agent to Third Persons.

1. *On Contracts.*

Attorney for Sale of Land—*Advance—Subsequent Purchase.*]—The attorney under an irrevocable power from the owner for the sale or other disposition of certain lands, and entitled in the event of sale to a share of the proceeds after payment of charges, agreed to pay out of the owner's share of the proceeds, when received, the amount of a further charge made by the owner, and subsequently purchased the lands himself:—Held, that he was not personally liable to pay the amount of the charge. Judgment in 27 O. R. 511 reversed. *Armstrong* v. *Lye*, 24 A. R. 543.

Broker — *Acting for Undisclosed Principal.*]—The defendant, a broker doing business on the Toronto Stock Exchange, bought from C., another broker, certain bank shares that had been sold and transferred to C. by the plaintiff. At the time of the sale C. was not aware that the defendant was acting for an undisclosed principal, and the name of a principal was not disclosed within the time limited for "settlement" of transactions by

the custom of the exchange. The transferee's name was left blank in the transfer book in the bank, but it was noted in the margin that the shares were subject to the order of the defendant, who, three days after settlement was due according to the custom of the exchange, made a further marginal memorandum that the shares were subject to the order of H. The affairs of the bank were placed in liquidation within a month after these transactions, and the plaintiff's name being put upon the list of contributories, he was obliged to pay double liability upon the shares so transferred, under the provisions of the Bank Act, for which he afterwards recovered judgment against C., and then, taking an assignment of C.'s right of indemnity against the defendant, instituted the present action:—Held, that, as the defendant had not disclosed the name of any principal within the time limited for settlement by the custom of the exchange, and the shares had been placed at his order and disposition by the seller, he became legal owner thereof, without the necessity of any formal acceptance upon the transfer books, and that he was obliged to indemnify the seller against all consequences in respect of the ownership of the shares, and the double liability imposed under the provisions of the Bank Act. Judgment in 24 A. R. 502 reversed, and that in 28 O. R. 285 restored. *Boultbee* v. *Gzowski*, 29 S. C. R. 54.

Disclosure of Principal — *Time.*] — A. orally contracted with B., the agent of an undisclosed principal, for the sale to B. of certain goods, &c., worth $100 and more, but before any delivery or part payment, the name of the principal was disclosed by B.:—Held, that the contract was not binding before a part delivery or payment took place, and, as neither took place before the disclosure by B. of his principal, he was not personally liable. *Haight* v. *Howard*, 11 C. P. 437.

Knowledge of Agency.]—To an action on an agreement for the sale of lands by defendants, who were partners as solicitors, the defendants pleaded on equitable grounds that the plaintiff contracted with them only as agents for the owner of the land, and not as principals:—Semble, that the evidence set out in the report shewed that the plaintiff knew that they were acting only as agents, but the jury having found against them, and the verdict being for $10 only, the court refused to interfere. *Campbell* v. *Dennistoun*, 23 C. P. 359.

Personal Undertaking of Agent.] — Where the plaintiff in writing agreed to deliver to A. W. & Co. 100 barrels of pork at a certain price, and by a writing signed by the defendant, "agent of A. W. & Co.," defendant agreed to pay for pork by bill in favour of the plaintiff:—Held, that, although defendant was personally liable on his undertaking, yet the action should be for not furnishing the bill, and not for goods sold. *Counter* v. *Roebuck*, L. T. 3 Vict.

Statutory Commissioners.] — Commissioners appointed under an Act of Parliament employing persons to make a macadamized road are not personally responsible. *New* v. *Burn*, T. T. 3 & 4 Vict.

Unqualified Personal Contract.] — In an action for not delivering certain cheese sold by defendant to plaintiff:—Held, that, even though the defendant acted merely as agent of certain cheese factories, he contracted in his own name without qualification, and was therefore personally liable. *Ballantyne* v. *Watson*, 30 C. P. 529.

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2. *Other Cases.*

Award against Principal.] — Defendants, as factors of one W., sold wheat to the plaintiff, who subsequently obtained an award in his favour in an arbitration on a separate transaction between himself and W., to which defendants were not parties, although they actively intervened as W.'s agents. In an action by plaintiff to recover the balance of account:—Held, that he was not entitled to include in his debit against defendants the amount of the sum awarded to him as against W. *Brunskill* v. *Rigney*, 6 C. P. 509.

Nuisance.] — Held, that a party cannot justify as agent for another for maintaining a public nuisance. *Regina* v. *Brewster*, 8 C. P. 208.

An agent merely to let or receive rents is not liable for a nuisance upon the premises let by him. Quære, as to the liability of a general agent clothed with power to let, repair, and in all respects to act for the owner. *Regina* v. *Oster*, 32 U. C. R. 324.

Trespass—*Agent of Crown.*]—A bill was filed against the attorney-general and A., the superintendent of certain slides belonging to the Crown, who was also collector of the rates thereat, alleging that he had seized certain saw logs of the plaintiff's, and was about to sell them on the false pretence that the tolls thereon had not been paid. The bill prayed for an injunction to restrain the sale. A. demurred to the bill, on the ground that being the agent of the Crown he was exempt from personal liability. The demurrer was overruled with costs. *Baker* v. *Rauney*, 12 Gr. 228.

V. Liability of Principal to Third Persons.

1. *Contracts of Agents.*

Credit — *To whom Given—Jury.*] — The defendants, merchants in Toronto, arranged with L. & H. in London, England, for a consideration specified, that all goods bought by defendants in England should be charged to L. & H. by the various sellers, with whom L. & H. were to settle. The plaintiffs' agent, K., sold goods to defendants on credit, and the plaintiffs' draft on L. & H. having been protested, they sued defendants. The evidence was contradictory as to K.'s knowledge of defendants' arrangement with L. & H., and as to whom credit was given upon the sale. The jury were directed that the plaintiffs were bound by K.'s arrangement for payment, if any, made with defendants; and were asked to say whether the goods were sold on the credit of L. & H., looking only to them for payment, or to defendants, on their own credit, in the ordinary way, and they found for defendants: — Held, that the direction was right: but, upon the evidence, a new trial was granted on payment of costs. *Creighton* v. *Janes*, 40 U. C. R. 372.

Deposit of Promissory Note — *Collateral Security—Memorandum in Writing—Parol Variation.*]—Defendants, two directors of the Canada Powder Company, placed in the hands of C., their secretary, their promissory note for $8,000, made in November, 1858, payable to the plaintiffs on demand, which C. deposited with the plaintiffs, having a receipt written under it and signed by their agent, which expressed that the note was to be held by the plaintiffs as collateral security for any unretired paper they might at any time hold of the company. In an action on this note the plaintiffs' agent swore that he took it upon the understanding expressed in the receipt, which was in C.'s handwriting, and he believed was signed at the same time; and that he made the arrangement wholly with C., never having any communication with defendants regarding it. Defendants had pleaded as an equitable defence, and desired to prove, that the note was given in consequence of a doubt as to the power of the powder company to become parties to a note, and as security only against the want of such power, and until it should be conferred upon them by the legislature, which was done in May, 1859, without loss in the meantime to the plaintiffs: —Held, that such evidence was rightly rejected, for that defendants having intrusted C. with their note were bound by his agreement, on which the plaintiffs had advanced their money, and which could not be varied by parol testimony. *Commercial Bank of Canada* v. *Merritt*, 21 U. C. R. 358.

Hiring of Servant — *Member of Committee.*]—A member of a committee is not responsible for the salary of a person employed by the committee (under a joint stock banking charter), before he became a stockholder in the bank and such member. *Mingaye* v. *Burton*, 10 C. P. 60.

Oral Contract — *Written Recognition.*] —An agent's subsequent written recognition of an oral contract, where such recognition was made in the performance of his duty in the carrying out of the contract:—Held, binding on the principal for the purpose of taking the case out of the Statute of Frauds. *Ward* v. *Hayes*, 19 Gr. 259.

Purchase of Land in Agent's Name — *Purchase Money—Evidence.*]—Where a purchase of land was made by a person in his own name, but in reality for the benefit of another, a personal decree against both for the payment of the purchase money was held to be correct. Parol evidence of the agency was held admissible, and the purchaser who entered into the contract in his own name, and who was a defendant, was held a good witness on behalf of the plaintiff against his co-purchaser, the other defendant. *Sanderson* v. *Burdett*, 18 Gr. 417, 16 Gr. 119.

Representation by Agent — *Advantage —Knowledge of Agent.*] — Where an agent does an act outside of the apparent scope of his authority, and makes a representation to the person with whom he acts to advance the private ends of himself or some one else other than his principal, such representation cannot be called that of the principal. In such a case it is immaterial whether or not the person to whom the representation was made believed the agent had authority to make it. The local manager of a bank, having received a draft to be accepted, induced the drawer to accept by representing that certain goods of his own were held by the bank as security for the drafts. In an action on the draft against the acceptor:—Held, that the bank was not bound by such representation; that by taking the benefit of the acceptance it could not be said to adopt what the manager said in procuring it, which would burden it with responsibility instead of conferring a benefit; and that the knowledge of the manager with which the bank would be affected should be confined to knowledge of what was material to the transaction and the duty of the manager to make known to the bank. *Richards* v. *Bank of Nova Scotia*, 26 S. C. R. 381.

Sale of Goods—*Undisclosed Principal.*]— Where undisclosed principals, carrying on a wholesale business, employ an agent to carry on a retail business in his own name but for their benefit, to sell their goods at invoice prices, they are not liable for the price of goods of the same kind purchased by the agent for himself from other persons, without the knowledge or authority of his employers. Watteau v. Fenwick, [1893] 1 Q. B. 346, considered. *Becherer* v. *Asher*, 23 A. R. 202.

Sale of Lands — *Mistake — Absence of Consent.*]—Where the owner of lands was induced to authorize the acceptance of an offer made by a proposed purchaser of certain lots of land, through an incorrect representation made to her and under the mistaken impression that the offer was for the purchase of certain swamp lots only, whilst it actually included sixteen adjoining lots in addition thereto, a contract for the sale of the whole property made in consequence by her agent was held not binding upon her and was set aside by the court on the ground of error, as the parties were not ad idem as to the subject matter of the contract, and there was no actual consent by the owner to the agreement so made for the sale of her lands. *Murray* v. *Jenkins*, 28 S. C. R. 565.

Sale of Timber — *Collateral Agreement as to Deposit.*]—Defendant's agent, having without authority contracted in writing to sell to the plaintiffs all the pine timber on lands of defendant, both the standing timber and that cut after a date named, as to the latter of which his authority was undisputed, received from plaintiffs $75 on account of the agreement, with the private and oral understanding that in case defendant's claim to logs cut before the date referred to could not be sustained, as turned out to be the case, the $75 should be returned. It appeared that as soon as defendant was informed of the sale by her agent of the standing timber to plaintiffs, she at once repudiated it, and in fact that plaintiffs had been aware, when they entered into the agreement, that the agent had no authority to sell it. In an action against defendant to recover back the $75 paid to her agent, which the latter retained in his hands: —Held, that the contract was an entire one, and that the plaintiffs could not recover against defendant, but that their remedy, if any, was against the agent. *Strickland* v. *Vansittart*, 18 C. P. 463.

Ship — *Supplies — Mortgagees—Owners.*] —Where one brought an action against the registered owners of a certain vessel for the value of goods supplied before they became such owners, not on the order of the defendants, but on the order of one G. C., between

whom and the defendants no relation of agency was proved:—Held, that the plaintiff could not recover. Held, also, that it was open to the defendants to shew that their real interest was that of mortgagees, though ostensibly registered owners. The fact that the vessel got the benefit of the supplies and necessaries did not make the registered owner liable. *Nelson* v. *Wigle*, 8 O. R. 82.

See Mail Printing Co. v. *Devlin*, 17 O. R. 15.

Transfer of Overdue Promissory Note.]—Where the agent of the holder disposes of a promissory note overdue, without authority, though for good consideration, the person taking from him obtains no title as against the principal. *West* v. *MacInnes*, 23 U. C. R. 357.

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2. Fraud and Misconduct of Agents.

Bailiff—*Loss of Account Books—Liability of Sheriff.*]—Action against a sheriff for not levying, although the debtor had sufficiency of goods. At the trial a verdict was found for the plaintiff for much less than he claimed. On motion for a new trial, which was granted:—Held, that defendant's statement to an insurance agent, that the goods, when seized, were worth $6,000, and his declarations to the different creditors that their claims were small as compared with the value of the debtor's goods, were evidence of value against the defendant; that his placing a stranger as his agent in possession of the goods, with authority to sell them in the shop as heretofore, who gave no satisfactory evidence on such sales, and who lost or mislaid or neglected to preserve the books of account which would have explained all these transactions, made him responsible for the consequences of his agent's misconduct; and that defendant was entitled to no advantage or consideration, because the books could not be or were not produced. *Hobbs* v. *Hall*, 14 C. P. 479.

Deputy Collector of Customs—*Defalcations.*]—A., having been appointed collector of customs, gave a bond to Her Majesty, conditioned that he should in all things well and truly discharge his duty as collector, and account for and pay over all moneys which should come into his hands, &c. He received written instructions that all entries were to be made by him, all permits were to be granted and signed only by him, and payment of all duties to be made to him, except under certain circumstances:—Held, that, having permitted the deputy collector rightfully to assume and perform duties intrusted to him alone, he was responsible under his bond for defalcations of the said deputy. *The Queen* v. *Stanton*, 2 C. P. 18.

Factor of Estate — *Misappropriation of Money—Dual Agency.*]—M. was administrator of the estate of S., and was managing the real estate for the heirs: he was also one of the executors and trustees of E. There was a sum of $808.55 due for taxes on some property of the S. estate, and M. paid the same with money of the E. estate, directing the agent of that estate to charge the amount to the S. estate: M. did not enter the amount in his accounts with the S. estate as a loan, and, on the contrary, in the accounts which he rendered he took credit for the amount as a payment by himself: the heirs knew nothing of the loan until some time afterwards; they had not authorized M. to borrow money; and he was at the time indebted to them as agent in a sum exceeding the amount of the taxes: M. afterwards died insolvent, and indebted to both estates:—Held, reversing the decision below, 16 Gr. 193, that the E. estate could not hold the heirs of the S. estate liable for the $808.55, and was not entitled to a lien therefor on the property in respect of which the taxes were payable. *Ewart* v. *Steven*, 18 Gr. 35.

Knowledge of Principal.]—The fraudulent act of an agent does not bind the principal, unless it is done for the benefit of the principal, or unless he knows of or assents to it, or takes advantage of it. *Gibbons* v. *Wilson*, 17 O. R. 290. See this case in appeal, 17 A. R. 1, and *Burns* v. *Wilson*, 28 S. C. R. 207.

Loan Company's Agent — *Borrower's Cheque.*] — The plaintiff, who applied to the defendants, through one W., their agent, for a loan, requested them by his application to send the money "by cheque, addressed to W." In accordance with their custom to make their cheques payable to their agent and the borrower, to insure the receipt of the money by the latter, they sent W. a cheque, payable to the order of himself and the plaintiff. W. obtained the plaintiff's indorsement to the cheque, drew the money, and absconded. The plaintiff swore that he did not know the paper he signed was a cheque, and there was no evidence to shew that he had dealt with W. in any other character than as the defendants' agent, through whose hands he expected to receive the money:—Held, that it was W.'s duty to indorse the cheque to the plaintiff or to see that he received the money, and that the defendants, who had put it in his power to commit the fraud, must bear the loss. *Finn* v. *Dominion Savings and Investment Society*, 6 A. R. 20.

Notary — *Executor—Misappropriation of Money.*]—When a testamentary executrix employs an agent as attorney, she is bound to supervise his management of the matters intrusted to him and to take all due precautions, and cannot escape liability for the misappropriation of funds by such agent, although he was a notary public of excellent standing prior to the misappropriation. *Lowe* v. *Gemley*, 18 S. C. R. 685.

Purchase of Land—*Misrepresentations of Agent.*]—L., as daughter of a U. E. Loyalist, had been granted a lot of land, but in 1825 left Canada for the United States, where she had resided ever since. Various persons took possession of the land and improved it so that it was worth £2,000. C. sent his agent to L. in Michigan, to treat for the purchase of her interest. This agent made numerous false representations as to the position and value of the land, and as to the intentions of his principal, and thereby induced L. to convey her interest in the land to C. for an inconsiderable sum:—Held, that the representations made by the agent were material, and to be considered in weighing the bona fides of the contract, which was ordered to be cancelled. *Latham* v. *Crosby*, 10 Gr. 308.

Railway Freight Agent—*Fraudulent Receipt.*]—C., freight agent of respondents at Chatham, and a partner in the firm of B. & Co., caused printed receipts or shipping notes in the form commonly used by the railway

company to be signed by his name as the company's agent, in favour of B. & Co. for flour which had never in fact been delivered to the railway company. The receipts acknowledged that the company had received from B. & Co. the flour addressed to the appellants, and were attached to drafts drawn by B. & Co., and accepted by appellants. C. received the proceeds of the drafts and absconded. In an action to recover the amount of the drafts: —Held, that the act of C. in issuing a false and fraudulent receipt for goods never delivered to the company, was not an act done within the scope of his authority as the company's agent, and the latter were therefore not liable. *Erb* v. *Great Western R. W. Co. of Canada*, 5 S. C. R. 179, 3 A. R. 446, 42 U. C. R. 90; *Oliver* v. *Great Western R. W. Co.*, 28 C. P. 145.

Sale of Timber — *Purchase Money — Failure to Pay.*]—The plaintiff, assignee of an insolvent estate, claimed from the defendant, a creditor of the estate, an account as to his dealings with timber limits assigned to him as security, and payment of any balance. Part of the timber had been placed in the hands of K. & Co. for sale:—Held, that the defendant was not liable for a loss occasioned by K. & Co.'s failure to pay over part of the price of the timber sold by them. *Bell* v. *Fraser*, 12 A. R. 1.

Settlement of Accounts—*Misrepresentations of Agent.*]—In consideration that the plaintiff would act as agent for the defendant in the purchase and consignment of furs to the defendant, and assume one-third of the losses to the extent of $3,000, all losses above that amount to be borne by the defendant, he agreed to pay plaintiff one-half the net profits of each year's transactions. The plaintiff impugned the bona fides of a settlement which he had been induced to make with the defendant, acting through an agent, and the court, being satisfied that the settlement had been secured by the fraudulent misrepresentations of such agent:—Held, the plaintiff entitled to an account of the transactions and an inspection of the books of the defendant, notwithstanding the provisions of the statute 36 Vict. c. 25, s. 1 (R. S. O. 1877 c. 133, s. 31). *Rogers* v. *Ullmann*, 27 Gr. 137.

Treasurer of Municipality — *Bank Overdraft—Dual Agency.*]—One S. was treasurer of the county of Middlesex and agent of the Gore Bank, having his office for both purposes in the same building. The council had no account with the bank, and did not direct S. where to keep his funds as treasurer, and he had always received enough to meet all disbursements for the county. He did, however, open an account with the bank, without the knowledge of the council, and having misapplied the moneys of the council, overdrew that account, without the knowledge or authority of the bank, nearly £8,000, for the purpose of paying debts due by the county for interest on debentures and other claims, which he ought to have paid out of the moneys received by him as treasurer. The coupons on some of these debentures were stamped by S., as paid by the Gore Bank. S. having absconded, the bank sued the council for the amount thus overdrawn, as money paid to their use:—Held, that no portion of it could be recovered. *Gore Bank* v. *County of Middlesex*, 16 U. C. R. 595.

——— *Discount—Scope of Authority.*]—On the 22nd August, 1879, the defendants' account at the Bank of Montreal was overdrawn $1,157.64. A resolution of the council was thereupon passed authorizing the mayor to borrow from some banking institution a sum not exceeding $2,000, to meet the current liabilities until the taxes were available, and authorizing him and the town clerk to sign the necessary documents therefor, and to affix the corporation seal. On 2nd September a promissory note, in accordance with this resolution, was made, and was discounted at the Bank of Montreal, and the proceeds placed to the defendants' credit. On 5th September a similar note was made and discounted at the plaintiffs' bank, where the defendants had kept an account, but which was virtually closed, though there was a small balance still remaining to their credit. The last note was in fact fraudulently procured to be made and discounted by one T., who was the defendants' clerk and treasurer, and who was in default, to cover up his defalcations, but of this the plaintiffs knew nothing. T., as such treasurer, then chequed out of plaintiffs' bank $1,656 of this amount, which he deposited to the defendants' credit at the Bank of Montreal, and then paid it out on corporation cheques for authorized corporation purposes: —Held, in an action for money had and received, that the plaintiffs were entitled to recover the $1,656, for that T., though acting fraudulently, had acted in a matter within the scope of his authority, and the defendants had received the benefit of the fraud. *Molsons Bank* v. *Town of Brockville*, 31 C. P. 174.

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3. *Torts of Agents.*

Arrest—*Power to Collect Money.*]—Plaintiff brought a suit in chancery against the defendant and S. and W., which was referred to arbitration, and an award made thereon against plaintiff for £120 to W., and £154 to defendant. This award was made a rule of court by an ex parte order, and an attachment was issued by W. for both sums of money, the defendant having previously assigned all his interest in the award to W., and given him a general power of attorney to collect the amount:—Held, that the power of attorney given by defendant to W. being a general power to collect the money due on the award, and to do all acts relating thereto, he, W., must be presumed to have been acting for the defendant, who was therefore responsible for the arrest. *Wilson* v. *Brecker*, 11 C. P. 268.

Assault and Imprisonment—*Officer of Ship — Scope of Authority.*]—The plaintiff, who had purchased a special excursion ticket from Toronto to Niagara and return on the same day by a steamer of the defendants, which ticket had been taken up by the purser on that day, claimed the right to return by it on the following day under an alleged agreement with the purser, which the latter denied. On the purser demanding plaintiff's fare, and the latter refusing to pay it, the porter, by the purser's direction, laid hold of a valise which the plaintiff was carrying and attempted to take it and hold it for the fare, whereupon a scuffle ensued, and the plaintiff was injured: —Held, that the purser was not acting within the scope of his duty in thus forcibly attempting to take possession of the valise, and the defendants were not liable for his act. It appeared that the purser had been summoned

by the plaintiff before a magistrate for the assault, and a fine imposed, which he paid. Per Wilson, C.J.—This under 32 & 33 Vict. c. 29 s. 45 (D.), though a release to the purser, did not constitute any bar to the present action against the company. Held, also, that the alleged imprisonment of the plaintiff by the purser in his office for non-payment of his fare, not being an act which the defendants themselves could legally have done, the defendants were not liable for it. *Emerson* v. *Niagara Navigation Co.*, 2 O. R. 528.

Conversion of Grain — *Warehouse — Authority of Warehouseman.*]—The plaintiffs had stored grain at Seaforth in the warehouse of one T., from whom defendants held warehouse receipts as security for certain notes. T. having left the country, R., defendants' agent at Seaforth, was advised by their solicitor to get authority from him to sell the wheat covered by their receipts. He accordingly followed T. to the States, and obtained a written authority to sell all the grain in the warehouse belonging to him. The plaintiffs alleged that, acting under colour of this authority, he converted wheat belonging to them in the warehouse, for which they brought trover against defendants:—Held, that if so, there was evidence to go to the jury to make defendants responsible for R.'s acts. *Gilpin* v. *Royal Canadian Bank*, 26 U. C. R. 445.

Doctrine of Agency.]—In torts the principle of agency does not apply; each wrongdoer is a principal. *Ontario Industrial Loan and Investment Co.* v. *Lindsey*, 4 O. R. 473.

Exclusion of Lessee — *Agent of Company.*]—The agent of an insurance company at Toronto negotiated for a lease to the plaintiffs, who were barristers, &c., of one flat of the company's offices for three years at $800 a year, and executed the lease on the part of the company, containing the usual covenant for quiet enjoyment, and received the rent. The caretaker of the whole building, who lived at a distance, locked the outer street door at 6 p.m., thus excluding the plaintiffs after that hour, and the agent refused to let them have a key unless they got the caretaker to be present:—Held, that the company were responsible for this act of their agent, which was clearly a denial of the plaintiffs' rights under the lease. *Maclennan* v. *Royal Ins. Co.*, 30 U. C. R. 515.

Negligence—*Action against a Bank for Amount Paid on Forged Indorsements—Negligence of Agent—Estoppel.*]—See *Agricultural Savings and Loan Association* v. *Federal Bank*, 6 A. R. 192.

——— *Corporation—Contractor.*]—Action against defendants for negligence in setting out fire in clearing a road allowance. It appeared that the work was let by contract, and that the contractor set out the fire:—Held, that defendants were not liable. *Carroll* v. *Corporation of Plympton*, 9 C. P. 345.

——— *Servants of Crown.*]—A petition of right does not lie to recover compensation from the Crown for damages occasioned by the negligence of its servants to the property of an individual using a public work. *Regina* v. *McFarlane*, 7 S. C. R. 216. See also *Muskoka Mills Co.* v. *The Queen*, 28 Gr. 563; *Regina* v. *McLeod*, 8 S. C. R. 1.

——— *Servants of Municipal Corporation — "Respondeat Superior."*]—See *McSorley* v. *Mayor, &c., of City of St. John*, 6 S. C. R. 531.

Trespass to Person — *Members of Lodge.*]—Action for damages caused by illusage upon the occasion of initiation into a secret society—Liability of lodge for acts of members during the ceremony. *Kniver* v. *Phœnix Lodge I. O. O. F.*, 7 O. R. 377.

VI. Power and Authority of Agent.

1. *Agents of Corporations and Companies.*

Agent of Bank — *Discounting.*] — K., agent of a bank and also a member of a business firm, procured accommodation drafts from a customer of the bank, which he discounted as such agent, and, without indorsing them, used the proceeds, in violation of his instructions, in the business of his firm. The firm having become insolvent, the question arose whether these drafts constituted a debt due from the estate to the bank, or whether the bank could repudiate the act of its agent and claim the whole amount from the solvent acceptors:—Held, that the drafts were debts due and owing from the insolvents to the bank. Semble, that the agent being bound to account to the bank for the funds placed at his disposal, he became a debtor to the bank, on his authority being revoked, for the amount of these drafts as money for which he had failed to account. *Merchants Bank of Halifax* v. *Whidden*, 19 S. C. R. 53.

Agent of Insurance Company—*Waiver of Conditions.*]—A person not an officer of an insurance company, appointed to investigate the loss and report thereon to the company, is not an agent having authority to waive compliance with conditions precedent to liability, and if he has such authority he can not, after the fifteen days for delivery of proofs have expired, extend the time without express authority from his principal. *Atlas Assurance Co.* v. *Brownell*, 29 S. C. R. 537.

Neither the local agent for soliciting risks nor an adjuster sent for the purpose of investigating the loss under a policy of fire insurance, has authority to waive compliance with conditions precedent to the insurer's liability or to extend the time thereby limited for their fulfilment, and as the policy in question specially required it, there could be no waiver unless by indorsement in writing upon the policy signed as therein specified. Atlas Assurance Co. v. Brownell, 29 S. C. R. 537, followed. *Commercial Union Assurance Co.* v. *Margeson*, 29 S. C. R. 601.

Foreman of Railway Company—*Contract.*]—Where the only evidence of the contract to carry was that the foreman of the freight department at one of the defendants' stations agreed to have certain trees forwarded to a station not on the defendants' line, but on one connecting therewith:—Held, that this was evidence to be submitted to a jury of a contract to that effect, binding the defendants, and that a nonsuit was wrong. *McGill* v. *Grand Trunk R. W. Co.*, 19 A. R. 245.

Manager of Insurance Company—*Retainer of Solicitor—Special Work.*]—The general manager of a company had authority to

do acts which occasionally required legal advice:—Held, that he had implied authority to retain a solicitor whenever in his judgment it was prudent to do so, but that such authority ceased on the suspension of the company. *Clarke* v. *Union Fire Ins. Co., Caston's Case*, 10 P. R. 339.

A solicitor for a company is entitled to charge such company for special work and journeys undertaken at the request of individual directors and the general manager. *Ib.*

——— *Agreement as to Winding-up.*]—Semble, that even if a general manager of a company positively agreed that any winding-up proceeding that should be necessary should be taken in Ontario rather than elsewhere, this would not bind the company, for the business of the manager is to manage a going concern. It is no part of his duty nor within his power to arrange about putting an end to it. *In re Briton Medical and General Life Assurance Co.*, 11 O. R. 478.

Managing Director of Railway Company—*By-law.*]—Held, that proof merely that C. was defendants' managing director was not sufficient evidence under 16 Vict. c. 253, ss. 10, 20, of C.'s authority to enter into a certain contract with plaintiff; but it should have been shewn that his act was in accordance with the powers conferred on him. Held, also, that the plaintiff was not (upon the facts) an agent of defendants within s. 17, so as to require his appointment by by-law. *Taylor* v. *Cobourg, Peterborough, and Marmora R. W. and Mining Co.*, 24 C. P. 200.

Secretary of Trading Company—*Scope of Duties—Contract.*]—The plaintiffs were a company incorporated under C. S. C. c. 63, and 24 Vict. c. 19, for the manufacture and sale of cheese, &c. On the 10th August, 1878, a written agreement was entered into between one C., the plaintiffs' secretary and salesman, and one M., on behalf, as was stated, of the plaintiffs and defendants respectively, which was signed by C. and M., for the sale of the whole of the plaintiffs' July cheese, as also of their August, September, and October cheese, at prices named:—Held, that C., in entering into the contract for the plaintiffs, was acting within the scope of his employment and duties; and that the defendants could not deny M.'s authority to act for them, for they had adopted and ratified the agreement. *Albert Cheese Co.* v. *Leeming*, 31 C. P. 272.

See BANKS AND BANKING, I.—BILLS OF EXCHANGE, VIII. 1, 2.—COMPANY, IV.—INSURANCE, III. 1, V. 8.

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2. *Bills and Notes.*

Implied Authority — *Purchase of Goods.*]—It was proved that one D. was clerk or agent for defendant in keeping a store at L., and that defendant had once sanctioned his purchasing certain goods:—Held, that this gave no implied authority to D. to sign defendant's name to negotiable paper, and that the jury were warranted in finding that defendant had given D. no authority to purchase goods of the plaintiff. *Heathfield* v. *Van Allen*, 7 C. P. 346.

Partnership—*Mutual Authority.*]—In an action against B. and S., a firm of solicitors, on promissory notes indorsed by B. in the name of the firm, it was proved that on other occasions S. had indorsed in the same manner, and, as witness believed, with B.'s knowledge, but it did not appear what the consideration was for the indorsements sued on, or that S. knew of them:—Held, sufficient evidence to go to the jury of a mutual authority; and a verdict having been found for the plaintiff, the court refused to interfere. *Workman* v. *McKinstry*, 21 U. C. R. 623.

Power of Attorney—*Construction.*]—A general power of attorney to an agent to sign bills and notes, and to superintend, manage, and direct all the affairs of the principal, gives him a power to indorse notes. *Auldjo* v. *McDougall*, 3 O. S. 399.

——— *Revocation—Acting under.*]—Defendant, on the 8th August, 1863, gave a bond to the plaintiffs conditioned to pay, to the extent of $2,000, debts then due or to be incurred to them by the firm of M. & G., carrying on business at Galt, whom the plaintiffs had been supplying with goods. In July or August, 1863, G. went to Buffalo, telling M. that he was going to leave the firm; and before going, in June, he gave to defendant, his uncle, a power of attorney, which recited his intention to reside some time in Buffalo, and that his interest in the firm would continue notwithstanding, and authorized defendant to carry on the business, with power to close it up, and to sign bills, notes, &c., in G.'s name, or that of the firm. After he left, the sign, by defendant's direction, was changed to M. & Co., but defendant told M. to give notes in the name of M. & G. to the plaintiffs for goods supplied after the date of the power of attorney. In June a notice of intended, and in September a notice of actual, dissolution was published in a local paper, of which the plaintiffs were not proved to have notice. In April, 1864, M., with defendant's knowledge, signed notes in the name of M. & G., payable at different dates, for the balance according to an account then rendered, and a separate note for goods bought in March previous; and in September, 1864, defendant, in writing to the plaintiffs, expressed his hope that it would soon be an advantage to them to continue their account with M. & G. without his guarantee. G. returned to Galt in September, 1863, and was employed in the bank of which defendant was agent; but he said he had not authorized his name to be used to the note given in April, 1864. In an action against defendant on this bond, the court being left to draw inferences of fact:—Held, that G.'s return from Buffalo, without in any way interfering with defendant, was not a revocation of the power; that notwithstanding the dissolution, which must be held to have taken place in September, 1863, he might permit his name to be used as it was in closing up the business; that the power sufficiently authorized defendant so to use it; that the inference from the facts was, that in what he did he was acting under such power; and that defendant therefore was liable for the purchases made in March, 1864. *Bryce* v. *Davidson*, 25 U. C. R. 371.

——— *Scope of Authority.*]—The plaintiffs sued defendant, an executor of E., as indorser of three notes payable to "the executors of the late E.," two being indorsed

"B., agent of the executors of the late E.," and the third "the executors late E., per pro. B." B. held a power of attorney from the executors, by which they as executrix and executors authorized him (among other things) for them, as such, to make and indorse all such notes as might be requisite in the management of the estate. These notes, it appeared, were received by B. from the makers for debts due to the estate, and given by him, indorsed as above, to M., one of the executors, who was largely indebted to the estate, and was in difficulties, M. telling him that he wanted to get them discounted on his own account. They were so discounted by the plaintiffs, to whom M. owed a large sum, and who made no inquiries as to the extent of B.'s authority, or the circumstances under which M. obtained them. Defendant knew nothing of the matter until after the notes fell due. The court being left to draw inferences of fact, and the question being the personal liability of the defendant:—Held, (1) that the indorsements were sufficient in form: but (2) that not being for the purposes of the estate, they were not within the authority given to B., the extent of which it was plaintiffs' duty to ascertain; and a nonsuit was ordered. Quære, as to the effect of a power given by an executor. Semble, that it may authorize the attorney to charge him by acceptances, &c., in his own right, for otherwise it would be illusory, but only for the payment of testator's debts. *Gore Bank* v. *Crooks*, 26 U. C. R. 251.

Where, by a document indorsed "procuration générale et spéciale," a wife being sole owner constituted her husband "son procureur générale et spéciale" to administer her affairs, specifying such acts as drawing bills of exchange and making promissory notes:—Held, that a wife's liability extended to all promissory notes made by the husband, and was not limited by art. 181 of the civil code to such notes as were required for purposes of the administration. *Banque d'Hochelaga* v. *Jodoin*, [1895] A. C. 612.

Where an agent accepts or indorses "per pro," the taker of a bill or note so accepted or indorsed is bound to inquire as to the extent of the agent's authority; where an agent has such authority, his abuse of it does not affect a bonâ fide holder for value. *Bryant* v. *Banque du Peuple*, *Bryant* v. *Quebec Bank*, [1893] A. C. 170.

Want of Authority—*Co-executor.*]—Action against J. S. M. and J., his wife, M. N., and W. N., as makers of four notes signed "The executors of the estate of the late W. N., per pro. J. S. M." M. N. was called as a witness by plaintiffs, and proved that J. S. M. had managed the affairs of the estate since testator's death, and she had left it to him to do what he thought best in winding it up; but she said she never gave him power to make her personally liable; and that she knew nothing of these notes:—Held, that, though J. S. M. might have sufficient authority as regarded the estate, he clearly had none to bind the defendants personally, as they were sued. *Gore Bank* v. *Meredith*, 26 U. C. R. 207.

——— *Estoppel by Conduct.*]—In an action against the indorser, it appeared that his name had been written by the maker, his nephew, and there was no evidence of express authority; but it was proved that defendant had before and afterwards indorsed for his nephew on purchases by him from these plaintiffs, and that when payment of this note was demanded from him he had asked for time, and had not denied his indorsement until some months afterwards, when the maker had absconded. His excuse was that he kept no memorandum of his indorsements and supposed it was right:—Held, that defendant had precluded himself by his conduct from disputing his liability; and the jury having found in his favour, a new trial was granted without costs. *Pratt* v. *Drake*, 17 U. C. R. 27.

In May, 1873, H. B. & Co. being indebted to plaintiffs' bank in $80,000, B. executed a mortgage as security therefor, reciting that it was for money lent on notes made by B. and indorsed by the firm, by defendant, and by Mrs. P. In October, the indebtedness having increased to $90,000, the bank required as further security a mortgage from defendant for $25,000, and one from Mrs. P. for a like amount. The mortgages were similar in form, and recited that the firm's indebtedness, being for moneys advanced on promissory notes made and indorsed as before stated, exceeded $25,000, and that such mortgage was given as collateral security for that sum, part of said indebtedness, whether represented by the notes then under discount, or by renewals or by substitutions therefor, and similarly made and indorsed. There was a covenant for the payment of the indebtedness represented by said notes when due, or by any renewals or substituted notes. B. had been signing defendant's and Mrs. P.'s names as indorsers to the notes, with their consent as he alleged, but which defendant denied; and to prevent the bank noticing any difference between the signatures to the notes and to the mortgage, B., with defendant's assent, signed defendant's and Mrs. P.'s names to the mortgages, which they subsequently acknowledged before a witness to be their signatures. Defendant alleged that he then believed the indebtedness to be only $60,000, being told so by B., but about three weeks afterwards he discovered it to be $90,000, and he then said nothing to the bank about it. After the mortgage was executed the notes were renewed from time to time down to the insolvency of the firm in 1877, by B. writing defendant's and Mrs. P.'s names as indorsers, as he stated, with their consent, but which defendant denied. The bank brought actions respectively against defendant personally, and as executor of Mrs. P., who had since died, on the covenants in the respective mortgages and also on the indorsements. The jury found that defendant did not authorize B. to indorse for him, and that defendant, when he gave the mortgage, supposed the debt to be only $80,000. The court granted a new trial, holding that the jury should be directed that the bank, under the circumstances, were warranted in accepting paper "similarly indorsed," i. e., in the same writing as the signature to the mortgage; and that defendant should not be permitted to repudiate his indorsements on the renewal notes, not having disclosed to the bank B.'s want of authority. As regards Mrs. P.'s estate, a new trial was refused, defendant as executor not being deemed to have assented to the use of his name. *Merchants Bank* v. *Bostwick*, 28 C. P. 450.

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3. *Collecting and Receiving Money.*

Implied Authority.]—Where an agent is empowered not merely to sell, but "to

sell and convey," authority to receive payment of the purchase money is implied. *Farquharson* v. *Williamson*, 1 Gr. 93.

Mode of Payment—*Bankers—Collection—Set-off.*]—Bankers are subject to the principles of law governing ordinary agents, and, therefore, bankers to whom as agents a bill of exchange is forwarded for collection, can receive payment in money only, and cannot bind the principals by setting off the amount of the bill of exchange against a balance due by them to the acceptor. *Donogh* v. *Gillespie*, 21 A. R. 292.

——— *Insurance Agent—Cheque.*]—Defendant, through one B., the plaintiffs' agent, effected a life policy with the plaintiffs. B., who had authority to receive the premium, brought the policy with the receipt for the first premium, issued from the plaintiffs' head office, to defendant, who was in charge of a branch of the bank at which B. kept his account. Defendant drew a cheque on another branch of the bank, and B. requested him to place the amount to the credit of his bank account, which was done in the usual way, and the cheque charged to defendant; but B.'s account was at the time overdrawn, and he afterwards became insolvent:—Held, that the payment thus made to B. was a payment to the plaintiffs. *Ætna Life Ins. Co.* v. *Green*, 38 U. C. R. 459.

——— *Money.*]—An agent instructed to receive payment for his principal, cannot as a general rule accept anything but money. *Fraser* v. *Gore District Mutual Fire Ins. Co.*, 2 O. R. 416.

Power of Attorney—*Construction—Release.*]—The plaintiffs by a power of attorney authorized one J. H. to take such proceedings as he should think proper to secure, or for the recovery of, a judgment against the defendants, and to accept any security for the whole or any part of the same, and upon such terms as should seem meet, and to give time for payment, and to execute and do all agreements, deeds, matters and things that might be expedient or necessary in the premises. Under this power J. H. executed for the plaintiffs a deed of assignment made by the defendants, dated 20th July, 1858, which contained a release from all other creditors who should execute the same. This action was brought to recover the amount of this judgment, to which the defendants pleaded the release so executed:—Held, that by the power no authority was given to compromise or accept a part in satisfaction of the whole, the general words therein applying only to what immediately precede them, that is, the accepting of security, and the giving of time; and, therefore, that defendants were not released. *Hamilton* v. *Holcomb*, 13 C. P. 9.

——— *Revocation — Notice—Administrator.*]—A person intending to take out letters of administration, executed a power of attorney to a creditor of the intestate, authorizing him to receive all moneys due the intestate. The power was given upon an agreement that the attorney should pay himself out of any money he should receive. The appointor afterwards revoked the power, and then took out letters of administration:—Held, reversing the decree below, 17 Gr. 621, that the power was not valid against the administrator, and that payments made to the attorney by a debtor after administration granted, and with notice of the revocation, were unauthorized payments, and did not discharge the debtor. *Sinclair* v. *Dewar*, 19 Gr. 59.

——— *Salvage Moneys.*]—A crew of sailors, claiming salvage from the owners of a vessel picked up at sea, gave a power of attorney to P., authorizing him to bring suit or otherwise settle and adjust any claim which they might have for salvage services, &c.:—Held, affirming the decision in 3 Ex. C. R. 33, that P. was not authorized to receive payment of the sum awarded for salvage, or to apportion the respective shares of the sailors therein. *Churchill* v. *McKay*, *In re The "Quebec,"* 20 S. C. R. 472.

Receipt—*Power to Give.*] — An agent appointed to receive money for another, must, in the ordinary course of business, be his agent also to give a receipt for it. *Bedson* v. *Smith*, 10 Gr. 292.

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4. Execution of Deeds.

Notarial Contract—*Statute of Frauds.*]—The ante-nuptial contract in question was not signed by the parties, but by the notaries in their own names, they having full authority from the parties to do so:—Held, that this was a sufficient signature within the Statute of Frauds to bind the parties. *Taillifer* v. *Tadlifer*, 21 O. R. 337.

Power of Attorney—*Assignment of Chattels—Filing.*]—An assignment of chattels, in addition to the conveyance of the property, contained a power of attorney to the assignee to take and hold it, but was void under the statute as an assignment, for want of filing:—Held, that the assignee's right could clearly not be sustained under the power of attorney. *Wilson* v. *Kerr*, 18 U. C. R. 470.

——— *Executing Deed.*]—A. received from B. a power of attorney to sell lands. Under the power A. delivered to C. a deed professing to be made as follows:—"Between A., by and under power of attorney, bearing date, &c., by and from one B., &c., yeoman, of the first part, and C. of the other part." Throughout the deed A., the said party of the first part, was made the grantor, and the deed was thus executed: Signed A. [L.S.], signed C. [L.S.]:—Held, that B.'s interest did not pass by the deed. Semble, that, even if B. had been made the granting party, the deed would have been inoperative from the informal mode of execution. *Duckstedcr* v. *Baird*, 5 U. C. R. 591.

———*Mode of Executing Deed—Fraud.*]—Held, that the execution of a deed by a person in the name of and representing himself to be another, may be forgery, if done with intent to defraud, even though he has a power of attorney from such person, but fraudulently conceals the fact of his being only such attorney, and assumes to be the principal. *In re Regina* v. *Gould*, 20 C. P. 154.

——— *Revocation—Release of Dower.*]—The demandant on the 6th March, 1863, executed a power of attorney to one M. to demand her dower in all lands of her late husband, to compound for her claim, and to accept such sum in lieu thereof, either by annual payments or in one sum, as he should

think fit, and to execute releases of such dower. On the 2nd May he released, in her name, to defendants her dower in the lands in question, for a consideration expressed of $400, but M. swore that he agreed to take $300, and that this was not paid until July. The power was revoked on the 23rd May, and the jury found that the release had been previously executed:—Held, that the power to release was not conditional upon receiving a cash payment or an agreement for an annuity; that the difference between the sum mentioned in the release and that received by M. could not avoid the release, and that the tenants therefore were entitled to succeed. *Williams* v. *Commissioners of Cobourg Town Trust*, 23 U. C. R. 330.

——— *Seal—Conveyance of Land.*]—A power of attorney and contract of sale acknowledged before a notary in Lower Canada (an instrument not under seal), will not authorize a conveyance of lands in this Province. *Doe d. Sheldon* v. *Armstrong*, Tay. 552.

——— *Sufficiency — Covenant.*] — The covenant sued on (for the payment by the mortgagor of a mortgage to defendant, assigned by defendant to plaintiff) had been executed by one C., as attorney for defendant, during his absence from the country, under a power which authorized him only to collect debts and to execute all such deeds and perform all such acts as might be considered necessary and proper concerning the business of defendant; but it was proved that the defendant, before leaving, agreed to give this covenant, and told the attorney of it, in consequence of which the latter executed the deed, and received the money:—Held, that under these circumstances the authority was sufficient, and defendant could not refuse to be bound by the covenant. *Darling* v. *McLean*, 20 U. C. R. 372.

Want of Authority—*Estoppel by Conduct.*]—To an action by L. against A., the defence was release by deed. On the trial it was proved that A. had executed an assignment for benefit of creditors, and received authority by telegram to sign the same for L. The deed was dated 8th October, 1881, and afterwards, with knowledge of it, L. continued to send goods to A., and on 5th November, 1881, he wrote to A. as follows: "I have done as you desired by telegraphing you to sign deed for me, and I feel confident that you will see that I am protected, and not lose one cent by you. After you get matters adjusted I would like you to send me a cheque for $800." * * * In April, 1885, A. wrote a letter to L., in which he said: "In one year more I will try again for myself, and I hope to pay you in full." In November, 1885, the account sued upon was stated:—Held, that the execution of the deed on his behalf being without sufficient authority, L. was not bound by the release contained therein, and never having subsequently assented to the deed, or recognized or acted under it, he was not estopped from denying that he had executed it. *Lawrence* v. *Anderson*, 17 S. C. R. 349.

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5. *Sale and Purchase of Goods.*

Exchange of Goods — *Misappropriation by Agent—Notice—Ratification.*]—The plaintiffs delivered to one R. some cultivators for the purpose of selling, as their agent, for cash or good notes. Three of these he exchanged with the defendant, who was aware of the fact of agency, for a buggy, which he sold and retained the proceeds. It was shewn that on a previous occasion R. had traded a cultivator with one M. for a horse, which he sold and gave the plaintiffs a forged note purporting to be that of the purchaser; and on the same day he traded another cultivator with one D., for a watch and $7, but for this also it was said he returned a note to the plaintiffs. It was not shewn that defendant knew of either transaction, and the plaintiffs had prosecuted R. for the forgery. In an action of replevin the jury gave a verdict in favour of the defendant, but the county Judge in term set it aside, and directed judgment to be entered for the plaintiffs, which on appeal was affirmed with costs. *Stewart* v. *Rounds*, 7 A. R. 515.

Extent of Authority—*Terms — Correspondence.*]—Defendant, living in London, and having 5,000 bushels of barley in his elevator there, employed A. & K., brokers in Toronto, to sell the same, giving them a sample. On 8th June A. & K. wrote defendant: "We have put under offer, subject to your approval, your lot of barley, say 4,000 to 5,000 bushels, cash 50c. net to you in your elevator; answer to be given to-morrow, if accepted," (which was taken to mean the answer of the person having the offer.) On the 9th defendant wrote a letter giving his approval, which was received on the 10th, and on the 11th A. & K. made a contract for the sale of the barley to plaintiff, no counter-instructions having been received by them from defendant. Plaintiff had seen the letters of the 8th and 9th before the contract was signed:—Held, that A. & K.'s authority was to sell on the terms mentioned on the 10th, and that defendant was not liable on the contract of the 11th. Quære, whether A. & K. had authority to sell for 50 cents per bushel, free on cars. *Farrell* v. *Hunt*, 21 C. P. 117.

Goods of Independent Principals—*Sale in One Lot—Ratification.*]—An agent of two independent and unconnected principals, has no authority to bind his principals, or either of them, by the sale of the goods of both in one lot, when the articles included in such sale are different in kind, and are sold for a single lump price not susceptible of a ratable apportionment except by the mere arbitrary will of the agent. There can be no ratification of such a contract unless the parties whom it is sought to bind have, either expressly or impliedly by conduct, with a full knowledge of all the terms of the agreement come to by the agent, assented to the same terms and agreed to be bound by the contract undertaken on their behalf. *Cameron* v. *Tate*, 15 S. C. R. 622.

Jury—*Findings of.*]—Questions were raised as to the power of one I. to sell the goods in question, and whether he was an agent within C. S. C. c. 59, &c.; but the finding of the jury, which the court refused to disturb, made it unnecessary to decide them. *McDermott* v. *Ireson*, 38 U. C. R. 1.

Proof of Authority.]—The evidence set out in this case sufficiently proved the agent's authority to act for defendant in selling goods to plaintiff. *Green* v. *Lewis*, 26 U. C. R. 618.

——— *Inspector of Railway Construction—Adoption of Acts.*] — The plaintiff, acting under a written contract for the delivery of 12 toise of stone for the piers of a bridge which defendants were building over a river on their line of railway, delivered the amount, and was paid by defendants therefor, as well as for an additional toise and a half, and some sand subsequently ordered by the inspector. The inspector then ordered the plaintiff to deliver some more stone and sand, stating that he did not know what quantity of stone was required, but telling plaintiff to go on drawing until told to stop, and the plaintiff then delivered some 26¼ toise of stone and a quantity of sand, defendants having furnished the men and teams to assist the plaintiff in doing so. On observing about the 8th May that defendants had stopped work on the bridge, the plaintiff ceased delivering. About the 12th May he was paid for what had been delivered up to that time, an account being made up by some one acting for defendants, and the hire of teams and men furnished by them being deducted in it from the price allowed, which was $2 a toise more than that in the written contract. On the work being renewed, and on being ordered by the inspector to continue delivering, he delivered 26 further toise and some more sand. The defendants, however, refused to pay for the latter delivery, contending that they were not liable:—Held, that there was sufficient evidence of authority on the part of the inspector to bind the defendants, and of their having adopted his acts. *O'Brien* v. *Credit Valley R. W. Co.*, 25 C. P. 275.

——— *Letter—Repudiation—Ratification.*] —Defendant, on 2nd July, addressed a letter to his agent in these words: "You better see what you can secure 1,000 barrels more of the best oil at, or, if there be a tank that you come across with from 2,000 to 5,000 genuine oil, I would buy it, and pay, say, $1,000, $2,000, or $3,000 down, or, if need be, the whole. I don't think oil can be much higher, but I don't look for it to be cheaper; therefore would not think it bad policy to secure enough to keep me running through the winter. Please post me what you can:"—Held, that no authority was conferred by this letter to complete a purchase of 3,000 barrels. A plaintiff seeking to recover damages by reason of the fall in price upon a contract to sell goods signed by an agent, must give clear proof of agency to bind defendant. Defendant's agent having, on 2nd or 3rd July, telegraphed him that he had bought 3,000 barrels from plaintiffs, defendant, on the same day, replied that he did not want 3,000 barrels, and also wrote that he was almost afraid he could not "tackle" the oil just then; that he (agent) no doubt thought he was buying cheaply or he would have advised with him before closing, but that, as some time had elapsed since he had communicated with him on the subject, it would have only been proper to have done so before closing the transaction, and that, meantime, he preferred not having it; requesting him at the same time to write him all about the market products, and he would in return write him his matured opinion. It further appeared that defendant was wholly ignorant of the terms of the contract, with the exception of the price and quantity, but as soon as made aware of them he told the agent to go back and see plaintiffs and try to get out of the contract, which, according to the agent's own evidence, he, defendant, had already repudiated; and defendant explained his interview thus, that he told the agent he would not take the oil, and that he had better see if he could not himself get out of it, and that he would go and see plaintiffs. On 28th July defendant wrote plaintiffs, repudiating the contract and the agent's authority in making it:—Held, no ratification of the contract. *Prince* v. *Lewis*, 21 C. P. 63, 31 U. C. R. 244.

Sale of Land—*Purchase of Goods—Scope of Authority—Declarations of Agent.*]—One McA., professing to act as agent for defendants S. & F., on the 13th January, 1859, bought the plaintiff's farm, mill, tannery, and loose property, for $5,400, of which $1,000 was for the loose property. An inventory of the articles was made out and signed by the plaintiff, headed "McA. bought of T." (the plaintiff), and with a memorandum at the foot stating that the plaintiff had sold all his right in them to McA. McA. gave to the plaintiff defendants' bond, dated 4th January, 1859, conditioned to convey to the plaintiff 300 acres of land in Iowa, and his own bond to convey to the plaintiff and his brother 68 acres there, to be taken from lands located by defendants and one P. On the same day (13th January) the plaintiff conveyed to defendant S. alone 90 acres, and the plaintiff's brother conveyed to him 100 acres, which he said he held for the plaintiff. The plaintiff also conveyed to McA. 14½ acres, the tannery property, which in May, 1860, McA. conveyed to S. for a consideration expressed of £5. A witness present at the bargain said that some of the loose property was covered by defendants' bond, the smaller bond by McA. not covering it all, and 62 acres of the 68 was to go to the plaintiff for the part not covered. The witness said that at first the plaintiff refused McA.'s bond, but the latter said he and defendant were in partnership, and added, as the witness believed, that he had part of these lands himself; and then the plaintiff took it. The loose property was left on the farm bought by S. for some eighteen months, and a letter was produced, of the 27th June, 1860, from S. to one McC., stating that he did not know what property if any J. McA. had bought of his father, which was on the Thayer (plaintiff's) farm; that the property on this farm, formerly in possession of D. McA., belonged to defendant, and J. McA. was merely his agent to take care of it:—Held, that upon the evidence there was nothing to shew that the chattel property sold nominally to McA. was in fact sold to defendants, or that McA. was authorized to buy it in their name, or to do more than sell for them the 300 acres in Iowa. Semble, that McA.'s declarations beyond the scope of his apparent authority could not bind defendants. *Thayer* v. *Street*, 22 U. C. R. 352.

Sheriff's Sale — *Signature of Memorandum—Acknowledgment.*]—A sale of goods by a sheriff or his bailiff under execution is within s. 17 of the Statute of Frauds, and either of them may sign for the purchaser the memorandum in writing in the same manner as an auctioneer or his clerk. The entry of defendant's agent as the purchaser is sufficient, if the defendant afterwards acknowledge the agent's authority, as was done in this case. *Flintoft* v. *Elmore*, 18 C. P. 274.

Special Contract—*Debt of Agent—Set-off.*]—Where the plaintiff employed his brother, W., as agent to conduct his business at T., which he himself left to carry on business

at N., and defendant purchased from W. certain goods, alleging that he had so purchased them out of the ordinary course of dealing with W. as agent of the plaintiff, under a special contract, by which W. had agreed to sell to him and allow him to credit half the price on an antecedent debt due by W. to him:—Held, that C. S. C. c. 59 did not apply to a case of this kind. Held, also, that the jury should have been directed to find whether the plaintiff had permitted W. so to carry on the business as to allow him to make this special sale to defendant. *McGuire* v. *Shaw*, 15 C. P. 310.

Taking Goods for Debt of Principal.]—In interpleader the plaintiff claimed the goods, two horses, as purchaser from one I., who he contended was agent for C., the owner, within C. S. C. c. 59. I. represented that the horses, with other goods, were sent to him by C. to sell, but that, C. owing him money, he took them for himself on account of the debt:—Held, that I. was not such a general agent as is intended by the statute, and that if he were, his thus taking the goods for himself would not be a sale made valid by it. *Hays* v. *O'Connor*, 21 U. C. R. 251.

Warranty — *Salesman.*] — The plaintiff sued the defendant, a piano-maker, for breach of a warranty given by his salesman on the sale of a piano that the instrument was then sound and in good order:—Held, that the salesman had authority to give the warranty. *McMullen* v. *Williams*, 5 A. R. 518.

See Moshier v. *Keenan*, 31 O. R. 658, *post* X. 2.

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6. *Sale and Purchase of Land.*

Engineer of Railway Company—*Enclosure.*]—Held, that the Great Western Railway Company could not be compelled to purchase land which had been enclosed by one of their engineers without the knowledge of the directors, but which they had never expressed any intention to acquire permanently. Quære, whether, if the company had gone to arbitration upon the value with the intention of taking the land, they could have been compelled to complete the purchase. *In re Baby and Great Western R. W. Co.*, 13 U. C. R. 291.

Instructions to Agent — *Cash Sale — Taking Bills—Payment.*]—A. authorized his agent to sell his estate for £500 cash, and the agent, instead of receiving cash, accepted bills from the vendee, drawn on his (the vendee's) agent in Europe, which bills the agent applied to his own use, by transmitting them to his correspondent, to whom he was largely indebted, and who placed the proceeds when honoured to his credit:—Held, that A. was not bound by such acts of his agent; that this was not a payment to A.; and that until he received the amount of the purchase money in cash he was not bound to execute a deed of the premises. *Brown* v. *Smart*, 1 E. & A. 148.

——— *Price—Collusion.*]—The grantee of the Crown executed a power of attorney in favour of an agent, authorizing him to sell or mortgage all her lands in Upper Canada, and subsequently went to England, where she continued to reside until her death. During her residence there she urged the agent to dispose of the property, and in the course of the correspondence stated that she would be willing to accept £1,000 for it. The agent, in 1844, having directed the property to be sold by auction, his sister became the purchaser for £628, having authorized the person who attended to bid at the sale on her behalf to go as high as £800 for the property. Upon a bill filed by the son and heir of the owner, in 1858, the court set aside the sale by auction, as having been made at a price not warranted by the agent's authority. *Kerr* v. *Lefferty*, 7 Gr. 412.

Manager of Bank—*Acceptance of Down Payment—Oral Authority.*]—The defendant wrote to the manager, who was orally authorized to sell certain lands belonging to a bank: "I hereby agree to purchase from the Dominion Bank, all," &c., and paid on account of the purchase money $100. This memorandum was not submitted to the managing board of the bank, nor was it signed by any one acting on their behalf, and the solicitor for the bank refused to allow it to be put into such a shape as to bind the bank:—Held, that the memorandum amounted to an offer to purchase only, and that before a formal acceptance thereof by the bank authorities, the defendant was at liberty to withdraw the same. And quære, whether in such a case authority for the purpose of selling the lands of the bank could be conferred by parol. *Dominion Bank* v. *Knowlton*, 25 Gr. 125.

Power of Attorney—*Discharge of Mortgage.*]—The discharge of a mortgage was executed under a power which, after authorizing the attorney to sell the principal's lands and give receipts for the consideration money, gave power, upon payment of all or any debts, to give proper and sufficient acquittances and discharges for the same:—Held, sufficient authority to sign the statutory certificate. *Lee* v. *Morrow*, 25 U. C. R. 604.

——— *Scope of—Credit Sale.*]—A power of attorney by mortgagees authorized their agent to enter and take possession of the mortgaged lands and sell the same at public or private sale, and for the best price that could be got for them, and to execute all necessary receipts, &c., which receipts "should effectually exonerate every purchaser or other person taking the same from any liability of seeing to the application of the money therein mentioned to be received and from being responsible for the loss, misapplication, or non-application thereof." The agent took possession and sold the land, receiving part of the purchase money in cash and the balance in a promissory note of the purchaser payable to himself, which he caused to be discounted, and appropriated the proceeds. The purchaser paid the note to the holders at maturity:—Held, that the power of attorney did not authorize a sale upon credit, and the sale by the agent was, therefore, invalid, and the purchaser was not relieved by the above clause from seeing that the authority of the agent was rightly exercised. The sale being invalid, the subsequent payment of the note by the purchaser could not make it good. *Rodburn* v. *Swinney*, 16 S. C. R. 297.

——— *Scope of—Exchange.*] — Held, reversing the decision below, 19 O. R. 739, that a power of attorney to the husband of a married woman, defendant, authorizing him to sell her lands, did not authorize him to exchange such lands for others, or to bind her to assume payment of a mortgage on the land given in

exchange, and that on the evidence she was not bound thereby. *McMichael* v. *Wilkie*, 18 A. R. 462.

——— *Scope of—Leasehold Property.*]—D., being about to leave this country for a time, executed a general power of attorney authorizing the agent, G., amongst other things, for the principal, and in his name, and to his use, "to buy any freehold lands, or any ships, vessels, or steamboats, or any shares therein, as the said G. may think expedient, and for my benefit." During D.'s absence the agent purchased a leasehold property known as the "St. Nicholas Saloon," together with the furniture, provisions, and business therein, for the payment of which he gave his own notes, indorsed by him in the name of the principal, under a clause in the power of attorney authorizing him to make and indorse notes, &c., in the course of business, alleging that he had made the purchase for the joint benefit of himself, his principal, and a third person, who also indorsed these promissory notes:—Held, that this was a purchase which the agent was not entitled to make. *Dick* v. *Gordon*, 6 Gr. 394.

——— *Scope of—Purchase Money.*]—Acting under a power of attorney from the defendant, empowering him to attend to and transact all the defendant's business in connection with her properties, both real and personal, and generally to do anything he might think necessary, &c., in the premises as fully and effectually as if she were personally present, the attorney entered into a contract for the sale of the defendant's farm to the plaintiff, and a deed was executed by the defendant and delivered over to the attorney for the purpose of carrying out the sale. The terms of purchase were that the plaintiff was to pay off certain incumbrances, make a cash payment, and execute a mortgage to secure the balance of the purchase money, which he did, making the cash payment and mortgage to the attorney as trustee for the defendant, which the attorney was willing to hand over to the latter on her delivering up possession, which she refused to do:—Held, that the power was a sufficient authority to the attorney to receive the purchase money and bind the defendant in the arrangement made; and that the plaintiff was entitled to possession of the land. *McClellan* v. *McCaughan*, 23 O. R. 679.

Scope of Authority — *Contract — Letter.*]—C. R. S., being the owner of certain leasehold property, wrote to E. E. K., a land agent, a letter in these words: "Please call on J. J. R. He keeps a small shop . . . He resides in my house on P. street, and has been wanting to purchase it for some time. Tell him if he gives me $235 cash at once I will send the papers to you for him, and he can pay over the money to you. Please write me by return mail." On the following day E. E. K. wrote J. J. R. as follows: "Mr. S. of Meaford wishes me to say that if you desire to purchase some property he owns on P. street, that if you give him $235 cash he will send the deeds to me and deliver them to you. Your reply early will very much oblige." About a month afterwards an acceptance was indorsed on the latter letter in these words: "I hereby accept the above on the understanding that I pay no expenses;" and it was signed by J. J. R. Upon an action being brought for specific performance by J. J. R. against C. R. S.:—Held, that the letter from C. R. S. did not contain authority to E. E. K. to enter into a contract for the sale of the property. *Ryan* v. *Sing*, 7 O. R. 266.

Sheriff—*Sale under Execution—Instructions.*]—The plaintiff, before the sale of lands under his execution, gave the sheriff a memorandum authorizing him to bid on his account to the amount of the debt and costs in the suit. The sheriff, instead of bidding gradually, bid at once the full amount, and bought in the land:—Held, that the plaintiff had clearly no ground of action against him for so doing; and quære, whether the writing could be construed as more than an authority, and whether, if defendant had disregarded it altogether, any action could have been maintained. *Markle* v. *Thomas*, 13 U. C. R. 321.

7. *Other Cases.*

Intervention of Principal — *Termination of Agent's Authority.*]—Where the principals negotiate, and either perfect a contract or put an end to proposals for one before the delegated power to their agents has been fully exercised, the acts of the principals are the binding acts, and the subsequent acts of the agents are of no avail as against their principals. In this case, upon the letters and evidence, it was held that the defendant had not withdrawn his prior proposals and abandoned the negotiations before a final arrangement had been come to by the respective solicitors. *Vardon* v. *Vardon*, 6 O. R. 719.

Notice of Abandonment.] — Authority of agent to give notice of abandonment to underwriters. *Merchants Marine Ins. Co.* v. *Barss*, 15 S. C. R. 185.

Pledge — *Lien—Notice.*]—A partner intrusted with possession of goods of his firm for the purpose of sale may, either as partner in the business or as a factor for the firm, pledge them for advances made to him personally, and the lien of the pledgee will remain as valid as if the security had been given by the absolute owner of the goods, notwithstanding notice that the contract was with an agent only. *Dingwall* v. *McBean*, 30 S. C. R. 441.

Power of Attorney — *Borrowing.*]—An agent who is authorized by his power to make contracts of sale and purchase, charter vessels, and employ servants, and as incidental thereto to do certain specified acts, including indorsement of bills and other acts for the purposes therein aforesaid, but not including the borrowing of money, cannot borrow on behalf of his principal or bind him by contract of loan, such acts not being necessary for the declared purposes of the power. *Bryant* v. *Banque du Peuple*, *Bryant* v. *Quebec Bank*, [1893] A. C. 170.

——— *Ejectment.*]—One G., a rector, in 1861 leased land to the plaintiff for twenty-one years, at an annual rent, with a proviso for re-entry on non-payment. The plaintiff entered and paid rent until the summer of 1865, when he went away from the county, leaving nearly a year's rent overdue, and giving the key to a person in the adjoining house. In July, 1866, the premises being then vacant, G. went to England, leaving a power of attorney with his son authorizing him to collect and distrain for his rents, and to commence and prosecute all actions and other proceed-

ings which might be expedient to be done or prosecuted about the premises as if he were present. Quære, whether the son was authorized, under the power of attorney, to bring ejectment and enter for the forfeiture. *O'Hare* v. *McCormick*, 30 U. C. R. 567.

——— *Evidence of.*]—A registered memorial of a deed, executed under a power of attorney, is not sufficient evidence of the power under 39 Vict. c. 29, s. 1, s.-s. 3 (O.) *Canada Permanent L. and S. Co.* v. *Ross*, 7 P. R. 79.

——— *Landlord and Tenant—Waiver.*]—A tenant absconded leaving rent in arrear, whereupon the landlord distrained, but, before selling, the tenant sent to the landlord a power of attorney authorizing him to dispose of the property; and by letter he directed the landlord to pay himself his claim for rent, as also his claim for expenses and trouble; and after payment thereof and of the plaintiff to remit the balance to the tenant. The landlord then abandoned his warrant, and disposed of the property under the power:—Held, that the landlord by so proceeding had not waived his right to payment of the rent due, and that the plaintiff was entitled to be paid only out of the balance remaining after payment of such rent, as also of any rent due by any former tenant for which a distress could have been made, together with the landlord's expenses and charges for trouble in executing the trusts of the power. *Tyrrell* v. *Rose*, 17 Gr. 394.

Stockbrokers — *Authority to — Implied Terms—Stock Exchange.*] — See *Forget* v. *Baxter*, [1900] A. C. 467.

Variation of Bill of Lading.]—Power of Toronto agent to change destination of goods or vary the terms of a bill of lading placed in the hands of an agent of a forwarding company at Waterford, Ont., for carriage to Liverpool. *Monteith* v. *Merchants Dispatch Transportation Co.*, 9 A. R. 282.

VII. Revocation of Authority to Agent.

[As to revocation by death, see R. S. O. 1897 c. 116, ss. 1, 2.]

Death of Principal.]—By the death of the principal the authority of an agent is determined. Where, therefore, an agent obtained on credit, from persons with whom his principal had been in negotiation previously, a supply of furniture for the house of the principal, in which he had intended carrying on business, but before any binding agreement was concluded, or the furniture delivered, the principal had died abroad, the court refused to decree a specific performance of the contract to purchase, and ordered the administrators, who had taken possession of the goods, to deliver them to the vendors, and pay the costs of the suit instituted for the purpose of obtaining possession of the furniture, or security for the price of it. *Jacques* v. *Worthington*, 7 Gr. 192.

——— *Knowledge of—Power of Attorney.*]—T., K., & Co., carrying on business as gasfitters and plumbers, contracted orally with D., an hotel-keeper, to supply a new hotel he was erecting with various articles in the way of their trade, which were to be paid for as the work progressed. D. afterwards left this Province on account of ill-health, having previously executed a power of attorney to one S., authorizing him to carry on his business during his absence. T., K., & Co., having discovered that D.'s estate was greatly involved, refused to proceed with their contract, unless secured for their work and materials, whereupon S., with a view of inducing T., K., & Co. to complete their contract, in pursuance of a previous arrangement, executed, as such attorney, a chattel mortgage of the goods furnished by them, securing T., K., & Co. payment of their demand. At the time of the execution of this instrument D. was dead, but this fact was not known to the parties until some time after the completion of the work:—Held, that T., K., & Co. were not, under this mortgage, entitled to remove any of the fittings put in the hotel; their only remedy being for the price of their work and material under their contract with D. Jacques v. Worthington, 7 Gr. 192, distinguished and approved. *McQuesten* v. *Thompson*, 2 E. & A. 167.

Notification—*Act Done before.*]—Semble, that an act done by an agent within the scope of his authority, and before any notification of its revocation, is good, although it may be entirely revoked at the time. *Kerr* v. *Lefferty*, 7 Gr. 412.

What Constitutes Revocation—*Letter—Authority of Agent.*]—The owner of land, in January, 1864, wrote to an agent requesting him to find a purchaser for it at $600 cash, or $800 on a certain specified credit. Nothing was done on this letter, and in December, 1865, the property in the meantime having risen greatly in value, the owner, having received an offer for the timber on the land, wrote to the same agent informing him thereof, and asking his opinion as to what "he (the owner) should take for the lot altogether." In February, 1866, the agent, without further communication with the owner, contracted in writing to sell the property for $600, "to be paid on the execution of a good and full warranty deed, clear of all incumbrances." On a bill filed for specific performance by the purchaser against the owner, the court, considering that the letter of December, 1865, was a revocation of any authority contained in the letter of January, 1864, to sell the premises, refused to enforce the contract; and quære, whether the letter of January, 1864, conferred upon the agent power to sell. But if that letter did empower the agent to sell, he had not any authority for agreeing to give a deed such as that stipulated for. *Anderson* v. *McBean*, 12 Gr. 463.

VIII. Rights of Agent against Principal.

1. *Advances by Brokers or Commission Merchants.*

Agreement — *Construction—Commission—Pleading.*]—The declaration stated that defendants covenanted with plaintiffs that the plaintiffs should make them advances either in money or wool: that the defendants would buy wool with moneys advanced: that the plaintiffs should have a lien on all the wool, and might insure it and charge the premium as advances: that the wool as manufactured should be consigned to the plaintiffs for sale: that the plaintiffs should be entitled to 1½ per cent. commission on advances, and 5 per

cent. on sales; and that the plaintiffs should credit proceeds of sales to defendants after deducting the advances and commission. Averment, that the plaintiffs made advances, paid insurances, and made sales, and credited defendants with the proceeds, less the advances and commission, whereby plaintiffs became entitled, in addition to the balances due to them for advances and interest, to large sums for commission under the agreement; and that upon the closing of the agreement there was due to the plaintiffs a large sum, as a balance due thereunder, which defendants had not paid:—Held, on demurrer, that upon the sale of all the goods delivered by defendants to the plaintiffs an action might lie on the covenant for any balance due to the plaintiffs for advances and commission, as a liability to be implied from the tenor of the agreement. 2. That the expression "upon the closing of the agreement," was not equivalent to an averment that plaintiffs had no goods of the defendants still on hand to be sold; and that the declaration was therefore insufficient. *Young* v. *Crossland*, 18 C. P. 312.

Illegal Contracts.]—Liability of principals to brokers for moneys advanced for the purpose of buying and selling grain on margin. *Rice* v. *Gunn*, 4 O. R. 579.

Interest — *Agreement — Custom — Evidence.*]—A merchant agreed in writing to advance money for the purpose of getting out timber, to be forwarded to him at Q. for sale; for which advances he was to be paid certain commissions. The timber was duly forwarded to him in the autumn; but, prices being low, he, with the assent of the other party, held the timber over till the following spring, and claimed interest on his advances from the 1st December until the sale of the timber, the case not being provided for by the agreement. It appeared that it had been customary in the trade to charge interest in such cases, where there was not any writing; but there was no evidence of such custom being known to the plaintiff:—Held, that interest could not be charged. *De Hertel* v. *Supple*, 13 Gr. 648, 14 Gr. 421.

——— *Purchase on Joint Account—Commission—Objection—Delay.*]—Where parties entered into an agreement that they should purchase goods on joint account, and at the joint risk, and that one of the parties should furnish the funds in the first instance:—Held, that interest could not be charged on the funds so furnished. In such a case a firm in C. was to advance the funds, and the goods were to be consigned for sale to their firm in L., which went by a different name:—Held, that they could not charge commission on their sales. Three months before the filing of a bill respecting the partnership, accounts had been furnished in which interest and commission were charged, and none of the partners had before suit suggested their objections to those charges. Held, that they were not precluded by this delay from objecting thereto in the suit. *Jardine* v. *Hope*, 19 Gr. 76.

Loss of Goods—*Refund of Advance—Evidence.*]—Defendant obtained an advance from plaintiffs on wheat which he had shipped from Oakville to Oswego, consigned to them, to the care of C. & B. The plaintiffs were to sell the wheat for defendant, and pay him the proceeds, deducting the advance and charges, &c. The wheat having been lost on the passage:—Held, that the defendant was bound to refund the sum advanced, as the wheat still continued his property. *Gooderham* v. *Marlatt*, 14 U. C. R. 228.

Defendant, at the trial, desired to prove that when the advance was made the plaintiffs were spoken to about insuring the wheat, and replied that they were their own insurers, and took the risk of wheat shipped on their account:—Held, that such evidence was rightly rejected; and that if admitted it would not have affected defendant's liability. *Ib.*

Request for Refund — *Custom—Evidence.*]—Defendant, at B., consigned for sale to the plaintiff, a commission merchant at N., a lot of butter for sale, and drew upon him at five days a bill for $2,000, which the plaintiff accepted and paid at maturity. At that time his instructions were not to sell for less than 18½c. per lb., which he could not get. The market continued to fall, and after a lengthy correspondence the butter was sent to plaintiff's agent at H., who wrote that no sale could be effected there. Plaintiff then sued defendant upon the common counts for the money paid by him:—Held, that he was entitled to recover, and that there was nothing in the facts, more fully set out in the case, to vary the common law obligation to refund the advance on request, or to compel the plaintiff to wait until a sale should be effected. *Cowie* v. *Apps*, 22 C. P. 589.

At the trial defendant tendered evidence to shew the meaning of cash advances made by commission merchants on account of goods consigned to them for sale, and the usual practice as to commission merchants reimbursing themselves for such advances:—Held, that such evidence was properly rejected. *Ib.*

Sale for Less than Advance—*Conduct of Agent—Pleading.*]—Defendant, living at C., consigned to the plaintiff at M. certain tobacco for sale, and, without authority, drew upon him at the same time for $250, which the plaintiff accepted and paid. The price which defendant asked could not be obtained in M., and the plaintiff therefore shipped the tobacco to E., where it was sold. The net proceeds, after deducting freight and charges, were only £14 sterling, and he sued defendant upon the common counts for the difference, $278, the expenses of shipping being also deducted. Defendant pleaded never indebted, payment, and set-off. When the draft fell due defendant had written to the plaintiff, offering to raise funds to retire it by drawing upon him again. The account sales received by the plaintiff from E. had been sent the defendant, who said, on receiving them, that he did not think he ought to bear the whole loss, but offered $150. The jury gave a verdict for $200:—Held, there being no evidence of any special contract, that the plaintiff was entitled to recover his advances without waiting for the sale of the tobacco; and that if he had done wrong in his dealings with it, such defence should have been pleaded. The verdict was therefore upheld. *Stewart* v. *Lowe*, 24 U. C. R. 434.

——— *Evidence—Charges.*]—Plaintiffs being commission merchants in N. Y., received from defendants a quantity of wheat, with instructions to ship it to L. for sale there, not limiting them as to price, nor directing the employment of any particular agent; and they made advances upon it, which, as they alleged, exceeded the net proceeds of the sales, one cargo having realized more than the ad-

vances, the other two cargoes much less. In an action for the excess thus advanced, the plaintiffs proved that they had mailed to defendant the account sales received by them from their L. agents, with an account between plaintiffs and defendants founded upon them, and that these account sales were afterwards seen in his possession; and evidence was given that the wheat was in a bad condition when shipped, as defendant knew; that the prices realized were what might have been expected, and the charges such as were usual. It appeared, also, that part of the wheat belonged to one J., and that on receiving the first account sales shewing a profit, the defendant had settled with him. This cargo, however, had not been consigned to the same agents as the other two. The jury having found for the plaintiffs:—Held, that the evidence was not sufficient to shew the price for which the wheat was sold, nor the amount of charges connected with the sales; and a new trial was therefore granted, with costs to abide the event. *Craig* v. *Corcoran*, 23 U. C. R. 441.

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2. *Remuneration and Indemnity.*

(a) *Agents for Purchase of Goods.*

Character of Party — *Principal or Agent.*]—Held, upon the evidence, that the defendants were acting as principals, and not as agents for the purchasers, and therefore could not charge commission. *Macklem* v. *Thorne*, 30 U. C. R. 464.

Negotiations — *Subsequent Contract by Principal.*]—Plaintiff, being employed to purchase and ship lumber for defendant on commission, attempted to purchase a large quantity from P., but was unable to agree as to terms, and the negotiation was broken off. Afterwards P. and defendant agreed on terms of sale, and defendant purchased. The court set aside a verdict for plaintiff for his commission, with costs to abide the event, on the ground that the evidence did not sustain it. *Boydell* v. *Snarr*, 6 C. P. 94.

Services outside Contract—*Interest.*]—R., who was engaged in the lumber business, employed S. as his agent, and by letter agreed to pay him $10 per 1,000 cubic feet on all timber which S. manufactured for him, which rate (the letter said) "includes purchasing, superintending the making, and attending to the shipping of the same," R. paying all travelling expenses. S. bought a quantity of timber for R., which was not manufactured under the superintendence of S.:—Held, that he was entitled to a reasonable compensation for this service. There having been considerable delay in enforcing payment, caused by R. having obtained an injunction restraining S. from proceeding at law:—Held, that S. was entitled to interest on the amount of his claim. *Ridley* v. *Sexton*, 18 Gr. 580. Affirmed on appeal as to the allowance of interest, 19 Gr. 146.

(b) *Agents for Purchase of Lands.*

Contract—*Statute of Frauds—Acting for Vendor.*]—Defendant agreed with the plaintiff, an attorney, to give him $1,000 for his trouble and commission, if he procured for him a certain hotel property for $15,000. The plaintiff took an agreement from the vendor to sell to himself, and afterwards, with the vendor's assent, substituted one O., who acted for the plaintiff, for himself as vendee. The defendant and the vendor, through the instrumentality of the plaintiff, then came together, and the price was reduced to $14,500. Deeds were made by O. and by the vendor to the defendant, who took possession, the plaintiff being employed by the vendor to prepare some of the papers, but he had not, as he swore, been employed by him to make the sale:—Held, that the plaintiff was entitled to recover; that the contract was not one within the Statute of Frauds; and that his acting for the vendor after the contract of sale had been made, notwithstanding the agreement for purchase in the first instance to himself, was not open to any legal objection. *White* v. *Curry*, 39 U. C. R. 569.

Indemnity against Purchase Money —*Contract in Name of Agent.*]—S., a school trustee, by desire of the board, bought land at an auction, for the board, for a school-site, and signed the contract with his own name only. The board afterwards, by several resolutions, during three years, recognized the purchase as their own, and paid three instalments of the purchase money. In an estimate under the corporate seal, the board applied to the town council for money to pay "for school premises for a central school, contracted for and agreed to be paid, $1,570; for building a central school house on said purchased premises, $7,870." It was shewn that there was no other property or contract to which this language could refer than that mentioned. The town council did not comply with the requisition, and ultimately trustees were elected, a majority of whom determined to repudiate the purchase:—Held, in a suit by S. against the board for indemnification in respect of the remainder of the purchase money, that he was entitled to relief. *Smith* v. *Belleville School Trustees*, 16 Gr. 130.

(c) *Agents for Sale of Goods.*

Contract—*Construction — Future Sales.*]—The defendants, wishing to introduce an ore called blue ore in Pennsylvania, corresponded with the plaintiff at Pittsburg. Through the plaintiff's intervention an agreement was made between O. & Co. and defendants for the sale of 15,000 tons, to be delivered before the 1st August, 1872, with an option to O. & Co. to order any number of tons from 10,000 to 30,000, during the five years from the 1st February, 1873, and a formal contract was subsequently executed. On the above sale being effected, C., defendants' managing director, wrote plaintiff that a commission of fifteen cents per ton would be paid him on that sale, and that he would make him the following offer for the future: "I will give you a commission of ten cents per ton for all ore introduced to any furnace, that is, for the first sale made to any furnace; and a commission of five cents per ton for all blue ore for the years 1873, 4, 5, 6, 7, that is, for five years from the 1st January, 1873; and I make you the sole agent for the sale of blue ore for Western Pennsylvania." The defendants paid plaintiff the fifteen cents on the 15,000 tons; but O. & Co. having exercised their option, and ordered the 30,000 tons, plaintiff claimed that he was entitled to

a commission of five cents per tons on this 30,000 tons, and brought this action therefor:—Held, that he could not recover, as the agreement to give five cents per ton on all sales during the five years, referred to future sales, and not to any amount ordered by O. & Co. under their contract. *Taylor* v. *Cobourg, Peterborough, and Marmora R. W. and Mining Co.*, 24 C. P. 200.

——— *Construction — Moneys Received after Termination—Estoppel.*]—The defendants, type founders in Edinburgh, employed plaintiff's father as their agent in Canada, to be paid by a commission "on the receipts, i. e., in cash, bills, and value of old metal received." He also had a small guaranteed salary. It was understood that as soon as the father got too old to manage the business, the plaintiff was to succeed him; and in 1880 this was effected. In 1882 the plaintiff was dismissed. He wrote complaining thereof, but said the sting was taken out of it by reason of a yearly allowance to the father of $1.250, for which he was grateful. In January, 1884, the defendants, annoyed at a loss occasioned by plaintiff's brother, threatened that the father's allowance would be stopped; and the father wrote plaintiff that he could make any claim he wished. The plaintiff then made a claim on defendants for commission on sales made before, but the amount whereof was received after plaintiff had left defendants' employment. On defendants notifying the plaintiff that if the claim were pressed the father's allowance would be discontinued, nothing further was done by plaintiff until after his father's death, when the claim was pressed and this action commenced. It appeared that had the claim been pressed the allowance would have been stopped; and that defendants paid the allowance under the belief that the claim would not be pressed:—Held, that the plaintiff was not entitled to recover. *Palmer* v. *Miller*, 13 O. R. 567.

——— *Period—Implication.*]—In a written contract of agency the principal agreed to pay to the agent a fixed commission on all sales of goods manufactured by the former effected by or through the latter. The contract was made terminable at the end of a year or a month's notice by either party; but it contained no express agreement by the principal to employ for any period or to manufacture any goods:—Held, that these terms could not be imported into the contract by implication. *Morris* v. *Dinnick*, 25 O. R. 291.

——— *Scope of Employment — Specific Goods.*]—The appellant company dealt in electrical supplies at Halifax and had at times sold goods on commission for the respondents, a company manufacturing electric machinery in Montreal. In 1897 the appellants telegraphed the respondents as follows:—"Windsor Electric Station completely burned. Fully insured. Send us quotations for new plant. Will look after your interest." The reply was:—"Can furnish Windsor 180 Kilovatt Stanley two phase, complete exciter and switchboard, $4,900, including commission for you. Transformers, large size, 75 cents per light." * * * The manager of the appellant company went to Windsor but could not effect a sale of this machinery. Shortly afterwards a travelling agent of the defendant company came to Halifax and saw the manager, and they worked together for a time trying to make a sale, but the agent finally sold a smaller plant to the Windsor company for $1,800. The appellants sued for a commission on this sale:—Held, that they were not employed to effect the sale actually made; that the respondents offered the commission only on the sale of the specific plant mentioned in the answer to the request for quotations; and that there was no evidence of any course of dealing between the two companies which would entitle the appellants to such commission. *Starr, Son, & Co.* v. *Royal Electric Co.*, 30 S. C. R. 384.

See Gooderham v. *Hyde*, 6 C. P. 341; *Young* v. *Crossland*, 18 C. P. 312; *Jardine* v. *Hope*, 19 Gr. 76; *Corby* v. *Williams*, 7 S. C. R. 470; *Jones* v. *Linde British Refrigeration Co.*, 32 O. R. 191, *ante* III. 1.

(d) *Agents for Sale of Lands.*

Amount of Commission — *Refusal of Purchasers to Complete—Deposit—Non-direction.*]—The appellants, real estate brokers at Winnipeg, received oral instructions from the respondents to sell certain lands of theirs at a certain price and on certain terms of payment. The appellants sold the land at the price named, receiving from the purchasers the sum of $5,000 as a deposit on account of the purchase money, and giving therefor a receipt. Prior to the expiration of the delay within which the balance of the purchase money was to be paid, the purchasers refused to complete their purchase, for want of title in the respondents to a certain portion of the land, and contended that from the absence of writing signed by them they could not be compelled to do so. The appellants then brought an action for commission upon the entire purchase money. The respondents set up the defence that the appellants promised to sell the lands and to complete such sale by preparing the necessary agreement in writing to make a binding contract with the purchasers. The case came on for trial before a jury, who followed the charge, and found a verdict in favour of the appellants for the full amount of their claim, thereby giving them two and a-half per cent. upon the entire purchase money of both parcels of land. The jury were not asked by the Judge to pronounce upon the nature of the terms upon which appellants were employed, upon the question whether the sale went off through the neglect of the appellants to take a writing binding the purchasers, or whether it went off by reason of the vendors not being able to complete the title, or because they were unwilling to do so. The full court directed that the verdict should be reduced to $125, being commission at the rate of two and a-half per cent. on the $5,000 actually paid, or, in the alternative, that there should be a new trial:—Held, affirming that judgment, that there had been a mistrial, and therefore the order for a new trial should be affirmed; appellants to have the alternative of reducing the verdict to $125. *MacKenzie* v. *Champion*, 12 S. C. R. 649.

Commission Paid by Purchaser—*Rights of Vendor—Waiver.*]—The plaintiff, a land agent, was employed by defendants to sell certain land at a stipulated price, and in the course of his employment, and after negotiating with an intending purchaser, an exchange was effected by certain of his lands being taken in part satisfaction of the defendants' price, and the plaintiff demanded commission

from the purchaser for effecting such exchange, to which the purchaser, without acknowledging the plaintiff's right to make it, acceded, and paid a sum of money to the plaintiff. The plaintiff said that such sum was paid not as commission, but as a gratuity:—Held, that such a sum, whether received as a commission strictly so called, or as a gratuity, was a profit directly made in the course of and in connection with the plaintiff's employment, and would, therefore, belong to his employers, the defendants; but, as it appeared that the defendants were fully aware of the plaintiff having received such sum, and made no objection to his retaining it, but with full knowledge thereof negotiated with him for a settlement of his remuneration, they could not afterwards, in an action by the plaintiff for such remuneration, set off such sum. *Culverwell v. Campton*, 31 C. P. 342.

Contract — *Purchase not in Accordance with—Acceptance.*]—Defendant agreed with the plaintiff that if the plaintiff would find him a purchaser for his farm at $6,000, and get not less than $1,000 down, he would pay him $200. The plaintiff found a purchaser at $6,000, who paid only $500 down, but the defendant accepted and sold to him, and it was proved that after the sale defendant promised the plaintiff to pay him the $200. The Judge having found for the plaintiff for $200 upon the common counts:—Held, on appeal, that defendant having accepted and dealt with the purchaser found by the plaintiff, though not such a purchaser as the agreement called for, the plaintiff was entitled to recover the value of his services on the common counts; and that, as the defendant had promised to pay the $200, the verdict was right. *Wycott v. Campbell*, 31 U. C. R. 584.

——— *Termination of—Parol Evidence—Refusal of Offer—Quantum Meruit.*] — The defendant, at the instance of the plaintiff, placed his farm in the plaintiff's hands for sale, subject to the payment of a certain commission in case the farm should be disposed of through him, and if the defendant himself sold without the aid of the plaintiff, the commission should be only one-half. The defendant alleged that it was a term of the arrangement that if the land remained unsold at the end of two years the agreement should cease:—Held, that, if parol evidence as to the limitation of time was not admissible, the law would infer its continuance for a reasonable time only, and that, in deciding what was a reasonable time, the time spoken of by the parties, which was two years, might be considered. Held, also, that the defendant having refused to sell to a proposed purchaser found by the plaintiff, the plaintiff was not entitled to recover his full commission as on a sale, but the value of his services as on a quantum meruit or damages for the defendant's wrongful refusal. *Adamson v. Yeager*, 10 A. R. 477.

Negotiation — *Incomplete Agreement—Sale to Others — Quantum Meruit.*] — The plaintiff had been employed by the defendants to procure offers for the purchase or exchange of three blocks of land owned by them, and he accordingly procured from one R. an offer at an estimated price of $97,000, which he submitted to the defendants, and which they, on the 10th September, 1884, accepted on condition that R. would agree to a variation of the terms of his offer. R. being then absent from the country, the plaintiff, without any instructions, agreed on behalf of R. to the proposed variation. R. returned shortly afterwards, and on the 18th September signed a formal ratification of the plaintiff's act, but it was not shewn that this was ever communicated to the defendants. Meanwhile the defendants, being pressed for money by a mortgagee of one of the properties, had arranged a sale of that property to one S., at a price $8,000 less than it was valued at in the offer of R., part of the consideration given by S. being some of the same lands offered by R. in exchange, of which it appeared that S. and not R. had the control; and by a subsequent arrangement the defendants' other two properties were sold to R. The defendants and S. were brought together during the negotiations arising out of R.'s offer:—Held, reversing the judgment in 11 O. R. 265, that, as between R. and the defendants, the matter had never passed beyond the stage of negotiation; R.'s offer was not one that he could carry out, and therefore the plaintiff was not entitled to commission upon the offer of R., or alleged contract of sale made with him; neither was he entitled to anything either on the footing of his agreement or quantum meruit by way of commission on the sales that were actually made. *Culverwell v. Birney*, 14 A. R. 266.

Right to Commission—*Change in Terms of Sale.*]—The defendant, knowing that the plaintiff was a land agent, arranged with him to procure a purchaser for his house and lot at a named price. Through the plaintiff's intervention a proposed purchaser was procured and a purchase discussed. Subsequently, and as a result of the discussion, a lease was entered into of the premises for three years, with a collateral agreement giving the purchaser the option of purchasing within a year, which he exercised:—Held, that the plaintiff was entitled to his commission from the defendant. *Morson v. Burnside*, 31 O. R. 438.

——— *Endeavour to Effect Sale—Expenses — Collateral Contract.*] — D. gave instructions in writing to H. respecting the sale of a coal mine on terms mentioned, agreeing to pay a commission of 5 per cent. on the selling price, such commission to include all expenses. H. failed to effect a sale:—Held, that in an action by H. to recover expenses incurred in an endeavour to make a sale, and reasonable remuneration, parol evidence was admissible to shew that the written instructions did not constitute the whole of the terms of the contract, but there had been a collateral oral agreement in respect to the expenses, and that the question as to whether or not there was an oral contract in addition to what appeared in the written instructions was a question that ought to have been submitted to the jury. *Dunsmuir v. Lowenberg*, 30 S. C. R. 334.

3. *Other Cases.*

Bill for Account.]—Ordinarily a bill for an account will not lie by an agent against a principal. *James v. Snarr*, 15 Gr. 229.

Set-off.]—An agent, if sued by his principal for money received, cannot deduct in the first instance from such money a claim for money lent, or for any independent transaction between himself and his principal—treating the balance as the only sum held for the use of the plaintiff; but he must plead his demand by way of set-off against his gross receipts. *Hamilton v. Street*, 8 U. C. R. 124.

Stated Account.] — Accounts were delivered in 1862 and 1865, by a trustee and agent to his principal, and the confidential relationship existed for upwards of two years after the latter account had been rendered:—Held, that these accounts were not binding on the principal as stated accounts. *Smith* v. *Redford*, 19 Gr. 274.

IX. Rights of Agent against Third Persons.

Right to Sue in his Own Name.]—A person receiving money from an agent on a promise to return it to him cannot, in an action by the agent to recover it back, set up as a defence that the money really belonged to a third party. *Lister* v. *Burnham*, 1 U. C. R. 419.

Held, that the plaintiff, who held notes indorsed to him in blank as his father's agent, could as such agent sue upon them in his own name. *Ross* v. *Tyson*, 19 C. P. 294.

Defendant in writing acknowledged the receipt from the plaintiff, described as assistant manager of the Howe Machine Company, of a sewing machine on hire for three months at $5 a month in advance. He agreed to pay $45, the value of the machine, in the event of its being injured or not returned; and in default of payment of the monthly rental, or the due fulfilment of the lease, or if the machine should be deemed by the lessors to be in jeopardy, the plaintiff or the company might resume possession of it; and the defendant waived all right of action for trespass, damages, or replevin by reason of any action taken by the plaintiff or the company in resuming such possession. The plaintiff said he had possession of the machine before it was delivered to defendant; that he was responsible to the company, a foreign corporation; and had no property in it except as their agent:—Held, that the plaintiff under the agreement might maintain replevin in his own name for the machine, on non-fulfilment of the conditions. *Coquillard* v. *Hunter*, 36 U. C. R. 316.

Defendant, being indebted to plaintiff, by an indenture reciting his indebtedness, and that he had agreed with the plaintiff for the repayment of said sum due within six months from date, with interest, conveyed to plaintiff certain lands, habendum in fee. Proviso, that plaintiff, if the debt was duly paid, would reconvey; but there was no covenant for payment by defendant. Indorsed on the indenture was a deed poll executed by plaintiff, stating the said debt thereby secured to be the proper money of one J. L., and that the plaintiff's name was only introduced therein as agent for said J. L.; and in consideration of the trust, and of 5s., he absolutely assigned all interest in the lands in the said indenture, as well as the indenture, to the said J. L.:—Held, that it was not open to defendant to deny that he was at the date of the said indenture indebted to the plaintiff, who could sue in his own name. *Allnutt* v. *Ryland*, 11 C. P. 300.

X. Rights of Principal against Third Persons.

1. *To Sue upon Contracts of Agents.*

In Name of Agent—*President of Company.*]—An agreement was made between the defendant and the plaintiff described as "President of the Port Burwell Harbour Company on behalf of the said President, Directors, and Company of Port Burwell Harbour," and under the seals of defendant and plaintiff:—Held, that the plaintiff was entitled to sue in his own name. *Saxton* v. *Ridley*, 13 U. C. R. 522.

In Name of Disclosed Principal—*Foreigner.*]—One of the plaintiffs, W., of New York, and his agent, C., of Ingersoll, saw defendant at his cheese factory in Stratford, and talked of the price of cheese. W., in leaving, said any correspondence would be through C., from whom defendant would probably hear on plaintiffs' behalf, when the cheese was ready for sale. Subsequently, plaintiffs authorized C. to buy cheese from defendant, and a contract was made by telegrams between C. and defendant:—Held, that the plaintiffs, though foreign principals, might sue upon the contract, there being evidence to shew that C. was authorized by them to enter into it on their behalf, and that defendant dealt with him as plaintiffs' agent. *Webb* v. *Sharman*, 34 U. C. R. 410.

——— *Telegram.*]—Held, that a contract may be made, through the medium of an agent, with a telegraph company for the transmission of a message; and where the principal sustains loss through the negligence of a company, he may maintain an action against them therefor. The person to whom a telegram was sent by his agent was held entitled to sue the telegraph company for negligence in the transmission of it. *Feaver* v. *Montreal Telegraph Co.*, 24 C. P. 258.

In Name of Undisclosed Principal.]—Semble, that a principal, for whose benefit a contract has been made by his agent, may sue thereon in his own name, though defendant may have known nothing of his interest in the subject matter. *Mair* v. *Holton*, 4 U. C. R. 505.

——— *Insurance Policy.*] — A marine policy was in this form: The Ætna Ins. Co., of, &c., on account of C., loss, if any, payable to McC. (the plaintiff) in gold, do make insurance, &c.:—Held, that the contract on this policy was entered into with C.; and that McC. was not insured, and could not sue on the policy. Semble, that the insertion in the policy of the words "for or in the name of all persons interested," &c., or "for whom it may concern," would have enabled McC., on shewing interest, to recover; also, that the words, "as broker" or "as agent," following after C.'s name, would have let in parol evidence to shew the interest and right of an undisclosed principal, who could have sued on the policy. *McCollum* v. *Ætna Ins. Co.*, 20 C. P. 289.

——— *Plea — Tender—Acknowledgment.*] Action by the Canada Shipping Company to recover $3,038.43, the price of 810 tons, 5 cwt., of steam coal sold by their agents Thompson, Murray, & Co., through T. S. Noad, broker, as per following note: "Montreal, 13th August, 1879. Messrs. Thompson, Murray, & Co.: I have this day sold for your account to arrive to the Hudon Cotton Mill Co. the 810 tons 5 cwt., best South Wales black vein steam coal per bill of lading per 'Lake Ontario' at $3.75 per ton of 2,240 pounds, duty paid ex ship, ship to have prompt despatch. Terms net cash on delivery or thirty days, adding interest buyer's option.

Brokerage payable by you; buyer to have privilege of taking bill of lading or reweighing at seller's expense." The defendants pleaded: (1) that the contract was with Thompson, Murray, & Co. personally, and the plaintiffs had no action; and (2) that the cargo contained only 755 tons, 580 lbs., the price of which was $2,868.72, which they offered Thompson, Murray, & Co., together with the price of ten tons more to avoid litigation, in all $2,890.72, which they brought into court without their acknowledging their liability to plaintiffs, and prayed that the action be dismissed as to any further or greater sum:—Held, per Ritchie, C.J., and Taschereau and Gwynne, JJ., that it was unnecessary to decide the question whether the action could be brought by the undisclosed principal, for by their plea of tender and payment into court the defendants had acknowledged their liability to plaintiffs, although such tender and deposit had been made "without acknowledging their liability." Per Strong, J., that the action by the respondents (undisclosed principals) was maintainable. *Hudon Cotton Co.* v. *Canada Shipping Co.*, 13 S. C. R. 401.

——— *Sale of Land.*] — W. signed and sealed a deed of conveyance of certain land to C., who supposed him to be the owner of the land, as he professed himself to be, whereas he was really only acting as agent for M., the owner. M. now brought this action against C. for specific performance of, as he alleged, a contract on C.'s part to purchase the land. There was no note or memorandum of the alleged contract, other than the deed, which was signed and sealed by C., and was in the ordinary short form, and acknowledged the receipt and payment of the purchase money, though the evidence shewed that only ten per cent. of it had been actually paid. It did not appear that the deed had ever been delivered:—Held, that the deed, though incomplete as a conveyance, was evidence of a contract of sale, sufficient to satisfy the Statute of Frauds. Held, also, that, though W. professed at the time of the contract to be the owner of the land, yet, as in reality he was acting as agent for M., M. could avail himself of the contract, and was entitled to judgment. *McCarthy* v. *Cooper*, 8 O. R. 316, 12 A. R. 284.

——— *Set-off against Agent.*]—In an action for use and occupation, and for money had and received, it appeared that the plaintiff was assignee of R. M. & Co., in trust to secure payment by instalments of a certain dividend to their creditors, who instructed him not to interfere with the property until default. F., one of the firm, orally leased the premises in question, which were included in the assignment, to defendant, and said he believed he mentioned to him at the time the plaintiff's name as owner, and referred defendant to him with regard to a proposition to purchase. Afterwards the firm and defendant had dealings together, and defendant claimed that after crediting the rent they were still indebted to him. The plaintiff, being examined, swore that he had no knowledge of defendant's occupation, or of the premises, but that F. was authorized to rent the place, and to use his name in the suit:—Held, that it was properly left to the jury to say whether defendant had taken the premises from the plaintiff through F. as his agent, or from the firm; and that the evidence warranted a verdict for defendant. *Crawford* v. *Fraser*, 21 U. C. R. 518.

Certain road stock, which stood in the name of M., but belonged to the firm, was assigned with other property to the plaintiff. The defendant, before the assignment, had received the dividends under authority from M., and continued to receive them afterwards. No evidence was given to shew that either defendant or the road company had notice of the assignment:—Held, that the plaintiff's right to recover was rightly left to the jury, as with regard to the rent, and a verdict for defendant was upheld. *Ib.*

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2. *Other Cases.*

Carriers' Liability — *Countermand of Agent's Direction.*] — Where A., the general agent for shipping B.'s flour, shipped twenty-five barrels of it as usual to A. & Co. in Kingston, and before the sailing of the ship, D., another agent, under special instructions from B., shipped the same flour to B. & Co. in Kingston, to be forwarded to Montreal:—Held, that, as the owner of the flour could at any time change its destination before the ship sailed, the owners of the ship were liable to B., through their master's last bill of lading, given to the special agent D., the flour having been forwarded by the master in mistake to A. & Co. in Kingston, and left there, instead of being forwarded, as last directed, through B. & Co. to Montreal. *Graham* v. *Browne*, 5 U. C. R. 234.

Conversion of Securities — *Fraudulent Pledge by Agent—Estoppel.*] — The Quebec Turnpike Trusts bonds issued under special Acts and Ordinances (R. S. Q. 1888, sup., p. 505) are payable to bearer and transferable by delivery. Certain of these bonds belonging to the estate of the late D. D. Young, had been used as exhibits and marked as such in a case of Young v. Rattray, and having been afterwards lost were advertised in a newspaper in Quebec in the year 1882. About ten years afterwards W., who was the agent and administrator of the estate and had the bonds in his possession, as such, pledged them to a broker for advances on his own account, the bonds then being long past due, but payment being provided for under the above cited statutes:—Held, that neither the advertisement, nor the marks upon the bonds, nor the broker's knowledge of the agent's insolvency, were notice to pledgee of defects in the pledgor's title; and that the owners of the bonds, having by their act enabled their agent to transfer them by delivery, were estopped from asserting their title to the detriment of a bonâ fide holder. *Young* v. *MacNider*, 25 S. C. R. 272.

Detinue—*Goods Sold without Authority—Tender—Demand.*] — The plaintiff's servant, one O., being in charge of his horses, sold one without plaintiff's authority to defendant's wife, who had the management of defendant's business, receiving $20 in cash and defendant's note for $55, payable to O. Afterwards, meeting O., the plaintiff got from him the note and $17 in cash. The plaintiff demanded the horse from defendant's wife, and offered her the note and the $17, which, however, she did not take. He then brought detinue:—Held, that the plaintiff was entitled to recover; for that he was not bound to tender to defendant the note and the money he had received, nor could defendant retain the horse until he obtained them, at all events without giving notice that he would do so, after first demanding them. *Morton* v. *Stone*, 30 U. C. R. 158.

Guarantee—*Goods Sold—Charges.*]—*See Higby* v. *Cummings*, 10 U. C. R. 222, *post* PRINCIPAL AND SURETY, I. 2 (c).

Sale of Goods—"*Agent*"—"*Intrusted*"—*Innocent Purchaser.*] — The "agent" referred to in R. S. O. 1897 c. 150, "An Act respecting contracts in relation to goods intrusted to agents," is one who is intrusted with the possession as agent in a mercantile transaction for the sale, or for an object connected with the sale, of the property. And where an agent had obtained possession of certain lumber from the master of a vessel without authority from the owner:—Held, that he had been intrusted with the possession, and that the owner was entitled to recover the value of the lumber from a bonâ fide purchaser from, who had paid, the agent. *Moshier* v. *Keenan*, 31 O. R. 658.

Setting aside Conveyance by Agent.]—See *Taylor* v. *Taylor*, 23 Gr. 496, 1 A. R. 245, 2 S. C. R. 616 (*sub nom. Taylor* v. *Wallbridge*), *ante* III. 1; *Stewart* v. *Rounds*, 7 A. R. 515; *Walmsley* v. *Griffith*, 10 A. R. 327; *Young* v. *MacNider*, 25 S. C. R. 272.

XI. MISCELLANEOUS CASES.

Bill of Lading—*Corporation*—"*Persons Signing.*"]—Semble, that under the Interpretation Act, 31 Vict. c. 1, s. 7, s-s. 9 (O.), the defendants, though a corporation, would be "persons signing" a bill of lading if signed by their authorized agent. *Royal Canadian Bank* v. *Grand Trunk R. W. Co.*, 23 C. P. 225.

Proof of Agency — *Estoppel—Res Judicata.*]—The plaintiffs and their father had been in possession of the lands about twenty or thirty years, the title, however, being all the while in another person. The plaintiffs employed one of the defendants, F., to obtain a conveyance, which he took in his own name for the avowed purpose of defeating the claim of one P., from whom a lease had been taken by the plaintiffs, and in a suit by P. against the plaintiffs to establish his right to the land, one of them swore that the deed to the defendant (the agent) was bonâ fide and for his own benefit; and subsequently to the dismissal of the bill in that suit, the plaintiffs took a lease of the premises from F.:—Held, that the plaintiffs were not precluded from establishing the agency of F., and afterwards shewing themselves entitled to the land as owners, and that the dismissal of the bill in P.'s suit was not res judicata of the question involved in this; but the court, while granting to the plaintiffs the relief to which they proved themselves entitled, refused them any costs. *Washburn* v. *Ferris*, 14 Gr. 516. See *S. C.*, in appeal, 16 Gr. 76.

Proof of Document Executed by Agent.]—A document executed by an agent in the name of his principal, the subscribing witnesses to which are dead or out of the Province, can be proved by proving the handwriting, i. e., by the same evidence which would be sufficient to prove its execution by the principal. *Dickson* v. *Jarvis*, 5 O. S. 694.

See MALICIOUS PROCEDURE, I. 1 (c)—WARRANTY, III.

PRINCIPAL AND SURETY.

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I. CONTRACT OF SURETYSHIP.

1. *Generally.*

Alteration in Contract.]—Where an alteration is made in the contract of suretyship, then, unless it is without inquiry self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the court will not go into an inquiry or permit the question to be submitted to the jury, but will hold that the surety must be the sole judge as to whether he will remain liable, notwithstanding the alteration. *Citizens Ins. Co.* v. *Cluxton*, 13 O. R. 382.

Creditor as Surety—*Raising Money for.*]—The fact that a person joins in a note as a surety to enable the principals to raise money to apply towards the discharge of certain obligations to him, does not prevent his being a surety. *Shepley* v. *Hurd*, 3 A. R. 549.

Execution of Bond—*Denial—Evidence.*]—In an action by the Crown against C. on a bond of suretyship for the faithful discharge by a government official of his duties as such, the defendant, under a plea of non est factum, swore that he signed the bond in blank; that he made no affidavit of justification; and that the certificate of the magistrate of the execution of the bond, as required by the statute, was irregular and unauthorized. The attesting witness to C.'s execution of the bond, and the magistrate, each swore to the correctness of his own action, and that C. must have properly executed the bond or the affidavit would not have been made or the certificate given:—Held, that the weight of evidence was in favour of the due execution of the bond by C. Per Patterson, J., that C. was estopped from denying that he had executed the bond, and that the execution of the bond, and not the certificate of the magistrate, was the proximate or real cause of its acceptance by the Crown. *The Queen* v. *Chesley*, 16 S. C. R. 306.

Execution of Contract on Condition of Others Joining.] — The plaintiffs sued defendants H. & D. as having jointly executed a bond to secure payment of rent by H. T. was also named in it as obligor, but had not executed. It appeared that at the execution of the bond T. was not present, and defendant D. told the plaintiffs that he could not conveniently attend, but would sign it at any time. T. afterwards refused to execute, and no objection had been made by D., although aware of the refusal:—Held, that the non-execution by T. was no defence under a plea of non est factum by H., as shewing a variance between the bond declared on and that set out. Held, also, that under the circumstances D. was not relieved from liability by T. not having executed the bond. *Sidney Road Co.* v. *Holmes*, 16 U. C. R. 268.

Declaration on a covenant by defendant as surety for payment of rent by B. Plea, on equitable grounds, that defendant executed on the understanding and representation that Y., K., and E. should also execute, and that he should be responsible with them but not solely; and that B. and K. represented to him that immediately after his (defendant's) execution the other three would execute; that they did not execute; and that before breach and with due diligence defendant notified plaintiffs of the premises, and that he claimed to be released by such non-execution:—Held, on demurrer, plea bad, for it did not connect the plaintiffs with the representations on which defendant executed, and they might have leased to B. on the understanding only that defendant should be surety. The evidence supplied this defect, and was held admissible under the plea of non est factum, which was also on the record. *County of Huron* v. *Armstrong*, 27 U. C. R. 533.

Action against V. and G. on their covenant for payment of rent by lessees. Plea, by V., that the agreement was drawn up to be executed by C. as his co-surety, and was delivered as an escrow, till its execution by C.: that C. refused to execute; and that the plaintiff then erased C.'s name and inserted that of G. Replication, that after execution by both V. and G., V. ratified the agreement and accepted G. as co-surety:—Held, that on the evidence, which was contradictory, a ratification might be inferred. *Henderson* v. *Vermilyea*, 27 U. C. R. 544.

A bond, intended to be joint and several, was drawn up, to be executed by G., who was plaintiffs' treasurer, and by L. and A. as his sureties. A. executed the bond on the 16th December, 1886, on the supposition and understanding that it should not be binding on him until executed by the others. On 27th December, to enable him to stand for the office of a councillor, A. requested the council to release him from the bond, which was agreed to, and on the 17th January, 1887, a formal resolution was passed accepting H. as surety in his place, and stating that a new bond had been executed by G., L., and H. On the same day the first bond, which had not been executed by G. or L., was then executed by them. In an action against A., on the first bond:—Held, that he was not liable thereon. *Township of Oxford* v. *Gair*, 15 O. R. 362.

Joint Liability with Principal.]—H., having been duly appointed collector by the trustees of a school section, signed the following contract at the foot of the instrument appointing him: "I agree, &c., to collect, &c., according to the said Act, and bind myself, by my sureties, in the sum of £250." Immediately under, S. and F., his sureties, signed the following: "We hereby agree to become security for the due fulfilment of the above contract:"—Held, that the sureties were not jointly liable with their principal, but that the agreements were distinct. *York School Trustees* v. *Hunter*, 10 C. P. 359.

Misrepresentation—*State of Accounts.*]—Effect of innocent misrepresentation as to state of accounts between principal and obligee before obligation entered into by surety. See *Village of Gananoque* v. *Stunden*, 1 O. R. 1.

Mortgagee — *Assignment—Covenant.*]—On the transfer of a mortgage the mortgagee covenanted that if default were made in payment of the mortgage money, he would pay the same:—Held, that this did not constitute him a surety within the meaning of s. 4 of the 32nd of the orders of 1853. *Clarke* v. *Best*, 8 Gr. 7.

Mortgagor—*Covenant—Sale of Equity—Liability of Assignee.*]—Where a mortgagor who has covenanted for payment of the mortgage debt sells his equity of redemption subject to such mortgage, he becomes surety for

the purchaser for the payment of such debt, and if the same is allowed to run into default he will be entitled to call upon his assignee to pay such debt. *Campbell* v. *Robinson*, 27 Gr. 634.

Notice—*Condition Precedent.*]—McC. and W., defendants, entered into a bond conditioned that one McK. should pay plaintiffs certain rent in equal monthly payments, with a proviso "that the said municipality (plaintiffs) shall, on default being made by the said McK. in the payment of the said amount monthly, give notice thereof to the said obligors." Upon action brought, it appeared the payments were to be made on the last day of each month, beginning with the last of January, 1861. The first payment was made the 1st February, the next the 8th March, the third the 19th April, the fourth the 14th June, and some irregular amounts between that day and the 15th November were paid. The first notice given was on the 15th August, 1861, the second on the 28th September, and the last on the 28th December, 1861:—Held, that the proviso for notice was to be considered as a condition precedent to the defendants' liability, and that notice not having been given within a reasonable time, they were relieved. *Corporation of Chatham* v. *McCrea*, 12 C. P. 352.

Promissory Note — *Maker.*]—Where a promissory note commencing "I promise to pay," and signed by two makers, was afterwards discounted by the plaintiff for the holder thereof, the money being paid to him on his agreeing to become responsible for the payment of the note, he signing his name under those of the makers:—Held, that the liability of the person so signing was that of surety, and that the validity of the note was not affected by the manner in which it was signed. *Kinnard* v. *Tewsley*, 27 O. R. 398.

See Fisken v. *Meehan*, 40 U. C. R. 146; *Exchange Bank* v. *Springer*, *Exchange Bank* v. *Barnes*, 29 Gr. 270; *Lightbound* v. *Warnock*, 4 O. R. 187; *Birkett* v. *McGuire*, 7 A. R. 53; *Wickens* v. *McMeekin*, 15 O. R. 408.

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2. *Guarantees.*

(a) *Generally.*

What Amounts to a Guarantee.]—A. contracts with a company to make a highway, and B. becomes A.'s surety to them. A. then employs C. to cut out certain timber for him, and while C. is thus engaged A. fails in his contract with the company. B., the surety, tells C. to go on and he will see him paid. Upon completing his work C. sues A. and B. jointly:—Held, that there was no joint contract by A. and B. with C., but that A. was primarily liable on his contract, and B. as a guarantor. *Nicholas* v. *King*, 5 U. C. R. 324.

"Sir,—Mr. J. informs me that you have a doubt respecting the validity of a mortgage from him to you for your claim for the sails and rigging. I am willing to become responsible to you that a good and valid mortgage shall be made to you in the course of this fall, provided you consent to the vessel being fitted for sea, or in default of your not receiving it, I will be responsible for the payment of your debt in twelve months:"—Held, (1) an actual guarantee, and not a mere proposal requiring acceptance to render it binding; (2) that offering a mortgage subject to two prior mortgages (which were given moreover after the guarantee), was not such a valid mortgage as the guarantee imported. *Jenkins* v. *Ruttan*, 8 U. C. R. 625.

W. made a note payable to plaintiff, but not negotiable, which defendants indorsed. It was proved to have been given for money lent to W. by the plaintiffs in defendants' presence, for which they agreed to become security; it was proved also that one of them had paid interest on it, and that both had promised to pay the note, when spoken to:—Held, that defendants could not be held liable as upon a note, nor as on an account stated. Quære, whether the plaintiffs could have recovered as upon a guarantee. *Skilbeck* v. *Porter*, 14 U. C. R. 430.

"I guarantee the payment of the within," indorsed on a note, over the signature of the payee, treated as an indorsement of the note, and not as a guarantee or collateral engagement for its payment. *Walker* v. *O'Reilly*, 7 L. J. 300.

Defendant indorsed notes for the accommodation of the maker, who was in business as a druggist, without knowing how they were to be applied, and the maker transferred them to the plaintiffs for goods purchased from them. Defendant not being liable upon them as notes, the sums payable being uncertain:—Held, that there was clearly no right of action against him as upon a guarantee. *Fahnestock* v. *Palmer*, 20 U. C. R. 307.

One H., requiring some proof spirits for his trade, received from defendant a letter to the plaintiff, distiller, to whom defendant was well known, but H. a stranger. There had been no previous application by H. to the plaintiff for a credit, nor had the latter declined dealing with him without a guarantee. The letter was as follows: "The bearer is Mr. H., a friend of mine, who wishes to purchase some proof spirits, which he hears that you manufacture. If you can arrange matters to your mutual satisfaction, I am sure that Mr. H. will prove a very reliable person to deal with. I will myself, with pleasure, become security for anything he may be disposed to give an order for:"—Held, not a perfect guarantee in itself, but that to make it such the plaintiff should have notified defendant that he accepted the proffered guarantee, and that he had given or meant to give credit to H. on the strength of it. *Kastner* v. *Winstanley*, 20 C. P. 101.

The plaintiff had worked for W. in getting out certain timber, but had not been paid in full. Defendant afterwards employed the plaintiff to get the same timber to market, promising in addition to his ordinary wages to pay him the arrears due by W.:—Held, not an undertaking to answer for the debt of another, but a new and original promise made upon a distinct consideration of benefit to defendant. *Tumblay* v. *Meyers*, 16 U. C. R. 143.

H. signed a writing in the following words:—"Toronto, 16th December, 1858. Mr. Dixon—Please let the bearer, B., have what goods he may require, and charge yours, M. Hutchinson:"—Held, not a guarantee for goods furnished to B. on the authority of it, but a direction to furnish the goods on defendant's

credit as principal. *Grascett* v. *Hutchinson*, 10 C. P. 265.

S. by letter informed R. and K. that his son was a partner in a firm, and that he had advanced to him £3,000 as his share of the capital thereof. The firm having failed made an assignment, in which S. was preferred to the amount of £3,565, represented as made up of loans and advances to the firm. The actual capital advanced to the son appeared to be only £1,000:—Held, notwithstanding, that S. was bound to make good his representation to R. and K. so far as they alone were concerned; but that other creditors could not participate, the representation being only to a particular creditor; unless it should appear that a portion of the preferred claim of S. was not a debt of the firm to him, but consisted of capital advanced to the son, in which event that portion would be applied on their claims, it not appearing that the goods furnished by them had been sold upon the faith of the representation to R. and K.; but semble, if that had been shewn to have been the case, they would have had that right. *Rainey* v. *Dickson*, 8 Gr. 450.

The guarantee did not come within the description of a guarantee for the act of a third party, for the guarantors were selling under R. S. O. 1877 c. 121, by virtue of being holders of a warehouse receipt for the lumber. *Dobell* v. *Ontario Bank*, 3 O. R. 299. See *S. C.*, 9 A. R. 484.

The plaintiff agreed with M. to repair a boiler in the latter's sawmill. During the progress of the work he received the following letter from the defendant: "As Mr. Morden's sawmill at Bismarck is about to come into my hands right away, and as I am to assume the expense of repairs to the boiler, be good enough to push forward the work to be done by you on the boiler as fast as possible; everything at present is at a standstill waiting on you. Please push on work and oblige yours truly, R. Taylor." The plaintiff, without communicating with the defendant, went on with the work. The defendant's contemplated purchase was not carried out:—Held, that he had not rendered himself liable by his letter for the price of the work done, and that a nonsuit had been properly entered. *Whitelaw* v. *Taylor*, 45 U. C. R. 446.

See Sutherland v. *Patterson*, 4 O. R. 565.

See, also, *post* (d).

(b) *Consideration.*

[By 26 Vict. c. 45, s. 1, (R. S. O. 1897 c. 146, s. 8,) the consideration for the promise need not appear in writing.]

Absence of.]—"I hereby guarantee to pay W. H., &c., $10 per month until the sum of $300 due by Messrs. B. & H., &c., shall be paid, &c. Signed, M. M." (the defendant):—Held, void, for not expressing or implying any consideration. *Palsgrave* v. *Murphy*, 14 C. P. 153.

Delay — *Misrepresentations* — *Evidence.*]—On a ship under charter being loaded it was found that a sum of £173 was due the charterer for the difference between the actual freight and that in the charterparty, and, as agreed, a bill for the amount was drawn by the master on the agents of the ship, and, also, a bill of £753 for disbursements. These bills not being paid at maturity, notice of dishonour was given to V., the managing owner, who sent his son to the solicitor who held the bills for collection to request that the matter should stand over until the ship arrived at St. John, where V. lived. This was acceded to, and V. signed an agreement in the form of a letter addressed to the solicitors, in which, after asking them to delay proceedings on the draft for £753, he guaranteed, on the vessel's arrival or in case of her loss, payment of the said draft and charges and also payment of the draft for £173 and charges. On the vessel's arrival, however, he refused to pay the smaller draft, and to an action on his said guarantee he pleaded payment and that he was induced to sign the same by fraud. By order of a Judge the pleas of payment were struck out. On the trial, the son of V., who had interviewed the solicitors, swore that they told him that both bills were for disbursements, but it did not clearly appear that he repeated this to his father. V. himself contradicted his son and stated that he knew that the smaller bill was for difference in freight, and there was other evidence to the same effect. His counsel sought to get rid of the effect of V.'s evidence by shewing that from age and infirmity he was incapable of remembering the circumstances, but a verdict was given against him:—Held, that the defence of misrepresentation set up was not available to V. under the plea of fraud, and, therefore, was not pleaded; that if available without plea it was not proved; that nothing could be gained by ordering another trial, as, V. having died, his evidence would have to be read to the jury, who, in view of his statement that he knew the bill was not for disbursements, could not do otherwise than find a verdict against him. Held, further, that the delay asked for by V. was sufficient consideration to make him liable on his guarantee, even assuming that he would not have been originally liable as owner of the ship. *Vaughan* v. *Richardson*, 21 S. C. R. 359.

Forbearance to Detain Goods.]—C. had contracted with defendants to carry their lumber from Collingwood to Chicago, and had chartered the plaintiff's vessel for that purpost. C., being indebted to the plaintiff, gave him two orders on defendants amounting to £211 10s. 6d. Defendants did not accept the orders formally when presented, but retained them and gave the plaintiff a written authority to draw on them at ten days on the return of the vessel to Collingwood. The plaintiff drew accordingly, but defendants then told him that C. had been overpaid by them, and they refused to accept. It was shewn that the plaintiff had threatened to detain the lumber on its arrival at Chicago if his claim was not paid, and was told by defendants that it would be satisfied out of the moneys coming to C. on the return of the vessel:—Held, that the plaintiff was entitled to recover from defendants, for that the evidence sufficiently shewed a discharge of C. by the plaintiff, or a giving time to him until ten days after the return of the schooner, either of which would form a good consideration for defendants' promise. Quære, whether plaintiff's forbearing to detain defendants' lumber as he had threatened would have been a sufficient consideration, it being unknown to the parties

whether the law at Chicago would allow him such right, though our law clearly would not. *Moberley* v. *Baines*, 15 U. C. R. 25.

Future Rent—*Letting of Premises.*]—A. leased from B. certain premises, covenanting to pay certain rents. On the back of the lease was the following memorandum signed by C.: "I do guarantee that the within rents shall be paid by me, as they become due, according to the lease, in case or in event that the within named A. does not pay them." This was signed before the delivery of the lease, and as a part of the same transaction:—Held, that the lease and the indorsement might be looked at together to find the consideration, and that the letting of the premises was a sufficient one. *Merrick* v. *L'Esperance*, 10 C. P. 259.

——— *Oral Promise.*] — The plaintiff declared on an oral promise to pay two quarters' rent due on certain premises which had been leased by the plaintiff to one G., the consideration being that the plaintiff would forbear to distrain. It appeared that when the promise was made only one quarter's rent was due:—Held, that the promise, being void as to the second quarter's rent, by the statute, was void altogether. *Hall* v. *Denholm*, 11 U. C. R. 354.

Giving Time — *Pleading.*] — Defendant gave plaintiff the following:—"I hereby become responsible to you for the payment of £120, on the 1st day of April next, in case C. fails in paying you that sum." In declaring on this the plaintiff alleged that C. was indebted to him in the sum named at the date of the guarantee, and that, in consideration of his giving time till the 1st April, defendant promised to pay then, &c. Defendant pleaded non assumpsit:—Held, that the plaintiff must be nonsuited, for the consideration stated was not supported by the instrument produced, and the plea put in issue the consideration as well as the promise. *Evans* v. *Robinson*, 16 U. C. R. 169.

——— *Promissory Note.*]—The defendant, after a note payable to the plaintiff had become due and while it remained unpaid, indorsed upon it the following words: "I guarantee the payment of the within note to Messrs. T. D. & Co. (the plaintiffs), on demand." The evidence shewed that the consideration for this guarantee was the giving of time to one C., for whose debt to the plaintiff the note was given as collateral security:—Held, that the evidence that the giving of time to C. was the consideration for the guarantee did not contradict the latter, though it was expressed to be "on demand;" for these words referred to a demand upon the guarantor after forbearance to press C.: and that such forbearance was a good consideration. *Davies* v. *Funston*, 45 U. C. R. 369.

Implication of Past Consideration.]—"Sir, Mr. J. informs me that you have a doubt respecting the validity of a mortgage from him to you for your claim for the sails and rigging; I am willing to become responsible to you that a good and valid mortgage shall be made to you in the course of this fall, provided you consent to the vessel being fitted for sea, or in default of your not receiving it, I will be responsible for the payment of your debt in twelve months;"—Held, that this did not import a past consideration. *Jenkins* v. *Ruttan*, 8 U. C. R. 625.

"I do hereby promise to guarantee the payment of any sum to S. that the arbitrators chosen by himself and S. & Co., and a fifth person to be chosen by them, may award to said S., in the arbitration now pending between the said parties"—dated the 29th September, 1851. The declaration in an action on this guarantee stated that, in consideration that the plaintiff, at defendant's request, would leave certain differences between the plaintiff and S. & Co. to the award of, &c., the defendant promised to pay him any sum that might be awarded to him. A bond of submission was signed by S. & Co. on the 3rd October, 1851:—Held, the evidence shewing that the arbitration was not conclusively agreed upon when the guarantee was signed, that the guarantee sustained the consideration as alleged, and that the words "now pending" did not necessarily imply a past consideration. *Shaw* v. *Caughell*, 10 U. C. R. 117.

A guarantee indorsed on a note, "We guarantee the payment of the within note," does not shew a sufficient consideration. *Lock* v. *Reid*, 6 O. S. 295.

Joint Contract.]—Where, in consideration of the sale of a vessel to A., B. joined with him in an agreement to deliver lumber:—Held, a joint contract, although B. was only surety, and that the consideration, therefore, need not appear in the agreement. *Thompson* v. *Cummings*, M. T. 4 Vict.

Sufficiency of Statement of—*Executed Consideration.*]—The declaration stated that by agreement between the plaintiff and J. and H., two of the defendants, the plaintiff was entitled, on delivering to them certain goods, to a conveyance in fee, free from incumbrances, of two lots mentioned, then subject to a mortgage to one S.; and, in consideration that the plaintiff would accept a conveyance and deliver up the goods, defendants in writing promised to pay the plaintiffs $500 in six weeks, if in the meantime the lots should not be released from the mortgage. Averment, that the conveyance was so accepted and the goods delivered; that the mortgage had not been discharged; and that the defendants had not paid the $500. The first agreement under seal, dated 1st June, 1865, set out the sale of the goods by the plaintiff to the defendants J. and H., for which they agreed to pay $1,400, $200 on receiving possession, $500 by a conveyance in fee of the lots, to be taken as cash for that sum, and the remaining $700 by instalments as stated in the agreement. The second, dated 10th June, was as follows: "Six weeks after date, we, or either of us, promise to pay to Thomas Gibbs Greenham $500, value received, if in the meantime park lots 7 and 8 in the Garvan survey be not released from the subsisting mortgage thereon to A. S. deceased." Signed by all the defendants:—Held, assuming the promise sued upon to be within the Statute of Frauds, either as a contract by the third defendant to indemnify against the default of the others, or as respecting an interest in lands—that the two agreements (the connection between which was established by their contents), construed with the surrounding circumstances to be gathered therefrom, together with the averments in the declaration, sufficiently shewed the consideration for defendants' promise. Semble, however, that there need have been no writing to bind the third defendant, for

the consideration was executed by the plaintiff delivering the goods without getting a conveyance free from incumbrances. Held, also, that under the first agreement the defendants were not entitled to possession of the goods until payment of the $200 and execution of the conveyance. *Greenham* v. *Watt*, 25 U. C. R. 365.

——— *Parol Evidence to Supplement.*]—Upon an action brought on a guarantee for the payment of two notes given in payment for land, the following guarantee was given in evidence: "I hereby guarantee to T. P., or bearer, the collection of two notes hereunto attached; said notes are dated as follows (setting them out); I hereby agree to pay all costs that may occur in the collection, and the said T. P., or bearer, agrees, if the said notes cannot be collected from A. H. B., the maker of said notes, by the said J. B. paying the notes and costs, to transfer the judgment to him, or, if the said J. B. considers best, may replace the said notes by other notes, subject to approval;"—Held, not to contain a sufficient consideration on its face, and, parol evidence not being admissible to prove the consideration, that it was void. *Perrin* v. *Bingham*, 12 C. P. 306.

Undertaking — *Performance of.*]—There were three executions in the sheriff's hands against one W., in two of which the plaintiffs were attorneys for the execution creditors, and the defendant was attorney for one H., who had the other execution. A sale had been advertised for the 25th January, and on that day the defendant signed an instrument under seal, as follows: "I agree with G. W. & C. (the plaintiffs) to pay off the principal, interest, and costs with sheriff's fees, in suits (naming the two suits in which plaintiffs were attorneys), in consideration of their agreeing to postpone the sale advertised of defendant's goods for one week." C. and the defendant then went to the sheriff's office, and instructed the person in charge to postpone the sale, and the bailiff left with the defendant to go out to the place and postpone it, for which the defendant was to pay the expenses. When the bailiff got there the sale had been going on an hour, but it was stopped, and the goods sold were got back except to the amount of $45, which was paid to defendant. The plaintiffs thereupon sued the defendant on his guarantee:—Held, that they were entitled to recover the amount unpaid in their two suits; for they had performed their agreement, and defendant had got what he had bargained for; and the plaintiffs were the proper parties to sue. *Guthrie* v. *O'Connor*, 36 U. C. R. 372.

(c) *Construction.*

Generally.]—A guarantee should be construed as all other contracts, not strictly as against either side, but by collecting the real intention of the parties from the instrument and the surrounding circumstances, taking the words in their ordinary sense, unless by the known usage of trade they have acquired a peculiar meaning. *Kastner* v. *Winstanley*, 20 C. P. 101.

Condition of Liability.]—A lumberman had a lien on lumber for freight, and C. wrote saying, "I wish you would advise your agents in Quebec to deliver to Coombe the sawn stuff on your rafts. I am to pay the river freight, and will thank you to take Coombe's draft on me at thirty days for river freight, which I will pay:"—Held, that this letter would not render C. liable to pay the freight until the lumberman had obtained Coombe's draft for the amount thereof. *Re Coombe*, 24 Gr. 519.

Declaration on the following guarantee:—"Please credit A. £100, and I agree to hold myself responsible for the payment of the same"—averring that the plaintiff did credit A.:—Held, that the plaintiff must prove such averment; and that calling a clerk, who stated that such credit had been given, because he saw it entered in the plaintiff's books, which were not produced, and which entry had not been made by him, was not sufficient. Semble, that such guarantee might refer to an existing account, or to future credit, and that on the evidence it was properly found to apply to the former. *Parker* v. *Dutcher*, 2 O. S. 106.

The chief object of an agreement between A. and B. was the profitable manufacture and sale of wares under a patent of invention issued to A.; and, in consideration of advances by B. to an amount not exceeding $6,000, C. by a letter of guarantee "agreed to become a surety to B. for the repayment of the $6,000 within twelve months from the date of the agreement if it should transpire that, for the reasons incorporated in said agreement, it should not be carried out." In an action brought by B. against C. for $6,000 it was proved at the trial that the manufacturing scheme broke down through defects of the invention:—Held, that C. was liable for the amount guaranteed by his letter. *Angus* v. *Union Gas and Oil Stove Co.*, 24 S. C. R. 104.

T. wrote a letter agreeing to guarantee payment for goods consigned on del credere commission to R., on condition that he should be allowed, should occasion arise, to take over the goods consigned. Shortly afterwards the creditor, without giving any notice to T., closed the agency, withdrew some of the goods, and permitted others to be seized in execution and removed beyond the reach of T. The creditor did not give T. any authority to take possession of the goods as stipulated in the letter of guarantee. In an action by the creditor to recover the amount of the guarantee:—Held, that the condition of the guarantee had not been complied with by the creditor, and that he could not hold the guarantor responsible. *Brown* v. *Torrance*, 30 S. C. R. 311.

See Hathaway v. *Chaplin*, 21 S. C. R. 23.

Continuing Security.]—Where defendant agreed to lend the plaintiff £2,000, to be advanced as it might be required, and received from plaintiff a conveyance of land to secure the advances, and gave back a bond reciting the agreement, and binding himself to reconvey the lands on repayment of the sum advanced, on a certain day, and defendant before that day made further advances to £10,000, and received timber, &c, on account to £7,000:—Held, that the bond was a continuing security, and that defendant was not obliged to reconvey on payment of the £2,000 first advanced. *Wells* v. *Ritchie*, 6 O. S. 13.

The plaintiff sued defendant on the following guarantee: "I hereby hold myself accountable to you for any goods Mr. F. M.

may purchase of you to the amount of £250 cy.:"—Held, a continuing guarantee. *Ross* v. *Burton*, 4 U. C. R. 357.

"Messrs. A. & D. Shaw: Gentlemen,—I have just received a line from F. informing me that he wishes to purchase goods from you. Being acquainted with his circumstances, and knowing him to be a man of prudence and integrity, I do not hesitate to be responsible to you for £150 or £200 worth of goods should he require that amount:"—Held, not a continuing guarantee. *Shaw* v. *Vandusen*, 5 U. C. R. 353.

Defendant and another addressed to plaintiff this note: "In consideration of your supplying to M. supplies of, &c., out of your store for his business, we agree to become responsible for the payment of $200 for such goods, and guarantee the payment of that amount, whether the same be due on note or book account, to you for said hardware, iron, &c.:"—Held, a continuing guarantee. *Fennell* v. *McGuire*, 21 C. P. 134.

S. by letter informed R. and K. that his son was a partner in a firm, and that he had advanced him £3,000 as his share of the capital thereof. The firm, having failed, made an assignment in which S. was preferred to the amount of £3,505, represented as made up of loans and advances to the firm. The actual capital advanced to the son appeared to be only £1,000:—Held, notwithstanding, that S. was bound to R. and K. by his representation, and that such statement of S. operated as a continuing guarantee to them. *Rainey* v. *Dickson*, 8 Gr. 450.

On 11th June, 1877, defendant wrote to the plaintiff that J. S., the person he wished to assist, "informs me now that I could help him by pledging myself to you that you might give him a letter of credit in Montreal, and I now say, if you will assist him in that way to $7,000 or $8,000, that I will become responsible to you for the like amount in any manner you may wish, &c." J. S. then applied to the plaintiff, who gave a continuing guarantee in his favour to some Montreal merchants, dated 28th August, for goods to the extent of $5,000, for three years. At the same time the following note signed by the defendant in blank was filled up by J. S.: "Three years after date I promise to pay to the order of J. S. $5,000, &c." "Value received." To which was added: "This note is given as collateral security for a guarantee of $5,000 given to J. S. by A. S.," the plaintiff. No notice was ever given to defendant of the plaintiff's guarantee, or of the form in which the note was filled in. In an action on the defendant's letter as a continuing guarantee, and on the note:—Held, per Wilson, C. J., that the letter was a guarantee, but not a continuing one, and there could be no recovery under it, as the evidence shewed that the amount of $5,000 secured thereby had been paid. Per Galt, J., agreeing with the judgment at the trial, that it was not a guarantee, but merely a proposition leading up to a guarantee; at all events, if a guarantee, it was not a continuing one. *Sutherland* v. *Patterson*, 4 O. R. 565.

The plaintiff's testator gave a guarantee in the following form: "In consideration of the goods sold by you on credit to M., and of any further goods which you may sell to M. upon credit during the next twelve months from date, I hereby undertake to guarantee you against all loss in respect of such goods so sold or to be sold; provided I shall not be called on in any event to pay a greater amount than $2,500." M. made an assignment for the benefit of his creditors, being then indebted to the guaranteed creditors in the sum of $5,556.23. They filed their claim therefor with the assignee, and afterwards received from the plaintiff the full amount covered by the testator's guarantee. The plaintiff contended that he was entitled to rank upon the estate for so much of the debt as had been thus paid by him:—Held, that the guarantee was one of the whole debt incurred, or to be incurred, with a limitation of the liability to $2,500, and, therefore, that the plaintiff was not subrogated to the rights of the secured creditors or entitled to receive the dividends in respect of that part of the debt which he had paid off under the guarantee. Judgment in 20 O. R. 257 reversed, and that in 19 O. R. 230 restored. *Martin* v. *McMullen*, 18 A. R. 559.

See Cosgrave Brewing and Malting Co. v. *Starrs*, 11 A. R. 156, 12 S. C. R. 571; *Merchants Bank of Canada* v. *McKay*, 15 S. C. R. 672.

Extent of Liability.]—"Messrs. A. & D. Shaw: Gentlemen,—I have just received a line from F. informing me that he wishes to purchase goods from you. Being acquainted with his circumstances, and knowing him to be a man of prudence and integrity, I do not hesitate to be responsible to you for £150 or £200 worth of goods, should he require that amount:"—Held, not applicable to the purchase of goods by F. and a partner, but by F. alone. *Shaw* v. *Vandusen*, 5 U. C. R. 353.

In an action on the following guarantee:—"Whereas H. H. & Co., of Albany, have authorized S. and J., of Houghton, Canada West, to draw on them to the amount of $5,000; and whereas the said S. and J. promise and agree to ship to the said H. H. & Co. a sufficient quantity of lumber, in the months of May, June, July, and August next, to pay the same. Now, therefore, in consideration of $1 to me in hand paid, I hereby guarantee to Messrs. H. H. & Co. that the lumber shall go forward agreeably to contract, and in default of the same I will be responsible to them to the amount of the advances, the same not exceeding $5,000:"—Held, that defendant was not entitled to credit as against his guarantee for the gross value of the lumber sent, but that the plaintiffs were entitled to deduct their charges. Held, also, that the declaration, as to the statement of the consideration, was sufficiently supported by the proof. *Higby* v. *Cummings*, 10 U. C. R. 222.

In April, 1850, R. became security to the plaintiffs for S. to the extent of £100, and S. thereupon received goods from them to the amount of £151. In April S. desired to make a further purchase. R. wrote to the plaintiffs becoming security to the extent of £75, and in his letter he said, "I understand from S. that he has paid you £75 on account of the £100." The plaintiffs sent no answer, but supplied the goods required. The £75 had been paid by S., and in his letter enclosing it he said, "I send you £75 on account of goods bought by me, being one-half of the whole:"—Held, that R. was entitled to have the whole of this payment credited against the £151 secured by his first guarantee, and that the

plaintiffs could not appropriate it to any part of the debt of S. for which R. was not liable. *Lyman* v. *Miller*, 12 U. C. R. 215.

A. agrees to become surety to B. for all such advances as B. may make to C. during a limited period. B. makes no individual advances to C. at all, but during the period B. with D., a stranger to A., make advances to C.:—Held, that B. cannot recover from A. such advances. *Stevenson* v. *McLean*, 11 C. P. 208.

One S. had contracted to build a house for defendant, and had employed the plaintiff, under an agreement, to do a portion of the work. The plaintiff complained that S. did not pay him as he had undertaken to do, and was unwilling to proceed, and, after some negotiation, the following paper was signed: "Stratford, 21st of May, 1858.—$198.—Good to P. A. Loftus (the plaintiff) or bearer, for $198, payable so soon as Loftus completes and finishes his contract at U. C. Lee's dwelling house in Stratford. Alex. Scrimgour." This was indorsed by defendant Lee, and at the foot was written as follows:—"£56. A further sum of fifty-six pounds will be due to Loftus, being balance of contract, three months after said contract is completed and accepted by the architect. This sum I secure to Loftus for account of Scrimgour. U. C. Lee. A. Scrimgour." The work had been completed and certified; it was proved that before the writing was signed defendant had told the plaintiff that if he would wait he would be answerable for the whole amount due him, and defendant had paid the plaintiff $115, for which a receipt was indorsed on the paper. The first count of the declaration alleged that, in consideration that the plaintiff, at defendant's request, would proceed with the work, defendant promised to pay him the £56, &c.; the other counts were for work and materials, and on account stated:—Held, that the plaintiff was entitled to recover the £56, but not the balance of the $198. *Loftus* v. *Lee*, 18 U. C. R. 195.

One T. contracted with two firms in Quebec, N. & Co. and M. & Co., for advances, to be covered by shipments of timber within a specified period, agreeing to furnish defendant's guarantee for performance of his part of the contract. Defendant in a letter to M., a partner in one of the firms, guaranteed that T. would furnish timber in the year 1859, equal in value to the advances made by him, M., to said T.:—Held, (1) that in an action by M. alone he could only recover the amount of his own advances to T. (2) That M. must, as far as defendant was concerned, give credit for all lumber received by him from T. *Stevenson* v. *McLean*, 10 C. P. 414.

Defendants on the 20th April, 1867, guaranteed in writing the payment to the plaintiff, a nursery gardener, of his account against H. for nursery products to be delivered to H. that spring, said payment to be made to the plaintiff by H. or the defendants within twenty days after receipt of the trees by H. On the 4th February preceding, an agreement under seal had been executed between the plaintiff and H., that the plaintiff should deliver trees at railway stations, at the prices mentioned, in such quantities as H. might sell, for which H. agreed to pay one-half ten days after delivery of the trees, and to give his note indorsed for the balance, payable in six or eight months from delivery, or the notes of the purchasers. In an action on the guarantee it appeared that the balance due by H. in all, for deliveries after the guarantee, was $460.22, of which $60 was due on the cash part of the transaction, and only this part had been entered by the plaintiff in his day book; for the rest he held purchasers' notes:—Held, that the guarantee clearly could apply only to the $60. *Leslie* v. *Long*, 27 U. C. R. 482.

Defendant's son, living at St. Catharines, applied to the plaintiffs, merchants in Hamilton, to supply him with goods, and on the 12th April they wrote to him that they would execute his order if he could get the indorsation of his father. On the 13th the son wrote to them to send the goods; and that he would get his father's indorsation if required. On the 17th the plaintiffs wrote proposing, in view of future business, and to save the trouble of getting an indorsement with each transaction, that the father should give a continuous guarantee. This son on the 19th wrote that he would get this, and urged them to send the goods at once, which they did on the same day, with a form of guarantee for the father to sign. On the 21st the son wrote to his father, who lived at Woodstock, "I am buying some goods" from the plaintiffs, and enclosing the guarantee for his signature. The father, not liking this form, wrote another, as follows:—"Woodstock, 20th April, 1875. Gentlemen,—In consideration of your supplying my son with what goods he may from time to time require of you this season, on your usual terms of credit, I do hereby guarantee the payment of the same." The defendant, as the court inferred from the evidence, was not aware when he signed this that his son had already obtained any goods from the plaintiffs. After the guarantee, in May and June, further goods were purchased by the son:—Held, that the guarantee applied only to the goods purchased after it, not to those previously furnished. *Wood* v. *Chambers*, 40 U. C. R. 1.

One M., requiring machinery for a cheese factory, gave the plaintiffs, who manufactured such machinery, an order for it in March, to be shipped to him on the 1st May, at the price of $1,100. The plaintiffs required security before filling the order, and the defendant wrote to them on the 25th March, 1875: "I recommended M. to you, and if he should fail in his promise to you for anything in your way, I consider myself jointly liable for the amount of $200, payable in six months, to your firm." The balance was secured by the guarantees of other persons. The machinery was shipped to M., the last shipment being made on the 5th May, and M. gave his note payable in six months from that day,—six months' credit being the plaintiffs' usual course of dealing. Defendant contended that the guarantee limited the period during which defendant should be liable to six months from its date, and that, a further time having been given, he was discharged; and at the trial the Judge ruled that it was a continuing guarantee for any goods to the extent of $200, but that defendant was not liable until the expiration of six months after M.'s default, so that this action brought on the 9th December was premature:—Held, taking the guarantee in connection with the surrounding circumstances, that it must be referred to the specific order which M. had given, and of which defendant must be supposed to have been aware; and that defendant's liability

arose immediately on M.'s default at the expiration of the six months' credit. *Boyle* v. *Bradley*, 26 C. P. 373.

The defendant, in order to enable one G. to carry out a contemplated settlement with the plaintiffs (creditors of G.), signed a memorandum guaranteeing the payment by G. of the first two of three promissory notes of $751 each, "to the extent of $751." When the first note to mature fell due G. was unable to meet it, and the defendant, without the knowledge of the plaintiffs or their agents, enabled G. to raise a part of the amount required to retire that note, which amount G. so applied; and this sum the defendant subsequently was compelled to pay:—Held, affirming the judgment of the court below, 46 U. C. R. 365, no answer to a claim afterwards made upon the defendant to pay the second note on G.'s failing to do so, the advance which had been so made by the defendant to G. forming no part of the sum the defendant was liable for under his guarantee. *Crathern* v. *Bell*, 8 A. R. 537.

A., a wholesale merchant, had been supplying goods to C. & Co., when, becoming doubtful as to their credit, he insisted on their account being reduced to $5,000 and security for further credit. W., who had indorsed to secure a part of the existing debt, thereupon gave A. a guarantee in the form of a letter, as follows:—"I understand that you are prepared to furnish C. & Co. with stock to the extent of $5,000 as a current account, but want a guarantee for any amount beyond that sum. In order not to impede their operations I have consented to become responsible to you for any loss you may sustain in any amount upon your current account in excess of the said sum of five thousand, but the total amount not to exceed eight thousand dollars including your own credit of five thousand, unless sanctioned by a further guarantee." . . A. then continued to supply C. & Co. with goods, and in an action by him on this guarantee:—Held, that there could be no liability on this guarantee unless the indebtedness of C. & Co. to A. should exceed the sum of $5,000, and at the time of action brought such indebtedness, having been reduced by payments from C. & Co. and dividends from their insolvent estate to less than such sum, A. had no cause of action. *Alexander* v. *Watson*, 23 S. C. R. 670.

A guarantee in the following words, "I hereby become responsible to H. M. for payment for goods sold to F. E. for feed store situate . . up to $400," was given at a time when the debt due by F. E. to H. M. was $280.85:—Held, that the guarantee covered the amount then due and an additional indebtedness up to $400. Chalmers v. Victors, 18 L. T. N. S. 481, followed. *Moyle* v. *Edmunds*, 24 O. R. 479.

The defendant gave to the plaintiff a guarantee that, in consideration of his indorsement for one F. of certain promissory notes for a large sum given by him for the purchase of a bankrupt stock, the defendant would guarantee the due payment of the amount of such notes at maturity, provided he was not called upon to pay in all more than $2,000:—Held, that the effect of the guarantee was that it continued in force, to the full extent of $2,000, until the last of the notes was paid, and that the defendant could not before such event relieve himself from liability by transmitting to the plaintiff $2,000 which he had received from F., being the proceeds of a portion of the stock. *Struthers* v. *Henry*, 32 O. R. 365.

See Hall v. *Merrick*, 40 U. C. R. 566; *Grand Junction R. W. Co.* v. *Pope*, 30 C. P. 633.

(d) *Operation of Statute of Frauds.*

Consideration.]—A guarantee indorsed on a note at the time of its execution in the following words, "We guarantee the payment of the within note," does not shew a sufficient consideration for the promise, the case being within the Statute of Frauds. *Lock* v. *Reid*, 6 O. S. 295.

See Walker v. *O'Reilly*, 7 L. J. 300; *Macklin* v. *Kerr*, 27 C. P. 47, 28 C. P. 90.

See ante (b).

Naming Person to whom Given.]—An undertaking as surety must, to comply with the Statute of Frauds, name the person to whom it is given. Where a guarantee did not sufficiently comply with the Statute of Frauds, but the transaction related to an interest in lands for one year, and the principal had gone into possession under the contract and retained possession:—Held, that the contract was binding on both principal and surety, on the ground of part performance. In such a case some of the sureties, some weeks after possession was taken, refused to sign a formal lease. No proceedings were taken to enforce their undertaking until the year had expired, and the principal had given up possession, a defaulter in respect of his rent:—Held, that the delay was no bar to the suit. *County of Huron* v. *Kerr*, 15 Gr. 265.

The defendant, owing the plaintiff, delivered to him a note for $100, made by one John McGee, payable to defendant or bearer, on the back of which defendant signed the following guarantee: "In consideration of the sum of one hundred dollars, I guarantee the payment of the within note:"—Held, that the guarantee was sufficient within s. 4 of the Statute of Frauds; for, although no promise was named in it, yet the reference in the guarantee to "the within note" made it a promise enuring to the benefit of the bearer, whoever he might be. Semble, that the guarantee created an absolute promise to pay in all events, and that defendant was not entitled to notice of dishonour; but there was no plea raising this question. Quære, whether defendant could be treated as a joint maker. *Palmer* v. *Baker*, 23 C. P. 302.

In an action for the price of goods supplied by the plaintiffs to C. A. E., it was proved that the plaintiffs received in an envelope, addressed to their firm, the following letter, signed by the defendant. "Lake Superior, Ont., July 4th, 1883. Gentlemen.—I beg to inform you that I have assumed all liabilities of the S. P. Co. lately carried on by Mr. C. A. E., and am responsible to the amount contracted by him up to July 24th, 1882. Kindly ship cases immediately." The envelope was lost, but its receipt and the address on it were proved:—Held, a sufficient agreement in writing to satisfy the statute, for the address on the envelope, referring to the "gentlemen" within, shewed that the plaintiffs were the persons guaranteed. *Richard* v. *Stillwell*, 8 O. R. 511.

Writing—*Absence of.*]—A. being indebted to B., and C. to A., a promise by C. that he will pay B. the debt due to him by A. in consideration that B. will discharge A., is not within the statute. *Kissock* v. *Woodward*, 1 U. C. R. 344.

Where the plaintiff had been employed by A. in getting out timber, which A. afterwards sold to the defendant, who agreed orally with the plaintiff and others who had been working with him, the timber being in their possession, that he would pay the wages of the plaintiff and the others, if they would assist in rafting the timber to Quebec, out of the proceeds of its sale there:—Held, that, on shewing the sale there, the plaintiff was entitled to recover for his wages as money had and received; and that the case was not within the Statute of Frauds. *McDonell* v. *Cook*, 1 U. C. R. 542.

Where defendant agreed that, if the plaintiff would give up his claim against A. B. for £46, he would pay him £35 out of the proceeds of a certain raft when it should arrive at Quebec:—Held, that the plaintiff could sue the defendant on such agreement upon the common counts, without an agreement in writing. *McDonald* v. *Glass*, 8 U. C. R. 245.

B. and another had executed a mortgage to the plaintiffs, by which the principal money became due on default in the interest, and the plaintiffs also held the mortgagors' note indorsed to them by the payee. The mortgagors assigned all their estate and effects, including the mortgaged property, to defendant, in trust for creditors, and he, in consideration that the plaintiffs would not enforce payment of the principal money which had become due on the mortgage, but would accept the interest when he could pay it, orally promised to pay the note:—Held, a promise to answer for the debt of another, and that the plaintiffs therefore could not recover. *Lee* v. *Mitchell*, 23 U. C. R. 314.

Held, that there was no evidence of original liability on the part of defendant for the price of the goods in question; and that his promise to pay, not being in writing, was therefore void under the Statute of Frauds. *Merner* v. *Klein*, 17 C. P. 287.

A. being indebted to the plaintiff in $1,100 for timber furnished to him, and used in a vessel which he had contracted to build for the defendant, the plaintiff refused to furnish any more, and the defendant then said to him, that if he, the plaintiff, would furnish what further timber was required to finish the vessel, he (defendant) would pay the plaintiff for it, on the plaintiff getting an order from A.; and that if the plaintiff got an order from A., he would pay it:—Held, that the promise as to the $1,100 was void, under the Statute of Frauds, not being in writing; and that it must be regarded as a mere naked undertaking to pay A.'s debt, not as made in consideration of the plaintiff furnishing A. with the timber. *Rounds* v. *May*, 35 U. C. R. 367.

A guarantee that a promissory note made by another will be paid at maturity is within s. 4 of the statute, and therefore invalid unless in writing. *Wambold* v. *Foote*, 2 A. R. 579.

One A. had contracted to build certain houses for defendant, and the plaintiff agreed with A. to do the brickwork, but, having some doubt as to A.'s ability to pay, the plaintiff hesitated to go on. The defendant told the plaintiff that he would see him paid, whereupon the plaintiff proceeded and finished the work:—Held, that defendant's promise was within the statute, and being oral only the plaintiff could not recover, for A.'s liability to the plaintiff continued, and defendant's only liability arose from this promise. *Bond* v. *Treahey*, 37 U. C. R. 360.

A. contracted to build houses for defendant, and sublet the plastering to the plaintiff. The plaintiff commenced the work, but refused to go on without security, whereupon A. gave him a written order to the architects to give him certificates for the plastering as the work proceeded. After this the plaintiff got money from time to time from the architects without reference to A. A. failed, and the plaintiff stopped work for some weeks, when the defendant told him to go on, saying he, the plaintiff, knew all was right; and he thereupon went on and completed the work:—Held, that there was no substitution of the plaintiff for A., but that A.'s liability continued; and that defendant's promise being collateral, and oral, was void, under the Statute of Frauds. *Poucher* v. *Treahey*, 37 U. C. R. 367.

Where a contractor for the building of a house made default in carrying on the work, and, in consequence, the owner, acting under a clause in the contract to that effect, dismissed him, and agreed orally with a sub-contractor, who had been employed by the contractor, that if the sub-contractor would go on and finish the work he, the owner, would pay him:—Held, that the agreement with the sub-contractor was a new and independent contract, and was not a contract to answer for the debt, default, or miscarriage of another within s. 4 of the Statute of Frauds, and was therefore valid and binding on the owner, although not in writing. Bond v. Treahey, 37 U. C. R. 360, distinguished. *Petrie* v. *Hunter*, *Guest* v. *Hunter*, 2 O. R. 233.

A collateral oral promise to pay the debt of another, who still remains liable, although founded on a good consideration, is not binding. Therefore, where defendant had bought the stock of one A., who was indebted to the plaintiff for wages, and in order to induce the plaintiff to continue with the defendant, the defendant promised to see that he was paid, and the plaintiff did accordingly work for the defendant:—Held, that the Statute of Frauds was a bar to the action. *James* v. *Balfour*, 7 A. R. 461.

A. M. was carrying on business as a brewer, when, owing to financial difficulties, he left, and S. M., his brother, a large creditor, took charge thereof. The plaintiff claimed that at this time there was a large sum due him for wages under a special agreement made with A. M.; and that S. M. agreed, if he would remain, to pay him the past wages then due him, and like wages for the future:—Held, that the agreement by S. M. to pay such past wages being merely a collateral promise, A. M. remaining liable, and not being in writing, could not be enforced. Held, also, that, on the evidence as to the amount of wages, each party swearing to a different agreement, and the other evidence being contradictory, the fair inference was that the parties' minds

were never ad idem, and the recovery would only be on the quantum meruit. *Hoener* v. *Merner*, 7 O. R. 629.

A promise made by a third person to a creditor to pay or to see paid the debt due to him by his debtor, whether such promise is absolute or conditional, is a promise to answer for the debt of another, and is within s. 4 of the Statute of Frauds. The plaintiff was the holder of a promissory note of an incorporated company of which the defendant was president, and was pressing for payment when the defendant orally promised to see him paid if he would forbear to sue and would renew:—Held, that this was not a promise of indemnity, but of guarantee, and therefore required by s. 4 of the Statute of Frauds to be in writing. Guild & Co. v. Conrad, [1894] 2 Q. B. 885, distinguished. *Beattie* v. *Dinnick*, 27 O. R. 285.

——— *Sufficiency of.*]—"Please credit A. £100, and I agree to hold myself responsible for the payment of the same:"—Quære, is this undertaking within the Statute of Frauds? *Parker* v. *Dutcher*, 2 O. S. 106.

A., deceased, was indebted to B., who had taken certain securities for the debt. C., on receiving these securities, gave B. the following agreement: This is to certify that I, C., do agree to settle all accounts against the estate of A., deceased, hereinafter mentioned: that is, an unsettled account between B. and A., and one note of hand held by D. against the said A., and one note held by E. against B.:—Held, not within the statute. *Gerow* v. *Clark*, 9 U. C. R. 219.

Plaintiff had worked for M. & D. at their mill, and they owing him for wages, the plaintiff's father proposed to let them have a siding machine to put up in the mill, and that the plaintiff should work it until he had sawed enough to pay the arrears due to him and his wages while so engaged, and the price of the machine, they finding the power and timber. Defendant, who was then about to purchase the mill from M. & D., agreed to this proposition, and he afterwards completed the purchase. The machine was put up and worked by the plaintiff, and defendant afterwards promised to pay him his wages while so employed:—Held, that by the arrangement defendant had assumed the arrears due to defendant by M. & D. as a debt of his own, and was liable without any written agreement; but that his letters, set out in the report of this case, sufficiently shewed a contract in writing. *Clark* v. *Waddell*, 16 U. C. R. 352.

F. being indebted to the plaintiffs, who were pressing him for payment, the defendant signed the following document and delivered it to the plaintiffs in consideration of their giving time to F.: "I will guarantee that the security offered by Mr. John Fleming for the balance of your account will be executed and forwarded within ten days." The security referred to was a mortgage upon real estate to be executed, and a paid-up life policy of $5,000, which F. had agreed orally to give the plaintiffs, neither of which existed at the time of F.'s agreement, or the defendant's guarantee. F. never gave the security, and the plaintiffs, by refraining from suing him, lost their debt:—Held, that the writing signed by the defendant was not sufficient to satisfy s. 4 of the Statute of Frauds, whether regarded as an original promise or guarantee. *Lightbound* v. *Warnock*, 4 O. R. 187.

As a written memorandum of an oral guarantee is required only for the purpose of evidence, a letter or other writing subsequently given by the guarantor, sufficiently shewing the terms of his undertaking, will suffice. A letter shewing the terms, written by the guarantor partly on his own behalf and partly on behalf of a firm of debtors, and signed by him in the firm name and in his own name for them per proc., is sufficient to bind him. *Thomson* v. *Lede*, 22 A. R. 105.

The plaintiffs, being creditors of an incorporated company, accepted an offer made by the company's president, in a letter addressed to the plaintiffs to "personally guarantee payment" of the company's debt, upon an extension of time being given, and, in order to carry out the arrangement, promissory notes were made by the company payable to the order of the plaintiffs, and indorsed by the president, who made an assignment for the benefit of his creditors, under R. S. O. 1897 c. 147, before the maturity of three of the notes, in respect of which the plaintiffs sought to rank upon his estate in the hands of the defendant as assignee:—Held, following Jenkins v. Coomber, [1898] 2 Q. B. 168, that, upon the Statute of Frauds, no action could be maintained on the notes against the president, as to whom the instrument was incomplete. And, although the correspondence and the notes taken together established an agreement of suretyship, notwithstanding the Statute of Frauds, yet proof could not be made upon such a contract when the notes guaranteed had not matured at the date of the assignment. Grant v. West, 23 A. R. 533, and Purefoy v. Purefoy, 1 Vern. 28, followed. *Clapperton* v. *Mutchmor*, 30 O. R. 595.

(e) *Person to Whom Given.*

Enforcement.]—"Mr. Thomas Mason. Dear Sir,—In answer to your favour of this date, I beg to say I will pay whatever sum you may agree upon to pay for an omnibus, if you should find one to suit you, so soon as the same is delivered to you in Hamilton; and this may be considered as a guarantee to the party from whom you may purchase, I remain yours very truly, Samuel Mills:"—Held, that this, though addressed only to T. M., would attach at once as a guarantee in favour of any person who might furnish the omnibus; and that no further proof of acceptance or of consideration was required. *Manning* v. *Mills*, 12 U. C. R. 515.

Defendant addressed to I. V. & Co. the following guarantee: "Gentlemen,—In consideration of your filling the orders for goods from your Birmingham house of J. C. & Co., say the spring importations, I hereby hold myself responsible for and guarantee the payment of the same to you." I. V. & Co. were the agents in New York for the Birmingham house referred to, whom the defendant knew, but they had no other connection with them. The goods having been furnished to J. C. & Co.:—Held, that the Birmingham firm could sue upon the guarantee, if intended for their benefit, which might be proved by parol evidence. *VanWart* v. *Carpenter*, 21 U. C. R. 320.

One T. contracted with two firms in Quebec, N. & Co. and M. & Co., for advances, to be covered by shipments of timber within

a specified period, agreeing to furnish defendant's guaranty for performance of his part of the contract. Defendant in a letter to M., a partner in one of the firms, guaranteed that T. would furnish timber in 1859, equal in value to the advances made by him, M., to said T.:—Held, that a joint action by M. and N. & Co. would not lie. *Stevenson* v. *McLean*, 10 C. P. 414.

A. agrees to become surety to B. for all such advances as B. may make to C. during a limited period. B. makes no individual advances to C. at all, but during the period, B., with D., a stranger to A., make advances to C.:—Held, that B. individually cannot recover from A. the amount of the advances so made. *Stevenson* v. *McLean*, 11 C. P. 208.

D. having negotiated for the purchase of unpatented lands, and the vendee of the Crown requiring security for the purchase money, D. obtained from his father a letter addressed to himself, as follows: "If you make the contemplated purchase from H. of wild lands, amounting to 16,000 acres, at 8s per acre, and deducting all amounts due or hereafter payable on the same, I will become your security for the payment of the principal on the Crown lands and interest, and the interest on the deeded lands." "P. S.—I will see you have the £2,000 to pay in cash when all papers are signed:"—Held, that this letter was not a promise to provide for the payment of the £2,000 cash, which could be enforced by the vendor. *Helliwell* v. *Dickson*, 9 Gr. 414.

See County of Huron v. *Kerr*, 15 Gr. 265; *Palmer* v. *Baker*, 23 C. P. 302; *Richard* v. *Stillwell*, 8 O. R. 511, *ante* (d).

II. DISCHARGE AND RELEASE OF SURETY.

1. *Alteration of Principal's Position.*

(a) *Bank and Company Officers.*

Bank Agent—*Cashier.*] — A surety by bond, for the due performance of the office of a bank agent, is not responsible for losses occurring after the nature of the agency has been changed and the agent appointed a cashier. *Bank of Upper Canada* v. *Covert*, 5 O. S. 541.

——— *Remuneration — Change in Mode of.*]—To a declaration against a surety on a bond, conditioned for the performance of his duty by W. while in the plaintiffs' service as their agent at N., or in any other capacity whatsoever, the defendant pleaded that W. entered into the plaintiffs' employment as such agent at a certain commission or percentage on the business done, and defendant executed the bond under the agreement that he should be so paid, and that afterwards the plaintiffs, without defendant's knowledge or consent, changed the mode of remuneration to a fixed salary:—Held, no defence. *Bank of Toronto* v. *Wilmot*, 19 U. C. R. 73.

Bank Cashier—*Non-banking Business.*] —The sureties of an absconding bank cashier are not relieved from liability by shewing that the bank employed their principal in transacting what was not properly banking business, in the course of which he appropriated the bank funds to his own use, the claim against sureties being for the moneys so appropriated by the principal, and not for losses occasioned by such illegal transactions. *Springer* v. *Exchange Bank of Canada, Barnes* v. *Exchange Bank of Canada*, 14 S. C. R. 716. See *S. C.*, 7 O. R. 309, 13 A. R. 390.

Bank Clerk—*Teller.*]—Declaration on a deed executed, reciting that B. had been appointed by plaintiffs a clerk in their bank at K. or elsewhere, as might be determined upon, B. covenanting during his service as clerk or in any other capacity whatsoever, to be faithful in his conduct, render proper accounts, pay moneys, &c., and defendant covenanting that B. should perform all his covenants. Averment, that R. entered the bank as a clerk, and while in such employ, &c., (charging misapplication of moneys, &c., by B. as teller.) Plea, that before breach B. was, without defendant's consent, removed by plaintiffs from the situation of clerk to that of teller, which was a different office, and in which he was intrusted with more moneys than in his former position, and his responsibility entirely changed and increased:—Held, bad. *Royal Canadian Bank* v. *Yates*, 19 C. P. 439.

Insurance Company—*Agent—Change in Extent of Duties.*]—A bond made by defendants as sureties, and B. as principal, to the plaintiffs, to secure the faithful and diligent performance of B.'s duties, including the payment over of moneys, recited that B. had been appointed agent for the plaintiffs for the Province of Ontario, and as such was to discharge certain duties, and to receive certain moneys, as defined in the instrument appointing him, and as to which the parties thereby declared they had due and sufficient communication. The condition of the bond was for the performance of such duties, and the payment over of such moneys. The bond also contained the following clause:—"The said sureties, in consideration of the premises, hereby agree to . . renounce to (sic) the benefits of division, discussion, and all other benefits of sureties, consenting to be bound as fully in all respects as the said principal party." The instrument of appointment provided that B. should be general agent for the Province, should have control over all local agents, except some six, including those of Hamilton and Galt, and his compensation should be a commission of thirty-five per cent. on all business obtained by himself or the said agents under his control, he to pay the agents thereout, and on renewals thirty per cent.; and also to have a salary of $75 a month, which was to include travelling expenses. The plaintiffs afterwards added Hamilton and Galt to his agencies. Subsequently B.'s business was confined to Toronto, and he agreed to relinquish his commission on the outside agencies; and it was intimated to him that at the close of the year his salary would have to be re-arranged:—Held, that the taking away of the outside agencies was such a change in B.'s position as could not be said to be, without inquiry, evidently unsubstantial and not prejudicial to the sureties, and would of itself discharge them; but as to Galt and Hamilton it could not be said, on the evidence, to have that effect. Held, also, that the effect of the renunciation clause was to place the principal and sureties in the position of joint contractors; that the agreement confining B.'s business to Toronto amounted to a new contract; and that the sureties would only be liable as principals for default up to

the date thereof and not thereafter. *Citizens' Ins. Co.* v. *Cluxton*, 13 O. R. 382.

——— *Agent—Remuneration — Change in Mode of.*]—Action on a bond given by the defendants W. and A. for the performance of W.'s duties as plaintiffs' agent, and for the payment of all moneys received by him, alleging non-payment of certain moneys, &c. Plea by defendant A., setting up in substance that when he executed the bond as such surety W. was agent under an agreement with plaintiffs, whereby his salary was fixed, and that afterwards, and before breach, the plaintiffs, without A.'s knowledge or consent, discharged W. from his then engagement, and re-engaged or re-appointed him on different terms, &c., namely, that his remuneration was to be by commission allowed for services performed instead of by fixed salary. Replication, in substance, that W.'s remuneration as such agent, whether by fixed salary or commission, formed no part of and was not contemplated in the contract of suretyship, nor was the change in any way prejudicial to the surety's interests, nor did it impose any greater liability upon him, and the said change did not include any change of W.'s duties and obligations as such agent:—Held, replication bad, as being no answer to the plea, which alleged a discharge of W. from his engagement and a re-engagement on different terms. Semble, that the change in the mode of remuneration by commission instead of by fixed salary would release the surety, if the nature of the remuneration was communicated to him when he entered into the contract, for it was an alteration which might be prejudicial to him. A rejoinder alleged that A. was induced to enter into the said bond for W. at a fixed salary, and, believing such representations to be true, executed said bond, and the change in said plea set out was without his authority or consent. Semble, rejoinder good: that it was not necessary to allege that said representation was made by the plaintiffs, for under the rejoinder the plaintiffs would have to prove that the representation was so made as to be binding on plaintiffs. *Canada Agricultural Ins. Co.* v. *Watt*, 30 C. P. 350.

Road Company — *Secretary and Treasurer—President.*]—A plea that the bond was given for the due performance of the duties of secretary and treasurer of the plaintiffs by A., and that before breach A. was appointed president and director of the plaintiffs:—Held, bad, for not shewing that the offices were incompatible, by alleging that the plaintiffs were incorporated under C. S. U. C. c. 49, if that Act would make them incompatible, or otherwise. And admitting them to be incompatible:—Quære, would the acceptance of one vacate the other. A plea that A. had ceased to be secretary and treasurer when the bond was given, and had become a director and president, but that defendant did not know it:—Held, no answer, without the incorporation of the bond in the plea, which being done, the recital contained an admission under seal of his being duly appointed treasurer and secretary, and was therefore a contradiction thereof. *Trent and Frankford Road Co.* v. *Marshall*, 10 C. P. 329.

(b) *Government Officers.*

Collector of Customs—*Change of Port.*] —Sci. fa. on a bond given by defendant as surety for one A., collector of customs. Defendant pleaded that A. was appointed a collector of customs in Upper Canada, at the port of B., and to no other office; and thereupon defendant executed a bond in reference thereto as follows: setting out the bond at length, which recited that A. had been appointed to the office of a collector in Her Majesty's customs, and the condition was that so long as he should hold such office he should pay over all moneys received by virtue thereof. Defendant then alleged that the bond was executed in reference to said office of collector at B., and not in respect of any other office or employment; and A. afterwards resigned said office, and was without defendant's knowledge appointed collector for the ports of N. and R. successively; and that the breach of duty, if any, was in respect of those offices, and not of his office at B. aforesaid. The plaintiff replied that collectors of customs were and are appointed generally, and not to any particular place; that A. was so appointed, and the bond given in respect of such appointment; that as such collector he was, without any resignation, transferred respectively from B. to N., and to R., at which last mentioned port the breach of duty sued for occurred — without this, that he was at the time of giving said bond appointed collector at B., and not to any other office, and afterwards resigned said office:—Held, on demurrer to the replication, plea bad, for setting up that the bond was given in respect to the office of collector at B. only, when, as set out in the plea, it was clearly not so, but as collector generally: replication good. At the trial, upon issue taken on the replication, A.'s commission was put in, dated the 28th May, 1850, appointing him "a collector of Her Majesty's customs in the Province of Canada," and a letter to him from the customs department, of the 14th May, informing him that he had been appointed collector of customs at the port of B., and requiring him to furnish securities. The bond was dated the 16th May. The removal of A. to the ports mentioned in the plea was proved, and that he was in default at R., whence he absconded:—Held, that defendant was liable for such default. *The Queen* v. *Miller*, 20 U. C. R. 485.

(c) *Merchants' Clerks.*

Becoming Partner.]—A person became surety for another for the due discharge of his duty as agent in the purchase of wheat for a mercantile firm. Afterwards the agent and his principals entered into partnership, and during the continuance thereof he became indebted to his co-partners in the sum of £750, and the surety having been called upon, executed a confession of judgment for the amount of his principal's indebtedness, in ignorance, as he alleged, of the fact that the agency had ceased, and a partnership been formed. Upon a bill filed to enforce the judgment against the surety, the court, under the circumstances, directed a reference to ascertain what, if any, portion of the debt for which the cognovit was given arose in respect of dealings during the agency, reserving further directions and costs; or, if the plaintiffs should decline this reference, then that the bill should be dismissed with costs. *Goodcrham* v. *Bank of Upper Canada*, 9 Gr. 39.

Sale of Business to.]—The plaintiff took a bond from defendants, conditioned for the

faithful performance by D. of his duties as agent and clerk of the plaintiff in a store to be opened by D. for the plaintiff at L. Subsequently the plaintiff sold to D. the goods, &c., at L. without the consent of the sureties:—Held, that they were discharged. *Van Allan* v. *Wigle*, 7 C. P. 459.

(d) *Municipal Officers.*

Deputy of County Treasurer—*Appointment—Change in Mode of.*]—A. became surety to B., a county treasurer, for the due accounting, &c., by C., as deputy treasurer, while B. continued in his office. C. received moneys for which he did not account, and B. sued A. upon the bond. B. held his commission as treasurer from the government, from the execution of the bond to the 10th October, 1846; and from that time to the 16th August, 1849, in consequence of a change made in the mode of appointment, he held his office under an election of the municipal council of the western district:—Held, that the surety was liable during the whole time the deputy was serving, without reference to the mode of B.'s appointment. *Baby* v. *Baby*, 8 U. C. R. 76.

District Treasurer — *Appointment — Change in Mode of.*]—A surety by bond to the Queen, for the due performance of B.'s duties as treasurer of a district, was not liable for any defalcations by B. after his election by the municipal council. *The Queen* v. *Hall*, 1 C. P. 406.

Township Treasurer — *Increase in Taxes.*]—The imposition of additional taxes to those assessed at the time of taking the security, and the increase of the risk thereby, did not vitiate a bond given for the general performance of duties and payment of all moneys by the treasurer for the township. *Township of Beverley* v. *Barlow*, 10 C. P. 178.

——— *Re-appointment.*]—The annual re-appointment of a municipal treasurer:—Held, not to discharge his sureties. *Township of Adjala* v. *McElroy*, 9 O. R. 580.

Village Treasurer—*Collector.*]—Temporary employment of municipal treasurer, who was also clerk of the municipality, as collector. Liability of surety for the performance of his office as treasurer, for moneys received by him in either capacity. *Village of Weston* v. *Conron*, 15 O. R. 595.

2. *Course of Dealing.*

Arrangement not Objected to—*Judgment.*]—Defendant was one of two sureties in a bond, on which the obligees sued. An arrangement was made between his principal, his co-surety, and the plaintiffs, to which he did not consent as to himself, but to which he offered no objection as regarded his principal and co-surety. Subsequently, an action being brought on the bond against him, he allowed judgment to go by default, and gave a cognovit, reserving any means he might have in equity to relieve himself. He now applied to set aside the judgment and cognovit, which, under the circumstances, the court held could not be done. Quære, whether a certain release given by the warden to the principal and one of the sureties, was binding at law. *Counties of Essex, Kent, and Lambton* v. *Baby*, 9 U. C. R. 34.

Condition of Guarantee—*Impossibility of Performance—Actions of Creditor.*]—The defendant R. contracted with the plaintiffs to deliver on their vessels at Montreal a large quantity of deals, and he delivered in 1877 all but 108 standard hundreds. These could not be shipped till the spring of 1878, and R. required in the meantime to receive payment for them. He had in his yard at Ottawa more than the required quantity of deals; and in place of then separating and delivering to the plaintiffs the 108 standards, he procured his son to give a storage receipt under 34 Vict. c. 5 (D.), acknowledging the receipt from the Ontario Bank of 108 standard hundreds of deals, specifying the qualities required by the contract. The bank thereupon gave a guarantee to the plaintiffs that those deals should "be satisfactorily culled next spring previous to shipment, and that any question arising as to the same shall be settled in the manner usual in Quebec, viz.: Messrs. D. & Co., for purchasers, and Messrs. C. & R., for Mr. R., to agree upon a sworn culler to act in the interests of both parties." Thereupon the plaintiffs paid for the deals, and the bank received the money. In the spring of 1878 R. forwarded 108 standards to Montreal by two barges, being urged to expedition in so doing by the plaintiffs; and sixty standards were loaded on vessels of the plaintiffs, which sailed with them to England. The quality of the remaining forty-eight standards was objected to, and they were landed at Montreal, and there culled and found deficient in quality. Messrs. C. & R., agents at Montreal for the defendant R., orally agreed with the plaintiffs, after the sixty standards had been shipped, that the quality of the forty-eight standards should be taken to be the average of the whole 108:—Held, reversing the decision in 3 O. R. 299, that the guarantee given by the bank only required that the plaintiffs should be satisfied with the culling at R.'s yard in Ottawa, and that, no objection having been made there, the guarantee was satisfied. But held, also, that the bank was not bound by the agreement made at Montreal by C. & R., and, even if the culling were to have been at Montreal, the shipment of the sixty standards having rendered it impossible to settle the question in difference in the manner agreed upon, the bank would have been discharged. *Dobell* v. *Ontario Bank*, 9 A. R. 484.

Contract—*Sale of Subject of, under Execution.*]—Where a surety covenanted to pay advances made by the creditors of the principal to him on a certain day, or so soon as certain timber should be sold at Quebec; and before the time appointed arrived, and whilst the timber was being conveyed to Quebec, an agent of the creditors obtained from the principal debtor a confession of judgment, and sued out execution thereon, under which the timber was sold:—Held, that this discharged the surety. *Dickson* v. *McPherson*, 3 Gr. 185.

Discharge of Collateral Security.]—A. and B., partners in business, borrowed money from C., giving him as security their joint and several promissory note and a mortgage on partnership property. The partnership having been dissolved, A. assumed all the

liabilities of the firm, and continued to carry on the business alone. After the dissolution C. gave A. a discharge of the mortgage, but without receiving payment of his debt, and afterwards brought an action against B. on the promissory note:—Held, affirming the decision in 20 A. R. 695, that, by the terms of the dissolution of partnership, the relations between A. and B. were changed to those of principal and surety, and it having been found at the trial that C. had notice of such change, his release of the principal, A., discharged B., the surety, from liability for the debt. *Allison* v. *McDonald*, 23 S. C. R. 635.

Division Court Clerk—*Special Arrangement with—Statements of Account.*]—After the defendants had become sureties for a division court clerk, a special arrangement was made between the plaintiffs and the clerk, under which the latter was to receive no costs but disbursements only in all suits entered with him by the plaintiffs in which nothing was realized, and he on his part guaranteed that the court had jurisdiction. This was subsequently varied by giving to the clerk fifty cents in addition to the disbursements in such suits. Periodical statements were made from time to time according to the agreement, and a cheque given for the balance thus shewn. It was afterwards discovered that the statements were incorrect, and that moneys collected by the clerk had not been paid over:—Held, that the special arrangement made with the clerk discharged the sureties. Held, also, that the periodical statements were not conclusive as against the plaintiffs. *Victoria Mutual Fire Ins. Co.* v. *Davidson*, 3 O. R. 378.

Hire of Chattel—*Subsequent Sale.*]—Where defendant became surety to the plaintiff for the rent of a certain piano, hired to one H., and for its return on request; and the plaintiff afterwards sold the piano to H., taking in security a bill on England, with the understanding that if the bill should be dishonoured the sale was to be void:—Held, that the defendant was discharged. *O'Neill* v. *Carter*, 9 U. C. R. 470.

Interference with Rights of Surety.]—The Union Bank agreed to discount the paper of S., A., & Co., railway contractors, indorsed by O'G., as surety, to enable them to carry on a railway contract for the Atlantic and North-West R. W. Co. O'G. indorsed the notes on an understanding or an agreement with the contractors and the bank that all moneys to be earned under the contract should be paid directly to the bank and not to the contractors, and an irrevocable assignment by the contractors of all moneys to the bank was in consequence executed. After several estimates had been thus paid to the bank, it was found that the work was not progressing favourably, and the railway company then, without the assent of O'G., but with the assent of the contractor and the bank, guaranteed certain debts due to creditors of the contractors, and out of moneys subsequently earned by the contractors made large payments for wages, supplies, and provisions necessary for carrying on the work. In October, 1888, the bank, also without the assent of O'G., applied for and got possession of a cheque for $15,000 which had been accepted by the bank and held by the company as security for the due performance of the contract, in consideration of signing a release to the railway company "for all payments heretofore made by the company for labour employed on said contract and for material and supplies which went into the work." The contract under certain circumstances gave the right to the company to employ men and additional workmen, &c., as they might think proper, but did not give the right to guarantee contractors' debts or pay for provisions and food, &c.:—Held, that there was such a variation of the rights of O'G. as surety as to discharge him. *O'Gara* v. *Union Bank of Canada*, 22 S. C. R. 404.

Insurance of Buildings—*Increase of Risk.*]—Defendant became surety by bond that his principal should keep insured certain buildings mortgaged by him to the plaintiff. Afterwards the position of the buildings was altered by the plaintiff's assignee, the outbuildings being brought nearer to the house, and the risk thereby increased:—Held, that defendant was discharged. *Grieve* v. *Smith*, 23 U. C. R. 23.

Judgment—*Lien on Lands of Principal—Discharge of.*]—The holder of a note recovered against the makers and indorsers a judgment, which was duly registered so as to create a lien on the real estate of the makers; subsequently he accepted from the makers of the note a composition of fifty per cent., and discharged their lands from further liability, expressly retaining the right to go against their personal assets, and then proceeded to execution against the goods of the indorsers:—Held, a discharge of the indorsers from further liability. *Mellish* v. *Green*, 5 Gr. 655.

Novation—*Mortgage*—*Variation.*]—A mortgage of leasehold lands to secure $5,000, made by three trustees and executors under a will, recited their appointment, and that the moneys were required for the purpose of the estate, the mortgage being under the Short Forms Act, and containing the usual covenant for payment by mortgagors. In 1888, under the provision therefor in the will, a new executor and trustee was appointed, the retiring one of the original three being released, and all his interest vested in his successor and those remaining. In 1892, while $3,000 still remained due, the security being greatly diminished in value, and worth no more than the amount then due on it, the plaintiffs, with a full knowledge of all the facts, entered into an agreement under seal with the then executors and trustees for an extension of the time for payment of the principal, which, though providing for a reduction of the rate of interest, also provided for its being compounded, and that the rate was to apply as well before as after maturity. The agreement contained a covenant by the then executors and trustees to pay the mortgage money, and also a proviso that the extension was consented to in as far as the company might do so without infringing on or in any way affecting the interests of other parties in the mortgaged premises, all rights and remedies against any security or securities the company might have against any third person or persons upon the original security being reserved:—Held, that the agreement to extend the mortgage was in effect a transaction for a new loan on different and more onerous terms, and that as between the executors and trustees, as last constituted, and the one who had retired, the relationship of principal and surety was created, and, by virtue of the agreement, notwithstanding the reservation of remedies, the

surety was discharged. *Canada Permanent L. and S. Co.* v. *Ball*, 30 O. R. 557.

——— *Mortgagee and Assignee of Equity of Redemption.*]—Where a mortgagor has assigned his equity of redemption, the assignee covenanting with him to pay the mortgage debt, though as between the mortgagor and the assignee the latter thus becomes primarily liable for the debt, this does not create any privity of contract between the assignee and the mortgagee; and the mortgagor cannot contend, as against the mortgagee, that he has become a mere surety for the debt, and, as such, has been released by certain dealings between the mortgagee and assignee of the equity of redemption, unless such dealings constitute a new contract between them. Mathers v. Helliwell, 10 Gr. 172, distinguished. *Aldous* v. *Hicks*, 21 O. R. 95.

The relations which exist among mortgagee, mortgagor, and assignee of the land who has agreed to pay the mortgage, are not those which obtain among creditor, surety, and principal debtor. Aldous v. Hicks, 21 O. R. 95, approved. Nor should the doctrine of discharge applicable to the case of an ordinary surety be extended to the case of a mortgagor, where no actual prejudice has arisen. So long as the covenant to pay endures, the mortgagor is liable to pay when sued by the mortgagee; his equitable right is, upon payment, to get the land back, or to have unimpaired remedies against his assignee if he has sold the land; and if those rights can be exercised by him at the time he is sued, it is immaterial that at some previous time there was such dealing between his assignee and the mortgagee as would then have interfered with such rights. Mathers v. Helliwell, 10 Gr. 172, explained. Dictum of Maclennan, J.A., in Trust and Loan Co. v. McKenzie, 23 A. R. 167, dissented from. Barber v. McCuaig, 24 A. R. 492, 29 S. C. R. 126, followed. *Forster* v. *Ivey*, 32 O. R. 175.

——— *Pleading—Abandonment.*]—Plaintiff declared on an instrument by which defendants agreed to pay him $2,000, "to be expended as may be agreed upon by" two of them, the other two being their sureties, and by the plaintiff, "in the way of produce." The two sureties pleaded that this agreement was abandoned, and that the plaintiff and the two principal defendants, without their knowledge or consent, entered into another agreement in writing, under which they dealt together, and not under that declared on. To this the plaintiff replied, admitting the agreement pleaded, but asserting that it was not an abandonment of, but an arrangement contemplated by, the contract sued on, in that part of it above set out; that he had sued not for breaches of the alleged substituted agreement, but of that declared on; and except to the extent to which he thus confessed and avoided the plea, he took issue thereon:—Held, on demurrer, that the replication was good (though unnecessarily long and containing a quasi new assignment not required), for it expressly denied the abandonment, which was the material part of the defence pleaded. *Moore* v. *Andrew*, 23 U. C. R. 367.

——— *Vendor and Assignee of Purchaser.*]—An agreement for sale and purchase of several lots, entered into between the plaintiffs and the defendant, described the lots by their plan number, and, after providing for payment of the purchase money, part in cash and part at times fixed therein, with a right of prepayment, contained the words: "Company will discharge any of said lots on payment of the proportion of the purchase price applicable on each." The defendant sold and assigned his interest in the agreement to a third person, who made several payments to the plaintiffs, and sold several lots and parts of lots, which were conveyed to the purchasers by the plaintiffs, who did not first insist upon payment of all interest, and who also on one occasion gave time to the third person for payment of interest:—Held, that there was no novation, the relations which the defendant himself created between the plaintiffs and the third person sufficiently accounting for the dealings between them. 2. That the proportion of the purchase price applicable to each lot was to be ascertained by dividing the balance of purchase money, after deducting the cash payment, by the number of lots. 3. That the plaintiffs were not entitled to convey lots without requiring payment of all interest in arrear at the time of each conveyance, and interest to the date of the conveyance upon the portion of principal being paid. 4. That, though the plaintiffs had no right to convey parts of lots, or to convey without requiring payment of interest, the defendant, even if merely a surety, was not wholly released by their doing this, and giving time for payment of interest, but was released as to interest in arrear when lots were conveyed and time was given, and was entitled to credit for the full proportion of purchase money of those lots of which parts had been conveyed. *Land Security Co.* v. *Wilson*, 22 A. R. 151. See the next case.

Held, by the supreme court of Canada, affirming the above judgment, that the dealings between the vendors and the assignee did not effect a novation by the substitution of him as debtor in the place of the original vendee, or release the vendee from liability under the original agreement. Held, also, that though the course of dealing did not change the relation of the parties to that of principal creditor, debtor, and surety, notice to the vendors of the assignment, and their knowledge that the vendee held the land as security for the performance of the assignee's obligations towards him, bound the vendors so to deal with the property as not to affect its value injuriously or impede him in having recourse to it as a security. In a suit by the vendors against the vendee to recover interest overdue, equitable considerations would seem to be satisfied by treating the company as having got from the third party on every release of a part of a lot the full amount that they ought to have got from him on a release for an entire lot and as having received on each transfer all arrears of interest. In the absence of any sure indication in the agreement, the ratio of apportionment of payments for the release of lots sold should be established by adopting the simple arithmetical rule of dividing the amount of the deferred instalments stated in the agreement by the total number of lots mentioned therein. *Wilson* v. *Land Security Co.*, 26 S. C. R. 149.

See post 4.

Performance of Contract—*Change in—Benefit of Surety.*]—Action on a bond for the performance by one C. of a covenant. Plea, on equitable grounds, that defendant made the bond as surety for C., and upon the terms set forth, and that by an arbitration between plaintiff and C. the terms of his surety-

ship were altered, in one particular especially, namely, that by the original covenant C. was to have insured the subject matter upon which he was surety, in $4,000, and that by the arbitration the insurance was done away with:—Held, that the changing of the contract, even though for the surety's benefit, without his consent, would release him from liability thereon. *Titus* v. *Durkee*, 12 C. P. 307.

Promissory Notes — *Renewals — Executors—Notice.*]—The testator, who was surety in a covenant for the payment by the defendant S. to the plaintiff of a sum of money, died leaving a will, by which he appointed S. and the two other defendants executors. After his death, S., on his own behalf, made various payments on account of the debt, and, being unable to pay the balance when due, he got the plaintiff to take his promissory note therefor, S. having arranged with his bankers to discount this note upon its being indorsed by the plaintiff, and the plaintiff received the money thereon. When the note matured, part of the amount was paid by S., and the balance renewed from time to time by notes of S. indorsed by the plaintiff as before. The last renewal being unpaid, the plaintiff sought to recover the amount from the defendants as executors. In the dealings between the plaintiff and S. as to the promissory note, and the various renewals, no reference was made to the estate of the surety or to the covenant, and the co-executors of S. had no notice of such dealings:—Held, that the estate of the surety was released from liability by the dealings between the plaintiff and S. *Austin* v. *Gibson*, 4 A. R. 316.

Railway Contract—*Mortgage of Railway —Alteration of Contract.*]—Declaration alleged that the defendants by agreement under seal had agreed to become sureties for the performance of a contract made by one B. with the plaintiffs, whereby B. covenanted to purchase and provide all the lands required for and to build and maintain the plaintiffs' railway from Belleville to Lindsay, and to deliver it over completed by a day named, &c., and to indemnify the plaintiffs against all claims, &c., for lands taken and damage done thereto, and from all acts, omissions, and defaults which would give rise to claims against the plaintiffs, alleging as distinct breaches default by B. in the performance of each of the covenants so entered into by him, whereby, &c. Fifth plea, that plaintiffs mortgaged and otherwise incumbered the said road, and thereby released the sureties:—Held, bad, as it did not appear how the incumbrances prejudiced the principal in the performance of the contract. Sixth plea, that the plaintiffs altered the conditions of the contract by allotting to the principal a large quantity of stock in the company, and thereby released the defendants:—Held, bad, in not shewing how the allotment altered the contract. Ninth plea, that the plaintiffs sustained no loss or damage by B.'s default:—Held, bad, for that the defendants' contract was not merely one of indemnity, but also for the performance by B. of certain specified acts, and non-performance of both was alleged. Tenth plea, that after the breaches the plaintiffs, by by-law, rescinded the contract:—Held, bad, as being no answer to the cause of action created by the breaches alleged. *Grand Junction R. W. Co.* v. *Pope*, 30 C. P. 633.

Sale of Mortgaged Premises—*Notice.*]—Where mortgagees sold the mortgaged premises, without notice to a surety for part of the debt:—Held, that they were liable as between themselves and the surety for the full value of the property. *Martin* v. *Hall*, 25 Gr. 471.

Satisfaction of Principal Debt — *Release of Debtor — Novation.*] — Held, by the court of appeal, reversing the decision in 22 O. R. 235, that a creditor may by express reservation preserve his rights against a surety, notwithstanding the release of the principal debtor, the transaction in such a case amounting in effect to an agreement not to sue, but if the effect of the transaction between the creditor and the principal debtor is to satisfy and discharge and actually extinguish the debt, there is nothing in respect of which the creditor can reserve any rights against the surety:—Held, by the supreme court of Canada, affirming the above decision, that, as according to the evidence there was a complete novation of the debt secured by the promissory note sued on, and a release of the maker, the indorsers on the note were also released. *Holliday* v. *Hogan*, 20 A. R. 298; *Holliday* v. *Jackson*, 22 S. C. R. 479.

Second Mortgage by Sureties — *Foreclosure by First Mortgagee—Notice to Sureties — Co-debtor Becoming Surety.*] — Where sureties for a debt gave to the creditor a second mortgage on land as an additional security, and foreclosure proceedings were taken by the first mortgagee:—Held, that the creditor, on being notified thereof, should either make himself a party to the suit and prove his claim, or notify the sureties to enable them to prove it, if they so desired:—Held, that the evidence shewed that the sureties had notice, at all events some three months before the day of redemption, which was sufficient. Held, also, that the fact of two co-debtors changing their position so as to make one of them as between themselves a surety, would not affect the creditor without his consent. *Jones* v. *Dunbar*, 32 C. P. 136.

Secret Bargain.]—A. guaranteed to B. (a creditor of C.) certain composition notes, which B. was to indorse for the other creditors of C. B. represented to one or more of the creditors, before the composition was agreed to, that he (B.) was to accept a like composition himself, but he had a secret bargain with C. that he should be paid in full:—Held, on grounds of public policy, that this secret bargain vitiated the whole transaction, and that A. was not liable to B. on his guarantee. *Clarke* v. *Ritchey*, 11 Gr. 490.

Transfer of Creditor's Business—*Payments to Transferee.*]—A mortgage was given to secure the debt of a third party to the extent of $800 so long as the creditor should continue to sell goods to such third party; subsequently the creditor transferred his business to other persons, with whom the debtor continued to deal for some time. During such dealings the debtor paid in more than sufficient to cover the amount of the mortgage:—Held, that the mortgage was thereby discharged. *Royal Canadian Bank* v. *Payne*, 19 Gr. 180.

See Barber v. *Morton*, 7 A. R. 114; *Molsons Bank* v. *Turley*, 8 O. R. 293; *Township of Adjala* v. *McElroy*, 9 O. R. 580; *Boulton* v. *Blake*, 12 O. R. 532; *Merchants Bank* v. *McKay*, 12 O. R. 498, 15 S. C. R. 672.

See also *post* 4.

3. *Determination of Contract by Death.*

Death of one Surety.]—Held, following Bradbury v. Morgan, 1 H. & C. 249, that the death of one of the guarantors did not extinguish the guarantee, in the absence of any notice to plaintiff on behalf of his estate, and the survivor having acknowledged his liability, and promised to settle. *Fennell* v. *McGuire*, 21 C. P. 134.

Death of Sole Surety.]—Where the engagement of a surety is a contract and not a bare authority, it is not usually revoked by his death, and his estate remains liable to the same extent as he would have been if he had lived. *Exchange Bank of Canada* v. *Springer*, *Exchange Bank of Canada* v. *Barnes*, 7 O. R. 309, 13 A. R. 390. See *S. C.*, 14 S. C. R. 716.

Dissolution of Creditors' Firm by Death of Partner—*Notice.*]—By an agreement under seal made in April, 1879, the defendant guaranteed to C. & Sons, or the members for the time being forming such firm, the price of any goods supplied by C. & Sons to one Q. to the amount of $5,000, and agreed that the guarantee should be a continuing one. C. died in September, 1881, after which the sons, who were named as executors in his will, carried on the same business under the like firm name until December, 1882, when the assets of the partnership were transferred to the plaintiffs, a joint stock company. Q. continued to obtain goods from the sons, and from the plaintiffs after the formation of the joint stock company, until the spring of 1883. Meanwhile, and on the 5th April, 1882, the defendant, being dissatisfied with the manner in which Q. was conducting his business, wrote to the firm forbidding them to supply any more goods to Q. under such guarantee:—Held, by the court of appeal, affirming the judgment in 5 O. R. 189, that such notice put an end to defendant's liability for any goods subsequently supplied to Q.; but, by the supreme court, reversing the judgment of the court of appeal, that the death of C. dissolved the firm of C. & Sons, and put an end to the contract of suretyship. *Cosgrave Brewing and Malting Co.* v. *Starrs*, 11 A. R. 156; *S. C., sub nom. Starrs* v. *Cosgrave*, 12 S. C. R. 561.

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4. *Giving Time to Principal or Co-surety.*

Agreement — *Consideration.*] — Declaration on defendant's bond for the performance by one H. of the covenants in a lease of land to H. from the plaintiff, alleging that H. thereby covenanted that he would by the 1st March, 1873, divide a certain field on the premises by a rail fence into four fields of equal dimensions; breach, non-performance by H. Equitable plea, that in the spring of 1872, H., in part performance of his covenant, erected a fence across the field, so as to divide it into two parts, and thereafter, while there was time for him wholly to perform his covenant, H. requested the plaintiff to extend the time for erecting the other fence until the 1st March, 1874, which the plaintiff did orally, before the time for performing the contract had elapsed, without the knowledge or consent of the defendant, and such extension remained unrevoked until after the time for performing the contract had elapsed:—Held, plea bad, as shewing no binding agreement to give time, and setting up a new contract, not founded on any consideration, to contradict the written one. *Fair* v. *Pengelly*, 34 U. C. R. 611.

——— *Consideration — Seal—Interest.*]—Declaration against defendant on a bond conditioned for the payment of money by one R. Plea, that defendant was surety for R., as the plaintiff well knew; that the time for payment had elapsed; and that the plaintiff, without the knowledge or consent of defendant, agreed (not saying under seal) with R. to give him time for one year, in consideration of certain usurious interest paid by him:—Held, clearly no defence. *Corrigal* v. *Boulton*, 17 U. C. R. 131.

——— *Interest.*]—W. owed A. $400. To secure this debt S., as surety, joined with W. in a note to the creditor (A.) for the amount, payable at a future date with interest. W., the principal, without notice to the surety (S.), agreed in writing to pay interest at fifteen per cent. as a condition of the note being accepted, and of the time mentioned in the agreement being given:—Held, that the surety was discharged. *Shaver* v. *Allison*, 11 Gr. 355; affirmed on rehearing.

Assent of Surety—*Dual Capacity—Executor of Surety—Pleading.*]—To an action against three defendants as executrix and executors under the will of G., deceased, on a covenant by G. that S., one of the said executors and defendants, would pay $2,500, alleging a part payment, but that $618 was still due and unpaid, the defendants pleaded that G.'s covenant was as surety for S. only, as the plaintiff then knew, and that the plaintiff for valuable consideration, and without the knowledge or consent of the other two executors, gave S. time, beyond the stipulated time, whereby the defendants were discharged. To this the plaintiff replied that S., as one of such executors, had notice and knowledge of the agreement to give time, and as such executor assented thereto:—Semble, that the plea was bad, for that in the absence of any allegation of fraud or prejudice to the estate, the assent of one executor might be sufficient, notwithstanding his being both executor and principal debtor; and that the effect of S. filling both positions would be to reserve the plaintiff's right to sue, if called upon to do so by the sureties. But, held, that the replication was a good answer to the plea. Another plea, which omitted to allege that the testator's covenant was as surety for S., was held bad. *Austin* v. *Gibson*, 28 C. P. 554.

Bail—*Replevin—Postponement of Trial.*]—Where the trial of an action of replevin had been postponed at the instance of defendant, but without the direct assent or concurrence of the bail:—Held, that the bail were discharged. The true question is, not whether the surety has actually been injured by the delay, but whether he might have been. *Canniff* v. *Bogert*, 6 C. P. 474.

Bond—*Instalment—Extension of Time.*]—A., the holder of a bond made by B., C., and D., the latter being sureties for B., when an instalment on the bond became due, without the knowledge of C. and D., took B.'s notes to himself, which he indorsed, and discounted at a bank, applying the proceeds upon the instalment and interest. Upon maturity of the notes, he retired them and brought this action on the bond. Upon an equitable plea:—

Held, that the sureties were discharged, and a verdict having been found against them, a new trial was granted. *Hooker* v. *Gamble*, 12 C. P. 512.

Upon a new trial had, a verdict against the principal and for the sureties was upheld, the court being of opinion that on the pleadings and evidence the instalment had been paid. *S. C.*, 13 C. P. 462.

——— *Maturity of Debt.*] — Where an obligee of a bond, given by a surety, gives the principal time after the maturity of the debt, the surety is released in equity. *Hooker* v. *Gamble*, 9 C. P. 434.

——— *Municipal Collector — Statutory Time.*]—Held, that the time given to one of two bondsmen, who was collector of a municipality, did not invalidate it as to the other on equitable grounds, such time, provided it was not extended beyond the 1st March, being within the provisions of 18 Vict. c. 21, s. 3. *Municipality of Whitby* v. *Flint*, 9 C. P. 449.

An extension of time for making the collection, without the surety's consent, does not discharge him, that being expressly allowed, and his liability retained, by 18 Vict. c. 21. *Corporation of Whitby* v. *Harrison*, 18 U. C. R. 606. See, also, *Todd* v. *Perry*, 20 U. C. R. 649.

Guarantee—*Period of Credit-Extension.*] —The plaintiffs sued defendant on the following guarantee: "I hereby hold myself accountable to you for any goods Mr. F. M. may purchase of you to the amount of £250 cy." It was proved that the plaintiff had sold goods to F. M. on the 19th November, 1845, amounting to £311, and that after the original credit of six months on the £311 (understood between the parties at the time of sale, as the jury found) had expired, the plaintiff had extended the time by taking notes without defendant's privity:—Held, that the guarantee was a continuing one; and that the plaintiffs by extending the time of credit had discharged the defendant. *Ross* v. *Burton*, 4 U. C. R. 357.

——— *Period of Credit—Extension—Subsequent Promise.*]—Defendant agreed in writing to be answerable for such goods as the plaintiffs should furnish to one C., to the extent of £500. It appeared that by the usual course of dealing the goods were sold to C. at six months' credit, taking his notes; but the plaintiffs afterwards took three large notes amounting to nearly $9,000, instead of several smaller ones overdue, and thus extended the original credit. This was done without defendant's knowledge or assent, but it was proved that afterwards, on being asked by one of the plaintiffs for security, he offered to convey a lot of land for £300, and said he would pay the rest as soon as he could. It was not shewn, however, that defendant was then aware of the credit having been extended, and the land was declined:—Held, that the offer having been made on a condition which was not accepted, and without knowledge of the facts, was not binding, and that defendant was discharged. Semble, the plaintiffs having taken issue on the plea alleging discharge by the extension of time, that the subsequent promise to pay was not admissible in evidence. *Kerr* v. *Cameron*, 19 U. C. R. 366.

——— *Mortgage — Collateral Security — Promissory Note.*]—Action by H. against M. on a guarantee of a mortgage made by one G. and assigned by M. to H. Plea, that the mortgage was given by G. as collateral security for two notes of £100 each, made by G. to one W., and indorsed by him, and that said notes were given to H. (plaintiff) with the mortgage, and that, one note having become due, H., without notice of presentment and dishonour, and without defendant's consent, gave G. time, for a valuable consideration:—Held, good, and that defendant as surety was discharged. *Howee* v. *Mills*, 10 C. P. 194.

Judgment—*Subsequent Extension—Condition.*]—After judgment had been recovered against a debtor and his surety, the party holding the judgment agreed with the debtor to extend the time for payment:—Held, that, under the circumstances, the surety was not discharged. *Duff* v. *Barrett*, 15 Gr. 632.

On the rehearing of this cause:—Held, that time given by a creditor to his principal after judgment recovered against the surety, did not discharge the surety; and that the debtor having stipulated to obtain the surety's consent for time, the agreement for time was thereby made conditional on such consent being given, and that the surety was not discharged. *Duff* v. *Barrett*, 17 Gr. 187.

——— *Setting aside.*] — After a cognovit given by the principal and his sureties jointly, the court will not set aside a judgment entered against all because time has been given to the principal without the consent of the sureties. *Mowat* v. *Switzer*, M. T. 3 Vict.

Mortgage — *Consideration—Pleading.*]—Action on a bond against a surety for W. R. as agent for the plaintiffs, alleging the conversion by W. R. of money received for them. The plea, which set up an accounting between plaintiffs and W. R., and a mortgage given to secure the money found due, by which the debt was merged in the mortgage, and the time extended without defendant's consent:—Held, bad, as not shewing that the consideration for which the mortgage was taken would include everything that could be proved under the declaration. *Commercial Bank* v. *Muirhead*, 12 U. C. R. 39.

——— *Covenant — Assignment—Consideration for Extension—Prejudice.*] — Declaration, that defendant assigned to the plaintiff a mortgage executed to defendant by one W., and by the deed of assignment covenanted that W. should pay the principal and interest when due, and that upon default made by W. defendant would pay the same; that W. made default, but defendant did not pay. Plea, on equitable grounds, that defendant covenanted as surety only for W.; that the plaintiff when he took the deed knew him to be so, and accepted him as such; and that the plaintiff afterwards, without defendant's knowledge or consent, and for good consideration, agreed with W. to give and did give him time for payment of the principal and interest secured by the mortgage beyond the time when it fell due:—Held, a good plea; that the declaration clearly shewed defendant to be only a surety; that the consideration was sufficiently stated; that the agreement might be by parol; and that it was not necessary to shew that defendant was prejudiced by the giving time. At the trial it was shewn that when the mortgage fell due the plaintiff told W., the mortgagor, that he would wait, on his paying twelve per cent. No time was settled, but W. signed two notes for £24 each, for one year's

interest, which he paid, and afterwards two others, on which the plaintiff had sued and obtained judgment. Nothing was said about defendant's liability when this arrangement was made, and defendant was not aware of it until long after. The court being left to draw the same inference as a jury:—Held, that the equitable plea was proved, and defendant discharged. *Darling* v. *McLean*, 20 U. C. R. 372.

——— *Covenant—Assignment—New Mortgage—Reservation of Rights.*] — A covenant by the assignor with the assignee in an assignment of mortgage that the mortgage moneys shall be duly paid, makes the assignor a surety for the mortgagor as to such payment. Darling v. McLean, 20 U. C. R. 372, followed. Gordon v. Martin, Fitz-G. 302, and Guild v. Conrad, [1894] 2 Q. B. 885, distinguished. On the maturity and non-payment of a mortgage, the grantee of the equity of redemption, who had covenanted with the mortgagor to pay the mortgage moneys, executed a new mortgage to the holder, through several mesne assignments, of the original mortgage, the new mortgage extending the time for payment of the principal and reducing the rate of interest, the mortgagee refusing to discharge the original mortgage, and orally reserving his rights against the assignor to him of that mortgage, who had covenanted that the mortgage moneys should be paid:—Held, that parol evidence of the reservation of rights against the surety was admissible. Held, also, that owing to the reservation of rights against the surety the extension of time given by the new mortgage did not interfere with the right of the surety to proceed against the original mortgagor. *Trusts Corporation of Ontario* v. *Hood*, 27 O. R. 135.

A covenant by the assignor of a mortgage with the assignee that the mortgage money shall be duly paid, makes the assignor a surety; but he is not discharged merely by the assignee taking a new mortgage for the same debt on the same land from a purchaser thereof from the mortgagor, with an extended time for payment, the assignee refusing at the same time to discharge the old mortgage; the new mortgage containing a redemise clause, but not being executed by the mortgagee. Judgment in 27 O. R. 135 affirmed. *Trusts Corporation of Ontario* v. *Hood*, 23 A. R. 589.

——— *Covenant—Notice of Suretyship.*]—Held, reversing the judgment in 19 O. R. 169, that, as there was no evidence whatever of the plaintiff's knowledge of the covenant under which the alleged suretyship arose, and as he had no reason to think that the relation of principal and surety existed, his dealing with the debtor did not work a release, assuming that the relationship did exist. Semble, that the defendant, as a volunteer, could not set up the rights of a surety under the covenant of the mortgagor, the grantor of the equity of redemption, against the plaintiff, the creditor of the mortgagor. Northwood v. Keating, 18 Gr. 643, referred to. *Blackley* v. *Kenney*, 18 A. R. 135.

——— *Postponement of Registered Judgment.*]—Where a creditor gives time to the principal by taking a mortgage from him and agreeing to postpone a registered judgment, without notice to the sureties, they will be discharged. *Todd* v. *City Bank*, 7 L. J. 123.

——— *Purchaser of Equity — Agreement with Mortgagee—Interest.*]—On the purchase of an estate subject to a mortgage the purchaser agreed to pay off the security, and subsequently agreed with the mortgagee for an extension of time for five years, agreeing in consideration thereof to pay an increased rate of interest, and covenanted that he would pay to the mortgagee the said interest quarterly, so long as the said forbearance should continue, and until the principal money was fully paid. On a bill filed to enforce payment of the incumbrance:—Held, that the purchaser was personally bound to pay only the interest on the debt; and that by the extension of time to the purchaser, who had become the party primarily bound to pay, the personal liability of the mortgagor therefor had been discharged. *Mathers* v. *Helliwell*, 10 Gr. 172.

Novation—*Increase in Rate of Interest—Reservation of Rights.*]—A new agreement between the debtor and creditor extending the time for payment of the debt and increasing the rate of interest, without the consent of the surety, is a material alteration of the original contract, and releases the surety. And a provision in such agreement reserving the rights of the creditor against the surety, though effectual as regards the extension of time, is idle as regards the stipulation for an increased rate of interest, and, notwithstanding such reservation, the surety is discharged. *Bristol and West of England Land Co.* v. *Taylor*, 24 O. R. 286.

An agreement between the mortgagee and the purchaser of the mortgaged premises for an extension of time for payment of the mortgage, in consideration of payment of interest at an increased rate, with a reservation of remedies against the mortgagor, does not operate as a release of the liability of the mortgagor upon his covenant. He is not a mere surety, and, if his right of redemption is not affected or the value of the mortgaged property impaired, he cannot complain. Bristol and West of England Land Co. v. Taylor, 24 O. R. 286, distinguished. *Trust and Loan Co.* v. *McKenzie*, 23 A. R. 167.

See ante 2.

——— *Stipulation against Indemnity—Reservation of Rights.*]—To a declaration on two promissory notes and a mortgage made by defendants they pleaded, on equitable grounds, that they made the notes, &c., as security only for one J. McD., and upon the terms of an agreement set out, which provided that upon J. McD. making certain payments in a given time, and giving the notes and mortgage, the plaintiff would release J. McD. from his indebtedness. It also contained a stipulation that the securities now sued on were to be regarded as so much additional value to J. McD.'s assets, and defendants were not to be indemnified or reimbursed in respect of them under penalty of relieving the plaintiff from carrying out the agreement. The plea then alleged that the notes and mortgage were made and accepted on the faith of this agreement, and that subsequently, without the privity or consent of defendants, the plaintiff and J. McD. entered into a new arrangement, set out in the plea, by which the indebtedness of J. McD. was fixed at a new and larger sum, which the plaintiff agreed to accept in full of all claims against him and his sureties; part of this sum was to be paid in money at a future day, additional securities were handed over and promised to the plaintiff, and other and prolonged times were fixed for the payment, and it was stipulated that on the secu-

rities being completed and said money paid according to this agreement, the plaintiff would hand over and release all other securities held by him. The defendants alleged that the last agreement was taken in satisfaction of the first, and that the defendants were thereby released from liability by such extension of time. The plaintiff replied that the defendants had been indemnified, contrary to the terms of the first agreement:—Held, on demurrer, that the plea was good; that the stipulation against the indemnity of defendants could not deprive them of their rights as sureties; that there was not in the second agreement any reservation of the plaintiff's rights under the first; and that without such a reservation distinctly expressed defendants were discharged. Held, also, replication bad, for that the stipulation relied on applied only as between the principal debtor and the plaintiff, and the breach of it could give no right of action against defendants. *Mulholland* v. *Broomfield*, 32 U. C. R. 369.

Principal Becoming Surety—*Assent of Creditor.*]—Semble, that where after a right of action accrues to a creditor against two or more persons he is informed that one of them is or has become a surety only, and after that he gives time to the principal debtor, without the consent and knowledge of the surety, he thereby discharges the surety, even though he may not have assented or been a party to the change of relationship between them. Swire v. Redman, 1 Q. B. D. 536, commented upon. In this case, however:—Held, upon the evidence, that the plaintiffs not only knew of but assented to the change of relationship. T., being in business, failed and made a composition with his creditors, giving his notes indorsed by W., and further secured by an assignment of certain mortgages made by T. to W. Afterwards W. got a transfer of all T.'s business and assumed all his liabilities. The plaintiffs were creditors of T., and received the notes for the composition. By a written document the plaintiffs authorized the discharge of one of the mortgages made by T. to W., and assigned to secure the notes, in consideration of W. giving another mortgage in lieu thereof; and they authorized also the discharge of another of the mortgages, so far as regarded part of the property in it, in order that W. by mortgaging it again might raise money to meet the last payment on the notes. When the last note fell due, which W. by his arrangement with T. should have paid as the principal debtor, the plaintiffs by agreement with W. drew upon him for the amount at five months. The learned Judge found that the plaintiffs knew of and assented to the arrangement between T. and W.; and that W. then assumed T.'s debts, and thus became the principal debtor. In an action by the plaintiffs against T. as maker of the last of the composition notes given to them:—Held, that the plaintiffs had discharged the defendant by the time given. And, semble, that the plaintiffs would also, by consenting to the release of the mortgages, as above mentioned, have discharged T. to the extent to which he was thereby prejudiced. *Bailey* v. *Griffith*, 40 U. C. R. 418.

Promissory Note—*Acceptance—Reservation of Rights.*]—The holder of a note, to which one of the defendants was a surety, accepted a new note from the principals without his knowledge or consent, on the understanding that he would not proceed on the original note, which he retained, unless the fresh note was not paid at maturity:—Held, that the surety was discharged, and that there was no reservation of the remedy against him. *Shepley* v. *Hurd*, 3 A. R. 549.

Surety Becoming Principal—*Taking Bond from Original Debtor—Co-sureties.*]—W. G. being indebted to H. & H.; C. G., B., and plaintiff (C.) in 1847 entered into a bond to secure the debt, which bond becoming due was forfeited. Plaintiff gave his bond to H., who held the claim of H. & H., to secure the debt: he in 1852, after payment of the first instalment, took from W. G. his bond to secure the same debt. Upon an action brought against B., one of the original co-sureties:—Held, on demurrer to the plea, that by the payment of the original debt the plaintiff had put himself in the position of principal debtor, and the taking the bond operated to the prejudice of his co-sureties, inasmuch as he could not, at any moment, be put in motion against the original debtor; and that therefore the co-sureties were released. *Cameron* v. *Boulton*, 9 C. P. 537.

Upon the trial of the last case:—Held, that the facts as proved did not substantiate the equitable plea, for the plaintiff had not satisfied the bond of 1847, so as to place himself in the position of H., and notwithstanding the taking the bond of 1852 from W. G., had not given time to the principal without the assent of the surety, and that he was therefore entitled to contribution from the defendant as co-surety. *S. C.*, 12 C. P. 570.

Void Settlement — *Voluntary Grantee.*]—Where a debtor makes a voluntary settlement under circumstances that render it void as against creditors, the grantee is not entitled, as being in effect a surety for the debt, to hold the property exonerated from the debt, in consequence of time being given to the debtor, or of any like transaction that would free a surety from his liability in ordinary cases of suretyship. *King* v. *Keating*, 12 Gr. 29.

See Agricultural Ins. Co. v. *Sargeant*, 26 S. C. R. 29, *post* IV.

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5. *Laches, Neglect, or Misconduct of Obligee.*

(a) *Contracts as to Officers, Servants, and Agents.*

Bank Cashier — *Neglect to Examine Books.*]—In an action against the sureties under a bond guaranteeing the honesty of one M. as cashier of the plaintiffs' bank, charging misappropriation of funds by M., the defendants set up, as a bar to recovery, neglect of the directors of the bank in not examining the books, so as to detect any malversation on M.'s part:—Held, that to sustain this defence the sureties must shew connivance between the plaintiffs and M., or a very strong case of negligence, which they had not done in the present case. The chief reliance of the surety, in such a case, ought to be in the honesty of the man whose honesty he has guaranteed. *Exchange Bank of Canada* v. *Springer*, *Exchange Bank of Canada* v. *Barnes*, 7 O. R. 309, 13 A. R. 390, 14 S. C. R. 716.

Clerk — *Default—Retention.*]—Where to an action on a bond against the sureties of a clerk for embezzlement, &c., the sureties pleaded that the plaintiff was damnified of his own wrong in allowing the clerk to remain in his office after he had become aware of the fraud:

—Held, that, though the fraud of the clerk was known to plaintiff long before he dismissed him, still, as this knowledge could only apply to the moneys taken after such knowledge had been acquired, the plaintiff should have had a verdict for something, and that the verdict for defendants should be set aside. *McDonald* v. *May*, 5 U. C. R. 68.

——— *Defalcations — Notice — Supervision.*]—A guarantee policy insuring the honesty of W., an employee, was granted upon the express conditions: (1) that the answers contained in the application contained a true statement of the manner in which the business was conducted and accounts kept, and that they would be so kept; and (2) that the employers should, immediately upon its becoming known to them, give notice of the guarantors that the employee had become guilty of any criminal offence entailing or likely to entail loss to the employers and for which a claim was liable to be made under the policy. There was a defalcation in W.'s accounts, and the evidence shewed that no proper supervision had been exercised over his books, and the guarantors were not notified until a week after the employers had full knowledge of the defalcation, and W. had left the country:—Held, that, as the employers had not exercised the stipulated supervision over W., and had not given immediate notice of the defalcation, they were not entitled to recover under the policy. *Harbour Commissioners of Montreal* v. *Guarantee Co. of North America*, 22 S. C R. 542.

Insurance Agent — *Collections—Refusal to Receive.*]—Declaration against a surety on a bond, conditioned that one L., the plaintiffs' agent, should, whenever requested, pay over to them all moneys received on their account, alleging various sums received and not paid. Plea, that L. paid over all sums received except $56.50, as to which and the causes of action in respect thereof, L. was ready and willing and offered to pay and account for the same in accordance with the bond and condition, and the plaintiffs, notwithstanding, refused to accept from him the said sum, and by their own acts prevented him from paying over the same in accordance with said bond and condition:—Held, on demurrer, a good plea. *Western Assurance Co.* v. *McLean*, 29 U. C. R. 57.

Municipal Collector—*Neglect to Deliver Roll to.*]—In an action on a bond given to T., the plaintiff, describing him as treasurer of the municipality of Fergus, for the performance by defendant P. of his duties as collector:—Held, that the neglect of the clerk to deliver to P. the roll before the 1st October, as directed by 16 Vict. c. 182, s. 39, formed no defence for the sureties. *Todd* v. *Perry*, 20 U. C. R. 649.

——— *Non-disclosure of Defaults.*]—In an action by a municipal corporation against the sureties to the bonds of a defaulting collector of taxes, for the due performance of his duties for 1886 and 1887, it appeared that there had been great laxity on the plaintiffs' part, but that, shortly before the collector absconded, in 1888, a majority of the members of the corporation had confidence in his honesty; while the defendants had not sought information from the plaintiffs as to the way he had performed his duties in former years:—Held, that the non-disclosure by the plaintiffs to the defendants of a motion having been made in council in 1885 that if the roll for 1884 was not returned by the next meeting, an inquiry before the county court Judge would be asked for; or of a resolution in August, 1885, instructing the treasurer to take proceedings against the collector and his sureties for the balance due on the 1884 roll unless fully settled before 10th September next, which it was; or of another like resolution in 1886, in reference to the taxes of 1885, which were afterwards, in 1888, paid over in full by him, and of the non-return by him of the 1885 roll until 1888—were not such non-disclosures as amounted to constructive fraud on the plaintiffs' part sufficient to relieve the defendants from liability on their bonds. Township of Adjala v. McElroy, 9 O. R. 580, specially considered. *Town of Meaford* v. *Lang*, 20 O. R. 42, 541.

Municipal Treasurer — *Demand — Appointment.*] — A treasurer having been duly appointed for three counties (while united), upon the separation of one from the other two counties:—Held, that a new appointment was not necessary under C. S. U. C. c. 54. An action being brought by a corporation against the sureties of their treasurer, defendants contended that because money which had been collected by the treasurer and fraudulently charged as paid by him was not demanded by the parties (the government) entitled thereto, they were not responsible therefor:—Held, that the liability of the treasurer was between the municipality and himself, he having received the money as their officer, and his responsibility was not altered by the government not demanding the money. *County of Essex* v. *Park*, 11 C. P. 473.

——— *Neglect of Auditors.*]—A surety to a municipal corporation for the due performance of the treasurer's duties is not relieved from his responsibility by the negligence of the auditors in passing the treasurer's accounts. *County of Frontenac* v. *Breden*, 17 Gr. 645.

——— *Permission to Mix Moneys.*]—Mere negligence by the obligee in looking after the principal, in calling him to account, or in requiring him to pay over money, is no defence against either antecedent or subsequent liability of the surety. A township council tacitly permitted the treasurer of the township to mix the township money with his own:—Held, that this conduct was wrong, but did not discharge the treasurer's sureties. *Township of East Zorra* v. *Douglas*, 17 Gr. 462.

——— *Retention after Knowledge of Default—Liability for Subsequent Defalcations—Annual Reappointment.*]—See *Township of Adjala* v. *McElroy*, 9 O. R. 580.

Postmaster — *Default—Notice.*] — The court stayed proceedings on a sci. fa., on a bond to the Queen, against a surety for the due performance of the duties of a post office by a deputy postmaster, as it appeared that when default was made he was in good circumstances, and the deputy postmaster-general had taken security from him for the amount of his default, the surety having had no notice of the default until three years after it had occurred, when the deputy postmaster had become insolvent. *The Queen* v. *Bonter*, 6 O. S. 551.

——— *Default—Notice—Neglect to Sue—Statute.*]—To a sci. fa. against P. on a bond

to the Crown, dated 5th June, 1865, in $2,000, conditioned that one W. should duly perform his duties as postmaster at C., and pay over to the postmaster-general all moneys. defendant pleaded that W. converted the moneys to his own use with the knowledge of the postmaster-general, but without defendant's knowledge; and that the postmaster-general did not inform defendant of W.'s default, but continued him in the office for three years, during which he frequently made default, and did not compel him to pay over each three months in pursuance of the statute, and was guilty of gross negligence in the matter, by reason whereof C. was in good conscience discharged. By C. S. U. C. c. 31, postmasters were required to give bonds for the faithful discharge of their duties required by law or which might be required by any instruction or general rule for the government of the department; the postmaster-general might appoint the periods at which they should render accounts, and if any postmaster should neglect or refuse, at the end of every such period the postmaster-general should cause a suit to be commenced against him; and a postmaster neglecting or refusing to account and pay over for a month after the time prescribed, was subject to a specified penalty. The Dominion Act of 1867, 31 Vict. c. 10, repeated these enactments, and the Audit Act of that year, c. 5, like C. S. U. C. c. 16, required all officers employed about the revenue to render accounts, and pay over at least once in three months. It appeared that W., on the 30th June, 1866, made default for two quarters, exceeding $900, which was notified to the inspector and afterwards settled. In December, 1866, he again made default for two quarters more, of which the inspector became aware in January, and there was a running balance against him until April, 1869, when it exceeded $2,500; after that he paid up current collections and reduced the old debt, and a new bond was taken in 1870. Up to that time he had been constantly pressed for payment by the department, but not sued. The sureties were not informed of his default, and on one occasion, when he owed over $2,000, the inspector told him he must inform the sureties, but was dissuaded by him from doing so. There was never, however, any arrangement to give time, but a constant pressure for immediate settlement; and the surety was not shewn to have made inquiries on the subject:—Held, that, apart from the statutory provisions above mentioned, there was no ground upon which the sureties, under 33 Hen. VIII. c. 39, s. 79, could claim to be relieved, and that these provisions imposed no obligation on the postmaster-general towards the surety. Held, also, that the plea was bad in law, as shewing no defence, and because the surety would at all events be liable for at least one quarter's default, which would entitle the Crown to judgment. Phillips v. Foxall, L. R. 7 Q. B. 666, and Burgess v. Eve, L. R. 13 Eq. 450, throw a new light on transactions of the kind referred to, and the decision might have been different if these cases had been before the court at the time of the argument. *The Queen* v. *Pringle*, 32 U. C. R. 308.

School Treasurer—*Terms of Guarantee—Failure to Comply with—Audit.*]—Action on a guarantee policy for loss sustained by the plaintiffs through the default of one D., their secretary-treasurer. The guarantee proposal contained certain statements which were made to form part of the contract, one of which was that D.'s books would be balanced and closed at the end of each year, and that the cash and securities at plaintiffs' credit at each balancing time would be examined and verified by the auditors as required by the statute:—Held, under R. S. O. 1877 c. 204, s. 87, s.-s. 7, and c. 205, s. 3, Paris not being an incorporated town withdrawn from the county, that the audit should have been made by the county auditors, and not, as here, by the town auditors; and also that the evidence, set out in the report, shewed that there was no audit in fact, and that therefore the terms of the guarantee had not been complied with. Another statement contained in the guarantee proposal was, that all moneys would be drawn out of the bank where they were deposited, only by the board of education. The course pursued was for the chairman and D., the secretary, to sign orders addressed to D., as such secretary, directing him to pay bearer so much money, and specifying the service for which it was payable. D. then drew his own cheques for the amounts without their being countersigned by any of the board, and without attaching the order thereto; consequently there was nothing to prevent D. drawing, as he did, moneys for his own purposes:—Held, that the terms of the guarantee in this respect also had not been complied with, and that the plaintiffs could not recover. *Paris Board of Education* v. *Citizens Insurance and Investment Co.*, 30 C. P. 132.

(b) *Other Cases.*

Bank Customer—*Collateral Securities—Prejudicial Dealing with by Bank.*]—K. & Co. were customers of the plaintiffs and gradually incurred a liability of about $26,000, to secure which the defendants gave a mortgage containing a recital that the plaintiffs had agreed to make further advances to K. & Co. on receiving security for the then present indebtedness, and a redemption clause providing for payment of all bills, notes, and paper upon which K. & Co. were then liable, together with all substitutions and alterations thereof, and all indebtedness in respect thereof, the same being a continuing security. The bank did business with K. & Co. in two different ways, one by discounting K. & Co.'s customers' notes, in which case their rule was to notify the customers that they held their notes, and another by discounting K. & Co.'s own notes and taking their customers' notes as collateral, in which case they always got the collateral notes to an amount exceeding the advance, but did not notify the customers. At the time the mortgage was given, all the notes held by the bank were believed to be genuine, and the discount of the customers' paper very largely exceeded the discount of K. & Co.'s notes. K. & Co. suspended two years later. At the time of the suspension it was discovered that by renewals and substitutions nearly all the notes at the date of the mortgage had been replaced by K. & Co., in renewals and substitutions by forgeries, and that the amount of the discounts of K. & Co.'s notes secured by the collaterals very largely exceeded the discounts of the customers' notes. In an action by the bank to foreclose the mortgage, the mortgagors claimed that they, as sureties, were discharged by the bank's action:—Held, that the bank parted with genuine and received fabricated securities, and through its laches or default necessarily worked prejudice upon the rights of the sureties; that of two innocent parties of whom one must suffer on account of the fraud or crime of a third, the one most to blame by

enabling the wrong to be committed should bear the loss, and the defendants were exonerated from liability in so far as they were prejudiced by the conduct of the bank. Primâ facie the bank were liable to the extent of the face value of the securities surrendered, but they were at liberty to reduce such amount by evidence as they might be advised. *Merchants Bank of Canada* v. *McKay*, 12 O. R. 498, 15 S. C. R. 672.

——— *Notice to Sureties—Solicitor—Dual Capacity.*]—Defendants were maker and indorser respectively of a note for the accommodation of D., who discounted it with the plaintiffs, they having knowledge of the facts. On the maturity of the note, plaintiffs handed it to D., who was their solicitor, for protest. D. did not protest or notify the defendants of its dishonour, but delivered it to them, adding that he had paid it. About three months after its maturity D. absconded in insolvent circumstances, and after that defendants were for the first time notified of the non-payment of the note. In an action against defendants on the note, they pleaded on equitable grounds the above facts, and that by the laches of the plaintiffs they were prevented from obtaining indemnity from D., and that if compelled to pay the note they would be defrauded out of the amount:—Held, a good defence, and that defendants were discharged. *Canadian Bank of Commerce* v. *Green*, 45 U. C. R. 81.

Execution Debtor—*Neglect to Seize.*]—The mere fact of a creditor abstaining from seizing under execution against the principal his interest as partner in the stock in trade, does not of itself furnish a ground for suspending execution against the surety; and the surety cannot claim that the creditor shall forbear against him until the exact value of such interest is ascertained. *Cunningham* v. *Buchanan*, 10 Gr. 523.

Mortgagor—*Neglect to sell.*]—Declaration on a bond by A. and B. conditioned for the payment by A. of £100 and interest. Plea, on equitable grounds, by B., that, on the execution of the bond, A. mortgaged certain lands to the plaintiff to secure the same money; that B. gave the bond as surety only; and it was agreed that the said mortgaged premises should be first sold before B. should be called upon; that said lands had not been sold, and until such sale, he, B., was in equity discharged from all liability in this action on the bond:—Held, on demurrer, plea bad, as affording ground at the most for a temporary injunction only, until the sale of the mortgaged premises. *Monsell* v. *Mitchell*, 23 U. C. R. 116.

It cannot be asserted as a proposition of law that wherever a creditor takes a mortgage from a principal debtor with power of sale, accompanied by the personal obligation of a surety, it becomes an imperative duty imposed upon the mortgage creditor, upon the request of the surety, at any time to sell the mortgaged property upon any default committed, at the peril, if he does not do so, of losing the benefit of the contract of suretyship in law; and held, that if defendant intended to rely upon an express agreement to this effect, the evidence set out in this case would not sustain such contention. *Bank of Montreal* v. *Davy*, 21 C. P. 179.

Purchaser of Land — *Non-payment Caused by Conduct of Obligee.*]—To an action on a bond whereby defendant became bound to pay to the plaintiffs $400, as soon as the patent for certain land should issue, and in case one W. G. should make default in the payment of the said sum, the defendant pleaded, on equitable grounds, that the only consideration for the bond, though not stated in it, was that W. G. being the purchaser of the said land, and having paid part of the purchase money, the receipt, through some mistake, was made as if the payment had been made jointly by W. G. and one J. G., the then husband of the female plaintiff, whose name became inserted in the Crown lands office in connection with the lot, creating a difficulty which for some time prevented W. G. obtaining the patent: that J. G. having subsequently died, and the female plaintiff having intermarried with the co-plaintiff, the plaintiffs agreed that if the defendant would execute the bond, neither they nor J. G.'s children would do anything to prevent, but would do all in their power to assist, the issue of the patent to W. G.; but that, nevertheless, the plaintiffs and the children opposed the issuing of the patent to W. G., both before the court of chancery and before the heir and devisee commission, whereby the defendant became discharged from his obligation:—Held, a good defence in equity, for it shewed that the plaintiffs' conduct was the cause of the defendant's non-performance, and that there was a total failure of consideration; and, although the alleged consideration was not stated in the bond, it was in no way inconsistent with or repugnant to it, and if so stated would have been a good defence at law. *Steen* v. *Swalwell*, 25 C. P. 356.

—Purchaser of Tolls—*Non-payment—Neglect of Obligee to Fulfil Contract.*] — Declaration against defendant as surety on a bond for the payment of the purchase money of certain tolls. Plea, that at the execution of the bond there was attached thereto a handbill shewing certain privileges to be received by the principal as set forth in the said plea, but which he did not receive by reason of omissions on the plaintiffs' part:—Held, bad, as not a defence sufficient to relieve defendant from the condition of his bond. *County of Middlesex* v. *Peters*, 9 C. P. 205.

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6. *Non-Disclosure or Misrepresentation of Material Facts.*

Concealment—*Intent.*]—A person about to become surety for another should be informed of all circumstances which may affect his suretyship, and if they are intentionally concealed by the party for whose benefit the security is given, the surety may have the bond delivered up to be cancelled. *Cashin* v. *Perth*, 7 Gr. 340.

Information—*Duty—Inquiry.*]—A creditor is not bound to send the surety information as to the position of his principal. If the principal's statements or credit are doubted, the surety should inquire into them, and the very fact that a guarantee is called for by the creditor should put the surety on the alert. *Cunningham* v. *Buchanan*, 10 Gr. 523.

——— *Fraudulent Withholding of.*] — A surety cannot get rid of his liability on the

ground of having become surety in ignorance of material facts, unless he can shew that information was fraudulently withheld from him. *Township of East Zorra* v. *Douglas*, 17 Gr. 462.

The court, being of opinion upon the evidence that most of the facts relied on as proving misconduct of the principal were known to the sureties, and that no information had been withheld from them fraudulently: —Held, that the bond given by the sureties was valid. *Peers* v. *Corporation of Oxford*, 17 Gr. 472.

Municipal Treasurer — *Audit—Representations.*]—The treasurer of a county for a number of years embezzled county funds and by manipulation of his books deceived the county auditors, who from year to year reported in good faith that his accounts were correct, and the council in good faith adopted the reports. At a time when in fact there was default to a large amount, the defendant, who was a ratepayer resident in the county and a relative of the treasurer, became at his request one of his sureties, and at the time was told in good faith by a member of the council and some of the county officials that the treasurer's accounts were correct:—Held, that the auditors' reports so adopted by the council were not implied representations by the council, the incorrectness of which discharged the defendant. Held, also, that the statements made by the member of the council and the county officials did not bind the council, and that, even if they did, having been made in good faith, they formed no defence. *County of Simcoe* v. *Burton*, 25 A. R. 478.

Reappointment of Agent Annually—*New Bond—Default in Previous Year.*]—W. was appointed agent of a company in 1891 to sell its goods on commission, and gave a bond with sureties for the faithful discharge of his duties. His appointment was renewed year after year, a new bond with the same sureties being given to the company on each renewal. His agreement with the company only authorized W. to sell for cash, but at the end of each season he was in arrear in his remittances, which he attributed to slow collections, and settled by giving an indorsed note, retiring the same before the bond for the next year was executed. After the season of 1894 the company discovered that W. had collected moneys of which he had made no return, and brought an action to recover the same from the sureties:—Held, reversing the decision in 22 A. R. 681, that each year there was an employment of W., distinct from, and independent of, those of previous years; that the position of the sureties on reappointment was the same as if other persons had signed the bond of the preceding year; and that the company were under no obligation, on taking a new bond, to inform the sureties that W. had not punctually performed his undertakings in respect of previous employment, nor did the non-disclosure imply a representation to the sureties when they signed a new bond that they had been punctually performed. *Niagara District Fruit Growers' Stock Co.* v. *Walker*, 26 S. C. R. 629.

Secretary of Company — *Default in Previous Employment.*]—To an action on a guarantee policy for the due performance of B.'s duties as plaintiffs' secretary, alleging default in paying over moneys, defendants pleaded that the plaintiffs, in order to induce defendants to enter into the contract, represented and warranted to defendants certain facts material to be known to them, as follows: that the said B. had never been in arrear or default in his accounts; yet the said B. had prior thereto been in arrear and default in his accounts while in the employment of one R. B.:—Held, plea good; for that the representation was not necessarily restricted to a default made while in plaintiffs' service, and what it really extended to might be shewn at the trial. *Ottawa Agricultural Ins. Co.* v. *Canada Guarantee Co.*, 30 C. P. 360.

Stipulation in Contract — *Mistatements.*]—By a contract in writing, made in 1890, the defendants agreed to guarantee the plaintiffs against pecuniary loss by reason of fraud or dishonesty on the part of an employee during one year from the date of the contract, or during any year thereafter in respect of which the defendants should consent to accept the premium which was the consideration for the contract. The defendants accepted the premium in respect of each of the three following years, and gave receipts intituled "renewal receipts," in which the premiums were referred to as "renewal premiums":—Held, that the contract was a contract of insurance made or renewed after the commencement of the Ontario Insurance Corporations Act, 1882, within the meaning of s. 33. Held, also, that, upon the true construction of s.-s. (2), the contract could not be avoided by reason of misstatements in the application therefor, because a stipulation on the face of the contract providing for the avoidance thereof for such misstatements was not, in stated terms, limited to cases in which such misstatements were material to the contract. *Village of London West* v. *London Guarantee and Accident Co.*, 26 O. R. 520.

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7. *Other Grounds.*

Agent's Bond—*Execution before Appointment — Repudiation.*]—The defendants executed a bond as sureties for one K., which recited his appointment as agent for the plaintiffs. The bond was sent, executed, to the head office of the plaintiffs, but no appointment was, in fact, made by them for a year and a half afterwards, when K. was notified of his appointment, but of this the defendants were not informed. About three months after the execution of the bond, the defendants, or one of them, wrote to plaintiffs' head office repudiating the suretyship, but received no reply:—Held, that, whether the plaintiffs were notified by one or both defendants, the latter were discharged. No appointment having been made in fact when the bond was executed, the defendants could not be held liable for defaults occurring months afterwards, for their contract was in respect of a present, not a future, engagement. *North British Mercantile Ins. Co.* v. *Kean*, 16 O. R. 117.

Change in Contract.]—The changing of a contract by an award, even though for the surety's benefit, without his consent, would release him from liability thereon. *Titus* v. *Durkee*, 12 C. P. 367.

Change in Principal's Circumstances —*Error.*]—The fact of the treasurer of a county having become reduced in his circumstances after the auditing and passing of his

accounts and before the discovery of an error in them, is no bar to a suit against the surety. *County of Frontenac* v. *Breden*, 17 Gr. 645.

Company—*Resolution—Effect of.*]—Where an action at law had been brought by a building society against W. as surety for the secretary of the society; and W. filed a bill to restrain the action, founding his equity on a resolution or minute alleged to have been passed or made by the board of directors in the following terms: "That Mr. W. had requested that his security for the secretary might be cancelled. It was suggested also, that Mr. R. W.'s name should be erased from the said bond by wish of the board, and both be relieved as securities. Mr. T. was requested to submit two other names as securities in place of the two gentlemen named:"—Held, that such a resolution afforded no ground for interfering with the action at law. *Whittemore* v. *Ridout*, 2 Gr. 525.

Discharge of Independent Co-surety —*Contribution.*]—The C. company and D. by separate independent contracts guaranteed to the plaintiffs the good conduct in office of B., their city chamberlain, who afterwards was guilty of misconduct within the guarantees. The guarantee of the C. company contained a proviso that as against every person then being or thereafter becoming security or surety for the said B. as aforesaid, the C. company should have and possess the right of ratable contribution, and all other the rights and remedies, both legal and equitable, of co-sureties. The scope of D.'s guarantee included and was more extensive than that of the guarantee of the C. company. The plaintiffs now sued the C. company on their guarantee, who, as a defence, set up that the plaintiffs had discharged D. from liability under his policy, and that this also discharged them:—Held, that, even if the plaintiffs had so discharged D., this operated only to release the C. Company to the extent to which they would have had a right of contribution from D., and that they would have been discharged to this extent as a matter of equity, independently of their contract. The C. company and D. could not be considered in any sense joint contractors or joint sureties. Ward v. National Bank of New Zealand, 8 App. Cas. 755, followed. *City of London* v. *Citizens Ins. Co.*, 13 O. R. 713.

Discharge of one Surety.] — Where separate actions are brought against two sureties, the discharge of one does not operate as a discharge of the other. *Burwell* v. *Edison*, M. T. 3 Vict.

Discharge of Principal—*Action.*]—A division court bailiff and his sureties having been joined in one action:—Held, that the recovery must be against all or none; and that the discharge of the principal for want of notice of action involved that of the sureties. *Pearson* v. *Ruttan*, 15 C. P. 79.

Mortgage — *Additional Security.*]—The plaintiff, who was an indorser on a note made by one McF. to a bank, shortly after the making thereof, made a mortgage to the bank, which was stated in terms to be an additional security for the payment of the note and any renewal or renewals thereof. Subsequently the bank discharged the principal debtor:—Held, that the position of the surety was not changed by the making of the mortgage. *Cumming* v. *Bank of Montreal*, 15 Gr. 686.

Mortgage by Co-surety.]—The plaintiff sued defendants, H., M., and S., as joint makers of a note. H. and M. did not appear, and judgment was signed by mistake against all, but afterwards set aside as against S., who pleaded a mortgage given for the same money by M., M. and S. being sureties for H.:—Held, that the giving such mortgage did not in itself discharge S., the other surety. *Kerr* v. *Hereford*, 17 U. C. R. 158.

Municipal Corporation — *Destruction of Bond—Relief of Surety—Discovery of Default.*]—One of the sureties for a county treasurer being desirous of being relieved, the treasurer offered another in his place; and the council thereupon passed a resolution approving of the new surety, and declaring that, on the completion of the necessary bonds, the withdrawing surety should be relieved. No further act took place by the council, but the treasurer and his new surety (omitting the second surety) joined in a bond conditioned for the due performance of the treasurer's duties for the future, and the treasurer executed a mortgage to the same effect. The clerk on receiving these gave up to the treasurer the old bond, which the treasurer destroyed. Eight years afterwards a false charge was discovered in the accounts of the treasurer, of a date prior to these transactions:—Held, that the sureties on the first bond were responsible for it. *County of Frontenac* v. *Breden*, 17 Gr. 645.

——— *Liability to Crown—Railway Bonus —Statutory Release.*] — Where a township municipality advanced a large sum of money to a railway company under the provisions of the consolidated Municipal Loan Fund Act, and some of the stockholders of the company were afterwards released from their liability by an Act of the legislature passed nearly eighteen months after the works on the road were stopped for want of funds, and new companies were formed under that and subsequent Acts of the legislature, which released the new corporations from the construction of the original line of road, until a new line had been constructed, and it appeared that there was no immediate prospect of such a result:—Held, that the municipality were not released from their liability to the Crown. *Norwich* v. *Attorney-General*, 2 E. & A. 541.

Payment after Judgment—*Assignee in Insolvency.*]—Semble, that one who brings an action against an official assignee in insolvency for default in dealing with a certain estate, upon his bond given as security against such defaults, is not bound to ascertain if the assignee is in default as to other estates; and the sureties to the bond are discharged by the payment to any one who recovers judgment against them. *Armstrong* v. *Forster*, 6 O. R. 129.

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8. *Reservation of Rights and Remedies.*

Agreement—*Abandonment before Breach — Seal.*] — Declaration upon defendants' bond, conditioned for the performance by one D. of his agreement under seal to construct a railway for plaintiffs, to be completed by the 15th February, 1871, or within such further time as might be allowed. Second breach,

failure to complete within the extension of time allowed. Equitable plea, that during the extension of time the plaintiffs, with D.'s consent, agreed in writing with one E. that E. should complete the contract between D. and the plaintiffs, with such changes as the plaintiffs and E. should agree upon; and thereupon D. abandoned the contract, before any breach thereof, and left the works, which E. took possession of. Replication, that by the agreement with E. it was expressly stipulated that all the plaintiffs' rights and remedies against D. and defendant as his surety, for the non-performance of D.'s contract, should be reserved:—Held, replication bad; for, the contract with D. being abandoned before breach, there could be no remedies upon it to reserve. Held, also, no objection, in equity, that the new agreement with E. was not under seal. *Port Whitby and Port Perry R. W. Co.* v. *Dumble*, 32 U. C. R. 36.

——— *Pleading.*]—A replication that when the time complained of was given it was expressly understood and agreed that the plaintiffs should reserve all their rights against the acceptor:—Held, good. *Bank of Upper Canada* v. *Jardine*, 9 C. P. 332.

Composition Deed—*Express Reservation.*]—The acceptance by a creditor of part of his demand against his debtor, and agreeing not to sue him, with a reservation of the creditor's rights against a surety of such debtor, will not discharge the surety. Where, therefore, the holders of a bill received from the acceptor a composition of the debt, and executed a deed to that effect, but expressly reserved their rights against the drawer:—Held, that the drawer was not discharged. *Wood* v. *Brett*, 9 Gr. 452.

Covenant not to Sue — *Assignment for Creditors.*]—A covenant not to sue entered into by a creditor with the principal debtor, without the surety's consent, but reserving all remedies by the creditor against others, does not discharge such surety. An assignment by the principal for the benefit of creditors generally, which contains a clause reserving all rights and remedies against third parties, but releasing the assignor from his liability, operates only as a covenant not to sue, and not as a release. *Hall* v. *Thompson*, 9 C. P. 257.

Discharge of Principal and Co-surety —*Intention to Reserve Rights — Parol Evidence.*]—A county treasurer having become a defaulter, actions were commenced against him and his two sureties respectively. Afterwards the warden, with the consent of the council, settled with the treasurer, and took his confession of judgment for £1,000 and a confession from one of his sureties for a like amount, together equal to the defalcation then ascertained, and released the actions; the second surety taking no part in this arrangement. Afterwards a further defalcation was discovered, and the council proceeded against the second surety and obtained judgment for £1,000. The court granted a perpetual injunction to restrain such action, although the warden and the attorney of the council swore that their rights as against the second surety were intended to have been reserved. *Baby* v. *Counties of Kent, Essex, and Lambton*, 5 Gr. 232.

Judgment — *Release of Principal.*]—The payee of a note indorsed for the accommodation of the maker, having obtained judgment against the maker and indorser, released the maker, reserving all his rights against the indorser:—Held, that he was entitled to do so, and might still enforce the judgment against the indorser. *Bell* v. *Manning*, 11 Gr. 142.

Mortgage — *Merger of Note—Parol Evidence of Reservation.*]—B., to the plaintiff's knowledge when he became the holder thereof, indorsed a promissory note for $1,400, dated 7th November, 1876, payable four months after date, as surety for H., the maker. On 3rd February, 1877, before the maturity of the note, the plaintiff, without B.'s knowledge, accepted a chattel mortgage for the amount secured by the note and for some additional items, with a proviso for redemption on 3rd February, 1878, with interest at ten per cent., and with the usual covenants for payment. The mortgage did not on its face refer to the note, but it was proved that it was the understanding between the plaintiff and H. that it was to be received as collateral security only, and not to affect the plaintiff's remedy on the note:—Held, that B., the surety, was not discharged; that the mortgage did not operate as a merger of the note, not being by the same parties and for the same debt as the note; and that the reservation of the remedy on the note, notwithstanding the giving of time by the mortgage, might be shewn by parol evidence, without appearing on the face of the mortgage. Quære, whether the taking of a specialty security from one of two joint debtors, on a simple contract, will operate as a merger; and whether Loomis v. Ballard, 7 U. C. R. 366, can be followed since Sharpe v. Gibbs, 16 C. B. N. S. 527, and Boaler v. Mayor, 19 C. B. N. S. 76. *Currie* v. *Hodgins*, 42 U. C. R. 601.

Parol Evidence of Agreement.] — Where a creditor gives his debtor an extension of time for payment, a formal agreement is not required to reserve his rights against a surety, but such reservation may be made out from what took place when the extension was given. Wyke v. Rogers, 1 DeG. M. & G. 408, followed. *Gorman* v. *Dixon*, 26 S. C. R. 87.

Release of one Surety — *Warranty.*]—Where a creditor has released one of several sureties, with a reservation of his recourse against the others, and a stipulation against warranty as to claims they might have against the surety so released by reason of the exercise of such resources reserved, the creditor has not thereby rendered himself liable in an action of warranty by the other sureties. *Macdonald* v. *Whitfield*, *Whitfield* v. *Merchants Bank of Canada*, 27 S. C. R. 94.

Release of Principal — *Independent Agreement Reserving Rights.*]—The plaintiff, who was indorser of a note made by one McF. to a bank, shortly after the making thereof, made a mortgage to the bank, which was stated in terms to be an additional security for the payment of the note and any renewal or renewals thereof. Subsequently the bank absolutely discharged the principal debtor:—Held, (1) that the position of the surety was not changed by the making of the mortgage; (2) that the surety was discharged, although it was shewn that, by agreement between the principal debtor and the bank, not incorporated in the release, the surety was to be still held liable. *Cumming* v. *Bank of Montreal*, 15 Gr. 686.

A creditor by mistake executed an absolute release to his debtor, but the agreement was that the creditor's right against a surety should be reserved:—Held, that the surety was not discharged, and that the creditor was entitled to a decree in equity to that effect. *Bank of Montreal* v. *McPaul*, 17 Gr. 234.

See Canada Permanent L. and S. Co. v. *Ball*, 30 O. R. 557; *Holliday* v. *Hogan*, 20 A. R. 298; *Holliday* v. *Jackson*, 22 S. C. R. 479; *Trusts Corporation of Ontario* v. *Hood*, 27 O. R. 135, 23 A. R. 589; *Bristol and West of England Land Co.* v. *Taylor*, 24 O. R. 286; *Trust and Loan Co.* v. *McKenzie*, 23 A. R. 167; *Mulholland* v. *Broomfield*, 32 U. C. R. 323; *Shepley* v. *Hurd*, 3 A. R. 549.

III. Liability of Surety.

1. *For Fidelity and Honesty of Persons.*

Assignee in Insolvency — *Change in Character—Continuance of Liability.*]—Held, that where an official assignee in insolvency had given a bond as such, with sureties, pursuant to the Insolvent Act of 1875, and amending Acts, and the creditors had duly appointed the same individual to be creditors' assignee, under s. 29 of that Act, but had not required him to give security as such creditors' assignee, the sureties under the bond given by him as official assignee remained liable for his dealings with the estate, and were not discharged by reason of such appointment as creditors' assignee. *Armstrong* v. *Forster*, 6 O. R. 129.

Bank Agent—*Covenant—Disobedience of Orders—Damages—Loss.*]—Plaintiffs sued on a covenant by defendant that one G. should perform an agreement, by which G. stipulated while in the plaintiffs' employ to obey their lawful commands, and to make good any loss they might suffer by his neglect, &c.; alleging as a breach that G. discounted certain worthless drafts drawn by one D. on one H., contrary to the lawful orders of the plaintiffs' inspector. Defendant pleaded, on equitable grounds, in substance, that D. and H. were already indebted to the plaintiffs with their sanction, and it was to lessen their liability that the drafts in question were discounted, to renew the then existing drafts, of which they paid part, so that no money was lent to them, and the plaintiffs lost nothing, but in fact gained, by the discounts in question:—Held, no defence, for the covenant was not one of indemnity, but that G. should keep his agreement; and nominal damages were recoverable for a breach, though unattended with any loss. *Royal Canadian Bank* v. *Goodman*, 29 U. C. R. 574.

Bank Cashier—*Guarantee Policy—Notice to Guarantors.*] — The policy sued on, guaranteeing to the extent of $20,000 the honesty and care of one W. while in the plaintiffs' employment as cashier, contained a condition that it should be void on the neglect of the plaintiffs to make known to the directors of the defendants in Canada any act or omission of W. discovered by them, giving a claim under it. In declaring on this policy, the plaintiffs alleged that while in their employment a sum exceeding $20,000 was intrusted to W., to be safely kept in the safe at their head office, of which $10,000 was lost owing to his negligence in regard to its custody; and they alleged as an excuse for not giving the notice, that the defendants had ceased to have or appoint directors in Canada. Defendants pleaded that before the alleged neglect of W., they had ceased to carry on business or have directors in Canada, and had appointed one R. to act for them, for the purpose of paying policies already granted and receiving all notices required, of which the plaintiffs had notice, but that they gave no notice to R., or to the directors of the company in any way:—Held, on demurrer, that the plea was bad, for the defendants had by their own act deprived themselves of the benefit of the condition, and rendered compliance with it impossible; and they could not insist upon notice to R. Held, also, that the averment of W.'s neglect in the declaration was not too general; and that the excuse for non-compliance with the condition was sufficiently stated. *Royal Canadian Bank* v. *European Assurance Society*, 29 U. C. R. 579.

Collecting Agent — *Appointment — Limited Time — Knowledge — Notice.*] — M. having been employed by the plaintiff as a sub-agent in the collection of money, &c., the defendants gave the plaintiff a bond to secure him against loss through M. The bond recited the appointment of M., and was conditioned that if M. should, from time to time, and at all times thereafter, account and pay to the plaintiff, &c., and at all times during such period as he should act as agent, &c., pay all sums received, &c., to the plaintiff, then the obligation to be void. M.'s appointment was made before the date of the bond, and was only till the 31st December, 1884, but the defendants were not aware when they executed the bond, nor at any time afterwards till the trial of this action, that M.'s appointment was for a limited time. M., by subsequent arrangement, continued to act as agent after the year 1884, and the only defalcations committed by him were in November and December, 1886:—Held, notwithstanding the want of knowledge on the part of the sureties, that the appointment recited in the bond must be taken to have referred to the appointment made before its date; and that the creditor and the principal could not, by an arrangement made after the liability of the sureties was created, be allowed to extend that liability beyond the period which originally formed its limit. The words found in the condition which would apply to the extended period, did not justify the position that the sureties must have contracted with a view to a subsequent extension. A letter was written by one of the sureties to the plaintiff on 17th December, 1886, in which he notified the plaintiff that from that date he withdrew from his suretyship:—Held, that this could not estop the surety from denying his liability; and, even if it was to be read as shewing that the surety assented to the continuation of the employment of M., it was immaterial. Kitson v. Julien, 4 E. & B. 854, and Sanderson v. Aston, L. R. 8 Ex. 73, followed. *Wickens* v. *McMeekin*, 15 O. R. 408.

Crown Officer—*Defalcations of Deputy.*] —A., having been appointed collector of customs, gave a bond to Her Majesty, conditioned to discharge his duty as collector, and account for and pay over all moneys which should come into his hands. He having received written instructions that certain duties were to be performed by him alone:—Held, that having permitted the deputy collector rightfully to assume and perform such duties, he

was responsible for defalcations of the deputy. *The Queen* v. *Stanton*, 2 C. P. 18.

——— *Default of Deputy — Other Remedies.*]—The defendant M. was appointed an inspector under the General Inspection Act, 1874, 37 Vict. c. 45 (D.) By s. 6 each inspector and deputy-inspector is required to give security by bond to the Crown for the due performance of the duties of his office, and such bond shall avail to the Crown and to all persons aggrieved by any breach of the conditions thereof. By s. 7 the inspectors are to appoint the deputy-inspectors, who are to be the deputies of the inspector for all the duties of his office, and their official acts shall be held to be his acts, and he is to be responsible therefor as if done by himself. A bond was given by the inspector, and the other defendants as sureties, for the faithful discharge of the duties of the said office, and for duly accounting for all moneys and property. A similar bond was given by the deputy-inspector. The deputy-inspector made a faulty inspection, and the plaintiffs purchased, relying thereon, and were damnified:—Held, under the statute and the bond given thereunder, that the defendant M.'s sureties were liable for the default of the deputy; and that the fact of the plaintiff having a remedy also on the deputy-inspector's bond was no answer to the claim against M.'s sureties. Held, also, that the plaintiffs were "persons aggrieved" within the meaning of the statute. Quære, whether the defendants were entitled to notice of action, but the question was not decided, as want of notice was not pleaded. Section 11 provided that disputes between the inspector and the deputy-inspectors and owners, &c., of articles inspected through or relating in any respect to the same, were to be settled by the board of trade, or where there was no such board, by certain specified persons: — Held, that the claim in this action was not a dispute within this section. *Verratt* v. *McAulay*, 5 O. R. 313.

Executors — *Defalcations after Death of Surety—Notice.*]—The executors of sureties are liable for the defalcation of the principal, committed after the death of their testator, and even after notice given by the executors that they would not be liable. *The Queen* v. *Leeming*, 7 U. C. R. 306.

Guardian of Infants — *Improper Payment to Solicitor of.*]—The testator by his will left money to his children, which was to be paid to them on their coming of age, and to be deposited by the executors in a savings bank in the meantime. One of the executors appropriated and set apart certain moneys of his testator to answer the trusts of the will, which moneys were afterwards paid by him to the solicitor of the guardian of the infants, who made default in payment over of the same, and the amount never reached the hands of the guardian:—Held, that the moneys by the act of setting apart had become, in the hands of the executor, impressed with the trusts of the will, and he could not properly pay the same to the guardian, nor could the guardian properly receive the amount; and, although the fund never reached the hands of the guardian so as to render her surety liable to make good the amount, yet under the circumstances the guardian was personally responsible for the money so paid to her solicitor, and a decree to that effect was pronounced with costs; though as against the surety the bill was dismissed with costs. *Galbraith* v. *Duncombe*, 28 Gr. 27.

Insurance Agent—*Moneys Received before Execution of Bond.*]—Upon a bond conditioned that J. should pay the plaintiffs monthly, while he should act as their agent, all moneys which he then had received, or which he should receive for premiums, &c., and should repay to the applicants all moneys which he had then received or should receive for insurances not accepted by plaintiffs, and should in all things well and faithfully conduct himself as their agent:—Held, that the sureties were liable only for moneys received after the execution of the bond. *Canada West Farmers' Mutual and Stock Ins. Co.* v. *Merritt*, 20 U. C. R. 444.

Municipal Treasurer—*Extent of Sureties' Liability.*] — Plaintiffs declared on a bond, conditioned that W., their treasurer, should pay over all moneys received since the 1st January, 1866, averring that on that day he had in his hands a large sum, and received further sums up to the 6th April, 1868, when he was dismissed; and that he accounted for all moneys received before that day, but not for a large sum received since. Plea, alleging payment of all moneys since that day; and issue thereon. The case being referred, the arbitrator found that W. admitted $5,031 to be due by him on the 1st January, 1866; that he had accounted for all moneys received since; and that of all moneys received up to his dismissal, including the $3,031, the balance was $1,806:—Held, that, as the breach was only in respect of moneys received since the 1st January, 1866, the plaintiffs upon this finding could recover nothing. *Township of Rawdon* v. *Ward*, 27 U. C. R. 609.

——— *Request—Payment.*] — The condition was, that a treasurer, his executors or administrators, at the expiration of his office, upon request to him or them made, should give a just account of all moneys received, and should pay and deliver over all balances due:—Held, that the words "upon request to him or them made" applied both to the giving an account and to the paying over. *County of Bruce* v. *Cromar*, 22 U. C. R. 321.

Postmaster—*Larceny of Cheques — Forgery—Loss.*]—The condition of a bond given by the defendants, as sureties for a postmaster, to the postmaster-general, was that the postmaster "do not and shall not commit any theft, larceny, robbery, or embezzlement of, or lose or destroy, or commit any malfeasance, misfeasance, or neglect of duty, from which may arise any theft, larceny, robbery, or embezzlement, loss or destruction of, any money, goods, chattels, valuables, or effects, or of any letter or parcel containing the same which may come into his custody or possession, as such postmaster," &c. The postmaster opened several letters which came into his possession as such postmaster, and having taken therefrom certain cheques, forged the payees' names as indorsers thereof, and got them cashed by a bank upon guaranteeing the genuineness of such indorsements. The drawers refused to recognize these cheques, but issued duplicates to the payees and paid them, so that the bank lost the money. In an action by the postmaster-general on the bond, on behalf of the bank,

to recover from defendants, as such sureties, the loss so incurred:—Held, referring to ss. 37 and 78 of the Post Office Act of 1875, that defendants were not liable, for that the forgery and the postmaster's guarantee, and not the larceny, were the proximate causes of the loss, and the contents of the letters did not belong to the bank. Remarks as to form of the condition. *Postmaster-General* v. *McColl*, 31 C. P. 364.

Registrar of Deeds—*Liability of Sureties.*] — See *County of Middlesex* v. *Smallman*, 19 O. R. 349, 20 O. R. 487.

School Treasurer — *Annual Reappointment.*] — A secretary-treasurer of a public school board was appointed for a year on giving the necessary security, which he did by bond with sureties, without any limit as to time or any reference to the period of his appointment. He was reappointed each year for several years in the same way and on the same condition, but without fresh security being taken, and subsequently became a defaulter in respect of moneys received by him during his last year's appointment:—Held, that the sureties were not liable for his defalcation. *Waterford School Trustees* v. *Clarkson*, 23 A. R. 213.

——— *Moneys Improperly Paid to — Mortgage by Surety—Mistake.*] — A municipal corporation passed a by-law for raising a loan to liquidate a debt to be incurred in enlarging the school house in a public school section, and providing for the issue of debentures for that purpose, and for levying a special rate to pay the interest thereon, and to create a sinking fund for payment of the principal; and the municipal authorities paid the moneys so raised by the said special rate to the secretary-treasurer of the school board of the said section. A., the secretary-treasurer of the school board, and B., as his surety, gave a bond of office, reciting that A. had been appointed such secretary-treasurer, and that "it was required that security should be given for the due and faithful performance of any and all the duties pertaining to such office," and conditioned to "correctly and safely keep any and all moneys and papers belonging to the said school board, and to faithfully and honestly deliver up, account for, and pay over any moneys which at any time thereafter might come into his hands and possession as such secretary-treasurer," and A. received and made default in respect of certain moneys improperly paid to him as such secretary-treasurer:—Held, that the condition must be read with reference to the recital, and its scope might be thereby restricted, and reading the two together B. was not liable for the moneys so received by A., which were outside the duties pertaining to his office, and should have been retained by the municipal corporation. B. having been informed by the school board that A. was in default, but not in respect of what moneys the default was made, as to which he made no inquiries, and having at the request of the school board given a mortgage to secure the liability which he was informed he had, by reason of such default, incurred as surety under the above bond, and having subsequently ascertained that the default was partly in respect of moneys improperly paid to A.:—Held, that B. was entitled to redeem on payment of the balance only of the moneys for which he was held liable as surety, the mortgage having been executed under a mistake. *Keith* v. *Fenelon Falls Union School Section*, 3 O. R. 194.

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2. *Other Cases.*

Indemnity—*Payment—Condition Precedent.*]—The defendants, husband and wife, executed in favour of the plaintiff, the husband's retiring partner, a bond conditioned to be void if the husband should save, defend, and keep harmless and fully indemnify the plaintiff from all loss, costs, charges, and damages and expenses which he might at any time sustain, or suffer, or be put to for or by reason of non-payment by the husband of the liabilities of the firm as the same became due, it being the intention and the plaintiff was thereby "indemnified or intended so to be from all and every liability of every nature and kind soever of the said firm." Judgments were recovered by creditors of the firm against them, and the plaintiff now sued the defendants to recover the amount to pay these judgments, although he had not himself paid them:—Held, that he was entitled to have the judgments and costs paid, and the amounts necessary were for that purpose ordered to be paid into court by the defendants. *Boyd* v. *Robinson*, 20 O. R. 404.

Under a bond conditioned to be void if the person on whose behalf it is given "shall indemnify and save harmless (the obligee) from payment of all liability of every nature and kind whatsoever," a right of action against the sureties arises in favour of the obligee as soon as judgment is recovered against him on a claim coming within the security. Payment of such claim by him is not a condition precedent. Boyd v. Robinson, 20 O. R. 404, approved. A bond without a penalty may be good as a covenant or agreement. *Mewburn* v. *Mackelcan*, 19 A. R. 729.

Payment of Money—*Condition—Breach—Demand—Executors and Administrators.*]—It is a condition precedent to the liability of the sureties in a bond conditioned for the delivery up by the principal on demand of all moneys received and not paid out by him, that a personal demand of payment should be made on him. And where the principal in a bond so conditioned dies before any demand for payment is personally made on him, a demand on his personal representatives is insufficient to charge the sureties. *Port Elgin Public School Board* v. *Eby*, 26 O. R. 73.

——— *Interest.*]—The bond contained a stipulation that in the event of any sum being found due by M. to the bank, interest should be payable thereon from the time an account of the balance due was delivered to the parties to the bond by the bank, and judgment was given in the court below in excess of the penalty:—Held, however, as the law would not allow a verdict against the obligors for a greater sum than the penalty, that interest could not be computed on that amount until after judgment. *Exchange Bank of Canada* v. *Springer*, *Exchange Bank of Canada* v. *Barnes*, 13 A. R. 390. *S. C.*, 7 O. R. 309, 14 S. C. R. 716.

Promissory Note — *Indorsement — Trust.*]—A promissory note, for value received, at three months, was made by one of the defendants to the order of the testator

and of the plaintiffs. Some years afterwards the maker conveyed his farm to his son, the other defendant, on an oral understanding, unknown to the payee, that the son was to pay the father's debts, including the note. After the conveyance, the payee having pressed the father for security, the son, without any indorsement of the note by the payee, wrote his name on the back of it, all parties supposing that he had thereby rendered himself liable as indorser. Subsequently he made a payment on account to the payee. In an action against father and son:—Held, that no liability attached to the son, either as indorser or guarantor, or as trustee of the property conveyed to him. *Robertson* v. *Lonsdale*, 21 O. R. 600.

——— *Qualified Indorsement.*]—D. indorsed two promissory notes, pour aval, at the same time marking them with the words "not negotiable and given as security." The notes were intended as security to the firm of A. & R. for advances to a third person on the publication of certain guide-books which were to be left in the hands of the firm as further security, the proceeds of sales to be applied towards reimbursement of the advances. It was also agreed that payment of the notes was not to be required while the books remained in the possession of the firm. The notes were protested for non-payment, and, A. having died, R., as surviving partner of the firm and vested with all rights in the notes, sued the maker and indorser jointly and severally for the full amount. At the time of the action some of the books were still in the possession of R., and it appeared that he had not rendered the indorser any statement of the financial situation between the principal debtor and the firm:—Held, that the action was not based upon the real contract between the parties, and that the plaintiff was not, under the circumstances, entitled to recover in an action upon the notes. *Robertson* v. *Davis*, 27 S. C. R. 571.

Rent — *Cesser of Term — Renewal of Lease.*]—Action on defendant's covenant as surety of a lessee, under a lease of a mill for nine years from 15th December, 1868, at a yearly rent, payable half-yearly in advance on the 15th June and December in each year, alleging non-payment of three half-yearly instalments of the rent reserved. Plea, on equitable grounds, that defendant covenanted as surety only: that by the lease it was agreed that in case of the total destruction of the mill by accidental fire, &c., the lease should at once cease and be at an end: that the lessee paid all rent due up to the total destruction of the premises by fire, including the half-year's rent due on the 15th June, 1869; and that the premises were so destroyed on the 30th October, 1869, whereupon the term ceased, and was at an end. To this the plaintiff replied, that after such fire, the lessee, with the knowledge and approval of defendant, continued to hold and occupy, and still holds and occupies, the premises under and by virtue of the lease, and, with the like knowledge and approval of the defendant, would not and did not put an end to the said term, or surrender said premises:—Held, plea good, for defendant's covenant, being restricted to the term, ceased with it; and that the replication was bad, as shewing at most the creation of a new tenancy, to which the covenant would not extend. *Taylor* v. *Hortop*, 22 C. P. 542.

Return of Goods—*Request—Excuse.*]—In an action against a surety who stipulates for the return of certain goods on request, such request is not excused by alleging that when the plaintiff required the goods the principal was out of the Province. *O'Neill* v. *Carter*, 9 U. C. R. 254.

Securities — *Assignment of — Right of Judgment Creditor to Call for.*]—A judgment creditor coming in to redeem a mortgage incumbrancer is entitled, upon payment of the amount due to the mortgagee, to an assignment not only of the mortgaged premises, but of all collateral securities, whether the same be subject to the lien of the creditor under the judgment or not. Therefore, where judgment had been recovered and duly registered against a party who had a contingent interest in real and personal property, subject to a mortgage by way of security for advances, and the debtor had insured his life, and assigned the policy to the same person as an indemnity against loss in respect of a bond executed by him as surety for the debtor:—Held, that the judgment creditors of the mortgagor, upon paying the amount due under the mortgage and indemnifying the mortgagee in respect of his liability as surety, were entitled to a transfer of the policy of insurance, and also of the mortgage upon the contingent interest, and to foreclose the mortgage. *Gilmour* v. *Cameron*, 6 Gr. 290.

——— *Assignment of—Right of Incumbrancers to Call for.*]—W. sold land to M., giving a bond for a deed. M. assigned to plaintiffs his interest in this bond, as also certain chattels, in security, but retained possession of the instruments. Subsequently M. assigned absolutely the bond to C., to whom (with notice of the prior security) W. conveyed the premises, taking back a mortgage for unpaid purchase money, upon which W. filed a bill for foreclosure against C., making the plaintiffs and their co-partners in the business defendants as incumbrancers by reason of a registered judgment, but they omitted to set up any interest in the premises by reason of the security given to them by M., in which suit the bill was taken pro confesso, and a final order for foreclosure was obtained against all the other defendants. On a bill against W. seeking to redeem or that he should pay off the claim of the plaintiffs under the security from M.:—Held, that M. was a necessary party to the suit; and also, that W. had a right to pay them off their claims against M., and to call for an assignment of the other securities held by them for such claim, the amount of which M. was bound to pay to the plaintiffs or W., in case of his paying. *McQuesten* v. *Winter*, 10 Gr. 464.

IV. PAYMENTS, APPROPRIATION OF.

Absence of Appropriation by Principal.]—A surety has no right to complain of the appropriation of payments by the creditor, when the principal makes no appropriation of them, but leaves it to the creditor. *Cunningham* v. *Buchannan*, 10 Gr. 523.

Collateral Securities — *Payments on—Bank—Interest—Overcharges.*]—The plaintiffs were sureties to a bank for a debt due by a company, for which the bank held

other notes as collaterals. Under a special agreement made in a prior suit, the receiver in such suit deposited the proceeds of such collaterals in such bank subject to the order of the court. The plaintiffs claimed to apply the proceeds so deposited to reduce the debt of the company, but the bank refused to apply them without an order of court:—Held, that the bank was constituted a stake-holder of such moneys, and could not so apply them unless with the sanction of the court. The debt to the bank carried nine per cent., and in taking the accounts the plaintiffs claimed a refund of the interest beyond the lawful rate of seven per cent., on the ground that the agreement to pay nine per cent. was ultra vires:—Held, (1) that, as there was nothing in the pleadings or judgment impeaching the agreement, the master had no jurisdiction to adjudicate upon such claims; (2) that overcharges beyond the lawful rate interest if paid cannot be recovered back or applied in reduction of the debt claimed to be due. *Hutton* v. *Federal Bank*, 9 P. R. 568.

Continuing Security—*Imputation—Reference.*]—J. H. S., a local agent for an insurance company, collected premiums on policies secured through his agency, remitting moneys thus received to a branch office from time to time. On the 1st January, 1890, he was behind in his remittances to the amount of $1,250, and afterwards became further in arrears until, on the 15th October, 1890, one W. S. joined him in a note for the $1,250, for immediate discount by the company, and executed a mortgage on his lands as collateral to the note and renewals that might be given, in which it was declared that payment of the note or renewals or any part thereof was to be considered as a payment upon the mortgage. The company charged J. H. S. with the balance then in arrears, which included the sum secured by the note and mortgage, and continued the account as before in their ledger, charging J. H. S. with premiums, &c., and the notes which they retired from time to time as they became due, and crediting moneys received from J. H. S. in the ordinary course of their business, the note and its various renewals being also credited in this general account for cash. W. S. died on 5th December, 1891, and afterwards the company accepted notes signed by J. H. S. alone for the full amount of his indebtedness, which had increased in the meantime, making debit and credit entries as previously in the same account. On the 31st July, 1893, J. H. S. owed on this account a balance of $1,926, which included $1,008 accrued since 1st January, 1890, and after he had been credited with general payments there remained due at the time of trial $1,009. The note which W. S. signed on 5th October, 1890, was payable four months after date with interest at 7 per cent., and the mortgage was expressed to be payable in four equal instalments of $312.50 each, with interest on unpaid principal:—Held, that the giving of the accommodation notes without reference to the amount secured had not the effect of releasing the surety as being an extension of time granted without his consent and to his prejudice; that the renewal of notes secured by the collateral mortgage was prima facie an admission that, at the respective dates of renewal, at least the amounts mentioned therein were still due upon the security of the mortgage; that, in the absence of evidence of such intention, it could not be assumed that the deferred payments in the mortgage were to be expedited so as to be eo instanti extinguished by entries of credit in the general account, which included the debt secured by the mortgage; and that, there being some evidence that the moneys credited in the general account represented premiums of insurance which did not belong to the debtor, but were merely collected by him and remitted for policies issued through his agency, the rule in Clayton's case as to the appropriation of the earlier items of credit towards the extinguishment of the earlier items of debit in the general account would not apply, and there should have been a reference to take the account. *Agricultural Ins. Co.* v. *Sargeant*, 26 S. C. R. 29.

Defalcations of Agent—*Application of Moneys of Estate — Interest.*] — Soon after B.'s defalcations were discovered he died, and after his death his executrix handed over certain of his property to a trustee, who was also an officer of the plaintiffs, to realize and apply the money therefrom towards satisfying the plaintiffs' claim in respect of B.'s defalcations, but without indicating to what part of such defalcations it should be applied. The trustee applied it towards satisfaction of the earlier of B.'s liabilities, in respect to which the defendants (sureties for B.) were not liable, since by a condition of their policy they were not liable except for losses occurring within a year before notice of claim made to them:—Held, that the case was similar to payment made by a debtor to a creditor without express appropriation, in which case the creditor could appropriate it, and the defendants had no right to complain of the appropriation made in this case. Held, also, that the defendants should pay interest on the amount due from them, from three months after the proofs of loss were delivered. *City of London* v. *Citizens' Ins. Co.*, 13 O. R. 713.

Dividend on Debt—*Judgment—Declaration of Right.*]—The plaintiff indorsed a note in the defendants' favour as security for part of a larger debt due to them for work done on their debtor's property. The note was discounted by the defendants and was dishonoured, and the holders obtained a judgment against the plaintiff, which remained unpaid. Subsequently the defendants received in mechanics' lien proceedings a dividend of eighty-one cents on the dollar on their whole debt, including the portion secured by the note:—Held, that they were not bound to apply the dividend first in satisfaction of the secured portion of their debt, nor entitled to apply it first in satisfaction of the unsecured portion, but were bound to apply it pro ratâ on each part of the debt. Held, also, that the plaintiff was entitled to a declaration of right in this respect, although he had paid nothing on the judgment. *Hood* v. *Coleman Planing Mill and Lumber Co.*, 27 A. R. 203.

Items of Account—*Concealed Item.*]—The rule that general payments are appropriated first to the earliest items on the other side of an account, does not entitle a surety to claim that a concealed item, which, from its not being known, the debtor had not been charged with, should be deemed to have been satisfied by the moneys which had from time to time been paid by the debtor, and which had when so paid been charged by both parties against the other sums received by the

debtor on behalf of the creditor. *County of Frontenac* v. *Breden*, 17 Gr. 645.

Mortgage by Principal—*Exoneration of Surety.*]—Defendant gave his bond in £1,000 as security for plaintiffs' agent. The agent misapplied a larger sum than this, but gave a mortgage to plaintiffs of lands, which were sold under an order in chancery, and the proceeds applied towards payment of the sum due, leaving a balance larger than the amount of defendant's bond:—Held, that the plaintiffs were entitled to apply the proceeds of the sale of the mortgaged lands in reduction of the general balance, and not in exoneration of defendant's bond. *Commercial Bank* v. *Muirhead*, 4 C. P. 434.

Municipal Treasurer—*New Sureties—Subsequent Payments.*]—A township treasurer had in his hands a large balance belonging to the township when he gave to the corporation new sureties:—Held, that subsequent payments by the treasurer were applicable first to the discharge of that balance. *Township of East Zorra* v. *Douglas*, 17 Gr. 462.

Partners—*Separate Securities for Partnership Debt.*]—One partner of a firm gave as security for half of the partnership indebtedness a mortgage on his separate real estate; the other partner gave an indorsed note for the remaining portion of the debt. Subsequently payments were made to the creditor on account of the joint debt, which he credited on the note, claiming to hold the mortgage for the entire balance:—Held, that an assignee of the mortgagor was entitled to have one-half of all sums which had been paid out of the partnership assets on account of the debt credited on the mortgage security. *Moore* v. *Riddell*, 11 Gr. 69.

See Royal Canadian Bank v. *Payne*, 19 Gr. 180.

V. Proceedings and Actions against Surety.

1. *Evidence.*

Bond—*Identity of.*]—To an action on a bond the plea was the discharge of defendant as surety by time given to the principal:—Held, that defendant must prove the bond, to identify it with the arrangement mentioned in the pleas. *Kerr* v. *Boulton*, 25 U. C. R. 282.

Books of Principal.]—Held, that the books of the agent or clerk of a public company during his lifetime are not good evidence against his surety, sued on his bond for a deficiency in the agent's accounts. *Ferrie* v. *Jones*, 8 U. C. R. 392.

In an action against a clerk of the division court, for moneys received for bailiff's fees, entries made by such clerk in the course of his business in books kept under the provision of an Act for that purpose:—Held, evidence against the sureties. *Middlefield* v. *Gould*, 10 C. P. 9.

See, also, *Murray* v. *Gibson*, 28 Gr. 12, *post* VI. 1 (a).

Conflicting Evidence—*Confession of Judgment.*]—A confession was given to secure a second set of sureties of a county treasurer, but on an arbitration it was found that defalcations had occurred under a former bond, a surety in which was also in the second. The evidence was conflicting as to whether the protection was for one set or for all. On a motion to retain moneys in the sheriff's hands, which had been made on the confession, it was ordered that the whole amount be paid into court, and that the subsequent judgment creditors should wait. *Leonard* v. *Black*, 4 L. J. 260.

Judgment against Principal—*Proof of against Surety—Third Party.*]—The plaintiff, having an unsatisfied judgment against the administratrix of an estate, procured an assignment of the administration bond and brought an action thereon against the sureties, when a person who had indemnified the sureties was made a third party under an order whereby the question of the indemnity was to be tried after the trial of the action, as the Judge might direct, with liberty to appear by counsel and defend the action and to call and cross-examine witnesses, and it was also ordered that he should not thereafter be at liberty to dispute the defendants' liability, if any, to the plaintiff. At the trial the judgment was put in and one of the defendants called as a witness, who stated that the amount of the judgment was correct. It was objected on behalf of the third party that the liability had not been properly proven as against him, and there should be a reference to ascertain and determine the defendants' liability, which was refused and judgment entered for the plaintiff:—Held, that the judgment so recovered was not sufficient to bind the third party; and a new trial was directed. *Zimmerman* v. *Kemp*, 30 O. R. 405.

Parol Evidence—*Agreement to give Security.*]—The plaintiff sued on a guarantee, alleging, by way of inducement, that it was proposed to him by the defendant N., that if he would allow a certain assignment made to him of a leasehold property to be put on record, he, N., would give him security on other real property for the payment of certain moneys, to which the plaintiff agreed; and the plaintiff averred that, in consideration that he would allow the said assignment to be put on record, the defendants promised that the arrangement made with N. for the payment of the said balance should be duly carried out, otherwise defendants would pay the plaintiff £135, that being the sum to be secured. The breach was, that defendants would not carry out the said arrangement, nor secure to the plaintiff the £135. Defendant N. pleaded non assumpsit. The guarantee, when produced, shewed that defendants had not agreed absolutely to secure the plaintiff, as alleged, but to pay the £135 if N. did not do so:—Held, that oral evidence of an agreement to the effect declared upon was inadmissible, and that it would at all events have been useless, for an agreement, either by the other defendant, I., to become responsible for N.'s default, or by both to give security on real property, must be in writing. *Irvine* v. *Nicholson*, 20 U. C. R. 464.

Proof of Notice to Principal.]—Where the principal, by repeating the contents of a notice required, shews clearly that he must have received it, this is sufficient proof of notice to bind the surety. Before

defendants became sureties for A., notice had been given to him to send the lumber required, specifying the quantity and quality thereof. After the guarantee, he was also distinctly notified to send in the lumber previously specified:—Held, sufficient to bind the sureties, without specifying the particular kind of lumber in the second notice. *Morton v. Benjamin*, 8 U. C. R. 594.

Proof of Payment—*Money Misspent.*]—In an action by A., a county treasurer, upon a bond to him for the due performance of his duty by C., his deputy, while A. continued in office, alleging moneys received and not accounted for:—Held, that the plaintiff need not prove that he had himself paid the money which his deputy had misspent. *Baby v. Baby*, 8 U. C. R. 76.

Resolution of Company — *Relieving Sureties.*]—Where an action at law had been brought by a building society against W., as surety for the secretary; and W. filed a bill to restrain the action, founding his equity on a resolution or minute of the board of directors as follows:—"That W. had requested that his security for the secretary might be cancelled. It was suggested, also, that R. W.'s name should be erased from the said bond by wish of the board, and both be relieved as securities. T. was requested to submit two other names as securities in place of the two gentlemen named:"—Held, that such a resolution afforded no ground for interference. *Whittemore v. Ridout*, 2 Gr. 525.

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2. *Pleadings.*

(a) *Before the Judicature Act.*

Bill of Complaint—*Allegation of Insolvency—Parties.*]—In a suit against one of two sureties of an assignee in insolvency and the administrator ad litem of the assignee, the bill alleged that P. (the other surety) was "without means or other estate of any kind that the plaintiff can discover, and is in fact, as the plaintiff believes, insolvent," as a reason for not making P. a party defendant:—Held, that these allegations were not sufficiently distinct to dispense with the necessity of joining him as a defendant. Sureties were jointly and separately bound; but a general account being necessary, G. O. 62, allowing proceedings to be taken against one of two or more persons jointly and severally liable, was held not to apply to such a case; and the allegation as to the insolvency of one of them was not sufficient to dispense with him as a party. That order is only available where the suit is for a liquidated sum or for a single breach of trust. Quære, whether in such a case the administrator ad litem sufficiently represents the estate of the principal debtor. *Garrow v. McDonald*, 20 Gr. 122.

——— *Covenant for Honesty of Agent—Non-compliance with Conditions.*]—The second count of a declaration, after referring to a deed set out in the first count, by which defendants covenanted to reimburse to the plaintiffs any loss, not exceeding $600, which the plaintiffs should sustain by any act of fraud or dishonesty on the part of one H. who had been appointed the plaintiffs' agent—such reimbursement to be made within three months after proof should be given to the satisfaction of defendants' directors of such loss—alleged that H. received, and appropriated to his own use, certain moneys of the plaintiffs; that the plaintiffs gave proof of their loss to defendants, and defendants thereupon repudiated all liability, and alleged as a reason that the plaintiffs had forfeited all right under said deed by non-compliance with certain conditions not relating to such proof, and did not require any further proof of said loss, and thereby waived all further proof thereof by the plaintiffs, &c.:—Held, that compliance with the deed in giving proof of the loss was sufficiently averred to call upon defendants to plead. *Manufacturers and Merchants' Mutual Fire Ins. Co. v. Canada Guarantee Co.*, 43 U. C. R. 247.

——— *Guarantee—Agreement.*]—One D. having recovered a judgment against M. & Co., certain notes payable to the firm were deposited with B., and underneath a list of them was the following guarantee: "We hereby, in consideration of £50 by us received from D. this day, guarantee the payment of the above notes by the respective makers at the respective maturities thereof." This was signed by M. & Co., and underneath was an agreement that, on payment of the judgment within ten days, the notes should be returned to M. In an action against M. & Co., on this guarantee, averring non-payment of one of the notes:—Held, that it was sufficient to declare on the guarantee only, without mentioning the agreement at the foot of it. *Day v. McLeod*, 18 U. C. R. 256.

——— *Guarantee—Agreement—Variance—Demurrer.*]—K. having agreed with the plaintiffs for the purchase of some lumber, defendants consented to guarantee his punctual payment for the same; but inadvertently K.'s agreement was recited in the agreement signed by the sureties as bearing date the 22nd December, 1851, instead of the 8th January, 1852. The plaintiffs, in declaring against the sureties, stated the first agreement as bearing date the 8th January, 1852. Defendants set out both agreements on oyer, and demurred, assigning for cause that the original agreement was not set forth in the declaration, or referred to with sufficient certainty:—Held, that the cause of demurrer assigned was not suited to the objection intended to be urged, as to the discrepancy of dates; and that defendants should not have demurred, but should have pleaded "non est factum," and relied at the trial upon the variance between their actual agreement and that declared on. Semble, that on such an issue, if it were shewn there was but one agreement between the parties relating to the matter, the error in the recital of it would not be fatal, and the plaintiffs might recover. *Wadsworth v. Townley*, 10 U. C. R. 579.

——— *Guarantee—Variance.*]—Where the plaintiff charged defendant as upon a guarantee to pay a certain judgment, which he set out in specific terms, and afterwards proved at the trial a guarantee extending to all claims:—Held, nonsuit right. Semble, however, that if the plaintiff had set out the guarantee as it was, and averred the claim under the judgment, he would have sustained his action. *Sutherland v. McCaskill*, 5 U. C. R. 316.

The plaintiff charged defendant on a guarantee for certain rent; to wit, £2 per month.

The evidence shewed an agreement to pay only £1:—Held, a fatal variance, notwithstanding that the amount was laid under a videlicet. *O'Neil* v. *Carter*, 9 U. C. R. 470.

The plaintiffs declared as upon a guarantee to pay for goods furnished to D. between the 26th October, 1848, and 1st April, 1852. The evidence shewed one guarantee to the 1st April, 1850, and attached to it an agreement that the same should continue until the 1st April, 1852:—Held, no variance. *Ross* v. *Cameron*, 4 C. P. 196.

Plea — *Guarantee — Satisfaction—Immaterial Issue.*]—Where A., in consideration of B.'s advancing money to C., guaranteed that B.'s acceptance of C.'s drafts should be covered by consignments of flour, together with commission; and in an action against A. for non-fulfilment, he pleaded that before the maturity of the drafts, which amounted in all to £1,500, the plaintiffs did receive from B., to cover the same, sundry large quantities of flour, amounting in the whole to 990 barrels, and did sell the same for a large sum, namely, £1,657 5s. 9d., and much more than sufficient to cover the said drafts so accepted, &c., and the said commission:—Held, plea bad, in not averring directly that the plaintiff B.'s advances were covered, together with commission; and also, in tendering an immaterial issue, in pleading that flour was received much more than sufficient to cover, &c. *Le Mesurier* v. *Sherwood*, 7 U. C. R. 530.

Pleas — *Guarantee—Promissory Notes—Request—Payment.*]—Declaration on a guarantee, by which, in consideration of the plaintiffs accepting three notes of G. for $751 each, in satisfaction of their claim against G. & Co., defendant did, "to the extent of $751, guarantee the payment of the first two of the said notes according to their tenor and effect." Pleas, (1) that the notes were payable to plaintiffs' order, and the plaintiffs indorsed the first note to certain persons who held it at maturity, and to whom, in the event of G. not paying it, the plaintiffs were liable as indorsers; that G. notified defendant of his inability to pay it in full, and defendant paid thereon $276, of which plaintiffs had notice, and afterwards G. failed to pay the second note, whereupon defendant paid the plaintiffs $476, being the balance of the sum of $751 guaranteed by defendant. (2) That the first two notes, to the amount of $1,276, were paid to plaintiffs as they became due, whereby defendant's guarantee was satisfied:—Held, on demurrer, pleas bad, for, as to the first, defendant was not liable to the plaintiffs' indorsees, and no express or implied request by the plaintiffs to pay was shewn; and as to the second, the guarantee was not satisfied by the payment by G. of $751. *Crathern* v. *Bell*, 45 U. C. R. 473.

Replication — *Annual Appointment of Principal.*]—Debt on bond given by C. and R., conditioned for the due performance by one D. of the office of secretary and treasurer of the Brantford Building Society. Plea, that the office is an annual one; that D. was appointed and defendants became sureties for one year, and no longer; and that during such term D. faithfully performed the duties. Replication, that defendants did not become sureties for the period in the plea mentioned, or for any other specified time:—Held, replication good. *Wilkes* v. *Clement*, 9 U. C. R. 339.

——— *Bond—Assignment of Breaches of Duty.*]—Sci. fa. on a bond to the Queen for performance of duty by a pork inspector. The assignment of breaches in the replication shewed an agreement to refer pork to the inspector for his inspection, and then alleged that he wrongfully branded pork of inferior quality with the words "prime mess pork," &c., contrary to the statute and to his duty. Demurrer, for not alleging that the acts complained of were breaches of his duty or were done by him knowingly, wilfully, or designedly, or that he did not in respect of such matters use the best of his skill, judgment, and ability:—Held, that the breaches were sufficiently assigned. *The Queen* v. *Mowat*, 3 C. P. 228.

——— *Limiting Claim—Continuing Guarantee.*]—The plaintiffs sued defendant on the following guarantee:—"I hereby hold myself accountable to you for any goods Mr. Francis Murphy may purchase of you, to the amount of £250 currency." It was proved that the plaintiffs had sold goods to M. on the 19th November, 1845, amounting to £311, and that after the original credit of six months on the £311 (understood between the parties at the time of sale, as the jury found), had expired, the plaintiffs had extended the time by taking notes without defendant's privity. It was also proved that on the 2nd April, 1846, other goods were sold to M. to the amount of £83, for which M. at the time gave his bill at three months. Defendant pleaded a defence which covered only the first sale of £311, to which the plaintiffs, by their replication simply denying the truth of his defence, admitted his claim to be limited:—Held, that, though the sum of £83 might have been recovered under the continuing guarantee, yet without a new assignment the plaintiff could not recover in this action. *Ross* v. *Burton*, 4 U. C. R. 357.

See Parker v. *Dutcher*, 2 O. S. 106; *Evans* v. *Robinson*, 16 U. C. R. 169; *Kerr* v. *Cameron*, 19 U. C. R. 366; *Royal Canadian Bank* v. *European Assurance Society*, 29 U. C. R. 579.

(b) *Since the Judicature Act.*

Counterclaim—*Action on Bond — Right of Surety to Indemnity.*]—An action against the defendant on his bond as surety for H. and McT. for the amount due the plaintiffs by H. and McT. on their banking account with the plaintiffs. Counterclaim by the defendant against the plaintiffs and H. and McT., alleging that the defendant is liable only as such surety, and that the plaintiff ought to resort to H. and McT. to enforce payment from them, and that H. and McT. should be ordered to pay the amount, and indemnify the defendant. As the counterclaim was not rested upon any particular agreement, but was set up as arising from the position of the parties as creditors, principal debtor, and surety, it was held bad, and ordered to be struck out. *Federal Bank* v. *Harrison*, 10 P. R. 271.

Statement of Claim — *Particulars — Judgment.*]—Semble, where in an action on a guarantee, the writ is not specially indorsed,

but full particulars are set out in the statement of claim, final judgment may be signed upon default of defence. *Molsons Bank* v. *Dillabaugh*, 13 P. R. 312.

Statement of Defence—*Bond—Seals.*]—See *Marshall* v. *Municipality of Shelburne*, 14 S. C. R. 737.

——— *Fraud.*]—See *Waterloo Mutual Insurance Co.* v. *Robinson*, 4 O. R. 295; *Merchants Bank of Canada* v. *Moffatt*, 5 O. R. 122, 11 S. C. R. 46; *Toronto Brewing and Malting Co.* v. *Hevey*, 13 O. R. 64.

——— *Release.*]—One of the defendants herein set up as a defence that he was surety for part of the claim and principal debtor as to the residue, and as to the latter admitted his liability, but pleaded that he could only be called upon to pay it on the execution of a proper release by the plaintiff of all liability against him in respect of the said claim:—Held, clearly no defence. *Jones* v. *Dunbar*, 32 C. P. 136.

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3. *Other Cases.*

Assignee in Insolvency—*Multiplicity of Proceedings against Sureties—Injunction.*]—This court will not interfere by injunction to restrain proceedings instituted against the sureties of a defaulting assignee in insolvency, notwithstanding several actions may have been brought against them, and the aggregate amount sought to be recovered greatly exceeds the amounts for which they had become surety. The proper mode of proceeding in such circumstances is as pointed out in Sinclair v. Baby, 2 P. R. 117. *Craig* v. *Milne*, 25 Gr. 259.

See Canada Guarantee Co. v. *Milne*, *ib.* 261.

Attachment of Debts.]—The garnishees had given the judgment debtors a bond conditioned that one A., in their employment, should pay over all moneys received:—Held, that the liabilities incurred under this bond could not be attached. *Griswold* v. *Buffalo, Brantford, and Goderich R. W. Co.*, 2 P. R. 178.

Guarantor—*Action against as Principal.*]—The defendant purchased goods from the plaintiffs with instructions to charge and send them to one Fox, which they did, and after receiving a portion of the purchase money brought this action against the defendant, claiming that he was liable as purchaser of the goods. Several letters were put in evidence written by the plaintiffs to Fox, in one of which was the following passage: "It is now so long since your account was due, that there is no other recourse left except to follow up Mr. McL., who is guarantor," and in another, "We shall place the matter in the hands of G. L., Amherstburg, with instructions to proceed immediately against you and Mr. McL. for the amount." The plaintiffs also proved that the defendant had ordered goods in the same manner from merchants in Montreal, and in some instances paid, and in others given his own notes for them. The jury having found for the plaintiffs, and that the credit was originally given to the defendant, the court refused to disturb the verdict. *Ogilvie* v. *McLeod*, 11 C. P. 348.

An action for goods bargained and sold cannot be maintained against a person who has become responsible for the payment of goods delivered to a third party. *McKenzie* v. *McBean*, 4 O. S. 151.

Mortgage to Surety — *Assignment of—Attack on.*]—A mortgage was executed to secure an accommodation indorser, and subsequently assigned by him to creditors of himself and the principal debtor. In a suit brought to sell the mortgaged estate, subsequent incumbrancers sought to impeach this transfer, on the ground that the surety as well as the principal was insolvent; but, as no such defence was raised by the answer, the court made the decree for a sale, as asked, leaving the question to be disposed of in a suit to be brought for that purpose. *Commercial Bank* v. *Poore*, 6 Gr. 514.

Multiplicity of Suits — *Decree.*] — A mortgagee proceeded on the same day to foreclose the property of the mortgagor and his sureties by several bills upon their respective mortgages, and to sue at law in different actions the same parties on notes held by the plaintiffs, to which the mortgages were collateral:—Held, that only one suit in equity was necessary, as all parties might have been brought before the court therein, all remedies given which might have been obtained at law, and all rights more conveniently adjusted between the parties in one than in several suits; and the court would not be deterred from granting relief by the circumstance of a decree being complicated. *Merchants Bank* v. *Sparkes*, 28 Gr. 108.

Parties—*Action on Postmaster's Bond—Crown.*]—The defendant entered into a joint and several bond to the Queen with D. and S., for the faithful discharge by S. of the duties of deputy postmaster at O. The Post Office Act, C. S. C. c. 31, s. 64, s.-s. 2, enacts that all suits for debts due to the post office, whether by bond in the name of the postmaster-general or otherwise, shall be instituted in the name of the postmaster-general:—Held, that though the statute may authorize the postmaster-general in such cases to sue in his official name, the words "or otherwise," contained therein, do not deprive the Crown of the right to sci. fa. on a bond taken expressly in the name of the Queen. *The Queen* v. *McPherson*, 15 C. P. 17.

——— *Principal—Remedy over against.*]—One M., and the defendants as his sureties, executed a bond conditioned for the good behaviour of M., a clerk of the plaintiffs at Montreal. The bond was executed at Hamilton by the defendants, who were resident there. M. made default at Montreal and absconded. Proceedings were taken against the sureties, without joining M.:—Held, that the plaintiffs could not proceed against the sureties alone, if they required the joinder of the principal in order that they might have their remedy over against him. Though the breach occurred in Montreal, and there was no cause of action till default, yet there was a potential equity in the defendants, coeval with the execution of the bond, which became a right of suit on the default of M.; and there was also an implied contract on the part of M., upon execution of the bond, to repay to his sureties any money that they might have to pay by reason of his default. *Exchange Bank of Canada* v. *Springer*, *Exchange Bank of Canada* v. *Barnes*, 29 Gr. 270.

Realization of Security by Creditor—*Action against Surety for Balance—Attack on Prior Sale.*]—A party secondarily liable, and entitled on payment of the debt to an assignment of the security held by the creditor, had agreed that that estate should be sold first, and his own estate be liable only for the balance, and such estate was sold in a suit brought by the creditor, to which both the parties primarily and secondarily liable were parties, and which estate was purchased by the creditor in the name of an agent. The party so liable, having forborne to apply to discharge the sale in that suit, and two years having elapsed, during which time the creditor sold the property, cannot, as a defence to a suit to enforce payment of the balance, insist that the sale in the former suit was invalid. *Kains* v. *McIntosh*, 10 Gr. 119.

Right of Action — *Crown—Postmaster's Bond—Lex Loci Contractûs.*]—In an action by the Crown, on the information of the attorney-general for Canada, upon a bond executed in the Province of Quebec in the form provided by the Act respecting the Security to be given by the Officers of Canada (31 Vict. c. 37, 35 Vict. c. 19), and the Post Office Act (38 Vict. c. 7):—Held, that the right of action under the bond was governed by the law of the Province of Quebec. Held, further, that such a bond was not an obligation with a penal clause within the application of arts. 1131 and 1135 of the Civil Code of Lower Canada. Held, also, that the rule of law that the Crown is not liable for the laches or negligence of its officers obtains in the Province of Quebec except when altered by statute. Judgment in 6 Ex. C. R. 236 affirmed. *Black* v. *The Queen*, 29 S. C. R. 693.

Sequestration—*Mortgagee and Assignee of Equity.*]—A chose in action can be reached by process of sequestration, but the right or interest of a surety in regard to the money for the payment of which he is surety, is not property of such a nature as can be reached by that process. Where, therefore, a mortgagee filed his bill against the assignee of the equity of redemption to enforce by this means payment of the deficiency arising on a sale of the mortgaged premises:—Held, that the right of the mortgagor to call upon his assignee to discharge the mortgage debt was not of such a nature as could be reached. *Irving* v. *Boyd*, 15 Gr. 157.

VI. Rights of Surety.

1. *Against Co-sureties.*

(a) *Contribution.*

Bond—*Fidelity of Officer—Separate Sureties—Change in Office—Evidence.*] — A loan and savings society appointed G. their treasurer, and the plaintiffs and defendant by two separate bonds became sureties for the due discharge of the duties of such officer. By several Acts of the legislature the society was incorporated, and its powers materially increased, and G. became its manager, the duties of which office it was shewn were similar to those of treasurer, the name of "manager" being given simply as one of honour, and not involving any additional duties. G. made default in his office, and a suit was instituted by the society against all the sureties, which was compromised by the plaintiffs paying about one-half of the sum claimed by the society:—Held, that the defendant was bound to contribute his share of the money so paid, and that the change in the name of the officer afforded no defence to the claim of the plaintiffs. Held, also, that in such a case the entries of G. in the books of the society were not evidence against the sureties during the lifetime of G. *Murray* v. *Gibson*, 28 Gr. 12.

Counter-security — *Right to Enforce—Depreciation.*] — Where the principal debtor gives to his sureties counter-security by mortgage of real estate, any of the sureties is entitled, after the principal debtor's default, to enforce the security without the consent or concurrence of the others, and it is not an answer to a claim for contribution by one surety who has paid the whole debt, that the security has depreciated in value and that the paying surety has refused to take any steps to enforce it. Judgment in 28 O. R. 35 affirmed. *Moorhouse* v. *Kidd*, 25 A. R. 221.

Discharge of Co-surety—*Payment.*]—Where one of several sureties has been released by the creditor giving time to the principal debtor, with the consent of the other sureties, the latter cannot, upon payment of the debt, recover contribution from the co-surety. Three out of four sureties on a note obtained from the holder an extension of time by a renewal during the absence and without the consent or approval of the fourth surety, the holder retaining the original note. After payment of the renewal by the three who had obtained the extension, they brought an action against the fourth for contribution:—Held, that they could not recover. *Worthington* v. *Peck*, 24 O. R. 535.

Joint Action against Principal and Co-surety.] — A surety cannot sue a co-surety jointly with the principal, for the amount of a debt of the principal which the surety has been obliged to pay. *Burnham* v. *Choat*, 5 O. S. 736.

Partnership — *Judgment—Award.*]—G. recovered a judgment against M. and C. upon a note made by them. It was said that one J. was also liable with them for the debt, though not a party to it; and that he was in effect a partner with G. in the transaction. M. made large payments on the judgment, but C. paid nothing. Upon reference between J. and M. the arbitrator was to determine which of them was liable, or to what extent, in respect of the judgment or the note, and to make any orders which he should think proper, to settle their liabilities in respect thereof. The arbitrator awarded that J., as between him and M., was liable to pay the balance due upon the judgment, and J. should pay it in a month:—Semble, that upon performing the award, and paying more than his share, J. might sue C. for contribution as for money paid on account of the judgment. *In re McLean* v. *Jones*, 2 C. L. J. 206.

——— *Promissory Notes—Indorsers.*]—A. and B., a trading partnership, entered into a joint speculation with C. and D. for the purchase and sale of lands; afterwards E. was admitted into the concern, each to be entitled to one-fourth of the profits, and liable in the same proportion to any losses incurred. For the purposes of the co-partnership, the parties were in the habit of discounting notes which were made by E., and indorsed by A. and B.

and C. and D. in their individual names. After nearly three years C. wrote to A. and B. and E. proposing to retire on receiving a certain amount in lands at a valuation, he agreeing for a certain period to continue to indorse renewals of the notes then outstanding, as accommodation indorser, which proposal was communicated to D., but nothing further was done with regard to it. Shortly afterwards D. made a similar proposition to A. and B. and E. on their "assuming all my share of the liabilities incurred by or for the said company, excepting only my liability for 12 or 15 months as accommodation indorser after K. [C.] on the paper in the Bank of Upper Canada," which proposal was accepted by A. and B. and E. Subsequently both C. and D. by a joint memorandum formally relinquished their interests in the company, but it did not appear that D.'s stipulation as to indorsing the notes was ever communicated to C. The notes so indorsed by C. and D. had been all consolidated into one note of £3,200, and upon a renewal of this note an action was subsequently brought against all the parties thereto, and a sale of D.'s land was effected under the execution in that action, which realized only a portion of the amount. Thereupon D. filed a bill against C. seeking to make him, as prior indorser, pay the amount still remaining due in respect of the judgment, to reimburse D. what his lands had sold for, and also to make up the loss sustained by him in consequence of the sale of his lands at, as was alleged, a great undervalue. Under the circumstances of the case the court below treated C. and D. as co-sureties for the continuing partners, and as such liable only to make up the amount of the claim in equal proportions; and it appearing that C. had already paid more than his moiety of the demand, ordered D. to repay the excess to him, together with the costs of the suit; and on appeal this was affirmed and the appeal dismissed with costs. *Harper* v. *Knowlson*, 2 E. & A. 253.

See Cameron v. *Boulton*, 12 C. P. 570; *Small* v. *Riddel*, 31 C. P. 373; *City of London* v. *Citizens Ins. Co.*, 13 O. R. 713.

(b) *Other Cases.*

Benefit of Security—*Indemnity.*]—The holder of several promissory notes applied to the plaintiff to indorse the same for his accommodation, which he did on the promise of the holder to execute a mortgage on certain lands to one L., to whom he was indebted in $1,200 on account of the purchase money of these lands, securing the payment thereof, as also of the notes. The consideration expressed in the mortgage was $1,200 only, but the proviso for redemption embraced the notes as well as the $1,200. L. also indorsed the notes, and on maturity retired them, and the plaintiff, having paid L. the amount of the notes, obtained from him an assignment of the mortgage:—Held, (1) that the transactions rendered L. and the plaintiff in effect co-sureties, and that the plaintiff was entitled to the benefit of the security held by L. by way of indemnity; and (2) that the plaintiff was entitled to enforce the mortgage against a purchaser who took his conveyance after searching the registry office and upon the assurance that the mortgage was made to secure $1,200 only. *Menzies* v. *Kennedy*, 23 Gr. 360.

Judgment — *Payment—Right to Proceed in Name of Creditor.*]—A. and B. entered as co-sureties into separate bonds to the Crown for C.; C. became a defaulter. The Crown proceeded by sci fa. on each bond, and obtained a separate judgment against each surety. A. satisfied the judgment against himself. B. moved to be allowed, on paying the judgment against himself in full, to stand in the place of the Crown, and to have the benefit of the Crown process against his co-surety for a moiety of the judgment:—Held, that the court could not thus relieve B.; that they might have allowed him to proceed in the name of the Crown to enforce the judgment which had been obtained on a sci. fa. against A., but this they could not now do, as it appeared the Crown had already enforced that judgment. *The Queen* v. *Land*, 3 U. C. R. 277.

Moneys Applicable to Debt.]—Where one of two sureties has moneys in his hands to be applied towards payment of the creditor, he may be compelled by his co-surety to pay such moneys to the creditor or to the co-surety himself if the creditor has already been paid by him. *Macdonald* v. *Whitfield*, *Whitfield* v. *Merchants Bank of Canada*, 27 S. C. R. 94.

Securities—*Rights to Assignment of.*]—The plaintiff sold twenty-four shares in a vessel to B. & Co., who, not being able to pay cash, procured O. to make a note in the plaintiff's favour, which was indorsed by him and B. In order to secure himself, O. took a bill of sale to himself of the shares. The plaintiff discounted the note at the bank, and after several renewals was obliged to pay it. In an interpleader issue between the plaintiff and the execution creditor of O., to try the right to the shares:—Held, that the effect of this agreement was to make B. the principal debtor to the bank for the amount of the note, and the plaintiff and O. his co-sureties therefor; and upon payment thereof, that the plaintiff was equally entitled to the twenty-four shares held by O., his co-surety, as security against his liability on the note. Quære, whether interpleader is a proper remedy in such a case, and whether the shares could be seized and sold by the sheriff. *Trevice* v. *Burkett*, 1 O. R. 80.

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2. *Against Creditor.*

(a) *As to Contracts.*

Assignment to Surety—*Right to Payment.*]—The plaintiffs were sureties to defendant for the performance by C. of an agreement whereby C. covenanted for himself, his executors, administrators, and assigns, to build certain cottages for £1,800, which defendant covenanted to pay to C., his executors, administrators, and assigns, in the following manner; £800 during the progress of the work, and the remaining £1,000 on the completion of the agreement, by the conveyance to C. of certain specified premises. C. failed to perform his contract, and assigned it to the plaintiffs, having received £800 on account. It was not shewn that defendant was any party to the assignment. The plaintiffs and defendant then entered into an agreement (to which C. was no party) reciting C's previous contract; the plaintiffs' liability as sureties for him; his non-performance and assignment to the plaintiffs; that the defendant at the plaintiff's

request had agreed to give further time for the completion of the contract; and that in consideration of the premises the plaintiffs covenanted to finish the work according to the first agreement; and the parties mutually bound themselves in £1,000 for the performance of this last agreement:—Held, that there was no covenant, either expressed or implied, on the part of defendant to convey to the plaintiffs, or to pay them the £1,000. *Hall* v. *Gilmour*, 9 U. C. R. 492.

A contracted with defendants to perform certain work, and B. entered into a bond as his surety. It appeared that B. was in fact the principal, and did the work, and that A. had tendered and taken the contract for him, and had executed a writing assigning to him all his interest in the proceeds:—Held, that B. could have no right of action against defendants. *Ferris* v. *Township of Kingston*, 12 U. C. R. 436.

(b) *As to Securities.*

Assignment by Creditor to Creditor of Surety.]—A debtor gave a mortgage to his creditor as collateral security for a debt for which another person, H., was surety. The creditor afterwards obtained judgment against H. for the debt, and placed an execution in the sheriff's hands against his goods. A creditor of H. subsequently placed an execution in the same sheriff's hands; and, there not being goods enough to pay both executions, he paid off the first execution, and took an assignment of the mortgage:—Held, that he was entitled to hold the mortgage to the extent of such payment, as against the plaintiff, to whom H., after both executions were delivered to the sheriff, had assigned his interest in the mortgage to secure another debt. *Garrett* v. *Johnstone*, 13 Gr. 36.

Assignment by Surety to Creditor—*Discharge of Liability.*] — A surety holding collateral securities is not bound to wait until he has paid the debt before he assigns such securities, but may do so at any time to the creditor, in discharge of his liability. *Paton* v. *Wilkes*, 8 Gr. 252.

Assignment by Surety to Principal—*Right of Execution Creditor to Attack.*]—H. obtained from his debtor an assignment of his books of account, notes, bills, and other evidences of debt, by way of security against notes for the accommodation of the debtor; and also a conveyance of real estate from the father of the debtor for the same purpose. Having been compelled to pay a large sum on such notes, H. recovered judgment against the debtor, and sued out execution thereon, which was the first placed in the hands of the sheriff against the debtor, and the effects of the debtor were afterwards sold under this and other executions subsequently placed in the hands of the sheriff, upon which sale sufficient was realized to pay the execution of H., and leave a balance in the hands of the sheriff; and H.'s claim was accordingly paid, and the books of account and other securities held by him were delivered up to the debtor, after notice from J., a later judgment creditor, not to part with them; and the father's land was reconveyed to him. The execution creditor who gave the notice claimed, in consequence, priority over intermediate execution creditors, and also a right to compel H. to make good the amount of his claim in consequence of his having parted with the securities:—Held, (1) that a subsequent execution creditor had not any equity to compel the first creditor to recover payment of his claim out of the property held by him in security, so as to leave the goods of the debtor to satisfy the subsequent executions; nor had he any right to call upon H. to assign the lands conveyed to him by the debtor's father; nor was H. personally liable to the subsequent execution creditors. (2) That the securities in the hands of H. being, at that time, not seizable under common law process, no right vested in J. to have them transferred to him by H., nor was H. bound to make good to J. any loss sustained by him by reason of his refusal to deliver the securities to J., but that such securities, being in the nature of equitable assets, should be distributed amongst all the creditors pari passu. *Topping* v. *Joseph*, 1 E. & A. 292. See *S. C., sub nom. Joseph* v. *Heaton*, 5 Gr. 636.

Realization of — *Right to Insist on — Sale—Account.*]—A decree for sale of property was directed at the suit of a surety of the mortgagor. In proceeding to take the accounts it appeared that the mortgagee had paid off several prior incumbrances, and the master in taking the account allowed him credit for the sums so paid, although no direction to that effect was given by the decree. The surety, insisting that as between him and the mortgagee he was entitled to receive credit for the gross amounts produced at the sale, without any references to the sums so paid to the prior incumbrancers, appealed from the master's finding in that respect. The court dismissed the appeal with costs. Upon an agreement entered into by the lender on mortgage, borrower, and surety, that a judgment against the surety should "stand as additional or collateral security for the payment of such mortgages, to pay and make up any deficiency that might arise or exist, should it at any time become necessary to sell the said farms," &c.:—Held, that the surety was entitled to have an account taken, the property sold, and credit given on his judgment for the amount realized, before he could be called upon to pay anything; and that he was not bound first to pay off the creditor and take an assignment of the mortgages for the purpose of proceeding against his principal, the mortgagor. *Teeter* v. *St. John*, 10 Gr. 85.

Release without Consent of Surety—*Judgment.*]—The plaintiffs, who held a number of promissory notes of a customer, indorsed by various persons, and also a mortgage from the customer on certain lands to secure his general indebtedness, sued the defendant as indorser of one of the notes. Before action brought, they had released certain of the mortgaged lands without the consent of the defendant:—Held, that the plaintiffs were entitled to judgment against the defendant for the amount of the note, but without prejudice to the right of the latter to make him account for their dealings with the mortgaged property when that security had answered its purpose, or the debt had been paid by the sureties, or when in any other event the application of the moneys from the security could be properly ascertained. Decision in 25 O. R. 503 modified. *Molsons Bank* v. *Heilig*, 26 O. R. 276.

See Gilmour v. *Cameron*, 6 Gr. 290; *McQuesten* v. *Winter*, 10 Gr. 464; *Menzies* v. *Kennedy*, 23 Gr. 360; *Harper* v. *Culbert*, 5 O. R. 152; *Victoria Mutual Ins. Co.* v. *Freel*, 10 P. R. 45; *Monsell* v. *Mitchell*, 23 U. C. R. 116; *Trerice* v. *Burkett*, 1 O. R. 80.

(c) *As to Set-off.*

Executor—*Debt to Testator — Personal Claim as Surety.*]—A testator, who owed debts to an amount exceeding his personal estate, devised his land to one of his sons, whom he also appointed an executor. The devisee paid debts to an amount exceeding the personal estate, and left but one debt unpaid; the devisee became surety for the creditor to whom the debt was due, for an amount exceeding the debt so due by the testator; and the devisee subsequently gave a mortgage on the land devised to secure the amount he was surety for:—Held, that the debt due by the testator was to be applied towards the discharge of the sum for which the devisee had become surety. *Goldsmith* v. *Goldsmith*, 17 Gr. 213.

Judgments.]—A surety cannot claim to have a judgment obtained by his principal against the plaintiff, set off against a judgment obtained by the plaintiff against him as surety. *Gray* v. *Smith*, 6 O. S. 62.

(d) *Other Cases.*

Charge on Land—*Priority—Mortgage.*]—The treasurer of a county, on substituting a new surety for one who wished to withdraw, gave a mortgage on property which he had previously mortgaged to the old sureties for their indemnification; the mortgage to the sureties had not been registered, but had been left with the clerk of the council for safe keeping. On receiving the new bond and mortgage, the clerk gave up to the treasurer the unregistered mortgage as well as the old bond, and the treasurer destroyed both:—Held, that the old sureties were entitled to a first charge on the property for their indemnification in respect of a defalcation discovered of a debt before these transactions. *County of Frontenac* v. *Breden*, 17 Gr. 645.

Parties—*Reference—Costs.*]—In an action against a municipal treasurer a reference was directed to ascertain what was due from him, and an order was made permitting the sureties to appear upon the reference and contest the claims of the municipality. The order was varied by making provision for awarding costs as between the municipality and the sureties. *County of Essex* v. *Wright*, *County of Essex* v. *Duff*, 13 P. R. 474.

Recovery of Money Paid to Creditor.]—A surety paying the debt of his principal after arrangements made between the creditor and the principal, which would have had the effect of discharging the surety, cannot recover the money so paid. *Geary* v. *Gore Bank*, 5 Gr. 536.

3. *Against Principal.*

Collateral Security — *Realization of—Credit to Principal.*]—P. made in favour of N. an accommodation note, which N. deposited with R. as collateral security for a mortgage debt. N. and B. afterwards went into partnership, and a new mortgage on partnership property was given to R. for N.'s debt, the note being still left with R. The partnership being dissolved, B. agreed to pay all debts of the firm, including the mortgage, and on settling the accounts between himself and the mortgagees B. was given credit for the amount of the note which P. had paid to the mortgagees. P. sought to recover from B. the amount so paid:—Held, reversing the judgment in 15 A. R. 244, which reversed the judgment in 16 O. R. 699, that N. having authority to deal with the note as he pleased, and having given it as a collateral security for the joint debt of himself and B., on such security having been realized by the mortgagees and the amount credited on the joint debt, P., the surety, could recover it from either of the debtors. Semble, assuming P. not to have been liable to pay the note to the mortgagees, and that it was a voluntary payment, it having been credited on the mortgage debt, and B. having adopted the payment on the settlement of the accounts between him and the mortgagees, that he was liable to repay it. *Purdom* v. *Nichols*, 15 S. C. R. 610.

Costs—*Refund of.*]—Quære, whether the principal is bound to refund to his surety costs of proceedings against the surety to enforce payment of the debt of the principal. *Whitehouse* v. *Glass*, 7 Gr. 45.

Indemnity against Indorsement.]—D., being about to leave this country for a time, executed a general power of attorney authorizing the agent G., amongst other things, for the principal, and in his name, and to his use, "to buy any freehold lands, or any ships, vessels, or steamboats, or any shares therein, as the said G. may think expedient, and for my benefit." During D.'s absence the agent purchased a leasehold property known as the "St. Nicholas Saloon," together with the furniture, provisions, and business therein, for the payment of which he gave his own notes, indorsed by him in the name of the principal, under a clause in the power of attorney authorizing him to make and indorse notes, &c., in the course of business, alleging that he had made the purchase for the joint benefit of himself, his principal, and a third person, who also indorsed these promissory notes:—Held, a purchase which the agent was not entitled to make. Held, also, that standing in the position of a surety in respect of the promissory notes, the principal was entitled to a decree for indemnity in respect of his liability as indorser thereof, against his agent and the subsequent indorser, without waiting to take an account of all the transactions between the parties. *Dick* v. *Gordon*, 6 Gr. 394.

Judgment — *Payment — Assignment — Costs.*]—Where one brought action against a maker of a note and an indorser thereon, and recovered judgment, with costs, which the indorser paid and took an assignment of the judgment:—Held, that the latter was entitled under R. S. O. 1877 c. 116, s. 3, to recover from the principal debtor the whole of the judgment, including the costs. *Harper* v. *Culbert*, 5 O. R. 152.

Judgment for a debt was obtained by the plaintiffs against the defendants, who stood towards one another in the relation of principal

and surety. The surety paid the plaintiffs the amount of their debt and costs, took an assignment of the judgment, and then proceeded to enforce it against his principal:—Held, that the costs as well as the debt were recoverable by the surety, as against his principal. *Victoria Mutual Ins. Co.* v. *Freel*, 10 P. R. 45.

——— *Payment—Proceeding in Name of Creditor.*]—An action having been brought and a judgment recovered against two defendants on a contract by them to carry lumber, the verdict and costs were paid by one, who thereupon, without applying to the plaintiff or tendering him any indemnity, issued an execution in the plaintiff's name against the other defendant for one-half of the debt and costs:—Held, clearly not warranted by 26 Vict. c. 45, and the execution was set aside. *Potts* v. *Leask*, 36 U. C. R. 476.

A judgment recovered against the two defendants, who were partners, was paid by the defendant G., who thereupon issued execution against his co-defendant, S., on the judgment, for half the amount. It appeared that the partnership accounts were unsettled, and that an award had been made in favour of S., the validity of which was disputed by G.:—Held, that under 26 Vict. c. 45, s. 4, the execution was improperly issued; and it was set aside. *Scripture* v. *Gordon*, 7 P. R. 164.

Mortgage by Surety—*Release of Principal.*]—H. had leased to defendant certain premises, the plaintiff becoming his surety for the rent. Defendant being in arrear, the three met, and it was agreed that the lease should be given up; that the plaintiff should secure H. by mortgage for the amount due; and that H. should release defendant. The mortgage was executed, and H. gave a receipt to the plaintiff for the sum secured. Before the mortgage fell due or had been satisfied, the plaintiff sued defendant as for money paid, and the jury found that the mortgage was received in satisfaction of defendant's debt, with his assent:—Held, that the action would lie. *McVicar* v. *Royce*, 17 U. C. R. 529.

——— *Sale of Property by Creditor—Principal—Surety's Heirs—Acquiescence.*]—A wife at her husband's request executed a mortgage of her separate lands to a creditor of her husband to secure his debt. After the wife's death, leaving several children (of whom the plaintiffs were two), the creditor commenced a suit for the sale of the wife's lands, to which the husband and all the wife's children except the plaintiffs were the parties, the plaintiffs having made an assignment under the Insolvent Act, and by arrangement the husband became the purchaser in his own name, upon advantageous terms of credit, which enabled them to pay off the purchase money out of sales of portions of the lands. Upon a bill filed by the plaintiffs alleging that the husband was bound to pay off the debt himself, and therefore could not purchase for himself, the defendants insisted that the husband had become the nominal purchaser, but in reality for the benefit of the children, other than the plaintiffs, and in trust for them only:—Held, that the plaintiffs were entitled to the benefit of the husband's arrangement with the creditor, equally with the other children, and that under the circumstances the purchase could not be for the benefit of the latter only. The sale by the creditor to the husband was made in June, 1867. This bill was filed in September, 1875. In the meantime sales had been made of portions of the lands, as was alleged, with the plaintiffs' knowledge, and the defendants insisted that the plaintiffs' acquiescence had debarred them from questioning the transaction. The court, being of opinion upon the evidence that the plaintiffs believed that the sales were being made by or with the authority of the creditor for the purpose of paying off the mortgage, and not by their father as owner, and that the defendants could be readily reinstated in the position they occupied before the arrangement with the creditor:—Held, that, in the absence of clear proof of knowledge by creditor, and that it was asserted to be for the benefit of the other children only, the defence of acquiescence could not be maintained. *Dougall* v. *Dougall*, 26 Gr. 401.

Municipal Corporation—*Surety for—Promissory Note.*]—Where a corporation, having a debt to pay, which it was to their advantage to discharge immediately, raised money upon an accommodation note of an individual, and applied the money to the payment of the debt, promising to protect the note or to repay, relief was given in chancery against the corporation upon a breach of the promise. And semble, that, if the corporation could be compelled to pay the debt, the person so giving his note would be entitled to stand in the place of the creditor. *Burnham* v. *Peterborough*, 8 Gr. 366.

Obligation to Pay off Mortgage—*Costs.*]—Where a purchaser of a mortgaged estate takes it subject to the vendor's mortgage, and sells to another without paying off said mortgage, he will be compelled to fulfil his undertaking to do so. Thus A., being the owner in fee of a certain lot of land, mortgaged it to B., and then sold to C., leaving the mortgage to be paid by C. to B., as the balance of the purchase money. C. then sold to D. without paying the mortgage, and default having been made B. sued A. at law on his covenant, whereupon A. filed a bill against C. and D. to make them pay off the mortgage:—Held, that A., as surety for C., had a right to call upon him to pay the mortgage to B.; and also his costs of the action at law. Held, also, that D. was a proper party where the vendor sought to enforce his lien on the land. *Joice* v. *Duffy*, 5 L. J. 141.

Payment of Debt—*Subrogation—Execution.*]—The holder of certain accommodation drafts, after having obtained execution against the payee, was paid the amount of them by the accommodation acceptor, and thereupon expressed his intention of directing the sheriff to credit that sum on the execution in his hands, the amount of which he had made by sale under execution of the goods of the payee, for whose accommodation the bills had been negotiated. The acceptor, hearing of this, gave the sheriff notice of his claim, and filed a bill to compel the payment of the amount which he had advanced:—Held, that as surety the acceptor had a right to receive the amount of his claim out of the proceeds of the execution, to the exclusion of the subsequent execution creditors. *Rigney* v. *Vanzandt*, 5 Gr. 494.

——— *Subrogation—Securities.*]—S. was surety to B. for a debt, for which A., the principal debtor, gave a mortgage to B. as a further security. The creditor recovered judgment against the surety and sold his lands un-

der execution. While the fi. fa. was in the sheriff's hands and before the sale, S. mortgaged the lands to creditors of his own:—Held, that as the surety would, on paying the debt to B., have been entitled to the benefit of the mortgage which the principal debtor had given to B., so where the lands of S. were sold to pay the debt, and the mortgagees of S. were thereby deprived of them, these mortgagees were entitled to the benefit of the original mortgage as against any subsequent assignment of the mortgage by the mortgagee, and any subsequent mortgage by the mortgagor. *Quay* v. *Sculthorpe*, 16 Gr. 449.

Surety—*Charge on Wife's Estate—Covenant of Husband—Exoneration—Account.*]—A married woman, who, under the terms of her father's will, was entitled to receive her share of his estate on coming of age, agreed, on attaining her majority, with the other beneficiaries, to postpone the division. An agreement was afterwards executed between the husband, wife, and the trustee of the estate, whereby, after reciting the above facts, the trustee agreed to advance her certain moneys, which she agreed to repay within a specified period, the advance being made a charge upon her share of the estate. The agreement also provided that the amount of the advance should be deducted from her share in case of non-payment, or of a division of the estate prior to the date fixed for repayment. The husband was a party to the agreement for the purpose only of joining in the covenant, and it was expressly agreed therein that none of the provisions of the indenture should "in any wise affect or prejudice the ordinary legal rights" of the trustee to enforce payment:—Held, that, notwithstanding the latter clause, the husband was liable as a surety only, and that he was entitled to be exonerated by his wife and to the benefit of her property in the trustee's hands, and to an account in regard thereto from the date of the covenant sued on. *Lee* v. *Ellis*, 27 O. R. 608.

VII. Miscellaneous Cases.

Administration Order—*Claim Arising out of Suretyship.*]—When a claim against an estate of a deceased person is one arising out of a contract of suretyship, the court will not, unless by consent of all parties, make an administration decree except on a bill filed. *Re Colton, Fisher* v. *Colton*, 8 P. R. 542.

The principal and surety being here the plaintiff and defendant respectively, Re Colton, Fisher v. Colton, 8 P. R. 542, which decides that in a case of principal and surety a summary application to administer under G. O. Ch. 638 is improper, was held not to apply. *Re Allan, Pocock* v. *Allan*, 9 P. R. 277.

Bond—*Fulfilment of Covenants—Penalty.*]—Where a party binds himself in an agreement to pay the plaintiff £25 if A. B. does not fulfil all the covenants and conditions of the agreement, the £25 must be looked on as a penalty, and not as liquidated damages giving the plaintiff an action as for an absolute debt. *McLean* v. *Tinsley*, 7 U. C. R. 40.

Bond of Indemnity—*Right of Action.*]—See *Boyd* v. *Robinson*, 20 O. R. 404, and *Mewburn* v. *Mackelcan*, 19 A. R. 729.

Covenant to Indemnify—*Right of Assignee for Benefit of Creditors.*]—See *Ball* v. *Tennant*, 21 A. R. 602.

Damages—*Action Quia Timet.*]—Upon a covenant by an incoming partner to indemnify and save harmless a retiring partner against the liabilities, contracts, and agreements of the firm, no cause of action accrues to the covenantee merely because an action to recover unliquidated damages for an alleged breach of agreement has been brought against the firm. Mewburn v. Mackelcan, 19 A. R. 729, and Leith v. Freeland, 24 U. C. R. 132, distinguished. Such a covenant is not assignable by the covenantee to a plaintiff suing the firm so as to enable him to join the covenantor as a defendant in the action to recover against him the damages for which the firm may be ultimately held responsible. *Sutherland* v. *Webster*, 21 A. R. 228.

Indorsement — *Commission.*]—See *McDonald* v. *Manning*, 19 S. C. R. 112.

Obligation to Indemnify—*Assignment of.*]—The obligation of a purchaser of mortgaged lands to indemnify his grantor against the personal covenant for payment, may be assigned even before the institution of an action for the recovery of the mortgage debt, and, if assigned to a person entitled to recover the debt, it gives the assignee a direct right of action against the person liable to pay the same. Affirming Campbell v. Morrison, 24 A. R. 224. *Maloney* v. *Campbell*, 28 S. C. R. 228.

Warranty — *Action — Incidental Demand.*]—It is only as regards the principal action that the action in warranty is an incidental demand. Between the warrantee and the warrantor it is a principal action, and may be brought after judgment in the principal action, and the defendant in warranty has no interest to object to the manner in which he is called in, where no question of jurisdiction arises and he suffers no prejudice thereby. But, if a warrantee elect to take proceedings against his warrantors before he has himself been condemned, he does so at his own risk, and, if an unfounded action has been brought against the warrantee, and the warrantee does not get the costs of the action in warranty included in the judgment of dismissal of the action against the principal plaintiff, he must bear the consequences. *Archbald* v. *DeLisle, Baker* v. *DeLisle, Mowat* v. *DeLisle*, 25 S. C. R. 1.

See Assessment and Taxes, IV.—Indemnity — Municipal Corporations, XXIII. 2.

PRIORITY.

See Arrest, II. 2 (f)—Bills of Sale, VII. 1—Crown, VI.—Division Courts, VII. —Execution, VI.—Lien, V. 5 (a)—Mortgage, XV. 2—Registry Laws, I.—Solicitor, VIII. 4.

PRIVATE ACTS.

See Statutes, XII.

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See WAY, X.

PRIVILEGE.

See ARREST, IV.—DEFAMATION, XII.—EVIDENCE, I. G—PARLIAMENT, III.—SOLICITOR, IX.

PRIVY COUNCIL.

I. APPEAL TO,

1. *Leave to Appeal*, 5767.

2. *Raising New Issues on Appeal*, 5768.

3. *Right of Appeal*, 5768.

4. *Security on Appeal*, 5768.

II. JUDGMENT OF—ENFORCING, 5769.

III. RIGHT TO ORDER NEW TRIAL, 5770.

I. APPEAL TO.

1. *Leave to Appeal.*

Criminal Cases.]—The rule of the judicial committee is not to grant leave to appeal in criminal cases, except when some clear departure from the requirements of justice is alleged to have taken place. *Riel* v. *The Queen*, 10 App. Cas. 675.

Issue of Facts — *Petition for Leave.*]—Petition for special leave to appeal in a case involving only an issue of fact refused. The petition must state fully but succinctly the grounds upon which it is based; the record not being before their lordships until forwarded by the proper authorities. *Canada Central R. W. Co.* v. *Murray*, 8 App. Cas. 574.

Public Interest.]—Where the determination of a case will not be decisive of any general principle of law, the judicial committee will not give leave to appeal from a unanimous judgment of the court below, on the ground that the questions involved are either of great importance to the parties or calculated to attract public attention. Leave to appeal from the judgment in 13 S. C. R. 258 refused. *DuMoulin* v. *Langtry*, 57 L. T. N. S. 317.

——— *Amount Involved.*] — Their lordships will not advise Her Majesty to admit an appeal from the supreme court of the Dominion save where the case is of gravity, involving matter of public interest, or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance, or of a very substantial character. Petition for special leave to appeal refused, the case depending on a disputed matter of fact—whether there had been a gift or sale of certain goods of the value of £1,000. *Prince* v. *Gagnon*, 8 App. Cas. 103.

Statutory Exclusion—*Act of Grace.*]—40 Vict. c. 41, s. 28 (D.), providing that the judgment of the court of appeal in matters of insolvency should be final, is within the competence of the Dominion Parliament and does not infringe the exclusive powers given to the provincial legislatures by s. 92 of the Imperial statute; nor does it infringe the Queen's prerogative, for it only limits the right of appeal as given by the code. The section, according to the true construction of the word "final" therein, excludes appeals to Her Majesty, but contains no words which purport to derogate from the prerogative of the Queen to allow such appeals as an act of grace. It, therefore, does not interfere with the prerogative of the Crown; and quære, what powers may be possessed by the Parliament of Canada so to do. Cuvillier v. Aylwin, 2 Knapp's P. C. C. 72, reviewed. *Cushing* v. *Dupuy*, 5 App. Cas. 409.

Terms — *Costs.*] — Special leave may be given on the terms that the appellants should be liable to pay the respondent's costs in any event. *Montreal Gas Co.* v. *Cadieux*, [1898] A. C. 718.

See Valin v. *Langlois*, 5 App. Cas. 115.

2. *Raising New Issues on Appeal.*

Where a writ and declaration alleged that the defendant had been guilty of wilful deceit, and had fraudulently effected a transference of fire insurance in his books after a fire had occurred, from a company of which he was agent, to the appellants, of whom he was also agent, with a specific fraudulent purpose, and such charges of fraud and deceit failed:—Held, that the appellants could not be allowed in final appeal to contend for the first time that the pleadings and evidence disclosed such negligence or breach of duty by the respondent, as their agent, as is in law sufficient to infer his liability for the amount paid by them under the insurance so transferred. Fraud was of the essence of the declaration, and the evidence of the respondent directed to that issue cannot be accepted as representing all that he would have brought forward to rebut a charge of negligence, nor had the points connected with that issue been submitted to the court below. *Connecticut Fire Ins. Co.* v. *Kavanagh*, [1892] A. C. 473.

The judicial committee declined to hear argument as to certain issues not raised on the pleadings and evidence and not adjudicated upon in the court below. *Grey* v. *Manitoba and North-Western R. W. Co. of Canada*, [1897] A. C. 254.

3. *Right of Appeal.*

Petition of Right.]—An appeal lies to Her Majesty in council from a decision of the court of Queen's bench, Quebec, on a petition of right. *The Queen* v. *Demers*, [1900] A. C. 103.

4. *Security on Appeal.*

Form of Bond.]—On a motion to disallow a bond filed by the defendants (appellants) pending an appeal to the privy council,

which was in the form given in O. J. Act, s. 38, with some further recitals, it was objected that the condition of the obligation ought to read "do and shall effectually prosecute such appeal, and pay," &c., instead of "or pay," as given in the form; and also that the condition should be to pay "what had been found due by the court appealed from," instead of "such costs and damages as shall be awarded:"—Held, that "or" was the correct word to use, and that "effectually prosecute" meant "successfully prosecute," but the bond was disallowed on the second objection, it being held that the proper condition must be drawn based upon the language in R. S. O. 1877 c. 38, s. 27, s.-s. 4. *International Bridge Co.* v. *Canada Southern R. W. Co.*, 9 P. R. 250.

Stay of Execution—*Action.*]—An action against the sureties upon a bond given by the defendants in the action of McLaren v. Canada Central R. W. Co., upon the appeal of the defendants to the court of appeal in that cause. The defendants in that action appealed from the judgment of the court of appeal to Her Majesty in council, and in that appeal security had been given and allowed, including security for the whole amount recovered, and execution had been stayed in consequence:—Held, that proceedings must also be stayed in this action. *McLaren* v. *Stephens*, 10 P. R. 88.

——— *Costs.*]—Where the plaintiffs were appealing to the privy council from a judgment of the court of appeal dismissing with costs an appeal from the judgment of the Queen's bench division in favour of the defendants with costs, and had given security in $2,000, as required by s. 2 of R. S. O. 1887 c. 41:—Held, that the order of a Judge of the court of appeal, under s. 5, allowing the security, should not have stayed the proceedings in the action, and so much of the order as related to the stay should be rescinded. Held, also, that the plaintiffs not having given security to stay execution for the costs in the courts below, and the stay being removed, if they now desired to have execution for such costs stayed, they should give security therefor as provided by rule 804, which is made applicable by s. 4 of the Act. Held, also, that if an order for payment out of the high court of money therein, awaiting the result of the litigation, was "execution" within the meaning of s. 3, it was stayed by the allowance of the security, and required no order; if it was not execution, a Judge of the court of appeal had no jurisdiction to stay proceedings in the court below; and it was for the high court to determine whether such an order was "execution," and if not, whether the money should be paid out. *McMaster* v. *Radford*, 16 P. R. 20.

Sureties on Prior Bond — *Sufficiency of.*]—See *Cameron* v. *Bickford*, 5 C. L. T. 176.

See Citizens' Ins. Co. v. *Parsons*, 32 C. P. 492.

II. Judgment of—Enforcing.

Rule of Supreme Court — *Costs.*] — Where the judgment of the supreme court of Canada has been reversed by the privy council, the proper manner of enforcing the judgment of the privy council is to obtain an order making it a rule of the supreme court of Canada. Where such judgment of the privy council was made a rule of court, the court ordered the repayment by one of the parties of costs received pursuant to the judgment so reversed. *Lewin* v. *Howe*, 14 S. C. R. 722.

III. Right to Order New Trial.

Jury—*Evidence.*] — Although the privy council have the right, if they think fit, to order a new trial on any ground, that power will not be exercised merely where the verdict is not altogether satisfactory, but only where the evidence so strongly preponderates against it as to lead to the conclusion that the jury have either wilfully disregarded the evidence, or failed to understand or appreciate it. *Connecticut Mutual Life Ins. Co. of Hartford* v. *Moore*, 6 App. Cas. 644.

PROBATE COURT (NEW BRUNSWICK).

Jurisdiction—*Trustees' Accounts.*] — A court of probate has no jurisdiction over accounts of trustees under a will, and the passing of accounts containing items relating to the duties of both executors and trustees is not, so far as the latter are concerned, binding on any court, and a court of equity, in a suit to remove the executors and trustees, may investigate such accounts again, and disallow charges of the trustees which were passed by the probate court. *Grant* v. *Maclaren*, 23 S. C. R. 310.

PROBATE—LETTERS OF.

See Executors and Administrators, V.

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PROHIBITION.

I. Generally—Grounds for, 5771.

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III. Damages, 5775.

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V. Part Prohibition, 5778.

I. Generally—Grounds for.

Error in Law.]—It is no ground for a prohibition that the Judge decided against law and good conscience, if he had jurisdiction in the case. *Siddall* v. *Gibson*, 17 U. C. R. 98.

——— *Construction of Statute.*] — Prohibition will not lie to a division court merely because the Judge has erred in his construction of a statute where he does not, by this error in construction, give himself jurisdiction he does not in law possess. Judgment in 19 O. R. 487 reversed. *In re Long Point Co.* v. *Anderson*, 18 A. R. 401.

The facts not being in dispute, prohibition to a division court was granted on the ground that the Judge had given an erroneous interpretation to 51 Vict. c. 23, s. 2 (O.), in holding that a magistrate's order thereunder was equivalent to the final judgment of a court, and in entertaining an action thereon for arrears of payments. *Re Sims* v. *Kelly*, 20 O. R. 291.

——— *Receiving Order.*]—The mother of the judgment debtor by her will empowered her executors, if in their discretion they should see fit, to pay the income of her estate, in part or in whole, to and for his benefit and advantage, at such time and in such manner and sums as they should see fit, leaving it to their option and discretion whether they should pay him any sum. An order was made in a division court action, after judgment, appointing the judgment creditor receiver to receive the amount of his judgment from the executors, whenever they should exercise their discretion to pay the judgment debtor the amount of the judgment, or any part thereof. Prohibition was granted against the enforcement of this order:—Held, following The Queen v. Judge of County Court of Lincolnshire, 20 Q. B. D. 167, that if the order was intended to interfere with the action of the executors, it should not have been made; and if it did not so interfere, it was nugatory. *Re McInnes* v. *McGaw*, 30 O. R. 38.

Error in Matter of Practice.]—Semble, the writ will not lie in regard to matters of practice in an inferior Court. *In re Clarke*, 2 C. L. J. 266.

Where the Judge has jurisdiction over the subject matter of the suit, prohibition will not go for irregularities in mere matters of practice. *In re McLean, McLeod, and McLeod*, 5 P. R. 467.

The affidavit on which to obtain an attaching order may be made by the attorney of the judgment creditor, or by a partner of the attorney. Semble, that proceedings on such order could not be prohibited on the ground that it was founded on a defective affidavit, that being a mere matter of practice. *In re Sato* v. *Hubbard*, 8 P. R. 445.

See Fee v. *McIlhargey*, 9 P. R. 329; *McKay* v. *Palmer*, 12 P. R. 219.

Evidence — *Examination of Judgment Debtor.*] — The refusal of evidence is not ground for prohibition. That the Judge has refused to allow the defendant, under examination upon judgment summons, to make explanations as to his dealing with money lent by and repaid to him after judgment, is not a ground for prohibition against proceeding upon an order for committal for making away with property. *Re Reid* v. *Graham*, 25 O. R. 573. See *S. C.*, 26 O. R. 1.

Excess of Jurisdiction.]—An order of prohibition is an extreme measure, to be granted summarily only in a very plain case of excess of jurisdiction on the part of a subordinate tribunal. *Re Cummings and County of Carleton*, 25 O. R. 607. See *S. C.*, 26 O. R. 1.

A writ of prohibition will not lie to prevent the execution of the sentence of an inferior tribunal where there has not been absence or excess of jurisdiction in the exercise of its powers. *Honan* v. *Bar of Montreal*, 30 S. C. R. 1.

Improper Amendment.] — Plaintiff having stated his claim, at the trial defendant objected to the jurisdiction, and judgment having been given against him, he afterwards obtained a new trial. In granting it, the Judge allowed the plaintiff to amend his claim, and as amended the claim was clearly within the jurisdiction: — Held, that the amendment being improper would form no ground for prohibition. *In re Higginbotham* v. *Moore*, 21 U. C. R. 326.

Jury—*Calling on Appeal — Evidence on Appeal.*]—After an appeal to the sessions from a conviction by a magistrate for selling liquor after 7 o'clock on Saturday evening, under 32 Vict. c. 32, s. 23 (O.), is confirmed, a prohibition to the sessions will not be granted. Under the above section it is irregular for the Judge who tries the case to call a jury, or to receive depositions of witnesses as evidence, but this is not ground for a prohibition. *In re Brown and Wallace*, 6 P. R. 1.

Matter within Jurisdiction of Inferior Court.]—After the recovery of judgment in a division court against the primary debtor and garnishee, but before the payment of the amount recovered, the debtor made an assignment for the benefit of creditors under R. S. O. 1897 c. 147, whereupon an application was made by the garnishee to the division court Judge for an order under s. 200 of R. S. O. 1897 c. 60, discharging the debt from the attachment, which was refused:—Held, that, the matter being one within the jurisdiction of the Judge, prohibition would not lie. *In re Dyer* v. *Evans*, 30 O. R. 637.

Question of Fact.]—Where the Judge found that money was handed over voluntarily by the defendant to a constable upon his arrest, and determined that it could be garnished: — Held, that the question whether the garnishee was indebted to the defendant

was a question of fact within the jurisdiction of the inferior court, and that prohibition would not lie. *Re Field* v. *Rice*, *Re Ford* v. *Rice*, 20 O. R. 309.

Question of Mixed Fact and Law.]—Held, reversing the judgment in 9 O. R. 274, that the status of C., as a person, or the assignee of a person, who registered a plan, was a question of law and fact combined for the county court Judge to determine upon C.'s application to him, under R. S. O. 1877 c. 111, s. 84, to amend the plan, and that his decision was not examinable in prohibition. *In re Chisholm and Town of Oakville*, 12 A. R. 225.

Raising Point in Inferior Court.]—Quære, the effect of an application to the inferior court for the relief afterwards sought in an application for a prohibition. *In re Clarke*, 2 C. L. J. 266.

——— *Costs.*]—A prohibition may go in the first instance without the question of jurisdiction being raised by any proceeding in the court below; but when a party applies without having raised the question there, he will not be allowed costs. *Nerlich* v. *Clifford*, 6 P. R. 212.

See In re Murphy and Cornish, 8 P. R. 420.

Territorial Jurisdiction of Division Court—*Transfer.*]—Under R. S. O. 1887 c. 51, s. 87, as amended by 52 Vict. c. 12, s. 5 (O.), either party in a division court action may, after notice disputing the jurisdiction has been duly given, apply to have the action transferred to another court. If no application be made, and if in fact there be jurisdiction, prohibition will not lie merely because the Judge has assumed that, as no application for a transfer had been made, he had jurisdiction i. e., has not tried the question of jurisdiction. But if, in fact, there be no jurisdiction, the objection still holds good, and prohibition will be granted. Judgment in 22 O. R. 583 affirmed. *In re Thompson* v. *Hay*, 20 A. R. 379.

Waiver.]—Remarks as to how far admitting jurisdiction waives the right to prohibition. *In re Cleghorn and Munn*, 2 C. L. J. 133.

An applicant for a prohibition for excess of jurisdiction, who had cross-examined witnesses, argued the case before the Judge, and taken no exception, was held precluded from objecting after judgment and execution. *In re Barrowes*, 18 C. P. 493.

See In re Clarke, 2 C. L. J. 266.

——— *Estoppel.*]—Where a Judge makes an order, which, though possibly erroneous in itself, is made at the request of one of the parties and is acted upon, a prohibition at the request of such party will be refused. *Richardson* v. *Shaw*, 6 P. R. 296.

II. Application for Prohibition.

Affidavits — *Intituling.*]—Affidavits to be used on an application for prohibition should be intituled in the court to which application is to be made, but not in any cause. *In re Miron* v. *McCabe*, 4 P. R. 171; *Siddall* v. *Gibson*, 17 U. C. R. 98.

The affidavits for a rule nisi for a prohibition, were intituled, "In the matter of a certain cause in the first division court of the counties of L. and A., in which E. A. M. is plaintiff, and B. D. is defendant:"—Held, that the intituling was unobjectionable. *In re Barrowes*, 18 C. P. 493.

Costs.] — Prohibition ordered without costs, as the objection to the jurisdiction had not been taken in the court below. *In re Murphy and Cornish*, 8 P. R. 420.

By R. S. O. 1877 c. 52, s. 2, a successful party on an application for a writ of prohibition is entitled to and should be awarded costs, unless the court in the proper exercise of a wise discretion can see good cause for depriving such party of them; and such party should not be deprived of costs unless there appear impropriety of conduct which induced the litigation, or impropriety in the conduct thereof. Under the circumstances of this case, reported 12 P. R. 450, the defendant was allowed costs of a successful motion for prohibition to a division court. *Re McLeod* v. *Emigh*, 12 P. R. 503.

Evidence—*Certificate of Judge.*]—Where on an application for a prohibition, the question of jurisdiction depended on a question of fact concerning which the affidavits were contradictory, and the parties had no desire to declare in prohibition, a certificate of the Judge as to the facts was held to govern. *In re Clarke*, 2 C. L. J. 266.

——— *Materials before Inferior Court.*]—Prohibition was refused where the applicant did not shew that all the materials on which the order which was alleged to have been made without jurisdiction was made, were before the court, so as to enable it to see clearly whether the county court Judge acted without jurisdiction, in which case only a prohibition should be granted. *In re Grass* v. *Allan*, 26 U. C. R. 123.

——— *Report of Judge.*]—On an application for prohibition to a county court, the Judge's notes at the trial should be accompanied by his report of the case. *Fleming* v. *Livingstone*, 6 P. R. 63.

Forum.]—A Judge in chambers has no power to order a prohibition restraining a Judge of a division court from proceeding with a plaint before him. *In re Kemp* v. *Owen*, 10 L. J. 269.

Staying Proceedings.] — Where on an application for a prohibition to the vice-chancellor sitting in bankruptcy as the court of review, the party about to be restrained applied for directions that the party moving should declare in prohibition, which was accordingly ordered, and afterwards the same party applied to stay further proceedings without costs, which was opposed by the plaintiff in prohibition, on the ground that he was proceeding to recover substantial damages—the court refused to stay the proceedings. *Regina* v. *Vice-Chancellor of Upper Canada*, 2 U. C. R. 92. See *Mittleberger* v. *Merritt*, 2 U. C. R. 413.

There is no authority in this country for a Judge to stay proceedings in the court below pending prohibition. *In re Miron* v. *McCabe*, 4 P. R. 171.

Time for Application.]—If the right to prohibition exists, it is optional with the defendant to apply at the outset of the division court proceedings, or he may wait till the latest stage of appeal, so long as there is anything to prohibit. *In re Brazill* v. *Johns*, 24 O. R. 209.

See In re Brown and Wallace, 6 P. R. 1, *ante* I.

III. Damages.

In a proceeding in prohibition the plaintiff can only recover nominal damages. For substantial damages, he must proceed by action after the entry of judgment quod set prohibitio. *Mittleberger* v. *Merritt*, 2 U. C. R. 415.

IV. Particular Tribunals.

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

See Re Township of Anderdon and Township of Colchester North, 21 O. R. 476; *Re Cummings and County of Carleton*, 25 O. R. 607, 26 O. R. 1.

——— *Inter-provincial Arbitration.*]—The jurisdiction of the courts of one of the litigant Provinces to interfere to stay the proceedings on the arbitration under the B. N. A. Act, s. 142, by writ of prohibition, considered, and held by the arbitrators that there is none. *Re Ontario and Quebec*, 6 C. L. J. 212.

Bar Council.] — See *Honan* v. *Bar of Montreal*, 30 S. C. R. 1, *ante* I.

County Court — *Ascertainment of Amount.*]—The plaintiff claimed $94.88, annexing to his summons particulars of claim, shewing an account for goods for $384.23, reduced by credits to the sum sued for; but nothing had been done by the parties to liquidate the amount or ascertain the balance, except a small amount admitted to have been paid, and a credit of $33 given for some returned barrels, but which still left an unsettled balance of upwards of $300:—Held, not within the jurisdiction, and a prohibition was ordered. *In re Judge of County Court of United Counties of Northumberland and Durham*, 19 C. P. 299.

——— *Inquiry to Ascertain Jurisdiction.*]—The Judge of a county court has the right, at the trial of a case, where the jurisdiction of the court is denied, to inquire into the facts so as to ascertain whether or not there be jurisdiction: *e.g.*, to inquire whether there has been a settlement of accounts between the parties. Until such inquiry has been made, prohibition cannot be granted. *In re Dixon and Snarr*, 6 P. R. 336.

——— *Striking out Part of Claim—Giving Jurisdiction.*]—A county court Judge at the trial, upon the application of plaintiff's counsel, ordered a count of the declaration and all pleadings relating thereto to be struck out, because they ousted his jurisdiction:—Held, that he had power to do so; and that if a prohibition had been applied for before trial, it would only have been granted as to that count. *Fitzsimmons* v. *McIntyre*, 5 P. R. 119.

See, also, County Courts.

County Court Judge—*Amendment of Plan.*]—*See In re Chisholm and Town of Oakville*, 12 A. R. 225.

——— *Committal of Insolvent Debtor.*]—Where a county court Judge made an order committing a person for unsatisfactory answers upon his examination as an insolvent debtor under R. S. O. 1897 c. 147, s. 34:—Held, that there was no jurisdiction to make such an order, and the remedy was by motion for prohibition against the order. *In re Rochon*, 31 O. R. 122.

——— *Division Court in Another County.*]—See *In re Wilson* v. *McGuire*, 2 O. R. 118.

——— *Municipal Elections—Quo Warranto.*]—By s. 219 of the Municipal Act, R. S. O. 1897 c. 223, jurisdiction is given respectively to a Judge of the high court, the senior or officiating Judge of the county court, and the master in chambers, to try the validity of a municipal election, and by s. 227, when there are more motions than one, all the motions shall be made returnable before the Judge who is to try the first of them. Two motions by different relators to try the validity of the same election were made returnable, the first of them before the master in chambers and the other before the county court Judge, who, notwithstanding objections, proceeded with the motion before him and decided that the proceedings before the master in chambers were collusive, when the county court Judge was prohibited from further proceeding by an order made by a Judge of the high court sitting in chambers:—Held, that the county court Judge having equal and concurrent jurisdiction in respect of the matter with the other named officials, a Judge of the high court sitting in chambers could not under the circumstances prohibit him from proceeding with the trial. Semble, that the county court Judge, who, without knowledge of the prior proceedings, had granted a fiat for like proceedings, had jurisdiction on the return thereof to inquire whether such prior proceedings were collusive, and if so to disregard them. *In re Regina ex rel. Hall* v. *Gowanlock*, 29 O. R. 435.

——— *Municipal Investigation — Persona Designata.*]—The council of the city of Toronto, under the provisions of R. S. O. 1887 c. 184, s. 477, passed a resolution directing a county court Judge to inquire into dealings between the city and persons who were or had been contractors for civic works, and ascertain if the city had been defrauded out of public moneys in connection with such contracts; to inquire into the whole system of tendering, awarding, carrying out, fulfilling, and inspecting contracts with the city; and to ascertain in what respect, if any, the system of the business of the city in that respect was defective. G., who had been a contractor with the city and whose name was mentioned in the resolution, attended before the Judge

and contended that the inquiry as to his contracts should proceed only on specific charges of malfeasance or misconduct, and the Judge refusing to order such charges to be formulated, he applied for a writ of prohibition:—Held, affirming the judgment in 16 A. R. 452, which reversed that in 16 O. R. 275, that the county court Judge was not acting judicially in holding this inquiry; that he was in no sense a court and had no power to pronounce judgment imposing any legal duty or obligation on any person; and he was not, therefore, subject to control by writ of prohibition from a superior court. *Godson v. City of Toronto*, 18 S. C. R. 36.

——— *Partition Proceedings.*]—See *Murcar v. Bolton*, 5 O. R. 164.

——— *Removal of Assignee for Creditors—Persona Designata.*]—A Judge of a county court, acting under the authority of 48 Vict. c. 26, s. 6 (O.), removed an assignee for creditors and substituted another assignee. The first assignee, as alleged, refused to deliver over the keys of the place of business of the insolvent to the second assignee, and the Judge made an order for the issue of a writ of attachment against the first assignee for contempt:—Held, that the Judge, in acting under the statute, was not exercising the power of the county court, but an independent statutory jurisdiction as persona designata, and had therefore no power to direct the issue of a writ of attachment; and prohibition was ordered. *Re Pacquette*, 11 P. R. 463.

Division Court—*Coverture.*]—Held, that under the facts stated in this case, no ground was shewn for a prohibition to the division court; that the suit was clearly within the jurisdiction; and that the defence of coverture should have been set up in the court below. *Read v. Wedge*, 20 U. C. R. 456.

——— *Territorial Jurisdiction — Giving Jurisdiction.*]—Where the holder of a promissory note, payable to "A. B., or bearer," indorsed it over to a third party:—Held, that under C. S. U. C. c. 19, s. 71, an action might be brought against the maker and indorser in the division court for the division in which the indorser resided; and that on a motion for a writ of prohibition, the question whether or not the indorsement was made for the purpose of giving jurisdiction could not be inquired into. *Bridges v. Douglas*, 13 C. L. J. 358.

——— *Committal of Judgment Debtor—Government Official.*]—A county court Judge has jurisdiction under R. S. O. 1897 c. 60, s. 247, as amended by 61 Vict. c. 15, s. 4 (O.), in an action in a division court, after the examination of, and an order for payment by, a judgment debtor who is a government official, to commit him for default in payment, although he has no other source of income than his official salary. Prohibition refused. *Re Hyde v. Cavan*, 31 O. R. 189.

See, also, DIVISION COURTS.

Justice of the Peace.]—A writ of prohibition may be issued to a justice of the peace to prohibit him from exercising a jurisdiction which he does not possess. *Re Chapman and City of London, Re Chapman and London Water Commissioners*, 19 O. R. 33.

See *Company of Adventurers of England v. Jeannette*, 23 S. C. R. 415.

——— *Issue of Distress Warrant.*]—Prohibition will not lie to restrain the issue and enforcement of a distress warrant by a justice of the peace upon a conviction regular on its face, and within the jurisdiction of the justice making it, such acts being ministerial, not judicial. Judgment in 26 O. R. 685 reversed. *Regina v. Coursey*, 27 O. R. 181.

License Commissioners.] — See *Re Thomas's License*, 26 O. R. 448.

Minister of Agriculture—*Inquiry under Patent Act, 1872.*]—See *In re Bell Telephone Co. and Telephone Manufacturing Co. and Minister of Agriculture*, 7 O. R. 695.

Municipal Officers — *Assessment and Taxes.*]—See *Coté v. Morgan*, 7 S. C. R. 1.

Police Magistrate—*Preliminary Inquiry—Nuisance.*]—See *Regina v. City of London*, 32 O. R. 326.

——— *Summary Proceedings.*]—A prosecution under s. 448 of the criminal code for selling goods to which a false trade description is applied must be by indictment. Prohibition granted to restrain summary proceedings before a magistrate. *Regina v. T. Eaton Co.*, 29 O. R. 591.

——— *Territorial Jurisdiction.*]—See *Regina v. Lee*, 15 O. R. 353.

Revising Officers.] — See *Re North Perth, Hessin v. Lloyd*, 21 O. R. 538.

Sessions—*Appeal from Order of Dismissal.*]—Held, that the prosecutor of a complaint cannot appeal from the order of a magistrate dismissing the complaint, as, by R. S. O. 1877 c. 74, s. 4, the practice of appealing in such a case is assimilated to that under 33 Vict. c. 47 (D.), which confines the right of appeal to the defendant. A prohibition was therefore ordered, but without costs, as the objection to the jurisdiction had not been taken in the court below. *In re Murphy and Cornish*, 8 P. R. 420. See 51 Vict. c. 45, s. 7 (D.)

——— *Costs.*]—The court having granted a prohibition to the sessions against proceeding further with an appeal from a conviction, refused a mandamus to the clerk of the peace to certify the non-payment of costs, under C. S. U. C. c. 103, s. 67. *In re Coleman*, 23 U. C. R. 615.

——— *Motion after Conviction Affirmed.*]—See *In re Brown and Wallace*, 6 P. R. 1.

Special Sessions of Peace — *Jurisdiction—Quebec License Act—Intra Vires.*]—*See Molson v. Lambe*, 15 S. C. R. 253.

Surrogate Court Judge—*Grant of Administration.*]—See *Re O'Brien*, 3 O. R. 326.

V. PART PROHIBITION.

Judgment—*Excessive Amount.*] — Where a division court has jurisdiction at the time of the institution of an action, but, by the addition of interest accruing during its pendency, judgment is given for an amount beyond the jurisdiction of the court, prohibition

will be granted until the Judge amends the judgment by striking out the excess; or a part prohibition will be issued to prevent the enforcement of judgment for the excess. *Re Elliott* v. *Biette*, 21 O. R. 595.

Where in an action for breach of contract judgment was given in a division court for $108.63:—Held, that prohibition should go only as to the excess over $100. *Trimble* v. *Miller*, 22 O. R. 500.

Severable Claim — *Interest.*] — The amount claimed in a division court plaint was $109.73, of which $14.73 was for interest. The claim for interest being severable, the prohibition was limited to the excess over $100. Trimble v. Miller, 22 O. R. 500, followed. *Re Lott* v. *Cameron*, 29 O. R. 70.

See DIVISION COURTS, XIV.—INTOXICATING LIQUORS—SESSIONS, III. 6.

PROMISSORY NOTES.

See BILLS OF EXCHANGE—INSURANCE, III. 8, V. 8.

PROMOTERS.

See COMPANY, IV.

PROOF OF CLAIMS.

See BANKRUPTCY AND INSOLVENCY, I. 3 (b) —COMPANY, X. 2.

PROPERTY AND CIVIL RIGHTS.

See CONSTITUTIONAL LAW, II. 22.

PROSTITUTE.

See PUBLIC MORALS AND CONVENIENCE, II.

PROVINCIAL ARBITRATIONS.

See CONSTITUTIONAL LAW, II. 3.

PROVINCIAL FISHERIES.

See CONSTITUTIONAL LAW, II. 21.

PROVINCIAL LAND SURVEYOR.

See PLANS AND SURVEYS, IX.

PROVINCIAL LEGISLATURE—POWERS OF.

See CONSTITUTIONAL LAW, II. 1—INTOXICATING LIQUORS, I.

PROVINCIAL RIGHTS.

See CROWN, II. 3.

PROVINCIAL SUBSIDIES.

See CONSTITUTIONAL LAW, II. 1.

PROXIMATE CAUSE.

See NEGLIGENCE, XII.

PUBLIC ACTS.

See STATUTES, XIV.

PUBLIC BUILDINGS.

See MUNICIPAL CORPORATIONS, XXVI.

PUBLIC DOCUMENTS.

See EVIDENCE, I. 2, XV. 5.

PUBLIC HEALTH.

Board of Health—*Corporation—Liability for Services of Physician—Mandamus.*] —Section 49 of the Public Health Act, R. S. O. 1887 c. 205, provides that "the treasurer of the municipality shall forthwith upon demand pay out of any moneys of the municipality in his hands the amount of any order given by the members of the local board, or any two of them, for services performed under their direction by virtue of this Act." A physician recovered judgment in a division court against a township local board of health, sued as a corporation, for services performed in a smallpox epidemic. It appeared that the physician had been appointed medical health officer of the municipality by the council, but that before suing the board he had brought an action against the municipal corporation for his services, in which he failed. Upon motion by the physician for a mandamus under s. 49 to compel the members of the board to sign an order upon the treasurer of the municipality for the amount of the judgment recovered: — Held, that, although it might be difficult to conclude that a board of health is constituted a corporation by the Act, yet the judgment of the division court practically decided that this board might be sued as such, and, not being in any way impeached, it could not be treated as a nullity. As there appeared to be no

other remedy, the applicant was entitled to the mandamus. *Re Derby and Local Board of Health of South Plantagenet*, 19 O. R. 51.

——— *Delegation to, of Power to Cancel License.*]—A municipal corporation cannot delegate to a board of health power to cancel a license which it may have under 62 Vict. (2) c. 26, s. 37 (2) (O.). *Re Foster and City of Hamilton*, 31 O. R. 292.

——— *Physician—Dismissal—Remedy.*]—Section 67 of the Act by which municipal corporations were established in Nova Scotia, 42 Vict. c. 1, giving them "the appointment of health officers . . and a board of health," with the powers and authorities formerly vested in courts of sessions, does not repeal c. 29 of R. S. N. S., 4th ser., providing for the appointment of boards of health by the Lieutenant-Governor in council. A board of health, appointed by the executive council by resolution, employed M., a physician, to attend upon small-pox patients in the district "for the season" at a fixed rate of remuneration per day. Complaint having been made of the manner in which M.'s duties were performed, he was notified that another medical man had been employed as a consulting physician, but, refusing to consult with the new appointee, he was dismissed from his employment. He brought an action against the municipality, setting forth in his statement of claim the facts of his engagement and dismissal, and claiming payment for his services up to the date at which the last small-pox patient was cured, and special damages for loss of reputation by the dismissal. The Act R. S. N. S., 4th ser., c. 29, s. 12, allows the board of health to incur reasonable expenses, which are defined by 37 Vict. c. 6, s. 1 (N. S.), to be services performed and bestowed and medicine supplied by the physicians in carrying out its provisions, and makes such expenses a district, city, or county charge, to be assessed by the justices, and levied as ordinary county rates:—Held, per Fournier, Gwynne, and Taschereau, JJ., affirming the judgment of the court below, that the contract with M. was to pay him $6.50 per day so long as small-pox should prevail in the district during the season; that his dismissal was wrongful; and the fulfilment of the contract could be enforced against the municipality by action. Per Ritchie, C. J., and Strong, J.—There was sufficient ground for the dismissal of M. Assuming, however, his dismissal to have been unjustifiable, M.'s only remedy would have been by mandamus to compel the municipality to make an assessment to cover the expense incurred. But the claim being really one for damages for wrongful dismissal, it did not come within the "reasonable expenses" which may be incurred by a board of health and made a charge on the county, and the municipality was, therefore, not liable. Per Patterson, J.—The proper remedy for the recovery of the expenses mentioned in s. 12 is by action, and not by mandamus to compel an assessment; but a claim for damages for wrongful dismissal does not come within the section, and is not made a county charge. *County of Cape Breton* v. *McKay*, 18 S. C. R. 639.

——— *Spread of Infectious Disease—Liability.*]—The directions of s. 84 of the Public Health Act, R. S. O. 1887 c. 205, are imperative. Where, instead of acting as directed in that section, by isolating and taking care of a person suffering from an infectious disease, the members of a local board of health send him into an adjoining municipality, they are personally liable to repay to that municipality moneys reasonably expended in caring for him and preventing the spread of the disease. *Township of Logan* v. *Hurlburt*, 23 A. R. 628.

Medical Health Officer.]—A medical health officer is not an "employee" within the meaning of R. S. O. 1877 c. 47, s. 125. *Re Macfie* v. *Hutchinson*, 12 P. R. 167.

Summary Conviction—*By-law.*]—Held, that the unloading of manure from a car on a certain part of railway premises into waggons, to be carried away, came within the terms of a by-law amending the by-law appended to the Public Health Act, R. S. O. 1887 c. 205, and prohibiting the unloading of manure on said part of said premises; that the use of the word "manure" in the amending by-law was not of itself objectionable; and that it was not essential to shew that the manure might endanger the public health. A conviction for unloading a car of manure on the premises, as contrary to the by-law, was therefore affirmed. *Regina* v. *Redmond*, *Regina* v. *Ryan*, *Regina* v. *Burk*, 24 O. R. 331.

——— *By-law—Appeal to Sessions.*]—Where there is a conviction for an offence under the by-law set out in the schedule to the Public Health Act, R. S. O. 1887 c. 205, as distinguished from any of the provisions in the Act itself, an appeal will lie from such convictions to the sessions, notwithstanding s. 112, which has no application. *Regina* v. *Courcey*, 26 O. R. 685. Reversed on other grounds, 27 O. R. 181.

——— *By-law — Plumbing in Houses—Agent of Owner.*] — By the sixth clause of a city by-law passed under the Public Health Act, R. S. O. 1887 c. 205, it was provided that before proceeding to construct, reconstruct, or alter any portion of the drainage, ventilation, or water system of a dwelling-house, &c., "the owner or his agent constructing the same" should file in the engineer's office an application for a permit therefor, which should be accompanied with a specification or abstract thereof, &c.; and by the eleventh clause, that, after the approval of such plan or specification, no alteration or deviation therefrom would be allowed, except on the application of the "owner or of the agent of the owner" to the city engineer. By s. 22 of the Public Health Act, "owner" is defined as meaning the person for the time being receiving the rents of the lands on his own account, or as an agent or trustee of any such person who would so receive the same if such lands and premises were let:—Held, that the agent intended by the Act and coming within the terms of the by-law, meant a person acting for the owner as trustee, or in some such capacity, &c., and did not include a plumber employed by the owner to reconstruct the plumbing in his dwelling-house. *Regina* v. *Watson*, 19 O. R. 646.

See Regina v. *Rowlin*, 19 O. R. 199.

See MUNICIPAL CORPORATIONS, XXXI.

PUBLIC MORALS AND CONVENIENCE.

I. Bawdy-Houses,

1. *Convictions for Keeping*, 5783.

2. *Conviction of Inmates and Frequenters*, 5785.

II. Prostitutes and Vagrants, 5785.

III. Seduction, 5787.

IV. Swearing, 5788.

I. Bawdy-Houses.

1. *Convictions for Keeping.*

Appeal to Sessions—*Amendment of Conviction.*]—See *Regina* v. *Smith*, 35 U. C. R. 518.

Certainty—*Place—Adjudication of Forfeiture.*]—Upon a motion on the return of a habeas corpus to discharge the prisoner, who was convicted of keeping a house of ill-fame:—Held, that the conviction was bad on its face for uncertainty in not naming a place where the offence was committed. Held, also, that it was defective because it did not contain an adjudication of forfeiture of the fine imposed. *Regina* v. *Cyr*, 12 P. R. 24.

——— *Time — Place — Evidence.*] — See *Regina* v. *Williams*, 37 U. C. R. 540, *ante* (Justice of the Peace.)

——— *Variance—Commitment.*]—The prisoner was convicted by the police magistrate for the city of Toronto, for that she "did on," &c., "at the said city of Toronto, keep a common disorderly bawdy house on Queen street, in the said city," and committed to gaol at hard labour for six months. A habeas corpus and certiorari issued: in return to which the commitment, conviction, information, and depositions were brought up. On application for her discharge:—Held, no objection that the commitment charged that the prisoner "was the keeper of," &c., and the conviction "that she did keep," both differing from the statute, which designates the offence as "keeping any disorderly house," &c.; for all these expressions convey the same idea. Nor that the conviction was not sustained by the information, the latter being that defendant was the keeper of a disorderly house, and the former for keeping a common disorderly bawdy house; for the commitment would not be void because of a variance between the original information and the conviction made after hearing evidence. Nor that the offence of keeping a common disorderly bawdy house was not sufficiently certain, for the legal meaning of the last two words is clear, and if keeping a disorderly house be no offence, the addition of that would be only surplusage. *Regina* v. *Munro*, 24 U. C. R. 44.

Fine—*Costs—Amount of.*]—The Act 32 & 33 Vict. c. 32, s. 17 (D.), provides that the magistrate may condemn the accused to pay a fine not exceeding, with the costs in the case, $100:—Held, that the meaning of this is, that the amount of the costs in the case shall be deducted from $100, and that the balance or difference shall be the utmost limit of the fine; and that the conviction in this case, being to pay the sum of $100 without costs, was therefore bad. *Regina* v. *Cyr*, 12 P. R. 24.

——— *Payment to Magistrate.*]—The conviction and warrant of commitment ordered the defendant to be imprisoned for six months, and to pay within the said period to said magistrate the sum of $100 without costs, to be applied according to law, and in default of payment before the termination of said period, further imprisonment for six months:—Held, bad, for uncertainty in requiring the fine to be paid to the magistrate personally, instead of to the gaoler. *Regina* v. *Newton*, 11 P. R. 98.

Husband and Wife—*Joint Conviction.*]—There may be joint conviction against husband and wife for keeping a house of ill-fame; the keeping has nothing to do with the ownership of the house, but with the management of it. Regina v. Williams, 10 Mod. 63, and Rex v. Dixon, *ib.* 335, followed. *Regina* v. *Warren*, 16 O. R. 590.

Imprisonment.]—A conviction, under C. S. C. c. 105, for keeping a house of ill-fame, or being an inmate of such a house, adjudicating that the accused should pay a fine of $50 forthwith, and be imprisoned for three months unless the fine be sooner paid, is not warranted by s. 16. *In re Slater*, 9 L. J. 21.

A conviction for keeping a house of ill-fame under 32 & 33 Vict. cc. 28 and 32 (O.) is bad where a fine and costs are imposed and in default imprisonment. *Regina* v. *Bell*, 13 C. L. J. 200.

——— *Distress.*]—A conviction under 32 & 33 Vict. c. 28 (D.), for keeping a house of ill-fame, ordered payment of a fine and costs, to be collected by distress, and in default of distress ordered imprisonment:—Held, good. *Regina* v. *Walker*, 7 O. R. 186.

——— *Distress—Certiorari.*] — A conviction for keeping a disorderly house and house of ill-fame:—Held, bad for awarding, after the adjudication of a penalty by fine and imprisonment, further imprisonment in default of sufficient distress or of non-payment of the fine. Held, also, that this was not a mere formal defect within s. 30 of 32 & 33 Vict. c. 32 (D.) Held, also, that the effect of s. 28 was not to take away the writ of certiorari. *Regina* v. *Richardson*, 11 P. R. 95.

Order—*Absence of Adjudication.*] — The defendant was convicted under proceedings taken under 32 & 33 Vict. c. 32 (D.), not 32 & 33 Vict. c. 28 (D.), for keeping a house of ill-fame. The conviction merely "ordered" but did not "adjudge" any imprisonment or any forfeiture of the fine imposed:—Held, bad, as substituting the personal order of the magistrate for a condemnation or adjudication. *Regina* v. *Newton*, 11 P. R. 98.

Satisfactory Account of Accused.]—The conviction and warrants charged that plaintiff "did unlawfully keep a certain bawdy house and house of ill-fame for the resort of prostitutes, and is a vagrant within the meaning of the statute," &c., not alleging that she

did not give a satisfactory account of herself:—Held, sufficient. Regina v. Arscott, 9 O. R. 541, dissented from. *Arscott* v. *Lilley*, 11 O. R. 153.

Sufficiency of Evidence — *Reference to Statute.*]—On an application to quash a conviction of the defendant by the police magistrate for the city of Toronto, for keeping a house of ill-fame, there being evidence upon which the magistrate could convict, the court refused to interfere. In the conviction the offence was stated to be against the statute in such case made and provided:—Held, that if not constituted an offence under 32 & 33 Vict. c. 32 (D.), the reference to the statute might be treated as surplusage, and the conviction sustained under the common law; but that the reference to the statute might be supported, because s. 17 imposes a punishment in some respects different from the common law. *Regina* v. *Flint*, 4 O. R. 214.

See Regina v. *Arscott*, 9 O. R. 541.

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2. Convictions of Inmates and Frequenters.

Frequenter—*Offence* — *Costs.*] — Held, that a conviction under 32 & 33 Vict. c. 32, s. 2, s-s. 6 (D.), for being an unlawful (instead of an habitual) frequenter of a house of ill-fame, and which adjudged the payment of costs, which is unauthorized by the statute, must be quashed. That section makes the being such habitual frequenter, a substantial offence, punishable as in s. 17, and does not merely create a procedure for trial and punishment. *Regina* v. *Clark*, 2 O. R. 523.

Inmate—*Satisfactory Account.*]—Upon a charge against an inmate of a house of ill-fame under s.-s. (j.) of s. 8 of R. S. C. c. 157, it is not necessary to shew that the accused was called upon to account for her presence in the house before arrest; the concluding words of the sub-section, "not giving a satisfactory account of themselves," are to be read as applying only to frequenters, and not to keepers or inmates. Regina v. Levecque, 30 U. C. R. 569, distinguished. *Regina* v. *Remon*, 16 O. R. 560.

II. Prostitutes and Vagrants.

Conviction — *Jurisdiction of Justice.*]—The prisoner had been convicted by one justice of the peace of being a vagrant under 32 & 33 Vict. c. 28 (D.), which requires the conviction to be "before any stipendiary or police magistrate, mayor, or warden, or any two justices of the peace:"—Held, that the conviction was bad, as it did not appear that the justice was a police magistrate. Quære, whether the conviction would have been good if it had appeared in the warrant that he was acting for the police magistrate under 36 Vict. c. 48, s. 308 (O.), or whether two justices would not have been required. *Regina* v. *Clancey*, 7 P. R. 35.

——— *Jurisdiction of Justices—Imprisonment.*]—By s.-s. 2 of s. 8 of R. S. C. c. 157, any loose, idle, or disorderly person, or vagrant, shall upon summary conviction before two justices of the peace be deemed guilty of a misdemeanour, and liable to a fine not exceeding $50, or to imprisonment not exceeding six months, or to both. By s. 62 of R. S. C. c. 178, the justices are authorized to issue a distress warrant for enforcing payment of a fine; and, if issued, to detain the defendant in custody, under s. 62, until its return; and, if the return is "not sufficient distress," then to imprison for three months. Two justices of the peace for the city of Toronto, in the absence of the police magistrate for the said city, convicted the defendant for an offence under said Act, and imposed a fine of $50, and, in default of payment forthwith, directed imprisonment for six months unless the fine were sooner paid:—Held, that under the said sub-section the justices had jurisdiction to adjudicate in the matter; and that it was not necessary to consider the effect of an agreement entered into between the police magistrate and one of the justices to assist him in the trial of offences. Held, also, that the conviction was bad, for under R. S. C. c. 157 there was no power to award imprisonment as an alternative remedy for nonpayment of the fine; while under R. S. C. c. 178, imprisonment could only be awarded after a distress has been directed and default therein; and furthermore the imprisonment in such case could only be for three months. *Regina* v. *Lynch*, 19 O. R. 664.

Disorderly Conduct — *Disturbance — Drunkenness.*]—The Act R. S. C. c. 157, s. 8 (f.), provides that "all persons who cause a disturbance in any street or highway by screaming, swearing, or singing, or by being drunk, or by impeding or incommoding peaceable passengers . . are loose, idle, or disorderly persons within the meaning of this section." The defendant was convicted and committed for that he "unlawfully did cause a disturbance in a public street . . by being drunk, and then was a vagrant, loose, idle, and disorderly person within the meaning of the Act respecting vagrants." The evidence disclosed that the defendant was drunk, and that he was guilty of impeding and incommoding peaceable passengers, but it negatived his causing a disturbance in the street by being drunk:—Held, that no offence of the nature described in the conviction and commitment was committed by the defendant, and an order was made for his discharge. *Regina* v. *Daly*, 12 P. R. 411.

Means of Maintenance—*Character.*]—The defendant registered his name and address at the American Hotel, Toronto, and on the same day was arrested at a railway station, having been pointed out to the police by some of the railway officials as a suspicious character. On his person were found two cheques, one for $700 the other for $900, which were sworn to be such as are used by "confidence men," a mileage ticket nearly used up in favour of another person, and $8 in cash. He offered no explanation of the cheques or the ticket, and gave no information about himself:—Held, that the Vagrant Act did not warrant his arrest, much less his conviction. Before a person can be convicted of being a vagrant of the first class named in the Act ("all idle persons who, not having visible means of maintaining themselves, live without employment") he must have acquired in some degree a character which brings him within it as an idle person, who having no visible means of maintaining himself, i. e., not "paying his

way," or being apparently able to do so, yet lives without employment. *Regina* v. *Bassett*, 10 P. R. 386.

——— *Crime—Evidence of Reputation.*]—The defendant was summarily convicted under 32 & 33 Vict. c. 28, s. 1 (D.), as "a person who, having no peaceable profession or calling to maintain himself by, but who does, for the most part, support himself by crime, and then was a vagrant," &c. The evidence shewed that the defendant did not support himself by any peaceable profession or calling, and that he consorted with thieves and reputed thieves; but the witnesses did not positively say that he supported himself by crime: —Held, that it was not to be inferred that the defendant supported himself by crime; that to sustain the conviction there should have been statements that witnesses believed he got his living by thieving, or by aiding and acting with thieves, or by such other acts and means as shewed he was pursuing crime. *Regina* v. *Organ*, 11 P. R. 497.

Satisfactory Account of Accused — *Evidence—Place of Offence.*] — A conviction under 32 & 33 Vict. c. 28 (D.), for that V. L. was, in the night time of the 24th February, 1870, a common prostitute, wandering in the public streets of the city of Ottawa, and not giving a satisfactory account of herself, contrary to this statute:—Held, bad, for not shewing sufficiently that she was asked, before or at the time of being taken, to give an account of herself, and did not do so satisfactorily. Semble, proceedings having been taken under 29 & 30 Vict. c. 45 (D.), that the evidence might be looked at; and if so, it was plainly insufficient, in not shewing that the place in which she was found was within the statute, or that she was a common prostitute. *Regina* v. *Levecque*, 30 U. C. R. 509.

——— *Statute—Construction of.*] — The Vagrant Act, 32 & 33 Vict. c. 28 (D.), declares certain persons or classes of persons to be vagrants, amongst others, "all common prostitutes or night walkers wandering in the fields, public streets, highways, lanes, or places of public meeting, or gathering of people, not giving a satisfactory account of themselves, all keepers of bawdy houses and houses of ill-fame, or houses for the resort of prostitutes, and persons in the habit of frequenting such houses, not giving a satisfactory account of themselves;" and that they "shall upon conviction be guilty of a misdemeanour, and punishable," &c.: — Held, that the Act does not, on its true construction, declare that being a prostitute, &c., makes such person liable to punishment as such; but only those who, when found at the places mentioned, under circumstances suggesting impropriety of purpose, on request or demand are unable to give a satisfactory account of themselves. *Regina* v. *Arscott*, 9 O. R. 541. But see *Arscott* v. *Lilley*, 11 O. R. 153, *ante* I. 1.

III. Seduction.

Abduction and Seduction of Young Girl—*Distinct Offences.*]—The prisoner was convicted under R. S. C. c. 162, s. 44, the Act relating to "offences against the person," for unlawfully taking an unmarried girl under the age of sixteen years out of the possession and against the will of her father. On the same day the prisoner was again tried and convicted under R. S. C. c. 157, s. 3, the Act relating to "offences against public morals," for the seduction of the said girl, being previously of chaste character, and between the ages of twelve and sixteen years of age:—Held, that the offences were several and distinct, and that a conviction on the first indictment did not preclude a conviction on the second one. *Regina* v. *Smith*, 19 O. R. 714.

See also Seduction.

IV. Swearing.

Public Place.] — A city by-law enacted that no person should make use of any profane swearing, obscene, blasphemous, or grossly insulting language, or be guilty of any other immorality or indecency, in any street or public place:—Held, that the object of the by-law was to prevent an injury to public morals, and applied to a street, or a public place ejusdem generis with a street, and not to a private office in the custom house. *Regina* v. *Bell*, 25 O. R. 272.

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QUIETING TITLES ACT.

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I. APPLICATION AND PETITION.

Affidavit — *Schedule.*]—The schedule of particulars referred to in the petitioner's affidavit should be identified by the commissioner in like manner as any other exhibit.. *Re Dickson*, 3 Ch. Ch. 352.

——— *Who should Make.*]—Although it is not imperative that the affidavit in proof of title should be made by the petitioner, some valid reason should be given why it is not so made when such is the case. *Re Rundel*, 4 Ch. Ch. 71.

Amendment of Petition — *Plan.*]—Where, pending the investigation of the title, the petitioner laid out the land in village lots and registered a plan:—Held, that the petition must be amended in accordance with the plan. *Re Morse*, 8 P. R. 475.

Certificate of Counsel.]—The certificate of counsel in support of a petition should follow the language of s. 8, and state to the effect that he has investigated the title, &c. A certificate of counsel that he had corresponded with the agent of the petitioner on the subject of the various matters set forth in the petition, and believed them to be true:—Held, insufficient. *Re Dickson*, 3 Ch. Ch. 352.

Cross-petition — *Evidence.*]—A contestant under the Quieting Titles Act must file a petition in his own name before a certificate can issue in his favour, but he may use on such petition the evidence adduced on the petition in which he was contestant. *Re Dunham*, 8 P. R. 472.

Service of Petition — *Infants.*]—In a proceeding by petition under the Quieting Titles Act service on the official guardian is good service upon infants who are required to be notified of the proceedings. *Re Murray*, 13 P. R. 367.

Status of Petitioner — *Consent.*]—Section 1 of the Act does not apply to the case of a vendee who has contracted to purchase, but who has not completed his contract. Where such a vendee filed a petition without first obtaining the consent of the vendor, the court, in the exercise of its discretion under s. 2, refused to entertain the petition. *Re Brown*, 3 Ch. Ch. 158.

Where a petitioner under the Quieting Titles Act has only an estate in fee in remainder, the consent of the tenant for life must be obtained before the petition can be filed. *Re Pelton*, 8 P. R. 470.

——— *Married Woman—Next Friend.*]—A married woman applying under this Act must proceed by next friend, notwithstanding the provision of s. 41 of 29 Vict. c. 2. *Re Howland*, 4 Ch. Ch. 74.

But it was held otherwise in *Re McKim*, 6 P. R. 190.

Substitution of Petitioners.]—Persons to whom land has been conveyed after the registration of the certificate of the filing of the petition, and pending the investigation of the title, must be substituted as petitioners. *Re Cummings*, 8 P. R. 473.

See Re West-half Con. 6, *Mono*, 6 P. R. 150, *post* V. 4.

II. CERTIFICATE.

Erroneous Issue — *Motion — Notice.*]—Where an erroneous certificate had been issued but not registered, and no deed or incumbrance since made affecting the land, a motion on petition that a proper certificate issue was granted ex parte. *Bradley* v. *McDonell*, 2 Ch. Ch. 274.

Ex Parte Issue—*False Affidavit—Costs.*]—A certificate granted ex parte on a false affi-

davit was set aside with costs, notwithstanding the contention that the notice as to the service of which the false allegation was made would not have been directed had the full facts been before the court; the court declining to enter into any question of merits. *Re Ashford*, 3 Ch. Ch. 77.

Form of.] — Mowat, V.-C., expressed his intention to direct the referee in future to draw up orders in similar terms to reports of masters; and that he "find and certify" instead of "adjudging and determining." *Re Referee*, 2 Ch. Ch. 22.

See Re Gordon, 4 C. L. J. 96.

III. Claims of Contestants.

Adverse Claim—*Adjudication on—Time—Consent.*]—Where a person holding a sheriff's deed put in an adverse claim, it was held that the referee could by consent report thereon before he was ready to decide on the petitioner's title, but should not do so without consent; that the petitioner must make out his title; and that until he has done so he cannot, generally, demand an adjudication on an adverse claim. *In re Cameron*, 14 Gr. 612.

Costs of Former Proceedings Unpaid.]—In prosecuting a claim to land before the referee of titles, a contestant, served with notice, will not be prevented from asserting his rights until payment of costs of proceedings instituted by him against the claimant, in respect of the property in question, ordered to be paid by the contestant. *Shepherd* v. *Hayball*, 13 Gr. 681.

Possession — *Proof of Title—Onus.*]—A contestant who is in possession should be permitted to point out defects in the claimant's primâ facie title, before being called upon to prove his own title. *Armour* v. *Smith*, 16 Gr. 380.

Tax Sale — *Invalidity—Lien.*]—Where a contestant sets up a tax sale, which is found invalid, he is entitled to a lien for the taxes paid by his purchase money, with the proper percentage to which the owner would have been liable if no sale had taken place. *In re Cameron*, 14 Gr. 612.

Statute of Limitations.]—The filing of a petition is not such a proceeding as will save the rights of a party contestant, otherwise barred by the Statute of Limitations. *Laing* v. *Avery*, 14 Gr. 33.

IV. Costs.

Establishing Title by Possession.]—Where a party having acquired title to land by adverse possession, institutes proceedings under the Act to quiet his title, he must establish his right at his own expense; costs do not follow as a matter of course in proceedings under this Act; and, semble, that although such adverse title is established, the applicant may be made to pay the costs of an unsuccessful contestant. *Low* v. *Morrison*, 14 Gr. 192.

Referee's Power.]—The referee had dismissed the petition for a certificate of title, with costs. On motion to set aside such order as irregular, the court held that the referee had power over costs, and refused to set aside the order. *Re Referee*, 2 Ch. Ch. 22.

See Shepherd v. *Hayball*, 13 Gr. 681, *ante* III.; *Re Ashford*, 3 Ch. Ch. 77, *ante* II.

V. Evidence.

1. *Abstract.*

Date of.]—The certificate to be produced from the county registrar as to the state of the registered title, must shew what memorials were registered up to the time of registering a certificate of the filing of the petition. *Ex parte Hill*, 2 Ch. Ch. 348.

Registrars' abstracts must be continued to the date of the certificate of title. *Re Cummings*, 8 P. R. 473.

Dispensing with.] — Where in a petition under the Quieting Titles Act it was shewn that the registrations on the whole lot of which the land in question formed a part, numbered over 500, and that it would take six months and cost $100 to prepare an abstract:—Held, that the abstract might be dispensed with, if the affidavit of a provincial land surveyor were filed, proving that he had examined all the registrations on the lot, and that only certain specified numbers affected the land in question. *Re Morse* (2), 8 P. R. 477.

2. *Execution and Taxes.*

Executions against Prior Owner.]—Where the petitioner's title was acquired within two years before the filing of the petition, the sheriff's certificate was required as to executions against the prior owner, as any such executions, if duly renewed, might bind the land. *Ex parte Lyons*, 2 Ch. Ch. 357.

Payment of Taxes.]—The court has no jurisdiction to grant a certificate, unless all taxes except those for the current year have been paid. *Ex parte Chamberlain*, 2 Ch. Ch. 352.

Sheriff's Certificate.]—A certificate from the sheriff of no executions against the petitioner must be produced. *Re Rundel*, 4 Ch. Ch. 71.

——— *Treasurer's Certificate—Contents.*]—Where a sheriff certified that he had not on a particular day any executions against the lands of the petitioner: — Held, insufficient, and that he should have certified that he had not had any for the thirty days previous, and that the lands in question had not been sold under execution for the preceding six months. Where the county treasurer certified that "there is no tax charged in his office against lot," &c:—Held, insufficient, and that it should be shewn that the return of lands in arrear for taxes for the preceding year had or had not been made by the township treasurer; also, that the county treasurer's certificate should shew that the land had not been sold for taxes for eighteen months preceding its date. *Re Harding*, 3 Ch. Ch. 252.

3. *Lost Deeds.*

Discharge of Mortgage — *Search for Mortgagee—Notice to—Dispensing with.*]—A mortgage more than twenty years old appeared upon the registrar's abstract. A discharge of this did not appear to have been registered; none was produced, nor was any proof given of the mortgage ever having been discharged. It was stated on affidavit that nothing was known of the mortgagees, and that no demand had ever been made for the mortgage debt, though nothing had been paid; and that no acknowledgment had been given within twenty years or more:—Held, that evidence should be adduced of search for the mortgagees or their representatives; that a single ex parte affidavit that no payment or demand had taken place, would not bar claims of mortgagees who could not be served with notice; but if they could not be found, notice might be dispensed with after a great length of time, and satisfaction presumed. *Re Caverhill*, 8 C. L. J. 50.

Power of Attorney—*Suspicious Circumstances—Possession—Notice.*] — To complete the chain of the paper title to the land in respect to which a certificate of title was prayed, production of proof of a power of attorney from the patentee to one J. was required. Search had been made for it without success. Its existence was not sworn to positively by the petitioner, and the only evidence of it was an affidavit of one P., who did not swear that he had ever seen it, and did not state his means of knowledge of its existence. There were also some suspicious circumstances with regard to a deed executed apparently in pursuance of the power. The only evidence as to possession was a statement in the petitioner's affidavit that one H., to whom the petitioner agreed to sell the land in 1866, was still in possession, and that possession had always accompanied the title. No notice appeared to have been given to the person who was in possession. No affidavit was put in as to adverse claims served upon the person directed to receive them. The evidence as to possession and the existence of the power of attorney was held insufficient, and a certificate of title was refused until further evidence should be given to clear up the suspicious circumstances in the deed said to be executed in pursuance of the power of attorney, and affording positive proof of the existence of the power, or else shewing the exercise of acts of ownership, which would justify the presumption that a conveyance of the legal estate had been made by the patentee. Notice was directed to be given to the person in possession, and an affidavit as to adverse claims ordered to be produced. *Re Street*, 4 Ch. Ch. 99.

Searches for Particulars — *Entry in Book.*]—In seeking to prove the existence and contents of a lost deed, the affidavit of the petitioner alone as to searches is not sufficient; the particulars as to searches, by whom made, where, and why there made, should be given, and such a case generally as would before a court be sufficient to let in secondary evidence. A memorandum made in a book by a person through whom the petitioner claimed, was held not to be evidence in favour of petitioner. *Re Bell*, 3 Ch. Ch. 239.

Secondary Evidence — *Memorial—Possession.*]—In examining a title under the Act for Quieting Titles, a memorial executed by the grantee is good secondary evidence where the possession has been in accordance with the title so claimed. The weight of authority appears to be also that such evidence is admissible in ordinary suits. A conveyance executed by a married woman and her husband in the year 1825, was lost:—Held, that the registration of the memorial was no evidence of the wife having been examined or a certificate of the examination having been indorsed on the deed. Long possession, in connection with other circumstances, may entitle a court or jury to presume the due examination and certificate, without express evidence of such examination and certificate. *Re Higgins*, 4 Ch. Ch. 128.

See Ex parte Chamberlain, 2 Ch. Ch. 352; *Re Gordon*, 4 C. L. J. 96.

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4. *Possession.*

Accompanying Title.] — Proof is indispensable either that possession has always accompanied the title under which petitioner claims, or that some sufficient reason exists for not adducing such proof. *Ex parte Wright*, 2 Ch. Ch. 355.

Where the petitioner seeks to establish title by possession, the possession must be uninterrupted possession, as owner of the land, and should be in accordance with the title set up. *Re Bell*, 3 Ch. Ch. 239.

Knowledge of Possession—*Patentee of Crown.*]—A petitioner claiming by length of possession against the patentee of the Crown, failed to shew that the patentee or his heir had any knowledge of such possession. It was held that he must shew possession for forty years, or such knowledge. *Re Linet*, 3 Ch. Ch. 230.

Notice to Holder of Paper Title—*Search for.*]—A petitioner claiming title by length of possession must prove possession for the requisite length of time, by clear and positive evidence, which should be of more than one independent witness. In such a case, a notice prepared by the referee should be served upon the person having the paper title, if he can be found; but if not, evidence should be put in, both of search for him and his representative; and if such search prove fruitless, possession should be shewn to have been long enough against him, even though he had no notice of such possession. *Re Caverhill*, 8 C. L. J. 50.

Petitioner—*Estate in Possession.*]—The court will not grant a certificate to quiet the title of a party who claims to be the legal owner in fee simple, but who is not in possession and is kept out by a person who disputes his title. He must first recover possession of the premises. *Re Mulholland*, 18 Gr. 528.

Proceeding under the Quieting Titles Act, will not be made a substitute for an action of ejectment, and the petitioner must therefore have substantially an estate in possession. *Re Bell*, 3 Ch. Ch. 239.

Section 21 of 36 Vict. c. 8 (O.) does not make any alteration in the rule that a petitioner under the Act for Quieting Titles must have substantially an estate in possession, or

a certificate will be refused. *Re West-half Con. 6, Mono*, 6 P. R. 150.

Wild Land — *Portion — Certificate.*]— When a referee finds in favour of a title acquired by adverse possession against the legal paper title, his certificate must shew of what portion of the lot the claimant has been in possession, for by the occupation of one or more acres of a wild lot of land a party will not acquire title to the whole lot. *Low* v. *Morrison*, 14 Gr. 192.

See Re Higgins, 4 Ch. Ch. 128; *Re Street*, 4 Ch. Ch. 99; *Re Gordon*, 4 C. L. J. 96.

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5. *Other Cases.*

Bill Impeaching Petitioner's Conveyance.]—Where a petitioner makes out his title satisfactorily he is entitled to a certificate, unless the title can be successfully impeached at law or in equity; and if a bill filed by the contestants impeaching the transaction by which the claimant's title arose, could be successfully resisted by the claimant on any ground, it will form no obstacle to a certificate. *Laing* v. *Matthews*, 14 Gr. 36.

Defective Materials — *Possession—Missing Deeds — Certificate Subject to Dower—Notice to Parties Interested—Mutual Insurance Companies' Policies.*]—See *Re Gordon*, 4 C. L. J. 96.

Description of Land—*Onus.*]—In proceeding to quiet a title under the Act, the petitioner adduced evidence to prove a possessory as also a paper title to lot 24 in the "broken" concession. The contestant claimed title to lot 24 in the "first" concession, and asserted that the "broken" and "first" concessions were one and the same:—Held, that the onus lay upon the contestant of proving this fact, and not upon the petitioner, who had already established a primâ facie title. *Re Burritt*, 23 Gr. 492.

——— *Will—Deed — Rectifying.*]—Where a petitioner under the Quieting Titles Act claimed title as devisee of certain land, but the description of the land in the will was different to that of the land which he claimed:—Held, that he might establish a title by shewing a misdescription in the will. But where a misdescription occurred in a deed:—Held, that the petitioner had merely established an equity to have the deed reformed, and that under the Act the court could not declare the title as though the deed had in fact been reformed. *Re Callaghan*, 8 P. R. 474.

Documents—*Forgery—Trial by Jury.*]—Where the question involved on an application for a certificate of title was the legal title to the property, and the proper determination of the question depended on the credibility of witnesses against or in favour of certain old documents which were impeached as forgeries, the court directed an action of ejectment to be brought, in order that the question might be tried by a jury of the county where the principal witnesses resided. *Brouse* v. *Staymer*, 16 Gr. 1.

——— *Forgery—Determination by Court.*]—The court, upon the conflicting evidence in this case, upon a petition under the Act, decided that a power of attorney and bond relied upon were forgeries. *S. C., ib.* 553.

The genuineness of the documents on which the petitioner claimed title having been impeached, and the evidence being doubtful, the court refused a certificate, without pronouncing absolutely upon the question. *Graham* v. *Mencilly*, 16 Gr. 661.

Independent Evidence.] — Every material fact which is capable of being proved by independent evidence, ought to be proved; thus, an affidavit by petitioner himself of search for missing deeds is insufficient. *Ex parte Chamberlain*, 2 Ch. Ch. 352.

Infants—*Proof of Service.*]—Where there was no evidence to shew that infants had been served with a decree of foreclosure, reserving to them a day to shew cause on attaining their majority, but it was shewn that they had been served with notice of proceedings under the Quieting Titles Act, proof of service of the decree was dispensed with. *Re Gilchrist*, 8 P. R. 472.

Married Woman—*Conveyance to—Bona Fides—Affidavits.*]—Where property is claimed by or on behalf of a wife under a conveyance to her during coverture, an explanation of the transaction should be given on oath to shew that it was bonâ fide, and good as against the husband's creditors; the affidavits for this purpose should be by the petitioners, and should be satisfactorily corroborated by disinterested persons of known credibility. *Ex parte Lyons*, 2 Ch. Ch. 357.

Mutual Policies — *Affidavit.*]—The liability of parties insured in mutual insurance companies is a charge on the property insured; and an affidavit is necessary stating that there is no such policy in existence, or only the policies named. *Ex parte Hill*, 2 Ch. Ch. 348.

Purchaser for Value.] — If it appear that, had a bill been filed to enforce the opposing claim, the applicant would have had a good defence as a bonâ fide purchaser for value without notice, he will be entitled to a certificate. *Cochrane* v. *Johnson*, 12 Gr. 177.

Supplying Deficiency in Proof.]—It is proper to give a further opportunity to a contestant to supply any deficiency in the proof of his title, as well as to the petitioner. *In re Cameron*, 14 Gr. 612.

Tenants in Common—*Conveyance to Co-tenant — Explanations.*] — A petitioner found entitled as one of two tenants in common, sought to obtain a certificate as sole owner, producing a conveyance from his cotenant. The court required evidence, &c., to be supplied shewing that the grantor had been informed that the court was prepared to issue a certificate to the petitioner and the grantor as tenants in common; and had also been informed as to the value of the land. *Re Dougherty*, 4 Ch. Ch. 80.

Vesting Order—*Presumption of Regularity.*]—Where a petitioner under the Quieting Titles Act claimed title through a vesting order made upon a sale under a decree in an administration suit:—Held, following Gunn v. Doble, 15 Gr. 665, that, in the absence of proof to the contrary, the order should be assumed to be regular, and that it was unnecessary to

give evidence shewing title. *Re Morse*, 8 P. R. 475.

Voluntary Grantee — *Explanations.*]—Where the former owner, a person of the same name as the petitioner, had conveyed the land to the petitioner a few days before the filing of the petition, and the title appeared simple, the court called for explanations, as it was necessary to take care that the Act was not being made use of for any improper purpose, such as defeating the creditors of the owner by getting the title of a voluntary grantee quieted before the creditors are aware of the attempt to defraud. *Ex parte Wright*, 2 Ch. Ch. 355.

VI. NOTICES.

Posting.]—It is necessary to shew that the notices posted at the court house and nearest post office were continued for the period directed by the referee. *Ex parte Hill*, 2 Ch. Ch. 348.

Where the advertisement in a quieting titles proceeding was posted at another court house than that required by G. O. Ch. 504:—Held, that the irregularity might be waived under R. S. O. 1887 c. 113, ss. 45, 46. *Re Harris*, 12 P. R. 430.

Proof of Service of Notice.]—The effect of a certificate under the Act is so stringent that great particularity must be exercised by the court in seeing that all parties entitled to notice have been duly and regularly served, and that strict proof of such service be given. The entry in a docket of a deceased solicitor of the fact of service of a notice of application, was considered insufficient evidence of notice having been given to all the tenants entitled to notice. *Ex parte Palmer*, 2 Ch. Ch. 351.

To whom Given—*Creditors.*]—Where the title had passed through the hands of a trustee to pay creditors, an advertisement was directed to be published calling on such creditors to shew cause why a certificate should not issue. *Re Rundel*, 4 Ch. Ch. 71.

——— *Heirs.*]—When a year after the testator's death a petition for a certificate was filed on the part of his devisees, notice was required to be given to the heirs or some of them. *Ex parte Hill*, 2 Ch. Ch. 348.

——— *Owners—Inquiry.*]—Where a title by possession is relied on by a petitioner, notice of his application must, under the direction of the referee, be given to the persons who but for such possession would be the owners, unless it has been shewn that due inquiry has been made for such persons without success. *Ex parte Chamberlain*, 2 Ch. Ch. 352.

——— *Persons Interested under Will.*]—Where the petitioner claimed the north-east part of a lot under a will devising the north-west part, and it was alleged that the word "north-west" was a clerical error in the will, all the parties interested in the opposite view were required to be served with a notice of the application, signed by the referee or inspector—unless a case should be made for dispensing with service on some of them. *Ex parte Lyons*, 2 Ch. Ch. 357.

See Re Caverhill, 8 C. L. J. 50; *Re Street*, 4 Ch. Ch. 99; *Re Gordon*, 4 C. L. J. 96; *Re Howland*, 4 Ch. Ch. 6.

VII. OUTSTANDING CLAIMS.

Infant—*Undivided Interest—Certificate.*]—Where the title of a petitioner under the Act was established except as to an undivided one-fifth interest in the bare legal estate, which appeared to be outstanding in an infant:—Held, that such interest must be got in by the petitioner, or be declared in the certificate of title to be outstanding. *Re Raynerd*, 8 P. R. 476.

——— *Order Barring—Effect of.*]—Quære, whether an order made by the referee of titles barring the claims of an infant heir at law would have the effect of divesting the estate of the infant. *Re Shaver*, 6 O. R. 312.

See Re Pelton, 8 P. R. 470.

VIII. REVIEW, REINVESTIGATION, AND APPEAL.

Discovery of New Evidence.]—There is no rule that a petition of review, on the ground of the discovery of new evidence, will not lie when the new evidence is of conversations and admissions. In a case of considerable suspicion as to the petitioner's title, the court stayed the certificate on the ground of the discovery of new evidence, though witnesses had been twice examined viva voce, and nearly a year had elapsed since the second examination; the applicants satisfactorily accounting for their not having adduced the new evidence at an earlier date. *Brouse* v. *Stayner*, 16 Gr. 1.

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

Reference to Surveyor—*Description—Finding.*]—On appeal from a report of the referee of titles, the Judge directed that it be referred to a surveyor to inquire and report whether the description in a certain conveyance did, or did not, include the land in dispute. The referee having found that it did, the surveyor's report confirmed the referee's finding. The Judge thereupon adopted the surveyor's report, and dismissed the appeal with costs. The court, or a Judge thereof, is empowered by s. 21 of the Quieting Titles Act, to refer a disputed question to an assessor or expert, and will act on the finding of said assessor or expert, unless the party contestant clearly establishes it to be erroneous. *Re Howland*, 4 Ch. Ch. 58.

Reinvestigation of Title—*Security for Costs—Stay—Extension of Time.*]—Contestants against whom the referee had found, appealed, and the appeal was dismissed with costs. They afterwards applied to have a reinvestigation of the title. On an application by the original petitioner, proceedings were stayed until the costs of the appeal were paid, and security given for costs of the present proceedings, and until a next friend was appointed for the married woman contestant. And this decision was upheld in appeal. The court will, in the interests of

justice, exercise a liberal discretion in extending the time for appealing, or reinvestigating a title, where any error is alleged to exist, and under the circumstances, it appearing that the contestants had been somewhat misled as to a separate piece of land to which they supposed no claim to be asserted, the court granted an application for a reinvestigation of the title after the time for appealing had expired, on payment of costs. *Re Howland*, 4 Ch. Ch. 74.

Security for Costs of Appeal—*Ex Parte Order.*]—An application for leave to pay into court $400 as security for costs of an appeal from a certificate of title under the Quieting Titles Act, having been granted by the referee ex parte, and it not having been brought to his notice that the appeal was as to two separate parcels of land, one claimed by a husband and wife, and the other by the husband alone:—Held, that the order was bad, as these facts should have been made known to the referee, and the order under such circumstances made upon notice. *Re Howland*, 4 Ch. Ch. 6.

See ante II.

QUO WARRANTO.

Harbour Company Directors.]—Where an election of directors in a joint stock company was clearly illegal, the voters having been allowed only one vote, without regard to their number of shares, whereas each share should have given a vote—but the parties chosen had continued ever since in discharge of the duties, and this application was not made until more than eight months after the election, the court refused to interfere by mandamus for a new election. Quære, whether, if the application had been made in sufficient time, mandamus or quo warranto would have been the proper remedy. *In re Moore and Port Bruce Harbour Co.*, 14 U. C. R. 365.

Information—*Form of—Amendment.*]—Where an information in the nature of a quo warranto is asked for on behalf of an individual, it must be exhibited, if allowed, in the name of the master of the Crown office; but where the rule in such a case was to shew cause why the attorney-general should not be allowed to file the information:—Held, that the mistake was not fatal. *Regina ex rel. Hart* v. *Lindsay*, 18 U. C. R. 51.

Municipality—*Assessor.*]—The council by resolution appointed one B. assessor, who was sworn into office and made an assessment. The appointment was made by a vote of three against two. The election of one of the three was afterwards set aside, and by a subsequent vote the resolution was rescinded, and by a by-law passed appointing another assessor. Both made assessments, and much confusion arose. Under these circumstances the court granted a quo warranto to determine the validity of the last appointment. *In re McPherson and Beeman*, 17 U. C. R. 99.

——— *Clerk—Illiteracy.*]—The court refused a quo warranto with the view of placing a person in the office of a township clerk, who in making his application shewed that he could not write. *Regina* v. *Ryan*, 6 U. C. R. 296.

——— *Reeve—Evidence.*]—An application for an injunction in the nature of a quo warranto against a reeve for usurping the office, on the ground that a fi. fa. against him had been returned nulla bona, was founded only on an affidavit that one D. had recovered a judgment against him, on which a fi. fa. issued, and was placed in the sheriff's hands, and returned by him nulla bona:—Held, insufficient, for it should have been shewn how and to whom the return had been made, and the writ and return should have been produced or proved. The rule nisi was therefore discharged with costs. *In re Wood*, 26 U. C. R. 513.

Railway Company Director.]—Held, that the office of director in the Galt and Guelph Railway Company was not an office for which a quo warranto would lie. *Regina* v. *Hespeler*, 11 U. C. R. 222.

Registrar of Deeds.]—A quo warranto information was refused to try the right to the office of registrar, and the applicant left to his action for the fees against the alleged intruder. *In re Hammond and McLay*, 24 U. C. R. 56.

School Trustees.]—Proper mode of testing the existence of a corporation composed of school trustees. *Askew* v. *Manning*, 38 U. C. R. 345.

Held, that quo warranto proceedings were the only means by which the seats of the defendants as members of a public school board could be declared vacant by the court. *Chaplin* v. *Woodstock School Board*, 16 O. R. 728.

——— *Civil Proceeding — Forum.*] — A motion for an information in the nature of a quo warranto is the proper proceeding to take to inquire into the authority of a person to exercise the office of a high school trustee. Askew v. Manning, 38 U. C. R. 345, 361, followed. Such a proceeding is a civil, not a criminal, one; and is properly taken before a single Judge in court, by way of motion, upon notice. *Regina ex rel. Moore* v. *Nagle*, 24 O. R. 507.

Supreme Court of Canada—*Appeal to.*]—An appeal from a decision of the court of Queen's bench for Lower Canada, appeal side, was quashed on motion, for want of jurisdiction, the proceedings being by quo warranto, as to which there is no appeal by the statute. *Walsh* v. *Heffernan*, 14 S. C. R. 738.

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Construction of Railway—*Contract—Time.*]—Held, that the defendants, who had contracted merely for the grading and fencing of a portion of their road before the date specified in s. 3 of 34 Vict. c. 2, were not disentitled to aid under that section, as having contracted for the construction of such portion of their road. *McRae* v. *Toronto and Nipissing R. W. Co.*, 22 C. P. 1.

Land Grant—*Provinces.*]—An Act of the Legislature of Canada having provided that a railway company should be entitled to 4,000,000 acres of the waste lands of the Crown on completion of their road, and a proportionate quantity of such lands on completion in the manner specified of twenty miles of the line:—Held, that a petition of right presented to the lieutenant-governor of Ontario, addressed to Her Majesty the Queen, was the proper proceeding for the purpose of enforcing the claim of the railway company under the Act, against that Province. The Legislature of Canada, by an Act, set apart a certain quantity of land along the line of a projected railway running through Quebec and Ontario, to be granted to the company on completion of the railway; and a proportionate part of such lands on the completion of twenty miles of the railway. The company, having completed a portion of the line of railway in Ontario to an extent of more than twenty miles, applied for a grant of the proportion to which, under the Act, they claimed to be entitled, which was refused. The company thereupon presented a petition of right against the Province of Ontario. It was alleged that the Province of Ontario had not along the line of the road sufficient lands to make the desired grant:—Held, that this formed no ground for the Province of Ontario insisting that the Province of Quebec should have been made a party to the proceeding. *Canada Central R. W. Co.* v. *The Queen*, 20 Gr. 273.

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2. *By Municipalities.*

(a) *By-laws.*

Assent of Inhabitants—*Majority—Rate Imposed.*]—A by-law to take stock in the Bytown and Prescott Railway Company was quashed: 1. Because it appeared not to have been concurred in by a majority of the assessed inhabitants, as required by 13 & 14 Vict. c. 132; 2. because no sufficient rate was imposed for the payment of the debt and interest, as required by 12 Vict. c. 81. The township corporation did not support their by-law, and the court refused to hear counsel on behalf of the railway company, as the rule was not directed to them. *In re Billings and Township of Gloucester*, 10 U. C. R. 273.

Mandamus to Pass—*Demand.*]—Before the court will grant a mandamus to a municipal corporation to pass or submit to the electors a by-law granting a railway bonus, a distinct demand upon and refusal by the corporation to pass or submit the by-law must be shewn. In this case, upon the facts:—Held, not to be sufficiently made out. *Re Peck and County of Peterborough*, 34 U. C. R. 129.

——— *Interest of Municipality.*] — The North Simcoe Railway Company is incorporated by 37 Vict. c. 54, (O.), s. 23 of which enacts that any municipal corporation "which may be interested in securing the construction of the said railway, or through any part of which, or near which, the railway or works of the said company shall pass or be situate," may aid the company by giving money by way of bonus: provided that no such aid shall be given except after the passing of a by-law for the purpose and the adoption thereof by the ratepayers. By s. 24 the proper petition, as prescribed in that section, shall first be presented to the council, expressing the desire to aid the railway, and stating in what way and for what amount, "and the council shall, within six weeks after the receipt of such petition by the clerk of the municipality, introduce a by-law to the effect petitioned for, and submit the same for the approval of the qualified voters." The company were empowered to construct a railway from Barrie or some other point on the line of the Northern Railway, passing through certain named townships, to Penetanguishene, and to extend it from some point in the township of Vespra to connect with the Northern, or with the Toronto, Grey, and Bruce Railway. A by-law to aid the company by a bonus of $100,000, reciting that the city of Toronto was interested in securing a railway connection with the townships through which the line would pass, was introduced, on a proper petition, and read twice in the council; but on motion to go into committee on the by-law it was resolved, by a vote of fourteen to seven, that it would be unwise, in view of the large increase of the city debt, to incur further liability to aid a railway totally disconnected with the city and more than sixty miles from it; and that the council, in the interest of the citizens, felt it to be their duty to refuse to submit it to the ratepayers:—Held, that the council should not be compelled to submit the by-law; and a rule nisi for a mandamus was discharged with costs. Semble, that it was for the council to decide whether the corporation were "interested in securing the construction of the railway:" but that if it was a question for the court, the materials before them would not warrant a decision in the affirmative. Quære, whether the provisional directors of the company had any status to warrant their application for such writ. Semble, that at all events the by-law submitted should contain proper conditions as to the expenditure of the money, &c., as contemplated by the statute. *In re North Simcoe R. W. Co. and City of Toronto*, 36 U. C. R. 101.

Petition for—*Portion of County.*] — By the statute incorporating the company, it was enacted that if fifty persons, at least, of the qualified ratepayers within the portion of the county affected by the railway should petition for the passage of a by-law granting aid to the undertaking, the council should pass such by-law, subject to the vote of the qualified ratepayers of such portion of the county:—Held, not necessary to make the by-law valid that the petition should be signed by a proportion of the fifty persons from each locality in the portion of the county affected. A petition to a municipal council prayed for the passage of a by-law granting aid to a railway company, to be charged on a specified section of the county. In the section so specified were situated two villages, both of which were incorporated, but they were not named in the petition or in the by-law:—Held, no objection to the by-law. *West Gwillimbury* v. *Simcoe*, 20 Gr. 211.

Powers of County Council.] — Held, that s. 2 of the Act under which the by-law in question was passed by the county of Bruce to aid the Wellington, Grey, and Bruce R. W. Co., 31 Vict. c. 13 (O.), was wide enough to include county municipalities, and that the by-law was therefore not ultra vires. *In re Gibson and County of Bruce*, 20 C. P. 398.

Powers of Town Council — *Guarantee —Injunction.*]—Under 44 & 45 Vict. c. 40, s. 2 (Q.), passed on a petition of the Quebec Central R. W. Co., after notice given by them, asking for an amendment to their charter, the town of Levis passed a by-law guaranteeing to pay to the Quebec Central R. W. Co. the whole cost of expropriation for the right of way for the extension of the railway to the deep water of the St. Lawrence river, over and above $30,000. Appellants, being ratepayers of the town of Levis, applied for and obtained an injunction to stay further proceedings on this by-law, on the ground of its illegality. The proviso in s. 2 of the Act under which the corporation of the town of Levis contended that the by-law was authorized, is as follows: "Provided that within thirty days from the sanction of the present Act, the corporation of the town of Levis furnishes the said company with its said guarantee and obligation to pay all excess over $30,000 of the cost of expropriation for the right of way." By the Act of incorporation of the town of Levis, no power or authority is given to the corporation to give such guarantee. The statute 44 & 45 Vict. c. 40 (Q.) was passed on the 30th June, 1881; and the by-law forming the guarantee was passed on the 27th July following:—Held, that the statute in question did not authorize the corporation of Levis to impose burdens upon the municipality which were not authorized by their Act of incorporation or other special legislative authority, and therefore the by-law was invalid, and the injunction must be sustained. *Quebec Warehouse Co.* v. *Levis*, 11 S. C. R. 666.

Powers of Township Council — *Railway not in Existence.*] — The Act incorporating the municipality of Shuniah, gave it all the powers of townships under the general municipal law, and in other sections authorized the council to make assessment for necessary expenses, and for the establishment of a lock-up house, and the salary of a constable:—Held, that this language did not prohibit the council from passing a by-law granting a bonus to a railway company, as the right of doing so when exercised rendered the payments under it necessary expenses. The fact that the railway intended to be benefited was not named, and was really not in existence when the vote on the question was to be taken, constituted no objection to the passing of a by-law for the purpose. *Vickers* v. *Shuniah*, 22 Gr. 410.

Submission to Ratepayers—*Bribery—Mandamus.*]—Held, that where a by-law granting a bonus to a railway company has been carried by the electors, a municipal council may refuse finally to pass it because its adoption has been procured by bribery, and may set up such bribery in answer to an application for a mandamus. Quære, whether it must be shewn, as it was here, that enough voters have been bribed to destroy the majority. Semble,

that a mandamus should not be granted at the instance of any railway company or person to be benefited by such by-law, where a single act of bribery or corruption has been brought home to the applicant. *In re Langdon and Arthur Junction R. W. Co. and Township of Arthur*, 45 U. C. R. 47.

——— *Casting Vote.*]—In 1880, before the passing of 46 Vict. c. 18 (O.), a municipal council, with the view of granting a bonus to a railway company, caused to be submitted to the vote of the ratepayers a by-law to raise money for that purpose. At the voting thereon the votes for and against it were equal, and the clerk of the municipality, who also acted as returning officer, orally gave a casting vote in favour of the by-law:—Held, reversing the judgment in 11 O. R. 392, that s. 152 of the Municipal Act, R. S. O. 1877 c. 174, is not applicable to the case of voting on a by-law, and therefore the casting vote of the clerk was a nullity, and the by-law did not receive the assent of the electors of the municipality within the meaning of R. S. O. 1877 c. 174, s. 317; as such a defect could not be cured by promulgation of the by-law. Held, also, following Canada Atlantic v. Ottawa, 12 A. R. 234, and S. C., 12 S. C. R. 377, that the by-law was bad for non-compliance with s. 330 of the Municipal Act, R. S. O. 1877 c. 174, the section corresponding with s. 248 of 36 Vict. c. 48. *Canada Atlantic R. W. Co.* v. *Township of Cambridge*, 14 A. R. 260.

——— *Injunction.*] — Where the corporation of a town were about submitting to the vote of the ratepayers a by-law authorizing the harbour commissioners of that town to issue debentures to the amount of $75,000 to aid in completing a railway, but which debentures the corporation had not legally the power of directing to be issued, the court restrained the corporation from proceeding to take such vote. *Helm* v. *Town of Port Hope*, 22 Gr. 273.

Where a municipality has legally a right to pass a by-law granting a sum of money, it would seem premature to apply to restrain the by-law being submitted to the ratepayers, as they might refuse to approve of the by-law. Helm v. Town of Port Hope, 22 Gr. 273, distinguished. *Vickers* v. *Shuniah*, 22 Gr. 410.

——— *Majority.*] — Held, that a "majority" of the electors referred to in the Railway Act of 1859 (22 Vict. c. 16, ss. 75, 76), and the Municipal Act of 1866, s. 196, s.-s. 6, required to assent to a by-law, is not an absolute majority of all the existing qualified electors, but a majority of those coming forward to vote. *Jenkins* v. *County of Elgin*, 21 C. P. 325; *Erwin* v. *Township of Townsend*, *ib.* 330.

——— *See*, also, *Re McAvoy and Municipality of Sarnia*, 12 U. C. R. 99.

——— *Necessity for.*] — A by-law of a county council, in aid of a railway, to the extent of $20,000, which had not been submitted to the ratepayers under the Municipal Act of 1866, was on that ground quashed. *Re Clement and County of Wentworth*, 22 C. P. 309.

——— *Notice—Bribery.*]—In giving notice submitting a by-law granting aid to a railway company for the approval of the ratepayers the officers (whose duty it was to give such notice) had not posted up the clauses of the Municipal Act in reference to bribery, in the manner required by the Act:—Held, no ground for quashing the by-law. *West Gwillimbury* v. *Simcoe*, 20 Gr. 211.

——— *Premature Vote—Consideration by Council.*] — A by-law was submitted to the council of a city, under 36 Vict. c. 48 (O.), for the purpose of granting a bonus to a railway then in course of construction, and after consideration by the council it was ordered to be submitted to the ratepayers for their vote. By the notice published in accordance with the provisions of the statute such by-law was to be taken into consideration by the council after one month from its first publication on the 24th September, 1873. The vote of the ratepayers was in favour of the by-law, and on 20th October a motion was made in the council that it be read a second and third time, which was carried, and the by-law passed. The mayor, however, refused to sign it, on the ground that its consideration was premature; and on 5th November the same motion was made and the by-law was rejected. Nothing more was done in the matter until April, 1874, when a motion was again made before the council that such by-law be read a second and third time, which motion was, on this occasion, carried. At this meeting a copy only of the by-law was before the council, the original having been mislaid, and it was not found until after the commencement of this suit. When it was found it was discovered that the copy voted on by the ratepayers contained, by mistake of the printers, a date for the by-law to come into operation different from that of the original. In 1883 an action was brought against the corporation of the city for the delivery of the debentures provided for by the by-law, in which suit the question of the validity of the whole proceeding was raised:—Held, that the vote of 20th November, 1873, was premature, and not in conformity with the provisions of s. 231 of the Municipal Act; that the mayor properly refused to sign it, and that without such signature the by-law was invalid under s. 226. 2. That the council had power to consider the by-law on the 5th November, 1873, and the matter was then disposed of. 3. That the proceedings of 7th April, 1874, were void for two reasons. One, that the by-law was not considered by the council to which it was first submitted as provided by s. 236, which is to be construed as meaning the council elected for the year, and not the same corporation; and the other, that the by-law passed in 1874 was not the same as that submitted, there being a difference in the dates. Semble, that the functions of a municipality in considering a by-law after it has been voted on by the ratepayers are not ministerial only, but the by-law can be confirmed or rejected irrespective of the favourable vote. *Canada Atlantic R. W. Co.* v. *City of Ottawa*, 12 S. C. R. 365, 14 A. R. 236, 8 O. R. 201.

——— *Publication—Omissions — Notice.*] —14 & 15 Vict. c. 51, s. 18, directs that a copy of the by-law (to take stock in a railway company) shall be inserted at least four times in each newspaper printed within the limits of the municipality; but the court refused to quash a by-law under which a large sum had been borrowed, because it had been published three times only in one of two papers. A full copy of the by-law was not

published, but, at the time of passing, a clause was added appointing the day on which it should come into operation, and directing that the debt should be payable within twenty years from that day, while in another clause the debentures were made payable in twenty years from their dates:—Held, that, whether 14 & 15 Vict. c. 51, s. 18, s.-s. 3, or 16 Vict. c. 22, s. 2, s.-s. 4, were to govern, this was an irregularity for which they were not bound to quash. It is sufficient, under 14 & 15 Vict. c. 51, s. 18, that the manner of ascertaining the consent of the electors should be prescribed by a notice attached to the proposed by-law when published, though the Act says that it shall be determined by the by-law. *Re Roulton and Town of Peterborough*, 16 U. C. R. 380.

——— *Publication—Seal.*]—Held, that the notice of a by-law for the granting of aid by a municipality to a railway company, should be published in accordance with the provisions of the Municipal Acts. Held, also, that the objection to a by-law that it was not sealed when submitted to the electors, was untenable. *Jenkins* v. *County of Elgin*, 21 C. P. 325.

See In re Bate and City of Ottawa, 23 C. P. 32, *post* (c); *In re Lloyd and Corporation of Elderslie*, 44 U. C. R. 235; *In re Canada Central R. W. Co. and Brown*, 35 U. C. R. 390; *In re Stratford and Huron R. W. Co. and County of Perth*, 38 U. C. R. 112; *In re Great Western R. W. Co. and Township of North Cayuga*, 23 C. P. 28, *post* (c).

Validating Statute—*Effect of—Mandamus.*]—By 18 Vict. c. 33, the Grand Junction R. W. Co., whose railway was to run from the town of Peterborough to Toronto, was, with certain other companies, incorporated with the Grand Trunk R. W. Co. Not having been built within the stipulated time, the charter of the former company expired, and in May, 1870, the Grand Trunk R. W. Co. having refused to construct it, an Act was passed by the Dominion Parliament, 33 Vict. c. 53, dissociating the work from the Grand Trunk R. W. Co., and reviving the charter of the Grand Junction R. W. Co. It directed that all the corporate powers originally vested in that company should be vested in certain persons, who should exercise the same as fully as the persons named in the original charter could have done, and extended the time for construction. On the 23rd November of the same year, the ratepayers of the defendant municipality voted in favour of granting the company a bonus of $75,000, but the by-law was never read a third time. At the time the municipality had no power to grant a bonus to a railway company, but subsequently in 1871, by 34 Vict. c. 48 (O.), the by-law was declared as valid as if it had been read a third time. It was declared to be binding on the corporation, and they were directed to act upon it, and issue debentures, as if it had been proposed after the Act. On the same day the municipal law was amended so as to empower all municipalities to grant aid for similar purposes. 37 Vict. c. 43 (O.) was then passed, amending and consolidating the Acts relating to the plaintiffs' railway, but it did not expressly give retrospective validity to anything that had been done, or mention the by-law, and by 39 Vict. c. 71 (O.), the time for completion was further extended, and it was directed that none of the by-laws should lapse by reason of non-completion within the time previously fixed:—Held, reversing the judgment in 45 U. C. R. 302, that the Grand Junction Railway being a local work of the Province of Ontario, the Act 33 Vict. c. 53 (D.) was ultra vires the Dominion Parliament, and that the company were therefore not in existence when the defendants granted the bonus, or when the Act 34 Vict. c. 48 (O.), validating the by-law, was passed; and as 37 Vict. c. 43 (O.), which was the first Act by a legislature having power to incorporate them, did not legalize the by-law in favour of the plaintiffs, they were not entitled to a mandamus to compel the delivery of the debentures. *Re Grand Junction R. W. Co. and County of Peterborough*, 6 A. R. 339. See *S. C.*, 8 S. C. R. 76.

Validity of By-law—*Statutes—Defects of Form—Registration.*]—The Act incorporating the railway company contained provisions respecting bonuses granted to it by municipalities not found in the Municipal Act:—Held, that such special Act was not restrictive of the Municipal Act, and it was only necessary that the provisions of the latter should be followed to pass a valid by-law granting such a bonus. Held, that all defects of form in the by-law were cured by 44 Vict. c. 24, s. 28 (O.), providing for registry of by-laws and requiring an application to quash to be made within three months after such registry. *Bickford* v. *Town of Chatham*, 16 S. C. R. 235.

(b) *Terms and Conditions of Aid.*

Certificate of Engineer—*Compliance—Debentures.*]—Held, that under 34 Vict. c. 48 (O.) the Grand Junction R. W. Co. was recognized as an incorporated company; otherwise that it was actually incorporated by 37 Vict. c. 43 (O.); the effect of the two Acts being to give to the company so incorporated the benefit of a by-law of the respondent corporation, which, under certain conditions, provided a bonus for the railway. Held, further, that under the Act of 1871 the said by-law was legal, valid, and binding on the corporation, but that the railway company had not, on the evidence, complied with the conditions precedent. The stipulated certificate of the chief engineer had not been produced, and although, under paragraph 8 of the by-law, debentures might be delivered to trustees without a certificate, that applied to a time when the debentures or their proceeds were to be held in suspense, not to a time when the trusts were spent and the payment, if made at all, should be made direct to the company. Judgment in 13 A. R. 420 affirmed. *Grand Junction R. W. Co.* v. *County of Peterborough*, 13 App. Cas. 136.

Commencement of Work—*Breach—Extension of Time—Mandamus—Action.*]—Upon an application for a mandamus to a township corporation to make and deliver to trustees certain debentures for $25,000 authorized by two by-laws of the corporation granting aid to a railway company, it was argued that the company had lost all claim to $18,000, if not to the whole of the bonus, by non-commencement of their road. On the other hand, the company contended that by certain agreements with the corporation, and by several statutes extending the time for commencement, their right to the debentures was

preserved:—Held, that such right, depending upon matters of contract, should not be determined upon such an application, but by suit in the ordinary way; and the application was dismissed with costs. *Re London, Huron, and Bruce R. W. Co. and Township of East Wawanosh*, 36 U. C. R. 93.

——— *Breach—Forfeiture—Debentures—Parties.*]—The county of Simcoe had under a by-law, passed under 35 Vict. c. 66, s. 15, issued debentures for $300,000 to aid in the construction of the Hamilton and North Western R. W. Co. (see West Gwillimbury v. Simcoe, 20 Gr. 211,) but, by reason of the neglect of the company to commence the railway within the time limited, their charter had become forfeited, and the by-law under which the debentures had been issued had therefore become void, whereupon one of the townships which had joined in the petition for the passing of the by-law, filed a bill against the railway company, the county, and trustees of the debentures, seeking to restrain the trustees from selling or parting with the debentures and to have the same handed back to the county: — Held, on demurrer by the county, (1) that the township had not any interest to maintain such a suit; and (2) that the corporation of the county was the proper party to institute proceedings. *Township of West Gwillimbury v. Hamilton and North Western R. W. Co.*, 23 Gr. 383.

——— *Compliance — Debentures.*] — A municipal corporation having passed a by-law giving a certain sum in debentures by way of bonus to a railway company, the company executed a bond to the township reciting that the township had agreed to give the bonus on condition (amongst other things) that sixty continuous miles of the road should be built within two years; that the debentures should not be disposed of by the company until the contracts had been let and the work commenced; and that if the road were not commenced and built as mentioned, the debentures should be returned to the municipality; and the condition of the bond was, that in case of failure the company would, on demand, pay over to the township the sum of $50,000, or return the debentures. The contracts having been let and the work commenced as stipulated:—Held, in view of the whole instrument, that the company should not be restrained from disposing of the debentures before the completion of the work. *Township of Brock v. Toronto and Nipissing R. W. Co.*, 17 Gr. 425.

——— *Compliance — Sufficiency.*] — A county by-law was passed on the 12th December, 1873, to aid a railway company by a bonus of $80,000, and to issue debentures therefor, under the clauses of the Municipal Act of 1873 then in force. The by-law required that the debentures should not be delivered to the trustees appointed to receive them until the company should have agreed that the amount thereof should be wholly expended upon the construction of the line within the county; that seventy-five per cent. of the amount should be advanced as the work progressed on the engineer's certificate, and the balance on completion of the road; and that the portions of the railway within the county should be commenced within one and finished within three years from the passing of the by-law. On application for a mandamus to the county to deliver these debentures to the trustees, it appeared that on the 24th November, 1874, the company, by agreement with the county, after reciting the by-law, covenanted to commence that part of the road within the county in one and complete it in three years from the passing of the by-law; and that they would only ask for the proceeds of the debentures, as to seventy-five per cent. thereof "to pay for work done and expenses incurred during the progress of said work within the county, and as to twenty-five per cent. thereof to pay for work done and expenses incurred on finally completing said railway within the county; and that the whole proceeds of the debentures should be expended in the construction of the said railway within the county, and not otherwise or elsewhere." This agreement was handed to the warden on the 7th December, 1874, (within five days of the time limited by the by-law for commencing the work), but was not executed by the county, and on the same day the debentures were demanded. The company had in that month made some purchases of rights of way. On the 4th December they entered into a contract with one C. for the construction of fourteen miles of the road within the county, to be begun within five days and completed by 1st September, 1875, but it contained a clause enabling the company to suspend the work at any time without being liable for damages. C. began work on the 10th December, and continued till the 15th February, 1875, for which he received about $800. He was told that he must begin by the 12th December in order to enable the company to get the debentures. The company had not filed their plans and survey as directed by the Railway Act, C. S. C. c. 66, without which they had no authority to begin their work, and were bound to no particular route:—Held, in the Queen's bench, that the company were not entitled to the mandamus, for they had not legally located their line, and were bound to no route; they had no power to begin the work as they had done; and from all the facts, more fully stated in the case, it appeared that they had not done so in good faith. Semble, that there was not a sufficient variance between the agreement required by the by-law and that executed by the company to have alone furnished an answer to the application, though they were not clearly identical. Quære, whether, before ordering the debentures to be handed over, the court could have required more stock to be called in. Semble, not; but it was suggested that the by-law should provide for this; and that to carry such by-laws a certain proportion of the whole number of votes of the locality should be required. The court of appeal being equally divided, this judgment was affirmed without costs. *In re Stratford and Huron R. W. Co. and County of Perth*, 38 U. C. R. 112.

Completion of Work—*Breach—Cause.*] —Under 31 Vict. c. 4, a township municipality passed a by-law granting a bonus to a railway company, upon the express condition that the debentures securing such sum should be deposited with the treasurer of the Province as custodian for the company, but the same were not to be delivered to the company, unless and until the railway should within two years be fully completed and in running order, and regular trains had passed over the road, and the company had performed certain other stipulated works; in all of which the company made default. In a suit by the municipality seeking to restrain

the treasurer from delivering up the debentures to the company:—Held, that time was of the essence of the transaction, and that the company having, no matter from what cause, failed to complete the work in the manner stipulated for, the plaintiffs were entitled to receive back the debentures. *Township of Luther* v. *Wood*, 19 Gr. 348.

——— *Change of Circumstances.*]—The railway company were bound by their original charter to commence within three years, and to finish the road within eight years, which they failed to do within the specified time:—Held, affirming the decisions in 8 O. R. 183, 201, that the plaintiffs were not in a position to enforce the delivery of the debentures after the lapse of nine years from the passing of the by-law, when a total change of circumstances had taken place, and when the period fixed by the plaintiffs' charter for the completion of the railway had expired. *Canada Atlantic R. W. Co.* v. *City of Ottawa*, 12 A. R. 234.

——— *Compliance—Onus—Debentures.*]—A municipal corporation, under the authority of a by-law, issued and handed to the treasurer of the Province of Quebec $50,000 of their debentures as a subsidy to a railway company, the same to be paid over to the company in the manner and subject to the same conditions in which the government provincial subsidy was payable under 44 & 45 Vict. c. 2, s. 19, viz., "when the road was completed and in good running order to the satisfaction of the lieutenant-governor in council." The debentures were signed by S. M., who was elected warden and took and held possession of the office after W. J. P. had orally resigned the position. In an action brought by the railway company to recover from the treasurer of the Province the $50,000 debentures after the government bonus had been paid, in which action the municipal corporation was mise en cause as a co-defendant, the Provincial treasurer pleaded by demurrer only, which was overruled, and the county of Pontiac pleaded general denial and that the debentures were illegally signed:—Held, that the debentures signed by the warden de facto were perfectly legal. 2. That as the provincial treasurer had admitted by his pleadings that the road had been completed to the satisfaction of the lieutenant-governor in council, the onus was on the municipal corporation, mise en cause, to prove that the government had not acted in conformity with the statute. *County of Pontiac* v. *Ross*, 17 S. C. R. 406.

——— *Impossibility of Compliance—Mandamus.*]—A railway charter provided that on receiving certain petitions the corporation of the county, &c., should submit to the electors a by-law to aid the company by a bonus, and should deliver to trustees the debentures for any such bonus when granted. The company, as an inducement to the passing of such a by-law, gave a bond conditioned to build their road within a certain time, and to repay the bonus to the county in the event of their ceasing within twenty-one years to be an independent company. Under the facts, the court refused a mandamus to compel the corporation to hand over the debentures to the trustees appointed to receive them, there being ground for apprehension, owing to the delay, that the bond could not be performed; but the rule was discharged without costs, and without prejudice to a further application. *In re Hamilton and North-Western R. W. Co. and County of Halton*, 39 U. C. R. 93.

Completion of Part of Railway—*Compliance—Mandamus—Parties.*]—A township corporation passed a by-law, that the reeve should make out debentures not exceeding $5,000, which should be sealed with the corporate seal, and signed by him and the treasurer; and that, provided the grading of defendants' railway should be completed to a certain point by a day mentioned, the reeve should subscribe for shares in defendants' company to the extent of $5,000, on behalf of the corporation, and deliver the debentures to the company in payment therefor. By 36 Vict. c. 98 (O.), the by-law was confirmed. On application for a mandamus to the reeve to make such subscription and delivery:—Held, unnecessary to shew an agreement by the municipality to take the stock, or a written subscription, or to make the treasurer or the corporation parties to the application; and on the affidavits the mandamus was granted with costs. *In re Canada Central R. W. Co. and Brown*, 35 U. C. R. 390.

Independence of Railway—*Breach—Liquidated Damages.*]—In 1874 the county of Halton gave to the Hamilton and North-Western Railway Company a bonus of $65,000 to be used in the construction of the railway, upon the condition that the company should remain "independent" for twenty-one years. In 1888 the Hamilton and North-Western Railway Company became (as was on the facts held) in effect merged in the Grand Trunk Railway Company, and ceased to be an independent line:—Held, that there had been a breach of the condition entitling the plaintiffs to recover the whole amount of the bonus as liquidated damages. *County of Halton* v. *Grand Trunk R. W. Co.*, 19 A. R. 252. Affirmed by the Supreme Court, 21 S. C. R. 716.

Maintenance of Railway—*Future Performance—Debentures.*]—Held, that a debenture being a negotiable instrument, a railway company that has complied with all the conditions precedent stated in the by-law to the issuing and delivery of debentures granted by a municipality, is entitled to said debentures, free from any declaration on their face of conditions mentioned in the by-law to be performed in future, such as the future keeping up of the road, &c.: art. 962, municipal code. *Parish of St. Cèsaire* v. *McFarlane*, 14 S. C. R. 738.

Maintenance of Shops—*Change of Circumstances.*]—A railway company, having obtained a bonus from the plaintiffs upon condition that its machine shops should be "located and maintained" within the city limits, did so erect and maintain them for some years, until authorized by legislation it amalgamated with and lost its identity in another company, all the engagements and agreements of the amalgamating companies being preserved. The amalgamated company was afterwards leased in perpetuity to a much larger railway company, who removed the shops outside the city limits:—Held, that, although all engagements and agreements made by the original company were preserved, the amalgamation and leasing in perpetuity by the larger company of the smaller under the authority of parliament imposed new relations upon the amalgamated road which worked a change in

the policy as to the site and size of the machine shops, and that the engagement had been satisfied by the maintenance of the said shops by the original company during its independent existence. *City of Toronto* v. *Ontario and Quebec R. W. Co.*, 22 O. R. 344.

Maintenance of Stations—*Erection—Accommodation.*]—One of the conditions in the agreement to be performed by the railway company was "to construct at or near the corner of Colborne and William streets (in Chatham) a freight and passenger station with all necessary accommodation, connected by switches, sidings, or otherwise with said road" upon the council of the town passing a by-law granting a necessary right of way:—Held, that such condition was not complied with, by the erection of a station building not used, nor intended to be used, and for which proper officers, such as station master, ticket agent, &c., were not appointed. The words "all necessary accommodation" in the condition required that grounds and yards sufficient for freight and passenger traffic in case the station were used should be provided. *Bickford* v. *Town of Chatham*, 16 S. C. R. 235.

——— *Establishment — Res Judicata — Evidence.*]—By agreement bearing date the 19th May, 1873, the defendants, in consideration of a bonus of $300,000 granted to them by a section of the county of Simcoe, of which the township of Nottawasaga forms a part, covenanted with the plaintiffs to (among other things) "erect, build, and complete good and sufficient and suitable station buildings for passengers and freight" at five certain places within the township; to "establish at each of the places hereinbefore mentioned regular way stations;" and to "well and sufficiently keep and maintain the said five stations above mentioned with all suitable, necessary, and proper buildings, as the business done or capable of being done at the said stations respectively may require, for seven years after the trains shall have commenced to run on the said road and (to) undertake to do the passenger and freight business of the county at said stations." By a further agreement bearing date the 25th May, 1878, the defendants, in consideration of a bonus of $20,000, granted to them by the plaintiffs, covenanted with the plaintiffs to "erect, build, and complete good and sufficient and suitable station buildings for passengers and freight on the line of the said railway at the several places following in the said township," five places being specified, and to "establish at each of such places regular way stations." This agreement provided that the route of the line of the railway through the township as defined in the former agreement might be deviated from to such an extent as to admit of the stations being placed at the points mentioned in the second agreement, and provided further that it should not be incumbent on the defendants to erect stations at the places mentioned in the former agreement, "but that the places herein defined for stations shall be taken to be in substitution for the places mentioned in such former agreement." The defendants erected stations at the points specified, three of these stations being respectively called A., G., and N. Trains commenced to run on the line in the year 1879. In 1880 the plaintiffs, being dissatisfied with the mode in which the stations at G. and N. were being maintained, brought an action against the defendants for specific performance of the agreements. In this action a consent decree was pronounced and an injunction granted restraining the defendants from ceasing to maintain the stations except in a certain manner in the decree specified. The decree contained no limitation or other provision as to the time during which the stations were to be maintained, though this question had been raised at the hearing of the action. In 1886, after the expiration of the seven years, the defendant made changes in their mode of maintaining the station at A. and kept it open for about four hours a day only. The plaintiffs were dissatisfied, and this action was thereupon brought by them to compel specific performance of the agreements:—Held, that the word "establish," does not in itself mean "maintain and use forever;" that the seven years limitation applied to the substituted stations, and that the defendants were not bound to maintain them after the expiration of that time. Bickford v. Town of Chatham, 14 A. R. 32, 16 S. C. R. 235, Jessup v. Grand Trunk R. W. Co., 7 A. R. 123, and Geauyeau v. Great Western R. W. Co., 3 A. R. 412, considered. Wallace v. Great Western R. W. Co., 3 A. R. 44, distinguished. Held, also, that the decree in the former action did not constitute the question of the seven years' limitation res judicata, there being no adjudication on that question; and in any event an adjudication on that question being unnecessary at the date of the former action. Concha v. Concha, 11 App. Cas. 541, considered and followed. At the trial evidence was admitted on behalf of the plaintiffs of representations made by directors of the defendant company, at meetings held to consider the question of granting the second bonus, to the effect that by the second agreement the defendants would be bound to maintain the stations for all time:—Held, that this evidence was clearly inadmissible. *Township of Nottawasaga* v. *Hamilton and North Western R. W. Co.*, 16 A. R. 52.

——— *Erection — Injunction — Specific Performance.*]—In consideration of a bonus granted by the plaintiffs, a railway company covenanted "to erect and maintain a permanent freight and passenger station" at G. Shortly afterwards the road was leased, with notice of this agreement, to defendants, who discontinued G. as a regular station, having no officer of the company to sell tickets or make arrangements for despatching or receiving freight, but merely stopping there when there were any passengers to be let down or taken up:—Held, affirming the decree in 25 Gr. 86, that the mere erection of the station was not a fulfilment of the covenant, and that the municipality was entitled to have it specifically performed. The decree, which enjoined the defendants from allowing any of their ordinary freight, accommodation, express, or mail trains, other than special trains, to pass without stopping for the purpose of taking up or letting down passengers, was varied by limiting it to such trains as are usually stopped at ordinary stations. *Township of Wallace* v. *Great Western R. W. Co.*, 3 A. R. 44.

——— *Use of Line by Others—Validity.*]—The conditions agreed upon in this case were, that the defendants should grant and continue to the Great Western R. W. Co., the Grand Trunk R. W. Co., and the Canada Southern R. W. Co., equal privileges as to working and using defendants' railway; that defendants should have a siding and flag station at or near to two named villages on their

line; and should cause or procure the Grand Trunk R. W. Co. to erect a station at or near a named point of intersection:—Held, that these conditions were all legal and valid; and that defendants, having received the debentures for the bonus, could not object that such agreement was ultra vires. *County of Haldimand* v. *Hamilton and North Western R. W. Co.*, 27 C. P. 228.

Obtaining Other Aid—*Breach—Preference Bonds—Waiver.*]—A proposed by-law for granting a bonus of $14,000 was assented to by the ratepayers of the township of Eldon; and, to induce the council afterwards to ratify the by-law, the company entered into a bond, that if certain other townships should deliver to the company certain debentures expected from them, the company would give to Eldon $6,000 of preferential bonds of the company; the company having a limited statutory authority to issue preferential bonds "for raising money to prosecute the undertaking." One of the townships failed to give the debentures expected from it, and the company, instead of giving its preferential bonds to Eldon, gave to the municipality an ordinary bond for the $6,000:—Held, that the company had no authority to give its preferential bonds in order to carry out its bargain with the municipal council; that the default of one of the other townships to give the debentures expected from it, disentitled Eldon to demand preferential bonds from the company, even if the company had had authority to grant them; and that the giving of the bond which the company did give, was no waiver of the objection, as an answer to the municipality's demand of preferential bonds. *Township of Eldon* v. *Toronto and Nipissing R. W. Co.*, 24 Gr. 396.

Obtaining Whole Sum—*Breach—Statutory Relief.*]—A railway and harbour company gave a bond to the town council of W., reciting that the council had agreed to lend them $25,000 to assist in constructing their railway, and conditioned that the company should not expend the loan, nor begin to construct their road, until the whole sum necessary to complete it from W. to Port D., should be obtained:—Held, that there was nothing in 19 Vict. c. 74 to relieve defendants from liability for a previous breach of this condition. *Town of Woodstock* v. *Woodstock and Lake Erie R. W. Co.*, 16 U. C. R. 146.

Running Trains—*Breach—Damages.*]—Where a railway company, in breach of a contract entered into by them, in consideration of a large amount of debentures given them by the plaintiffs, to run trains from the eastern part of the city of St. T. to the western part, ceased to run such trains:—Held, on a reference as to damages, that though the actual depreciation of property in the western part of the city resulting therefrom was a matter pertaining to the property owners, and not to the city, yet the lessened taxation resulting from such depreciation was not too remote a fact for consideration on the reference, and such a loss in taxation which could be traced to or reasonably connected with the company's default formed a yearly standard which might be capitalized so as to fairly represent the money compensation to which the plaintiffs were entitled. Stated broadly the inquiry was how much less benefit had been received by the municipality by reason of the railway service at one station being discontinued:—Constat, that the personal loss or inconvenience suffered by travellers or citizens from the abandonment of the station, or the actual depreciation in value of the land individually owned in that neighbourhood, could not be reckoned as constituents per se of the damages suffered by the corporation. Held, also, that if the railway company admitted that they would never again run trains to the western end of the city, the damages should be assessed once for all, which might be done either by fixing one sum, or by directing a yearly payment. *City of St. Thomas* v. *Credit Valley R. W. Co.*, 15 O. R. 673.

Specific Performance of Conditions—*Damages—Debentures.*]—By an agreement between the E. & H. Railway Company and the town of C. the latter agreed to pass a by-law granting a bonus to the company in aid of the construction of a railway, subject to the performance of certain specified conditions. The by-law subsequently approved by the ratepayers, and passed by the council of the town, did not contain all the conditions of the agreement. In an action against the town to compel the delivery of debentures for the amount of the bonus the defendants pleaded non-performance of the conditions of the agreement as justifying the withholding of the debentures, and, by way of counterclaim, prayed specific performance of such conditions by the plaintiffs:—Held, that the title to the debentures did not depend upon prior performance of conditions in the agreement not included in the by-law, but upon performance of those in the by-law alone, and the latter having been complied with the debentures should issue. (2) That specific performance was not an appropriate remedy in such a case, and the defendants could only claim damages for non-performance. (3) Semble, also, that the claim of defendants for damages could be disposed of in this action under the counterclaim, and there should be a reference to assess the same. *Bickford* v. *Town of Chatham*, 10 O. R. 257, 14 A. R. 32, 16 S. C. R. 235.

Statutory Power to Make Conditions.]—By 32 Vict. c. 36, s. 7 (O.), municipalities were authorized to aid the Hamilton and Erie Railway Company, subsequently incorporated with defendants, by way of bonus, subject to such restrictions and conditions as might be mutually agreed upon between the municipality and the directors of the railway; and by 34 Vict. c. 41, amending this Act, the county were authorized, on the petition of certain townships and villages of the county, to grant such aid, and issue the debentures of the county payable by special rates and assessments in such townships, &c.:—Held, that the powers given by the first Act to agree as to the conditions on which such aid should be granted, would apply to aid granted under the subsequent Act. *County of Haldimand* v. *Hamilton and North Western R. W. Co.*, 27 C. P. 228.

See City of St. Thomas v. *Credit Valley R. W. Co.*, 7 O. R. 332, 12 A. R. 273; *Re Grand Junction R. W. Co. and County of Peterborough*, 6 A. R. 339, 8 S. C. R. 76.

(c) *Other Cases.*

Assessment — *Future Rate — Repeal of By-law.*] — The corporation of the township of North Cayuga, under 33 Vict. c. 33, s. 18

(O.), incorporating "The Canada Air Line Railway Company," passed a by-law reciting the statute, and that the railway had been located in North Cayuga, and provided that all the real property of the company in the township should be rated at $12 per acre (the then average rate), for 50 years. This by-law was subsequently repealed, but it did not appear that upon the faith of it the applicants had in fact altered their position, or done anything which they otherwise would not have done, and the railway was being constructed through the township before it was passed:—Held, on an application to quash the repealing by-law, that the court under the circumstances could not interfere. *In re Great Western R. W. Co. and Township of North Cayuga*, 23 C. P. 28.

Debentures—*Contract for—Enforcement—Remedy—Action—Mandamus.*]—As the undertaking entered into by the municipal corporation contained in the by-law for granting a bonus to a railway company, is in the nature of a contract entered into with the company for the delivery to it of debentures upon conditions stated in the by-law, the only way in Ontario in which delivery to trustees on behalf of the company can be enforced, before the company shall have acquired a right to the actual receipt and benefit of them by fulfilment of the conditions prescribed in the by-law, is by an action under the provisions of the statutes in force then regulating the proceedings in actions, and not by summary process by motion for the old prerogative writ of mandamus, which the writ of mandamus obtainable on motion without action still is. *Re Grand Junction R. W. Co. and County of Peterborough*, 8 S. C. R. 76.

Held, following Re Grand Junction R. W. Co. and County of Peterborough, 8 S. C. R. 76, that a writ of mandamus to compel the issue of debentures by a municipal corporation under a by-law in aid of a railway, will not be granted upon motion, but the applicant must bring his action. *In re Canada Atlantic R. W. Co. v. Township of Cambridge*, 3 O. R. 291.

——— *Neglect of Municipality to Deliver—Damages.*]—The corporation of the county of Ottawa under the authority of a by-law undertook to deliver to the Montreal, Ottawa, and Western Railway Company, for stock subscribed by them, 2,000 debentures of the corporation of $100 each, payable twenty-five years from date and bearing six per cent. interest, and subsequently, without any valid cause or reason, refused and neglected to issue said debentures. In an action brought by the company against the corporation solely for damages for their neglect and refusal to issue said debentures:—Held, that the corporation, apart from its liability for the amount of the debentures and interest thereon, was liable under arts. 1,065, 1,073, 1,840, and 1,841, C. C., for damages for breach of the covenant. *County of Ottawa v. Montreal, Ottawa, and Western R. W. Co.*, 14 S. C. R. 193.

——— *Railway Contractors — Lien — Award.*]—By 16 Vict. cc. 22 and 124, and 18 Vict. c. 13, certain municipalities were authorized to issue debentures under by-laws to aid in the construction of a railway. The contractors for building the road agreed with the company to take part of their remuneration in these debentures, and the work having been commenced certain debentures were issued to the company. The contractors afterwards failed to carry on the works, and disputes having arisen between them and the company, all matters in difference were left to arbitration, and an award made in favour of the contractors for £27,954, payable by instalments. One instalment being in arrear, the contractors filed a bill to have the debentures delivered over to them in the proportion stipulated for according to the contract:—Held, that, although the contractors would have been entitled to a specific lien on these debentures under their original agreement, the reference and award in their favour for a money payment precluded them from that relief; and a demurrer for want of equity was allowed. *Sykes v. Brockville and Ottawa R. W. Co.*, 9 Gr. 9.

——— *Seizure by Sheriff — Agreement—Trust.*]—The municipality of B., being interested in the completion of a railway, by a by-law agreed to lend the company, in municipal loan fund debentures, £100,000, for securing the repayment of which the company executed to the municipality a mortgage on all their property, which, by a statute, was declared to be valid and binding as well against all the property of the company already owned by them as that which they might afterwards acquire; and which, by a subsequent agreement made for the settlement of certain suits pending between the parties, it was agreed should be advanced to the company in certain proportions as the work progressed. In compliance with a requisition of the company for funds, "for work done, and material furnished, and right of way, &c., for the use of the railway," the municipal council directed their bankers to hand over to the company an amount of the debentures, which, upon their being handed over, were immediately seized by the sheriff, under an execution at the suit of the bankers. Upon a bill filed for the delivery up of the debentures:—Held, that, so far as the debentures were required for the payment of the right of way, rolling stock ready to be delivered, and other materials not yet become the property of the company, they were impressed with a trust to be applied by the company to the payment of those demands. *Brockville v. Sherwood*, 7 Gr. 297.

Dominion Railway.] — Held, following Canada Atlantic R. W. Co. v. City of Ottawa, 8 O. R. 201, 12 A. R. 234, that under s. 559, s.-s. 4, of the Municipal Act, R. S. O. 1877 c. 174, a grant by way of bonus may be made to a Dominion railway. *Canada Atlantic R. W. Co. v. Township of Cambridge*, 11 O. R. 392.

Grant by Municipality to Individual—*Repayment.*]—A by-law granting $1,000 to an individual, in consideration of his having, at the instance of the corporation, advanced that amount in aid of a railway:—Held, bad, for it was not a grant to a railway, and it had not been assented to by the electors. Quære, whether without such assent the corporation could grant a bonus to a railway out of surplus funds in hand. *In re Bate and City of Ottawa*, 23 C. P. 32.

Grant of Land Expressly Appropriated for Public Purposes.]—See *In re Bronson and City of Ottawa*, 1 O. R. 415.

Liability of Municipality to Crown—*Release from—Statutes.*]—Where a township

municipality advanced a large sum of money to a railway company under the provisions of the Consolidated Municipal Loan Fund Act, and some of the stockholders of the company were afterwards released from their liability by an Act passed nearly eighteen months after the works on the road were stopped for want of funds, and new companies were formed under that and subsequent Acts of the legislature, which released the new corporations from the construction of the original line of road, until a new line had been constructed, and it appeared that there was no immediate prospect of such a result:—Held, that the municipality were not released from their liability to the Crown. *Norwich* v. *Attorney-General*, 2 E. & A. 541.

See Higgins v. *Town of Whitby*, 20 U. C. R. 296; *Michie* v. *Erie and Huron R. W. Co.*, 26 C. P. 566.

II. Amalgamation of Railways.

Decree—*Enforcement against Amalgamated Company.*]—Part of the consideration for the right of way over plaintiff's land was that the company, the Belleville and North Hastings Railway Company, should construct a cattle-pass under the railway, for the use of the plaintiff. The company refused to construct the pass, whereupon the plaintiff, on the 30th April, 1880, filed a bill in chancery against them to enforce the agreement, to which the company on the 13th September, 1880, filed an answer, and on the 13th November a decree was obtained by consent to construct it on certain terms specified therein. In March, 1879, the Acts 42 Vict. cc. 53 and 57 (O.) were passed, authorizing the Belleville and North Hastings Railway Company and the defendants to enter into an agreement for amalgamation subject to the ratification and approval of a majority of the shareholders of said companies, at public meetings called for that purpose. On the 29th June, 1880, an agreement was entered into for the amalgamation of the two companies under defendants' name, which was on the same day ratified and approved of by the respective shareholders. The plaintiff had no notice or knowledge of the deed of amalgamation, or of its contents. On the 4th March, 1881, the Act 44 Vict. c. 68 (O.) was passed, by s. 1 of which the said deed of amalgamation was declared legal and valid, and it was enacted that the two companies should be amalgamated and united, under the defendants' name, in the terms of the said deed. The decree not having been carried out, the plaintiff brought this action against the defendants to enforce it:—Held, that there was no complete amalgamation of the two companies until the passing of 44 Vict. c. 64 (O.), so that the Belleville and North Hastings Railway Company had not ceased to exist when the decree was made, which was therefore legal and valid; and that the plaintiff was entitled to maintain this action to enforce it against the defendants. *Fargey* v. *Grand Junction R. W. Co.*, 4 O. R. 232.

Provisional Directors—*Bond of—Bonus—Conditions—Liability to Perform.*]—By the bond of a railway company, executed by its provisional directors, in consideration of a bonus in aid of the railway, the company agreed to erect and maintain workshops in a certain town during the operation of the railway. The company, after certain changes of name, amalgamated with other companies and formed a larger one under another name, which latter company, although it had agreed to do so, ceased to so maintain the workshops. This last mentioned company subsequently amalgamated with and became part of the defendants' system, and by the amalgamation the defendants became responsible for all liabilities of the other companies:—Held, that the bond of the provisional directors was a corporate act binding on the company's successors, and, by consequence on the defendants, who had acquired the road; that the road, though it formed part of a larger railway connection represented by the defendants, was still in operation, and, as the contract was to maintain the workshops during the operation of the railway, it remained a binding engagement; and a reference to ascertain the damages, if any, for breach of the covenant, was directed. *Town of Whitby* v. *Grand Trunk R. W. Co.*, 32 O. R. 99.

See Jones v. *Canada Central R. W. Co.*, 46 U. C. R. 250; *Re Grand Junction R. W. Co.* v. *County of Peterborough*, 6 A. R. 339.

See ante I. 2 (b).

III. Assessment of Railways.

See In re Great Western R. W. Co., 1 L. J. 178; *S. C.*, 2 L. J. 193; *S. C.*, 4 L. J. 23; *Great Western R. W. Co.* v. *Rouse*, 15 U. C. R. 168; *Municipality of London* v. *Great Western R. W. Co.*, 16 U. C. R. 500; *S. C.*, 17 U. C. R. 262; *Buffalo and Lake Huron R. W. Co.* v. *Town of Goderich*, 21 U. C. R. 97; *City of Toronto* v. *Great Western R. W. Co.*, 25 U. C. R. 570; *Great Western R. W. Co.* v. *Rogers*, 27 U. C. R. 214; *S. C.*, 29 U. C. R. 245; *In re Great Western R. W. Co. and Township of North Cayuga*, 23 C. P. 28; *In re Canadian Pacific R. W. Co. and City of Toronto*, 23 A. R. 250; *Canadian Pacific R. W. Co.* v. *City of Quebec, Grand Trunk R. W. Co.* v. *City of Quebec*, 30 S. C. R. 73; *Niagara Falls Park and River R. W. Co.* v. *Town of Niagara*, 31 O. R. 29.

See Assessment and Taxes, II.—Municipal Corporations, XVI. 1.

IV. Bonds or Debentures.

(*See* also *ante* I.)

1. *Issue of.*

Illegal Issue — *Condition Precedent — Validating Statute.*]—See *City of Quebec* v. *Quebec Central R. W. Co.*, 10 S. C. R. 563.

Issue in Blank—*Subsequent Insertion of Payee's Name—Negotiation.*]—The C. P. and M. Railway Company being authorized by 38 Vict. c. 47 (O.) to issue preferential debentures, the holders of which, it was enacted, might, on default in payment, obtain a foreclosure or sale of the railway by suit in chancery, the directors passed a by-law enacting that such debentures should be issued under the seal of the company, and should "be negotiated from time to time as the proceeds thereof shall be required for the purposes of the company by the managing director."

Debentures were accordingly issued in blank, and handed to the managing director, who, subsequently, the railway company being indebted to the plaintiffs, delivered certain of them to the latter, as security for such debt. The debentures were in the following form: debenture No. The C. P. and M. Railway Company owes the Bank of Toronto, or order, the sum of $1,000 payable in ten years . . . with interest at eight per cent. per annum, payable half-yearly, on presentation of the proper coupons hereto attached. The name "Bank of Toronto" was not filled in until about the time of delivery to the plaintiffs, who now brought this action for an account of what was due under the debentures and payment, or, in default, a sale by the court of the property of the company:—Held, that the debentures were valid, and judgment must go as asked. The strict rules of the common law relating to deeds are not applicable to such debentures, but rather the rules of the law merchant relating to negotiable securities. But if this were not so, the fact that the name Bank of Toronto was not filled in until delivery to the plaintiffs did not make the debentures void: it would come within that class of cases where deeds have been held good notwithstanding an alteration or subsequent addition, because, at the time of execution, there was something which could not be ascertained, and was therefore to be filled up afterwards. Here, however, there was no execution, which imports delivery, prior to the time when the name was filled in. Held, also, that, although the debentures were under seal, this did not detract from their character, which was rather that of promissory notes than of mortgages; and though the Act made them a charge on all the property of the company, with a right to foreclosure and sale, this was something superinduced upon the security by virtue of the statute. Held, further, that the company having issued the debentures in blank and handed them to the managing director, who was also secretary and treasurer, to be dealt with by him at his discretion, he was empowered to complete them by the insertion of the obligee's name, and the company would be estopped from relying on such defences as the above. Held, lastly, that inasmuch as it appeared that these debentures were delivered with a view to facilitate the company's operations in getting out and disposing of ore, the main branch of its business, this was a "negotiation" of them "for the purposes of carrying on the company's business," and so within the meaning of the aforesaid Act and by-law. *Bank of Toronto* v. *Cobourg, Peterborough, and Marmora R. W. Co.*, 7 O. R. 1.

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2. *Payment of Interest.*

Coupon — *Presentment—Pleading.*]—Declaration on a bond, whereby defendants covenanted to pay R., or the holder, at, &c., £200, on, &c., and interest thereon semi-annually, on the delivery at the Gore Bank of the warrants therefor to the bond annexed, and that the plaintiffs became the holders, and have always been ready and willing to deliver said warrants at, &c., but £12 for interest is now due:—Held, bad, in not averring an actual delivery of or an offer to deliver the warrants at the bank. *Osborne* v. *Preston and Berlin R. W. Co.*, 9 C. P. 241.

The plaintiffs sued for interest on two bonds made by defendants on the 27th January, 1855, for the payment to the plaintiffs or order of the principal money named, on the 1st November, 1855, at the agency of the Bank of Upper Canada in Hamilton, together with interest thereon. Both counts alleged that, although defendants paid the principal on the 29th January, 1861, with interest up to the 1st November, 1855, yet they had not paid any interest after that day. In the second count it was averred that the bond was in defendants' possession and cancelled by them, and the plaintiffs therefore could not present it on the day appointed for payment; and that on that day defendants had no money at the agency, and gave no instruction to the manager there to pay. Defendants pleaded, to the first count, that they were always ready to pay the principal and interest according to the bond, and did pay the same when presented, but that the bond was not presented at the said agency on the day appointed for payment, nor at any other time; and that defendants never owed nor covenanted to pay the plaintiffs interest after that day, when they were ready to pay both principal and interest. And to the second count, that they had money at the said agency to pay the bond, but the plaintiffs had no one there, nor was any one there on that day or at any time after to receive the same; and that they never owed, &c., (as in the last plea):—Held, both pleas good; and that the omission to aver presentment in the first count was cured by the plea. At the trial it appeared that the bond declared on in the first count had never been in the plaintiffs' custody, having been retained at their request by defendants' solicitor, and it was proved that when the bonds fell due, and up to July, 1857, defendants had funds at the agency out of which they would have been paid if presented:—Held, that the pleas were proved; that defendants were not liable to pay interest after the bonds matured; and that the Judge properly directed a verdict in their favour. *McDonald* v. *Great Western R. W. Co.*, 21 U. C. R. 223.

——— *Presentment — Pleading — Assignment—Equities—Forfeiture.*]—A declaration alleged that defendants, by their bond or debenture, &c., did bind themselves, &c., to pay the bearer of the said debenture on, &c., $1,000, and interest thereon half-yearly at seven per cent. per annum on the 1st March and September, at a named place, on presentation of the proper "coupons" therefor, and then annexed to the said bond, &c.; that the defendants delivered the bond to C. & Co., who thereby became the lawful holders of the said bond and coupons; that after the making of the said bond the coupon for $35, being the instalment of interest due 1st September, 1873, was duly presented at the said place, and was not paid, but was dishonoured, and payment refused; and that the said coupons and all claims in respect thereof have been assigned to the plaintiff, who now sues for the recovery of the amount thereof: — Held, declaration bad, for that it did not appear what a "coupon" was, or that its assignment alone gave any right of action, the covenant to pay interest being contained in the bond. *McKenzie* v. *Montreal and City of Ottawa Junction R. W. Co.*, 27 C. P. 224.

By s. 13 of 34 Vict. c. 47 (D.), the defendants' Act of incorporation, they were empowered to issue bonds or debentures in such form

and amount, and payable at such times and places as the directors might from time to time appoint, &c.; and by 35 Vict, c. 12, s. 2 (O.), the bonds or debentures of corporations made payable to bearer, or any person named therein as bearer, may be transmitted by delivery, and such transfer shall vest the property thereof in the holder, to enable him to maintain an action in his own name. Defendants issued bonds or debentures, with coupons attached for the payment of the interest half-yearly, payable to bearer, and delivered them to C. & Co., the contractors for the building of the road. The coupons for the first instalment of interest not having been paid, the plaintiff brought an action thereon, alleging an assignment to him, and that he was the lawful holder thereof:—Held, that the plaintiff held the coupons freed from any equities arising between the defendants and C. & Co. under an agreement creating a charge upon such instruments, and a plea setting up the forfeiture of such debentures under such agreement, was held bad. *S. C.*, 29 C. P. 333.

Interest in Arrear—*Remedy—Attachment of Debts—Receiver.*]—So long as a railway company is a going concern, bondholders whose bonds are a general charge on the undertaking have no right, even although interest on these bonds is in arrear, to seize, or take, or sell, or foreclose any part of the property of the company. Their remedy is the appointment of a receiver. The bondholders of the defendants in this case were held not entitled to the moneys claimed by them, which were the earnings of the road deposited in a bank, and which had been attached by judgment creditors of the road. Decision in 18 O. R. 581 reversed. *Phelps* v. *St. Catharines and Niagara Central R. W. Co.*, 19 O. R. 501.

See Re Thomson and Victoria R. W. Co., 9 P. R. 119, *post* 3.

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3. *Right of Bondholders to Register and Vote.*

Creditors—*Delivery of Debentures to—Mandamus.*]—A trustee held certain debentures of a railway company on trust to secure certain creditors of the company for advances made by them, which debentures were to be handed over to the creditors for sale, upon the company making default in payment of the advances. The company made default, and the debentures were delivered over to the creditors:—Held, that the creditors were entitled under 34 Vict, c. 43, s. 33 (O.), to be registered as holders of the debentures, to enable them to qualify and vote for directors; and that a mandamus should issue to compel the company so to register them. *In re Thomson and Victoria R. W. Co.*, 8 P. R. 423.

Default of Interest—*Proof of.*]—To an application for a mandamus to compel a railway company to register bonds, it was objected that it did not appear that the company had made default in payment of the interest, the coupons not being shewn to have been presented at the place named for payment:—Held, that the fact of the company never having been ready to pay them there or elsewhere, was a sufficient answer to their objection. *Re Thomson and Victoria R. W. Co.*, 9 P. R. 119.

Demand—*Officer of Company.*]—A demand upon a railway company to register the bonds was held sufficiently made upon the assistant secretary, who, it was shewn, performed all the duties of the secretary's office. *Re Thomson and Victoria R. W. Co.*, 9 P. R. 119.

Transferee—*Production of Transfers—Mandamus.*]—O., being the holder of fourteen bonds of the railway company, issued on 1st May, 1876, payable on 1st January, 1881, with interest meanwhile half-yearly at six per cent. per annum, requested the secretary of the company to register the bonds under 38 Vict. c. 56 (O.) This the secretary refused to do unless the intermediate transfers were produced and registered at the same time:—Held, that the secretary was bound to register the bonds without the production or registration of the transfers, and a summons for a mandamus was made absolute with costs. *In re Osler and Toronto, Grey, and Bruce R. W. Co.*, 8 P. R. 506.

The Canadian Bank of Commerce received from M. R. & Co., bankers in London, bonds of the T., G., and B. Railway Company, to the amount of £105,800, represented by M. R. & Co. as belonging to different persons named, and tendered them for registration at the railway office, in order that these persons might vote thereon. The secretary of the railway company registered such of the bonds as stood in the names of the original holders, but refused to register the others unless written transfers from the original holders were produced:—Held, that the company should register the bonds without the production of the transfers; that the proof of title in the alleged owners was sufficient; that the issue of script in London as representing the bonds formed no objection; and a mandamus to register the bonds was granted. *In re Johnson and Toronto, Grey, and Bruce R. W. Co.*, 8 P. R. 535.

If the holders of railway bonds desire to acquire the right of voting thereon under the Act, all the transfers must be evidenced in such a way as to enable the company to register them in the same manner as they register shares. No special provision by by-law for the registration of such bonds is requisite. It is enough that the bondholders on the application for a mandamus should make out a primâ facie title, and the mere fact that they were directors of the company was held no objection, it not being denied that they had done what was necessary under 37 Vict. c. 63, s. 25 (O.), to entitle them to become holders. *Re Thomson and Victoria R. W. Co.*, 9 P. R. 119.

Votes—*Number of.*]—By the Act of incorporation of a railway company, every shareholder was entitled to one vote for every share held by him. It was provided by the same Act, that if the interest on the bonds issued by the company should be in arrear all holders of bonds should have the same right of voting and qualification for directors as were attached to shareholders:—Held, that the bondholders were not entitled to more than one vote on each bond. *Bunting* v. *Laidlaw*, 8 P. R. 538.

——— *Special Meeting—Questions Arising at—Agreement.*]—Under a statute which enacted that, in the event at any time of the interest upon the bonds of a railway company remaining unpaid and owing, then, at the next general meeting of the company all holders of

bonds should have and possess the same rights and privileges, and qualifications for directors, and for voting, as are attached to shareholders, provided that the bonds, and any transfers thereof, should have been first registered in the same manner as was provided for the registration of shares:—Held, that the words "at the next general meeting" were merely indicative of the earliest period at which the bondholders might vote, and that the statute did not require a new registration in order to entitle the bondholders to vote at any subsequent meeting, so long as the interest remained unpaid. Held, also, that the bondholders' right to vote was not limited to the right of voting for directors, but that they had the right to vote on all subjects properly coming before a general annual meeting upon which shareholders might vote. And where a subsequent statute extended the bondholders' right of voting to "special meetings:"—Held, also, that the bondholders had the like right to vote on all subjects coming before "special meetings." Where a statute authorized the railway company to enter into agreement with any other company, for leasing or working its line, provided that assent thereto should be given by at least two-thirds of the shareholders present, or represented by proxy, at any meeting specially called for the purpose:—Held, that the word "shareholder" must be interpreted to include all who were entitled to vote as shareholders, which included bondholders. Held, also, that the registered bondholders were entitled to vote at a special meeting called for the purpose of obtaining the assent of the shareholders to such an arrangement, on the question of its adoption. In re Osler and Toronto, Grey, and Bruce R. W. Co., 8 P. R. 506, and In re Johnson and Toronto, Grey, and Bruce R. W. Co., *ib.* 535, followed. Held, also, that the votes of registered bondholders having been rejected, the arrangement, though confirmed by two-thirds of the actual shareholders present, or represented, was nevertheless not properly confirmed within the meaning of the statute, and an action to compel specific performance of the agreement was dismissed. *Hendrie* v. *Grand Trunk R. W. Co.*, *Grand Trunk R. W. Co.* v. *Toronto, Grey, and Bruce R. W. Co.*, 2 O. R. 441.

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4. *Trustees for Bondholders.*

Possession of Railway — *Liability* — *Privileged Claim*—*Unpaid Vendor.*]—In virtue of the provision of a trust conveyance, granting a first lien, privilege, and mortgage upon the railway property, franchise, and all additions thereto of the South Eastern Railway Company, and executed under the authority of 43 & 44 Vict. c. 49 (Q.), and 44 & 45 Vict. c. 43 (Q.), the trustees of the bondholders took possession of the railway. In actions brought against the trustees after they took possession, by the appellants, for the purchase price of certain cars and other rolling stock used for operating the road, and for work done for and materials delivered to the company after the execution of the deed of trust, but before the trustees took possession of the railway: — Held, that the trustees were not liable. 2. That the appellants lost their privilege of unpaid vendors of the cars and rolling stock as against the trustees, because such privilege cannot be exercised when movables become immovable by destination (as was the result with regard to the cars and rolling stock in this case), and the immovable to which the movables are attached is in possession of a third party or is hypothecated: art. 2017, C. C. 3. But, even considered as movables, such cars and rolling stock became affected and charged by virtue of the statute and mortgage made thereunder, as security to the bondholders, with right of priority over all other creditors, including the privileged unpaid vendors. *Wallbridge* v. *Farwell*, *Ontario Car and Foundry Co.* v. *Farwell*, 18 S. C. R. 1.

Security—*Second Mortgagee*—*Purchase*—*Banks.*]—W. having agreed to advance money to a railway company for completion of its road, an agreement was executed by which, after a recital that W. had so agreed and that a bank had undertaken to discount W.'s notes indorsed by E. to enable W. to procure the money to be advanced, the railway company appointed said bank its attorney irrevocable, in case the company should fail to repay the advances as agreed, to receive the bonds of the company (on which W. held security) from a trust company with which they were deposited, and sell the same to the best advantage, applying the proceeds as set out in the agreement. The railway company did not repay W. as agreed, and the bank obtained the bonds from the trust company, and having threatened to sell the same, the company, by its manager, wrote to E. and W. a letter requesting that the sale be not carried out, but that the bank should substitute E. and W. as the attorneys irrevocable of the company for such sale, under a provision in the aforesaid agreement, and if that were done, the company agreed that E. and W. should have the sole and absolute right to sell the bonds for the price and in the manner they should deem best in the interest of all concerned, and apply the proceeds in a specified manner, and also agreed to do certain other things to further secure the repayment of the moneys advanced. E. and W. agreed to this, and extended the time for payment of their claim, and made further advances, and, as the last mentioned agreement authorized, they re-hypothecated the bonds to the bank on certain terms. At the expiration of the extended time the railway company again made default in payment, and notice was given them by the bank that the bonds would be sold unless the debt was paid on a certain day named; the company then brought an action to have such sale restrained:—Held, that the bank and E. and W. were respectively first and second incumbrancers of the bonds, being to all intents and purposes mortgagees, and not trustees of the company, in respect thereof, and there was no rule of equity forbidding the bank to sell or E. and W. to purchase under that sale. Held, further, that if E. and W. should purchase at such sale, they would become absolute holders of the bonds and not liable to be redeemed by the company. Held, also, that the dealing by the bank with the bonds was authorized by the Banking Act. *Nova Scotia Central R. W. Co.* v. *Halifax Banking Co.*, 21 S. C. R. 536.

See Jones v. *Canada Central R. W. Co.*, 46 U. C. R. 250.

V. Carriage of Goods.

1. *Damages for Loss or Non-Delivery.*

Excessive Damages.] — Defendants undertook to carry for plaintiffs a quantity of

oats to T., which they did, delivering them at an elevator there belonging to S., who received them to hold for plaintiffs. Of the quantity thus delivered plaintiffs received part before the elevator was destroyed by fire, as it subsequently was. There was a very large amount of grain besides the plaintiffs' in the elevator at the time of its destruction, most of which settled down in a conical mass on the wharf on which the building stood, the remainder falling into the water. Plaintiffs desired to remove what remained of their grain, alleging that they could select it from the general mass, from their knowledge of the portion of the building in which it had been stored; but defendants, who were the bailees of the greater part, assumed charge of the whole for the benefit of all, and refused to allow plaintiffs to do so, stating that it would be sold for the general benefit, which it accordingly was, when the plaintiffs' share of the proceeds was found to amount to only about $28:—Held, that plaintiffs could maintain trover against defendants in respect of their grain so disposed of by defendants, inasmuch as the latter prevented plaintiffs from removing it if they could find it. Held, also, that this was a case in which no greater than the actual damages sustained should have been assessed; and, the jury having awarded excessive damages, the court ordered a new trial, unless plaintiffs would reduce their verdict to a sum named. *Moffatt* v. *Grand Trunk R. W. Co.*, 15 C. P. 392.

Evidence of Loss.]—Under an averment in the declaration of a loss of market of corn by delay in carriage:—Held, that evidence of the loss caused by the corn sprouting and thus deteriorating in quality was improperly received. *Kyle* v. *Buffalo and Lake Huron R. W. Co.*, 16 C. P. 76.

Measure of—*Loss of Profits.*]—In an action by plaintiffs against defendants for damages occasioned by the non-delivery of a certain article of machinery contracted to be delivered by them for plaintiffs, it appeared that no notice had been given at the time of the contract to the defendants of the necessity for a prompt delivery of the machinery nor of the use it was to be put to:—Held, that the plaintiffs could only recover the value of the missing article, and were not entitled to the loss of profits arising from this non-delivery, or the wages of certain workmen employed upon the building in which the machinery was to be used. *Ruthven Woollen Manufacturing Co.* v. *Great Western R. W. Co.*, 18 C. P. 316.

——— *Mitigation.*]—Where issues in fact were left to a jury, reserving the question of nominal or substantial damages for the opinion of the court:—Held, that the only question for the court was, whether the plaintiff should be limited to nominal damages, or recover the actual value of his goods; and that the question of mitigating the damages upon the facts proved could not be considered. *Robson* v. *Buffalo and Lake Huron R. W. Co.*, 10 C. P. 279.

——— *Value of Goods—Interest.*]—In an action for conversion of oats sold by the railway company at the place to which they were consigned:—Held, that the plaintiff was entitled to recover as damages the value of the oats at that place at the time of conversion; but, as there was some difficulty in ascertaining this, substantial justice would be done by allowing the plaintiff the price paid at the place of shipping with six per cent. interest added. *Worden* v. *Canadian Pacific R. W. Co.*, 13 O. R. 652.

——— *Value of Goods—Tender.*]—Plaintiff had sold certain goods to M., which were at the time lying at defendants' railway station, and defendants were fully aware of the sale, but, notwithstanding, they contracted with plaintiff to carry and deliver them for him as required, and gave him a shipping bill accordingly. In an action by plaintiff against defendants for the non-delivery:—Held, that defendants could not set up M.'s title to the goods as against the plaintiff. It further appeared that beyond the fact of M. having notified defendants of his claim, and making a demand for the goods, he did nothing to indicate his intention of looking to them for damages, but in fact sued plaintiff and recovered the whole amount of his claim from him:—Held, that the case could not be brought within the principle of a bailee setting up the jus tertii against the bailor, as there was here no bonâ fide defending in right and title of such third person. Held, also, that plaintiff was entitled to recover the whole value of the property converted, and not merely the difference between the price at the time of refusal to deliver and tender of it back again. The tender in question was made in writing by defendants' solicitor, two days before the commission day of the assizes, offering for plaintiff's acceptance the fifty kegs of butter (the goods in question) sold by him to M., and for which M. had recovered against him, stating same to be at T. at plaintiff's own risk:—Held, wholly illusory, and not to partake of any of the incidents of a legal tender. *Brill* v. *Grand Trunk R. W. Co.*, 20 C. P. 440.

See Milligan v. *Grand Trunk R. W. Co.*, 17 C. P. 115; *Crawford* v. *Great Western R. W. Co.*, 18 C. P. 510; *Brodie* v. *Northern R. W. Co.*, 6 O. R. 180; *McGill* v. *Grand Trunk R. W. Co.*, 19 A. R. 245.

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2. *Deficiency in Goods Delivered.*

Proof of—*Evidence.*]—Defendants received 2,000 bundles of hoop iron to be carried to London and delivered at their station there to the plaintiffs. On its arrival, the plaintiffs having no agent in London and living in Montreal, defendants sent to them their advice notes of the arrival, and unloaded the iron in their yard, where it remained for nearly three weeks and was injured by rust and exposure:—Held, that the defendants as common carriers were not liable. Eighteen bundles were missing, and defendants' officers, not having checked the number taken out of the cars, could only say that if the 2,000 bundles arrived there it was all placed in the yard, and must have been stolen from there:—Held, that the defendants were liable for the eighteen bundles. *Hall* v. *Grand Trunk R. W. Co.*, 34 U. C. R. 517.

——— *Onus—Conduct of Parties.*]—The plaintiff shipped a number of bundles of iron by defendants' railway from Montreal to London, subject to a condition that on its arrival, and on being detached from the train, the delivery was to be complete and the liability of defendants to terminate. On the arrival

of the iron defendants forthwith sent the plaintiff advice notes of its arrival, on which were indorsed the above condition, and from which it would appear that all the iron had arrived: and requested him to send for it without delay, and notified him that it thenceforth remained at his risk. The plaintiff, who was the ticket clerk at the London station during all the time that the iron was there, saw the iron and could have counted the bundles and have seen that they were correct. Instead, however, of doing so and taking it away, he allowed it to remain in a place where, by an arrangement which had existed for some years between him and defendants, it was accustomed to be placed free of charge and for his sole convenience, and where he was enabled, from time to time, to send for and take such portions as he required:—Held, that under these circumstances defendants were not bound to shew that all the iron shipped had in fact arrived; that therefore no liability would attach upon them for an alleged deficiency; and, at all events, that this point could not be raised in term, as it was not taken at the trial. *Taylor* v. *Grand Trunk R. W. Co.*, 24 C. P. 582.

Receipt—*Statement of Weight*—*Estoppel.*]—Certain bars and bundles of iron came by ship from Glasgow to Montreal, consigned to the plaintiff. His agent gave to defendants' agent an order to get it from the ship, and afterwards received from the latter a receipt, specifying the number of bars and bundles and the gross weight, but with a printed notice at the top of it that "rates and weights entered in receipts or shipping bills will not be acknowledged." All the iron received by defendants for the plaintiff was delivered at G., but there was a very considerable deficiency in the weight. So far as appeared, the iron had not been weighed either on being taken from the ship or afterwards:—Held, affirming the judgment in 30 U. C. R. 139, that defendants were not estopped by their statement of weight in the receipt, and were not liable to the plaintiff. *Horseman* v. *Grand Trunk R. W. Co.*, 31 U. C. R. 535.

See Milligan v. *Grand Trunk R. W. Co.*, 17 C. P. 115.

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3. *Liability as Carriers or Warehousemen.*

(a) *Goods in Company's Warehouse at Destination.*

Dutiable Goods—*Notice*—*Destruction by Fire.*]—Plaintiff delivered to defendants, as common carriers, foreign goods in bond at Buffalo, to be carried to Brantford, valued at £69 3s. A receipt was given (26th April, 1854), for (amongst other things) a box at Buffalo for way station. The contract alleged was to carry the goods from Buffalo to Brantford, and there to deposit and keep them for the plaintiff, for reward, &c. Frequently, before defendants' freight station was burnt at Brantford (on the 8th or 9th May, 1854), and afterwards, the plaintiff applied for the goods, when the answer was "not arrived." On 9th May the answer was, "burnt up." It was admitted that the goods arrived on the 5th or 6th May, and were stored in a bonded warehouse in defendants' control, and were burnt on the 8th or 9th, and that no notice of arrival was sent to the consignee:—Held, that, under the contract as stated in the declaration and proved, defendants' liability as common carriers had ceased, and that of warehousemen commenced, and they were not liable under the contract as alleged, and not bound to give notice. *Bowie* v. *Buffalo, Brantford, and Goderich R. W. Co.*, 7 C. P. 191.

Declaration, that the plaintiff delivered goods to defendants as common carriers, valued at £150, to be safely conveyed from Suspension Bridge to Toronto, within a reasonable time, for hire. Breach, that defendants did not, within such reasonable time, take care of and convey the said goods to Toronto, and never delivered the same. The plaintiff, on the 24th July, 1856, received a notice that "the undermentioned goods consigned to you have arrived here this day; we will thank you to send for them as soon as possible, as they remain here at your risk and expense." The goods were spring goods, which had arrived from the bridge on the 5th April and 11th March, and were placed by defendants in a bonded warehouse, being subject to duties. Being unseasonable at the time of receipt of the notice, plaintiff refused to take them:—Held, that the goods being bonded goods, subject to duty, and defendants having conveyed them within a reasonable time to the warehouse, where they were bound by law to deliver them, they were not bound to give notice of their arrival there, and their duty as common carriers had ceased. The last case confirmed. *O'Neill* v. *Great Western R. W. Co.*, 7 C. P. 203.

Special Conditions—*Delay in Delivery.*]—On 3rd April, 1871, defendants received at Montreal a case of hats to be carried to Toronto, consigned to the plaintiffs. The goods arrived in due course at Toronto, and were placed in defendants' warehouse, but were not delivered to the plaintiffs until the 15th June following, whereby the sale of the goods was lost, and their value very considerably deteriorated. It appeared, however, that the goods were carried under this special condition: "The company will not be responsible for any goods left until called for or to order, warehoused for the convenience of the parties to whom they belong, or by or to whom they are consigned; and that the delivery of the goods will be considered complete, and the responsibilities of the company will be considered to terminate, when placed in the company's shed or warehouse." But it also appeared that it was the custom of defendants to deliver to the consignees goods brought by them and warehoused, and to charge for the cartage in the freight:—Held, that the condition would only relieve defendants from liability as common carriers, but not as warehousemen; and that, being bound in the latter capacity to deliver the goods, they were liable for the loss sustained by the detention. It appeared also that the address in the shipping bill was not very distinctly written, and it was contended that this was the cause of the delay; but this was expressly left to the jury, who found for the plaintiffs, and the court would not interfere. *McCrosson* v. *Grand Trunk R. W. Co.*, 23 C. P. 107.

——— *Destruction by Fire.*]—Under a condition in a railway shipping bill the delivery of goods was to be considered complete and the responsibility of the company to terminate when the goods were placed in the company's warehouse at their destination.

The goods were carried to the station at the place of delivery and were placed in the company's shed there used for the purpose of storing goods, where they were subsequently destroyed by fire. The station was some five miles distant from the village where the plaintiff's place of business was:—Held, that the station was the destination of the goods and not the village; that the shed was a warehouse within the meaning of the condition; and that after the goods were placed there the company's liability was at an end. *Richardson* v. *Canadian Pacific R. W. Co.*, 19 O. R. 389.

——— *Grain—Non-delivery.*]—The plaintiff, who lived at Meaford, sold a quantity of barley by sample to one D., a brewer in Toronto, and shipped same by the defendants' railway, consigned to D. at Brock street, signing a consignment note and receiving a shipping receipt from the company, which stipulated that such receipt should not be transferable, but that as to grain consigned to defendants' elevator at Toronto defendants would grant a negotiable receipt. The barley was duly carried to Toronto and warehoused by defendants in their elevator there, under, as they contended, the right conferred therefor by certain conditions of the contract; and they then tendered grain of the same grade as plaintiff's, which D. refused to accept:—Held, that the consignment note and shipping receipt, which constituted the contract between the parties, shewed that a distinction was made between grain consigned to the defendants' elevator and other grain; the conditions as to warehousing being only applicable to the former, and that the plaintiff was therefore entitled to recover the amount of the damages sustained by the non-delivery of the specific grain shipped. *Leader* v. *Northern R. W. Co.*, 3 O. R. 92.

——— *Loss of Goods.*]—On the back of the request note and shipping receipt given and received by the plaintiff on the shipment of goods from Montreal to Toronto and the freight advice note received by him on the arrival of the goods at Toronto, and specially referred to on the face thereof respectively, were a number of conditions under the heading: "General notices and conditions of carriage," one of which was that the company should not be liable for any goods left until called for or to order, or warehoused for the convenience of the parties to whom they belonged, &c., and that the warehousing of all goods would be at the owner's risk and expense. On the arrival of the goods at Toronto they were placed in the defendants' warehouse there, and the plaintiff, on receipt of the freight advice note, called at the warehouse, and obtained permission to leave them there, nothing being said about storage. The goods were subsequently lost, and the plaintiff brought an action against the defendants to recover their value:—Held, that he could not recover, for, although the defendants must be deemed to have held the goods as warehousemen and not as carriers, the terms and conditions of the request note and shipping receipt, which constituted the contract between the parties, applied and bound the plaintiff, irrespective of whether he had read the conditions or knew their contents, and therefore the defendants were protected by the condition above set forth. *Mayer* v. *Grand Trunk R. W. Co.*, 31 C. P. 248.

See Penton v. *Grand Trunk R. W. Co.*, 28 U. C. R. 367; *Hall* v. *Grand Trunk R. W. Co.*, 34 U. C. R. 517; *Mason* v. *Grand Trunk R. W. Co.*, 37 U. C. R. 163; *Lake Erie and Detroit River R. W. Co.* v. *Sales*, 26 S. C. R. 663; *Vineberg* v. *Grand Trunk R. W. Co.*, 13 A. R. 93, *post* VI.

(b) *Goods in Company's Warehouse in Transit.*

Special Conditions — *Detention of Goods.*] — A condition was, that goods addressed to places beyond the defendants' line, and respecting which no direction to the contrary should have been received, would be forwarded by the defendants as opportunity might offer, by public carriers or otherwise, or might be suffered to remain in the defendants' warehouse, at the risk of the owner; but that the delivery by the defendants should be considered complete, and their responsibility cease, when the other carriers should have received notice that the defendants were prepared to deliver the goods to them; and that the defendants would not be responsible for any loss or detention after arrival at their station nearest the place of consignment. The third count alleged that the goods were delivered to the defendants to be carried from Montreal to Peterborough, subject to this condition (setting it out), amongst others, and averred that the defendants did not forward the goods to Peterborough within a reasonable time, but on the contrary detained them at Port Hope in their warehouse:—Held, that defendants were charged as carriers, and were so acting, not as warehousemen. *Mason* v. *Grand Trunk R. W. Co.*, 37 U. C. R. 163.

——— *Destruction by Fire.*]—Four carloads of flour were delivered to defendants to be carried from Newmarket, Ont., to Chatham, N. B., under a special contract whereby defendants were not to be liable for any delay occasioned by want of opportunity to forward goods beyond places where defendants had stations, but they could forward them to their destination by public carriers or otherwise, as opportunity might offer; that pending communication with the consignees the goods remained on the defendants' premises at the owner's risk; and that defendants were not to be liable after notification to the carriers that they were ready to deliver the goods for further conveyance; and that defendants were not to be liable for loss by fire. It appeared that the defendants' line did not extend beyond Toronto, and that the goods were to be forwarded by the Grand Trunk Railway; that on their arrival at Toronto, they were placed in defendants' freight sheds, and notice, addressed to the consignee, sent to the consignor at Newmarket, and also to the Grand Trunk Railway Company, that the defendants were prepared to deliver the goods for further conveyance; and that, after such notice, while the goods were in defendants' freight sheds, they were destroyed by fire without any negligence on defendants' part:—Held, that defendants were not liable as carriers, because they had expressly limited their liability; nor as warehousemen, because no negligence was shewn; the only negligence suggested being that defendants did not procure or supply cars for the transhipment before the fire, but that this was not sustainable; and, even if this could constitute negligence, quære, whether the recovery could be for more than nominal damages, i.e., whether

the loss by fire was the damage naturally resulting from such negligence. *Brodie* v. *Northern R. W. Co.*, 6 O. R. 180.

(c) *Goods in Company's Warehouse at Place of Shipment.*

Destruction by Fire.]—When a shipper stores goods from time to time in a railway warehouse, loading a car when a carload is ready, the responsibility of the railway company in respect of such of the goods as have not been specifically set apart for shipment is not that of carriers but of warehousemen, and in case of their accidental destruction by fire, the shipper has no remedy against the company. Judgment in 23 O. R. 454 reversed. *Milloy* v. *Grand Trunk R. W. Co.*, 21 A. R. 404.

4. *Special Contracts Limiting or Relieving from Liability.*

(*See* also cases under 3.)

(a) *Conditions—Validity of, to Protect Company.*

Binding Contract—*Reading over—Conversion of Cattle—Payment into Court.*]—Plaintiff sent some cattle from Beachville by defendants' railway, signing a paper which declared that he undertook all risk of loss, injury, or damage, in conveyance and otherwise, whether arising from the negligence, default, or misconduct, criminal or otherwise, on the part of defendants and their servants. He was told by the station master that he would have to sign these conditions, which he did without taking time to read them. To an action for negligence in the carriage of the cattle by which five of them were killed, defendants pleaded these conditions, which the jury found that the plaintiff had signed: —Held, that he was bound by them, though he might not have read or understood the paper. Simons v. Great Western R. W. Co., 2 C. B. N. S. 620, distinguished, as being founded on the fraud practised on the plaintiff to induce him to sign. There was also a count in trover for conversion of the five cattle, as to which defendants paid into court $52, being the price for which they were sold by defendants' station master after they had been killed:—Held, that such payment admitted only a cause of action, not the particular cause sued for; and the evidence proved no conversion by defendants, the sale not being the ordinary duty of a station master. *O'Rorke* v. *Great Western R. W. Co.*, 23 U. C. R. 427.

——— *Transportation of Cattle — Pleading.*] — To a declaration against defendants, setting out a special contract entered into with plaintiff to carry certain cattle, whereby plaintiff undertook "all risk of loss, injury, damage, and other contingencies in loading, unloading, transportation, conveyance, and otherwise, no matter how caused," and alleging the consequent duty on defendants' part to furnish suitable and safe carriages, and the breach of such duty, whereby some of the cattle were killed and others injured, defendants pleaded this special contract, and that while said cattle were being so conveyed a door of one of the cars became open, and some of the cattle fell out and were injured: —Held, on demurrer, a good plea, and (following the last case) that defendants were not liable. *Hood* v. *Grand Trunk R. W. Co.*, 20 C. P. 361.

——— *Transportation of Glass — Gross Negligence.*] — Defendants received certain plate glass to be carried for the plaintiff, who signed a paper, partly written and partly printed, requesting them to receive it upon the conditions indorsed, which provided that they would not be responsible for damage done to any china, glass, &c., delivered to them for carriage; and defendants gave a receipt with the same conditions upon it:— Held, that such delivery and acceptance formed a special contract, which was valid at common law, and exempted defendants from injury to the goods, even though caused by gross negligence. *Hamilton* v. *Grand Trunk R. W. Co.*, 23 U. C. R. 600. Followed in *Spettigue* v. *Great Western R. W. Co.*, 15 C. P. 315, and *Bates* v. *Great Western R. W. Co.*, 24 U. C. R. 544.

——— *Transportation of Hogs — Reasonable Condition.*]—The plaintiff delivered to the defendants, at Stony Point, eighty-six hogs, and on the following day he put on board the same car, at Thamesville, on the way, twenty more hogs, to be carried to Guelph. He got at Stony Point a drover's pass to pass him in charge of his stock. The agent there said that he allowed the plaintiff to label the car "Thamesville," on condition that the plaintiff would see the label changed, and that if it had been labelled "Guelph" it would not have stopped at Thamesville at all. The plaintiff went as far as Thamesville with the hogs, and thence went on by express. By some error the car went round by Hamilton; a delay of several days occurred, by which the hogs were injured, and several died; and when the car reached Guelph nine were missing altogether. The jury found that they were lost after leaving Thamesville, but how they could not say. Upon the shipping bill, as well as upon the plaintiff's pass, was indorsed a condition that upon a free pass being given, defendants would not be responsible for any negligence, default, or misconduct, gross, culpable, or otherwise, on the part of defendants or their servants, or of any other person, causing or tending to cause the death, injury, or detention of the goods: —Held, that the condition protected the defendants, for it sufficiently appeared that the loss must have happened from some cause within it; and quære, whether it was not a reasonable condition, the pass being given to enable the plaintiff to accompany and take care of the stock. Held, also, that the plaintiff was to blame for not having the proper label put on at Thamesville, and for not remaining himself or sending some one with the hogs. The declaration alleged as a breach of defendants' contract the non-delivery within a reasonable time:—Held, that under this the plaintiff might have recovered for the hogs lost and not delivered at all. *Farr* v. *Great Western R. W. Co.*, 35 U. C. R. 534.

Construction of Conditions — *Risk — Loss.*]—Defendants received at Petrolia two car loads of coal oil to be carried to London. The shipping notes stated, "The G. W. Railway will please receive the undermentioned property, to be sent subject to their tariff, and under the conditions stated above and on the

other side," one of which conditions was that defendants would not be liable for the loss or damage to goods of a combustible nature. One of the cars never arrived, and defendants could give no account of it; the other reached London, and was damaged there, as was supposed, and all the oil in it lost:—Held, that defendants were liable, for the condition related only to risk of carriage. *Fitzgerald* v. *Great Western R. W. Co.*, 39 U. C. R. 525.

Oral Contract — *Risk* — *Wrongful Act.*] — The respondents sued the appellant company for breach of contract to carry petroleum in covered cars from L. to H., alleging that they negligently carried the same upon open platform cars, whereby the barrels in which the oil was were exposed to the sun and weather and were destroyed. At the trial, an oral contract between plaintiffs and defendants' agent at L. was proved, that the defendants would carry the oil in covered cars with despatch. The oil was forwarded in open cars, and delayed in different places, and in consequence a large quantity was lost. On the shipment of the oil, a receipt note was given which said nothing about covered cars, and which stated that the goods were subject to conditions indorsed thereon, one of which was, "that the defendants would not be liable for leakage or delays, and that the oil was carried at the owner's risk:"—Held, that the loss did not result from any risks by the contract imposed on the owners, but that it arose from the wrongful act of the defendants in placing the oil on open cars, which act was inconsistent with the contract they had entered into, and in contravention as well of the undertaking as of their duty as carriers. Evidence was admissible to prove an oral contract to carry in covered cars, which contract the agent at L. was authorized to enter into, and which must be incorporated with the writing so as to make the whole contract one for carriage in covered cars, and non-compliance with the provision as to carriage in covered cars, prevented the appellants setting up the condition that "oil was carried at the owner's risk" as exempting them from liability. Judgments in 27 C. P. 528, 28 C. P. 586, and 4 A. R. 601, affirmed. *Grand Trunk R. W. Co.* v. *Fitzgerald*, 5 S. C. R. 204.

See Rickwell v. *Grand Trunk R. W. Co.*, 26 A. R. 451, *post* XIII.

(b) *Liability beyond Defendants' Line.*

Delivery to Connecting Company — *Nearest Station—Notice.*]—Declaration upon a contract by defendants to carry goods from St. Mary's to Hamilton within a reasonable time, alleging non-performance. Plea, that the goods were carried upon certain special conditions, providing, in substance, that goods addressed to points beyond defendants' railway would be forwarded by public carriers, and defendants' responsibility should cease on notice to such carriers that the goods were ready for them; and that defendants should not be responsible for any damage or detention after said notice, or beyond their limits, nor for "claims arising from delay or detention of any train, whether in starting, or at any station, or in the course of the journey." And the defendants alleged that they had no station at Hamilton, and that they conveyed the goods to their nearest station thereto, and handed them over to the Great Western R. W. Co., which conveyed them to Hamilton. Replication, that the plaintiff sues not only for the neglect and delay in the plea alleged, but for unreasonable delay by defendants at St. Mary's, and for neglect to carry thence to their station nearest to Hamilton. Rejoinder, repeating the conditions set out in the plea, and alleging that defendants only agreed to carry on those conditions:—Held, on demurrer, that the rejoinder was bad, for not stating any facts to bring defendants within the conditions; and that the plea was bad for not averring that defendants conveyed the goods to their nearest station to Hamilton, and gave notice to the Great Western R. W. Co. within a reasonable time. *Devlin* v. *Grand Trunk R. W. Co.*, 30 U. C. R. 537.

——— *Subsequent Delay.*] — Defendants were charged with negligence and delay in the carriage of certain furs belonging to the plaintiff, from Toronto to New York, in pursuance of their contract. Defendants' railway extended only to the Suspension bridge, and it appeared that the goods were delivered to them, addressed to R., at New York, and a receipt given, which specified that they were received to be forwarded to such address, subject to their tariff, rules, and regulations. In these conditions it was stated that when goods were intended, after being conveyed by their railway, to be forwarded by some other means to their destination, the company would not be responsible after they were so delivered. The goods were sent on by defendants to the bridge, and there delivered to the New York Central R. R. Co., which placed them in the bonded warehouse of the American customs, until certain documents were procured, without which they could not be sent on. The plaintiff was asked by defendants for such papers, but they were not furnished for some time, and the furs were spoiled by the delay:—Held, that defendants were not liable, for there was no contract by them to convey the goods to New York as alleged, but their undertaking was only to carry them over their own line, and deliver them to the company who were to take them on. *Rogers* v. *Great Western R. W. Co.*, 16 U. C. R. 389.

——— *Subsequent Delivery to Wrong Person.*]—In 1874 the plaintiff, at Toronto, agreed with defendants to forward all his goods for the season of 1874, viâ the defendants' railway and Lake Superior line of steamers to Duluth, and thence to Fort Garry, the defendants to forward the goods from Toronto to Duluth at 75 cents per 100 lbs., and the rate from Duluth to Fort Garry to be $2.90 per 100 lbs., subject to changes of tariff of the Northern Pacific Railway, and Kitson's line of Red River steamers. The goods in question were shipped by plaintiff under a shipping note addressed to himself at Fort Garry, "G. G. Allen, C. O. D.," subject to the following amongst other conditions: That when goods are addressed to consignees beyond the places of the company's stations, they will be forwarded by public carriers or otherwise, as opportunity may offer, &c.; but that the delivery by the company will be complete, and their responsibility cease, when such carriers have received notice that the company is prepared to deliver to them the goods for further conveyance; and they will not be responsible for any damage or detention, &c.,

after such notice, or beyond their limits. The goods were carried by defendants to Collingwood, and thence by the Lake Superior steamers to Duluth, where they were delivered to the N. P. R. Co., and carried by them and K.'s steamers to Fort Garry, and there delivered to G. G. Allen, but without the payment of the price. The plaintiff then made a claim against defendants for such delivery without payment, and so opened his case at the trial, but on it appearing that payment was to be made to the express company, and on the plaintiff stating that his claim was for the delivery without his order or indorsement of the shipping note, his claim was rested on this ground:—Held, that plaintiff could not recover, for that the defendants' contract was only to carry to Duluth, and on the delivery there to the N. P. R. Co., their liability was at an end. Semble, that, even if defendants' contract extended to Fort Garry, there would be no liability, for the evidence shewed that it was never intended that the goods should not be given up except on a formal order by the plaintiff or indorsement of the shipping bill. *Rennie* v. *Northern R. W. Co.*, 27 C. P. 153.

——— *Subsequent Loss—Notice—Estoppel.*]—The plaintiff signed a paper requesting the defendants to forward certain goods received from him at Toronto, to Indianapolis, in Indiana, "subject to their tariff and under the conditions stated on the other side." On the other side, headed "General notices and conditions of carriage," the company "gave public notice," that in certain events specified they would not be responsible. The tenth paragraph, after stating the course which would be pursued by them with respect to goods addressed to consignees resident beyond the places at which defendants had stations, proceeded, "and the company hereby further give notice, that they will not be responsible for any loss, damage, or detention," to goods beyond their limits. It was found by the jury that all the goods had been delivered by defendants to a railway connecting at Detroit with their line and running to Indianapolis:—Held, that the latter part of the sentence could not be regarded as a notice as distinguished from a condition; and that, whether a notice or a condition, it formed part of a special contract on which defendants received the goods, and by which they were exempted from liability. The plaintiff was at Indianapolis when the goods (except the missing box sued for) arrived there, and remained until some time in the month following. Held, that he was resident there within the condition, and that having named himself as the consignee at that place, he was estopped from denying such residence. *La Pointe* v. *Grand Trunk R. W. Co.*, 26 U. C. R. 479.

——— *Transit—Termination.*]—One of the conditions in a contract by the G. T. R. Co. to carry goods from Toronto to Portage la Prairie, Man., a place beyond the terminus of their line, provided that the company "should not be responsible for any loss, misdelivery, damage, or detention that might happen to goods sent by them, if such loss, misdelivery, damage, or detention occurred after said goods arrived at the stations or places on their line nearest to the points or places which they were consigned to, or beyond their said limits:"—Held, that this condition would not relieve the company from liability for loss or damage occurring during the transit, even if such loss occurred beyond the limits of the company's own line. Semble, that the loss having occurred after the transit was over, and the goods delivered at Portage la Prairie, and the liability of the company as carriers having ceased, this condition reduced the contract to one of mere bailment as soon as the goods were delivered, and also exempted the company from liability as warehousemen, and the goods were from that time in custody of the company on whose line Portage la Prairie was situate, as bailees for the shipper. Judgments in 12 O. R. 103 and 15 A. R. 14 reversed. *Grand Trunk R. W. Co.* v. *McMillan*, 16 S. C. R. 543.

Delivery to Wharfinger—*Agent—Notice.*]—One condition required the plaintiffs to give notice in writing of their claim to the defendants' station freight agent within twenty-four hours after the delivery of the goods. It appeared that Halifax, the place to which the goods were sent, was beyond the limits of defendants' railway, but that all freight carried over their railway for delivery there, was transmitted to one B., a wharfinger, who received the same as he did the goods of other persons, making for his own benefit a special charge thereon:—Held, that B. was not a station freight agent within the meaning of the condition. *Fitzgerald* v. *Grand Trunk R. W. Co.*, 28 C. P. 387.

Failure to Deliver to Connecting Company—*Notice.*]—Defendants on the 5th October, 1874, received goods at Montreal for the plaintiffs, addressed to the plaintiffs at Peterborough, "by the Grand Trunk Railway Company to Port Hope, thence by the Midland railway." One of the conditions on which the defendants received the goods was, that no claim for damages to, loss of, or detention of goods, should be allowed "unless notice in writing, and the particulars of the claim for said loss, damage, or detention, are given to the station freight agent at the place of delivery within thirty-six hours after the goods in respect of which the said claim is made, are delivered." The goods got to Port Hope on the 8th October, but by some mistake one case was not given by the defendants to the Midland Railway Company till the 9th November, and the plaintiffs were advised of its arrival at Peterborough on the 11th. On the 12th the plaintiffs wrote to the defendants' agent at Montreal, and to the station agent of the Midland railway at Peterborough, that they had been advised of its arrival, but that they refused to accept it, because the delay had been most unreasonable, they had suffered loss through the detention, and had been compelled to re-order goods, and they required defendants to compensate them for the loss sustained, and the value of the package:—Held, that these letters were not a compliance with the condition. Held, also, that the "place of delivery," mentioned in the condition above stated, was Peterborough, the place of delivery to the plaintiffs, not Port Hope, where the goods were to be delivered to the Midland railway; and that such notice should be given to the station freight agent at Peterborough, who would be the person agreed upon to receive it. Held, also, that such notice was required, though the place of delivery was off the defendants' line. Held, also, that the defendants were under no obligation to give notice of the delivery of the goods by them to the Midland railway. *Mason* v. *Grand Trunk R. W. Co.*, 37 U. C. R. 163.

——— *Damages — Customs — Evidence.*] —The declaration charged defendants, in the first count, on a contract to carry certain wool from Cobourg to Boston within a reasonable time, subject to certain conditions indorsed on a receipt given by defendants—amongst others, that defendants should not be responsible for damages occasioned by delays from storms, accidents, or unavoidable causes; and alleging as a breach the neglect to carry. In the second count the contract was stated to be to carry within a reasonable time, and so that the wool should be imported into the United States before the 17th March, when the reciprocity treaty would expire. Breach that defendants did not so carry, by which the plaintiffs were disabled from importing the wool into the States unless upon payment of duties. As to the first count, it appeared by the defendants' receipt, put in by the plaintiffs, that there was an additional condition, that as to goods addressed to consignees resident beyond the places where defendants had stations (as these goods were), defendants' responsibility should cease upon their giving notice to the carriers onward, that they were prepared to deliver the goods to them for further transport:—Held, a substantial qualification of the contract declared on, which therefore was not proved as alleged. As to the second count, the same receipt applied, which named no day for carriage into the United States, but there was oral evidence of an agreement to forward by the 17th March:—Held, that, though this term might thus be added to the written contract, it would not dispense with the condition above mentioned, which shewed a substantial variance from the contract declared on. The plaintiffs, therefore, were held not entitled to recover on either count. The witnesses called to prove the imposition of a duty in the United States after the 17th March, derived their knowledge only from printed circulars:—Held, insufficient. The wool was sent as far as Prescott, where it was to cross the St. Lawrence, but not having been sent over to Ogdensburg by the 17th, the plaintiffs gave no further instructions, and it remained at Prescott:—Held, that though, if a special contract to deliver within the United States by the 17th had been proved, the duty, if paid by the plaintiffs, might have been recovered as damages, yet it was their duty to enter the goods and pay it, and they could not hold defendants responsible for delay occasioned by their default. *Fraser* v. *Grand Trunk R. W. Co.*, 26 U. C. R. 488.

See Gordon v. *Great Western R. W. Co.*, 25 C. P. 488; *Smith* v. *Grand Trunk R. W. Co.*, 35 U. C. R. 547; *Leslie* v. *Canada Central R. W. Co.*, 44 U. C. R. 21; *Harvey* v. *Grand Trunk R. W. Co.*, 7 A. R. 715; *Brodie* v. *Northern R. W. Co.*, 6 O. R. 180; *Hately* v. *Merchants' Despatch Transportation Co.*, 12 A. R. 201, 14 S. C. R. 572; *Worden* v. *Canadian Pacific R. W. Co.*, 13 O. R. 652; *McGill* v. *Grand Trunk R. W. Co.*, 19 A. R. 245.

(c) *Liability for Goods Received from Other Companies.*

Contract for "Through Rate"—*Destruction by Fire.*]—Plaintiffs bought twenty-four bales of cotton in Cincinnati, through their agent B., who delivered it there to the C. H. and D. R. Co. The bill of lading contained a heading "contract for through rate." Under the general heading of the C. H. and D. R. Co., it was stated that the cotton was forwarded by B., and that the shipping marks were: "G. & M.—for Gordon, Mackay, & Co., Thorold, Ont., viâ Detroit & G. W. R.;" and in the margin were added the words, "Through at 40c. per 100 lbs., &c., to D. viâ ——." The cotton was delivered without instructions to defendants, at D., by the teamster of a line connecting with the C. H. and D. R. Co., and was burned while in transit on defendants' line to T.:—Held, that the bill of lading shewed a contract with the C. H. and D. R. Co. for a through rate to T., and therefore that defendants were not liable to the plaintiffs. *Gordon* v. *Great Western R. W. Co.*, 34 U. C. R. 224.

The plaintiffs bought twenty-four bales of cotton in Cincinnati, through their agent B., who delivered it there to the C. H. and D. R. Co. The bill of lading contained a heading, "Contract for through rate." Under the general heading of the C. H. and D. R. Co., it was stated that the cotton was forwarded by B., and that the shipping marks were "G. & M.—for Gordon, Mackay, & Co., Thorold, Ont., viâ Detroit & G. W. R.:" and in the margin were added the words: "Through at forty cents per 100 lbs., @ — p. barrel. To Detroit, via ——." The conditions indorsed excepted that railway, and the boats and railways with which it connected, from loss by fire. The evidence, however, shewed that the freight payable under the bill of lading was not in fact a through freight to Thorold, but only extended to Detroit, there being a special contract between the plaintiffs and the defendants as to the freight from Detroit to Thorold, under which the goods were carried, and which contained no exemption from fire. It appeared also from certain letters written by the defendants after the loss that they did not consider themselves exempt under the original contract. The goods having been destroyed by fire while in transit on the defendants' line to Thorold:—Held, that the defendants were liable to the plaintiffs, for the contract with the C. H. & D. R. Co. did not extend to them, but protected only the companies carrying as far as Detroit. *Gordon* v. *Great Western R. W. Co.*, 25 C. P. 488.

Refusal of Connecting Company to Receive Goods—*Destruction by Fire—Privity of Contract—Applicability of Conditions.*]—Plaintiff's correspondents in Chicago delivered there to the Michigan Southern Railway Company certain merchandize, to be transported to Toronto for plaintiff, that company at the time of delivery giving a receipt-note to the effect that they had received from plaintiff's correspondents the merchandize in question, consigned to plaintiff at Toronto, to be transported over their line of road to their terminus, and delivered to the company whose line might be considered a part of the route, to be carried to the place of destination; the Michigan company not to be liable as common carriers for the goods whilst at any of their stations awaiting delivery to the company which was to forward them; and that no company or carrier forming part of the line over which the freight was to be carried, should be responsible for demurrage or detention at its terminus, or beyond or on any part of the line, arising from any accumulation or over pressure of business; and that "the company" should not be liable for the destruction or

damage of the freight from any cause whilst in the depot of the company, or for any loss or damage from "providential" causes, or from fire, whilst in transit or at the stations. There was an arrangement between the Michigan company and defendants that the latter should carry their freight from the terminus of their line to certain points in Canada, and this freight arrived in Detroit, the terminus of the Michigan company, who telegraphed defendants' agent the day before its destruction by fire, that it was in store, and requested them to forward it. Defendants had such an accumulation of freight on hand that they could not transport it all over their line, and could not therefore receive plaintiff's goods, which were destroyed by fire at the Michigan company's station in Detroit, the day after the defendants were advised of their arrival. In an action against defendants for the value of the goods, charging a refusal on their part to receive them:—Held, that the plaintiff could not recover, for that under the receipt-note given by the Michigan company, they became the carriers; but that they only undertook to carry over their own line, and were plaintiff's agents to deliver over his merchandize to defendants to be carried to Toronto; but that the arrangement between them and defendants created no privity between defendants and plaintiff, so as to enable him to sue defendants for not carrying it out; and that, even if defendants were bound to receive the merchandize at Detroit, for carriage to Toronto, the evidence shewed that they were not liable for not receiving, owing to the over crowded state of their premises, and the pressure of freight upon them. Held, also, that plaintiff could not, in any case, recover more than nominal damages, as the value of the goods would not be the damages naturally flowing from a breach of contract to carry, in disregard of defendants' common law obligation to do so; for that the loss by fire arose from the omission to insure, and it would by no means follow that, even if defendants had received the property, it might not have been on the express condition of exemption from liability in that event. Held, also, that the condition that "the company" should not be liable for loss from providential causes, or from fire from any cause whatever, &c., applied to the Michigan company alone, and not to defendants also. *Crawford* v. *Great Western R. W. Co.*, 18 C. P. 510.

Warehouse—*Destruction by Fire.*]—The statement of claim alleged that the plaintiff had purchased goods from persons in Toronto and elsewhere to be delivered, some to the G. T. R. Company, and the rest to the C. P. R. and other companies, by the said several companies to be, and the same were, transferred to the defendants for carriage to Merlin. That on receipt by the defendants of the goods it became their duty to carry them safely to Merlin and deliver them to the plaintiff. There was also an allegation of a contract by the defendants for storage of the goods and delivery to the plaintiff when requested, and a lack of proper care whereby the goods were lost. The goods were destroyed by fire while stored in a building owned by the defendants at Merlin:—Held, that as to the goods delivered to the G. T. R. Company to be transferred to the defendants, as alleged, if the cause of action stated was one arising ex delicto, it must fail, as the evidence shewed that the goods were received from the G. T. R. Company for carriage under the terms of a special contract contained in the bill of lading and shipping note given by that company to the consignors; and if it was a cause of action founded on contract, it must also fail, as the contract under which the goods were received by the G. T. R. Company provided, among other things, that the company would not be liable for the loss of goods by fire; that goods stored should be at sole risk of the owners; and that the provisions should apply to and for the benefit of every carrier. Held, further, that as to the goods delivered to the companies other than the G. T. R. to be transferred to the defendants, the latter were liable under the contract for storage; that the goods were in their possession as warehousemen, and the bills of lading contained no clause, as did those of the G. T. R. Company, giving subsequent carriers the benefit of their provisions; and that the two courts below having held that the loss was caused by the negligence of servants of the defendants, such finding should not be interfered with. Held, also, that as to goods carried on a bill of lading issued by the defendants, there was an express provision therein that owners should incur all risk of loss of goods in charge of the defendants as warehousemen; and that such condition was a reasonable one, as the defendants only undertook to warehouse goods of necessity and for convenience of shippers. *Lake Erie and Detroit River R. W. Co.* v. *Sales*, 26 S. C. R. 663.

See Richardson v. *Canadian Pacific R. W. Co.*, 19 O. R. 369, *post* 5.

(d) *Notice to Company of Damage or Loss.*

Delivery—*Owner.*]—To an action for the non-delivery of goods delivered to defendants to be carried from Hamilton to Toronto, the defendants set up that they duly carried and delivered the said goods to the plaintiff at Toronto, but that he did not, as required by one of the terms of the special contract entered into between the parties, give the defendants within thirty-six hours thereafter notice of any damage or loss:—Held, that the defence failed, as the evidence shewed that the goods were never carried or delivered as alleged. A further defence set up was, that the plaintiff could not maintain the action, which was in case, because he was not the owner of the goods at the time of the shipment at Hamilton, having sold them to one H.:—Held, that the evidence shewed that the plaintiff was the owner, for, although there appeared to have been a sale, the property was not to pass until the delivery of the goods at Toronto. *Steele* v. *Grand Trunk R. W. Co.*, 31 C. P. 260.

See Mason v. *Grand Trunk R. W. Co.*, 37 U. C. R. 163, *ante* (b); *Fitzgerald* v. *Grand Trunk R. W. Co.*, 28 C. P. 586, *ante* (b).

(e) *Statutory Provisions.*

(*Legislation Suggested.*)

Remarks as to the necessity and justice of legislative redress in such cases. *Bates* v. *Great Western R. W. Co.*, 24 U. C. R. 544.

(31 Vict. c. 68 and 34 Vict. c. 43 (D.))

Application to Great Western Railway Company.]—Held, that s. 20, s.-s. 4, of

the Railway Act, 1868, 31 Vict. c. 68 (D.), as amended by 34 Vict. c. 43, s. 5 (D.), is not, by virtue of s. 7 of the latter Act, made applicable to the Great Western Railway Company; and therefore that they were not deprived of the protection afforded by one of their special conditions—which stated that fruit was to be carried only at the risk of the owners, and that they would not be liable for injury occasioned by frost—although the jury found that the fruit in question, which was being carried by them, became frozen owing to their negligence. *Scott* v. *Great Western R. W. Co.*, 23 C. P. 182.

——— *Amending Act—Pleading.*] — Sub-section 4 of s. 20 of the Railway Act, 1868 (D.), gives an action against certain railway companies for neglect to carry goods, &c., but the Act does not apply to the Great Western Railway Company, the defendants. By s. 5 of 34 Vict. c. 43 (D.), this sub-section "is hereby amended by adding thereto the following words: 'From which action the company shall not be relieved by any notice, condition, or declaration, if the damage arises from any negligence or omission of the company or of its servants;'" and by s. 7, "The provisions of this Act" are made applicable to every railway company:—Held, that the sub-section of the earlier Act, as thus amended, did not apply to defendants; but that the effect of the later Act was merely to add the newly enacted words to the sub-section, and "The provisions of this Act," therefore, did not include the amendment. To a declaration for breach of contract to carry goods within a time agreed on, or within a reasonable time, from G. to B., defendants pleaded setting up a special condition of the contract, that defendants "should not be liable under any circumstances for loss of market or other claims arising from delay or detention of any train, whether at starting for any of the stations, or in the course of the journey, nor for damages occasioned by delays from storms," &c. Replication, that the damages sued for arose from negligence and omission of the defendants and their servants within the Railway Act of 1868, s. 20, s.-s. 4 (D.), as amended by 34 Vict. c. 43, s. 5 (D.), in this, that the car in which the goods were placed was negligently allowed to remain at a station unattached to any train, and was negligently attached to a train on a different branch of defendants' railway from that between G. and B., and was carried thereon to W., at a distance from B., and allowed to remain there a long time:—Held, replication bad, for it was not a traverse of the plea, but the allegation of negligence was dependent upon the previous reference to and reliance on the statute. Quære, whether the replication of negligence alone would have been an answer to the plea, independent of the statute. *Allen* v. *Great Western R. W. Co.*, 33 U. C. R. 483.

Extent of Statute.]—Sub-section 4 of s. 20 of the Railway Act of 1868, 31 Vict. c. 68 (D.), does not extend to all cases in which negligence is charged against the railway company, but to cases only of neglect coming within the provisions of s.-ss. 2 and 3. They are not prevented therefore from stipulating for a limited liability in other cases. *Scarlett* v. *Great Western R. W. Co.*, 41 U. C. R. 211.

(42 Vict. c. 9 (D.))

Application to Grand Trunk Railway Company—*Cattle—Person in Charge —Pass.*]—A dealer in horses hired a car from the appellants for the purpose of transporting his stock over their road, and signed a shipping note by which he agreed to be bound by the following, among other, conditions: (1) The owner of animals undertakes all risks of loss, injury, damage, and other contingencies, in loading, &c. (3) When free passes are given to persons in charge of animals, it is only on the express condition that the railway company are not responsible for any negligence, default, or misconduct of any kind, on the part of the company or their servants, or of any other person or persons whomsoever, causing or tending to cause the death, injury, or detention of any person or persons travelling upon any such free passes—the person using any such pass takes all risks of every kind, no matter how caused. The horses were carried over the Grand Trunk Railway in charge of a person employed by the owner, such person having a free pass for the trip; through the negligence of the company's servants a collision occurred by which the horses were injured:—Held, affirming the judgments in 2 O. R. 197 and 10 A. R. 162, that under the General Railway Act, 1868, 31 Vict. c. 68, s. 20, s.-s. 4, as amended by 34 Vict. c. 43, s. 5, re-enacted by Consolidated Railway Act, 1879, 42 Vict. c. 9, s. 25, s.-ss. 2, 3, 4, which prohibited railway companies from protecting themselves against liability for negligence by notice, condition, or declaration, and which applies to the Grand Trunk Railway Company, the company could not avail themselves of the above stipulation that they should not be responsible for the negligence of themselves or their servants. *Grand Trunk R. W. Co.* v. *Vogel*, 11 S. C. R. 612.

(R. S. C. c. 109.)

Application to Contract for Carriage beyond Defendants' Line.] — Where a railway company undertakes to carry goods to a point beyond the terminus of its own line, its contract is for carriage of the goods over the whole transit, and the other companies over whose line they must pass are merely agents of the contracting company for such carriage, and in no privity of contract with the shipper. Bristol and Exeter R. W. Co. v. Conins, 7 H. L. Cas. 194, followed. Such a contract, being one which a railway company might refuse to enter into, s. 104 of the Railway Act, R. S. C. c. 109, does not prevent it from restricting its liability for negligence as carriers or otherwise in respect to the goods to be carried after they had left its own line. The decision in Grand Trunk R. W. Co. v. Vogel, 11 S. C. R. 612, does not govern such a contract. *Grand Trunk R. W. Co.* v. *McMillan*, 16 S. C. R. 543. See *S. C.*, 12 O. R. 103, 15 A. R. 14.

(51 Vict. c. 29 (D.))

Application to Contract Limiting Liability to Specific Sum.]—By s. 246 (3) of the Railway Act, 1888, 51 Vict. c. 29 (D.), "every person aggrieved by any neglect or refusal in the premises shall have an action therefor against the company, from which action the company shall not be relieved by any notice, condition, or declaration, if the damage arises from any negligence or omission of the company or of its servants;"—Held, that this provision does not disable a railway company from entering into a special contract for the carriage of goods and limiting its liability as to the amount of damages to be recovered for

loss or injury to such goods arising from negligence. Grand Trunk R. W. Co. v. Vogel, 11 S. C. R. 612, and Bate v. Canadian Pacific R. W. Co., 15 A. R. 388, distinguished. The Grand Trunk Railway Company received from R. a horse to be carried over its line, and the agent of the company and R. signed a contract for such carriage, which contained this provision: "The company shall in no case be responsible for each and any horse," &c.:—Held, affirming the decisions in 21 A. R. 204 and 24 O. R. 75, that the words "shall in no case be responsible" were sufficiently general to cover all cases of loss however caused, and the horse having been killed by negligence of servants of the company, R. could not recover more than $100, though the value of the horse largely exceeded that amount. *Robertson* v. *Grand Trunk R. W. Co.*, 24 S. C. R. 611.

See Grenier v. *The Queen*, 6 Ex. C. R. 276.

Application to Contract not to Hold Company Liable — *Reduced Rate.*]—The plaintiffs' agent shipped a quantity of plate glass by the defendants' railway, signing an agreement that, in consideration of the defendants receiving the goods at a reduced rate of twenty-three cents per 100 pounds, they should not be responsible for any damage arising in the course of the transit, including negligence. The defendants had two rates, namely, the twenty-three cents, a third-class rate, and a double first-class rate of sixty cents, which they contended were in accordance with the Canadian Joint Freight Classification, adopted by them and approved by the governor in council under s. 226 of 51 Vict. c. 29 (D.), the Railway Act, the said classification stating that the third-class rate applied where the goods were "shipped at owner's risk—shipper signing special plate glass release form." The plaintiffs' agent was aware of the two rates, and signed the agreement assenting to the lower rate, under the belief that the defendants could not, under s. 246, take advantage of the provision absolving them from liability where the damage was occasioned by negligence. No by-laws approving of the company's tariff under which these rates were charged had been approved of by the governor in council, although a by-law fixing a first-class rate of sixty-six cents and a third-class rate of fifty cents had inter alia been so approved:—Held, that the railway company were liable for damages to the goods resulting from negligence, notwithstanding the agreement not to hold the company liable in consideration of the reduced rate. Grand Trunk R. W. Co. v. Vogel, 11 S. C. R. 612, followed. *Cobban* v. *Canadian Pacific R. W. Co.*, 26 O. R. 702, 23 A. R. 115.

——— *Destruction on Part of Line in Foreign Country.*]—The Railway Act of Canada is not applicable to a railway situate in a foreign country, though operated by a company incorporated by or under the authority of the parliament of Canada. Therefore, where goods shipped from Scotland to be delivered at Portland, Maine, U.S., to the Grand Trunk Railway Company, and by that company to be forwarded thence to the plaintiffs at Toronto, were destroyed by fire on the line of that company in New Hampshire, U. S., by negligence from which they were protected from liability by the terms of the contract for carriage:—Held, that the provisions of s. 246 of 51 Vict. c. 29 (D.), disabling the railway company from relieving itself from liability for its own negligence or that of its servants, were not applicable to the defendants' contract; and an action to recover damages for the loss of the goods failed. *Macdonald* v. *Grand Trunk R. W. Co.*, 31 O. R. 663.

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5. Other Cases.

Bill of Lading—*Agent.*]—Semble, that under the Interpretation Act, 31 Vict. c. 1, s. 7, s.-s. 9 (O.), the defendants, though a corporation, would be "persons signing" the bill of lading, if signed by their authorized agent. *Royal Canadian Bank* v. *Grand Trunk R. W. Co.*, 23 C. P. 225.

——— *Conditions — Construction.*]—See *Hately* v. *Merchants Despatch Transportation Co.*, 4 O. R. 723, 12 A. R. 201, 14 S. C. R. 572; *Dymont* v. *Northern and North Western R. W. Co.*, 11 O. R. 343.

Contract—*Authority of Agent—Delivery to Wrong Person.*]—E., in British Columbia, being about to purchase goods from G., in Ontario, signed, on request of the freight agent of the Northern Pacific Railway Company in British Columbia, a letter to G. asking him to ship goods viâ Grand Trunk Railway and Chicago and North-Western, care of Northern Pacific Railway at St. Paul. This letter was forwarded to the freight agent of the Northern Pacific Railway Company at Toronto, who sent it to G., and wrote to him: "I enclose you card of advice, and if you will kindly fill it up when you make the shipment, and send it to me, I will trace and hurry them through, and advise you of delivery to consignee." G. shipped the goods, as suggested in this letter, deliverable to his own order in British Columbia:—Held, affirming the decisions in 21 A. R. 322 and 22 O. R. 645, that on arrival of the goods at St. Paul, the Northern Pacific Railway Company were bound to accept delivery of them for carriage to British Columbia, and to expedite such carriage; that they were in the care of said company from St. Paul to British Columbia; that the freight agent at Toronto had authority so to bind the company; and that the company were liable to G. for the value of the goods which were delivered to E. at British Columbia, without an order from G., and not paid for. *Northern Pacific R. W. Co.* v. *Grant*, 24 S. C. R. 546.

——— *Evidence — Connecting Line.*] — Where the only evidence of the contract to carry was that the foreman of the freight department at one of the defendants' stations agreed to have certain trees forwarded to a station not on the defendants' line, but on one connecting therewith:—Held, that this was evidence to be submitted to a jury of a contract to that effect binding the defendants, and that a nonsuit was wrong. The measure of damages against carriers for non-delivery of trees considered. *McGill* v. *Grand Trunk R. W. Co.*, 19 A. R. 245.

Delay in Delivery—*Bill of Lading—Indorsement of—Status of Indorsee.*]—The declaration alleged that the plaintiff by his agents delivered to the defendants 8,000 bushels of corn, to be carried from Chicago to Stratford, &c., and to be delivered to the Bank of Montreal or their assigns; that the bank assigned the corn to the plaintiff; yet that defendants neglected for an unreasonable time to carry and deliver it, whereby the plaintiff

lost a market, and was afterwards obliged to sell for a less price than he would otherwise have done. It appeared that the corn was shipped by M. & Co., "as agents and forwarders," on account of whom it might concern, to be delivered to the Bank of Montreal or their assigns, and the bill of lading was indorsed by the agent of the bank to the plaintiff, with whom defendants treated as the owner, and delivered it to him after some delay caused by a charge made and afterwards remitted by them. It was objected that the consignor or consignee only could sue upon this contract, not the plaintiff; that the bank could not assign to him; and if they could, the right of action would not pass. There was no evidence to shew what interest the bank had in the corn:—Held, there being no plea denying plaintiff's property in the corn, that he was admitted to have been the owner when it was shipped; that the bill of lading did not transfer the property to the bank, in whom no other right was shewn; that their indorsement was therefore unnecessary; and that he was entitled to maintain the action. Semble, however, that if he had first acquired his title by such indorsement, he might have sued defendants for any negligence occurring after they had recognized him as owner. A bill of lading is not conclusive proof of the change of property, like a bill of sale; it is a question of evidence whether such an operation should be attributed to it. *Kyle* v. *Buffalo and Lake Huron R. W. Co.*, 16 C. P. 76.

Delivery to Third Person—*Notice—Stoppage — Customs.*]—Goods which came from Montreal in bond were deposited in the customs warehouse at the Grand Trunk station at Toronto. The consignees became insolvent, and the consignors gave notice of stoppage in transitu to the railway company, after which the agent of the company gave an order for delivery, on payment of charges, to another person, who made the entry and received them from the customs:—Held, that such notice was sufficient, though in such cases it is advisable to give notice also to the customs officer; and that an action would lie against the company for such delivery. *Ascher* v. *Grand Trunk R. W. Co.*, 36 U. C. R. 609.

Injury to Goods by Fire—*Conversion—Estoppel—Damages.*]—The first count of the declaration stated that defendants agreed to carry 3,244 lbs. of Canadian wool from T. to P. by rail, and thence to B. by steamboat or rail, and deliver there to plaintiff, certain perils and casualties excepted; breach, non-delivery. Second count, the same, but alleging they were to carry and deliver within a reasonable time; breach, they did not so carry. Third count, that the defendants agreed properly to stow and safely carry and deliver the wool, certain casualties, &c., excepted; breach, goods damaged by the defendants' negligence. Fourth count, trover. The defendants pleaded (among other pleas) to the first, second, and fourth counts, that the goods were delivered to and received by them upon the conditions that they should not be liable for damages arising from delays from storms, accidents, unavoidable causes, or from damage from the weather, fire, &c.; and that the goods in course of carriage were damaged and destroyed by an accidental fire, which prevented the delivery. The evidence was, that on 6th Septemb-r, 1864, plaintiff delivered to defendants thirteen sacks of wool, weighing 3,244 lbs., addressed to the consignees in B., to be sent subject to defendants' tariff and to the conditions contained in the plaintiff's written request to defendants to receive same, defendants giving a receipt with similar conditions thereon. This wool was put into a car with wool from Michigan, consigned to one R. together with certain dutiable goods, and all arrived at Island Pond on 18th September following, where they were detained by the customs authorities. The car subsequently took fire, and the sacks containing the wool were burnt. Some of the wool was also burnt and some singed. In endeavouring to save it, the wool became mixed and was carried in this state to P., where new sacks were obtained and the wool conveyed in them to B., and the thirteen sacks delivered to the consignees on the 22nd October, but containing only 2,498 lbs, instead of 3,244, which the bill of lading shewed. On the delivery of four additional sacks, the weight being still short by twenty-nine pounds, an examination of the wool was made, when it was found to consist of 873 lbs. of Canada fleece, 1,190 lbs. scorched Canada, and 1,168 lbs. American fleece damaged by fire. This was sold on plaintiff's account, but did not realize as much, it was proved, as it would have brought had it arrived about a month earlier. It further appeared that 962 lbs. Canada fleece had been delivered to R. The Judge charged the jury that defendants were not liable for the damage by fire, or for the delay at Island Pond; that the plaintiff was entitled to such damages as arose from defendants' neglect in delivering mixed instead of Canadian fleece, and for the short weight. The jury gave plaintiff $300 damages:—Held, that the first and second counts, not embodying the exceptions contained in the contract, were not proved; and that the third count was not sustained by the evidence. Held, also, that plaintiff could not recover for the short weight, the evidence shewing a loss by fire of a considerable portion of the wool, and of the sacks, which would cause a diminution in the weight. Held, also, that plaintiff was not estopped by the taking of the American wool from shewing a conversion by defendants of the Canadian wool; but that had defendants pleaded that he took the latter in lieu of the former, or of so much thereof as was deficient, there was evidence to go to the jury to warrant a verdict for defendants to a certain extent, if not for all that really ought to have been delivered. Held, also—granting a new trial, costs to abide the event—that the proper direction to the jury would be, that defendants were not liable for the loss by fire; that they were liable for the wool belonging to plaintiff, which they carried to B., and did not deliver; but that if plaintiff, with the knowledge of all the circumstances the evidence disclosed, took the one kind for the other and sold it, when he might have had his own, and the damaged Canadian wool was delivered to the consignee of the American wool with plaintiff's consent, in consideration of his getting the American in lieu of it, then plaintiff could not claim substantial damages either for breach of contract or for the wrongful conversion. *Milligan* v. *Grand Trunk R. W. Co.*, 17 C. P. 115.

Liability of Crown as Common Carrier.]—See CROWN.

Loss of Goods — *Connecting Line—Privity.*]—Goods were sent by another railway company and were carried by it to its

crossing point with defendants' line, where the goods were delivered over to defendants to be carried to the plaintiff:—Held, that an action for the loss of the goods was not maintainable by the plaintiff against defendants, as there was no privity of contract between them. *Richardson* v. *Canadian Pacific R. W. Co.*, 19 O. R. 369.

Misdelivery — *Production of Shipping Bills.*]—The plaintiffs, knowing that the defendants sometimes delivered goods without production of the shipping bills where not consigned "to order," consigned certain goods to the "I. C. Company," not yet incorporated, and the defendants delivered them to an individual carrying on business in that name and at the ostensible office of the company, without production of the bill:—Held, that the defendants were not liable for misdelivery. There is no law in this Province requiring carriers to take up shipping bills before the delivery of goods. *Conley* v. *Canadian Pacific R. W. Co.*, 32 O. R. 258.

Negligence — *Proof of.*]—Case for negligence for putting upon one of defendants' carriages a mare, which it was alleged had been delivered to and received by them from the plaintiff, to be safely loaded and unloaded and conveyed to A. Plea, denying the delivery to and receipt by defendants, and issue thereon. A witness for the plaintiff swore that he took the mare to the station, where a man assisted him to put her into a car, in doing which the accident happened, and the mare was then taken on the train to A:—Held, that the proof was insufficient to sustain the issue. *Griffin* v. *Great Western R. W. Co.*, 15 U. C. R. 507.

——— *Proof of—Jury—New Trial.*]—See *Cobban* v. *Canadian Pacific R. W. Co.*, 26 O. R. 732, 23 A. R. 115.

Rates—*Reasonableness.*]—Held, affirming the judgment in 9 O. R. 251, that in the absence of collusion the court would not inquire into the reasonableness of the rates charged by a railway company to an express company. *Vickers Express Co.* v. *Canadian Pacific R. W. Co.*, 13 A. R. 210.

——— *Reduction.*]—See *Cobban* v. *Canadian Pacific R. W. Co.*, 26 O. R. 732, 23 A. R. 115.

Sale of Perishable Goods—*Notice—Demand.*]—The plaintiff on the 2nd March, 1882, delivered to the G. W. R. Co., at L., Ont., 840 bushels of oats, to be carried by said railway and connecting railways to B., Man., and there delivered to the plaintiff. The oats were shipped in car No. 6263, and while in transit were transferred to car No. 3966 of the St. P., M. & M. R. W. Co. Before the arrival of the oats, the plaintiff arranged with the defendants' agent at Winnipeg to have car 6263 stopped at Winnipeg. The oats were not stopped at Winnipeg but were carried on to Brandon. The plaintiff, before leaving Brandon and making the Winnipeg arrangement, had instructed his agent at Brandon to receive the oats. The oats arrived at Brandon on the 5th May. The plaintiff's agent at Brandon frequently applied for the same, but was informed that they had not arrived. The defendants alleged that notice of arrival was sent by post card to the plaintiff's proper address at Brandon, but there was no evidence to shew that this reached the plaintiff, and the goods being of a damageable or perishable nature were, on 22nd July, sold by defendants. In an action for non-delivery and conversion:—Held, that the plaintiff was entitled to recover; that the defendants were not protected by 42 Vict. c. 9, s. 17 (D.), and sub-sections, for to come within it, the goods must remain in the defendants' possession for at least a year, unless the tolls have been demanded from the persons liable, and payment refused or neglected for six weeks after demand; and though s.-s. 3 says nothing of a demand, the whole section must be read together, which shews a demand was required; that the post card was not a sufficient demand, unless it was shewn to have reached the person addressed to; that there was no breach in not stopping at Winnipeg, as the contract to stop only applied to car 6263. *Worden* v. *Canadian Pacific R. W. Co.*, 13 O. R. 652.

Stoppage by Customs Officer—*Pleading.*]—Defendants undertook to carry from Buffalo and deliver to plaintiffs in Goderich certain goods, which were stopped and bonded by the custom house officer in Stratford, of which the plaintiffs received no notice:—Held, that defendants were bound to carry out their contract, or shew some stoppage by a duly authorized officer; and their plea being defective in this respect, the postea was awarded to the plaintiffs. *Robson* v. *Buffalo and Lake Huron R. W. Co.*, 9 C. P. 183.

VI. Carriage of Passengers and Their Luggage.

See also *post* XIII.

1. *Government Railways.*

See Crown—Petition of Right.

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2. *Lost or Destroyed Luggage—Liability for.*

Checked Luggage—*Giving up Check—Connecting Lines—Continuous Journey.*]—The plaintiff purchased a ticket from defendants at Detroit for a first-class passage from Detroit to Washington, paying the fare for the whole distance. It had five coupons attached, perforated so that they could be detached and given up, each one being for the distance to be traversed over a different railway or omnibus route on the way. The plaintiff's trunk was checked to Buffalo, and, when near the place, a person took his check for it, with the coupon for the omnibus route to the station of the Erie railway, by which the plaintiff was to proceed, and gave him an omnibus check across the city of Buffalo in return. The conductor of defendants' train, being asked by the plaintiff, told him it was right to give his check to this person. The omnibus line was paid by the Erie Railway Company. The trunk having been lost owing to the neglect of the omnibus agent:—Held, that defendants were liable, for the contract was with them, to carry the plaintiff and his luggage the entire distance. It was objected that the plaintiff had forfeited his right to be carried by having stopped over on the journey, instead of making a continuous one; but, held, that defendants, not having insisted on the forfeiture, if they had a right to do so,

and having chosen to carry him and his luggage, were bound to do so with reasonable care. *Smith* v. *Grand Trunk R. W. Co.*, 35 U. C. R. 547.

——— *Termination of Responsibility for.*]—The plaintiff was a passenger from Paris to Seaforth, with two trunks, checked. At Seaforth the trunks were put on the platform, and he assisted defendants' servant to carry them into the baggage room, and went in an omnibus to a hotel about 3 p.m. About 8 p.m. he sent for the trunks, but one of them had disappeared, and the evidence went to shew that it had been stolen:—Held, that defendants were not responsible: that their duty as common carriers ended when the trunk had been placed on the platform, and the plaintiff had had a reasonable time to remove it, as he clearly had here. *Penton* v. *Grand Trunk R. W. Co.*, 28 U. C. R. 367.

It is the duty of a railway company to have luggage ready for delivery on the platform at the usual place of delivery, until the owner in the exercise of due diligence can call and receive it; and it is the owner's duty to call for and receive it within a reasonable time. Therefore, where a person on arriving at his destination deliberately refrained from applying for his luggage, being told by his cabman that he could not conveniently take it, and on sending for it on the following day, one of three trunks could not be found:—Held, in an action to recover the value of the trunk and the wearing apparel it was said to contain, that the liability of the railway company as common carriers had ceased; and a nonsuit was ordered to be entered. The only claim, if any, which the plaintiff, under the circumstances, had against the company, was as warehousemen or bailees. *Vineberg* v. *Grand Trunk R. W. Co.*, 13 A. R. 93.

Contents—*Fraudulent Claim—Evidence.*]—Plaintiff sued for the loss of his trunk, which he alleged contained several valuable papers, and among them the lease of a farm from his father to himself. Defendants resisted his claim as fraudulent, denying that they had ever received the trunk, and gave strong evidence to support their defence. They then offered to prove (as tending further to shew the dishonesty of the claim) that this farm had been the subject of a suit in chancery, in which it was decreed that the plaintiff's father held the land only as agent for another, and should convey to him; and that the plaintiff was aware of the fact, having been examined as a witness in the case:—Held, that such evidence was rightly received; and that it was sufficient to support the decree, without the other proceedings in the suit. *Thomas* v. *Great Western R. W. Co.*, 14 U. C. R. 389.

——— *Merchandize.*]—A railway company are not liable for merchandize carried by a passenger as luggage, for which no extra charge is paid. *Shaw* v. *Grand Trunk R. W. Co.*, 7 C. P. 493.

——— *Miscellaneous Articles.*]—The plaintiff a carpenter, had with him, as a passenger by defendants' railway, a box containing a concertina, *a rifle, a revolver, two gold chains, a locket, two gold rings, a silver pencil case*, a sewing machine, and a quantity of tools of his trade, such as chisels, planes, &c. The box having been lost at the Toronto station while in defendants' care:—Held, that the articles in italics were ordinary personal luggage, for which defendants were responsible, but that the others were not. Held, also, that the fact of the other articles being in the box could not prevent the plaintiff from recovering for such as were personal luggage. *Bruty* v. *Grand Trunk R. W. Co.*, 32 U. C. R. 66.

——— *Plants—Knowledge.*]—The plaintiff, an emigrant for Toronto, brought with him from England a box, as personal luggage, which contained only rare plants and roses intended for sale. He delivered it to defendants' baggage master at Quebec, saying that he would pay for it, but not stating its contents, on which the latter asked for his ticket, and on seeing that it was a third-class government emigrant ticket, he said there was nothing to pay, and that it might go with the plaintiff on the train. The plaintiff said the box was marked somewhere, "Plants—perishable," but he could not say that defendants' officers saw the mark, and it was sworn that if they had been notified that the contents were freight or merchandize the box would not have been taken:—Held, that defendants were not liable for its loss. *Lee* v. *Grand Trunk R. W. Co.*, 36 U. C. R. 350.

Special Contract—*Evidence—Limitation of Amount—Time.*]—In an action by the plaintiff, a passenger by defendants' railway, for the loss of her luggage, in which the defence was that the defendants' liability was limited by a condition on the ticket to $100, certain letters were admitted in evidence, one written by the defendants' baggage agent to the passenger agent asking whether plaintiff's attention had been called to the condition on the ticket, and why it had not been signed by her, and the other the reply thereto, stating that the company's rules did not require unlimited first-class tickets to be signed, and that this ticket had been sold at full tariff rate:—Held, that the letters were properly admitted; but they were of no consequence, as the ticket on its face shewed that it was not purchased subject to the condition. Kirkstall Brewing Co. v. Furness R. W. Co., L. R. 9 Q. B. 468, followed. Held, also, that the six months' limitation clause, R. S. C. c. 109, s. 57, does not apply to an action of this character arising out of contract, but to actions for damages occasioned by the company in the execution of the powers given or assumed by them to be given for enabling them to maintain their railway. The cases on this subject reviewed. *Anderson* v. *Canadian Pacific R. W. Co.*, 17 O. R. 747.

An appeal was taken to the court of appeal on two grounds: (1) that the accident was caused by the act of God or vis major; (2) that the defendants were protected by the limitation clause, R. S. C. c. 109, s. 27, the accident having taken place more than six months before action. As to the first point the court agreed with the court below, and thought that the finding of the jury was fully justified by the evidence. Upon the second point the appellants also failed, owing to a division of opinion in the court. *S. C.*, 17 A. R. 480.

——— *Notice—Negligence.*]—The plaintiff purchased from an agent of the defendant company at Ottawa, what was called a land seeker's ticket, the only kind of return ticket issued on the route, for a passage to Winnipeg and return, paying some $30 less than

the single fare each way. The ticket was not transferable, and had printed on it a number of conditions, one of which limited the liability of the company for baggage to wearing apparel not exceeding $100 in value, and another required the signature of the passenger for the purpose of identification and to prevent a transfer. The agent obtained the plaintiff's signature to the ticket, explaining that it was for the purpose of identification, but did not read nor explain to her any of the conditions, and, having sore eyes at the time, she was unable to read them herself. On the trip to Winnipeg an accident happened to the train, and the plaintiff's luggage, valued at over $1,000, caught fire and was destroyed. In an action for damages for such loss the jury found for the plaintiff for the amount of the alleged value of the luggage:—Held, reversing the judgments in 15 A. R. 388 and 14 O. R. 625, that there was sufficient evidence that the loss of the luggage was caused by the defendants' negligence, and the special conditions printed on the ticket not having been brought to the notice of the plaintiff, she was not bound by them, and could recover her loss from the company. *Bate* v. *Canadian Pacific R. W. Co.*, 18 S. C. R. 697.

Unchecked Luggage.] — Plaintiff, travelling on a first-class passenger ticket on defendants' railway from Chatham to Toronto, took a travelling bag with him into the car, not having offered it to be checked, nor having been asked to do so, or to give it in charge to any of defendants' servants. At the London station, where the train stopped for refreshments, he left it on his seat in the car to retain the place, and on his return from the refreshment room it was gone:—Held, that defendants were liable for the loss. Remarks on effect of custom of checking luggage. *Gamble* v. *Great Western R. W. Co.*, 21 U. C. R. 407.

Held, in appeal, affirming the judgment, that the mere fact of a passenger retaining possession of a bag or other article of luggage, did not, without some evidence of contract, express or implied to that effect, relieve the company from their liability as common carriers in case of loss. *S. C.*, 3 E. & A. 163.

——— *Commencement of Responsibility.*] —The plaintiff, an intending passenger by defendants' railway, a quarter of an hour before the train started entered a passenger car standing at the station at the original starting point, left his valise on a vacant seat, and went out; and on his return shortly afterwards, his valise was gone. It was not shewn that at the time he left the valise any one was in charge of the train, or that there was any other passenger in the car:—Semble, that there was no sufficient delivery of the valise to defendants to render them liable. *Ivey* v. *Grand Trunk R. W. Co.*, 24 C. P. 269.

——— *Package Containing Money—Absence of Negligence.*]—The plaintiff was a passenger on one of defendants' cars, occupying a sleeping berth. Before going to sleep he had undressed himself and had put his pocket-book, containing his money, in his trousers pocket, rolling up his trousers and putting his braces around them, and then placed them under his pillow next the wall. When he was called before arriving at his place of destination, he discovered that his pocket-book and money were gone. No negligence in the defendants was shewn:—Held, that no liability attached to the defendants. *Stearn* v. *Pullman Car Co.*, 8 O. R. 171.

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3. *Passengers.*

(a) *Conditions on Ticket.*

(*See* also (b)).

Continuous Journey — "*Stop over.*"]—Plaintiff purchased from defendants a ticket from Buffalo to Detroit, marked "good only for twenty days from date." He took defendants' afternoon accommodation train at the Suspension bridge, which ran only as far as London, but he left it at St. Catharines, an intermediate station, and defendants refused to let him go on thence by the night express:—Held, that they were justified in so doing: that their contract bound them to convey the plaintiff in one continuous journey from the Suspension bridge to Detroit, giving him the option of taking any passenger train from the point of commencement, and if that train did not go the whole distance, to be conveyed the residue in some other train, the whole journey to be completed within twenty days; but that it did not give a right to stop at any or every intermediate station. Quære, whether if he had gone on to London by the accommodation train, he would have been bound to take the next through train thence. *Craig* v. *Great Western R. W. Co.*, 24 U. C. R. 504.

Declaration, that defendants contracted to carry the plaintiff as a passenger from G. to T., but wrongfully expelled him from the cars. Defendants pleaded that on the 8th December, 1864, they sold to plaintiff at G. a ticket thence to T. "good for this day only;" that he thereupon took the train at G., which proceeded to T. by a continuous journey, but left it without defendants' consent at C., and on the 10th December entered another of their trains going to T., by which they refused to carry him—which was the grievance complained of. Replication, that before the 8th December, defendants had publicly advertised, by their time table, that a passenger train would leave G. at 3.05 p.m. and arrive in T. at midnight: that he purchased his ticket before the arrival of the train at G. on that day, on its way to T., on the faith of such representation, but the train did not leave G. until 6 p.m., and defendants well knew that it would not, and it did not, arrive at T. until the morning of the 9th; that on its arrival at C. the plaintiff, finding the train could not reach T. until the 9th, left it, and defendants waived the terms of their ticket, and the plaintiff on the 10th claimed to go on by the morning train passing C. for T. on this ticket, but was prevented:—Held, on demurrer, that the plea, without reference to the replication, was a good defence, for the ticket was a contract by defendants to convey the plaintiff from G. to T. in one continuous journey, to commence on the date of issuing it. 2. That the replication was bad, for, even if the time table could be construed as incorporating a condition as to time into the contract, yet, as the contract was in part executed for the plaintiff's benefit by his conveyance to C., the breach could only entitle

him to compensation in damages. 3. That the time table was not part of the contract, but a representation only; and in that view the plaintiff should have averred that he bought his ticket on the faith of such representation before the time specified for the train to leave G., not merely before the arrival of the train there, for, if after the time specified, he knew as well as defendants that the time table had been departed from. Quære, whether the plaintiff by leaving the train at C., and thus making it impossible for defendants to perform the substantial part of their contract, by conveying him in one continuous journey to T., had not forfeited all right under it. *Briggs* v. *Grand Trunk R. W. Co.*, 24 U. C. R. 510.

The suppliant, who was a manufacturers' agent and traveller, purchased an excursion ticket for passage over the Intercolonial Railway between certain points and return within a specified time. On the going half, printed in capitals, were the words, "good on date of issue only," and immediately thereunder, in full-faced type, "no stop over allowed." He knew there was printing on the ticket, but put it into his pocket without reading it. He began the journey on the same day he purchased the ticket, but stopped off for the night at a station about half-way from his destination on the going journey. The next morning he attempted to continue his journey to such destination by a regular passenger train. Being asked for his ticket he presented the one on which he had travelled the evening before, and was told by the conductor that it was good for a continuous passage only. On his refusal to pay the prescribed fare for the rest of the going journey, the conductor put him off the train at a proper place, using no unnecessary force:—Held, that issuing to the suppliant a ticket with the conditions upon which it was issued plainly and distinctly printed upon the face of it, was in itself reasonably sufficient notice of such conditions; and if, under the circumstances, he saw fit to put the ticket into his pocket without reading it, he had nothing to complain of except his own carelessness or indifference. Held, affirming the foregoing, that by the sale of a railway ticket the contract of the railway company is to convey the purchaser in one continuous journey to his destination; it gives him no right to stop at any intermediate station. Craig v. Great Western R. W. Co., 24 U. C. R. 509, Briggs v. Grand Trunk R. W. Co., 24 U. C. R. 51, and Cunningham v. Grand Trunk R. W. Co., 9 L. C. Jur. 57, 11 L. C. Jur. 107, approved and followed. *Coombs* v. *The Queen*, 4 Ex. C. R. 321, 26 S. C. R. 13.

——— "*Stop over*"—*Forfeiture of Right to be Carried—Waiver.*]—See *Smith* v. *Grand Trunk R. W. Co.*, 35 U. C. R. 547.

——— *Transfer by Omnibus—Damages—Costs.*]—The plaintiff was a passenger by the defendants' railway under a contract by which the defendants were to carry him by continuous journey from Harrisburg to Stratford, viâ Galt and Berlin. There was a break in the line of the defendants at Galt, the distance between the stations being three-fourths of a mile; an omnibus was provided, as advertised by the defendants, but the plaintiff was asked to pay a fare of ten cents for transfer in it, and refusing to do so, was not permitted to be transported free. He failed to make his connection, and brought this action for damages:—Held, that he was entitled to be conveyed from station to station free of expense; but it would have been reasonable for him to have paid the ten cents and made his connexion, and the damages should be restricted to that sum. Costs on the scale of the county court, in which the action was brought, were allowed, as it was to test a right. *Clarry* v. *Grand Trunk R. W. Co.*, 29 O. R. 18.

Meaningless Condition — *Viâ Direct Line.*]—See *Dancey* v. *Grand Trunk R. W. Co.*, 19 A. R. 664.

See Farewell v. *Grand Trunk R. W. Co.*, 15 C. P. 427; *Anderson* v. *Canadian Pacific R. W. Co.*, 17 O. R. 747; *Bate* v. *Canadian Pacific R. W. Co.*, 18 S. C. R. 697, *ante* 2.

(b) *Removal from Trains.*

(See also (a)).

Breach of Condition — "*Viâ Direct Line*"—*Damages.*]—A condition in a railway ticket as to travelling "viâ direct line" was rejected as meaningless, each of three possible routes being circuitous, though one was shorter in point of mileage than the others. The amount of damages allowed by the jury to the plaintiff, because of his removal from the train while taking one of the longer routes, was reduced by the court of appeal as unwarrantably large. Semble, that in this country it is not the law that a passenger rightfully travelling upon his ticket is bound to pay fare wrongfully demanded, or to leave the train on the conductor's order, at the peril of not being able to recover damages for an assault committed in expelling him by force. The American cases on the subject considered and not followed. Judgment in 20 O. R. 603 varied. *Dancey* v. *Grand Trunk R. W. Co.*, 19 A. R. 664.

Cause of Action — *Where Arising.*] — Where a person having a return ticket for a passage from one place to another on a railway line is put off the train at an intermediate point, the cause of action arises at this latter place, and not where the ticket is issued. *Ralph* v. *Great Western R. W. Co.*, 14 C. L. J. 172.

Damages.] — Verdict for £50 against a railway company for putting the plaintiff off a train, though the inconvenience occasioned to him was trifling, and the conductor acted bonâ fide, under an impression that the plaintiff had not paid his fare, and without harshness or violence. New trial granted for excessive damages. *Huntsman* v. *Great Western R. W. Co.*, 20 U. C. R. 24.

——— *Assault — Accidental Injury.*] — Where the conductor forcibly and without excuse removes from a train a passenger who has paid his fare, the company are liable for the assault. But where, in the course of such removal, and while leaving the car, plaintiff slipped and was injured:—Held, that defendants were not liable for the injuries sustained by him, as his removal was not the proximate but remote cause of the accident. *Williamson* v. *Grand Trunk R. W. Co.*, 17 C. P. 615.

Non-production of Ticket — *Offer to Pay Fare—Damages.*]—The plaintiff, while

travelling between St. M. and L., mislaid, and being called upon to produce could not find, his ticket. The conductor after waiting some time stopped the train and turned him off, he offering to pay, but the conductor refusing to take his fare. Upon an action brought against the railway company and $300 damages awarded:—Held that defendants were responsible for this act of the officer. Although the damages were considered excessive, it being the second verdict for the plaintiff, the court would not interfere. *Curtis* v. *Grand Trunk R. W. Co.*, 12 C. P. 80.

——— *Refusal to Pay Fare.*]—Case, for compelling plaintiff to leave defendants' train on her journey from St. Catharines to Paris. Plea, that defendants had established certain fares on their road, which were all made payable to the conductor; that the conductor of the train, in discharge of his duty, demanded of plaintiff the usual fare, which she refused to pay, and therefore he obliged her to leave the train at a way station. Replication, that before the plaintiff entered the cars she paid to defendants her fare at the St. C. station, and received a ticket, which ticket she casually lost before the conductor called upon her for payment, of all which the conductor had notice; without this, that she refused to pay the said fare in the plea mentioned, or did not pay the same as alleged—concluding to the country:—Held, on demurrer, plea good; replication bad. *Duke* v. *Great Western R. W. Co.*, 14 U. C. R. 369.

The facts at the trial appeared to be that the plaintiff lost the ticket before reaching Grimsby, an intermediate station between St. Catharines and Paris, and when the conductor demanded her fare informed him of these facts, of which he had no other knowledge. He insisted nevertheless upon her paying again to him, and on her refusal obliged her to leave the cars at G. In so doing he was obeying the regulations of the company, which were authorized by their charter:—Held, that he was justified, and the company not liable. *S. C., ib.* 377.

By s. 248 of the General Railway Act, 51 Vict. c. 29 (D.), any passenger on a railway train who refuses to pay his fare may be put off the train:—Held, reversing the decisions in 20 A. R. 476 and 22 O. R. 667, that the contract between the person buying a railway ticket and the company on whose line it is intended to be used, implies that such ticket shall be produced and delivered up to the conductor of the train on which such person travels, and if he is put off a train for refusing or being unable so to produce and deliver it up, the company is not liable to an action for such ejectment. *Grand Trunk R. W. Co.* v. *Beaver*, 22 S. C. R. 498.

Presentation of Old Ticket—*Jury.*]—In an action for putting plaintiff off a train, defendants pleaded that they had not received the plaintiff to be carried for reward, as alleged. It appeared that the ticket offered by him to the conductor must have been sold about sixteen months before, and that the conductor refused to take it on that account. It was proved also that on a previous occasion the same plaintiff had presented an old ticket, and on its being rejected had paid his fare:—Held, that the circumstances being calculated to excite suspicion, the mere production of the ticket was not sufficient to entitle the plaintiff to succeed, but that it should have been left to the jury to say whether the plaintiff had procured it fairly, or was attempting an imposition. *Davis* v. *Great Western R. W. Co.*, 20 U. C. R. 27.

——— *Refusal to Pay Fare — Demand — Pleading.*]—The first count alleged payment of the legally authorized fare demanded by defendants for plaintiff's passage from Oshawa to Toronto and back again; that plaintiff entered the train at T. to be transported back to O., of which defendants had notice, yet defendants, contrary to the statute, would not transport plaintiff to O., but ejected him from their cars. 2nd count, that the plaintiff, being a passenger on defendants' cars from T. to O., was by defendants' servants forcibly and wrongfully put out of same before it reached O., though no one entitled had demanded any fare or ticket from plaintiff, and though no servant of defendants on said train wearing on his hat or cap any badge to indicate his office presented himself, to whom plaintiff could pay such fare or produce such ticket. 3rd. That plaintiff was by force and violence put out of the cars by the conductor and servants of defendants, neither of whom then wore on his hat or cap any badge indicating his office. The second plea to the first count was, in substance, that the plaintiff bought from defendants a return ticket marked "good for day of date and following day only," paying therefor a reduced rate; and six days after the date of said ticket, on which he had gone from O. to T., plaintiff presented it to the conductor going from T. to O., and upon said conductor refusing to accept the same, plaintiff refused to pay the lawful fare or any fare to defendants; whereupon said conductor put plaintiff out of the cars, &c. Second plea to 2nd count, that the plaintiff well knew the conductor in charge of the train, who carried and wore a badge indicating his office, and that the plaintiff refused to pay him, whereupon said conductor stopped, &c., and put plaintiff off, &c.:—Held, 2nd and 3rd counts good; that the second count sufficiently charged an act against defendants, which their servants in course of their employment might lawfully perform; that the allegation that plaintiff was a passenger shewed primâ facie that he was lawfully there; that plaintiff was not obliged to shew that he had a ticket or was ready and willing, or offered to pay his fare, or that no fare was demanded, the action not being for a refusal to carry him, but for turning him off the train, to justify which defendants should shew a demand of the fare; and that plaintiff, complaining of a mere trespass, was not obliged to allege that a person wearing a badge and authorized by defendants, and known to plaintiff as being authorized, was present to receive the fare. Held, also, 2nd plea to 1st count good; that defendants were not obliged to deny, and could not properly deny, that the plaintiff legally paid his fare, having admitted his purchase of a return ticket to and from T.; that defendants had shewn a good contract not inconsistent with their statutory duty, and not necessary to have been embodied in a by-law in order to make it legal; that it was unnecessary to deny that defendants had charged more than 2d. per mile, as it did not appear that they had done so; that defendants could lawfully impose a condition of returning within a specified time, because it was a special and reasonable bargain, and optional with the plaintiff to enter into or not; and that, therefore, the ticket issued by defendants to plain-

tiff, constituted a valid contract between them, and was binding upon plaintiff. Held, also, second plea to 2nd count bad, for not alleging that the conductor wore the badge "upon his hat or cap," or on some conspicuous part of his person or dress, or so as to be seen by passengers; and that a similar plea to 3rd count was not objectionable on this ground, for that count not shewing any justifiable cause for plaintiff being in the train, defendants could no doubt put him out, and their officer was not, therefore, obliged to assume the badge for that purpose. But held, that neither plea shewed a sufficient justification for the act complained of, without the allegation that plaintiff was requested to leave the cars before he was forcibly ejected therefrom. *Farewell* v. *Grand Trunk R. W. Co.*, 15 C. P. 427.

Refusal to Pay Fare—*Tender.*] — The plaintiff got upon the train without a ticket, and when asked for his fare declined paying then, as he said he had not made up his mind how far he should go. The conductor said he must decide, and afterwards, on his declining again on the same ground, stopped the train and put him out, at a place about a mile and a quarter from the last station, and within half a mile of a house. The plaintiff at last tendered a $20 gold piece, telling the conductor to take his fare ($1.35) out of it:—Held, that the plaintiff had refused to pay his fare within the meaning of 14 & 15 Vict. c. 51, s. 21, s.-s. 6, and that the conductor was justified in what he did. *Fulton* v. *Grand Trunk R. W. Co.*, 17 U. C. R. 428.

(c) *Special Arrangements for Carriage of Persons.*

Express Messenger.]—Deceased was an express messenger, and as such was being carried on the defendants' train at the time of his death, without a ticket or payment of fare, under a contract between the defendants and the express company:—Held, that the deceased being lawfully on the train, the defendants were liable for negligence in causing his death. Held, also, that the deceased was the servant of the express company, and was not in any sense engaged in any common employment with the servants of the railway company. *Jennings* v. *Grand Trunk R. W. Co.*, 15 A. R. 477. Affirmed in the Judicial Committee, 13 App. Cas. 800.

Passes—*Agreement between Companies—Demand.*]—The plaintiffs by deed, dated the 1st October, 1853, leased to defendants the railway floor of their suspension bridge, with the right to give other companies the privilege of crossing it with trains. The plaintiffs agreed to allow the directors and employees of the defendants, and such other companies as they should arrange with, free tickets over the bridge; and defendants agree to allow from their own and procure from the companies with whom they should so arrange free tickets for the directors and officers of the plaintiffs to pass over their respective railways. Defendants in 1855 made an agreement with the New York Central R. Co. "to render more convenient their interchange of freight and passengers at the bridge," by which the N. Y. C. R. Co. were to convey across the bridge on their cars the freight brought by them for the G. W. R. Co., &c. Up to 1860 defendants gave the directors and officers of the plaintiffs annual passes over their railway, and up to 1858 procured for them passes from the N. Y. C. R. Co.; but they then refused to give more than special passes over their own road, to be used only on the business of the plaintiffs, and limited to one trip; and as to passes over the N. Y. road, they contended that they had never been demanded, or if they had that they were not bound to procure them:—Held, 1. that defendants were bound by the covenant, and the passes could not be confined to the plaintiffs' business. 2. That the N. Y. C. R. Co. was within the agreement, so as to entitle the plaintiffs to demand passes on that railway from defendants. 3. That a demand of the passes by the plaintiffs was necessary, for, though the plaintiffs might not know with what other companies defendants had made arrangements, yet they would be aware, while defendants might not be, for what persons such passes were demanded. 4. That taking the previous usage in giving tickets into consideration, the letters given in the report, constituted a sufficient demand. 5. That considering such usage, which shewed the intention of the parties at the time, and the inconvenience of a different construction, it might be held that the passes should be annual, not for each trip. *Niagara Falls International Bridge Co. and Niagara Falls Suspension Bridge Co.* v. *Great Western R. W. Co.*, 25 U. C. R. 313.

See Bicknell v. *Grand Trunk R. W. Co.*, 26 A. R. 431, *post* XIII.

(d) *Tolls or Fares of Passengers.*

See XXV. *post.*

VII. Construction of Railways.

1. *Agreements for.*

Contract Price—*Payment into Court.*]—Where a bill was filed to compel a railway company to carry out a contract entered into by their agent for constructing the road, and the evidence taken in the cause shewed that at the prices agreed upon, which the company insisted were most exorbitant, a balance of £12,500 was due the contractor, the court, at the hearing, ordered that amount into court without waiting for the master's report. *Whitehead* v. *Buffalo and Lake Huron R. W. Co.*, 7 Gr. 351.

Independent Agreements — *Construction and Working—Pleading.*] — Declaration, that the plaintiffs agreed to complete the ballasting of a certain portion of defendants' railway, and to construct stone culverts and bridge abutments at certain points, and to do the grading necessary, &c., all to be completed before the 1st January, 1859, provided the company should furnish cash to meet the monthly estimates of the engineer; and that the plaintiffs commenced and were ready to complete the work, but defendants wrongfully prevented and discharged them. Plea, that by the same agreement it was provided, that whereas the plaintiffs had leased said railway from defendants by lease bearing even date with the agreement, in which it was provided that £30,000 should be expended by defendants on the completion of the road before the rents should be payable, and whereas defendants were unable to raise the £30,000, it was

therefore agreed that the plaintiffs should work the road free of any charge for the use of it, and should expend the surplus earnings on the completion thereof, the amount so expended to be taken as part of the £30,000; that the lease so made was for the express purpose of enabling the plaintiffs to work the road, and raising thereby enough to enable defendants to pay them for the work contracted to be done by them; and that the plaintiffs, although they had the free use of the road, refused to work, as they lawfully might:—Held, on demurrer, plea bad, the agreements being independent. *Tate* v. *Port Hope, Lindsay, and Beaverton R. W. Co.*, 17 U. C. R. 354.

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

Specific Performance—*Superintendence of Court—Parties — Insolvent Contractors — Assignee.*]—A railway company entered into a contract for the construction of their road, which was to be completed and in perfect running order by the 1st January, 1875; and to be paid for partly in cash and municipal bonds, partly in bonds or debentures of the company, and partly in guaranteed shares or stock of the company; and the contractors entered upon the construction of the work, but owing to financial difficulties they were obliged to suspend in 1873, and in August, 1874, they made a deed of composition with their creditors, and J. was appointed the official assignee. After the time appointed for the completion of the work, the assignee and the contractors filed a bill in their joint names against the railway company, asking that the contract might be performed by the company, offering on their own part to perform it, and seeking to restrain the company from entering into any contract for the work with any other person, and from making, signing, or issuing any stock or bonds of the company, until the stock or bonds to which the plaintiffs were entitled were issued to the assignee. A demurrer for want of equity and for misjoinder of plaintiffs was allowed; the rule of the court being that it will not decree the specific performance of works which the court is unable to superintend; and that an insolvent or bankrupt cannot be joined as a co-plaintiff with his assignee. *Johnson* v. *Montreal and City of Ottawa Junction R. W. Co.*, 22 Gr. 290.

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

See Great North-West Central R. W. Co. v. *Charlebois*, [1899] A. C. 114, *post* XX.

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2. *Bridges.*

[*See* 62 & 63 Vict. c. 37 (D.)]

(a) *Over Navigable Waters.*

Access to Bridge — *Public Highway—Interlocutory Injunction.*] — The office of an interlocutory injunction is simply to retain matters in statu quo. Where, therefore, it had been declared that the railway track of the Niagara Falls Suspension bridge was a public highway, and that an agreement that the same should be used by one railway exclusively was ultra vires the charter of the bridge company, and the E. and N. F. R. Co. moved to restrain the G. W. R. Co., with whom such illegal agreement had been made, from preventing the E. and N. F. R. Co. from crossing the lands of the G. W. R. Co. in order to obtain access to the bridge; and it was shewn that the latter company were not actively interfering to prevent the approach being obtained, but were simply passive, the court, on interlocutory motion, refused the injunction, although of opinion that, at the hearing, the relief should be granted. *Erie and Niagara R. W. Co.* v. *Great Western R. W. Co.*, 21 Gr. 171.

Obstruction to Navigation — *Riparian Owner—Reversioner—Remedy—Pleading.*] — Declaration, that defendants, in constructing

their railway, built a bridge across the river Rouge, so as to impede the navigation; that the plaintiff owned land on the river above the bridge, and by reason thereof was entitled to the free use of the river thence to the lake; that vessels had been accustomed to pass up and down to his land, but could no longer do so; and that the trade of the river had been destroyed, and his land in consequence diminished in value. Plea, not guilty, by statute: —Held, that the declaration did not state any injury peculiar to the plaintiff, which could entitle him to maintain an action, but that the proper remedy was by indictment. 2. That, as the land had been all the time in possession of a tenant, the plaintiff as reversioner could not recover upon the case stated in the declaration. 3. That both these objections were open to defendants under the plea of "not guilty by statute." The Rouge found to be a navigable river. *Small* v. *Grand Trunk R. W. Co.*, 15 U. C. R. 283.

——— *Riparian Owner—Statutory Powers — Parties—Attorney-General.*]—The Grand Trunk R. W. Co. in 1855 erected a fixed bridge over a navigable river, near the outlet. The plaintiff then owned land on the river, on which he had erected a factory, and contemplated building a dock and mills. It was material to him to enjoy the navigation unimpeded, in order to have the most beneficial use of the premises. At the time the bridge was built s. 20 of 16 Vict. c. 37 was in force; but before the bill in this cause was filed 20 Vict. c. 12, s. 7, was passed. This section was not specially set up in answer, but was relied upon in argument, as permitting a fixed bridge in cases authorized by the executive. The plaintiff relied on the former Act as providing for a draw-bridge, which would not impede navigation, and prayed that the company might be required to remove the present fixed bridge, and to erect a draw-bridge, not impeding the navigation or plaintiff's business; also, that an account might be taken of all loss sustained by the plaintiff by reason of the present bridge:—Held, that if the river was not navigable, the bridge had been properly erected; if navigable, the company were wrong in erecting it, but that this was cured by the latter statute, and that plaintiff was not entitled to the relief asked. Semble, that in such a case the bill should be by the Attorney-General, the statute referred to having been passed for the general benefit of the public. *Cull* v. *Grand Trunk R. W. Co.*, 10 Gr. 491.

——— *Temporary Impediment—Pleading.*]—Held, that in this case the declaration and ninth plea (set out), taken together, sufficiently shewed that the stream in question was a navigable stream, and capable of being used by boats for the purposes of commerce. The declaration charged defendants with obstructing the navigation of the stream by building a bridge across it. The ninth plea, after setting out the incorporation of defendants and the powers thereby given to them to cross streams, provided that the free and uninterrupted navigation thereof should not be interfered with by the said railway, alleged that they had erected the bridge under such powers for the purposes of their railway, and thereby unavoidably a little impeded the navigation for a short time:—Held, plea bad, as shewing no defence. *Snure* v. *Great Western R. W. Co.*, 13 U. C. R. 376.

Statutory Powers — *Compensation.*]—Held, that after 18 Vict. c. 176, the plaintiff could not maintain an action against defendants for unlawfully and wrongfully erecting a bridge across the Twenty Mile creek, and impeding the navigation, for the statute expressly authorizes such erection, and gives only a right to compensation for damage sustained. *Wismer* v. *Great Western R. W. Co.*, 17 U. C. R. 510.

——— *Compensation—Notice of Claim.*]—Held, that a notice of claim for injury sustained by the erection of a bridge over a river, given on the 10th September, 1857, under 20 Vict. c. 146, which received the royal assent on the 10th June, 1857, and required three months' notice of such claim to be given, was sufficient, and a rule was granted commanding the appointment of an arbitrator thereunder. *In re Trustees of St. Andrew's Church and Great Western R. W. Co.*, 12 C. P. 399.

See, also, *Regina ex rel. Trustees of St. Andrew's Church* v. *Great Western R. W. Co.*, 14 C. P. 462.

Swing Bridge — *Injury to Vessel.*]—A railway company had control of a swing bridge over a canal, which the plaintiff's ship was navigating at the same time that a train was about to pass the bridge. Notice was given of the plaintiff's vessel being about to pass, by blowing a horn and hailing, and notice was given by the railway company's servants, by signal, that the bridge could not then be swung, and injury was received by plaintiff's vessel from the bridge remaining closed:—Held, that the company were not then bound to open the bridge, and were not liable for the injury. *Turner* v. *Great Western R. W. Co.*, 6 C. P. 536.

See Hamilton and Brock Road Co. v. *Great Western R. W. Co.*, 17 U. C. R. 567; *Brown* v. *Grand Trunk R. W. Co.*, 24 U. C. R. 350; *Desjardins Canal Co.* v. *Great Western R. W. Co.*, 27 U. C. R. 363; *Attorney-General* v. *International Bridge Co.*, 22 Gr. 298; *Town of Peterborough* v. *Grand Trunk R. W. Co.*, 32 O. R. 154.

(b) *Over or Connecting Highways.*

Canal Bridge—*Duty to Repair—Road Company.*]—Held, that the G. W. R. Co. were bound by s. 5 of 16 Vict. c. 54, to maintain in repair the bridge over the Desjardins canal, which it allows them to erect. That bridge forms part of the road leading into the plaintiffs' road:—Held, that the loss of custom and tolls occasioned to the plaintiffs was not sufficient to enable them to maintain an action against defendants for allowing such bridge to fall out of repair. *Hamilton and Brock Road Co.* v. *Great Western R. W. Co.*, 17 U. C. R. 567.

Overhead Bridge—*Delay in Erecting—Cutting in Highway—Obstruction.*]—Defendants' line crossed the highway between plaintiff's farm and the town of London, and a deep cutting was necessarily made there. Plaintiff sued defendants, charging that, after a reasonable time for restoring the road had elapsed, they wrongfully and injuriously continued the cutting, and thus rendered the highway impassable, and prevented plaintiff from driving along it to town, &c. The evidence shewed that it was impossible to construct a bridge across the cut until it was completed; that the defendants had carried on

the work with diligence; and that before the trial the bridge had been completed and the use of the highway restored:—Held, that the plaintiff could not recover, because (1) it was no wrong in defendants to let the cutting continue for however long a time, and that was the injury complained of; (2) if the declaration had complained of delay in restoring the road by a bridge, the evidence disproved it; (3) such delay would have made defendants guilty of obstructing a public highway, for which they might be indicted, but the plaintiff as an individual could maintain no action. *Ward* v. *Great Western R. W. Co.*, 13 U. C. R. 315.

——— *Duty to Repair.*]—Where a railway company carried the highway across and over their road by a bridge:—Held, under C. S. C. c. 66, s. 9, s.-s. 5, s. 12, s.-s. 4, that the company were bound to keep in repair such bridge and the fence on each side of it. *Van Allen* v. *Grand Trunk R. W. Co.*, 29 U. C. R. 436.

——— *Neglect to Make—Road Company.*]—A road company, incorporated under the general Acts, were held entitled to sue the Hamilton and Toronto Railway Company for neglecting to make a proper bridge over their railway where it crossed the plaintiffs' road, *Streetsville Plank Road Co.* v. *Hamilton and Toronto R. W. Co.*, 13 U. C. R. 600.

——— *Neglect to Raise—Servant of Company—Intersecting Railway.*]—The plaintiff, as administratrix, sued the defendants, under 44 Vict. c. 22, s. 7 (O.), for the death of her illegitimate son, a brakesman on the defendants' railway, who was killed by being carried against a bridge, not of the height required by that Act, while on one of their trains passing underneath it. The bridge belonged to another railway company, which had the right to cross the defendants' line in that way, and, although the time allowed by the statute for raising the bridge had expired, they had not done so. The jury found that the defendants had been guilty of negligence in not raising, or procuring to be raised, the bridge:—Held, that the plaintiff was not entitled to recover, because s. 7 of the Act applies only to bridges within the control of the company whose servant had been injured. *Gibson* v. *Midland R. W. Co.*, 2 O. R. 658.

——— *Neglect to Raise—Servant of Company—Dominion Railway—Provincial Statute.*]—Action to recover damages for injuries sustained by the plaintiff by reason of an overhead bridge being less than seven feet above the top of the defendants' car. At the time of the accident the defendants were operating the Midland Railway under an agreement made 22nd September, 1883, whereby it was agreed that the defendants should take over all the lines of the Midland Railway Company, buildings, rolling stock, stores, and materials of all kinds, and should during the continuance of the agreement well and efficiently work the said lines and keep and maintain them with all the works of the Midland Railway in as good repair as they were when so taken over. The agreement was to be in force for 28 years. The Midland Railway Company, though incorporated under 44 Vict. c. 67 (O.), was brought under the control of the parliament of Canada and made a Dominion railway by 46 Vict. c. 24 (D.), passed in 1883, before the agreement was made. By the Act of 1881, 44 Vict. c. 24, s. 3 (D.), amending the Consolidated Railway Act of 1879, every bridge or other erection or structure under which any railway passes, &c., existing at the time of the passing of the Act, of which the lower beams were not of sufficient height from the surface of the rails to admit of an open and clear headway of at least seven feet, shall be reconstructed or altered within twelve months from the passing of the Act, so as to admit of such open and clear headway of at least seven feet, at the cost of the company, municipality, or other owner thereof, as the case may be, &c. By 44 Vict. c. 22 (O.), passed when the Midland Railway was under the legislative authority of the Province of Ontario, that company were required to reconstruct bridges owned by the company within twelve months from the passing of the Act in terms identical with the Dominion Act, except that the former Act makes every railway liable to its servants for any neglect, &c.:—Held, that the defendants were not liable for the injury sustained by the plaintiff. *McLauchlin* v. *Grand Trunk R. W. Co.*, 12 O. R. 418.

——— *Raising Approach—Misfeasance.*]—See *Fairbanks* v. *Township of Yarmouth*, 24 A. R. 273.

——— *Statutory Powers—Compensation.*]—Defendants were sued for erecting a bridge over a highway running through plaintiff's land, and crossed by their railway under such bridge, and for the injury to plaintiff's land in obstructing access to the highway, &c. There was, however, sufficient room left for access to one end of the bridge. The jury found that no damage had been sustained:—Semble, however, that there was no right of action, for the defendants' charter bound them to do what was complained of, for the safety and convenience of the public, and made no provision for compensation which could apply here. *McDonell* v. *Ontario, Simcoe, and Huron R. W. Union Co.*, 11 U. C. R. 271.

——— *Width—Statute.*]—A railway company by their charter were bound to restore any highway intersected by their track "to its former state, or in a sufficient manner not to impair its usefulness." They constructed their road across a street in the city of Hamilton, which was sixty-six feet wide, and connected the street again by a bridge across the track forty feet two inches in width:—Held, that the jury might with propriety find this to be a sufficient compliance with the Act, and that defendants were not necessarily guilty of a nuisance because the bridge was not of equal width with the street. *Regina* v. *Great Western R. W. Co.*, 12 U. C. R. 250.

Subway.]—See *West* v. *Village of Parkdale*, 12 A. R. 393, 12 S. C. R. 250, 12 App. Cas. 602.

3. *Drains and Watercourses.*

Abstracting Water of Stream—*Damages—Injunction.*]—The fact that a riparian proprietor has recovered nominal damages at law establishing his legal right, does not necessarily entitle him to an injunction to restrain the injury complained of. The exercise of this jurisdiction is discretionary, depending very much on the reality and irreparable nature of the injury complained of, and, when no mala fides exists, on the balance of

inconvenience. Where, therefore, a railway company had constructed tanks, which were filled from a stream running through the plaintiff's land, for the use of their locomotives, in doing which they did not abstract more than 1-80th or 1-100th part of the water in the stream, the court refused to restrain the company from using the water of the stream, and dismissed a bill filed for that purpose, with costs; notwithstanding that the plaintiff had, for the same act, recovered a verdict at law, with 1s. damages. *Graham* v. *Northern R. W. Co.*, 10 Gr. 259.

Agreement to Construct Culvert—*Specific Performance—Costs.*]—The owner of land agreed to convey to a railway company a portion thereof, the consideration of which was paid, on which to erect an embankment, on condition that they would make a culvert through such embankment. The building of the railway passed from such company into the hands of another, who built the embankment, but without making a culvert therein, they having had no knowledge of the stipulation in respect thereof, and the owner having omitted to give them any notice in regard to it during the progress of the works. Upon a bill filed by him for the specific performance of the covenant to construct such culvert:—Held, that it would be a hardship upon the company to decree specific performance, there having been no wilful default on their part, and the cost of now constructing the culvert would be very great, and that the parties ought now to be placed in the same position as if such agreement had not been entered into, in order that the company might proceed under the provisions of the Railway Act; the court retaining the bill until such proceedings were taken, giving to each party liberty to apply, but, under the circumstances, refusing either party any costs of the litigation. *Hill* v. *Buffalo and Lake Huron R. W. Co.*, 10 Gr. 506.

Ditches and Watercourses Act.]—Railway companies:—Held, not subject to the Ditches and Watercourses Act, R. S. O. 1877 c. 190. *Midler* v. *Grand Trunk R. W. Co.*, 45 U. C. R. 222.

An award under the Ditches and Watercourses Act directed that a drain should be built by the initiating owner a certain distance along a highway of the defendants, then by the defendants along the highway to a point opposite the land of a railway company, then by another land owner, and then by the railway company along the highway, or across the highway through their own land, as far as might be necessary to give a proper outlet. The drain was built by contract under the Act as far as the point opposite the railway company's land, but the railway company, whose railway had been declared to be a work for the general advantage of Canada, refused to recognize the award or do the work directed. The defendants then built a culvert across the highway and brought the water to the railway company's land, and the railway company thereupon built an embankment to keep it back, the result being that it overflowed from the highway ditches and caused damage to the plaintiff:—Held, that there was no jurisdiction under the Ditches and Watercourses Act as far as the railway company were concerned; that the award was therefore no protection to the defendants; that the damage resulted from the construction of the culvert; and that the defendants were liable therefor. *McCrimmon* v. *Township of Yarmouth*, 27 A. R. 636.

Diversion of Watercourse—*Damages—Compensation.*]—See *Tolton* v. *Canadian Pacific R. W. Co.*, 22 O. R. 204; *Arthur* v. *Grand Trunk R. W. Co.*, 25 O. R. 37, 22 A. R. 89, *post* WATER AND WATERCOURSES.

——— *Highway—Erection of Bridge—Liability to Repair.*]—A railway company, desiring to cross a highway at a point where it was carried by a bridge over a small stream, in pursuance of its statutory powers, diverted the stream to a point some distance away, and built a new bridge over it where it there intersected the highway:—Held, that, whatever remedy the municipality might have if it had sustained damage by reason of the exercise by the railway company of its rights, the latter was under no liability, in the absence of special agreement, to keep the bridge substituted by it in repair. *Town of Peterborough* v. *Grand Trunk R. W. Co.*, 32 O. R. 154.

Negligent Construction of Ditch.]—Declaration, that defendants so negligently constructed their railway and made their ditches, that they caused the surface water on each side of the railway crossing the plaintiff's farm to flow out of the ditches and injure the crops; that to remedy this the plaintiff allowed them to cut a ditch from their ditches across his land to the lake; and that they began to make such ditch, but made it only a short distance, and of insufficient size, so that it brought down the water upon the plaintiff's land and left it there. An agreement was proved, purporting to be between the plaintiff and defendants, but executed by plaintiff only, that the company should dig the ditch as alleged; and a memorandum was added under the plaintiff's signature, that they would continue and deepen his ditch, if necessary, to carry off the water. It was proved, also, that they did begin the ditch, but made it only part of the way to the lake, so that the only effect was to lead the waters from the railway on to plaintiff's land:—Held, that the plaintiff was entitled to recover, for, although the defendants were not bound to make the ditch at all, yet, as they had commenced it by plaintiff's permission, they were liable for their carelessness in constructing it. *Utter* v. *Great Western R. W. Co.*, 17 U. C. 392.

Negligent Construction of Drain—*Injury to Road—Municipality.*]—The plaintiffs, a township municipality, declared that they were proprietors of a certain public road between two concessions of said township, and complained that the defendants, in constructing their railway, so negligently and unskilfully made certain drains as to greatly injure said road and compel them to expend large sums in repairing same:—Held, declaration good, as shewing a special injury to the plaintiffs sufficient to sustain the action; for, though, as a municipality, they were not proprietors of the road, yet it might have been purchased by them from some joint stock company, or otherwise. *Municipality of Sarnia* v. *Great Western R. W. Co.*, 17 U. C. R. 65.

Obstruction of Ditch—*Absence of Negligence.*]—The plaintiff sued the Grand Trunk R. W. Co., alleging that their road passing through his land obstructed the flow

of water which used to escape along a ravine, and thereby flooded several acres of his farm, and made his residence unhealthy and unfit to live in. There was no natural stream through the ravine; and no negligence was complained of in the construction of the railway. It appeared that the plaintiff had purchased from one B., who, in 1854, had conveyed to defendants the track, and given a receipt in full for the purchase money, and for all damages occasioned by the railway passing over his land:—Held, that the action would not lie. *Wallace* v. *Grand Trunk R. W. Co.*, 16 U. C. R. 551.

Obstruction of Drains.] — Declaration, that the plaintiff was seised of certain lands adjoining defendants' railway, which lands ought of right to be drained by ditches through defendants' lands; that defendants were using these lands for their road; yet that they negligently, wrongfully, and injuriously placed earth, &c., in, upon, and across the said drains, and thereby obstructed the same, whereby plaintiff's land became wet and useless, &c.:—Held, that a sufficient cause of action was shewn. *Alton* v. *Hamilton and Toronto R. W. Co.*, 13 U. C. R. 595.

Obstruction of Watercourse — *Continuing Damage.*] — The defendants, in constructing their line of road, crossed plaintiff's land at a point where a watercourse draining it passed, by which the watercourse was obstructed, and plaintiff's land afterwards overflowed. Upon action brought after six months after the act done:—Held, that, as it was to be assumed that defendants constructed their railway upon plaintiff's land either upon agreement with the plaintiff or upon an arbitration under 4 Wm. IV. c. 29, s. 3, and that the plaintiff had been paid therefor, and that the damage resulted from the construction as originally made, no subsequent claim for that damage as a continuing damage could be maintained. *Knapp* v. *Great Western R. W. Co.*, 6 C. P. 187.

——— *Insufficient Culvert—Compensation—Damages—Time Limit.*]—Declaration, that the plaintiff was possessed of land through which a watercourse was accustomed to flow, and that defendants so negligently and unskilfully constructed an embankment for their railway across said stream, by not providing sufficient openings for the water, that his land was overflowed. It was proved that the plaintiff went into possession in 1853, about the time the railway was commenced, and that the patent issued to him in 1859. The railway passed through his land upon an embankment, and defendants put in a culvert some distance from the channel by which the land had formerly been drained, but it did not answer the purpose, and after this suit they made another at the old channel. Several acres were thus overflowed, the damage varying both as to time and extent, but never wholly ceasing. No evidence was given as to the terms on which defendants obtained their right of way from the plaintiff. The jury found for the plaintiff, who claimed damages for six years, giving $390:—Held, that the action would lie, there being no presumption from defendants' entry and construction of the railway with the plaintiff's acquiescence that the plaintiff had obtained compensation for the negligence complained of; but that by C. S. C. c. 66, s. 83, the plaintiff could not claim damages for more than six months next before the action. *McGillivray* v. *Great Western R. W. Co.*, 22 U. C. R. 69.

——— *Insufficient Culvert—Negligence—Surface Water.*]—The plaintiffs sued defendants for not constructing and maintaining a sufficient culvert under their railway where it crossed the plaintiff's land, so as to prevent as little as possible the flow of a natural watercourse there; and, in another count, for neglect, when requested, to fence off their railway from the plaintiff's land adjoining. A count in trespass was added. The jury found $390 damages on the second and third counts, and 1s. damages on the first. There being no evidence of any natural stream:—Held, that the plaintiff could not recover on the first count, for the interference with the flow of surface water formed no ground of action, and there was no charge of negligence in constructing the railway. The last case commented upon and distinguished. *Nichol* v. *Canada Southern R. W. Co.*, 40 U. C. R. 583.

——— *Surface Water.*]—The plaintiff alleged that he was possessed of land through and away from which a stream was accustomed to flow and the surface water to escape, and that defendants negligently constructed an embankment on their railway across said land, by not providing sufficient openings for escape. The jury found that "there was a stream of water, and it was obstructed by the railway." There was a creek on the plaintiff's land, which clearly had not been interfered with; and the only obstruction shewn was of such a stream as a general flow of surface water would present on a gradual slope of land:—Held, that the word stream in their finding must be taken to mean such water; and that, as the plaintiff shewed no right to the land on both sides of the embankment, nor any easement over the land on the other side, he had no right of action. The right of drainage of surface water does not exist jure naturæ, and the principles applicable to streams of running water do not extend to the flow of surface water. *Crewson* v. *Grand Trunk R. W. Co.*, 27 U. C. R. 68.

Overflow — *Negligence — Compensation.*] —Defendants, by deed from plaintiff, obtained certain land, habendum to defendants to their sole and only use for ever, "to be used for the purposes of the Grand Trunk Railway Company of Canada, the said sum being in full compensation for the land and the company so using it as aforesaid." On this land defendants built their railway so unskilfully, as in July, 1858, after a very heavy rain, to cause the water to overflow the plaintiff's land, doing injury to his crops:—Held, that the compensation paid for the deed could not be considered as paid or received as a compensation for such unskilful construction of the railway, and that defendants were liable. *Vanhorn* v. *Grand Trunk R. W. Co.*, 9 C. P. 264.

Overflow of Culvert — *Time Limit.*]— The first count alleged that plaintiff's farm was drained by drains on each side of and across the cultivated portion, which kept and would have continued to keep it free from water but for the negligent and improper conduct of defendants; yet defendants constructed their railway across other lands to the east and west of plaintiff's land, and then negligently made and kept open a drain at each side of the railway, without any proper outlet

for the water therefrom, whereby the water from lands west of plaintiff's land flowed into these drains on either side of the railway, and along them to a culvert made by defendants, which being too narrow the water there overflowed and ran upon the plaintiff's land, where it overflowed the drains and injured the crops, &c. It was proved that the plaintiff's land was drained as described, and that, although the railway had been constructed more than two years, he had not been injured by water until the last summer, when the season was exceedingly wet; but it appeared that there would have been no overflow if defendants' culverts had been sufficiently large:—Held, that the action was maintainable, and brought in time, being within six months from the overflow. *Carron* v. *Great Western R. W. Co.*, 14 U. C. R. 192.

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

——— *Pleading — Justification.*]—Case for penning back the water of a stream by placing a hatch or gate across the same. Plea, that the defendants were incorporated by statute to construct a railway, and empowered to intersect or cross any stream on the route of said railway, and to construct it across or upon the same; that the said stream was on their route, and it was necessary that the said railway should be constructed across the same; whereupon defendants, in accordance with the said Acts, placed the said hatch or gate in and across the said stream, and continued the same there, the said portion of the road not being completed at the commencement of this suit, so as to enable defendants to restore the said stream to its natural state:—Held, on demurrer, plea bad, as not confessing and avoiding or traversing the injury complained of, and for not shewing a sufficient justification. *Anderson* v. *Great Western R. W. Co.*, 11 U. C. R. 126.

Stopping up Ditch — *Absence of Negligence.*]—Defendants purchased part of plaintiff's land for their road, which ran through it: the price was fixed by agreement, and the land conveyed without any reservation. The plaintiff had previously drained his land by means of a ditch which he had made, running through the land conveyed. In constructing their railway defendants stopped up this ditch, and plaintiff's land was thus overflowed. For this the plaintiff sued, charging defendants with negligence in so constructing their road:—Held, that the action could not be maintained, the injury being attributable to the mere construction of the railway, which should have been taken into consideration at the sale, or at the reference provided for in the Act, if the parties had disagreed. *L'Esperance* v. *Great Western R. W. Co.*, 14 U. C. R. 173.

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4. *Farm Crossings.*

Agreement for — *Breach of—Justification—Lease.*] — To an action on a special agreement for not maintaining proper crossings for the plaintiff, whose lands had been separated by the railway, and for not keeping up the cattle guards and fences connected with such crossings, defendants pleaded that the agreement was executed by them for the benefit of the plaintiff, his executors, administrators, and assigns, for the time being the occupants of said land, and that during the whole continuance of the grievances complained of, one J. T. and others were possessed to their own use, and to the exclusion of the plaintiff, of said land on each side of the railway, for divers terms of years, under leases executed by the plaintiff before the commencement of said grievances:—Held, no defence. *Hugo* v. *Great Western R. W. Co.*, 16 U. C. R. 506.

——— *Parol Agreement.*]—The right to a bridge or farm crossing over a railway will not pass by a parol agreement. *Mills* v. *Hopkins*, 6 C. P. 138.

Delay in Furnishing—*Special Damage.*]—In an action for breach of covenant by delaying the completion of a railway crossing, which afforded the best road to the plaintiff's saw mill:—Held, that evidence of special damage was not admissible, none being alleged in the declaration, and the plaintiff not having notified the defendants at the time of the fact of his suffering the loss of profit which constituted the alleged damage. *Shaver* v. *Great Western R. W. Co.*, 6 C. P. 321.

Duty to Construct—*Amendment of Statute.*]—Under 14 & 15 Vict. c. 51, s. 13, railway companies were required to erect and maintain fences on each side of the railway with openings, or gates, or bars therein, "and" farm crossings, &c., for the use of the adjoining proprietors; but on the consolidation of this Act in C. S. C. c. 66, s. 13, the clause was changed by requiring the company to erect and maintain fences, &c., "at" farm crossings:—Held, that the substitution of the word "at" in the consolidated Act for the word "and" in the former Act, varied the liability of railway companies, and imposed no duty upon defendants, who were incorporated by 31 Vict. c. 41, to make farm crossings. *Brown* v. *Toronto and Nipissing R. W. Co.*, 26 C. P. 206.

Held, that the company were bound to provide such farm crossings as might be necessary for the beneficial enjoyment by C. of his farm, the nature, location, and number of said crossings to be determined on a reference to the master of the court below. The substitution of the word "at" in s. 13 of C. S. C. c. 66 for the word "and" in s. 13 of c. 51 of 14 & 15 Vict., is the mere correction of an error, and was made to render more apparent the meaning of the latter section, the construction of

which it does not alter nor affect. Brown v. Toronto and Nipissing R. W. Co., 26 C. P. 266, overruled. *Canada Southern R. W. Co.* v. *Clouse*, 13 S. C. R. 139.

——— *Amendment of Statute — Jurisdiction of Provincial Legislatures.*]—An owner whose lands adjoin a railway subject to the Railway Act of Canada, upon one side only, is not entitled to have a crossing over such railway under the provisions of that Act, and the special statutes in respect of the Grand Trunk Railway of Canada do not impose any greater liability in respect to crossings than the Railway Act of Canada. Midland R. W. Co. v. Gribble, [1895] 2 Ch. 827, and Canada Southern R. W. Co. v. Clouse, 13 S. C. R. 139, referred to. The Provincial legislatures in Canada have no jurisdiction to make regulations in respect to crossings or the structural condition of the roadbed of railways subject to the provisions of the Railway Act of Canada. Canadian Pacific R. W. Co. v. Corporation of Notre Dame de Bonsecours, [1899] A. C. 367, followed. *Grand Trunk R. W. Co.* v. *Therrien*, 30 S. C. R. 485.

See Vezina v. *The Queen*, 17 S. C. R. 1; *Guay* v. *The Queen*, *ib.* 30.

——— *Other Access.*] — Plaintiff owned land along the river Thames where there was a bend or elbow in the stream. He conveyed to defendants the strip required for their track, which ran close to the bank at this bend so as to leave no passage from his land above to that below, but he had access to each part separately by the highway:—Held, that defendants were not bound to provide any such passage. *Carroll* v. *Great Western R. W. Co.*, 14 U. C. R. 614.

——— *Place for — Continuing Damage—Pleading.*]—Where a railway severs a farm, it is primâ facie the duty of the company to construct a farm crossing, and the fact of their having commenced it at a particular place and desisted at the request of the owner, who forbade them to cut into his land, does not prevent the owner from recovering damages as for a continuing breach. *Reist* v. *Grand Trunk R. W. Co.*, 6 C. P. 421.

The G. T. Railway passed through plaintiff's farm, and where it intersected a lane running from front to rear of the farm, a cutting was necessary. The plaintiff insisted on having a farm crossing made in continuation of this lane, and by means of a raised bridge. Defendants offered to make it there, but not by a raised bridge; and they were proceeding to cut through the plaintiff's land on either side, to make an approach to the railway, so as to cross upon a level, when the plaintiff interfered, and prevented them from going on. They then desisted, and did nothing more. The plaintiff sued them for not making a convenient crossing, and recovered £12 10s.:—Held, upon the authority of the previous decision, that the verdict must stand, for defendants should have gone on and completed the crossing, at least on their own land. Semble, that in such an action, being for a nonfeasance, defendants could not plead the general issue by statute, and give special matter in evidence. *S. C.*, 15 U. C. R. 355.

——— *Place for—Sufficiency of—Delay.*]—The embankment of a railway intersected a private road used by plaintiff between different portions of his farm, and the company had made a crossing so as to give him access to that part of his farm cut off, but he required the crossing in continuation of the old road directly across the track, which would have involved great expense and difficulties:—Held, (1) that he had not the right to prescribe the place where the farm crossing should be made. (2) That it was defendants' duty without delay to make the necessary crossing at the most fitting place. (3) That the owner of the land might sue either for not affording him a crossing at all, or an insufficient one, or for unreasonable delay in making it. *Burke* v. *Grand Trunk R. W. Co.*, 6 C. P. 484.

Place for — *Mandamus.*] — A mandamus to compel a railway company to make crossings at a particular place, under 14 & 15 Vict. c. 51, s. 13, was refused. *In re Reist and Grand Trunk R. W. Co.*, 12 U. C. R. 675.

Right of Way—*Prescription.*]—When a line of railway severs a farm, and no crossing is provided by the company, a right of way across the line may be acquired by the owner of the farm by prescription. A farm crossing, provided by a railway company, may be used by any person who, after the severance, becomes the owner of portions of the farm on both sides of the line of railway, and has a right of access to the crossing. A right of way may be acquired, although the dominant tenement is not contiguous to the servient tenement. *Guthrie* v. *Canadian Pacific R. W. Co.*, 27 A. R. 64.

Use of.]—The relative rights and duties of railway companies and landowners with regard to the use of farm crossings considered. *Bender* v. *Canada Southern R. W. Co.*, 37 U. C. R. 25.

See Great Western R. W. Co. and Vilaire, 11 C. P. 509; *Jackson* v. *Jessop*, 5 Gr. 524; *Wood* v. *Hamilton and North Western R. W. Co.*, 25 Gr. 135; *Murphy* v. *Grand Trunk R. W. Co.*, 1 O. R. 619; *Plester* v. *Grand Trunk R. W. Co.*, 32 O. R. 55.

See, also XII. 1, XV.

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5. *Fences, Gates, and Cattle Guards.*

(*See*, also, *post* XII.)

Breaking down Fences—*Delay in Replacing—Remedy.*]—The declaration charged that defendants were making their railway through plaintiff's close, and fencing off said close from their line, and that they ought to have kept up the plaintiff's fences, &c.; yet they threw down the plaintiff's fences between the said close and the railway, and permitted them to remain prostrate for an unreasonable time, &c., so that cattle got in and destroyed the plaintiff's crops. It appeared that the injury must have been occasioned by the first breaking down the fences for the purpose of entry (which was authorized by 10 & 11 Vict. c. 117, s. 11), and before a reasonable time had expired for fencing in the line (as defendants were bound to do under s. 15):—Held, therefore, that no action would lie, but plaintiff must proceed by arbitration under s. 3. *Rutledge* v. *Woodstock and Lake Erie R. and H. Co.*, *Burgess* v. *Woodstock and Lake Erie R. and H. Co.*, 12 U. C. R. 663.

Duty during Construction.] — Under 4 Wm. IV. c. 29, s. 9, the Great Western Railway Company are bound to put up sufficient fences along their line of road while the work is in progress. *Bradley* v. *Great Western R. W. Co.*, 11 U. C. R. 220.

Duty Regarding Bridge — *Neglect to Fence—Lessees—Status as Plaintiffs.*] — The Grand Trunk Railway and the Weston Plank Road crossed the plaintiff's land, not far apart, on parallel lines. The railway company, it was alleged, found it necessary to change the course of a stream over which the road company had built a bridge, to which the latter consented, on the railway company agreeing to make and maintain a bridge for them over the new channel:—Held, that such agreement could not impose upon defendants any obligation to fence at this latter bridge, or make them liable to the plaintiffs for omitting to do so. The plaintiffs also sued defendants for neglecting to fence in their own railway:—Held, that, though only lessees of the land, they were "proprietors" within the reasonable construction of the Railway Act, and might recover for damage done to them. *Brown* v. *Grand Trunk R. W. Co.*, 24 U. C. R. 350.

Duty Regarding Crossings.]—Semble, that the effect of 4 Wm. IV. c. 29, s. 9, is to oblige the company to erect fences and to place gates where their road crosses highways, and to have such gates properly watched and attended; and that this clause extends to all parts of the road, as well west as east of London. *Renaud* v. *Great Western R. W. Co.*, 12 U. C. R. 408; *Moison* v. *Great Western R. W. Co.*, 14 U. C. R. 102.

But quære, as to gates. *Nicholls* v. *Great Western R. W. Co.*, 27 U. C. R. 382.

Per McLean, J.—It does not so extend. *L'Esperance* v. *Great Western R. W. Co.*, 14 U. C. R. 173.

The company, under 4 Wm. IV. c. 29, are bound to fence along the line where it crosses highways, and are liable for accidents on default. Per Richards, J.—The statute would be sufficiently complied with by the erection of fences and gates on the line of the highways across the railway. *Parnell* v. *Great Western R. W. Co.*, 4 C. P. 517; *McDowell* v. *Great Western R. W. Co.*, 6 C. P. 180.

Encroachment on Highway—*Injury to Person.*]—The plaintiff on a dark night, intending to go to the railway station, walked along the highway until he came to the railway crossing, and then turned to the left intending to go along the track to the station, when he fell into the cattle guard, which was within the limits of the highway, and was injured:—Held, that he could not recover, for, assuming that the encroachment on the highway by the cattle guard was illegal, it was in no way the cause of the accident, which resulted from the plaintiff leaving the highway to walk along the track, and would have happened without such encroachment. *Thompson* v. *Grand Trunk R. W. Co.*, 37 U. C. R. 40.

Injunction against Company Using Line until Proper Fences are Erected.] —See *Masson* v. *Grand Junction R. W. Co.*, 26 Gr. 286.

Maintenance of Gates at Crossings—*Railway Committee—Apportionment of Cost—Municipal Corporations — Legislation.*] — See *In re Canadian Pacific R. W. Co. and County and Township of York*, 27 O. R. 559, 25 A. R. 65.

Material of Fence — *Nuisance.*]—Held, that, in the face of 46 Vict. c. 18, s. 490, s.-ss. 15 and 16 (O.), which seemed to sanction them, and empowered municipalities to provide against injury resulting from them, barbed-wire fences constructed by the defendants upon an ordinary country road along the line of their railway, could not be treated as a nuisance, no by-law of the locality in which the accident complained of in this case happened, having been passed respecting fences of the kind; and that derendants were not, therefore, liable for the loss of the plaintiff's colt, which, while following its dam as the latter was being led by the plaintiff's servant, ran against the fence and received injuries resulting in its death. *Hillyard* v. *Grand Trunk R. W. Co.*, 8 O. R. 583.

Neglect to Fence — *Pleading — Ownership.*]—Where, in the inducement of the declaration, for neglect to fence, it was alleged that defendants were proprietors of the railway, not saying at the time of the negligence complained of:—Held, that under a plea of "not guilty," defendants might shew that at such time it was not their property. *Van Natter* v. *Buffalo and Lake Huron R. W. Co.*, 27 U. C. R. 581.

——— *Request—Time Limit.*]—Sub-sections 1 and 2 of 14 & 15 Vict. c. 51, s. 13, are distinct provisions, passed with different objects. The first is to compel the company to fence in their track, so that cattle may not get upon it and be injured by the trains; non-compliance renders them liable for any such injury, but this clause does not apply until the railway is in use. The second is to provide for the separation, not only of the track, but of all lands taken by the company from the lands of adjacent proprietors, so that the latter may not be subject to trespasses by cattle escaping from the company's lands; this clause may apply before the railway is in operation, but not until six months after the company have taken the land, and been requested to fence it. Where, therefore, a declaration charged that defendants built their railway over the plaintiff's land, but neglected to fence as directed by s.-s. 1, whereby cattle broke in and destroyed his crops, but it was not averred that the plaintiff had requested them to fence, nor that the six months had elapsed:—Held, that no cause of action was shewn, for the injury was one within s.-s. 2, and these averments were essential. *Elliott* v. *Buffalo and Lake Huron R. W. Co.*, 16 U. C. R. 289.

The declaration in this case was the same as in the above case, but charged, as additional damage resulting from the same breach of duty, that by reason thereof a steer and heifer of the plaintiff got upon the railway, and were killed by an engine of the defendants running thereon:—Held, bad. *Ferguson* v. *Buffalo and Lake Huron R. W. Co.*, 16 U. C. R. 296.

As to the neglect to fence, defendants pleaded "not guilty by statute" C. S. C. c. 66, specifying s. 83, among others, but at the trial they raised no question under that clause as

to the plaintiff's damages being confined to six months, and it was not shewn clearly how much of the damage accrued beyond that time. It seemed probable, however, that only eight or ten weeks would be excluded if the clause applied, and the court refused to interfere on this ground. Quære, whether the clause would apply, this being an act of omission. Quære, also, as to the liability of defendants for acts of their contractors, but this point was not determined, as they were bound by C. S. U. C. c. 66, s. 19, to fence on request, and a request was proved. *Nichol* v. *Canada Southern R. W. Co.*, 40 U. C. R. 583.

Watching Cattle — *Bad Fences—Damages.*]—See *Young* v. *Erie and Huron R. W. Co.*, 27 O. R. 539, *post* XII.

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6. Highways—Running along or across.

Culvert—*Substitution for Ditch—Source of Danger.*]—The railway crossed a highway, and in the line of the ditch formerly running at the side of the highway, and several feet within the limits of the highway, the railway company constructed an open culvert of square timber about five feet deep and seven feet wide. The plaintiff, walking along the road and crossing the railway, fell into this culvert and was injured:—Held, that the company were liable; for their duty was to restore the highway to its former state, or in a sufficient manner not to impair its usefulness; and in substituting this open culvert, which they could readily have covered, for the former ditch, they had unnecessarily made it more dangerous:—Quære, whether the corporation were bound to repair this part of the highway. Held, that if so, that would not relieve the defendants. *Fairbanks* v. *Great Western R. W. Co.*, 35 U. C. R. 523.

Diversion of Highway—*Injury—Evidence.*]—Semble, that under 14 & 15 Vict. c. 51, a permanent diversion of a highway may be made upon the construction of a railway, where it is necessary or expedient. Where the evidence as to the injury done to a highway by the manner in which a railway was constructed was conflicting, the court refused an injunction, leaving the parties to their legal remedy. *Municipality of Fredericksburg* v. *Grand Trunk R. W. Co.*, 6 Gr. 555.

Double Track—*Injury to Adjoining Land—Assignees of Company.*]—Defendants, assignees of a railway company, laid down a double track where there had been a single one along the street at the side of the plaintiff's premises:—Held, following Ward v. Great Western R. W. Co., 13 U. C. R. 315, that if the construction of this double track affected all as it did plaintiff, he had no right of action, but the remedy, if any, must be by indictment. Defendants had also maintained a cutting in the street in front of plaintiff's house, which prevented the street being used as it formerly had been:—Held, that if the plaintiff had been more injuriously affected thereby than others, and was entitled to compensation for the damage done, redress must be sought from the company and not from defendants individually as exercising its rights and franchise. *Hamilton* v. *Covert*, 16 C. P. 295.

Intersection of Highway—*Projecting Track.*]—The rails of defendants' track where it crossed a highway projected from eight to nine inches above the level; and while the plaintiff with a pair of horses and waggon was crossing over, an engine standing close by whistled to give notice of the train starting. This caused the horses to start forward, striking the waggon against the projecting rails and breaking the whipple-tree, in consequence of which the horses ran away and one of them was injured:—Held, that defendants would not be liable if the whippletree was broken by the sudden starting of the horses without reference to the state of the track, for it was not proved that the blowing of the whistle was an unnecessary and unlawful act; but that if the accident happened through the defective state of the track they would be liable, and the case should have been left to the jury, without any evidence on the plaintiff's part to shew what the state of the highway was before defendants' railway intersected it. *Thompson* v. *Great Western R. W. Co.*, 24 C. P. 429.

Intersection of Street—*Bridge—Embankments—Authority.*]—Plaintiff, being possessed of a lot of land on the west side of Mary street, in the city of Hamilton, required by the defendants for their railway, sold and conveyed to them the north half of the lot, with the appurtenances, retaining the south half, upon which was erected a dwelling house, approached from Mary street, and which was drained by Mary street. Defendants, in constructing their line of road, intersected Mary street opposite the north half of the lot so purchased, at a certain depth below the surface of such street; and, in order to restore the communication thus intersected, erected a bridge across their line of road, with embankments in the street and opposite plaintiff's close. Upon action brought by plaintiff:—Held, that the defendants were authorized by 4 Wm. IV. c. 29, s. 9, to do the acts complained of, and that s. 11 did not apply. *Connors* v. *Great Western R. W. Co.*, 6 C. P. 108.

——— *By-law—Construction of Branch—Manner of—Effect.*]—By 16 Vict. c. 169, municipalities may pass by-laws sanctioning the construction of branch railways of limited length "under such restrictions as the councils may see fit." Acting under this statute, the corporation of Kingston passed a by-law authorizing the Grand Trunk Railway Company to construct a branch line running on and across certain streets of the city to the waters of the harbour; the articles of agreement and specifications were drawn up and agreed upon between the parties, under which the company proceeded to construct their branch line. When the works were well advanced and nearly completed the corporation discovered that the probable effect of the works being carried out in the manner proposed, would be to produce a large body of stagnant water, which would in all likelihood injuriously affect the health of the city, whereupon they required the company to fill in this space, or to desist from the works, with which the company refused to comply, and the corporation thereupon filed a bill to compel the company to perform the works according to such views of the corporation. At the hearing the court refused the relief prayed, and dismissed the bill with costs. *City of Kingston* v. *Grand Trunk R. W. Co.*, 8 Gr. 535.

——— *Grade—Resolution of Municipality.*]—See *In re Bronson and City of Ottawa*, 1 O. R. 415.

Obstruction of Highway—*Right of Action—Special Damage.*]—The second count alleged that the plaintiff owned lands adjoining an original allowance for road which defendants' railway crossed, and that afterwards the municipal council opened the said allowance, but defendants obstructed it by fences across the same, without making any crossing, &c. It was alleged as special damage, and proved, that this was the only communication between the plaintiff and the town line, and the plaintiff was precluded from egress from his residence and a portion of his farm to the said town line, and was thereby prevented from carrying to market the products of that portion of his said farm, and also certain cordwood and valuable bark, which was subsequently destroyed by fire and rendered useless:—Held, that this was sufficient special damage to enable plaintiff to recover, and that defendants clearly had no right to obstruct the highway after it had been opened; but the jury having disagreed a new trial was granted to enable the facts to be found. *Brown* v. *Toronto and Nipissing R. W. Co.*, 26 C. P. 206.

Occupying Street — *Assent—By-law—Notice.*]—The G. T. R. Co. were indicted for nuisance, in obstructing a street in Guelph, by occupying it with their road. It appeared that the municipality had by-law allowed them to occupy the street, and ordered that for that purpose a portion of it should be closed altogether as a highway:—Held, that such by-law was not within 12 Vict. c. 81, s. 192, and therefore that the notice there directed to be given was not required. Held, also, that the consent of the municipality might have been given, under 14 & 15 Vict. c. 51, s. 12, by resolution as well as by by-law. Semble, that the indictment should have been for carrying the railway along the street without leave of the municipality. *Regina* v. *Grand Trunk R. W. Co.*, 15 U. C. R. 121.

The town council of Guelph passed a by-law, enacting that from the passing thereof the G. T. R. Co. might carry their railway through the streets of the town, pursuant to the plan annexed; that a part of Kent street as shewn in said plan should be thenceforth stopped up as a highway, and might be appropriated by the company; that another street named should be diverted as so shewn; and that the by-law should be in force only on certain conditions mentioned in it:—Held, that such by-law was valid under 14 & 15 Vict. c. 51, s. 12, without the formalities required by 12 Vict. c. 81, s. 192; and that the leave given by it might equally have been given by resolution. Held, also, that if notice had been necessary, the want of it should have been objected to without delay, not after the work had been completed. *In re Bay and Town of Guelph*, 15 U. C. R. 126.

——— *Assent—Proposed Highway—Mandamus—Survey.*]—By 22 Vict. c. 116, s. 15, it is enacted, in substance, that all highways occupied by the defendants' railway with the written assent of the municipality within which they are situated, shall be declared vested in the defendants to the extent of the user permitted or enforced by the municipality; and all proposed or contemplated streets occupied by the company, or which they have been permitted to occupy by the license of the owner in fee, and which shall not lead to any place beyond the said railway, shall be deemed closed, and the occupation by the said railway shall be lawful:—Held, that defendants, being indicted for obstructing certain streets in the town of Sarnia, were clearly entitled to an acquittal under this clause, for first, as to the first part of the clause, a written assent given afterwards by the municipality would suffice, and might be inferred from their letters, in which they asked only for pecuniary compensation; and secondly, these were proposed or contemplated streets occupied by the company, and not leading to any place beyond the railway, in which case no assent was required. Held, also, that C. S. U. C. c. 54, s. 333, had no application, for it could not be said that these streets, under the facts of the case, had not been opened by reason of any other road being used in lieu thereof; that under 16 Vict. c. 99, s. 4, and 16 Vict. c. 101, defendants had clearly a right to take possession of this land for their railway, with any easement thereto. Quære, whether 4 Wm. IV. c. 29, s. 9, which requires this railway company on intersecting any highway to restore it to its former state, or in a sufficient manner not to impair its usefulness, could have been applied to this case; the streets in question never having been opened or used, being covered by the works of defendants, so that they could not be restored without dispossessing them, and leading to no place beyond. Semble, that at all events a mandamus would not, under the circumstances, have been granted at the instance of the municipality. Under C. S. U. C. c. 54, s. 313, these streets, being laid out on the original plan made by the Crown surveyor, would be public highways, though not staked out upon the ground, and never opened or used. Semble, that under 12 Vict. c. 35, s. 41, the Indians, or the government acting for them, had power to alter and amend the survey by striking out these streets where they ran through the land sold to defendants. *Regina* v. *Great Western R. W. Co.*, 21 U. C. R. 555.

Planting Posts—*Statutory Signboard—Nuisance — Time.*]—Where the plaintiff's horse, which she was driving along the highway, became frightened, and the vehicle to which it was attached was in consequence brought into collusion with one of the posts supporting the "signboard" required by the statute (C. S. C. c. 66) to be erected across the highway, and damage resulted to the plaintiff:—Held, that defendants would not be liable merely for putting the posts in the highway, as the law allows them so to do, provided they place them in a reasonably proper manner, with a due regard to all the surrounding circumstances, although the posts necessarily obstruct the use of the road over the spots where they are placed. Held, also, that the posts would not necessarily be an indictable nuisance. Held, also, that it would have been no objection to the plaintiff's right to recover, that the posts had been erected more than six months before the cause of action arose. *Soule* v. *Grand Trunk R. W. Co.*, 21 C. P. 308.

Powers of Municipality.]—Held, that under R. S. O. 1877 c. 165, s. 21, the corporation of the city of Hamilton had clearly power to allow the defendants to run their railway along Ferguson avenue. *How* v. *Hamilton and North-Western R. W. Co.*, 3 A. R. 336.

Repair — *Enforcing Duty — Status of Municipality as Plaintiffs.*]—A municipality may file a bill to compel a railway company to put streets and highways improperly traversed by their line of railway in good repair, and will not be restricted to proceeding by indictment or information. The plaintiffs, a municipal corporation, filed a bill seeking to restrain the defendants, a railway company, from trespassing by running their tracks along one of the streets of the municipality without the consent thereof, thus impeding traffic, in contravention of the Railway Act, C. S. C. c. 66, s. 12, s-s. 1:—Held, that by virtue of the Municipal Act there is such power of management, control, &c., bestowed upon municipalities, and such a responsibility cast upon them as to justify them in intervening on behalf of the inhabitants for the preservation of their rights. Semble, but for the language used in Guelph v. Canada Co., 4 Gr. 656, the proper frame of the suit would have been by way of information in the name of the attorney-general, with the corporation as relators. *Fenelon Falls* v. *Victoria R. W. Co.*, 29 Gr. 4.

Track Laid without Authority—*Acquiescence.*]—Held, per Armour, J., that the jury were rightly directed, under the facts stated in the report of this case, that the defendants had laid down the track on which the accident happened, in the city of Ottawa, without authority, it being a third track or switch for use in connection with their station, for the purpose of shunting, &c., and if illegally laid down no acquiescence, except by by-law, would make it rightful as against the plaintiff. Per Hagarty, C.J.—Having been there for many years with the knowledge and acquiescence of the corporation, its existence could not alone make defendants liable, but it was properly left as a circumstance to be considered by the jury. *Lett* v. *St. Lawrence and Ottawa R. W. Co., Hinton* v. *St. Lawrence and Ottawa R. W. Co.*, 1 O. R. 545.

Track Laid without Formal Authority—*Recognition—By-law — Acquiescence.*]—Where a railway company constructed their railway along a highway in a municipality, the council whereof were not formally applied to for leave, but subsequently passed a resolution notifying the railway company to fill up the ditch existing on both sides of the railway, and to put down proper crossings:—Held, that the corporation had thereby admitted that the railway company were lawfully in occupation of the highway, and could not afterwards object. The leave of the municipal or local authorities required by 31 Vict. c. 68 (D.), before a railway is carried along an existing highway, may be granted at any time, whether before, during, or after the construction of the railway, and need not necessarily be given by by-law. Semble, that R. S. O. 1877 c. 174, s. 277, enacting that the powers of township councils shall be exercised by by-law, must be construed as referring only to the exercise of powers of the council under the Municipal Act, and not to powers which may be exercised under a special Act passed for other purposes or by another legislature. Held, that the corporation having stood by while the railway was constructed, and subsequently for upwards of five years, while it was in operation, and having also by the resolution aforesaid, procured further expenditure by the company, were bound by acquiescence, and could not now maintain an action for the removal of the railway from the street. A corporation may be bound by acquiescence as an individual may. Quære, whether such acquiescence would have availed as a legal justification for the defendants on an indictment for a nuisance at the suit of the Crown. *Township of Pembroke* v. *Canada Central R. W. Co.*, 3 O. R. 505.

See Municipality of Sarnia v. *Great Western R. W. Co.*, 17 U. C. R. 65; *Carron* v. *Great Western R. W. Co.*, 14 U. C. R. 192; *Town of Peterborough* v. *Grand Trunk R. W. Co.*, 32 O. R. 154; *City of Toronto* v. *Metropolitan R. W. Co.*, 31 O. R. 367 (*post* STREET RAILWAYS).

See, also, *ante* 5.

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7. *Other Cases.*

Commencement of Work.]—The plaintiffs were empowered by their Act of incorporation to construct a railway in sections between the river S. S. M. on the west, and G. on the east, and such railway was by s. 2 of their Act to be commenced within three years, and to be completed within six years from 4th March, 1881. In the years 1881 and 1882 they surveyed, located, and filed plans from the river S. S. M. easterly to S. R., about one-third of the entire length of their road, and did some work thereon of the character of "construction" such as grading, blasting, and chopping. Little more was done by them from 1882 to 1886 owing to financial reasons, but with no intention of abandoning the road. The defendants, who had constructed a line of railway as far west as A., proceeded, in December, 1886, to continue the construction of their line westerly from A. to the river S. S. M., and in doing so used this line which plaintiffs had located:—Held, on the evidence, that the work done by the plaintiffs was a bonâ fide commencement of their railway within the three years required by their Act. Held, also, that, as the plaintiffs were authorized to construct their railway in sections, they were not bound before commencing work to file plans of their whole line. *Ontario and Sault Ste. Marie R. W. Co.* v. *Canadian Pacific R. W. Co.*, 14 O. R. 432.

See Corporation of Parkdale v. *West*, 12 App. Cas. 602.

Conveyance of Land Acquired for Railway—*Trespass.*]—The defendants, having acquired land 90 feet wide for the construction of their line, conveyed to the plaintiff a portion going 22 feet into the embankment, which at that point was high. The plaintiff built a root house on his portion, which fell in, and defendants filled up the hole, and repaired the embankment there, for which the plaintiff brought trespass. The jury found that what defendants did was necessary for the safety of their railway:—Held, that, nevertheless, they were liable; for having conveyed the land, as they had a right to do, they could not afterwards, without notice or compensation, interfere with their vendee. Quære, whether they could again acquire the land under the statute. *McDonald* v. *Grand Trunk R. W. Co.*, 28 U. C. R. 320.

Easement — *Destruction of — Remedy — Time Limit.*]—Second count, that the plaintiff was possessed of certain land in the village of W., and by reason thereof ought to have a certain way therefrom, and from the highway in front thereof, over a certain close

in said village to the Detroit river and back again, for himself and his servants, &c.; yet defendants wrongfully stopped up the said way. It appeared that his land formed part of lot No. 88; that one B., in 1835, conveyed three acres of this lot to P., reserving a right of way from the highway to the water. These three acres afterwards became the property of K., who conveyed to defendants. In 1851 B. conveyed to the plaintiff a part of lot No. 88, with a right of way therefrom to the river such as B. himself then had. The plaintiff had had a way across K.'s land until K. sold to defendants, and was deprived of it by the construction of the railway about two years before this action. The railway separated the highway from the water along the whole extent of these three acres:—Held, that the action could not lie, for defendants were authorized to build their road where they did, and the doing so could not be treated as wrongful; that if any recompense is given by the Acts to the owner of such an easement, it is by arbitration, unless 4 Wm. IV. c. 29, s. 9, applies, and then the action should be for not restoring the way in the manner there directed. Semble, however, that that clause applies only to public roads. Semble, also, that if the action had been maintainable, it was brought too late, the cause of action being complete on the construction of the railway. The clauses of defendants' charter relating to easements, apply only to easements belonging to the land taken, not to easements in that land appertaining to other lands. *Carron* v. *Great Western R. W. Co.*, 14 U. C. R. 192.

——— *Entry for Gravel—Compensation—Agreement—Tenant for Life — Reversioner.*]—The first count of the declaration in each of two actions brought by different plaintiffs against a railway company, charged that defendants wrongfully entered upon the plaintiff's land, and carried away gravel, then lying lower than two and a half feet above the level of the lake, thereby injuring the soil, &c. The second count alleged that the plaintiff was seised for life of the land, and one R. owned the reversion; and that by an agreement between them and the B. B. and G. R. Co., they granted to said company the two first ridges of gravel next the lake; and the company thereby agreed to leave the ground two and a half feet in depth above the level of the lake, and the surface even and level; that afterwards, under 19 Vict. c. 21, the said company delivered over their railway to defendants, and defendants completed the same under the agreement set forth in the statute; that defendants chose to enforce the said agreement with plaintiff, and removed the gravel, but dug pits below the stipulated depth, thereby injuring the land. R. brought a separate action as reversioner for the same injury. Defendants, in each case, pleaded "not guilty" by statute. The agreement, when produced, appeared to be with both plaintiffs jointly:—Held, that the plaintiff could not recover on the first count, for defendants, by 19 Vict. c. 21, were entitled to take the gravel, either on making compensation, as pointed out by s. 28, or under their agreement; nor under the second count, for defendants were not bound by the agreement; and, besides, it being entered into with the plaintiffs jointly, they could not maintain separate actions. *Peac* v. *Buffalo and Lake Huron R. W. Co.*, 17 U. C. R. 282.

Injury to Adjoining Land.]—A railway company is responsible for injury done in the construction of their railway to adjoining property, unless with due and proper skill it could not be avoided. And a conveyance of the land on which the railway is built, by the party complaining of the injury:—Held, not to relieve them from liability. *Minor* v. *Buffalo and Lake Huron R. W. Co.*, 9 C. P. 280.

VIII. DIRECTORS.

By-law—*Salary of Solicitor—Powers of Directors.*]—Where the directors of a railway company passed a by-law enacting that the salary of the plaintiff, as solicitor of the company, should be fixed at $1,000 per annum, which by-law was afterwards, at a meeting of the shareholders, repealed:—Held, that the by-law was within the competence of the directors, under C. S. C. c. 66, s. 47, and the shareholders could not undo the arrangement in respect of past services of the solicitor received by them. Without express power it is the right of the directors of a railway company to appoint necessary officers and agents of the company, and to provide for the manner of their payment. *Falkiner* v. *Grand Junction R. W. Co.*, 4 O. R. 350.

Managing Director—*Salary.*]—By a special Act incorporating a railway company, it was enacted that the board of directors might "employ one or more of their number as paid director or directors," and by a resolution under the seal of the company, the board of directors appointed the plaintiff, one of their number, a paid director or manager at a salary of $1,000 a year, under which appointment $500 accrued due to the plaintiff, but this the company refused to pay, contending that they were liable for expenses and disbursements only:—Held, that, although under the general Railway Act, C. S. C. c. 66, a director could not hold any office under the company, yet under the words of the special Act, and the resolution of the board, he was entitled to recover; and a reference was directed to take an account of what was due to the plaintiff, together with costs to the hearing. *Reynolds* v. *Whitby R. W. Co.*, 26 Gr. 519.

President—*Personal Liability on Acceptance of Bill of Exchange.*]—See *Madden* v. *Cox*, 5 A. R. 473.

Provisional Directors — *Contract — Authorization — Sale — Lien — Costs.*]—The plaintiff was employed by one of the provisional directors of the defendant railway company to do certain work on behalf of the company in advertising and promoting its undertaking. The evidence established that this director was intrusted by the company with the performance of the various duties necessary for the purpose of promoting and furthering the undertaking, and that he did this, from time to time, without any specific instructions from his co-directors at formal meetings of the board, everything being done in the most informal manner; but that they were fully cognizant of what he did, and of his manner of doing it, and vested in him, either tacitly or by direct authorization, the right and authority to transact the business of the company:—Held, that the plaintiff was entitled to recover from the company the value of his work. Mahony v. East Holyford Mining Co., L. R. 7 H. L. 869, followed. Wood v. Ontario and Quebec R. W. Co., 24

C. P. 334, commented on. The undertaking having been sold by the provisional directors, free of all liens and incumbrances, for a certain sum of money, which was paid to them, and a portion of which was paid into court under an order in another action; all the provisional directors being parties to this action, and two of them submitting to the order of the court and being willing that the judgment debt should be paid out of the fund in court; an order was made, notwithstanding that the purchasers were not parties, directing payment of the plaintiff's debt and costs and of the costs of the two directors out of such fund. *Allen* v. *Ontario and Rainy River R. W. Co.*, 29 O. R. 510.

——— *Powers of.*]—The plaintiff, one of the provisional directors of defendant company, named as such, with his assent, in their Act of incorporation, 36 Vict. c. 70 (O.), was, without resigning this office, appointed at a meeting of the provisional directors, "provisional secretary and treasurer," and to act in conjunction with a committee then appointed in procuring municipal aid; and he acted in such capacity, and was chiefly instrumental in procuring the passage of the municipal by-laws for bonuses in aid of the railway. The understanding was, that he should be well paid, but no sum was specified: —Held, that plaintiff continued a director and trustee under the statute for certain specified purposes, and could not recover for services rendered in matters unauthorized thereby, and beyond the powers and duties of the provisional directors. Held, also, that the employment of the plaintiff for such a purpose was beyond the power or duties of the provisional directors, who have not the full powers of directors elected by the shareholders. *Michie* v. *Erie and Huron R. W. Co.*, 26 C. P. 566.

See In re North Simcoe R. W. Co. and City of Toronto, 36 U. C. R. 101; *Counties of Peterborough and Victoria* v. *Grand Trunk R. W. Co.*, 18 U. C. R. 220; *McLaren* v. *Fiskin*, 28 Gr. 352; *Wilson* v. *Ginty*, 3 A. R. 124; *Denison* v. *Leslie*, 3 A. R. 536.

IX. EQUITABLE REMEDIES AGAINST COMPANIES.

1. *Receiver.*

Appointment of—*Execution Creditor.*]—Held, that a judgment creditor of a railway company, with execution against their lands in the hands of the sheriff, is entitled to the appointment of a receiver of the earnings of the road, the profits thereof to be applied in payment of his demand. *Peto* v. *Welland R. W. Co.*, 9 Gr. 455. Affirmed on rehearing, 16th February, 1864.

——— *Mortgagee—Judgment Creditor.*]—A mortgagee or judgment creditor of a railway company is not entitled to enforce payment of his demand by sale or foreclosure of the railway; he is only entitled to have a manager or receiver of the undertaking appointed; and quære, whether the rule is otherwise in the case of a vendor seeking to enforce his lien for unpaid purchase money. *Galt* v. *Erie and Niagara R. W. Co.*, 14 Gr. 466.

Duty of—*Gross Receipts.*]—Where the receiver of a railway company was appointed to receive "the rents, issues, and profits of the railway;"—Held, that it was his duty to receive the gross receipts for the traffic and to pay the running expenses thereout, and not to receive only the surplus after paying the expenses. The order for the receiver's appointment should direct the payment to him of the tolls and profits arising from the railway. *Simpson* v. *Ottawa and Prescott R. W. Co.*, 1 Ch. Ch. 126.

——— *Seizure of Rolling Stock—Assent to Sale—Bona Fides—Costs.*]—A receiver had been appointed to collect the gross amount of the tolls, rents, issues, and profits, of the O. and P. R. Co. Afterwards the rolling stock of the company had been seized by a sheriff under a fi. fa. at the suit of another company, not a party to the suit. The sheriff, however, declined to sell the same unless authorized by the receiver, who, believing under the advice of counsel that he had no control over the rolling stock, assented to the sale by the sheriff, and the same was accordingly sold:—Held, on motion to remove the receiver for misconduct, that he had committed a breach of duty in not informing the court of the seizure and threatened sale, and in assenting to the sale without its sanction; but, as it appeared that he acted bonâ fide and to the best of his judgment for the benefit of all parties, the court declined to remove him, but ordered him to pay the costs of the application. *Simpson* v. *Ottawa and Prescott R. W. Co.*, 1 Ch. Ch. 337.

Payments by—*For Right of Way—To Solicitor for Costs—Working Expenses—Priorities.*]—The receiver appointed to receive the proceeds of a railway company and apply the same in carrying on the business of the company, paid $55.97 to the owner of land over which the line ran for the right of way over his lands, he having threatened to obstruct the passage of the company's trains unless paid. On passing his accounts the master refused to allow the payment in favour of the receiver, which ruling was affirmed on appeal, as such payment did not properly come under the head of "working expenses and outgoings" for the road, which, alone, the receiver was authorized to pay. The court, however, gave the receiver liberty to take out an order now for the allowance of this disbursement, on payment of the costs of the appeal, but refused to make such an order in respect of fees paid to the solicitor of the company for the examination of titles, as there was not any evidence to shew that the payment was such as would have been sanctioned by the court if applied to in the first instance for permission to pay the same. *Gooderham* v. *Toronto and Nipissing R. W. Co.*, 28 Gr. 212.

A receiver of the defendants' railway had been appointed to take the revenues, issues, and profits, to pass his accounts periodically, and to pay into court the balance due from him after providing for the working expenses and outgoings of the railway. The master was directed to take an account of all persons entitled to liens, charges, or incumbrances, and to settle their priorities, and the money to be paid into court was to be paid to such persons according to their priorities to be ascertained:—Held, that the master, in taking the receiver's accounts, should have allowed debts paid for working expenses, which were not regularly payable until after his appointment, but not those already in

default at that time, which were properly payable out of the moneys to be paid into court according to their priority. *S. C.*, 8 A. R. 685.

——— *Purchase of Rolling Stock.*]—Although the duty of the receiver of the gross proceeds and revenues of a railway, is to pay thereout all expenses necessary for the maintenance, management, and working of the undertaking, he would not be warranted in expending the same in any extraordinary outlay; and where an application was made by the receiver to authorize the purchase of a large amount of rolling stock, the outlay in respect of which would require to be met by anticipating income, the court refused to sanction the expenditure. *Lee* v. *Victoria R. W. Co.*, 29 Gr. 110.

See Fox v. *Nipissing R. W. Co.*, *Gooderham* v. *Nipissing R. W. Co.*, 29 Gr. 11; *Lee* v. *Credit Valley R. W. Co.*, 29 Gr. 180; *Smith* v. *Port Dover and Lake Huron R. W. Co.*, 12 A. R. 288; *Grey* v. *Manitoba and North-Western R. W. Co. of Canada*, [1897] A. C. 254, *post* 2.

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2. *Other Cases.*

Mortgage — *Acceleration — Interest — Bonds — Default — Collateral Securities — Sale.*]—Where bonds were given by a railway company for the payment of a certain sum of money and interest in twenty years, and also mortgages of lands, redeemable in ten years, as security for the payment of the principal money of the bonds:—Held, that a breach of covenant to pay interest on the bonds did not accelerate the right of the mortgagees to proceed upon the mortgages; but they were entitled to a decree for sale of other bonds given as collateral security. *Great Western R. W. Co.* v. *Galt and Guelph R. W. Co.*, 8 Gr. 283.

Mortgagees — *Receiver—Sale—Jurisdiction of Provincial Court.*]—In a suit by the appellants, being mortgagees of a division of 180 miles of the respondents' railway and of its revenues, subject to working expenses, for a sale of the division and for a receiver and other relief:—Held, (1) that this division of 180 miles is by the law of Canada applicable to the railway, a section capable of sale in its entirety, but that the Provincial court had no power to order a sale, part of the section being within and part without its jurisdiction. (2) That so long as the railway was worked as a whole, the revenues of the division were subject, along with other revenues, to the working expenses of the whole line, and that the receiver was entitled to the net earnings only of the division so ascertained. The committee declined to hear argument as to the validity of the mortgage or the power of sale, or of the mortgagees' right of entry, the pleadings and evidence not raising those issues, and the courts below not having adjudicated thereon. *Grey* v. *Manitoba and North Western R. W. Co. of Canada*, [1897] A. C. 254.

Shareholder — *Complaint against Director—Parties to Bill.*]—A bill was filed by a shareholder complaining of the misconduct of the managing director, against the managing director and the company, on behalf of the plaintiff and all other shareholders not made defendants; to which defendants demurred on the ground, amongst others, that the bill should have been by the company, which demurrer was allowed, with liberty to amend; and thereupon the plaintiff amended by charging that the managing director and the other directors held proxies sufficient to control, and did control, the corporation, and had caused the company to adopt and confirm the illegal acts of the managing director; and that, controlling as they did the meetings of the bondholders and shareholders, it would be idle and useless to have a general or special general meeting of the bondholders and shareholders called for the purpose of obtaining a direction from them to the directors to bring him to an account. Defendants demurred for want of equity, which was allowed; but without costs, as the defendants had raised grounds of demurrer which had been overruled on the argument of the demurrer to the original bill. The proper manner of framing a bill in such a case considered and stated. *McMurray* v. *Northern R. W. Co.*, 23 Gr. 134.

X. Fire from Engine Injuring Property Adjoining Railway.

1. *Accidental Fire.*

6 Anne c. 31—*1½ Geo. III. c. 78.*]—See *McCallum* v. *Grand Trunk R. W. Co.*, 31 U. C. R. 527; *Jaffrey* v. *Toronto, Grey, and Bruce R. W. Co.*, 23 C. P. 553, 24 C. P. 271; *Holmes* v. *Midland R. W. Co.*, 35 U. C. R. 253; *Canada Southern R. W. Co.* v. *Phelps*, 14 S. C. R. 132, *post* (3).

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2. *Limitation Clause.*

Application of.]—See *North Shore R. W. Co.* v. *McWillie*, 17 S. C. R. 511; *McCallum* v. *Grand Trunk R. W. Co.*, 31 U. C. R. 527.

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3. *What Constitutes Negligence.*

Circumstantial Evidence.]—In an action against a railway company for negligently causing fire by sparks from their engine, the cause of the fire may be proved by circumstantial evidence. *Rainville* v. *Grand Trunk R. W. Co.*, 28 O. R. 625. Affirmed 25 A. R. 242, 29 S. C. R. 201.

Construction and Management of Engine—*Inflammable Material on Railway Strip.*]—Where it appeared that the fire was caused by the engine, but that all usual and proper precautions had been used in the construction and management of it:—Held, that the defendants should in reason have succeeded; and a verdict for plaintiff was set aside on payment of costs. Semble, that in such cases it would add materially to defendants' case to shew that they had thoroughly cleared away all logs and brushwood, &c., from the whole space occupied by their line of railway in its ordinary width. *Hewitt* v. *Ontario, Simcoe, and Huron R. W. Union Co.*, 11 U. C. R. 604.

——— *Property near Track.*]—Railway companies, in the management of their engines, are bound only to use the ordinary and regular care and appliances to prevent

the escape of sparks. Any property so near the track as to be in danger, notwithstanding such precautions, remains there at the owner's risk; and they are not obliged to shut off steam, or take extraordinary care, in passing it. *Hill* v. *Ontario, Simcoe, and Huron R. W. Co.*, 13 U. C. R. 503.

——— *Preventing Fire Spreading.*]—However clear the rule may be, that a party may kindle or permit the fire to burn on his own land, still his neighbour must not be injured thereby; and if it is likely by spreading to injure him, he is bound to put it out, or exert himself so to do; otherwise, he will be liable. In this case, whilst a locomotive of defendants was passing over their track, some coals of fire dropped upon the track and spread into the plaintiff's land. The evidence shewed that defendants' trackmen, though they exerted themselves in saving defendants' fence, made no exertion to extinguish the fire or prevent it from extending to plaintiff's premises, which were in consequence considerably damaged:—Held, that defendants were liable. Held, also, on the authority of Vaughan v. Taff Vale R. W. Co., 5 H. & N. 679, that where there is no negligence either in the construction or the management of the locomotive, the company are not liable for injury resulting from the mere emission of fire therefrom into the adjoining lands. *Ball* v. *Grand Trunk R. W. Co.*, 16 C. P. 252.

——— *Servants' Negligence — Damages — Remoteness — Accident.*] — In an action brought by P. against the appellants for negligence in causing the destruction of P.'s house and outbuildings by fire from one of their locomotives, it was proved that the freight shed of the defendants was first ignited by sparks from one of the defendants' engines passing the Chippewa station, and the fire extended to P.'s premises. The following questions, inter alia, were submitted to the jury, and the following answers given:—Q. Was the fire occasioned by sparks from the locomotive? A. Yes. Q. If so, was it caused by any want of care on the part of the company or its servants, which, under the circumstances, ought to have been exercised? A. Yes. Q. If so, state in what respect you think greater care ought to have been exercised? A. As it was a special train and on Sunday, when employees were not on duty, there should have been an extra hand on duty. Q. Was the smoke-stack furnished with as good apparatus for arresting sparks as was consistent with the efficient working of the engine? If you think the apparatus was defective, was it by reason of its not being the best kind, or because it was out of order? A. Out of order. P. obtained a verdict for $800. —Held, (1) that the questions were proper questions to put to the jury, and that there was sufficient evidence of negligence on the part of the appellants' servants to sustain the finding. (2) If a railway company are guilty of default in the discharge of the duty of running their locomotives in a proper and reasonable manner, they are responsible for all damage which is the natural consequence of such default, whether such damage is occasioned by fire escaping from the engine coming directly in contact with and consuming the property of third persons, or is caused to the property of such third persons by a fire communicating thereto from the property of the railway company, which has been ignited by fire escaping from the engine coming directly in contact therewith. The statute 14 Geo. III. c. 78, s. 86, which is an extension of 6 Anne c. 31, ss. 6 and 7, is in force in the Province of Ontario as part of the law of England introduced by the Constitutional Act, 31 Geo. III. c. 31, but has no application to protect a party from legal liability as a consequence of negligence. *Canada Southern R. W. Co.* v. *Phelps*, 14 S. C. R. 132.

——— *Sufficiency of Evidence.*]—In an action against a railway company for damages for loss of property by fire alleged to have been occasioned by sparks from an engine or hot-box of a passing train, in which the court appealed from held that there was not sufficient proof that the fire occurred through the fault or negligence of the company, and it was not shewn that such finding was clearly wrong or erroneous, the supreme court would not interfere with the finding. *Sénésac* v. *Vermont Central R. W. Co.*, 26 S. C. R. 641.

Construction of Engine—*Dangerous Condition.*]—A train of the Canada Atlantic R. W. Co. passed the plaintiff's farm about 10.30 a.m., and another train passed about noon. Some time after the second train passed it was discovered that the timber and wood on the plaintiff's land was on fire, which fire rapidly spread after being discovered and destroyed a quantity of the standing wood and timber on the said land. In an action against the company it was shewn that the engine which passed at 10.30 was in a defective state and likely to throw dangerous sparks, while the other engine was in good repair and provided with all necessary appliances for protection against fire. The jury found, on questions submitted, that the fire came from the engine first passing, that it arose through negligence on the part of the company, and that such negligence consisted in running the engine when she was a bad fire thrower and dangerous:—Held, affirming the judgment in 14 A. R. 309, that there being sufficient evidence to justify the jury in finding that the engine which passed first was out of order, and that, it being admitted that the second engine was in good repair, the fair inference, in the absence of any evidence that the fire came from the latter, was that it came from the engine out of order; and the verdict should not be disturbed. *Canada Atlantic R. W. Co.* v. *Moxley*, 15 S. C. R. 145.

Inflammable Material on Railway Strip — *Duty of Plaintiff.*] — In answer to a question whether the plaintiff had been guilty of contributory negligence in piling his lumber near the track, or by allowing sawdust to remain on it, or by not having sufficient appliances to extinguish fire, and if so, whether the defendants by the use of ordinary care and diligence could have prevented the injury; the jury answered: "Not as to piling lumber or as to sawdust, but somewhat as to appliances. We think that the defendants could have prevented fire, and that the plaintiff is entitled to a verdict." The plaintiff, it appeared, had for many years piled his lumber upon defendants' land, with their assent, within a short distance of the track:—Held, that the plaintiff was not bound to provide appliances to guard against defendants' negligence. *McLaren* v. *Canada Central R. W. Co.*, 32 C. P. 324. Affirmed by an equal division of the court, 8 A. R. 564.

——— *Contributory Negligence--Accident.*] —Although a railway company are not responsible for the emission of sparks, &c., from

their engines, where all known and reasonable precautions are taken to prevent it, yet they must keep the track reasonably clear from combustible matter, &c., likely to be thus set on fire. In an action against defendants for negligently allowing combustible matter, brush, &c., to be on their track, whereby a fire was caused upon it from defendants' engines and spread to plaintiff's land, &c., the evidence shewed that the track was in such a state, but it did not clearly appear how the fire originated, or that the state of the track caused the injury to plaintiff's land. The jury having found for the plaintiff, and the Judge being dissatisfied with the verdict, a new trial was granted with costs to abide the event. It was objected that the plaintiff's land being also much covered with dry brush wood, &c., he was guilty of contributory negligence:—Held, however, that he was not bound, as a matter of law, to keep or manage his land in any particular manner, because the railway ran close to or along it, or to keep his land more clean, or to remove brushwood, &c., with greater expedition in anticipation of the possible occurrence of fire on the railway track; but that the jury might properly be told that he was bound to keep his property in a reasonably careful way. Quære, as to the application of 14 Geo. III. c. 78 in defendants' favour. *Jaffrey* v. *Toronto, Grey, and Bruce R. W. Co.*, 23 C. P. 553.

After a second trial:—Held, that defendants were not protected by 6 Anne c. 31 and 14 Geo. III. c. 78. The authorities upon this question reviewed. Held, under the circumstances — the railway having been recently built through the forest, and the plaintiff's land being in a state of nature—that there was no sufficient evidence of negligence on the defendants' part; and a second verdict having been found for the plaintiff, a new trial was granted. *S. C.*, 24 C. P. 271.

——— *Contributory Negligence—Accident—Fence.*]—In an action against a railway company for negligently allowing their land adjoining the track to remain covered with brushwood, &c., whereby cinders from the locomotive fell thereon and caused a fire, which extended to the plaintiff's land, it was shewn that the railway fence, in which the fire originated, was a brush fence, the line having been recently built through a new country. The plaintiff had been employed by defendants to cut down the trees on his own land within 100 feet of the centre of the track, under C. S. C. c. 66, s. 4, and he had felled them lengthwise with the track and left them there. The jury having found for the plaintiff, the court refused to interfere:—Held, that under the circumstances the plaintiff was not guilty of contributory negligence in having left the trees felled by him on his own land. Held, also, that 14 Geo. III. c. 78 afforded no defence. Quære, whether the defendants, under the circumstances, could have been compelled to put up any other than a brush fence; but if the adjoining land owners are content with such a fence, they cannot complain of it as negligence on the part of the company. In this case, however, the question as to such a fence being "brushwood" within the meaning of the declaration, or as to its being negligence in defendants to have such a fence there, was not raised at the trial. *Holmes* v. *Midland R. W. Co.*, 35 U. C. R. 253.

——— *Preventing Fire Spreading—Limitation — Accident.*] — The declaration alleged that defendants were possessed of a strip of land, being the bank and side of a railway, separating their track from plaintiff's land; that they negligently and contrary to their duty allowed dry wood, leaves, &c., to accumulate there, on which red hot ashes, &c., fell from the engine, and there was in consequence great danger, as they knew, that the leaves, &c., would be ignited, and the fire extend to the plaintiff's land, unless the leaves, &c., were removed, or care taken to prevent any fire so occasioned from extending; but that they so negligently kept such strip of land that in consequence the leaves, &c., took fire from their engine, and thereby, and by want of due precaution by them to prevent such fire extending, the fire spread to the plaintiff's land and burned his trees, &c.:—Held, affirming the judgment in 30 U. C. R. 122, that the count disclosed a good cause of action. 2. That it was for an injury sustained "by reason of the railway" within C. S. C. c. 66, s. 83; and that the plaintiff, therefore, suing more than six months after such injury, was barred. Quære, as to the effect of the Imperial Act 14 Geo. III. c. 78 in such a case. *McCallum* v. *Grand Trunk R. W. Co.*, 31 U. C. R. 527.

——— *Question for Jury.*]—During a very dry summer — little rain having fallen, and none for some time prior to the fire in question, fires also having been frequent in that section of the country—the defendants allowed brush and long dry grass, which had been growing for two or three years, to remain uncut on the side of the track adjoining the plaintiff's farm, while they had the day previous to the fire, for the protection of their own property on the other side of the track, burned up the dry grass, &c., there. A spark from defendants' engine having set fire to the dry grass, &c., adjoining the plaintiff's land, the fire extended and destroyed his fences, growing crops, &c. In an action against defendants therefor, all these circumstances were laid before the jury, who found for the plaintiff:—Held, that the case having been properly submitted to the jury, their verdict could not be interfered with. *Flannigan* v. *Canadian Pacific R. W. Co.*, 17 O. R. 6.

——— *Question for Jury — Concurrent Findings of Courts below.*] — In an action against a railway company for damages in consequence of plaintiffs' property being destroyed by fire alleged to be caused by sparks from an engine of the company, the jury found, though there was no direct evidence of how the fire occurred, that the company negligently permitted an accumulation of grass or rubbish on their road opposite the plaintiffs' property which, in case of emission of sparks or cinders, would be dangerous; that the fire originated from or by reason of a spark or cinder from an engine; and that the fire was communicated by the spark or cinder falling on the company's premises and spreading to plaintiffs' property: — Held, affirming the judgments in 28 O. R. 625 and 25 A. R. 242, and following Sénésac v. Central Vermont R. W. Co., 26 S. C. R. 641, and Matthews Co. v. Bouchard, 28 S. C. R. 580, that the jury having found that the accumulation of rubbish along the railway property caused the damages, of which there was some evidence, and the finding having been affirmed by the trial court and court of appeal, it should not be disturbed by a second appellate court. *Grand Trunk R. W. Co.* v. *Rainville*, 29 S. C. R. 201.

Management of Engine — *Fuel Used.*]—The plaintiff owned a barn situated about two hundred feet from the defendants' line, and such barn was destroyed by fire, caused, as was alleged, by sparks from the defendants' engine. An action was brought to recover damages for the loss of the barn and its contents. On the trial it appeared that the fuel used by the defendants over this line was wood, and evidence was given to the effect that coal was less apt to throw out sparks. It also appeared that at the place where the fire occurred there was a heavy up-grade, necessitating a full head of steam, and therefore increasing the danger to surrounding property. The jury found that the defendants did not use reasonable care in running the engine, but in what the want of such care consisted, did not appear by their finding:—Held, that the company were under no obligation to use coal for fuel for their engines, and the use of wood was not in itself evidence of negligence; that the finding of the jury on the question of negligence was not satisfactory, and that therefore there should be a new trial. *New Brunswick R. W. Co.* v. *Robinson*, 11 S. C. R. 688.

——— *Inference for Jury.*]—In an action for negligence by reason of which it was alleged that fire had escaped from a locomotive of the defendants, and the plaintiff's property was destroyed, there was evidence that the engine had passed only a short time before fire was discovered in a manure heap, which communicated to the destroyed property; that a strong wind blew across the track towards the manure heap; that there was no other known source from which the fire was at all likely to have come; that the wind was not in a direction to have caused sparks from a steam sawmill close by, to reach the premises, and that cinders were found in the straw lying on the manure heap by those who went to extinguish the fire:—Held, that from these facts there was evidence for the jury that the mischief was caused by the locomotive. The evidence further shewed that the engine had run ninety miles without the ashpan having been emptied; that ignited substances were found upon the manure heap, which were too large to pass through the net of the smoke-stack, and it was alleged must therefore have come with the ashpan; that the ashpan was perfectly good and so constructed that it was difficult for ashes to escape from it; and that the possibility of any escape would be prevented by emptying or partly emptying the pan:—Held, reversing the judgment in 11 O. R. 307, that the jury might have found as legitimate inferences of fact that the fire escaped because the pan was full, and that the result might with reasonable care have been avoided; that there was therefore sufficient evidence of negligence to go to the jury, and that a nonsuit was improper. *McGibbon* v. *Northern R. W. Co.*, 14 A. R. 91.

——— *Property near Track.*]—Running a train too heavily laden on an upgrade, when there was a strong wind, caused an unusual quantity of sparks to escape from the locomotive, whereby the respondents' barn, situated in close proximity to the railway track, was set on fire and destroyed:—Held, that there was sufficient evidence of negligence to make the railway company liable for the damage caused by the fire. *North Shore R. W. Co.* v. *McWillie*, 17 S. C. R. 511.

See Wealleans v. *Canada Southern R. W. Co.*, 21 A. R. 297; *Michigan Central R. R. Co.* v. *Wealleans*, 24 S. C. R. 309.

XI. Government Railways.

See Crown, III.

XII. Injury to Animals.

(*See ante* VII. 5, *post* XIII.)

1. *At Crossings.*

Approach—*Look-out.*]—Defendants were sued for injury done to the plaintiff's cattle, which were killed by a train while they were crossing the railway at a farm crossing, where the line ran through the plaintiff's farm upon a level. Upon the evidence set out, the jury twice found for the plaintiff, acquitting him of all blame, and finding defendants guilty of negligence in not keeping a sufficient look-out on rounding the curve before coming to the crossing, and the court refused to interfere. The relative rights and duties of railway companies and landowners with regard to the use of farm crossings considered. *Bender* v. *Canada Southern R. W. Co.*, 37 U. C. R. 25.

——— *Signals.*] — Under 14 & 15 Vict. c. 21, s. 21, the omission to ring the bell or sound the whistle of a locomotive on approaching a highway crossing, was held evidence of a breach of duty and negligence by the company. See 20 Vict. c. 12, s. 16, since passed. *Shields* v. *Grand Trunk R. W. Co.*, 7 C. P. 111.

Where a train is approaching a crossing and the persons in charge neglect to give the proper signals, the company will not be relieved from liability because the person whose cattle were run over did not take the best means to avoid the accident, or because his horses were unmanageable. *Tyson* v. *Grand Trunk R. W. Co.*, 20 U. C. R. 256.

Farm Crossing — *Defect*—"*Farm Purposes*" — *Stranger.*] — The defendants having, in compliance with the requirements of s. 191 of the Railway Act of Canada, 51 Vict. c. 29, made, and assumed the duty of keeping in repair, a crossing over their railway where it crossed a certain farm, nevertheless allowed it to get into an unsafe and defective condition whereby a horse of the plaintiff was injured. The plaintiff was at the time using the horse, with the permission of the owner of the farm, in hauling gravel from a part of the farm to the highway, for which purpose it was necessary to cross the railway:—Held, without deciding whether the right of user of such a crossing is limited to a user for farm purposes, but assuming it to be so limited, that the hauling of gravel was, under the circumstances, a farm purpose, and that the defendants owed a duty, even apart from s. 289, towards one using the crossing by invitation of the owner. *Piester* v. *Grand Trunk R. W. Co.*, 32 O. R. 55.

Government Railway.] — See *Gilchrist* v. *The Queen*, 2 Ex. C. R. 300.

Straying on Highway — "*At Large*"—*Jury.*]—Cattle are "at large" within the

meaning of s. 271 of 51 Vict. c. 29 (D.) when the herdsman in following one of the herd which has strayed gets so far from the main body that he is unable to reach them in time to prevent their loitering or stopping on the highway at its intersection with a railway when he sees a train approaching. The question whether cattle are at large or not need not under all circumstances be submitted to the jury. It is for the Judge in that case as in others to say whether there is any evidence for the jury that the cattle were in charge within the meaning of the Act. *Thompson* v. *Grand Trunk R. W. Co.*, 22 A. R. 453.

Straying on Land of Others—*Escape thence to Railway.*]—Held, that a railway company are not bound to maintain and keep up fences along their track except as between them and the owners of the adjoining property; and where cattle strayed on to a neighbour's land and thence got on the railway track through some bars put up for a farm crossing, and were killed:—Held, that the railway company were not responsible. Semble, that the owner of the land for whose convenience such bars are constructed, is bound to see that they are kept up, and that the company are not responsible for injury caused by his leaving them open. *McLennan* v. *Grand Trunk R. W. Co.*, 8 C. P. 411.

Trespassing on Railway—*Duty of Company.*]—Where cattle have wrongfully got upon a railway through the negligence of the owner, the company must still use ordinary care to avoid a collision; and in this case, where horses had escaped upon the track through a gate at a farm crossing, which the owner had left open, but, although they were seen by the engine driver, the speed was not slackened, and no precaution taken except sounding the whistle, the company were held liable. *Campbell* v. *Great Western R. W. Co.*, 15 U. C. R. 498.

——— *Duty of Company.*]—By the negligence of the plaintiff's servants, his horses escaped upon the defendants' line of road at a farm-crossing, not far from an open overhead bridge on the track. Some of them were astray upon the track. While being driven back towards the crossing by the persons in charge, a train approached, which drew up for a time, the rear cars being on the crossing, and then the track being clear the engine driver sounded the whistle for brakes off, and proceeded. The horses, or some of them, had then come nearly abreast of the engine, but, alarmed by the whistle and motion of the train, they turned and ran on towards the bridge. They got upon the bridge before they could be stopped, and some had their legs broken by getting them between the ties, and others jumped over the ties and were killed or injured. There was ample space on each side of the track by which the horses might have passed. There was no evidence that the engine driver had acted recklessly or wantonly in proceeding with the train:—Held, that the defendants were not liable; there was no evidence of negligence in the manner in which the train was started; the defendants were using their own property as of right and in a lawful way, and no duty was cast upon the engine driver to wait until the horses had been entirely driven off their premises. Auger v. Ontario, Simcoe, and Huron R. W. Co., 9 C. P. 165, considered. Campbell v. Great Western R. W. Co., 15 U. C. R. 498, observed upon and distinguished. *Hurd* v. *Grand Trunk R. W. Co.*, 15 A. R. 58.

Trial of Action—*Jury.*]—Order made to send a case for trial by a Judge without a jury under 36 Vict. c. 8, s. 18, in an action against a railway company for negligence in killing horses by a train at a road crossing. *McGunnighal* v. *Grand Trunk R. W. Co.*, 6 P. R. 209.

See Renaud v. *Great Western R. W. Co.*, 12 U. C. R. 408; *Jack* v. *Ontario, Simcoe, and Huron R. W. Co.*, 14 U. C. R. 328, *post* 3; *Murphy* v. *Grand Trunk R. W. Co.*, 1 O. R. 639, *post* 3; *McMichael* v. *Grand Trunk R. W. Co.*, 12 O. R. 547, *post* 3; *Dunsford* v. *Michigan Central R. W. Co.*, 20 A. R. 577, *post* 3.

See, also, *post* 4; *ante* VII. 4.

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2. *By Want of or Defects in Fences.*

Damages—*Watching Cattle.*]—The damages under s. 2 of 53 Vict. c. 28 (D.) are limited to injuries caused to animals by the company's trains or engines; damages incurred in watching cattle by reason of the bad state of the fences, are not recoverable. *Young* v. *Erie and Huron R. W. Co.*, 27 O. R. 530.

Duty to Fence—*Adjoining Owner—Other Persons—Township By-law.*]—Certain cattle of the plaintiff, whose lands did not adjoin the railway, were at large in a township, through which the unfenced railway of the defendants ran. The township was surveyed and organized for settlement, and a by-law of the municipality permitted cattle to run at large. The cattle were killed by the defendants' train:—Held, that the by-law related only to roads, and not to unenclosed lands of private owners, and that the cattle were wrongfully on the track of the railway. Held, also, that 51 Vict. c. 29, s. 194 (D.), gives no right to others than adjoining owners, and those in privity with them, by which they can recover damages through neglect of the company to fence their line. *Rathwell* v. *Canadian Pacific R. W. Co.*, 25 C. L. J. 468.

——— *Waiver—Gates—Agreement—Statute of Frauds.*]—Declaration for neglecting to fence, whereby plaintiff's horses and colts strayed on the track and were killed, &c. Plea, that the railway was constructed on the plaintiff's farm on a level, and gateways put in the fence for his convenience, which it was his duty to keep closed and fastened, but that he allowed them to get open and out of repair, by means whereof, &c. On demurrer:—Held, that the acceptance and use of gates by the plaintiff was a waiver of the duty imposed upon defendants to fence their line, and that having once accepted the fence in that state it was not defendants' duty to use extraordinary means to prevent accident. Held, also, that an agreement to accept and see to gates on the plaintiff's farm, in place of fences, is not an agreement in relation to land within the Statute of Frauds. *Vilaire* v. *Great Western R. W. Co.*, 11 C. P. 509.

——— *Waiver—Erection in Lieu of Fence.*]—H., the owner of land crossed by defendants' railway, let to G., under an oral lease for three years, a certain piece of it. At the place where the accident happened there was no fence along the railway, but defendants had erected in lieu thereof, at the express wish of the owner, by whom it was

considered sufficient, a fence at right angles to the railway, to a pond about two feet distant, across which the owner had planted a row of willows, with which he objected that a fence would interfere. It appeared that G. had received the plaintiff's horse to pasture, and on account of the water in the pond being low, the horse got out of the pasture field round the fence, and thence across the small strip between the pond and the railway on to the track, where it was injured:—Held, that the fence having been built as it was at the express wish of the owner, by whom it was considered sufficient, and who in fact objected to one along the line of the railway, the plaintiff claiming through him could not recover. *Clayton* v. *Great Western R. W. Co.*, 23 C. P. 137.

——— *Waiver — Removal of Fence by Consent—Notice to Replace.*]—M., the owner of land adjoining a railway, took down the fence separating it from the track, with the assent of the railway company, in order to supply them with wood cut upon the land. He then sold the land to one C., stipulating that he should retain one or two acres on which this wood was piled. C. afterwards leased the east half of the land to the plaintiff, containing part of the land retained by M., and C. allowed the plaintiff's cattle to run on the west half, there being no line fence between the two halves. The plaintiff's cattle escaped from this west half on to the railway where the fence had been removed by M., and were killed:—Held, that the plaintiff could not recover, for the facts shewed a license by implication from C. to leave the fence as it was, and the plaintiff, as C.'s licensee, could have no better right than C. Held, also, that, as the fence was originally removed with the assent of the parties interested in it, the defendants could not be liable without a notice to erect it from some one duly authorized, of which there was no evidence. *Kilmer* v. *Great Western R. W. Co.*, 35 U. C. R. 595.

Duty to Repair.] — The obligation to maintain fences on each side of their track, involves the duty of a continuous watchful inspection, and the company must take notice of its state at all times:—Held, therefore, in an action by an adjoining proprietor, for injury to his horses getting upon the track through defect of fences, that it was a misdirection to tell the jury, that if the fence became out of repair, and before the plaintiff notified the defendants, or before a reasonable time for defendants to repair it had elapsed, the horses got through, defendants would not be liable. Quære, as to the liability if the fence, being sufficient, had been prostrated by an extraordinary tempest and repaired without unnecessary delay. *Studer* v. *Buffalo and Lake Huron R. W. Co.*, 25 U. C. R. 160.

Escape from Railway of Other Company.]—The plaintiff sued the defendants for the loss of certain cattle which had escaped to their road by reason, as he alleged, of the neglect of the company to fence, and were killed by their train. It appeared that the plaintiff owned land on both sides of the defendants' railway, but the Toronto, Grey, and Bruce Railway, which lay to the north of defendants' railway, and the land for which had also been taken from his farm, ran between his land and defendants' railway: — Held, that there was no evidence that the cattle had reached the railway from the south side; and the fact that the Toronto, Grey, and Bruce R. W. Co. had neglected to fence did not give the plaintiff, in respect of the occupation of their land by his cattle, the status of that company for the time, as adjoining proprietors, against whom only the defendants were bound to fence, so as to make the defendants liable. *Douglass* v. *Grand Trunk R. W. Co.*, 5 A. R. 585.

Highway—*Animals not Lawfully on.*]—Sheep belonging to the plaintiff escaped from his premises on the highway, and thence, owing to defects in the fences of the defendants, into lands of theirs, whence they strayed on to the railway track, where they were killed by a passing train:—Held, that the defendants were not liable for the loss, the sheep not being lawfully on the highway. *Daniels* v. *Grand Trunk R. W. Co.*, 11 A. R. 471.

——— *Duty to Fence—Negligence.*]—The line of the G. W. R. Co. crosses a highway on a level, and one of their trains going at its usual rate of speed killed two cows, which were passing along the highway at their usual pace but without an attendant. Their owner sued the company, founding his claim to damages solely on the ground of their neglect in not slackening speed at the crossing. It appeared in evidence that the track was not fenced: — Held, that if the company were bound to fence in the road where the accident occurred, it was by their default that the cows got upon the track, and therefore they could not object that the cows were not legally on the highway. 2. That if the company were not bound to fence, still they were guilty of negligence as charged, and therefore as against them the cows were legally there. *Renaud* v. *Great Western R. W. Co.*, 12 U. C. R. 408.

The declaration stated the cause of action to have accrued before the passing of 20 Vict. c. 12, and alleged a duty to fence and a breach of that duty, by means whereof certain colts of plaintiff, one of which was lawfully in a close near the railway, and the other was lawfully on the highway near the railway, by defendants' breach of duty got upon the railway, and by means thereof, and by and through the negligence of defendants in running their engines, and while the said colts were so upon the railway, a locomotive of defendants ran against them, &c.:—Held, that all the allegations respecting the duty to fence, and the breach of that duty, by which plaintiff's fillies got on the railway, being struck out, the declaration in alleging negligence on the defendants' part in running and propelling their locomotives, still disclosed a good cause of action. *Chisholm* v. *Great Western R. W. Co.*, 10 C. P. 324.

——— *Duty to Fence—Pleading.*]—Declaration, that plaintiff's steers, being lawfully on the highway, got upon defendants' railway through defect of fences, and were injured. Plea, that the steers were unlawfully depasturing on land adjoining the railway, belonging to one R., who had not given license for the said steers to be there; and that the said steers strayed from the said lands upon the defendants' lands adjoining, and thence on the railway, and being so there were injured, without any default of defendants:—Held, bad, on demurrer; the averments that the steers were lawfully on the highway, and escaped thence on the track, not being denied. *McDowell* v. *Great Western R. W. Co.*, 5 C. P. 130.

Lawfully in Adjoining Close—"*Cattle*"—*Horses.*] — The plaintiff's horse, having a right to pasture in a pasture field belonging to one M., escaped into a pea field adjoining, also owned by M., owing to a defect in the fence dividing the two fields, and from the pea field he got on to defendants' track adjoining it, by reason of the insufficiency of defendants' fence, and was killed:—Held, that defendants were liable, for the horse was not wrongfully in the pea field as regarded M., having got there owing to M.'s defective fence; and it therefore was not wrongfully there as regarded defendants, who were bound to fence as against M. The word "cattle" in C. S. C. c. 66, s. 13, applies to horses. *McAlpine* v. *Grand Trunk R. W. Co.*, 38 U. C. R. 446.

——— *Material Issues.*] — Case, against a railway company for running over and killing plaintiff's mare. The first count alleged that the mare was in the close of one W. by his leave, and that defendants neglected to fence along their line, whereby the mare strayed upon the railway. Defendants pleaded, that W. was not possessed of the close; and that the mare was not there by his leave:—Held, that issues upon these pleas were material and necessary to be proved. *Connors* v. *Great Western R. W. Co.*, 13 U. C. R. 401.

"Occupied Lands"—*Squatter—Contributory Negligence.*]—The plaintiff and one Nadeau occupied adjoining lots on the line of the defendants' railway—Nadeau as the locatee of the Crown, plaintiff as a squatter—and by agreement between them it was arranged that their horses should pasture together. One of the plaintiff's horses strayed from Nadeau's lot on to the unfenced track of the defendants, and was killed by a passing train. In an action for the value of the horse:—Held, that "occupied lands" under the Railway Act, 46 Vict. c. 24 (D.), denote lands adjoining a railway and actually or constructively occupied up to the line of the railway by reason of actual occupation of some part of the section or lot by the person who owns it or is entitled to possession of the whole, and that, although mere occupation such as that of a squatter is not provided for in the Act, N. was, under the circumstances, entitled to require the defendants to fence, notwithstanding that he had omitted to fulfil the conditions of his location by performance of the settlement duties required thereby—the Crown never having taken steps to cancel such location; that under the circumstances the question as to contributory negligence did not arise; and therefore plaintiff was entitled to recover. *Davis* v. *Canadian Pacific R. W. Co.*, 12 A. R. 724.

Open Common — *Escape from.*] — The Canada Company owned land in the town of Goderich through which defendants' railway ran, and on which, being an open common, the cattle of persons living in the town had for thirty or forty years been accustomed to pasture, though without any express permission. The plaintiff's cow having escaped from this land on to the railway, owing to the want of fences, and been killed by a train:—Held, that he could not recover, for as against him the defendants were not bound to fence. *McIntosh* v. *Grand Trunk R. W. Co.*, 30 U. C. R. 601.

Possession of Close—*Escape of Cattle.*] —The plaintiff, owning land adjacent to the railway, permitted one D., a servant of the company living within their fences, to cultivate a small piece free of rent. D. made a gate in the railway fence to give him access to this land, and the plaintiff's horses passed through it to the track and were killed:—Held, that the plaintiff was sufficiently in possession of the close from which the horses escaped to entitle him to recover. *Henderson* v. *Grand Trunk R. W. Co.*, 20 U. C. R. 602.

Request to Fence—*Extent of Liability.*] —The preamble to 20 Vict. c. 143, which repeals s. 18 of 12 Vict. c. 196, and applies to this company the clauses of the Railway Act with respect to fences, has not the effect of extending their liability beyond that of other companies subject to the same provisions. *Wilson* v. *Northern R. W. Co.*, 28 U. C. R. 274.

——— *Sufficiency—Dispensing with Duty.*] —The plaintiff, owning adjoining lands, orally requested defendants' resident engineer to erect a fence, and, as this was not done, he put up a slashed fence for himself, and some bars in it being left down, his cows got on the track and were killed:—Held, (1) that the request was sufficient. (2) That what the plaintiff had done could not dispense with the duty imposed upon the company, or affect his right to compensation. *Wilson* v. *Ontario, Simcoe, and Huron R. W. Co.*, 12 U. C. R. 463.

——— *Sufficiency—Unenclosed Lands.*]—Declaration, that the plaintiff's horses were lawfully upon certain land belonging to one M., out of which defendants had taken a strip for their road; that the proprietor of said lands desired them to fence off the land so taken from his land, yet defendants neglected to do so, by means whereof the plaintiff's horses, then being upon said land, escaped therefrom on to the railway, and were killed by the train:—Held, declaration bad, as it was not averred that the horses were on the land with the consent of the owner. Upon the trial it appeared that M.'s land was altogether unenclosed, but that they were there by M.'s consent, the plaintiff having agreed to pay her a small sum for their pasturing:—Held, that the company were not liable. A notice to fence, given by letter written by M.'s son, who acted for her in such matters, to the superintendent of the company:—Held, sufficient. *Auger* v. *Ontario, Simcoe, and Huron R. W. Co.*, 16 U. C. R. 92.

Straying on Adjoining Lands.]—Defendants by their charter, 12 Vict. c. 196, s. 18, were bound to fence off their railway from the adjoining lands, in case the owners of such lands should at any time so desire, or in case defendants should think proper to fence. Where the plaintiff's cow, trespassing on A.'s close, strayed upon defendants' railway adjoining, through a defect in the fence:—Held, that plaintiff could not recover: (1) because both at common law and by the Act the obligation to fence would apply only as against the owners of the adjoining close; and (2) because it was not clearly averred either that the owner of the land adjoining had requested defendants to enclose their road or that they had thought proper to do so. *Dolrey* v. *Ontario, Simcoe, and Huron R. W. Co.*, 11 U. C. R. 600.

The declaration averred that it was defendants' duty to keep up sufficient fences along their line, and that by the neglect of such duty the plaintiff's mare, which was lawfully depasturing on the adjoining land, got upon the track and was killed. It was proved that the mare had escaped from another farm, and was trespassing on the lot from which she got upon the railway:—Held, that the plaintiff could not recover; defendants being bound to fence only as against the owner of the adjoining lands. *Gillis* v. *Great Western R. W. Co.*, 12 U. C. R. 427.

The plaintiff, by permission of one H., put his cattle into a pasture field of H. adjoining defendants' railway, and the evidence went to shew that they escaped thence into an adjoining field occupied by one J., and thence on to the track, where they were killed by a train passing. The plaintiff sued, alleging that the horses escaped from the field where they were pasturing by reason of defects in the railway fences:—Held, that he could not recover, for the horses were not in the field from which they escaped by the owner's permission. *Wilson* v. *Northern R. W. Co.*, 28 U. C. R. 274.

53 Vict. c. 28, s. 2 (D.), amending the Dominion Railway Act of 1888, enacts " . . and no animal allowed by law to run at large shall be held to be improperly on a place adjoining the railway merely for the reason that the owner or occupant of such place has not permitted it to be there." Horses belonging to the plaintiff, while running at large, strayed from premises adjoining the defendants' line of railway, where they had been without permission of the occupant, on to the railway track, which, contrary to the statute, was unfenced, and were run over by a locomotive and killed. No affirmative by-law had been passed by the local municipality permitting horses to run at large:—Held, that the defendants were not liable. *Duncan* v. *Canadian Pacific R. W. Co.*, 21 O. R. 355.

Title to Adjoining Land—*Different Owners of Same Lot.*]—The plaintiffs occupied about an acre of lot 29 adjoining the railway of the defendant company. Their horses pasturing on another part of the lot, which the plaintiffs did not occupy and to which they had no title, passed on to the track and were killed by a passing train:—Held, affirming the judgment in 7 O. R. 673, that the plaintiffs were not entitled to call upon the defendant company to fence across that part of the lot from which the horses escaped; and therefore, that the company were not liable to make good their loss to the plaintiffs. *Conway* v. *Canadian Pacific R. W. Co.*, 12 A. R. 708.

The meaning of the terms "proprietor," "tenant," and "occupant," considered. *S. C.*, 7 O. R. 673.

See Elliott v. *Buffalo and Lake Huron R. W. Co.*, 16 U. C. R. 289; *Ferguson* v. *Buffalo and Lake Huron R. W. Co.*, 16 U. C. R. 296, *ante* VII.; *Bennett* v. *Covert*, 24 U. C. R. 38; *Madden* v. *Nelson and Fort Sheppard R. W. Co.*, [1899] A. C. 626, *post* XXI.

See also, *post* 4.

3. *By Want of or Defects in Gates and Cattle Guards.*

At Culvert—*Watercourse.*]—A natural watercourse, which flowed through a culvert under a railway track, dried up in the summer, and to prevent cattle from passing through it the railway company had placed gates in the culvert, which they neglected to keep up, and by reason of the absence thereof, of which the company was duly notified, the plaintiff's cattle, which were lawfully pasturing in a field on one side of the track, got through the culvert into a field on the other side of the track, and thence on to the railway track, where they were injured:—Held, that the defendants were bound to keep the watercourse, as part of their railway, properly fenced, and were liable for the damages sustained by the plaintiff. *James* v. *Grand Trunk R. W. Co.*, 31 O. R. 672.

At Farm Crossing—*Gate—Repair.*]—The defendants' line of railway ran through the plaintiff's farm, and the plaintiff's mare escaped from a field adjoining the railway through a gate opposite a farm-crossing which the defendants had constructed, and which was out of repair, and was killed on the railway:—Held, that the duty imposed by law upon the railway company to erect and maintain fences on each side of the railway with openings or gates or bars therein at farm crossings of the road, is not at all dependent upon whether or not a duty is imposed upon them by law to erect and maintain such crossings, but wholly independent of it. *Murphy* v. *Grand Trunk R. W. Co.*, 1 O. R. 619.

——— *Gate — Repair—Duty to Close.*]—Plaintiff's horses, in consequence of insecure fastening of the gates at the farm crossing where the defendants' railway crossed their farm, got through the gates and on the railway track, and were killed by a passing train:—Held, that the plaintiff, by reason of the continued use of the faulty fastenings, could not be deemed to have adopted them as sufficient, and that it was the duty of the defendants to provide and maintain proper fastenings for the gate. Section 9 of 47 Vict. c. 11 (D.) commented on as to the nature of the duty cast on the plaintiff to keep the gate closed; and quære, whether the words in that Act, that the owners must keep the gates closed, extend further than in respect of their own use of them; or whether, if the gate became open by any accidental means, or by the act of a stranger, and remained open without any person being near to prevent animals passing through it, the owner or occupier would be liable to the full extent provided by the Act, although it had become open without his agency or neglect, and remained so without his knowledge. *McMichael* v. *Grand Trunk R. W. Co.*, 12 O. R. 547.

It is the duty of the railway company to make and duly maintain gates at farm crossings with proper fastenings, and the knowledge of the owner of the farm that the fastenings are insufficient, and his failure to notify the company of that fact, will not prevent him from recovering damages from the company if his cattle stray from his farm, owing to the insufficiency of the fastenings, and are killed or injured. McMichael v. Grand Trunk R. W. Co., 12 O. R. 547, approved. *Dunsford* v. *Michigan Central R. W. Co.*, 20 A. R. 577.

At Highway Crossing — "*Place where they might Properly Be.*"]—In an action for damages for the loss of horses killed on the defendants' railway, the statement of claim alleged that the horses "escaped" from the plaintiffs' farm, passed down a concession road to an allowance for road which was intersected by the railway "on the level," then along the allowance for road to the point of intersection, and thence along the railway to the place where they were struck by a passing train. The only negligence charged was that the defendants had not constructed and maintained cattle guards or fences. It was not alleged that the horses were in charge of any person:—Held, that the horses being, contrary to the provisions of s. 271 of the Railway Act of Canada, 51 Vict. c. 28, within half a mile of the intersection and not in charge of any person, they did not get upon the railway from an adjoining place, where, under the circumstances, they might properly be, within the meaning of 53 Vict. c. 28, s. 2 (D.); and therefore the defendants were not liable. *Nixon* v. *Grand Trunk R. W. Co.*, 23 O. R. 124.

——— *Unenclosed Highway.*] — First count, that defendants' railway crossed on a level a certain highway; that it was their duty to have gates at such crossings on each side of the railway, or cattle guards instead, provided that the board of railway commissioners should approve thereof, and also to use due care to prevent injury by the railway to persons and cattle lawfully upon said highway; that the commissioners did not approve of cattle guards; that nevertheless defendants, not regarding their duty, did not erect gates; and for want of such gates an ox of the plaintiff, lawfully upon said highway, while the train was nearing the crossing, by the negligence of defendants and their servants was run against and killed. The second count was founded entirely upon alleged negligence of defendants in the management of their train. Plea, not guilty. It appeared that plaintiff's land did not join the railway, and that the highway was unenclosed on either side, so that the want of gates could not have occasioned the accident. The jury found that defendants had not been guilty of negligence, and gave a verdict in their favour on the second count, but against them on the first count:—Held, that the first count disclosed a sufficient cause of action after verdict, whether defendants were bound to erect gates or not; but that, as defendants were acquitted of negligence, the verdict was not warranted. *Jack* v. *Ontario, Simcoe, and Huron R. W. Co.*, 14 U. C. R. 328.

Escape from Highway — *Absence of Guards.*] — Declaration charging defendants with neglect in maintaining cattle guards, by means whereof the plaintiff's ox, lawfully being on the highway, got upon the railway and was killed. It appeared that there were no cattle guards, and that the ox got on the track from the highway:—Held, that in the absence of cattle guards, defendants, under 14 & 15 Vict. c. 51, s. 13, were liable, without reference to whether the ox was lawfully on the highway or not. *Huist* v. *Buffalo and Lake Huron R. W. Co.*, 16 U. C. R. 299.

See McLennan v. *Grand Trunk R. W. Co.*, 8 C. P. 411, *ante* 1; *Campbell* v. *Great Western R. W. Co.*, 15 U. C. R. 498, *ante* 1; *Vilaire* v. *Great Western R. W. Co.*, 11 C. P. 509, *ante* 2; *Henderson* v. *Grand Trunk R. W. Co.*, 20 U. C. R. 602, *ante* 2.

See, also, the next sub-head.

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4. *Exemption from Liability as to Cattle.*

[*See* 20 Vict. c. 12, s. 16; R. S. O. 1877 c. 165, ss. 95-97; R. S. O. 1897 c. 207, s. 30; 51 Vict. c. 29, s. 194 et seq. (D.), amended by 53 Vict. c. 28, s. 2.]

Points of Intersection—"*In Charge of.*"]—In an action for not erecting fences and cattleguards, whereby plaintiff's horse got on the track and was killed, there was evidence that the horse escaped from plaintiff's field into the street within half a mile of the railway, and thence upon the track:—Held, that if so the plaintiff was precluded from recovering by 20 Vict. c. 12, though the horse was not killed at the very point of intersection. *Ferris* v. *Grand Trunk R. W. Co.*, 16 U. C. R. 474; *Simpson* v. *Great Western R. W. Co.*, 17 U. C. R. 57.

The plaintiff, as constable, seized a horse under a distress warrant, and put him in the stable of an inn. The horse escaped to the road, and, having got upon the railway owing to defects in the cattle guards, was killed at some distance from the point of intersection:—Held, that under 20 Vict. c. 12 the horse was unlawfully upon the highway, and the company were not responsible, notwithstanding the defect in the cattle guards. Held, also, that, although the horse was upon the road without the plaintiff's knowledge or permission, yet he was there unlawfully, for the statute obliged the plaintiff to prevent him from being there. Semble, also, that the plaintiff had sufficient property in the horse to entitle him to sue. *Simpson* v. *Great Western R. Co.*, 17 U. C. R. 57.

The plaintiff's son, a boy of fourteen, was driving four of plaintiff's horses along the highway about dusk, intending to put them in a field, the gate of which opened into the road about sixty yards from the railway crossing. While he was opening the gate the horses, being loose, passed on to the track, where three of them were killed by a train, which was passing at its usual time:—Held, that the plaintiff was barred by 20 Vict. c. 12, for his horses were not "in charge of" the boy, within that section; and that, independently of that statute, he was guilty of culpable negligence in sending his horses, as he did, in charge of a boy, without a bridle or any means of control, after dark, and at a time when it was known that the train might be expected. Held, also, that the neglect of the company to blow the whistle or ring the bell, in approaching the crossing, could not affect the right of action. *Thompson* v. *Grand Trunk R. W. Co.*, 18 U. C. R. 92.

The plaintiff sent three of his horses to a watering place on the highway, with his servant, who merely drove them before him, not having any further means of control, by bridle, halter, or otherwise. They passed the watering place, and got on to the railway over the cattle guard, which was filled up with snow, and one of them was killed by the train some distance from the point of intersection. The jury found that the plaintiff was guilty of no negligence, and that, had the cattle guard been kept clear of snow, the horses

could not have got upon the track:—Held, that the plaintiff nevertheless could not recover, for his horses were not "in charge of" any person when they got upon the railway. *Cooley* v. *Grand Trunk R. W. Co.*, 18 U. C. R. 96.

The plaintiff's son, as it was getting dark, was taking three horses along a road which crossed defendants' railway, riding one, leading another, and driving the third. The last horse, being from sixty to one hundred feet in front, attempted to cross the track as a train approached, and was killed:—Held, that the horse was not "in charge of" any person within C. S. C. c. 66, s. 147, and that the plaintiff could not recover. *Markham* v. *Great Western R. W. Co.*, 25 U. C. R. 572.

Declaration, that defendants' railway crossed a highway on the level; that it was their duty to keep up sufficient gates at the point of intersection, so as to prevent horses from getting on their road, &c., yet that they so negligently managed their train, that the plaintiff's horses passing along the highway were killed. Defendants pleaded that the horses were straying on the highway within half a mile of its intersection with the railway, and not in charge of any person, contrary to the statute, and so strayed directly from the highway on to the railway at the point of intersection. The plaintiff replied, "not admitting" that the horses were straying, &c., as alleged, "but taking issue upon" the said allegation,—that defendants so carelessly managed their train that thereby, and from no other cause, the horses were killed:—Held, on demurrer, that the plaintiff was not entitled to succeed, for that the statute barred all remedy under the circumstances stated in the plea, notwithstanding defendants' negligence. As to the form of the replication, it would be bad either as an attempt to avoid without confessing the plea, or as a new assignment of the same cause of action already stated in the declaration. *McGee* v. *Great Western R. W. Co.*, 23 U. C. R. 293.

See Thompson v. *Grand Trunk R. W. Co.*, 22 A. R. 453, *ante* 1; *Chisholm* v. *Great Western R. W. Co.*, 10 C. P. 324, *ante* 2; *Duncan* v. *Canadian Pacific R. W. Co.*, 21 O. R. 355. *ante* 2.

5. *Other Cases.*

Careless Management of Engine — *Pleading.*]—The second count averred defendants' possession of their railway, and of the engine thereon, and charged that they so carelessly managed the same that the engine ran against plaintiff's mare and threw her upon the railway and killed her:—Held, bad, on demurrer: (1) because no value was stated for the mare: (2) because it implied that the mare was trespassing on the railway. *Connors* v. *Great Western R. W. Co.*, 13 U. C. R. 401.

Cattle Wrongfully on Track—*Negligence — Limitation Clause.*] — Two of the plaintiff's horses, having by some means got on the defendants' track, were killed by a locomotive, for which the plaintiff brought his action:—Held, that the horses were wrongfully there as against defendants, and that the facts stated afforded no sufficient proof of negligence. Held, also, that such action, under 12 Vict. c. 196, ss. 20, 47, must be brought within six months. *Auger* v. *Ontario, Simcoe, and Huron R. W. Co.*, 9 C. P. 164.

XIII. Injury to Persons.

1. *At Crossings.*

(a) *By Collision with Trains.*

Duty of Person Crossing—*Precautions—Neglect to Give Warning.*] — Persons approaching and passing over level railway crossings are bound to exercise their ordinary powers of observation, and the omission to ring the bell or sound the whistle, as directed by the statute, in no way releases them from the exercise of such care. In this case there was evidence that the morning when the accident happened was rather wild and blustering, with snow blowing in the plaintiff's face. The plaintiff swore that he approached the crossing on a walk, and looked both ways along the track, but saw nothing until the engine was close upon him. He then whipped up the horses, but the engine struck the sleigh, and killed one of the horses. Defendants' witnesses, on the other hand, said that plaintiff could not have failed to have seen the train approaching had he looked. It was clear that the bell was not rung as directed nor the whistle sounded. The jury were told that they must be satisfied that the plaintiff in crossing took all the precautions which a prudent man would have taken, and that, if he did, taking into consideration the weather, the manner of approaching the crossing, &c., and notwithstanding this that the accident happened, and defendants' servant did not ring the bell at all, or did not ring it so that the plaintiff could hear it, or until the crossing was passed, the plaintiff was entitled to recover:—Held, a proper direction, and a verdict for the plaintiff was upheld. The views expressed in Johnston v. Northern R. W. Co., 34 U. C. R. 432, considered and affirmed. *Miller* v. *Grand Trunk R. W. Co.*, 25 C. P. 389.

A traveller on approaching a railway crossing is bound to use such faculties of sight and hearing as he may be possessed of, and when he knows he is approaching a crossing and the line is in view, and there is nothing to prevent him from seeing and hearing a train if he looks for it, he ought not to cross the track in front of it, without looking, merely because the warning required by law has not been given. *Weir* v. *Canadian Pacific R. W. Co.*, 16 A. R. 100.

See Morrow v. *Canadian Pacific R. W. Co.*, 21 A. R. 149.

——— *Precautions—Obstruction of View.*] —It is the duty of a person driving across a railway track to use care and precaution to see whether a train is approaching, and the omission to do so is contributory negligence. In this case the plaintiff having approached and attempted to cross the track at a trot, and without looking out, though he could have seen along the line in either direction for some distance:—Held, that he could not recover for an injury sustained by collision with defendants' train, and a nonsuit was ordered. It was urged that the evidence, set out in the report of this case, disclosed negligence on the part of defendants in allowing cars to be on a siding, obstructing the view while the train was passing; but semble, that it did not. *Johnston* v. *Northern R. W. Co.*, 34 U. C. R. 432.

Neglect to Fence—*Proximate Cause—Contributory Negligence.*]—Under the special circumstances of this case, the driver of the plaintiff's cab having been careless in approaching the crossing:—Held, that the plaintiff was not entitled to recover; for, though the failure of the defendants to fence the crossing was negligence and a disregard of their statutory duty, still it did not entitle the plaintiff to recover against them, however culpable he might himself have been; and, though such want of fencing did not cause the accident, that, to justify a recovery for such a cause, it must appear that the damage to plaintiff resulted from the omission to fence as the proximate, if not the direct, cause of the accident, which the evidence did not shew, but rather that it arose from his own gross negligence, or that of his driver, in not keeping a proper look-out for the train, which, with this precaution, it clearly appeared, could easily have been avoided. In an action by plaintiff against the same defendants, in his own individual right, for injury sustained from the same accident, the Judge at first directed the jury that, assuming defendants to have been guilty of neglect in not fencing, they must determine whether plaintiff so far contributed to the accident that but for such negligence or want of care it would not have happened:—Held, that this direction was right. But afterwards, at the request of plaintiff's counsel, who did not wish the question of contributory negligence to be left to the jury, the Judge, as he took the same view, did not charge them to find specially on the question of negligence generally, as applicable to the state of the road, when defendants' counsel objected; so that, in the confusion which arose, the question of community of default being understood to be withdrawn from the jury, they were led to believe that because defendants were in default, plaintiff must recover. On this ground, therefore, the court granted a new trial without costs. *Winckler* v. *Great Western R. W. Co.*, 18 C. P. 250.

Neglect to Provide Attendant—*Rate of Speed.*]—Where a train was approaching a level crossing over a public thoroughfare in a town, and the conductor was aware that the watchman or flagman was not at his post at such crossing, it was held that the conductor was guilty of negligence in running his train at so great a rate of speed as to put it out of his control to prevent a collision with a vehicle which had attempted to pass over the crossing before the train was in sight. *Connell* v. *The Queen*, 5 Ex. C. R. 74.

Neglect to Provide Gate and Attendant—*Contributory Negligence.*]—The plaintiff, being in a cab, approached a railway crossing, where a train could be seen at a distance of three-quarters of a mile. The driver, however, who knew the crossing well, did not look out at all until within about twenty yards of the track, and then only straight in front of him. He did not see the train, which was a very long one, consisting of twenty passenger cars and two engines, until the horses' feet were on the rails, and it was within seventy feet, and he then tried to cross in front of it, but the cab was struck and overturned. The plaintiff, from within, had seen the train approaching, and called to the driver to stop, but a man sitting on the box with him urged him to go on, which he did:—Held, that the driver's negligence was so far the cause of the accident that the plaintiff could not recover, notwithstanding the defendants' neglect of their statutory obligation to have a fence and gate at the crossing, with an attendant to watch it. A nonsuit was therefore ordered. *Nicholls* v. *Great Western R. W. Co.*, 27 U. C. R. 382.

In this case also, upon substantially the same evidence as the last, it was held, that the plaintiff could not recover. The jury were directed, that if they were satisfied that the accident would not have happened if the defendants had erected proper fences, they should find for the plaintiff:—Held, a misdirection, for that if the driver, by his negligence contributed to the accident, so that but for his want of reasonable care it would not have happened, the plaintiff could not succeed. *Rastrick* v. *Great Western R. W. Co.*, 27 U. C. R. 396.

Warning of Approach—*Effect of Giving.*]—Held, that obedience to the ringing of the bell or sounding the whistle at or approaching crossings as directed by the statute, does not of itself free the company from responsibility for accidents or damages arising from any neglect or breach of duty. *Haas* v. *Grand Trunk R. W. Co.*, 11 C. P. 86.

——— *Evidence — Contributory Negligence.*]—The plaintiff's waggon was being driven by his son along one of the streets of St. Thomas, another man sitting beside him, and in attempting to pass over a railway crossing, the locomotive of an approaching train struck the hind wheel of the waggon, by which it and the horses were injured. It appeared that in approaching the crossing neither of them was looking out for or thinking of the train; and it was not until they were on a side track or switch, within fifteen yards of the main track, that the man on looking around saw the train, when he sharply told his son to put on the whip, but, he said, the son appeared confused and did nothing. He then attempted to get the whip and whip the horses across, but it was too late. The son acknowledged having heard what the man said, but said that, as he was looking the other way, he did not understand him. The weight of evidence went to shew that the whistle was sounded and bell rung, and that the train was not going more than six miles an hour. Both of them had been in the habit of crossing there many times daily, and it appeared that, had the son been looking out, the accident might have been avoided, as there was plenty of time either to have stopped or got across. The court being left to draw inferences as a jury:—Held, that there was such contributory negligence on the driver's part as prevented the plaintiff from recovering. *Boggs* v. *Great Western R. W. Co.*, 23 C. P. 573.

———*Evidence of — Sufficiency—Contributory Negligence.*]—Action against defendants for an injury sustained by plaintiff being run over by defendants' train at a highway crossing, caused, as alleged, by the omission to ring the bell or sound the whistle. The persons in charge of the train swore that the whistle was sounded in compliance with the statutory requirements. The plaintiff said he heard a whistle which he thought came from a round house near by, but which might have been from the approaching train, and, though the plaintiff's witnesses stated they did not hear the whistle, it was quite consistent with their evidence that the whistle was sounded.

The plaintiff, as he approached the track, looked to the north-west for shunting engines, which he knew were going backwards and forwards all the time, and so did not look to the south-west, being the direction in which the train was approaching, and if he had been looking he would have seen the train and the accident would have been avoided. A person following immediately behind plaintiff, saw the train and stopped his waggon:—Held, that no negligence on defendants' part was proved, for it could not be said on the evidence that the whistle was not sounded as required. Quære, whether there was contributory negligence on the plaintiff's part in approaching the crossing in not looking in the direction of the approaching train. *Blake* v. *Canadian Pacific R. W. Co.*, 17 O. R. 177.

——— *Neglect to Give.*] — In an action against a railway company for injuries alleged to have been caused by the negligence of the servants of the company in not giving proper notice of the approach of a train at a crossing, whereby the plaintiff was struck by an engine and hurt, the case was withdrawn from the jury by consent and referred to the full court to assess damages or enter a nonsuit. On appeal to the supreme court of Canada from the decision of the full court assessing damages to the plaintiff:—Held, that the decision was not open to review on appeal, but if the merits could be considered the decision should be affirmed. *Canadian Pacific R. W. Co.* v. *Fleming*, 22 S. C. R. 33.

——— *Neglect to Give—Contributory Negligence.*]—M. B., while driving along the highway at the crossing of a railway operated by the defendants, was killed by a train of the defendants, which was then, as found by the jury, running at a high rate of speed without ringing a bell continuously or sounding a whistle at short intervals. For the defence it was shewn that the deceased was driving slowly across the track with his head down and that he did not attempt to look out for the train until shouted to by some persons who saw it approaching, when he whipped up his horses and endeavoured to drive across the track, and was killed. As against this there was evidence that there was a curve in the road which would prevent the train being seen, and also that the buildings at the station would interrupt the view. The jury at the trial answered all the questions submitted to them in a manner favourable to the plaintiff and adversely to the company, and negatived any contributory negligence on the part of the deceased:—Held, by the court of appeal, affirming the judgment in 8 O. R. 601, that there was sufficient evidence of negligence to warrant the findings of the jury in favour of the plaintiff. The supreme court of Canada was divided on the question of contributory negligence. *Beckett* v. *Grand Trunk R. W. Co.*, 13 A. R. 174, 16 S. C. R. 713.

The deceased, who was well acquainted with the locality, while driving along a road running in the same direction as and crossing the railway, was killed at the crossing by a locomotive, not a regular train. The jury found that the engine was going unusually fast; that the whistle was sounded at another crossing, three-fifths of a mile off, but the sounding was not continued; and that deceased was not guilty of contributory negligence. The common pleas division, upon the evidence, more fully stated in the report, refused to disturb this verdict, and on appeal their judgment was affirmed, on the ground that the plaintiff was bound to disprove contributory negligence; that she had failed to do so, for had deceased looked he must have seen the train coming; and that there should therefore have been a nonsuit. Davey v. London and South-Western R. W. Co., 11 Q. B. D. 215, 12 Q. B. D. 70, and Dublin, Wicklow, and Wexford R. W. Co. v. Slattery, 3 App. Cas. 1155, commented on. *Peart* v. *Grand Trunk R. W. Co.*, 10 A. R. 191.

——— *Neglect to Give—Evidence of Negligence.*]—In an action to recover damages for the death of the plaintiff's husband, who was killed at a railway crossing by a train of the defendants, the jury found that the engine bell was not rung on approaching the highway, nor kept ringing until the engine crossed it; that the deceased did not see the train approaching in time to avoid it; and that he had no warning of its approach; and assessed damages at $1,000:—Held, that the plaintiff was entitled to judgment upon these findings, notwithstanding that the jury, to a question whether the deceased, if he saw the train approaching, used proper care to avoid it, answered "we don't know." Held, affirming this decision, that in an action to recover damages for causing the death of a person, there is sufficient evidence of negligence to be submitted to the jury, when it was sworn that the deceased was seen approaching the railway track in a vehicle just before the passing of a train; that immediately after the train passed the deceased and the horses were found dead at the crossing; and that the statutory signals of the approach of the train were not given. *Johnson* v. *Grand Trunk R. W. Co.*, 25 O. R. 64, 21 A. R. 408.

——— *Neglect to Give—Limitation Clause—Independent Contractor.*]—Plaintiff sued defendants for injury to himself and his waggon by collision with their train at a railway crossing, owing to neglect to sound the whistle or ring the bell on their approach, as required by the statute, and to improper construction of the railway, which was alleged to be more above the level of the highway than the Act allowed. The jury having found for the plaintiff:—Held, that the injury, if arising from either cause alleged, was sustained "by reason of the railway;" that it was not a case within the exception as to "continuation of damage;" and that the action, having been brought more than six months from the accident, was therefore too late. The defendants had contracted with one P. to ballast their road, and the train in question was laden with ballast, under the charge of men employed and paid by him, the defendants having no control, except that by his contract he was bound to keep these trains from interfering with the passage of their trains along the road:—Quære, whether this would have relieved defendants from liability for an accident caused by such train running over a waggon at a crossing. *Browne* v. *Brockville and Ottawa R. W. Co.*, 20 U. C. R. 202.

——— *Neglect to Give—Reasonable Care.*]—The plaintiff, early in the morning, it not being quite daybreak and snowing a little, was driving a yoke of oxen and a pair of bob sleighs along the highway towards a railway crossing, sitting on the front bob, low down behind the oxen. The track crossed the highway at an acute angle, and was some seven feet above the highway, which was graded up

to it. At the crossing there were some bushes which obstructed the view, but before reaching them there was a view of the track for some sixty or seventy rods, but not while in the hollow at the bottom of the grade and sitting as the plaintiff was. The plaintiff, without looking for the train, drove on to the track, and as he did so he saw a train approaching a few rods off, when he jumped to the off side and hit the off ox, causing it to spring aside and clear the track, but before he could get clear himself he was struck by the train and injured. It was urged that the plaintiff by so doing voluntarily exposed himself to danger; but there was evidence to the contrary. The defendants' engine had an automatic bell. A witness stated that these bells do not always ring when the train is in motion. The engine driver stated that the bell was in good order when the engine left the last station, but he could not say whether or not it was ringing when the accident happened, while a number of witnesses stated that the bell was not then ringing. The jury found that the bell was not ringing; that it was not in good order; and that the plaintiff exercised reasonable care:—Held, that there was evidence for the jury; that it could not be said that the findings were not justified; and the court therefore refused to interfere. *Wilton* v. *Northern R. W. Co.*, 5 O. R. 490.

——— *Neglect to Give — Station Yard—Contributory Negligence.*]—The servant of the plaintiff was in charge of an omnibus running to and from the station of the defendants' railway, and on the evening in question was attending at Georgetown station, at about ten feet from the track, but was unable to see along the railway in either direction by reason of houses intervening. By leaving the omnibus, however, and going to the track he could have seen an approaching train; but omitting to take this precaution, although aware that a freight train was then on the track near the crossing, he started off to cross it, and did not hear or see anything of the approaching train until within about four feet of him, when he was unable to avoid it, and the omnibus and harness were considerably damaged. It was not shewn that the driver of the train had given any warning of its approach by sounding the whistle or bell on its nearing the part of the track where it crossed the road to the station. At the trial the plaintiff was nonsuited on the ground of the contributory negligence of the plaintiff's servant:—Held, that the question of contributory negligence had been improperly withdrawn from the jury, and that a new trial must be had in order to submit that question to them. *Bennett* v. *Grand Trunk R. W. Co.*, 7 A. R. 470.

A mere track crossing, on a road or way on a railway company's own grounds for the convenience of passengers and others in going to and from the station on railway business, is not a public crossing, highway, or place, within C. S. C. c. 66, s. 104, so as to subject the company to the requirements of that section of ringing the bell or sounding the whistle when approaching such crossing; but, semble, apart from the statute, care must be taken in starting engines from the station. *Bennett* v. *Grand Trunk R. W. Co.*, 3 O. R. 446. See the last case.

——— *Neglect to Give—Station Yard.*]—The statutory obligation to ring the bell, or sound the whistle, applies only to a highway crossing, and not to an engine shunting on defendants' own premises. *Casey* v. *Canadian Pacific R. W. Co.*, 15 O. R. 574.

——— *Neglect to Give — Station Yard—"Train of Cars"—Unusual Danger—"Stop, Look, and Listen."*]—A highway crossed the defendants' line at right angles; their passenger station lay adjacent to the highway on the east, and their shunting ground and yard adjacent to it on the west. The shunting yard was less than eighty rods in extent from the highway, and eight tracks crossed the highway with intervals of a few feet between them. The defendants in shunting a train of flat cars drew them from the east end to the west end of the yard, and after a pause backed them easterly. After backing for some distance the engine uncoupled from the train of cars, switched upon another track to the south, and the train and engine both continued to back down on different tracks to the highway, at a speed of about six miles an hour. At the time the plaintiff was proceeding along the highway from south to north, and was about to cross the tracks. The flat cars had reached the highway and were passing over it. The plaintiff, while watching those in front of her, did not see or hear the engine coming down on the other track, and was struck by the tender and injured. There was no look-out man on the tender, and there was contradictory evidence as to the ringing of the bell at all, though at most it was not rung until the engine had run some distance towards the highway, and the whistle was not blown. The jury found that the accident was caused by the negligence of the defendants, and that the negligence consisted in not ringing the bell in time:—Held, that where the company are not able to comply with the terms of s. 256 of 51 Vict. c. 29 (D.) as to ringing a bell or sounding a whistle at least eighty rods from a crossing, because the engine starts to cross within that distance, some other kind of precaution should be taken to warn the public of danger; and where, as in this case, the crossing is unusually dangerous, it is incumbent upon them to use even greater and other precautions than those required by the statute. Held, also, that an engine with tender, moving reversely, is a "train of cars" within the meaning of s. 290, and some one should be stationed on the tender to warn persons crossing the track. The rule "stop, look, and listen," as applied by the Pennsylvania State courts to persons about to cross a railway track, is not in force here, and is not one that should be adopted. The court of appeal was divided, and in the result the decision was affirmed. *Hollinger* v. *Canadian Pacific R. W. Co.*, 21 O. R. 705, 20 A. R. 244.

——— *Neglect to Give — Station Yard—Unusual Danger.*]—B., in driving towards his home on a night in September, had to cross a railway track between nine and ten o'clock, on a level crossing near a station. Shortly before, a train had arrived from the west, which had to be turned for a trip back in the same direction, and also to pick up a passenger car on a siding. After some switching the train was made up, and just before coming to the level crossing the engine and tender were uncoupled from the cars to proceed to the round house. B. saw the engine pass, but apparently failed to perceive the cars, and started to cross, when he was struck by the latter and killed. There was no warning of the approach of the cars which struck him. The jury found that the railway company were guilty of negligence, and that a man should

have been on the crossing when making the switch to warn the public:—Held, that it was properly left to the jury to determine whether or not, under the special circumstances, it was necessary for the company to take greater precautions than it did and to be much more careful than in ordinary cases where these conditions did not exist; and that the case did not raise the question of the jury's right to determine whether or not a railway company could be compelled to place watchmen upon level highway crossings to warn persons about to cross the line. *Lake Erie and Detroit River R. W. Co.* v. *Barclay*, 30 S. C. R. 360.

(b) *By Fright at Approach of Train.*

Evidence of Negligence.]—Defendants were empowered by the corporation of the city of Hamilton to run their railway along Ferguson avenue in that city. The plaintiff, who was driving along Barton street, which crosses Ferguson avenue on a level, found a freight train across the street facing southward, and stopped his horse about 150 feet from it. Presently a pilot engine came down to the head of the train to assist it up the grade to the south, but immediately upon its arrival it was found that firewood was required for its use, and the train at once moved to the north to allow the pilot engine to go to the woodshed, which was situated to the north of Barton street. The train had moved only to the other side of Barton street, about fifteen or twenty feet, when the plaintiff attempted to cross, but the horse shied at the pilot engine, which had remained stationary, and the plaintiff was thrown out and injured:—Held, that there was no evidence of negligence which should have been submitted to the jury, and a nonsuit was ordered. *Howe* v. *Hamilton and North-Western R. W. Co.*, 3 A. R. 336.

Silent Car—*Proximate Cause—Contributory Negligence.*]—The plaintiffs, husband and wife, sued for damages for injuries sustained by the wife, charging the defendants with negligence in using their railway in shunting cars, &c., and in not notifying and protecting the public at crossings. The wife was being driven in a cutter by her son along a street which crossed three tracks of the defendants, and when the cutter was thirty feet away a "silent" car passed along one of the tracks. The son pulled the horse up suddenly, with the effect of throwing the mother out of the cutter and so producing the injury complained of. The jury found that the defendants were guilty of negligence, and that the son by his driving contributed to the accident: — Held, that, upon the evidence, the finding of contributory negligence could not be interfered with; and that the injury was too remote a consequence to be attributed to the negligence of the defendants. *Atkinson* v. *Grand Trunk R. W. Co.*, 17 O. R. 220.

Warning of Approach—*Necessity for—Siding.*]—At a place which was not a station nor a highway crossing, the company had a siding for loading lumber delivered from a saw mill and piled upon a platform. The deceased was at the platform with a team for the purpose of taking away some lumber, when a train coming out of a cutting frightened the horses, which dragged the deceased to the main track, where he was killed by the train:—Held, that there was no duty upon the company to ring the bell or sound the whistle or to take special precautions in approaching or passing the siding. *New Brunswick R. W. Co.* v. *Vanwart*, 17 S. C. R. 35.

——— *Neglect to Give.*]—Held, affirming the judgments in 32 C. P. 349, 8 A. R. 482, that C. S. C. c. 66, s. 104, must be construed as enuring to the benefit of all persons who, using the highway which is crossed by a railway on the level, receive damage in their person or their property from the neglect of the railway company's servants in charge of a train to ring a bell or sound a whistle, as they are directed to do by said statute, whether such damage arises from actual collision, or as in this case by a horse being brought over near the crossing and taking fright at the appearance or noise of the train. The jury, in answer to the question, "If the plaintiffs had known that the train was coming, would they have stopped their horse further from the railway than they did?" said "Yes:"—Held, that, though this question was indefinite, the answers to the questions as a whole, viewed in connection with the Judge's charge and the evidence, warranted the verdict. *Grand Trunk R. W. Co.* v. *Rosenberger*, 9 S. C. R. 311.

Judgment in 19 O. R. 164, affirmed by the court of appeal, upon the ground that the defendants had omitted to comply with the statutory requirements as to ringing the bell when approaching a railway crossing; Burton, J.A., dissenting. Rosenberger v. Grand Trunk R. W. Co., 8 A. R. 482, 9 S. C. R. 311, considered. Held, by the supreme court of Canada, affirming the judgment of the court of appeal, that a railway company has no authority to build its road so that part of its road-bed shall be some distance below the level of the highway, unless upon the express condition that the highway shall be restored so as not to impair its usefulness, and the company so constructing its road and any other company operating it is liable for injuries resulting from the dangerous condition of the highway to persons lawfully using it. A company which has not complied with the statutory condition of ringing a bell when approaching a crossing is liable for injuries resulting from a horse taking fright at the approach of a train and throwing the occupants of the carriage over the dangerous part of the highway on to the track, though there was no contact between the engine and the carriage. Grand Trunk R. W. Co. v. Rosenberger, 9 S. C. R. 311, followed. *Sibbald* v. *Grand Trunk R. W. Co.*, *Tremayne* v. *Grand Trunk R. W. Co.*, 18 A. R. 184, 20 S. C. R. 259.

——— *Neglect to Give—Shunting.*]—The statutory warning required to be given where a line of railway crosses a highway on the level is for the benefit, not only of persons crossing the line of railway, but also of persons lawfully using the highway and approaching the line of railway. Where, therefore, owing to the failure of the defendants to give the statutory warning, or any equivalent warning, the plaintiff drove close to their line of railway and his horses were frightened by a passing engine and injury resulted, he was entitled to recover. *Henderson* v. *Canada Atlantic R. W. Co.*, 25 A. R. 437. See the next case.

Section 256 of the Railway Act, 1888, providing that "the bell with which the engine is furnished shall be rung, or the whistle sounded at the distance of at least eighty rods

from every place at which the railway crosses any highway, and be kept ringing or be sounded at short intervals until the engine has crossed such highway" applies to shunting and other temporary movements in connection with the running of trains as well as to the general traffic. Judgment in 25 A. R. 437 affirmed. *Canada Atlantic R. W. Co.* v. *Henderson*, 29 S. C. R. 632.

——— *Neglect to Give—Cause of Accident—Street on Plan.*]—In 1871 the owner of a block of land had a plan made and registered laying out the land into lots, and streets, &c. Most of the land, including that part marked on the plan as O. street, was fenced in and used for pasturage and so continued until 1881, when a portion thereof, including O. street, no lots fronting thereon having been disposed of, was sold by the owner to the defendants, who treated the land as their private property, using it as a shunting yard. The plaintiff, a little boy, who lived with his father near by, was standing on a snow bank on the side of the track where it crossed O. street. He saw a train approaching, and when it came opposite where he was it gave a jerk which frightened him, and he slipped down on to the track and was run over by the train and injured. No whistle was sounded or bell rung:—Held, that the omission to sound the whistle or ring the bell did not impose any liability on the defendants, as it in no way contributed to the accident. Held, also, that O. street as marked on the plan was not a highway within the meaning of the Railway Act. *Shoebrink* v. *Canada Atlantic R. W. Co.*, 16 O. R. 515.

(c) *By Obstructions in the Highway.*

Bridge—*Approaches—Unlawful Incline.*]—A railway company, with the sanction of a township municipality, erected an overhead bridge across a highway, and afterwards, without the consent of the municipality, raised the same so as to cause the approaches thereto to be at a greater incline than prescribed by the Railway Act, 1888, 51 Vict. c. 29 (D.) An accumulation of snow resulted from this, against which the plaintiff's cutter was upset, and she sustained injuries for which she brought this action:—Held, that the accumulation of snow amounted to a want of repair under s. 531 of the Municipal Act, 55 Vict. c. 42 (O.), for which the municipality was liable. Held, also, that the railway company was also liable for a misfeasance in raising the bridge and approaches so as to be at a greater incline than prescribed by s. 186 of the Railway Act, 1888, thus causing the obstruction by means of which the accident happened. *Fairbanks* v. *Township of Yarmouth*, 24 A. R. 273.

Culvert.]—The railway crossed a highway, and in the line of the ditch formerly running at the side of the highway, and several feet within the limits of the highway, the railway company constructed an open culvert of square timber about five feet deep and seven feet wide. The plaintiff, walking along the road and crossing the railway, fell into this culvert and was injured: — Held, that the company were liable. Quære, whether the corporation were bound to repair this part of the highway; but held, that if so, that would not relieve the defendants. *Fairbanks* v. *Great Western R. W. Co.*, 35 U. C. R. 523.

Track.]—The plaintiff fell while attempting to cross a railway track which was lawfully, and without negligence or undue delay, being built across a street in a city:—Held, that neither the railway company nor the city was responsible in damages. Keachie v. Toronto, 22 A. R. 371, followed. Judgment in 28 O. R. 229 reversed. *Atkin* v. *City of Hamilton*, 24 A. R. 389.

(d) *Contributory Negligence.*

See Winckler v. *Great Western R. W. Co.*, 18 C. P. 250; *Nicholls* v. *Great Western R. W. Co.*, 27 U. C. R. 382; *Rastrick* v. *Great Western R. W. Co.*, 27 U. C. R. 396; *Boggs* v. *Great Western R. W. Co.*, 23 C. P. 573; *Blake* v. *Canadian Pacific R. W. Co.*, 17 O. R. 177; *Beckett* v. *Grand Trunk R. W. Co.*, 13 A. R. 174, 16 S. C. R. 713; *Peart* v. *Grand Trunk R. W. Co.*, 10 A. R. 191; *Bennett* v. *Grand Trunk R. W. Co.*, 7 A. R. 479; *S. C.*, 3 O. R. 446; *Atkinson* v. *Grand Trunk R. W. Co.*, 17 O. R. 220 (all under sub-heads (a), (b), or (c).)

2. *At Stations.*

Negligence—*Indirect Way.*]—A railway company are not bound to maintain any but the usual and direct road for access and egress to and from their station; and a passenger, taking an indirect road not appropriated to the purposes of a footway, cannot hold the company responsible for damage or accident thereby. *Walker* v. *Great Western R. W. Co.*, 8 C. P. 161.

——— *Invitation—Way.*]—The approach to a station of the Grand Trunk Railway from the highway was by a planked walk crossing several tracks, and a train stopping at the station sometimes overlapped this walk, making it necessary to pass around the rear car to reach the platform. J., intending to take a train at this station before daylight, went along the walk as his train was coming in, and seeing, apparently, that it would overlap, started to go around the rear, when he was struck by a shunting engine and killed. It was the duty of this shunting engine to assist in moving the train on a ferry, and it came down the adjoining track for that purpose before the train had stopped. Its headlight was burning brightly, and the bell was kept ringing. There was room between the two tracks for a person to stand in safety. In an action by the widow of J. against the company:—Held, that the company had neglected no duty which they owed to the deceased as one of the public. While the public were invited to use the plank walk to reach the station, and also to use the company's premises, when necessary, to pass around a train covering the walk, there was no implied representation that the traffic of the road should not proceed in the ordinary way, and the company were under no obligation to provide special safeguards for persons attempting to pass around a train in motion. The decision in 16 A. R. 37 affirmed. *Jones* v. *Grand Trunk R. W. Co.*, 18 S. C. R. 696.

——— *Way—Platform — Excavation.*]—A railway company are bound to provide for passengers safe means of ingress to and egress from its stations; and where a passenger arriving at a station at night walked along a

platform, not intended but frequently used as a means of exit, but which was not in any way guarded, and after leaving the platform fell into an excavation in the company's grounds and was injured, the company were held liable in damages. *Oldright* v. *Grand Trunk R. W. Co.*, 22 A. R. 286.

Postal Car—*Bare Licensee—Negligence.*]—The plaintiff in attempting to post a letter on a train which had just commenced to move out of a station, and to which was attached a postal car with an opening in the door for posting letters provided by direction of the post office department for the use of the public, while following the car tripped and fell and was injured, as was alleged, on a stake some inches out of the ground, which had been planted by the defendants for the furtherance of alterations being made in the station:—Held, that the plaintiff was a bare licensee upon the premises of the defendants, who under the circumstances were not liable to him. *Spence* v. *Grand Trunk R. W. Co.*, 27 O. R. 393.

See Bennett v. *Grand Trunk R. W. Co.*, 7 A. R. 470; *S. C.*, 3 O. R. 446; *Casey* v. *Canadian Pacific R. W. Co.*, 15 O. R. 574; *Holtinger* v. *Canadian Pacific R. W. Co.*, 21 O. R. 705, 20 A. R. 244; *Jones* v. *Grand Trunk R. W. Co.*, 45 U. C. R. 193.

See, also, *post* 9.

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3. By Collision between Trains.

Cause of Action—*Fright—Pleading.*]—Declaration, that the plaintiff, being pregnant, at the request of defendants became a passenger in one of their carriages to be safely conveyed by them for reward; yet the defendants so negligently conducted themselves that a collision took place with another train, by means whereof the carriage in which the plaintiff was was broken, &c., and thereby the plaintiff was much alarmed, whereby she became sick and disordered, and thereby also, by reason of the alarm so occasioned to her, and of such sickness caused thereby, she had a premature labour, and bore a still-born child:—Held, on demurrer, that a sufficient cause of action was disclosed. *Fitzpatrick* v. *Great Western R. W. Co.*, 12 U. C. R. 645.

Contributory Negligence—*Passenger—Place for.*]—The plaintiff, travelling in defendants' train on a passenger ticket, went into the express company's compartment of a car, of which the two other compartments were for the post office and the baggage. While there, owing to the negligence of defendants' servants, the train, which was stationary, was run into it by another coming up behind it, and the plaintiff's arm was broken. The compartment in which he was was not intended for passengers, but they frequently went in there to smoke, and the conductor had twice passed through it while the plaintiff was there without making any objection. No person in the passenger car was seriously injured. It was proved that notice that passengers were not allowed to ride upon the baggage car was usually put up on the inside of each door of the passenger cars and on the door of the baggage car, but it was not distinctly shewn that it was there on that day. The jury found that the plaintiff was wrongfully in the car, but that he was not told where to go when he bought his ticket, nor did the conductor order him out; and so that he was not to blame:—Held, that, assuming the plaintiff was aware of the notices, and nevertheless went into the baggage car, the defendants were not thereby excused under all circumstances; and that the jury were warranted here in finding that the plaintiff did not so contribute as to prevent him from recovering, the collision having resulted entirely from defendants' gross negligence. Held, also, that s. 107 of the Railway Act, C. S. C. c. 66, did not apply. *Watson* v. *Northern R. W. Co.*, 24 U. C. R. 98.

The plaintiff was going from I. to M. by train in charge of cattle. At T. the train on which he had come from I. was partly broken up, to be remade with some cars which were standing on another track. While there the plaintiff, unknown to the defendants, went into the caboose at the end of the cars which were to be added to the cars from I., and when the connection was about to be made, deliberately stood up, and was washing his hands, when the shock of the connection caused the injury for damages for which this action was brought:—Held, that there was no evidence of negligence on defendants' part; and the mere fact of the accident happening to the plaintiff was not in itself sufficient evidence of negligence. Held, also, that there was evidence of contributory negligence, in that the plaintiff knew that he was in a freight train, where there would not be so much care shewn, and yet stood up, instead of sitting down, as he might have done, while the connection was being made, especially as he entered the caboose before the train was made up, and had no reason to think that the defendants knew that he was there. *Hutchinson* v. *Canadian Pacific R. W. Co.*, 17 O. R. 347.

Negligence—*Defect in Brakes—Contributory Negligence.*]—The Grand Trunk Railway crosses the Great Western Railway about a mile east of the city of London, on a level crossing. On 19th June, 1876, a Grand Trunk train, on which plaintiff was on board as a conductor, before crossing, was brought to a stand. The signal man, who was in charge of the crossing and in the employment of the Great Western Railway Company, dropped the semaphore, and thus authorized the Grand Trunk train to proceed, which it did. While crossing the track, a Great Western train, which had not been stopped, owing to the accidental bursting of a tube in air-brakes, ran into the Grand Trunk train and injured plaintiff. It was shewn that these air-brakes were the best known appliances for stopping trains, and that they had been tested during the day, but that they were not applied at a sufficient distance from the crossing to enable the train to be stopped by the hand-brakes, in case of the air-brakes giving way. C. S. C. c. 66, s. 142, enacts that "every railway company shall station an officer at every point on their line crossed on the level by any other railway, and no train shall proceed over such crossing until signal has been made to the conductor thereof, that the way is clear." Section 143 enacts that "every locomotive . . . or train of cars on any railway shall, before crossing the track of any other railway on a level, be stopped for at least the space of three minutes:"—Held, that the Great Western Railway Company were guilty of negligence in not applying the air-brakes at a sufficient distance from the crossing to enable the train to be stopped by

hand-brakes in case of the air-brakes giving way. That there was no evidence of contributory negligence on the part of the Grand Trunk Railway Company, as they had brought their train to a full stop, and only proceeded to cross the Great Western track when authorized to do so by the officer in charge of the semaphore, who was a servant of the Great Western Railway Company. *Great Western R. W. Co.* v. *Brown*, 3 S. C. R. 159. Affirming *S. C.*, 2 A. R. 64, 40 U. C. R. 333.

——— *Disregard of Rules — Proximate Cause.*] — Defendants' railway crossed the track of another railway on the level, and both were bound by statute to stop at least a minute before crossing, but neither did so. Defendants' line was signalled as clear, and their train, in which the plaintiff was a passenger, went on without stopping. The other line was signalled as not clear, but the train on it ran on, disregarding this signal, and struck defendants' train at the crossing, whereby plaintiff was injured. If either train had pulled up about two seconds sooner the collision would have been avoided:— Held, that defendants were liable to the plaintiff, for that their neglect to stop for the required time was, so far as the plaintiff was concerned, a part of the cause of his injury and sufficiently proximate. Quære, as to the liability as between the two companies. *Graham* v. *Great Western R. W. Co.*, 41 U. C. R. 324.

Nonsuit—*Evidence—Consent—Servant of Company.*]—The conductor of a special freight train travelled upon the locomotive, and was killed by a collision. Upon an action by his administratrix it appeared that the rules of the railway company prohibited his so travelling:—Held, that upon the evidence given at the trial the plaintiff was properly nonsuited; and that the nonsuit must stand, having been directed upon a point of evidence with the counsel's consent, and no further evidence sufficient to support the verdict being stated on affidavit. *Stoker* v. *Welland R. W. Co.*, 13 C. P. 386.

See Conger v. *Grand Trunk R. W. Co.*, 13 O. R. 109; *Bicknell* v. *Grand Trunk R. W. Co.*, 26 A. R. 431.

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4. *Damages.*

Excessive Damages.]—Action on the case for negligence in carrying plaintiff, whereby he sustained serious bodily injury. Defendants withdrew their plea of not guilty, and the jury assessed damages at £6,178. Upon motion for a new trial for excessive damages, the court, on the ground that the jury had not exercised a sound discretion, made the rule absolute on payment of costs, and on payment of £500 into court, with leave to plaintiff to accept without prejudice. *Batchelor* v. *Buffalo and Brantford R. W. Co.*, 5 C. P. 127, 470.

New trial granted, where the jury gave £5,000, to be distributed, £500 to the widow, and the rest in unequal sums among five infant children, the deceased having been a blacksmith, 35 years of age, the patentee of an invention for an improved plough, and of careful, industrious habits, &c. *Morley* v. *Great Western R. W. Co.*, 16 U. C. R. 504.

In actions under 10 & 11 Vict. c. 6 (C. S. C. c. 78), the court will interfere if the damages are clearly excessive. But it was held, under the circumstances of this case, that £3,000 was not exorbitant for the widow and three children of deceased. Semble, that the mother in this case could have no claim. *Secord* v. *Great Western R. W. Co.*, 15 U. C. R. 631.

The court, thinking that the damages awarded by the jury in an action for causing death were excessive, ordered that there should be a new trial unless the plaintiffs accepted a reduced amount. *Curran* v. *Grand Trunk R. W. Co.*, 25 A. R. 407.

The court, being of opinion that damages of $3,000 allowed by the jury were excessive, ordered that there should be a new trial unless the plaintiff should consent to accept $1,500. *Collier* v. *Michigan Central R. W. Co.*, 27 A. R. 630.

Measure of Damages—*Death of Person — Action by Executors.*] — See *Ferrie* v. *Great Western R. W. Co.*, 15 U. C. R. 515.

——— *Death of Person—Action by Widow and Children — Workmen's Compensation Act.*]—Section 289 of the Dominion Railway Act, 51 Vict. c. 29, giving to any person injured by the failure to observe any of the provisions of the Act a right of action "for the full amount of damages sustained," is intra vires, and the limitation of amount mentioned in the Workmen's Compensation for Injuries Act does not apply to an action by a workman or his representatives under this section. *Curran* v. *Grand Trunk R. W. Co.*, 25 A. R. 407.

Mental Shock — *Damages for, not Recoverable.*]—Victorian Railway Commissioners v. Coultas, 13 App. Cas. 222, followed. *Henderson* v. *Canada Atlantic R. W. Co.*, 25 A. R. 437.

Right to Damages—*Death of Child—Expectation of Benefit.*]—In an action by a parent to recover damages for the death of his child, there need not be evidence of pecuniary advantage derived from the deceased; it is sufficient if there is evidence to justify the conclusion that there is a reasonable expectation of pecuniary benefit to the parent in the future, capable of being estimated. *Rombough* v. *Balch*, *Green* v. *New York and Ottawa R. W. Co.*, 27 A. R. 32.

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5. *Derailment of Train.*

Cause—*Breaking of Axle—Precautions.*]—Plaintiff being a passenger in one of defendants' cars, the axle of the tender broke, and the tender and car in which plaintiff was were thrown off the track, whereby plaintiff's arm was broken. At the trial defendants called the engineer of the train, who proved that he examined the axle shortly before the accident, when it appeared all right. The jury having found for the plaintiff upon this evidence, and with a charge favourable to defendants, the court refused to set the verdict aside. *Thatcher* v. *Great Western R. W. Co.*, 4 C. P. 543.

——— *Breaking of Rail — Climate.*] — Where the breaking of a rail is shewn to be

due to the severity of the climate and the suddenly great variation of the degrees of temperature, and not to any want of care or skill upon the part of the railway company in the selecting, testing, laying, and use of such rail, the company are not liable in damages to a passenger injured by the derailment of a train through the breaking of such rail. *Canadian Pacific R. W. Co.* v. *Chalifoux*, 22 S. C. R. 721.

——— *Excessive Speed—Negligence—Government Railway.*]—It is not negligence per se for the engine driver or conductor of a train to exceed the rate of speed prescribed by the time-table of the railway. If the time-table were framed with reference to a reasonable limit of safety at any given point, then it would be negligence to exceed it; but, aliter, if it is fixed from considerations of convenience and not with reference to what is safe or prudent. Semble, that the obligation of the company is to carry their passengers with reasonable care for their safety; and the company are responsible only for accidents arising from negligence. *Colpitts* v. *The Queen*, 6 Ex. C. R. 254.

See Dubé v. *The Queen*, 3 Ex. C. R. 147.

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6. *Fire in Train.*

Negligence — *Contributory Negligence—Nonsuit.*]—The plaintiff was a passenger in defendants' train when he heard a lamp drop in the water closet at the front end of the car, and going forward with others saw a light in the closet and some one trying to put out the fire. The fire broke out, and he tried to pull the bell-rope, but found it would not work, and he then ran into the next car in front, the smoking-car, to pull the rope. The conductor had run forward, and the plaintiff supposing, as he said, that something had been done to stop the train, and thinking of his valise, and that there was danger of the car being burned, went back into the burning car and got it, and tried to return, but the fire broke out fiercely across the passage and prevented him. He was then driven to the rear end of the car, where the other passengers were crowding, and was seriously burned before the train stopped. The other passengers who went with him into the smoking car remained there, and it was not burned. Defendants gave evidence to shew that the lamp was of the best construction and well secured, and that the oil was of the best kind, such as would not explode or take fire from the lamp falling. The jury having found for the plaintiff:—Held, that there was some evidence from which the jury might infer that the lamp was not properly secured, and that the fire was occasioned by its fall in consequence; and that the omission to have a bell-rope, as required by the statute, was negligence on defendants' part. But, upon the evidence, the damage to the plaintiff was caused, not by defendants' negligence, but by his own voluntary act in returning to the car. A nonsuit was therefore ordered. *Hay* v. *Great Western R. W. Co.*, 37 U. C. R. 456.

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7. *Getting on and off Train.*

Government Railway.]—See *Martin* v. *The Queen*, 2 Ex. C. R. 328, 20 S. C. R. 240.

Moving Train—*Invitation to Alight.*]—The plaintiffs, husband and wife, were on a train of defendants, going to Lefroy. The conductor, before reaching the station, announced that the next station was Lefroy. On approaching the station the train, according to the plaintiffs' witnesses, was slowed, but did not stop. The husband got off while the train was moving slowly, and his wife, seeing that the speed was increasing, and that they were passing the station, sprang after him, though he had let go of her hand, and told her not to jump, and was injured. It was left to the jury to say whether she had acted imprudently in so doing, and they found a verdict for the plaintiffs:—Held, affirming the judgment in 4 O. R. 201, that there was evidence of an invitation to alight, and that it was for the jury to say whether she had acted in a reasonably prudent and careful manner in availing herself of it. *Edgar* v. *Northern R. W. Co.*, 11 A. R. 452.

——— *Invitation to Enter—Jury.*]—The plaintiff, who was a passenger on the train of the defendants, alighted at a station, and the train having started before he had re-entered it, endeavoured to jump on while it was in motion. In doing so he was injured, and brought this action for damages for negligence. There was evidence of an invitation by the conductor of the train to jump on while it was in motion, and the jury found (1) that there was such invitation. They also found (2) that the plaintiff used a reasonable degree of care in endeavouring to get on; and (3) that he was injured while trying to get on, in pursuance of the request of the conductor. It was argued by the defendants that the danger to the plaintiff was so patent and obvious that he had no right to act on the conductor's invitation, or to attempt to get on the train:—Held, that this was a matter which should have been submitted to the jury, and that it was not covered by the second finding; that the questions involved in the action could not be determined on the findings; and that there should be a new trial. *Curry* v. *Canadian Pacific R. W. Co.*, 17 O. R. 65.

Negligence—*Contributory Negligence.*]—The plaintiff, an intending passenger by a way train on the defendants' railway, arrived at the station just as the train, which was some minutes late, was moving out of the station, whereupon he ran quickly to the train, and seizing the iron railing of one of the cars, and holding thereon, ran along the platform at the speed of the train with his face towards the car, and, after the train had moved a certain distance, in attempting to jump thereon, he struck a baggage truck which was close to the edge of the platform, and which had been used in taking baggage to the baggage car, and had been left to bring back the baggage therefrom. By the concussion he was thrown under the wheels of the train and received an injury to one of his legs which rendered an amputation necessary:—Held, that the leaving of the truck on the platform did not constitute negligence on the part of the defendants; but, even if it did, the plaintiff, in attempting to get on the train as he did, was guilty of such contributory negligence as would prevent his recovering. *Haldan* v. *Great Western R. W. Co.*, 30 C. P. 89.

L. was the holder of a ticket and a passenger on the company's train from Levis to Ste. Marie, Beauce. When the train arrived

at Ste. Marie station, the car upon which L. had been travelling was some distance from the station platform, the train being longer than the platform, and L., fearing that the car would not be brought up to the station, the time for stopping having nearly elapsed, got out at the end of the car, and, the distance to the ground from the steps being about two feet and a half, in so doing fell and broke his leg, which had to be amputated. The action was for $5,000 damages, alleging negligence and want of proper accommodation. The defence was contributory negligence:—Held, that, in the exercise of ordinary care, L. could have safely gained the platform by passing through the car forward, and that the accident was wholly attributable to his own default in alighting as he did, and therefore he could not recover. *Quebec Central R. W. Co.* v. *Lortie*, 22 S. C. R. 336.

——— *Contributory Negligence—Accord and Satisfaction.*]—See *Haist* v. *Grand Trunk R. W. Co.*, 26 O. R. 19, 22 A. R. 504.

——— *Intoxication of Passenger.*]—Deceased was a passenger in defendants' railway for W. station, and was, as the conductor said, "pretty drunk" when he got on the train. He went out of the car door at that station, and next morning was found about 100 yards beyond it, about four feet from the rail, with his legs cut through at the knee joints, and his left foot crushed, of which injuries he died that afternoon. There was contradictory evidence as to whether the train stopped long enough at the station, for which there was only two passengers, to enable persons to alight; but the other passenger said he got off leisurely, and the person to whom deceased had been talking on the car said he thought deceased had left the train, and that he told the conductor so after the train started. The conductor and baggage master also got off there to see the station master, and returned to the car. There was no further proof of the manner in which deceased met with the accident:—Held, that there was no evidence of negligence on defendants' part to go to the jury, and a nonsuit was ordered. *Giles* v. *Great Western R. W. Co.*, 36 U. C. R. 309.

8. *Lord Campbell's Act.*

Time Limit.]—The widow and child of a person killed in consequence of the defendants' negligence may, when letters of administration to his estate have not been issued, bring an action under R. S. O. 1897 c. 166, without waiting six months. *Curran* v. *Grand Trunk R. W. Co.*, 25 A. R. 407.

Widow's Right under — *Renunciation by Deceased.*]—Art. 1056, C. C., embodies the action previously given by a statute of the Province of Canada re-enacting Lord Campbell's Act. Robinson v. Canadian Pacific R. W. Co., [1892] A. C. 481, distinguished. An employee on the Intercolonial Railway became a member of the Intercolonial Railway Relief and Assurance Association, to the funds of which the government contributed annually $6,000. In consequence of such contribution a rule of the association provided that the members renounced all claims against the Crown arising from injury or death in the course of their employment. The employee having been killed in discharge of his duty by negligence of a fellow servant:—Held, reversing the judgment in 6 Ex. C. R. 276, that the rule of the association was an answer to an action by his widow under art. 1056, C. C., to recover compensation for his death. *The Queen* v. *Grenier*, 30 S. C. R. 42.

See ante 4.

9. *On Railway Lines or Tracks.*

Licensee — *Contributory Negligence — Backing Train—Station.*] — The defendants' station at A. was on what was known as the side track, between which and the main track there was a centre platform for passengers alighting from and getting on to trains on the main track. The plaintiff had come to the station to meet a friend, and was attempting to cross over the side track to reach the centre platform, when the engine and tender, which had been detached from the rest of the train and switched on to the side track, and were backing down to pick up a car some fifty yards distant, ran over and injured him. The plaintiff was looking in the opposite direction from that from which the engine and tender were coming, and therefore did not see them; and it appeared that had he been looking out he must have seen them before he attempted to cross, and so could have avoided the accident, as it was only a second or two from the time he started to cross until he was struck, and there was no obstruction to his view. In an action for damages the jury having disagreed:—Held, that the plaintiff's evidence having shewn that the accident was caused by his own negligence and want of care, the defendants were not liable; and judgment was ordered to be entered for them. Quære, whether an engine and tender constitute a train within s. 52 of R. S. C. c. 109, so as to require a man to be stationed on the rear thereof to warn persons of their approach; but, in any event, there was a man so stationed who did give warning. *Casey* v. *Canadian Pacific R. W. Co.*, 15 O. R. 754.

Passenger Leaving Train—*Invitation to Use Track.*]—A passenger aboard a railway train, storm-bound at a place called Lucan Crossing, on the Grand Trunk railway, left the train and attempted to walk through the storm to his home a few miles distant. Whilst proceeding along the line of the railway, in the direction of an adjacent public highway, he was struck by an engine and killed. There was no depot or agent maintained by the company at Lucan Crossing, but a room in a small building there was used as a waiting room, passenger tickets were sold and fares charged to and from this point, and, for a number of years, travellers had been allowed to make use of the permanent way in order to reach the nearest highways, there being no other passage way provided. In an action by his administrators for damages:—Held, that, notwithstanding the long user of the permanent way in passing to and from the highways by passengers taking and leaving the company's trains, the deceased could not, under the circumstances, be said to have been there by the invitation or license of the company at the time he was killed, and that the action would not lie. Judgments in 27 O. R. 441 and 24 A. R. 672 reversed. *Grand Trunk R. W. Co.* v. *Anderson*, 28 S. C. R. 541.

See Jones v. *Grand Trunk R. W. Co.*, 16 A. R. 37, 18 S. C. R. 696, *ante* 2.

10. *Packing Railway Frogs.*

Dominion Railway — *Application of Provincial Statute.*] — The plaintiff, a workman employed by the Grand Trunk R. W. Co., was injured while in discharge of his duties, by reason of his foot having been caught in one of the frogs of the rails, which was not packed in the manner prescribed by 44 Vict. c. 22 (O.):—Held, that the Grand Trunk Railway, being a Dominion railway, and within s. 92, cl. 10 (a), of the B. N. A. Act, was not affected by the statute, which professed only to apply to railway companies in respect of which the provincial legislature had authority to enact such provisions; and, therefore, that the defendants were not liable. *Monkhouse* v. *Grand Trunk R. W. Co.*, 8 A. R. 637.

——— *Application of Provincial Statute—Connecting Railway.— Notice of Defect.*] — Action by plaintiff, as administrator of C., for damages, under 44 Vict. c. 22 (O.), by reason of the omission to pack a frog on the Midland Railway, which the defendants were operating, whereby C.'s foot was caught in the frog and he was killed by a train:— Held, that defendants were not liable; that the Midland Railway was a railway connecting with or crossing the defendants' railway, and under 46 Vict. c. 24 (D.) was exempt from the operation of the Ontario Act. Held, that the omission to state in the statement of claim, as required by s.-s. 2 of s. 8 of 44 Vict. c. 22 (O.), and to prove, that the defendants knew that the frog was not packed, or that the deceased did not know it, or that he had notified the defendants or any person superior to himself in the service of the defendants, or that such person was not aware thereof, would preclude any recovery. *Clegg* v. *Grand Trunk R. W. Co.*, 10 O. R. 708.

Duty of Company — *Keeping Filled.*] — The duty of a railway company under s.-s. 3 of s. 202, 51 Vict. c. 29 (D.), is not only to fill with packing the spaces behind and in front of every railway frog, but continuously to keep the same filled. *Misener* v. *Michigan Central R. W. Co.*, 24 O. R. 411.

Servant of Company—*Person Injured—Notice of Defect—Contributory Negligence.*] —Section 202, s.-s. 3, of 51 Vict. c. 29 (D.), provides that "the spaces behind and in front of every railway frog or crossing, and between the fixed rails of every switch, where such spaces are less than five inches in width, shall be filled with packing up to the under side of the head of the rail," and s. 289 of the same Act provides that "every company, . . . causing or permitting to be done any matter, act, or thing contrary to the provisions of this Act or the special Act . . . or omitting to do any matter, act, or thing required to be done on the part of any such company, . . . is liable to any person injured thereby for the full amount of damages sustained by such act or omission," &c. The plaintiff, who had been for some months employed at the place where the accident happened, as a switch foreman, while in the course of his duty in the act of uncoupling cars, had his foot caught in an unpacked frog, where it was crushed by the wheels of the cars:—Held, that, although he was a servant of the defendants, he was a "person injured" within the meaning of the statute, and entitled to maintain an action for negligence. The jury, having found that the frog was not packed, in reply to a question whether the plaintiff had "notice or knowledge or ought to have had notice or knowledge, that the frog was not packed," answered: "We believe he did not have notice, and should have had notice." And in answer to another question they negatived contributory negligence on the plaintiff's part:—Held, that, even assuming that the meaning of the answer was to impute notice of the danger to the plaintiff, it would not prevent his recovering so long as he himself was not negligent, there being no finding or evidence to sustain a finding that the plaintiff, freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it. *Le May* v. *Canadian Pacific R. W. Co.*, 18 O. R. 314, 17 A. R. 263.

11. *Running Reversely.*

Contributory Negligence — *Voluntary Act—Look-out Man—Dangerous Place.*]—Defendants, under the authority of 12 Vict. c. 196, and 16 Vict. c. 51, had constructed a wharf at Collingwood, and laid three tracks thereon for the purposes of their business. The wharf was much frequented, and the only means of access to vessels lying at it. The tracks were so close together that it was difficult to distinguish between the tracks and the spaces between them. No portion of the wharf was fenced off for foot passengers, nor was there any railing to prevent them from falling into the water, and they had either to walk upon the tracks or spaces between them. A woman carrying the dinner of her husband, who was working at a vessel, was walking down the wharf on the outside of the western track, and on meeting some men coming up, she, apparently to avoid them, stepped across on to the centre track, not observing a gravel train backing down along it. Just as the train was upon her, one of these men, observing her danger, jumped on to the track and pushed her off, but for some reason hesitating for a moment was himself struck by the train and killed. It appeared that there was no look-out man on the last car, and the evidence was contradictory as to whether the defendants were going more than six miles an hour, and whether the whistle was sounded or the bell rung. In an action by the administratrix of the deceased the jury found that defendants were guilty of negligence, and that neither the woman nor the deceased was guilty of contributory negligence, and that she would have been killed had not deceased pushed her off, which was the only means of saving her:—Held, that the administratrix could not recover, for the deceased was guilty of contributory negligence, his own direct and wilful act, however praiseworthy, being the cause of the accident. *Anderson* v. *Northern R. W. Co.*, 25 C. P. 301.

Look-out Man—*Station Yard.*]—Semble, that s. 145 of C. S. C. c. 66, requiring a person to be stationed on the last car in the train, applies to the station grounds of railway companies in cities, towns, and villages, as well as to the limits outside of such station grounds. *Bennett* v. *Grand Trunk R. W. Co.*, 3 O. R. 446.

——— *Position of.*]—The defendants were required by law to station a man on the last car of every train moving reversely in any town, to warn persons standing on or crossing the track of the approach of the train:—Held, that the defendants did not comply with

this direction by having a man at the front end of the last car, where he could not see persons crossing the tracks. In this case there was no brake at the rear end of the last car. The brakesman on the last car, seeing the track clear a few minutes before the accident, went to the front end, and the plaintiff then attempting to cross, was injured:—Held, evidence of negligence to go to the jury. *Levoy* v. *Midland R. W. Co.*, 3 O. R. 623.

Warning of Approach — *Crossing — Dangerous Place.*] — Where the train was backing at the time the accident happened, the jury were rightly directed that defendants were bound to sound the whistle or ring the bell, when the nearest part of the train was eighty rods from the crossing; and having regard to the fact that they had without authority increased the number of tracks there, it was also right to tell them that it was for them to say whether, considering the nature of the crossing, they should not have stationed a man there, or taken some other than the statutory precautions. *Lett* v. *St. Lawrence and Ottawa R. W. Co.*, *Hinton* v. *St. Lawrence and Ottawa R. W. Co.*, 1 O. R. 545.

See Casey v. *Canadian Pacific R. W. Co.*, 15 O. R. 574; *Hollinger* v. *Canadian Pacific R. W. Co.*, 21 O. R. 705, 20 A. R. 244.

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12. *Servants and Workmen.*

(*See*, also, *ante* 10; *post* XVIII.)

(a) *Carriage of Contractors' Workmen.*

Negligence — *Collision — Pleading.*] — Declaration, that the plaintiff was a servant in the employment of one K., a contractor with defendants for keeping their road in repair; that in performing said repairs certain carriages and engines, under the management of defendants' servants, were used to transport materials and convey workmen employed by K.; that the plaintiff, being one of such workmen, became a passenger in one of these carriages to be carried from his place of work to his residence; that it was defendants' duty to use proper care in the management of said train, but by their negligence it came into collision with another train, whereby the plaintiff was injured; — Held, sufficient to shew defendants liable. *Torpy* v. *Grand Trunk R. W. Co.*, 20 U. C. R. 446.

——— *Contract—Agent Exceeding Authority.*]—Defendants agreed, with a contractor for the construction of their railway, to furnish a construction train to be used in carrying materials for ballasting and laying the track of a portion of their road then under construction; the defendants to provide the conductor, engine driver, and fireman; the contractor furnishing the brakesmen. After work was over for the day, and the train was returning to Owen Sound, where the plaintiff, one of the contractor's workmen, lived, the plaintiff, with the permission of the conductor, but without authority of defendants, got on the train. Through the negligence of the person in charge of the train an accident happened and the plaintiff was injured:—Held, that the defendants were not liable, for their contract was to carry materials only, not passengers, and the conductor in permitting the plaintiff to get upon the train was not acting as defendants' agent. *Graham* v. *Toronto, Grey, and Bruce R. W. Co.*, 23 C. P. 541.

——— *Right to be on Train—Pleading.*]—Declaration, that I. S. (husband of the plaintiff) was a servant and workman employed by certain contractors with defendants in ballasting defendants' railway, and in performing such work certain cars and engines, under the guidance and management of defendants' servants, were used for the transport of materials and the conveyance of workmen employed by the contractors, said workmen not being servants of the defendants, to and from their residence and their work, for reward to defendants; and that I. S. in his lifetime, being such workman, became a passenger on a car drawn on said railway by a locomotive under the defendants' management, to be carried from his place of work home, and as such workman and passenger was then lawfully in and on said car, yet the defendants so negligently managed the train, &c., that I. S. was injured thereby, and by reason thereof died. Pleas, (1) "not guilty," by statute; 2. that the train was not used for conveyance of said workmen for reward to the defendants as alleged, and I. S. was not lawfully on said train. The words "for reward to defendants" having been struck out of the declaration at the trial, the defendants demurred to the declaration, and the plaintiff demurred to the second plea:—Held, declaration good, for it shewed that the train, under the management of the defendants, was for the purpose of carrying materials and the contractors' workmen, and alleged that I. S. was lawfully thereon, and a sufficient consideration, if any were necessary to be averred, was shewn. At the trial the evidence shewed that defendants were only bound by their contract with the contractors to provide an engine and platform cars for carrying ballasting and materials for track-laying, to be under the charge of their own conductor, engine driver, and fireman, the contractors to find the brakesmen; and that it was not necessary for defendants to carry the workmen. There was no evidence that defendants consented to the use of the cars by the men, further than that the conductor and engine driver permitted it:—Held, that I. S. was not lawfully on the cars with the consent of the defendants, and a nonsuit was directed. Semble, that the deceased could not have been considered a fellow servant with those employed by the defendants. *Sheerman* v. *Toronto, Grey, and Bruce R. W. Co.*, 34 U. C. R. 451.

See Stoker v. *Welland R. W. Co.*, 13 C. P. 386; *Alexander* v. *Toronto and Nipissing R. W. Co.*, 33 U. C. R. 474.

See also *post* (c).

(b) *Injury to Servants by Negligence of Fellow Servants.*

At Common Law.]—Action for the death of one D., an engine driver in defendants' employment, alleging that they negligently employed one R., an incompetent person, as switchman, and that by his incompetency the collision occurred. It appeared that R. neglected to raise the semaphore at the east end of the Stratford station, so as to prevent D.'s train going west from entering the yard while a freight train was coming from the west, and this caused the accident. According to the testimony on both sides, R. was an intelligent man, employed at work which one witness said could be learned in a day, another in two or three weeks, and after being a week about the yard he had performed this

work regularly for two weeks without complaint until this occasion. A verdict having been found for the plaintiff:—Held, that there was no evidence to go to the jury that defendants negligently employed an incompetent person; that for R.'s neglect, he being D.'s fellow-servant, the plaintiff clearly could not recover; and a nonsuit was ordered. *Deverill v. Grand Trunk R. W. Co.*, 25 U. C. R. 517.

Plaintiff as administratrix sued defendants for the death of her husband, caused by a railway accident. It appeared that deceased, with three others and a foreman, were employed with a hand car in clearing snow from the track near Limehouse station. The foreman saw a freight train approaching at speed a quarter of a mile off, upon which he left the men, telling them "to clear," and walked towards it waving a flag. Two of the men stepped aside when it came up, but deceased and the other man ran in front of it along the track, until it drove the hand car against and killed them both:—Held, clearly a case of contributory negligence on the part of deceased; and a nonsuit was ordered. One of the brakesmen on the train swore that the brakes were defective, and that the train could not therefore be stopped in obedience to the proper signal, which was up. It appeared, however, that the defects mentioned by him could have been removed by tightening a bolt or shortening a rod, which any one employed by defendants could have done in a few minutes; and other witnesses swore that with the brakes as they were after the accident the train could have been stopped; that it came up at a speed shewing no intention to stop at all, and with the engine reversed ran a quarter of a mile past the station; and that at the next station, on the same grade, and with the same brakes, it was stopped without difficulty: — Held, that these facts conclusively shewed the negligence not to have been that of defendants, but of their servants engaged in a common employment with deceased, and for which therefore defendants were not responsible. *Plant v. Grand Trunk R. W. Co.*, 27 U. C. R. 78.

Under Workmen's Compensation for Injuries Act.]—B., the plaintiff's son, was employed as fireman on a locomotive engine which was in charge of a driver named R., B. being under his orders. B. was severely scalded by the bursting of the boiler, from which death resulted. The accident was apparently caused by the sudden influx of cold water into the boiler, which had been allowed to run too low. There was no evidence to shew to whom the negligence was attributable; but it was proved that, though the company held the driver responsible as regards the engine, it was the duty of the fireman, for which he also was responsible to the company, to attend to the supply of water, which was part of his education to fit him for the superior position of driver, and that from his position he had greater facilities for opening the valve than those possessed by the driver; and from a report put in by one of the defendants' officials, it appeared that B. had charge of the water at the time of the accident. In an action against defendants for damages under the Workmen's Compensation for Injuries Act, 49 Vict. c. 28, s. 3, s-s. 5 (O.):—Held, that the defendants were not liable. *Brunnel v. Canadian Pacific R. W. Co.*, 15 O. R. 375.

J., a switch-tender of the Canada Southern R. W. Co., was obliged in the ordinary dis-

charge of his duty to cross a track in the station yard to get to a switch, and he walked along the ends of the ties which projected some sixteen inches beyond the rails. While doing so an engine came behind him and knocked him down with his arm under the wheels, and it was cut off near the shoulder. On the trial of an action against the company in consequence of such injury the jury found that there was negligence in the management of the engine in not ringing the bell and in going faster than the law allowed. They also found that J. could not have avoided the accident by the exercise of reasonable care:—Held, that the Workmen's Compensation for Injuries Act of Ontario, 49 Vict. c. 28, applies to the Canada Southern Railway, notwithstanding it has been brought under the operation of the Railway Act of the Dominion. Held, also, that there was no such negligence on J.'s part as would relieve the company from liability for the injury caused by improper conduct of their servants; and the judgment of the court below sustaining a verdict for the plaintiff was right. *Canada Southern R. W. Co. v. Jackson*, 17 S. C. R. 316.

Action under the Workmen's Compensation for Injuries Act against a railway company by the deceased's administratrix for damages sustained through deceased's death while engaged, as alleged, in coupling the defendants' cars, caused, as alleged, by his being struck by the overlopping lumber on a lumber car, through the absence of stakes in the sockets thereof. There was no direct evidence to shew how the accident happened, it being merely a matter of conjecture:—Held, that the action was not maintainable. The plaintiff was paid a sum of $250 by a benefit insurance society in connection with the railway, though a distinct organization, of which the deceased was a member. The plaintiff gave a receipt stating that the railway company was relieved from all liability. The deceased's certificate did not profess to be an insurance against accidents, and the railway company were no party to the receipt:—Held, that the receipt formed no bar to the action against the defendants; nor was there any right to deduct the amount received from the benefit society from the sum the plaintiff was entitled to as damages. Hicks v. Newport, &c., R. W. Co., 4 B. & S. 403 note, distinguished. *Farmer v. Grand Trunk R. W. Co.*, 21 O. R. 299.

W. was an employee of the railway company whose duty it was to couple cars in their Toronto yard. In performing this duty on one occasion, under specific directions from the conductor of an engine attached to one of the cars being coupled, his hand was crushed owing to the engine backing down and bringing the cars together before the coupling was made. On the trial of an action for damages resulting from such injury the conductor denied having given directions for the coupling, and it was contended that W. improperly put his hand between the draw bars to lift out the coupling pin. It was also contended that the conductor had no authority to give directions as to the mode of doing the work. The jury found against both contentions, and W. obtained a verdict, which was twice affirmed, 23 O. R. 436, 20 A. R. 528:—Held, that, though the findings of the jury were not satisfactory upon the evidence, a second court of appeal could not interfere with them. *Grand Trunk R. W. Co. v. Weegar*, 23 S. C. R. 422.

Where a statutory direction imposed upon an employer has not been observed, it is no defence that the non-observance is due to the negligence of a fellow-servant of the person injured. *Curran* v. *Grand Trunk R. W. Co.*, 25 A. R. 407.

(c) Injury to Servants by Negligence of Railway Company.

Carriage of Servant—*Course of Employment.*]—The statement of claim alleged that the plaintiff was employed by the defendants to work at track-laying; that while so employed the defendants directed and required him to assist in bringing railway supplies to the place where they were being used; that they also directed and required him to be carried, as part of his employment, on the defendants' trains; that accordingly he was received by the defendants "to be safely carried" on a train; and that, owing to the defendants' negligence, he was, while so travelling, thrown off the train and injured:—Held, that, if the plaintiff accepted a different employment from that originally contemplated, he became the defendants' workman, in that new employment, just as he had been in his former employment. 2. That the statement that the plaintiff was received on the train "to be safely carried" did not imply that a special bargain was made "to safely carry," but only that the plaintiff was to be safely carried as one of their workmen in the course of his employment; and that there was no cause of action. *May* v. *Ontario and Quebec R. W. Co.*, 10 O. R. 70.

Contributory Negligence.]—On the undisputed facts disclosed in the plaintiff's case, it appeared that there was a switch-stand erected in the defendants' yard close to the track, the deceased, who was a brakesman in the defendants' employment, being aware of its position and proximity to the track. On the day in question the deceased was engaged as a brakesman on a train passing through the yard. His position as brakesman should have been on top of the car, but, for some reason which did not appear, he was on the side of the car, holding on to the ladder by which brakesmen mount to the top of the car, and his attention being drawn towards the end of the train he did not see the switch-stand, when he was struck by it and thrown under the wheels of the car and killed:—Held, that there was no evidence of negligence on the part of the defendants; and that there was such want of care on the part of the deceased as disentitled the plaintiff, his administrator, to recover; and the case was therefore properly withdrawn from the jury. *Ryan* v. *Canada Southern R. W. Co.*, 10 O. R. 145.

The plaintiff was necessarily on the top of the car in the performance of his duty. There was no evidence to shew that he knew, at the time of the accident, that he was near the bridge, the night being dark; and it was a matter of doubt whether he even knew that the bridge was too low. The bell-rope was not connected before the train left the station, but this did not appear to have been through any neglect of his, and, for all that appeared, the train might not have been completed until just before starting, and until the engine was attached no connection could be made:—Held, that the plaintiff could not be deemed guilty of contributory negligence. *McLauchlin* v. *Grand Trunk R. W. Co.*, 12 O. R. 418.

Action by plaintiff to recover damages for the death of her husband by reason of, as was alleged, a defective brake on a car on defendants' railway, on which deceased was employed as a brakesman:—Held, that there could be no recovery, for the evidence failed to shew how the accident happened, the contention that it was the defective brake being mere conjecture; and, even had it been the cause, it would have been no ground of liability, for under the defendants' rules it was the deceased's duty to examine and see that the brakes were in proper working order and report any defect to the conductor; and if he made the examination he apparently discovered no defect, as he made no report, a latent defect being no evidence of negligence; and if he omitted to make such examination, &c., then the accident would be attributable to his own negligence. *Badgerow* v. *Grand Trunk R. W. Co.*, 19 O. R. 191.

Negligence—*Grass on Siding.*]—For a railway company to permit grass and weeds to grow on a side track is not such negligence as will make it liable to compensate an employee who is injured in consequence of such growth while on the side track in the course of his employment. *Wood* v. *Canadian Pacific R. W. Co.*, 30 S. C. R. 110.

——— *Omission to Give Warning—Shunting.*]—The plaintiff's son was given leave by a yardmaster of the defendants to learn in the railway yard the duties of car-checker, with the expectation that if he became competent he would be taken into the employment of the defendants in that capacity, and he was free to devote as much or as little time to acquiring the necessary knowledge as he saw fit. While he was in the railway yard a few days after this permission had been given, he was killed by an engine of the defendants, which was running through the railway yard without the bell being rung, though the rules of the defendants required this to be done:—Held, that the deceased was a licensee and not a trespasser; that the defendants were bound to exercise reasonable care for his protection; and that the omission to give the warning was negligence which made them liable in damages for his death. *Collier* v. *Michigan Central R. W. Co.*, 27 A. R. 630.

——— *Want of Lock at Switch.*]—The omission to have a lock at a railway switch not otherwise securely guarded, situate near a much travelled highway, is such negligence as to make those having control of the railway liable in damages for the death of their servants resulting from the switch becoming misplaced. *Rombough* v. *Balch, Green* v. *New York and Ottawa R. W. Co.*, 27 A. R. 32.

See Gibson v. *Midland R. W. Co.*, 2 O. R. 658.

(d) Injury to Third Persons by Negligence of Servants.

Course of Employment.]—The plaintiff was in the employment of one C., a contractor with the defendants for building fences along their line. C., as a matter of convenience to him, was permitted by defendants to carry his tools on their trains, and was thus taking

two crow-bars from Port Hope to a point on the line where his men were at work. As the train passed the spot C. dropped one bar out, and the baggage master pitched out the other, which struck and injured the plaintiff. C. swore that it was his business to put the bars on and take them off the car, the baggage men having nothing to do with him nor any right to meddle with his tools, nor did he ask him to put the bar out:—Held, that defendants were not responsible for the injury, for the baggage man was not acting as their servant or in pursuance of his employment. *Cunningham* v. *Grand Trunk R. W. Co.*, 31 U. C. R. 350.

——— *Carelessness.*]—Some men in defendants' employment had been using a hand car on the track for laying down rails; and on approaching the Colborne station on their return home, about 5 p.m., and finding the railway track occupied by a train, they stopped at a highway crossing, about 400 yards from the station, removed the car from the rails, and placed it on the highway, the car encroaching some six to ten inches on the gravelled part. The men then left it, and remained away about half an hour, the foreman going to the station; and two men seeing it came and sat upon it. At this time the plaintiff drove past in his carriage, and his horse shying at the car ran away, threw the plaintiff out, and severely injured him. The foreman took the hand car back to a station, about four miles off, the same evening:—Held, that there was evidence of negligence to go to the jury, in thus placing the car on the highway, for which defendants were responsible; and a verdict for the plaintiff was upheld. Ivers v. *Grand Trunk R. W. Co.*, 23 C. P. 143.

——— *Contributory Negligence.*] — While defendants' servants were employed in the attempt to replace on the track one of defendants' engines which had run off it, near a highway crossing, but within defendants' grounds, the female plaintiff, with another woman, approached the crossing with a horse and waggon, and asked defendants' servants if they might cross, when one of them said yes, and then winked at the other and laughed. While she was crossing, she herself holding on to the horse by the head, and the other woman sitting in the waggon holding the reins, steam was let off through the sides of the engine, and the horse becoming frightened knocked down the female plaintiff and injured her:—Held, an actionable wrong, for which defendants were liable. Held, also, that there was clearly no evidence of contributory negligence, as every precaution was used in crossing. Semble, that even if the act was an unnecessary and wanton act on the part of defendants' servants, the defendants would still be liable, for it was done in the course of their (the servants') service and employment, and for the purpose, though ignorantly, of promoting the object of it. *Stott* v. *Grand Trunk R. W. Co.*, 24 C. P. 347.

See Jennings v. *Grand Trunk R. W. Co.*, 15 A. R. 477, 13 App. Cas. 800; *Canada Atlantic R. W. Co.* v. *Hurdman*, 25 S. C. R. 205, *post* 13.

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13. *Shunting.*

Negligence—*Volenti non Fit Injuria.*]—A lumber company had railway sidings laid in their yard for convenience in shipping lumber over the line of railway with which the switches connected, and followed the practice of pointing out to the railway company the loaded cars to be removed, the railway company thereupon sending their locomotives and crew to the respective sidings in the lumber yard and bringing away the cars to be despatched from their depot as directed by the bills of lading:—Held, that, in the absence of any special agreement to such effect, the railway company's servants while so engaged were not the employees of the lumber company, and that the railway company remained liable for the conduct of the persons in charge of the locomotive used in the moving of the cars; and that where the lumber company's employees remained in a car lawfully pursuing their occupation there, the persons in charge of the locomotive owed them the duty of using reasonable skill and care in moving the car with them in it, so as to avoid all risk of injury to them. On the trial of an action for damages in consequence of an employee of the lumber company being killed in a loaded car which was being shunted, the jury had found that "the deceased voluntarily accepted the risk of shunting," and that the death of the deceased was caused by defendants' negligence in the shunting, in giving the car too strong a push:—Held, that the verdict meant only that deceased had voluntarily incurred the risks attending the shunting of the cars in a careful and skilful manner, and that the maxim "volenti non fit injuria" had no application. Smith v. Baker, [1891] A. C. 325, applied. Judgments in 25 O. R. 209 and 22 A. R. 292 affirmed. *Canada Atlantic R. W. Co.* v. *Hurdman*, 25 S. C. R. 205.

See Hollinger v. *Canadian Pacific R. W. Co.*, 21 O. R. 705, 20 A. R. 244; *Blake* v. *Canadian Pacific R. W. Co.*, 17 O. R. 177, *ante* 1 (a); *Casey* v. *Canadian Pacific R. W. Co.*, 15 O. R. 574, *ante* 1 (a); *Atkinson* v. *Grand Trunk R. W. Co.*, 17 O. R. 220, *ante* 1 (b); *Jones* v. *Grand Trunk R. W. Co.*, 18 S. C. R. 696, *ante* 2; *Hutchinson* v. *Canadian Pacific R. W. Co.*, 17 O. R. 347, *ante* 3; *Canada Atlantic R. W. Co.* v. *Henderson*, 29 S. C. R. 632; *Collier* v. *Michigan Central R. W. Co.*, 27 A. R. 630; *Lake Erie and Detroit River R. W. Co.* v. *Barclay*, 30 S. C. R. 360.

See, also, *ante* 11.

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14. *Travelling with Passes.*

Liability—*Condition—Connecting Lines—Cattle Drover.*]—A contract was made by a railway company for the carriage of cattle to a point on the line of a connecting railway company at a fixed rate for the whole journey. The contract provided that the shipper (or his drover) should accompany the cattle; and that the person in charge should be entitled to a "free pass," but only "on the express condition that the railway company are not responsible for any negligence, default, or misconduct of any kind on the part of the company or their servants;"—Held, that the condition was valid and could be taken advantage of by the connecting railway company, who therefore were not liable to the shipper for injuries suffered by him in a colli-

sion caused by their servants' negligence. Hall v. North-Eastern R. W. Co. L. R. 10 Q. B. 437, applied. *Bicknell* v. *Grand Trunk R. W. Co.*, 26 A. R. 431.

——— *Contract.*]—Defendants gave a free ticket for 1857 over their railway in these words: "Pass J. S. free between any station and any station from the 1st January, 1857, to 31st December, 1857. This ticket is not transferable, and the person accepting it assumes the risk of accidents and damage:"—Held, that defendants were authorized to enter into a special contract, and were not liable for damage or injury arising to the person holding such a ticket while travelling under it. *Sutherland* v. *Great Western R. W. Co.*, 7 C. P. 409.

——— *Contract with Another Company—Director—Pleading.*]—Action for the death of Z. caused by a railway accident, the declaration averring that Z. was being carried by defendants for reward. Plea, that he was not received by them to be conveyed for reward as alleged, but as a passenger under a special contract contained in a free pass ticket by which he assumed the risk of accident. The plaintiff replied that the ticket was delivered to him in accordance with a certain agreement made between defendants and the Niagara Falls Suspension Bridge Co., by which said company leased to defendants the right of way over their bridge, in consideration of a certain rent, and of the right being given to the directors of said company to pass over defendants' road free of charge, and without any proviso as to the risk of accident; that Z. was a director in the company, and the agreement in force; that by virtue of it defendants were bound to carry Z. as such director, and were so carrying him at the time of said accident, and not under the contract in the plea mentioned:—Held, on demurrer, replication good, being in effect a denial that Z. was travelling upon such a ticket as set out in the plea; and that it was not a departure from the declaration. *Woodruff* v. *Great Western R. W. Co.*, 18 U. C. R. 420.

——— *Contract with Employer — Newsboy.*]—Declaration, under C. S. U. C. c. 78, by the administrator of A., alleging that A. was lawfully on the platform at a station on defendants' railway, and defendants so negligently managed and drove an engine and carriages loaded with timber, along the line near said station, that a piece of timber, projecting from said carriages, struck and killed the said A. Plea, that A. was a newsboy in the employ of C. & Co., vending papers on defendants' trains, under an agreement between C. & Co. and defendants, which agreement provided that defendants should carry C. & Co., their newsboys and agents, on their trains, and should not be liable for any injury to the persons or property of said C. & Co., their newsboys or agents, whether occasioned by defendants' negligence or otherwise:—Held, plea good, without alleging that A. was a party to or aware of the agreement. Quære, whether such a contract is to be considered as made with the person carried, and if so, as to the effect of his being an infant. *Alexander* v. *Toronto and Nipissing R. W. Co.*, 33 U. C. R. 474.

See Bettridge v. *Great Western R. W. Co.*, 3 E. & A. 58; *Farr* v. *Great Western R. W. Co.*, 35 U. C. R. 534.

15. *Unskilful or Improper Construction of Railway.*

Negligence — *Embankment — Jury.*] — In an action against a railway company for negligence in the construction of their line, it was proved that the embankment which had given way, and caused the death of the person on whose account the action was brought, was so constructed that a pool of considerable extent had formed, in which the drainage of 60 or 70 acres of land would remain and saturate the railway track upon occasions of heavy or continued rains. The jury—although several of the most eminent engineers of the Province gave their opinion that the embankment was properly and skilfully constructed, and the Judge cautioned them against valuing such evidence lightly—found for the plaintiff. The court refused a new trial on the ground of the verdict being against the weight of evidence. *Braid* v. *Great Western R. W. Co.*, 10 C. P. 137.

——— *Portion Giving Way—Evidence—Act of God—Nondirection.*]—Where an injury is alleged to have arisen from the improper construction of a railway, the fact of its having given way will amount to primâ facie evidence of its insufficiency; and this evidence may become conclusive from the absence of any proof on the part of the company to rebut it. A railway company, in the formation of their line, are bound to construct their works in such a manner as to be capable of resisting all violence of weather which, in the climate through which the railway runs, might be expected, though perhaps rarely, to occur. In an action to recover compensation for injuries resulting to a passenger from an accident caused by the giving way of a portion of the railway, it was proved, on behalf of the company, that they had always employed skilful engineers in the construction of their works, and that the giving way was caused by a storm of unusual violence. The Judge in directing the jury never explained to them the effect of such evidence upon the question of negligence:—Held, that the jury ought to have had their minds distinctly and pointedly directed to this question; but as, notwithstanding this nondirection, the verdict was in accordance with the evidence, the judgment below refusing a new trial was affirmed. *Great Western R. W. Co.* v. *Fawcett*, 9 L. J. 160, 1 Moo. P. C. N. S. 101, 9 Jur. N. S. 339.

Roadbed—*Defects in.*]—Liability of railway company for loss of luggage caused by defects in roadbed, constructed under contract for the government before the acquisition of the road by the defendants. *Bate* v. *Canadian Pacific R. W. Co.*, 14 O. R. 625, 15 A. R. 388, 18 S. C. R. 697.

——— *Faulty Construction — Company Operating Line.*]—Where a railway crosses a public highway at a level crossing, and it is open to observation that the highway is in a dangerous state, liability will rest upon the operating company for resulting accident, even although a different company were responsible for the original faulty construction of the railway roadbed which led to the unsafe condition of the highway. *Sibbald* v. *Grand Trunk R. W. Co.*, *Tremayne* v. *Grand Trunk R. W. Co.*, 19 O. R. 164, 18 A. R. 184, 20 S. C. R. 259.

See Browne v. *Brockville and Ottawa R. W. Co.*, 20 U. C. R. 202, *ante* 1 (a).

See, also, *ante* 1 (c).

XIV. Intersection of Railways.

Appointment of Arbitrators—*Appeal—Companies—Plans.*]—The order of a Judge appointing arbitrators to settle the terms on which one railway shall cross another, under 14 & 15 Vict. c. 51, s. 9, s.-s. 15, cannot be reversed by the court. That clause is not confined in its application to companies subject to the Railway Act. The enactments as to filing plans in that Act have no application to a case of intersection. *In re Buffalo and Lake Huron R. W. Co. and Great Western R. W. Co.*, 14 U. C. R. 397.

——— *Disagreement — Owners — Plan — Compensation—Tender.*]—On an application of the Buffalo and Lake Huron R. W. Co. for the appointment of arbitrators to arrange for their intersection with the Great Western R. W. Co., it appeared that in 1854 a negotiation was entered into between the Buffalo, Brantford, and Goderich R. W. Co. (former owners of the applicants' line) and the Great Western R. W. Co., upon the same question; but no agreement was then made, as the latter company wished the crossing to be under their road, which the former would not accede to. Subsequently the Buffalo and Lake Huron R. W. Co. wrote to the Great Western R. W. Co. requesting a meeting to settle the matter, and received an answer refusing any discussion until the adjustment of certain claims by the latter company against the Buffalo, Brantford, and Goderich R. W. Co.:—Held, that such refusal was unauthorized, and that a disagreement between the companies as to the point or manner of crossing sufficiently appeared to warrant the appointment of arbitrators. Held, also, that it was not necessary, before claiming a crossing, that the name of the Great Western R. W. Co. should be inserted in the plan and book of reference filed by the applicants, as the owners of land to be taken for such crossing, or to tender compensation, for no land was required to be taken, but only an easement. *S. C.*, 2 P. R. 88.

Award—*Motion against—Appeal—Time.*]—Arbitrators appointed under the Railway Act (R. S. O. 1877 c. 165) to determine the compensation to be paid by the Credit Valley Railway Company to the Great Western Railway Company in respect of their power of crossing the latter railway under s.-s. 15 of s. 9 of the Act, made an award on the 31st December, 1877. On the 19th February, 1878, after Hilary term had expired, the Great Western Railway Company obtained a rule nisi to set aside the award, and also took steps to appeal against it, under s. 19 of R. S. O. 1877 c. 165, within the month after the award, by filing a bond for costs, and giving notice of intention to appeal:—Held, that this was not a submission to arbitration within 9 & 10 Wm. III. c. 15, or s. 291 of the C. L. P. Act, so as to enable the submission to be made a rule of court; and that, even if it were, the motion for the rule nisi should have been made before the last day of Hilary term; and that the appeal therefrom was too late, as the giving security was not a commencement of the appeal within the meaning of s.-s. 19 of s. 20. Semble, also, that the appeal given by that section is confined to arbitrations respecting lands and their valuation, and does not extend to an arbitration with regard to the intersection of railways. *Re Credit Valley R. W. Co. and Great Western R. W. Co.*, 4 A. R. 532.

Provincial Crossing — *Dominion Railway—Approval—Waiver.*]—When it is necessary for a Provincial railway in Ontario to cross a Dominion railway, the company desiring to effect such crossing must procure the approval of the commissioner of public works for Ontario, as well as the approval of the railway committee of the privy council of the Dominion; and the railway companies cannot, by arrangement, waive this provision. *Credit Valley R. W. Co.* v. *Great Western R. W. Co.*, 25 Gr. 507.

XV. Lands and their Valuation.

1. *Compulsory Expropriation of Lands.*

(a) *Generally—Rights and Powers of Companies.*

Alienation of Lands Taken — *Estoppel.*]—Held, that the Grand Trunk R. W. Co., under 14 & 15 Vict. c. 51, has no power to convey or alienate lands; and certainly not lands acquired by them for the purposes of the railway, and which were necessary for its construction, maintenance, and accommodation. Quære, as to such power under C. S. C. c. 66, s. 9, s.-s. 2. As the deed from the company was not shewn to contain any covenant:—Held, in ejectment against them, that they were not estopped; and, quære, whether, in any case, they could be estopped in such an action. *Pratt* v. *Grand Trunk R. W. Co.*, 8 O. R. 499.

Charter—*Strict Construction.*]—There is a distinction between the rights conferred upon municipal corporations and railway companies respectively to expropriate property, the former existing for the public good, the latter being commercial enterprises only. The charters of the latter are therefore more rigidly construed than are the powers of a municipal corporation. *Harding* v. *Township of Cardiff*, 29 Gr. 308.

Foreshore of Harbour — *Statutory Right to Take—Conflict with Municipality—Jus Publicum—Crossing.*]—By 44 Vict. c. 1, s. 18 (D.), the Canadian Pacific Railway Company "have the right to take, use, and hold the beach and land below high water mark, in any stream, lake, navigable water, gulf, or sea, in so far as the same shall be vested in the Crown and shall not be required by the Crown, to such extent as shall be required by the company for its railway and other works, and as shall be exhibited by a map or plan thereof deposited in the office of the minister of railways." By 50 & 51 Vict. c. 56, s. 5 (D.), the location of the company's line of railway between Port Moody and the city of Westminster, including the foreshore of Burrard Inlet, at the foot of Gore avenue, Vancouver city, was ratified and confirmed. The Act of incorporation of the city of Vancouver, 49 Vict. c. 32, s. 213 (B.C.), vests in the city all streets, highways, &c., and in 1892 the city began the construction of works extending from the foot of Gore avenue, with the avowed object of crossing the railway track at a level and obtaining access to the harbour at deep water. On application by the railway company for an injunction to restrain the city corporation from proceeding with their work of construction and crossing the railway:—Held, that, as the foreshore formed part of the land required by the railway company, as shewn on the plan deposited

in the office of the minister of railways, the jus publicum to get access to and from the water at the foot of Gore avenue was subordinate to the rights given to the railway company by the statute 44 Vict. c. 1, s. 18a, on the foreshore, and therefore the injunction was properly granted. *City of Vancouver* v. *Canadian Pacific R. W. Co.*, 23 S. C. R. 1.

Mining Lands—*Injunction.*]—See *Jenkins* v. *Central Ontario R. W. Co.*, 4 O. R. 593.

"Owner"—*Person in Possession—Title—Jus Tertii.*]—By s. 103 of the Railway Act of Canada, 51 Vict. c. 29, the lands which may be taken without the consent of the owner shall not be more than 650 yards in length by 100 yards in breadth. The defendants desired to use for their railway a tract of land more than 650 yards long of which the plaintiff was in possession, and they alleged that a strip in the middle of the tract was ordnance land of the Crown, and therefore sought to expropriate two pieces, one on each side of the alleged ordnance reserve, which latter the plaintiff claimed as his own by length of possession:—Held, that the scheme of the Act is that the company shall deal with the person in possession as owner, and if the company propose to disturb that possession, it must be pursuant to the powers conferred by the Act; the matter of title is to be held in abeyance until a later stage in the expropriation proceedings. The company cannot, even in the case of defective title, ignore the person who actually occupies the land as owner, and proceed as if his interest had been duly invalidated by legal process on the part of the real owner. Though part of the land be held by a precarious tenure, yet where there is possession of the whole as one property, there should be but one set of proceedings and one arbitration, and the whole should be dealt with under the statute as the property of one and the same owner. *Stewart* v. *Ottawa and New York R. W. Co.*, 30 O. R. 599.

Powers — *Cesser of, on Completion of Railway.*]—See *Kingston and Pembroke R. W. Co.* v. *Murphy*, 17 S. C. R. 582, *post* (c).

Purpose— *Building Station — Consent of Owner.*]—Held, that 46 Vict. c. 64 (D.), which empowered the company to hold and own land in any municipality through or in which the main line or any branch was carried for the erection and maintenance thereon of stations, sidings, &c., as might be necessary for the purposes of the company, did not empower them to expropriate against the will of the owner. *Kingston and Pembroke R. W. Co.* v. *Murphy*, 11 O. R. 302.

——— *Improper Purpose — Acquisition of Fee Simple.*]—Where the special Act of a railway company incorporated the clauses of the general Railway Act relating to powers, plans, and surveys, and lands and their valuation, and also authorized the company, from and out of the ores obtained along their line of railway, to manufacture iron and steel for their own use, and to acquire mining properties by purchase; and the company had chosen a site for a station upon the lands of the plaintiffs, covering a valuable mine of magnetic iron ore, and called upon the plaintiffs to arbitrate, and the plaintiffs were unwilling to part with the land:—Held, that the plaintiffs could not obtain an injunction restraining the company from expropriating the land in question, even though it were conceded that the company knew of the mine, and that it was the property of the plaintiffs, for the legislature had left the expropriation clauses to their full effect, which, in this country, at least, enables the company to acquire the fee of the land. Aliter, if it were proved that the company were acquiring the land not for the purposes for which the powers were given, but for some collateral object, as, for example, with the object of afterwards selling it to a third party. Semble, that if it should afterwards appear that such a scheme was actually in contemplation, and had been carried out, means might be found to frustrate it. *Jenkins* v. *Central Ontario R. W. Co.*, 4 O. R. 593.

——— *Improper Purpose—Injunction.*]—Where a railway company gave notice of their intention to expropriate certain lands adjoining their lines, but which were not required for building any of their works upon, and the evidence shewed grounds for supposing that the powers were to be exercised for other than those purposes which the railway laws of this country permit and allow:—Held, that they should be enjoined from proceeding with the expropriation. *Nihan* v. *St. Catharines and Niagara Central R. W. Co.*, 16 O. R. 459.

——— *Taking Gravel.*] — The Northern Railway Company of Canada have no power to take land compulsorily under s. 7, s.-s. 2, or s. 2, s.-s. 10, of the Railway Act of 1868, incorporated in their special Act 38 Vict. c. 65 (D.), for the purpose only of obtaining therefrom gravel or other material for the repair or maintenance of their road, because these sections do not confer compulsory powers to take land. Nor have they such powers under s. 9, s.-s. 38 and 39, of the Railway Act of 1879, because that Act does not apply to their railway. Semble even if compulsory powers are conferred by s. 9, s.-s. 10, of the Act of 1868, that the powers are to take materials only, not the land itself, as was attempted in this case. *Re Watson and Northern R. W. Co.*, 5 O. R. 550.

Semble, that a purchase of land for a gravel pit, under 18 Vict. c. 176, s. 20, is to be governed by the same proceedings as purchases of other lands by the company. *Mitchell* v. *Great Western R. W. Co.*, 35 U. C. R. 159, note a. See *S. C.*, 38 U. C. R. 471.

Quebec Law.] — See *Quebec, Montmorency, and Charlevoix R. W. Co.* v. *Gibsone*, 29 S. C. R. 340.

Resuming Title to Lands Taken.]—See *Jessup* v. *Grand Trunk R. W. Co.*, 7 A. R. 128; *Erie and Niagara R. W. Co.* v. *Rosseau*, 17 A. R. 483.

Right to Take Part of Block—*Church —Injunction.*]—The plaintiffs were incorporated under 37 Vict. c. 91 (O.) for the purpose of building a cathedral, and were the owners of a block of land enclosed within one fence, and bounded on three sides with streets, known as the cathedral or chapter house block, upon which they had erected a chapter house as part of the cathedral, and had leased other portions, but for want of funds the other part of the cathedral was not proceeded with for some years. The defendants, in constructing their railway, required part of the block, which would cut off a part of the

cathedral, when erected, for their line, and took possession of it, but the plaintiffs, under the circumstances, declined to sell or convey, or arbitrate as to the value of, anything less than the whole block. In an action to compel the railway company to take the whole and desist from their proceedings as to part only:—Held, that the block of land was set apart for cathedral purposes, and had not, by any default of the plaintiffs, lost that distinctive ecclesiastical character, and an injunction was granted against the railway taking a part only, as in Sparrow v. Oxford, &c., R. W. Co., 2 D. M. & G. 94. It was contended by the plaintiffs that the defendants, having taken possession, could not withdraw, but must take the whole block:—Held, that the mere going into possession of part, although a high-handed act on the part of the defendants, did not necessarily commit them to the purchase of the whole, and that the defendants should have the option to take the whole or withdraw, and pay all damages and costs sustained by the plaintiffs. But see 50 & 51 Vict. c. 19, s. 4 (D.) *Cathedral of the Holy Trinity* v. *West Ontario Pacific R. W. Co.*, 14 O. R. 246.

Statutory Vesting.]—The Acts vest the land in the company, and not merely an easement or right of way over the roadway. *Anglin* v. *Nickle*, 30 C. P. 72.

Title of Company—*Proof of.*]—Where land had been taken by the Great Western R. W. Co. for the purpose of their railway under 9 Vict. c. 81, s. 30, and 16 Vict. c. 99, the company, in ejectment brought by them, can rely on the title acquired thereby, and are not driven to prove strictly the title of their grantors. *Great Western R. W. Co.* v. *Lutz*, 32 C. P. 166.

See City of Toronto v. *Metropolitan R. W. Co.*, 31 O. R. 367, *post* STREET RAILWAYS.

(b) *Compensation.*

Action for—*Bond—Award.*]—See *Masson* v. *Robertson*, 44 U. C. R. 323.

——— *Defence — Previous Conveyance.*] — In 1854 the plaintiff, in consideration of £156 5s., conveyed certain land to the Woodstock and Lake Erie Railway Company for their track across his farm, which they, after doing some work on it, abandoned, and the plaintiff in 1855 retook possession, and continued to hold it for more than twenty years. In 1872 defendants were incorporated by 35 Vict. c. 53 (O.), which empowered them to acquire the lands and roadway of the Woodstock and Lake Erie Railway Company; and by 36 Vict. c. 88, s. 1 (O.), in amendment of that Act, it was enacted that after acquiring the said lands, &c., they were to be entitled to all the rights over the same theretofore possessed by the said company. In 1874, without having attempted to acquire the land under these statutes, they, with full knowledge of all the circumstances, dealt with the plaintiff as the owner, went to arbitration with him, and received possession on execution of the arbitration bond; and $374.40 was awarded to the plaintiff as compensation:—Held, that the plaintiff was entitled to recover on the award, the previous conveyance to the old company forming no defence. *Parsons* v. *Port Dover and Lake Huron R. W. Co.*, 28 C. P. 84.

——— *Tender of Conveyance.*] — A landowner to whom compensation has been awarded for land taken by a railway company, under the Railway Act, C. S. C. c. 66, cannot sue upon the award before tendering a conveyance of the land. A plea to such an action, that no such conveyance had been executed or tendered, was therefore held good. *Cawthra* v. *Hamilton and North-Western R. W. Co.*, 41 U. C. R. 187.

Amount of — *Ascertainment — Date of Taking.*]—In fixing compensation to a land owner for lands expropriated for a railway, the rule is, to ascertain the value of the land of which it forms a part before the taking, and the value of such land after the taking, and deduct one from the other, the difference thus arrived at being the actual value to the owner of the part taken. Rule laid down in Re Ontario and Quebec R. W. Co. and Taylor, 6 O. R. at p. 348, followed. The "taking" is properly fixed as at the date of the company giving notice to the land owner of their intention of taking the land; and it is not correct to say that the value of the lands should be taken as of a date prior to knowledge of intention to construct, or in anticipation of the construction of the railway. *James* v. *Ontario and Quebec R. W. Co.*, 12 O. R. 624.

Held, by the court of appeal affirming the judgment in 12 O. R. 624, that in ascertaining the compensation to be made to a land owner for land expropriated for a railway under R. S. C. c. 109, s. 8, the value of the part taken (as well as the increased value of the part not taken, which by s.-s. 21 is to be set off) must be ascertained with reference to the date of the deposit of the map or plan and book of reference, under s.-s. 4 (or in this case with reference to the date of the notice or determination to expropriate), and, therefore, such value should include an increase which may have been caused by, or is owing to, the contemplated construction of the railway. *S. C.*, 15 A. R. 1.

——— *Ascertainment — Reference.*]—The remedies pointed out by statute for settling the claims of land owners to compensation for lands taken becoming ineffectual, the court will direct a reference to the master for that purpose. *Malloch* v. *Grand Trunk R. W. Co.*, 6 Gr. 348.

——— *Ascertainment—Reference—Powers of Master.*]—Instead of proceeding under the statute to ascertain the amount to be paid to the owner of lands taken for the purposes of a railway, the parties consented to a decree referring it to the master to ascertain and settle the amount payable by the company "for compensation or damages for the lands . . . taken or to be taken" by the company; the master to have all the powers of an arbitrator under C. S. C. c. 66, but to act as master, with a right to either party to appeal:—Held, that under this reference the master had no authority to award compensation to the owner for the severance of one portion of the property from the other, or on account of access to a spring being obstructed, nor for increased risk of fire to the premises of the owner, nor for lands injuriously affected in any way but not taken. *Cummins* v. *Credit Valley R. W. Co.*, 21 Gr. 162.

——— *Benefit to Remaining Land—Deduction.*]—Where arbitrators are appointed to award compensation for lands taken for the

purposes of a railway and to assess the damages sustained by the proprietors by reason of the severance of the lands, they may properly take into consideration the increased value to the estate by reason of the construction of the railway, although benefited only in the same way as other farms in the neighbourhood through which the railway does not pass; as also the increase in value by reason of the probable location of a station at a town in the vicinity of the lands, which the company had bound themselves to place there in consideration of a bonus paid by such town. *Re Credit Valley R. W. Co and Sprague*, 24 Gr. 231.

——— *Cutting Trees—Damage to Remaining Land—Notice.*]—The right of a railway company to cut down trees for six rods on each side of the railway under the Consolidated Railway Act, 1879, s. 7, s.-s. 14, is entirely distinct from their right to expropriate land for the road. If compensation can be claimed for it, it must be distinctly demanded by the notice:—Held, therefore, that an award was bad in allowing compensation to the owner of lands expropriated for the damage that might accrue to the owner by the possible exercise of such right. Quære, whether, under the Consolidated Railway Act, 1879, more than the value of the land actually taken can be allowed, as the Act does not contain a section equivalent to s. 7 of R. S. O. 1877 c. 165, and s. 5 of C. S. C. c. 66, giving compensation for damages to lands injuriously affected. Semble, that where a parcel of land is severed by the railway the actual value is the difference between the value of the land of which it forms part before the expropriation, and the value to the owner of the remainder after the expropriation. Held, that the possible damage to bush land from greater exposure to winds and storms, and the greater liability to injury by fire by reason of the working of the railway, were contingencies too remote to be considered in estimating the amount of compensation where there were no buildings to be endangered. The notice by the railway company included compensation "for such damages as you may sustain by reason or in consequence of the powers above mentioned:"—Held, sufficient to allow the arbitrators to award damages resulting to the owner from the expropriation. *In re Ontario and Quebec R. W. Co. and Taylor*, 6 O. R. 338

——— *Depreciation of Land—Farm Crossing.*]—Where land expropriated for government railway purposes severed a farm, the owner, although not at the time entitled to a farm crossing apart from contract, was held entitled to full compensation covering the future as well as the past for the depreciation of his land by the want of such a crossing. *Guay* v. *The Queen*, 17 S. C. R. 39. See 52 Vict. c. 38, s. 3; *Vezina* v. *The Queen*, 17 S. C. R. 1.

——— *Depreciation of Remaining Land.*]—Arbitrators appointed to assess the damages sustained by land owners whose lands have been taken for railway purposes, have a right to take into consideration matters other than the value of the mere quantity of land taken. Where, therefore, arbitrators allowed a sum "for depreciation to farm generally by the permanent occupation of the land as a railway," the award was held valid. *Great Western R. W. Co.* v. *Warner*, 19 Gr. 506.

——— *Excess.*] — The court set aside awards made under 9 Vict. c. 81, as to compensation to be paid to persons whose land was required for the Great Western Railway; the sum awarded being so excessive as to shew clearly that the arbitrators had disregarded the direction of the statute, to consider the benefit conferred on the property as well as the damage done. *Great Western R. W. Co.* v. *Baby*, 12 U. C. R. 106.

Award held objectionable for the excessive compensation given. *Great Western R. W. Co.* v. *Dodds*, 12 U. C. R. 133. See also *Great Western R. W. Co.* v. *Dougall*, *ib.*

The award was set aside: 1. Because the arbitrators, in valuing the land, which bordered on water, allowed a large sum for the water frontage, to which the owner had no legal or equitable right, but merely a supposed claim upon the favourable consideration of the government to grant it to him. 2. Because the award did not transfer any such claim to the company, if the arbitrators could legally have allowed for it. Quære, whether the sum awarded was not so extravagant as in itself to vitiate the award. *In re Miller and Great Western R. W. Co.*, 13 U. C. R. 582.

An award cannot be impugned on the ground of excessive damages on the affidavit of one of the arbitrators, in which he gives no data or basis for calculation to support his opinion against the majority. *In re Great Western R. W. Co. and Chauvin*, 1 P. R. 288.

Upon a petition under 38 Vict. c. 15 (O.) for the review of awards made against a railway company for compensation for land taken, on the ground that the sums awarded were excessive, the evidence as to value being conflicting, the awards were upheld. Quære, as to the admissibility of affidavits on such an application. The intention of the statute was not to make the Judge appealed to a substitute for the arbitrators, or to permit him to reverse their finding as to amount, on the weight of evidence merely, where a similar verdict could not be set aside for excessive damages. Some misconduct, legal or otherwise, or the disregard of some legal principle, must be shewn. One of the arbitrators, an old resident and well acquainted with the locality, protested against the waste of time involved in taking the evidence of many witnesses having much less knowledge of the value of the land than himself, and in the end, having received the evidence, refused to give up his own judgment to that of such witnesses:—Held, that he could properly do so. Where the company desired to take land, as authorized by s. 129 of C. S. C. c. 66, for an extension across three lots of their original line, which was in operation:—Held, that the arbitrators were not required to take into consideration the additional value conferred on such land by the original construction of the railway. The intention of the Act is, that when the act proposed to be done, whether original construction or proposed deviation, gives increased value to the land, the owners must allow for such increase. *In re Canada Southern R. W. Co. and Norvall*, 41 U. C. R. 195.

See Norvall v. *Canada Southern R. W. Co.*, 5 A. R. 13; *Great Western R. W. Co.* v. *Warner*, 19 Gr. 506; *Cummins* v. *Credit Valley R. W. Co.*, 21 Gr. 162.

——— *Interference on Appeal.*]—See *The Queen* v. *Paradis*, *The Queen* v. *Beaulieu*, 16 S. C. R. 716; *The Queen* v. *Charland*, *ib.* 721.

——— *Mandamus to Settle — Application for—Title.*]—The owner of land taken by a railway, is entitled to compensation; and the company must proceed to settle the amount thereof, under R. S. O. 1877 c. 165, s. 20; if they do not, the proper course is to apply for a mandamus. On such application a formal title, in the absence of proof to the contrary, need not be proved; it is sufficient if the applicant swear that he is the owner of the land taken. *Demorest* v. *Midland R. W. Co.*, 10 P. R. 73.

——— *Taking for Gravel — Operation of Railway—Farm Crossing.*] — Where land is taken by a railway company for the purpose of using the gravel thereon as ballast, the owner is only entitled to compensation for the land so taken as farm land where there is no market for the gravel. The compensation to be paid for any damages sustained by reason of anything done under and by authority of R. S. O. c. 29, s. 3, s.-s. (e), or any other Act respecting public works or government railways, includes damages resulting to the land from the operation as well as from the construction of the railway. The right to have a farm crossing over one of the government railways is not a statutory right, and in awarding damages full compensation for the future as well as for the past for the want of a farm crossing should be granted. *Vézina* v. *The Queen*, 17 S. C. R. 1. See *Guay* v. *The Queen*, *ib.* 30.

Election to Dispense with—*Rights of Successor in Title.*]—S., being the owner of lands through which the defendants desired to build their road, agreed to give them the right of way, and the company, with his written permission, took possession without compensation and constructed their road, and had up to this time been in uninterrupted possession for more than ten years. The plaintiff, claiming under S., now demanded compensation and obtained a mandamus nisi to proceed to arbitration under the Railway Act, 1888:—Held, that the plaintiff was not entitled; that S. having the right to accept any or no compensation, and having elected to take none, the company then became entitled to the lands, and the plaintiff could not succeed. *Thompson* v. *Canada Central R. W. Co.*, 3 O. R. 136.

Enforcement of Judgment for—*Lien—Sale—Injunction.*] — Held, that where a railway company had failed to pay the balance of compensation awarded to land owners in accordance with a judgment obtained for the same, although they had entered into possession and were operating their railway over the lands, the land owners were entitled to an order declaring them to have a vendor's lien on the lands for the amount, with such provisions as were necessary to realize by means of a sale; but they were not entitled to an injunction to restrain the defendants from operating the railway on the lands, nor to an order for delivery up of possession. Allgood v. Merrybent and Darlington R. W. Co., 33 Ch. D. 571, distinguished. *Lincoln Paper Mills Co.* v. *St. Catharines and Niagara Central R. W. Co.*, 19 O. R. 106.

Interest — *Confirmation of Title — Diligence.*]—On a petition to the superior court praying that a railway company be ordered to pay into the hands of the prothonotary of the superior court a sum equivalent to six per cent. on the amount of an award previously deposited in court under s. 170 of the Railway Act, and praying further that the company should be enjoined and ordered to proceed to confirmation of title with a view to the distribution of the money, the company pleaded that the court had no power to grant such an order, and that the delay in proceeding to confirmation of title had been caused by the petitioner, who had unsuccessfully appealed to the higher courts for an increased amount:—Held, that by the terms of s. 172 of the Railway Act it is only by the judgment of confirmation that the question of additional interest can be adjudicated upon. Held, further, that, assuming the court had jurisdiction, until a final determination of the controversy as to the amount to be distributed, the railway company could not be said to be guilty of negligence in not obtaining a judgment in confirmation of title: Railway Act, s. 172. *Atlantic and North-West R. W. Co.* v. *Judah*, 23 S. C. R. 231.

——— *Date of Commencement.*]—Interest is properly allowed to the land owner on the amount of his compensation from the time of the taking to the time of the award. *James* v. *Ontario and Quebec R. W. Co.*, 12 O. R. 624.

——— *Rate of.*]—Money was paid into a bank under the Consolidated Railway Act, 1879 (D.), s. 9, s.-s. 28, and an order for immediate possession of lands expropriated by the company was made by a Judge under the subsection, and an award of compensation was made subsequently: — Held, that the land owner was entitled to interest on the amount awarded him only at the rate allowed by the bank on the money paid in and not at the legal rate. *Re Taylor and Ontario and Quebec R. W. Co.*, 11 P. R. 371.

An order was obtained for immediate possession of land under the Consolidated Railway Act, 1879 (D.), and money was paid into a bank under the same Act by the company:—Held, that the land owner was entitled to interest upon the amount subsequently awarded him from the date of the award, only at the rate allowed by the bank upon a deposit and not at the legal rate of six per cent. Re Lea, 21 C. L. J. 154, followed. *Re Philbrick and Ontario and Quebec R. W. Co.*, 11 P. R. 373.

——— *Right to—Payment into Court.*]—F., the owner of land required for the Canada Air Line Railway, having refused the sum tendered by the company, an arbitration was had. The arbitrators awarded him $800, and settled the costs of the award at $31. This sum he refused to receive without his costs and interest from the date of the award; whereupon the company paid it into court with six months' interest, under 16 Vict. c. 99, s. 7, and a notice was published as that clause directs. F. then applied for a rule upon the company to shew cause why the money should not be paid to him, with interest and costs of the arbitration, and why they should not join in the conveyance, or give an undertaking to secure the construction and maintenance of a farm crossing, which the award provided for:—Held, that the application must be refused, for that the company, having taken all proper proceedings under the section mentioned, had acquired the title, and had nothing more to do; and the applicant's proper course was to file his claim and apply as the section provides. *In re Foster and Great Western R. W. Co.*, 32 U. C. R. 162.

The money awarded for land taken for the Great Western Railway having been paid into court by the company, with six months' interest, and it being from no fault on their part that the claimant did not receive it within the six months, the court discharged with costs a rule calling upon them to pay further interest; and it was referred to the master to report as to the claims filed, and the right of the applicant to the money. *S. C., ib.* 503.

Offer — *Subsequent Arbitration — Time for Making Award — Reference back.*] — D. brought an action to compel a railway company to arbitrate to ascertain the value of certain land taken for the purposes of the railway company, and after the service of the writ the company served a notice to arbitrate, and after arbitration an award was made by two of the arbitrators, but was subsequently set aside by the court as invalid. D. then proceeded with his action, and the railway company pleaded that the arbitrators had fixed a time for the making of the award, but did not make any within the time limited, and did not enlarge the time, and that therefore the sum of $400 offered by the railway company before proceedings taken had become the amount of the compensation. The Judge found on the evidence that no time had been fixed by the arbitrators for making the award: —Held, that, as the parties by their pleadings had placed themselves upon an issue as to whether the arbitrators had fixed a time or not, and as that issue was found in favour of the plaintiff, the sum of $400 offered had not become the compensation to be paid; and a reference back was ordered. *Demorest* v. *Grand Junction R. W. Co.*, 10 O. R. 515.

Offer to Mortgagee — *Amount Chargeable — Redemption.*] — A mortgagee of land, part of which was taken by a railway company, was offered £100 as compensation for the land so taken, which he refused; and the matter having been referred to arbitration, £30 only was awarded. On a bill filed to redeem: — Held, that, under the circumstances, he was chargeable with the sum awarded, and no more. *Gunn* v. *McDonald*, 11 Gr. 140.

Payment — *Condition Precedent to Possession.*] — See *Corporation of Parkdale* v. *West*, 12 App. Cas. 602, *post* (e).

Payment out of Court—*Notice.*]—When money has been paid into court as the value of land required by a railway company, the court will not upon an ex parte motion order it to be returned to the company. *In re Ontario, Simcoe, and Huron R. W. Co. and Cotton*, 4 Gr. 101.

See Cawthra v. *Hamilton and North-Western R. W. Co.*, 41 U. C. R. 187.

——— *Order—Appeal.*]—An order granted under the Railway Act, R. S. C. c. 109, s. 8 (31), by a Judge in chambers for payment out of money deposited by a railway company as security for land taken for railway purposes, is not appealable as a proceeding instituted in a superior court within the meaning of R. S. C. c. 135, s. 28. *Canadian Pacific R. W. Co.* v. *Little Seminary of Ste. Thérèse*, 16 S. C. R. 696.

A Judge making an order under s. 165 of the Dominion Railway Act, 51 Vict. c. 29, for payment out of court of compensation moneys, acts, not for the court, but as persona designata by the statute; and no appeal to a divisional court lies from his order. Canadian Pacific R. W. Co. v. Little Seminary of Ste. Thérèse, 16 S. C. R. 696, followed. *Re Toronto, Hamilton, and Buffalo R. W. Co. and Hendrie*, 17 P. R. 199.

Refund of Money—*Diligence.*] — A railway company took possession of and built their road across a plot of land of the plaintiff, who instituted proceedings to compel payment therefor. Under the decree a sum of $1,800 was found to be the value of such plot, which sum, together with interest and costs, was paid by the company in order to prevent the land being purchased by a rival company; and three years afterwards they applied on petition to have a portion of such purchase money refunded, on the ground that another railway company, whose rights had been assigned to them, had previously paid a prior owner of the land for a portion thereof. The court refused the relief asked with costs, on the ground, amongst others, that the company, had they exercised due diligence in the matter, might have become aware of such prior purchase and payment. *Dumble* v. *Cobourg and Peterborough R. W. Co.*, 29 Gr. 121.

Right to Compensation—*Doubt as to Ownership—Title—Reference.*] — A railway company took possession of certain lots in a city, under the compulsory powers in their Act of incorporation, but omitted to take any steps to ascertain the amount of compensation to be paid therefor. After a delay of some years the owner of the property filed a bill to enforce payment of compensation, when the company objected to the title on the ground that prior to the company taking possession the plaintiff had disposed of the property by lottery, and the company therefore felt unsafe in settling with him, and were not aware who were the persons really entitled to compensation. It appeared in evidence that nothing had been done to validate the title of the purchasers at such lottery as directed by the statute (27 & 28 Vict. c. 32.) The court therefore decreed a reference to inquire as to the title of the plaintiff, when, if it should appear that the plaintiff could make a good title, the master was to settle the amount of compensation (being the present value of the land), which was to be paid by the company to the plaintiff, together with his costs of suit. *Scanlon* v. *London and Port Stanley R. W. Co.*, 23 Gr. 559.

——— *Mortgagee.*]—A mortgagor does not represent his mortgagee for purposes of the Railway Act of Ontario, and is not included in the enumeration of the corporations or persons who under s. 13 of R. S. O. 1887 c. 170 are enabled to sell or convey lands to the company. He can only deal with his own equity of redemption, leaving the mortgagee entitled to have his compensation for lands taken separately ascertained. *In re Toronto Belt Line R. W. Co.*, 26 O. R. 413.

A railway company took possession of certain lands under warrant of the county court Judge, and proceeded with an arbitration with the owners as to their value. The lands were subject to a mortgage to the plaintiffs, who received no notice of, and took no part in, the arbitration proceedings, and gave no consent to the taking of possession. An award was made, but was not taken up either by the rail-

way company or the owners. The plaintiffs brought this action against the railway company and the owners for foreclosure, offering in their claim to take the compensation awarded, and release the lands in the possession of the railway company:—Held, that the railway company were proper parties to the action, and that the plaintiffs were entitled to a judgment against all the defendants with, in view of the offer, a provision for the release of the lands in the possession of the railway company on payment to the plaintiffs of the amount of the award. Per Osler and Maclennan, JJ. A.—Sub-section 25 of s. 20, R. S. O. 1887 c. 170, applies only where the compensation has been actually ascertained and paid into court. *Scottish American Investment Co. v. Prittie*, 20 A. R. 398.

——— *Mortgagor—Conveyance of Equity.*] —See *Farr* v. *Howell*, 31 O. R. 693.

——— *Tenant for Years.*]—A railway Act provided that the company should make satisfaction "to all persons and corporations interested" in any lands which should be taken under the powers given, and should agree with the "owners or occupiers respectively," touching the compensation to be paid to them:—Held, that a tenant for a term of years was within the Act, and might maintain trespass against defendants, who had entered, having compensated only the owner in fee. *Johnson* v. *Ontario, Simcoe, and Huron R. W. Co.*, 11 U. C. R. 246.

——— *Tenant for Years—Remedy—Estopped.*] — The Grand Trunk Railway passed through land of which C. was owner, and the plaintiff a tenant for years. In 1853 an arbitration was held to determine the sum to be paid to C., and the plaintiff, being appointed arbitrator on his behalf, concurred in an award, saying nothing then of his own claim, but in 1855, more than six months after the company had taken possession, he brought trespass:—Held, that the action, if maintainable, was brought too late; and that his remedy, if any, was by arbitration. Quære, whether the arbitration clauses of 14 & 15 Vict. c. 51 extend to tenants for years. Semble, that the plaintiff, by his conduct, had estopped himself from any claim. *Detlor* v. *Grand Trunk R. W. Co.*, 15 U. C. R. 595.

——— *Time Limitation.*] — The right to compensation for land taken by a railway company is not barred short of twenty years, and is not barred by the claimant's title to the land being extinguished by reason of the railway company having been in possession for ten years. *Ross* v. *Grand Trunk R. W. Co.*, 10 O. R. 447.

——— *Time Limitation — Conveyance of Whole Lot.*]—Where there is a right against a railway company to compensation for land taken for railway purposes, such lands forming part of a block of land owned by one person, the conveying away of the whole of such land does not of itself carry the right to compensation. The right to compensation is not barred until the expiration of twenty years from the time the land is entered upon and taken for railway purposes. Ross v. Grand Trunk R. W. Co., 10 O. R. 447, followed. *Essery* v. *Grand Trunk R. W. Co.*, 21 O. R. 224.

Security for Payment—*Liability of Sureties—Award.*]—The plaintiff owned land required by the Canada Southern Railway Company, who obtained an order under the Railway Act, C. S. C. c. 66, s. 11, s.-s. 21, for immediate possession, and the defendants became sureties by bond for payment to the plaintiff, within one month after making the award, of the compensation to be awarded. The award directed that the company should within one month pay $1,644 for the land taken, and also the further sum of $400, unless the said company should not give to the plaintiff license to remove from off the line of railway, and at any time within five months from the award, the dwelling house occupied by him and standing on the land:—Held, that defendants were not liable for this $400, their obligation being limited to the sum which might be awarded as compensation for the land and be payable unconditionally within a month. *Murray* v. *Thompson*, 5 U. C. R. 28.

See post 5.

(c) *Filing Plans.*

[*See* 62 & 63 Vict. c. 37 (D.)]

Necessity for—*Deviation—Completion of Road.*]—A company built their line to the terminal mentioned in the charter and then wished to extend it less than a mile in the same direction. The time limited for the completion of the road had not expired, but the company had terminated the representation on the board of directors, which by statute was to continue during construction, and had claimed and obtained from the city of K. exemption from taxation on the ground of completion of the road. To effect the desired extension it was sought to expropriate lands which were not marked or referred to on the map or plan filed under the statute:—Held, affirming the judgments in 11 O. R. 382, 582, that the statutory provision that land required for a railway shall be indicated on a map or plan filed in the department of railways, before it can be expropriated, applies as well to a deviation from the original line as to the line itself, and the company, having failed to shew any statutory authority therefor, could not take the said land against the owners' consent. Held, also, that the proposed extension was not a deviation within the meaning of 42 Vict. c. 9, s. 8, s.-s. 11 (D.); that the road authorized was completed as shewn by the acts of the company, and upon such completion the compulsory power to expropriate ceased. *Kingston and Pembroke R. W. Co.* v. *Murphy*, 17 S. C. R. 582.

——— *Deviation—Notice—Warrant—Jurisdiction—Injunction.*] — Under the Railway Act of Ontario, R. S. O. 1887 c. 170, a railway company, having filed an original plan shewing the location of its line, and desiring to acquire other lands compulsorily for the purpose of an alteration from the original location, however small the deviation may be, must file, under s.-s. 7 of s. 10, a plan of the proposed deviation. Semble, under the Dominion Railway Act this requirement must also be observed. The notice required by s.-s. 1 and the certificate of a surveyor under s.-s. 2 of s. 20 of the Railway Act of Ontario should state in cash the sum which would be a fair compensation for the lands to be taken and damages. And where a railway company, without having filed any plan of a proposed deviation, applied for and obtained from

a county court Judge a warrant for possession on a notice in which, in addition to a sum in cash, certain crossings and station privileges were offered as compensation for the land and the damages, and which was accompanied by a surveyor's certificate that the sum offered was a fair compensation therefor:—Held, that the foundation of the Judge's authority to issue a warrant rested on a proper compliance by the railway company with the above sub-sections, and that he had acted herein without jurisdiction. The high court of justice has power to restrain railway companies from acting upon warrants so obtained, and it is not necessary to proceed by certiorari. *Brooke* v. *Toronto Belt Line R. W. Co.*, 21 O. R. 401.

——— *Order of Railway Committee.*]—Held, that an order of the railway committee of the privy council, under s. 4 of 46 Vict. c. 24, does not of itself, and apart from the provisions of law thereby made applicable to the case of land required for the proper carrying out of the requirements of the railway committee, authorize or empower the railway company on whom the order is made to take any person's land or to interfere with any person's right:—Held, that such provisions of law include all the provisions contained in the Consolidated Railway Act, 1879, under the headings of "Plans and surveys" and "Lands and their valuation," which are applicable to the case; the taking of land and the interference with rights over land being placed on the same footing in that Act. When a railway company, acting under an order of the railway committee, did not deposit a plan or book of reference relating to the alterations required by such order:—Held, that they were not entitled to commence operations. Held, further, that under the Act of 1879, the payment of compensation by the railway company is a condition precedent to their right of interfering with the possession of land or the rights of individuals. Jones v. Stanstead R. W. Co., L. R. 4 P. C. 98, distinguished. Judgment in 12 S. C. R. 250 affirmed; judgment in 12 A. R. 393 reversed; judgment in 8 O. R. 59 affirmed; judgment in 7 O. R. 270 affirmed. *Corporation of Parkdale* v. *West*, 12 App. Cas. 602.

See Ontario and Sault Ste. Marie R. W. Co. v. *Canadian Pacific R. W. Co.*, 14 O. R. 432; *Quebec, Montmorency, and Charlevoix R. W. Co.*, v. *Gibsone*, 29 S. C. R. 340.

(d) *Government Lands.*

Ordnance Lands—*Acquisition Free from Lien.*]—The Ontario, Simcoe, and Huron Railway Company (afterwards changed to "The Northern Railway Company of Canada"), in the course of the construction of their roadway, acting in assumed and alleged pursuance of the powers conferred on them by their charter, entered upon and took possession of certain government lands held by the principal officers of Her Majesty's ordnance for ordnance purposes, and proceeded to construct their road thereon. Afterwards negotiations were opened between the company and the principal officers for acquiring such right of way, in the course of which numerous letters passed between the parties and between the several departments connected with the ordnance department, from which it appeared that the parties concerned had arrived at the conclusion that the company were acting within their statutory powers, and that all the department could require was compensation for the land taken. Subsequently all these lands were, by the Imperial government, ceded to the government of Canada, and in the year 1875 it was ascertained that the sum for which the government held a lien upon the road amounted to about £600,000; and by an Act of the legislature of that year that claim was compromised by the government for £100,000 sterling, which was paid. In the year 1856 or 1857 this company agreed with the Grand Trunk Railway Company for the use of a portion of this land for the purposes of the line of the latter company, who it was shewn had entered upon and continued in the use of this land until 1879, when the Credit Valley Railway Company, with a view of obtaining an entrance into the city of Toronto, entered upon this tract of land, and were proceeding to construct their line of road thereon. Upon a bill filed by the Grand Trunk Railway Company an interlocutory injunction was granted to restrain the further construction of the Credit Valley Railway, until the hearing, when the injunction was made perpetual, the court being of the opinion that the Northern Railway Company, under their dealings with the board of ordnance, and under the various statutory enactments appearing in the case, had acquired an absolute title to the land in question, free from any lien in respect thereof. *Grand Trunk R. W. Co.* v. *Credit Valley R. W. Co.*, 27 Gr. 232.

Removal of Timber—*Statutes.*]—By s. 4 of 19 & 20 Vict. c. 112, the clauses, amongst others, of the Railway Clauses Consolidation Act, 14 & 15 Vict. c. 51, relating to lands, were incorporated therewith, whereby the company were empowered to enter upon the Crown lands on the line of their railway, and to fell and remove the trees standing thereon, &c. By s. 8 of 16 Vict. c. 169, the possession of such lands was not to be taken without the consent of the governor in council, but it was expressly provided that this was not to limit or affect the powers given by the special Act:—Held, that the last named proviso shewed that s. 8 was not to apply to this company. *Booth* v. *McIntyre*, 31 C. P. 183.

Shore of River—*Award.*] — An award included compensation for the beach lying in front of plaintiff's property, which belonged to the Crown, and, for that reason, was set aside. *Bigaouette* v. *North Shore R. W. Co.*, 17 S. C. R. 363.

(e) *Order for Immediate Possession.*

Application for—*Costs of.*]—Where a railway company, having a right to expropriate land, obtain under s. 163 of the Railway Act, 51 Vict. c. 29 (D.), a warrant for immediate possession, and the amount subsequently awarded to the land owner is not more than he was previously offered by the company as compensation, the costs of the application for the warrant should, under s. 165, be paid by the land owner. *Re Shibley and Napanee, Tamworth, and Quebec R. W. Co.*, 13 P. R. 237.

——— *Forum.*]—The application for a warrant for possession of land required by a

railway company under s.-s. 23 of s. 20 of R. S. O. 1887 c. 170, should be made to the county court Judge and not to a Judge of the high court. *Toronto Belt Line R. W. Co. v. Lauder*, 19 O. R. 607.

——— *Notice of.*]—In the computation of the ten days' previous notice necessary to be given under 51 Vict. c. 29, s. 164 (D.), to obtain a warrant for the possession of land by a railway company, the day of the service of the notice and the day of the return must both be excluded. *Re Ontario Tanners' Supplies Co. and Ontario and Quebec R. W. Co.*, 12 P. R. 563.

County Court Judge—*Powers of—Interference by Injunction.*]—Semble, that the powers conferred on the county court Judge by the Railway Act of Ontario, R. S. O. 1877 c. 165, s. 20, s.-s. 23, of ordering immediate possession, before arbitration had, do not exclude the jurisdiction of the high court to enjoin the taking of possession, if the company are making use of their powers to attain any object collateral to that for which they were incorporated; but otherwise it is not within the jurisdiction of a Judge of the high court to interfere with an order of a county Judge, though granted ex parte. *Jenkins v. Central Ontario R. W. Co.*, 4 O. R. 593.

Power to Grant—*Construction Work.*]—Quære, whether R. S. C. c. 109, s. 8, s.-s. 4, permits possession to be given before the price is fixed and paid of any land, except land on which some work of construction is to be at once proceeded with. *Canadian Pacific R. W. Co. v. Little Seminary of Ste. Therese*, 16 S. C. R. 606.

Right to—*Urgency — Costs.*]—Immediate possession of land, alleged to be necessary for the purposes of a railway, should not be granted to the railway company on summary process under the Railway Act unless two points are very clearly established: 1st, that the company have an indisputable right to acquire the land by compulsory proceedings; and 2nd, that there is some urgent and substantial need for immediate action; and, inasmuch as these points could not be said to have been clearly established by the affidavits and arguments in this case, the court declined to interfere summarily, and dismissed the application of the railway company for a warrant to enter forthwith upon the lands. Quære, as to power of Judge to award costs directly under 47 Vict. c. 11 (D.). *Re Kingston and Pembroke R. W. Co. and Murphy*, 11 P. R. 304.

See post XXVII.

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2. *Grant or Agreement for Grant of Lands to Company.*

(a) *By Particular Persons.*

Executors.]—See *Mitchell v. Great Western R. W. Co.*, 38 U. C. R. 471.

Married Woman — *Agreement with.*]—Where a railway company contracted for the purchase of certain land with B., a married woman, in the absence of her husband:—Held, that the company were under no obligation to see that B. had independent advice in the matter; and, inasmuch as the price seemed not to be grossly inadequate, and B. appeared to be fully compos mentis, and no unfair advantage had been taken of her, the agreement could not be set aside. B.'s marriage took place in 1876, and the land was held by her to her separate use:—Held, that the concurrence of her husband in the contract was unnecessary, nor was it necessary for him to join in the conveyance. *Bryson v. Ontario and Quebec R. W. Co.*, 8 O. R. 380.

——— *Agreement with Husband.*]—On an application against a railway company to compel them to arbitrate as to certain land taken, it appeared that the land belonged to a married woman, and that the company had taken possession of it upon an arrangement with her husband, which would have been an answer to the application if he had been the owner. An arbitration was ordered. *In re Benson and Port Hope, Lindsay, and Beaverton R. W. Co.*, 29 U. C. R. 529.

See, also, *Great Western R. W. Co. v. Baby*, 12 U. C. R. 106.

Tenant for Life—*Rights of Remainderman—Compensation Money.*]—Although a tenant for life has authority—under the Railway Acts, C. S. C. c. 66, and 24 Vict. c. 27, to contract for the sale and to convey the fee simple of land required for the use of a railway, the company are not warranted in paying him the full amount of compensation agreed on, notwithstanding that the statute omits to provide for the application of the amount, as is done in the Imperial Act 8 Vict. c. 18. And where a railway company did so pay the amount, they were compelled afterwards, at the suit of a person interested in the remainder, to make good the amount of his interest. *Cameron v. Wigle*, 24 Gr. 8.

——— *Rights of Remaindermen—Compensation Money—Estate in—Will—Parties.*]—Under the Railway Act, C. S. C. c. 66, s. 11, s.-s. 1, as interpreted and explained by 24 Vict. c. 17, s. 1, a tenant for life had power to convey the fee to a railway company, but had no power to receive the purchase money; and, therefore, a railway company which took a conveyance in fee from a tenant for life and paid her the purchase money, remained responsible for the payment. The meaning of s.-s. 22 of s. 11 is, that the money value of the land is converted into a piece of real estate, which the railway company holds for the owner of the land in place of which it stands, and that the estates in the land existing at the time the land is taken become estates in the compensation instead; and, upon the tenant for life in this case conveying the fee, she became tenant for life in the compensation, and those entitled to the inheritance became entitled to the reversion in fee in the compensation as against the railway company; and the Statute of Limitations did not begin to run against them until the death of the tenant for life. The tenant for life conveyed to the railway company in 1871. The person entitled to the reversion after the life estate died in 1871 intestate, and I. H. Y., his sole heiress-at-law, died in 1884, leaving a will, in which she devised to the plaintiff a specific parcel of land, including the part conveyed to the railway company:—Held, that this will did not pass to the plaintiff the right to receive the compensation money, and that as to it I. H. Y. died intestate, and it descended to her heirs-at-law, of whom the plaintiff was one;

and the plaintiff was allowed to amend by adding the other heirs-at-law as parties. *Young* v. *Midland R. W. Co.*, 16 O. R. 738.

Although, under C. S. C. c. 66, s. 11, as amended by 24 Vict. c. 17, s. 1, a railway company could obtain a good title in fee simple to expropriated lands by a conveyance from the tenant for life thereof, they were not justified in paying the compensation money to the tenant for life; and where such payment was made in 1871 the company was ordered to pay the amount over again to the persons entitled in remainder whose title accrued within six years of the time of bringing the action. Cameron v. Wigle, 24 Gr. 8, approved. *Young* v. *Midland R. W. Co.*, 19 A. R. 265. Affirmed, 22 S. C. R. 190.

——— *Rights of Remaindermen—Parties—Compensation Money — Payment — Recovery back.*]—A railway company paid to tenants for life the full price of the land conveyed by them to the company for their line of railway, and on the cesser of the life estate the parties entitled in remainder filed a bill stating that the railway company assumed to purchase the lands for the right of way; that the company alleged that they had paid the full consideration for the land to the tenants for life; submitting that, even if the company did make such payment, they did so in their own wrong, and asking for payment of the plaintiffs' share of the purchase money:—Held, that the statement that the company "alleged" that the purchase money was all paid to the vendors, was not such a positive statement of the fact of payment to the tenants for life as to make them proper parties to the bill; and a demurrer was allowed on this ground. *Owston* v. *Grand Trunk R. W. Co.*, 28 Gr. 428.

An "action for money had and received will lie wherever a certain amount of money belonging to one person has improperly come to the hands of another." Therefore, where a railway company paid to the executors of a tenant for life the sum payable for the fee simple of lands taken by the company for the purposes of their road, and subsequently the remainderman filed a bill against the company and the representatives of the tenant for life, seeking to obtain payment from the company of the proportion of purchase money payable to the remainderman:—Held, that the executors were properly made parties with a view to the company obtaining relief over against them in the event of the company being compelled to make good the money in the first instance, and a demurrer by the executors was overruled with costs, on the ground that the company were entitled to a remedy over against them for the amount overpaid them, and on the additional ground that the bill alleged all facts necessary to entitle the plaintiffs to a direct decree against them, although the bill was not framed with a view to a direct remedy against the executors; for "the payment being made by the company to the executors . . . of money to a proportion of which the plaintiffs were entitled, and the payment being made without the authority of the plaintiffs, it became money had and received by the executors to the use of the plaintiffs." *S. C.*, *ib.* 431.

———*Right to Sell — Order of Court—Costs.*]—Where land was conveyed to C. D. for life with remainder to her children, and C. D. during the infancy of her children agreed to sell and convey the land to a railway company for the purposes of their railway:—Held, that C. D., notwithstanding the provisions of s. 36 of the Railway Act of Canada, 51 Vict. c. 29, had no right in law to sell; to get such a right an order of a Judge under s. 137 was required; and where the proceeding was entirely for the benefit of the railway company, and no factious opposition was raised by any one, the company should pay the costs of the order as part of the price of the land. *Re Dolsen*, 13 P. R. 84.

Tenant in Common — *Infant Co-tenants—Parent and Children.*]—The mother of infant children, resident with her, being entitled to a third undivided interest in the land, they owning the residue, by deed agreed with a railway company, in consideration of an extension by them of their line of railway from R. to P., and for one dollar, to grant to them in fee the right of way "through my land in P., consisting of such portion of lots 18 and 19 as may be required to carry the railway across said lots," and conveyed to them accordingly. At the time of the conveyance she had not been appointed guardian to her children:—Held, that under the Railway Act of 1888 (51 Vict. c. 68, s. 9, s.-ss. 3, 9 (D.)), her deed barred the children's interest in the land as well as her own, and that they were therefore not entitled to compensation from the company. *Dunlop* v. *Canada Central R. W. Co.*, 45 U. C. R. 74.

(b) *Conditions of Grant.*

Annuity — *Privileges—Specific Performance.*]—The owner of land granted to a railway company the privilege of crossing his property, in consideration of which the company agreed, amongst other things, to pay him $400 a year, to carry flour for him on certain favourable terms, and "to bottom out his present mill race from its present unfinished point:"—Held, a contract of which the court of chancery should not decree a specific performance, or damages for breach of it; but leave the plaintiff to sue upon it at law. *Dickson* v. *Covert*, 17 Gr. 321.

Erection of Stations.]—The plaintiff, on the representation of persons that they had given land to defendants for the purpose of having the terminus of their railway at Windsor, conveyed lot 83 to the defendants in 1847, expressing in the conveyance that the same had been selected by the company "for the purpose of establishing the western terminus of their road thereon, . . . and the execution of which condition constituted the sole consideration for this grant." When the plaintiff made this deed he knew that one H. had conveyed the adjoining lot 84 to the defendants on substantially the same condition. In 1853 the defendants built a passenger station on lot 83, and a freight house partly on lots 83 and 84, which were destroyed by fire, and a passenger station was afterwards built on lots 83 and 84, and a freight station on lot 84, which the defendants continued to use until shortly before this suit, when they built a passenger station about half a mile from the original one. The bill alleged that the western terminus had been removed to the city of Detroit, and sought to restrain such removal from the land in question. It appeared that instead of unloading the passengers and freight in Windsor,

the cars were carried across the Detroit river on ferry boats, where they were taken charge of by the companies over whose line they were to go; but that the terminus of the defendants was still at Windsor. It was also shewn that the business of the defendants could not be conducted on so small a space as lot 83, and that the buildings on lots 83 and 84 were used for freight:—Held, reversing the decision in 25 Gr. 62, that the terminus and depot were not confined to buildings alone, but extended to the whole premises necessary for conducting the business of a terminus, and that upon the true construction of the deed the plaintiff was only entitled to have lot 83 included in the terminus, and had no right to have all the buildings or any particular building on lot 83. *Grandjeau* v. *Great Western R. W. Co.*, 3 A. R. 412. See *Township of Wallace* v. *Great Western R. W. Co.*, 25 Gr. 86, 3 A. R. 44.

Primâ facie the term "railway station," in a contract, means the station house. *Carroll* v. *Cascmore*, 20 Gr. 16.

An engineer of the defendants, whose duty it was to obtain transfers of land and determine the situation of station houses, procured from the plaintiffs, for nominal considerations, grants of land for a station house and ground, representing that the station would be put, as desired by the plaintiffs, at a certain point advantageous to both. The deed of the plaintiff S. contained this proviso:—"Provided that the said company, their successors and assigns, do erect and maintain on the said lands a station for the accommodation of passengers and freight, and name the same B." The station was erected on the land in the deed containing this proviso, but not at the point represented:—Held, that, though the plaintiffs had the expectation that the station would have been placed where they desired, yet there had been no deceit practised by the defendants' engineer for the purpose of obtaining the grants of the land; that the engineer had no power to bind the defendants to such a thing; and that the defendants had done all they were bound to do by observing the proviso in the deed, which called for the erection of the station house on the lands without specifying any particular point. *Schlichauf* v. *Canada Southern R. W. Co.*, 28 Gr. 236.

The plaintiff agreed with the contractors for the building of a railway to convey to them in fee simple six acres, to be increased to ten if necessary, in consideration of their placing the station for the town of Prescott thereon. After the road had been surveyed and the station buildings erected on the property, the plaintiff executed a conveyance thereof to the contractors, which contained a covenant by them to continue and maintain the station on those lands thenceforth, but the deed was never executed by the grantees. The company continued to use such station for about ten years, when they removed it to a distance of one and a-half miles:—Held, reversing the judgment in 28 Gr. 583, that the act of the company in thus placing and using the station was a substantial compliance with the agreement, and that they were not bound to continue that station there for all time. *Jessup* v. *Grand Trunk R. W. Co.*, 7 A. R. 128.

See Clouse v. *Canada Southern R. W. Co.*, 4 O. R. 28; *Bickford* v. *Chatham*, 10 O. R. 257, 14 A. R. 32, 16 S. C. R. 235.

Farm Crossings.]—In treating with the owner of lands for the right to cross the same by a railway, or in proceedings before arbitrators appointed between him and the company, with a view to ascertain the amount of compensation, the solicitor acting for the company at the arbitration is not qualified to enter into any special agreement binding the company to construct and maintain a crossing. *Wood* v. *Hamilton and North-Western R. W. Co.*, 25 Gr. 135.

A deed conveying a right of way to the defendants in 1863 contained the following stipulation: "The company to make and maintain a farm crossing, with gates at the present farm lanes, the fence at crossing to be returned as much as possible." R., the company's engineer, treated for the conveyance, but had no power to agree for a second crossing, though it was said he had promised that, if he should find a second crossing necessary, he would, so far as in him lay, get it done, and the deed was executed upon this understanding:—Held, reversing the decision in 27 Gr. 95, that the defendants could not be compelled to make a second crossing for use in winter; and that, upon the construction of the words above set forth, they were bound to continue the crossing, not close it up or impair it or alter its character as a farm crossing, but were not obliged to keep it free from snow. *Cameron* v. *Wellington, Grey, and Bruce R. W. Co.*, 28 Gr. 327.

In negotiating for the purchase of lands to be used by the Canada Southern Railway Company for the purposes of their railway, the agent of the company signed a written agreement with the owner, which contained a clause to the effect that such owner should "have liberty to remove for his own use all buildings on the said right of way, and that in the event of there being constructed on the same lot a trestle bridge of sufficient height to allow the passage of cattle, the company will so construct their fence on each side thereof as not to impede the passage thereunder:"—Held, reversing the judgment in 11 A. R. 306, that this agreement only obliged the company to maintain a cattle pass so long as the trestle bridge was in existence, and did not prevent them from discontinuing the use of such bridge and substituting a solid embankment therefor, without providing a pass under such embankment. *Canada Southern R. W. Co.* v. *Erwin*, 13 S. C. R. 162.

The C. S. R. Co., having taken for the purposes of their railway the lands of C., made an oral agreement with C., through their agent T., for the purchase of such lands, for which they agreed to pay $662, and they also agreed to make five farm crossings across the railway on C.'s farm, three level crossings and two under-crossings; that one of such under-crossings should be of sufficient height and width to admit of the passage through it, from one part of the farm to the other, of loads of grain and hay, reaping and mowing machines; and that such crossings should be kept and maintained by the company for all time for the use of C., his heirs and assigns. C. wished the agreement to be reduced to writing, and particularly requested the agent to reduce to writing and sign that part of it relative to the farm crossings, but he was assured the law would compel the company to build and maintain such crossings without an agreement in writing. C. having received advice to the same effect from a lawyer whom he

consulted in the matter, the land was sold to the company without a written agreement, and the purchase money paid. The farm crossings agreed upon were furnished and maintained for a number of years until the company determined to fill up the portion of their road on which were the under-crossings used by C., who thereupon brought a suit against the company for damages for the injury sustained by such proceeding and for an injunction:—Held, reversing the judgment in 11 A. R. 287, which varied the judgment in 4 O. R. 28, that the evidence shewed that the plaintiff relied upon the law to secure for him the crossings to which he considered himself entitled, and not upon any contract with the company, and he could not, therefore, compel the company to provide an under-crossing through the solid embankment formed by the filling up of the road, the cost of which would be altogether disproportionate to his own estimate of its value and of the value of the farm. *Canada Southern R. W. Co.* v. *Clouse*, 13 S. C. R. 139.

Free Carriage of Grantor.]—The rector of Woodstock filed a bill against the Great Western Railway Company for the specific performance of an alleged contract for a free pass for himself and his successors, as the consideration for certain rectory land conveyed by the plaintiff to the company for railway purposes. The court of chancery decreed for the plaintiff. The court of appeal, not being satisfied with the evidence of the alleged contract, and also deeming the contract to be open to various objections, reversed the decree and ordered the bill to be dismissed with costs. *Bettridge* v. *Great Western R. W. Co.*, 3 E. & A. 58.

Lien for Price.]—See *Paterson* v. *Buffalo and Lake Huron R. W. Co.*, 17 Gr. 521.

Right to Land of Railway Company Owing to Non-completion of Work.]—See *Grand Junction R. W. Co.* v. *Midland R. W. Co.*, 7 A. R. 681.

See Quebec, Montmorency, and Charlevoix R. W. Co. v. *Gibsone*, 29 S. C. R. 340.

(c) *Effect of Agreement and Possession.*

As to Vesting.] — Land purchased and used by the Toronto and Hamilton R. W. Co., but not paid for or conveyed, does not vest in the company in fee simple absolute by 4 Wm. IV. c. 29. *Her Majesty's Secretary of State for the War Department* v. *Great Western R. W. Co.*, 13 Gr. 503.

Enforcing in Equity.] — An agreement not under seal for the sale of land to a railway company, for the purposes of the railway, no price being agreed on, in pursuance of which agreement the railway company are allowed to take and do take possession, is enforceable in equity. *Paterson* v. *Buffalo and Lake Huron R. W. Co.*, 17 Gr. 521.

Rights of Land Owner—*Compensation—Validity of Settlement of Amount.*]—In an action against defendants, a railway company, for compensation for land taken by them and interest thereon, it appeared that in 1874 defendants, without giving any notice or taking any proceedings for acquiring the land under the Railway Act, C. S. C. c. 66, entered upon it and proceeded with the construction of the railway. No settlement was made, though the plaintiff frequently demanded compensation, until 1878, when on his threatening to proceed against the company, the president, being authorized by the board, instructed the secretary to make a settlement, and he, after seeing the plaintiff, valued the land at $1,775, allowing 6 per cent. interest from the time the land was taken, making in all $2,199, which the plaintiff agreed to accept. The valuation was shewn to the president, who expressed no dissent, and the written memorandum thereof was given to the plaintiff, and a copy placed among the records of the company. No resolution of the board was passed in regard to the valuation, and no formal contract drawn up, but the valuation was before the board when making the contract for the completion of the road. It was also proved that the plaintiff tendered a conveyance of the land to the company, and the only objection thereto was, that they were unable to pay the money:—Held, under the circumstances, that the plaintiff was entitled to recover the amount of the compensation agreed upon, and the interest. *Starling* v. *Grand Junction R. W. Co.*, 30 C. P. 247.

Rights of Railway Company — *Lease of Part—Dispossession.*]—In 1858 the defendants, requiring certain land for their stations and grounds, fenced it in, with the consent of the proprietor, M., but the amount to be paid for it was, for some reason, not agreed upon. Defendants, however, occupied it until 1866, when they leased a small portion of it to the plaintiff for the purpose of a warehouse, and in 1868 M., not having been paid for the land, put up a fence, which interfered with the plaintiff's enjoyment. The plaintiff thereupon sued defendants on the covenant in the lease for quiet enjoyment:—Held, that he could not recover, for M. could not have dispossessed the defendants, his right to the land having been by the statutes converted into a claim for compensation, and the eviction, therefore, if there was one, was not by title paramount. *Clarke* v. *Grand Trunk R. W. Co.*, 35 U. C. R. 57.

Vendee.]—The position of a vendee under a contract for sale of land considered. *Mason* v. *South Norfolk R. W. Co.*, 19 O. R. 132.

(d) *Lease of Right of Way.*

Lands Acquired by Municipality.]—Upon a motion to quash resolutions of a city council providing for a lease of right of way to the Canada Atlantic Railway Company over lands expropriated by the city for waterworks purposes, under 35 Vict. c. 80 (O.):—Held, that, though primâ facie the only right intended to be conferred on a company is that of expropriating the private property of individuals or corporations, and not property already devoted to the public uses, or already expropriated under other Acts, yet under some circumstances the right to make such expropriation might exist, and if so, then the city would have the corresponding power to convey; and, as the applicant had not shewn to the court that circumstances did not exist under which the railway company could take the land, the court would not assume that the council had committed a breach of trust in passing the resolutions. Held, also, that the resolutions did not authorize the

railway to cross the streets at a grade different from that prescribed by the Railway Act of 1879. *In re Bronson and City of Ottawa*, 1 O. R. 415.

Termination—*Removal of Tracks—Penalty—Damages.*]—See *Townsend* v. *Toronto, Hamilton, and Buffalo R. W. Co.*, 28 O. R. 195.

See The Queen v. *Smith*, 43 U. C. R. 369, *post* (c).

(c) *Priorities.*

Mortgagee—*Registry Laws.*]—The registry law is binding on railway companies. Where it appeared that, after an owner of land had contracted with the Grand Trunk Railway Company for the conveyance of parts of the land for a roadway and station ground, he mortgaged the same land to a creditor without notice; and the mortgage was registered before the conveyances to the railway company:—Held, that the mortgagee was entitled to priority, and that the company were entitled under their special Act to retain the land on paying to the mortgagee its value at the time the company became entitled to it. *Harty* v. *Appleby*, 19 Gr. 205.

Other Railway Company — *Registry Laws.*]—Held, (1) that, under the special facts and documents set out in the report of this case, the Stratford and Huron Railway Company had power to acquire the land in question, and accept a deed thereof; (2) that the deed in question operated as a grant of the land, and not merely as a grant of a right of way over it. Quære, whether the Great Western Railway Company had any legal right to enter on the land for the purpose of building a switch, or for any other purpose, as against the Stratford and Lake Huron Railway Company, whose deed of the land was first registered. *The Queen* v. *Smith*, 43 U. C. R. 369.

——— *Trespass—Power of Sale—Forfeiture.*]—The P. and C. L. R. W. Co., incorporated in 1855, by 18 Vict. c. 194, had acquired the land in question as part of their roadbed. In 1865 their charter expired, the road not having been put in operation. In 1866 29 & 30 Vict. c. 98 was passed, by which the road was to be sold at auction, the Act of incorporation was revived, and the time for completing the railway extended for five years from the passing of the Act, and there was a further provision for sale under order of the court of chancery. Within the five years a conveyance was executed to the defendant company, who took possession, but did not use the land till a short time before the suit. In 1872 the C. P. and M. R. and M. Co. filed a map and book of reference of a proposed extension of their line over the land in question, and constructed part of their road thereon, but ceased in 1873. In 1880, under 43 Vict. c. 54 (O.), the C. P. and M. R. and M. Co. leased to the plaintiff company the land in question, and this action was brought to recover possession thereof:—Held, that the construction of their road in part by the C. P. and M. R. and M. Co. in 1872 was an act of trespass; that the defendant company, under the reviving Act and conveyance in pursuance thereof, acquired a title to the land; that the power to sell by order of the court of chancery was permissive merely; that their right to the land was not forfeited by non-completion of the work on the land within the five years; and therefore that the plaintiff company should not succeed. The deed to the defendant company described them by their original name, when in fact their name had been changed:—Held, a sufficient descriptio personæ to enable the company to take, though it might not be sufficient to sue in. *Grand Junction R. W. Co.* v. *Midland R. W. Co.*, 7 A. R. 681.

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3. *Lands Injuriously Affected.*

(a) *Action for Compensation.*

Pleading — *Amendment.*] — An arbitration having taken place, an award was made, on which the plaintiff sued, and a verdict rendered for defendants was set aside, after an appeal to the court of appeal. The defendants then applied to add a plea that the land was not injuriously affected, urging that when the mandamus was ordered there was no right of appeal in such a matter, and that they should be allowed to re-open the question by plea in order to obtain such right. The court, under the circumstances, refused the application. Quære, if the plea had been allowed, whether the decision on the mandamus could have been replied by way of estoppel. Ricket v. Metropolitan R. W. Co., L. R. 2 H. L. 175, and Beckett v. Midland R. W. Co., L. R. 3 C. P. 82, commented upon. *Widder* v. *Buffalo and Lake Huron R. W. Co.*, 29 U. C. R. 154.

(b) *Amount of Compensation.*

Damages—*Loss of Profits.*]—Where under the Railway Act, 51 Vict. c. 29 (D.), the owner of a mill, who was also the owner of a lot adjoining it, which was used as the principal means of communication between the mill and a public highway, and across which lot a railway company had erected a trestle bridge, also sought compensation for the loss of local custom to and from the mill, not arising from the construction of the railway, but from a subsequent user of it:—Held, that the damages were too remote and speculative to be allowed. *St. Catharines R. W. Co.* v. *Norris*, 17 O. R. 667.

Excess — *Pleading* — *Fraud* — *Evidence* —*Misdirection.*]—An arbitration having taken place, the defendants to an action on the award made in favour of the plaintiff, pleaded, on equitable grounds, that the sum awarded was excessively and fraudulently exorbitant, and the award was made by the fraud, covin, and misrepresentation of the plaintiff and the arbitrators making it:—Held, on demurrer, a good defence. *Widder* v. *Buffalo and Lake Huron R. W. Co.*, 24 U. C. R. 222.

To support the plea of fraud, defendants called witnesses to prove that the sum awarded by arbitrators was grossly excessive. None of these witnesses, however, had been brought forward at the arbitration, although defendants could have called them then as well as at the trial; the award was clearly sustained by the only evidence before the arbitrators; no attempt was made to impeach the credit of any of the witnesses who gave it; no misconduct was proved on the part either of the plaintiff or of the arbitrators; and the arbitrators, being sworn, denied any improper motive:—

Held, that under these circumstances the evidence as to value of witnesses not before the arbitrators was inadmissible in support of the plea. Quære, whether anything short of actual fraud could support such a plea. Daly v. Buffalo and Lake Huron R. W. Co., 16 U. C. R. 245, referred to. *S. C.*, 24 U. C. R. 520.

On appeal:—Held, that such evidence could not be wholly rejected. *S. C.*, 27 U. C. R. 425.

The jury were directed that if the plaintiff urged to the arbitrators that he had an exclusive right to the water when he had not, it was evidence to sustain the plea of fraud:—Held, that no argument used by the plaintiff to enhance his claim or place his case in the best light, could be a fraud. *S. C.*, 24 U. C. R. 520; affirmed in appeal, 27 U. C. R. 425.

The jury were also told that the plaintiff's right of access to the water remained as before, subject to defendants' right to use their railway:—Held, that this was a direction calculated to mislead, for the convenience of access was materially interfered with, and the jury might confound the right with the power of exercising it. *S. C.*, 24 U. C. R. 520.

At the trial defendants moved for a nonsuit, objecting that they had a right to build their crib-work in the river, and that it was improperly considered as part of the damage:—Held, that this objection had been disposed of by the judgment awarding a mandamus. Defendants also contended that evidence was improperly received of the cost of constructing crib-work to make plaintiff's property available, he having no right to make it:—Held, clearly no ground for a nonsuit. *Ib.*

(c) *Payment into Court.*

Attachment — *Mortgage—Priorities.*]—The judgment debtors had leased from C. a lot of land on the river Humber, on which there was a stone quarry. Upon an arbitration under 20 Vict. c. 146, the Great Western Railway Company were directed to pay the judgment debtors £255 as compensation for injury occasioned to them as such lessees by the erection of a permanent railway bridge over the river. Before the arbitration, one of them, being the sole lessee, had mortgaged to a building society his interest in the land, and all privileges as to quarrying stone contained in the lease; and the railway company, being notified by the society not to pay to the judgment debtors the amount awarded, paid it into the common pleas. The judgment creditors, having obtained a judgment in the court of Queen's bench, attached the claim, and asked to be allowed to take the money out of court, or for an order on the company to pay it:—Held, that the money being in the common pleas, the Queen's bench could not interfere; but that, if they had power to dispose of it, the mortgagees would be entitled before the judgment creditors. Quære, whether the company were authorized under 16 Vict. c. 99, to pay such money into court. Quære, whether such debt could be attached. An application was afterwards made to the common pleas on behalf of the mortgagees, but that court refused to interfere, on the ground that the company had no right to pay the money into court. *French* v. *Lewis*, 16 U. C. R. 547.

(d) *Right to Compensation.*

Bar—*Time Limit.*]—The mandamus nisi set out the provisions of 18 Vict. c. 180, and 20 Vict. c. 146, by which the prosecutors claimed the right to have an arbitration to settle the amount of their claim against the Great Western R. W. Co., by the erection of a permanent bridge over the river Humber. The company returned to the writ, that the prosecutors had not commenced proceedings to entitle them to a reference within six months after the passing of the first Act. The prosecutors demurred, contending that the provisions of the first Act had been altered and extended by the second Act, and that they had done all that the second Act required of them to establish their claim to an arbitration:—Held, that under 18 Vict. c. 180, the prosecutors would have been barred, not having commenced proceedings within six months after the passing of that Act; that 20 Vict. c. 146 having extended its provisions much beyond those of 18 Vict. c. 180, and extended the rights thereunder beyond those explained in s. 1 to be within the meaning of the words "private rights," the rights defined in 20 Vict. c. 146 were not restricted by the provisions of 18 Vict. to those only who had commenced proceedings within six months of the passing of the latter Act; that the notice required to be given within three months after the passing of 20 Vict. was the only condition precedent to the prosecutors' right to recover. *Regina ex rel. Trustees of St. Andrew's Church* v. *Great Western R. W. Co.*, 14 C. P. 462.

——— *Time Limit—Act of Contractor.*]—The prescription of a right of action for injury to property runs from the time the wrongful act was committed, notwithstanding that the injury remains as a continuing cause of damage from year to year, when the damage results exclusively from that act and could have been foreseen and claimed for at the time. A company building a railway are not liable for injury to property caused by the wrongful act of their contractor in borrowing earth for embankments from a place, and in a manner, not authorized by the contract. *Kerr* v. *Atlantic and North-West R. W. Co.*, 25 S. C. R. 197.

Easement—*Destruction of.*] — Where in building their road the defendants left a subway under a trestle bridge, and the evidence shewed that the plaintiff, the owner of the land crossed by the railway at this point, had enjoyed the open and continuous user of this subway as of right ever since 1862, but that the defendants were now proceeding to fill it up:—Held, that, though the plaintiff could not prevent the filling up of the subway, he was entitled to damages for his property in the easement. The plaintiff was entitled to assume that there was a reservation of the subway in the deed from the original grantor of the right of way to the railway company, which deed was lost, or he was entitled to claim the easement under the Prescription Act from long and uninterrupted enjoyment as of right. Clouse v. Canada Southern R. W. Co., 4 O. R. 28, 11 A. R. 287, 13 S. C. R. 139, distinguished. *Wells* v. *Northern R. W. Co.*, 14 O. R. 594.

Extension of Railway—*Wharf — Evidence—Crown.*]—See *The Queen* v. *Robinson*, 4 Ex. C. R. 439, 25 S. C. R. 692.

Injury to Timber Limits.]—The plaintiff, a timber licensee, sold his interest in the license and limits to one W., who entered and cut timber, but the transfer was not proved, and by the regulations of the Crown lands department all transfers were to be in writing and subject to approval, and were to be valid only from such approval:—Held, that the legal title to the limits and timber thereon was in the plaintiff, and that W.'s possession was the plaintiff's and he was entitled to maintain an action for damage done to the limits by construction of a railway. *Booth* v. *McIntyre*, 31 C. P. 183.

Interference with Access — *Possession—Reversion.*]—The plaintiff was in possession of certain lands under an oral agreement of purchase at $450, payable in bricks deliverable as demanded, of which $100 worth had been demanded and delivered. The defendants, without making any compensation or taking any steps under the statute therefor, built their railway in front of the land so as to interfere with the plaintiff's right of access, whereupon this action was brought, and damages recovered by the plaintiff, he being treated as entitled to the whole estate in the land, and the injury being treated as permanent, reducing the value of the land:—Held, that the company were trespassers, and could not justify the acts complained of under the statute; that substantial damages, on proof of them, were recoverable for the disturbance of the possession; but in a first action only nominal damages for the injury to the reversion:—Held, therefore, that the damages here were not properly assessed, and a new trial was directed. Semble, that the damages for injury to the reversion belonged to the vendor; and leave was given to add him as a party plaintiff. *Mason* v. *South Norfolk R. W. Co.*, 19 O. R. 132.

Interference with Access to River.]—W. owned land upon the navigable river Maitland, extending to high water mark. The Buffalo and Lake Huron Railway Company constructed their road upon cribs in the river, three or four feet above the level of the water, not touching his land, but running along the whole front of it, and connected with the bank above and below, thus shutting him out from all access to the river except across the railway. Semble, that his land was not "injuriously affected," so as to entitle him to compensation under the Railway Act, s. 5; but a mandamus nisi to appoint an arbitrator was granted, so as to bring up the question formally. Quære, whether the statute applies in any case where the land itself is not injured bodily, though the owner may sustain damage by its depreciation in value or otherwise. Quære, also, whether the power given this company by their special Act of incorporation, 19 Vict. c. 21, s. 36, is controlled by ss. 136 and 138 of the Railway Act, notwithstanding the provisions in s. 139. *In re Widder and Buffalo and Lake Huron R. W. Co.*, 20 U. C. R. 638.

On the return to the mandamus:—Held, that W.'s land was "injuriously affected." Defendants under 19 Vict. c. 21, and as assignees of the Canada Company, claimed a right to erect any works for improving the navigation, and to be the owners of the bed of the stream:—Held, that the powers given for that purpose were distinct from those granted for the purposes of their railway; and that, admitting the ownership, it was still subject to the public right, which they had infringed so as to cause a particular injury to the prosecutor. *Regina* v. *Buffalo and Lake Huron R. W. Co.*, 23 U. C. R. 208.

——— *Riparian Rights.*]—The appellants made a railway upon the foreshore of a tidal and navigable river by means of an embankment extending along the entire length of the respondents' frontage, cutting off all access to the water from the respondents' land except through one opening left in the said embankment and another opening just outside the respondents' boundary: — Held, affirming the judgment in 14 S. C. R. 677, that by the French law prevailing in Lower Canada, the respondents as riparian owners had the same rights of accès et sortie as they would have had if the river had not been navigable; that the above obstruction to such rights without parliamentary authority was an actionable wrong; and that the substituted openings above mentioned were no answer to a claim for indemnity. There is no distinction in principle between riparian rights on the banks of navigable or tidal and on those of non-navigable rivers. In the former case, however, there must be no interference with the public right of navigation, and in order to give rise to riparian rights the land must be in actual daily contact with the stream, laterally or vertically. Lyon v. Fishmongers' Co., 1 App. Cas. 662, followed and held to be applicable to every country in which the same general law of riparian rights prevails, unless excluded by some positive rule or binding authority of the lex loci. Held, that under the Quebec Railway Consolidation Act, 1880, s. 9, no authority is given to a railway company to exercise its powers in such a manner as to inflict substantial damages upon land not taken, without compensation. *North Shore R. W. Co.* v. *Pion*, 14 App. Cas. 612.

A riparian proprietor on a navigable river is entitled to damages against a railway company for any obstruction to his rights of accès et sortie, and such obstruction without parliamentary authority is an actionable wrong. North Shore R. Co. v. Pion, 14 App. Cas. 612, followed. *Bigaouette* v. *North Shore R. W. Co.*, 17 S. C. R. 363.

Lowering Grade of Street — *Leave of Municipality.*]—The lands in question were lots 3, 4, and 6 on Clinton avenue, in the town of Niagara Falls. The defendants had taken for the purposes of their railway a small part of lot 3, and the plaintiff claimed damages for the injury caused to that lot and lots 4 and 6, by lowering the street in front of these lots so as to enable the railway to be carried over the highway, which was done in such a manner as to obstruct the plaintiff's access to his land:—Held, (1) that upon the evidence the sum paid to plaintiff for the part of lot 3 actually taken, included any damage to that lot, but not to lots 4 and 6. (2) That the claim as to lots 4 and 6 was in respect of lands injuriously affected by the exercise of the powers granted for the railway within the meaning of the Consolidated Railway Act, 1879, s. 9, s.-ss. 10 and 12 (D.). Quære, whether the compensation clauses of part I. of the Consolidated Railway Act, 1879, apply to the defendants' railway; but, held, that either under that Act or C. S. C. c. 66, as applied to these defendants by their special Act, compensation was recoverable. Held, also, that there was nothing to exonerate the

defendants in the fact that they had obtained the leave of the municipality for doing as they had done. *Bowen* v. *Canada Southern R. W. Co.*, 14 A. R. 1.

Negligent Work—*Remedy.*]—The plaintiff in his statement of claim claimed damages from the defendants for "unlawfully, negligently, and wrongfully" depressing certain streets in a town and thereby making it inconvenient and almost impossible for persons to approach the plaintiff's store for business: also for, in like manner, blocking them up and rendering them almost impassable in the neighbourhood of the plaintiff's store, and thereby "negligently, unlawfully, and wrongfully" preventing customers or others coming thereto, and almost entirely destroying the plaintiff's business. The statement further claimed that if the depressing and blocking up should be found to be lawful, a mandamus should be granted requiring the defendants to proceed to arbitrate to ascertain the compensation payable to plaintiff; or that it be referred to the proper officer to ascertain and state such compensation: — Held, on demurrer, that the statement of claim was sufficient; for it alleged that the work was negligently done, and this gave a cause of action, even though the work itself might be lawful. Quære, whether a mandamus would be granted; for, if the plaintiff was entitled to compensation, the proper remedy would apparently be by reference to the proper officer, as asked by way of alternative relief; also, whether it was necessary to allege that defendants' railway touched or took a portion of plaintiff's land; and whether, also, under the Railway Acts, defendants were liable to make compensation except for lands taken. As to the latter points, as the judgment could not be reviewed until after the trial, they were enlarged before the Judge thereat. *Quillinan* v. *Canada Southern R. W. Co.*, 6 O. R. 567.

Operation of Railway.] — A railway company were permitted by a city corporation to run their track along a street in the city, which was only thirty feet wide. The plaintiff, owning a brick cottage and frame house in the street, complained that the trains passing caused the houses to vibrate, and the plaster to fall off the walls, and alleged loss of tenants thereby; but the evidence as to any structural injury caused by the railway was contradictory, and the court found that it was not sufficiently made out:—Held, that the plaintiff was not entitled to compensation under the Railway Act. *In re Berlin and Hamilton and Lake Erie R. W. Co.*, 40 U. C. R. 160.

Held, that the railway company, though incorporated by 47 Vict. c. 75 (O.), were, by 54 & 55 Vict. c. 86 (D.), subject to the legislative authority of the parliament of Canada, and their power to do the work of altering the grade of a street, in the doing of which the damages claimed by a land owner arose, was under s. 90 of the Dominion Railway Act, 1888; and the rights of the parties in an arbitration to ascertain such damages were governed by the provisions of that Act. And where the arbitrator awarded that the land owner had suffered no damage:—Held, that, having regard to the provisions of s. 161, s.-s. 2, no appeal lay from the award. Held, also, that the arbitrator had no power to allow the land owner "structural damages" caused to his buildings, or damages for "personal inconvenience" by reason of his means of access being interfered with. Ford v. Metropolitan R. W. Co., 17 Q. B. D. 12, distinguished as to the former kind of damages, and followed as to the latter. *Re Toronto, Hamilton, and Buffalo R. W. Co. and Kerner*, 28 O. R. 14.

——— *Interest.*]—A claimant entitled under the Railway Act of Canada, 51 Vict. c. 29, to compensation for injury to lands by reason of a railway, owing to alterations in the grades of streets and other structural alterations, is also, having regard to ss. 90, 92, and 144, entitled to an award of damages arising in respect of the operation of the railway, and to interest upon the amounts awarded, notwithstanding that no part of such lands has been taken for the railway. Hammersmith, &c., R. W. Co. v. Brand, L. R. 4 H. L. 171, distinguished. *Re Birely and Toronto, Hamilton, and Buffalo R. W. Co.*, 28 O. R. 468.

Under the Dominion Railway Act, 51 Vict. c. 29, compensation recoverable in respect of lands injuriously affected must be based on injury or damage to the land itself, and not on personal inconvenience or discomfort to the owner or occupant. It was held, therefore, that no compensation could be allowed to the owner of land fronting on a street along which a railway company lawfully constructed its line of railway, there being no interference with access to the land except so far as that resulted from the passing of trains. Re Birely and Toronto, Hamilton, and Buffalo R. W. Co., 28 O. R. 468, considered. *Powell* v. *Toronto, Hamilton, and Buffalo R. W. Co.*, 25 A. R. 209.

Order of Railway Committee of Privy Council—*Leave of Municipality.*]—The sections of the Dominion Railway Act, 1888, under the headings "Plans and Surveys," and "Lands and their Valuations," apply as well to lands "Injuriously Affected," as to lands taken for the purposes of the railway. It is no answer to a complaint by a land owner that the company is proceeding without having taken the necessary steps under these sections, that they have the authority of the railway committee of the privy council for the execution of the works. Corporation of Parkdale v. West, 12 App. Cas. 602, followed. Held, also, that a by-law passed by the municipal council granting aid for the railway, and the validating Act, 58 Vict. c. 68 (O.), did not affect this question. *Hendrie* v. *Toronto, Hamilton, and Buffalo R. W. Co.*, 26 O. R. 667. See, also, *S. C.*, 27 O. R. 46.

Private Owner—*Nuisance.*]—The Grand Trunk Railway Company ran their line through and along a street in Guelph, to which the lands of the applicant were adjacent:—Held, that if the works complained of amounted to a public nuisance it would not be a case for private compensation; and that if authorized by law, the works did not injuriously affect the applicant within the meaning of 14 & 15 Vict. c. 51, s. 4. *Day* v. *Grand Trunk R. W. Co.*, 5 C. P. 420.

——— *Nuisance—Injunction.*]—A railway company being about to construct their line along a public street, a bill was filed by the owner of property in front of which it would pass, to restrain the construction of the road, on the ground, as alleged, that his property would be thereby greatly depreciated in value from divers causes, and rendered greatly less

eligible from the inconvenience and danger occasioned by the cars running immediately in front thereof, and the present traffic be diverted from that part of the road:—Held, that the injury as alleged did not amount to a private nuisance, and therefore the complainant was not entitled to an injunction; and also that, as the injury was not irreparable, the court would not, if otherwise in favour of the plaintiff, have granted the application. *Magee* v. *London and Port Stanley R. W. Co.*, 6 Gr. 170.

Purchase after Injury.]—Held, that a purchaser of land is not entitled to damages for an injury committed by the construction of a railway through the land prior to his possession; and a mandamus to appoint an arbitrator to assess such damages was refused. *Partridge* v. *Great Western R. W. Co.*, 8 C. P. 97.

See McArthur v. *Northern Pacific Junction R. W. Co.*, 15 O. R. 733, 17 A. R. 86; *In re Ontario and Quebec R. W. Co. and Taylor*, 6 O. R. 338, *ante* 1 (b); *Vezina* v. *The Queen*, 17 S. C. R. 1, *ante* 1 (b); *Grand Trunk R. W. Co.* v. *Fitzgerald*, 19 S. C. R. 359.

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4. *Proceedings, Suits, and Actions by Land Owners.*

Actions or proceedings on the award, or agreement for sale, or to compel compensation under the statutes. *See* the previous subheads.

Damages — *Injunction — Removal of Obstruction.*]—Held, that, as the appellants had not taken the steps necessary under the Act of 1880, to vest in them the power to exercise the right or do the thing for which compensation would have been due under the Act, an action by the respondents for damages and the removal of an obstruction would lie; in which, if the obstruction were not ordered to be removed, damages as for a permanent injury to the land could be recovered. Corporation of Parkdale v. West, 12 App. Cas. 602, followed. *North Shore R. W. Co.* v. *Pion*, 14 App. Cas. 612.

Discovery — *Pleading — Amendment.*] — The bill alleged that tenants pur autre vie had sold and conveyed to a railway company land for their roadway. After the cesser of the life estate the parties entitled in remainder filed a bill against the vendors and the company, seeking discovery as to what estate or interest the vendors had conveyed, stating that the company alleged they had paid the vendors the full price of the fee in the land, and that they (the vendors) were liable to account for the price so paid; and prayed for an account and payment to the plaintiffs of a proper share or proportion thereof:—Held, on demurrer by the vendors, that no sufficient ground of equity was alleged against them; the plaintiffs, however, to be at liberty to amend their bill as they should be advised. *Gerston* v. *Grand Trunk R. W. Co.*, 26 Gr. 93.

Dower.]—Under 16 Vict. c. 99, s. 7, on the purchase of lands by the Great Western Railway Company from the proprietors, the price agreed upon is made the compensation to be paid for such lands, and to stand in the stead thereof; and "any claim to or incumbrance on said land," &c., is converted into a claim on such compensation. When, therefore, the company agreed with the then owner in fee for the purchase of land, and obtained a conveyance:—Held, that on his death his widow could not maintain an action of dower against the company. *Chewett* v. *Great Western R. W. Co.*, 26 C. P. 118.

Ejectment.]—The Great Western R. W. Co. are not authorized by 4 Wm. IV. c. 29 to enter upon and assume lands to be permanently appropriated to the uses of the railway without the permission first obtained of the owner, or by reference under the statute. Defendants requiring plaintiff's land for their railway, a sealed agreement for a reference was entered into to ascertain the price, and an award was accordingly made for £503 15s., to be paid by defendants to plaintiff within three months from the date of the award, on plaintiff's shewing a good title to and executing free from incumbrance a valid conveyance of the land. Defendants entered into possession under the reference, and with plaintiff's permission, and built part of their works thereon with his knowledge; but he being unable to shew a good title within the three months, defendants did not pay the sum awarded, and the plaintiff, after the three months, refused to accept the sum awarded, and brought ejectment:—Held, that he could not treat the defendants as trespassers, and therefore ejectment would not lie. *Rankin* v. *Great Western R. W. Co.*, 4 C. P. 463.

Defendants required land of the plaintiff, on the river Credit, for their railway, and an arbitration was agreed on to determine the value and any damages by interference with plaintiff's privileges in the river. He had purchased from the government about 1,000 acres, extending above and below where the railway was to pass, but had not obtained the patent, and he claimed to be entitled to certain water privileges, of which defendants did not know the nature or extent, but they assumed that he had and could convey them. The award, made on the 17th April, 1854, determined the value of the land, and compensation for all damages and interference with such privileges, at £3,675, to be paid on the plaintiff executing to them a valid conveyance of said land; and further, that the company might take immediate possession. On the 22nd the plaintiff drew on defendants' solicitor for the sum, and he accepted the order, agreeing to pay when the plaintiff had fulfilled his part of the award; and on this acceptance the bank advanced the money to the plaintiff. In July following a patent issued to the plaintiff for the whole tract, but it expressly reserved all navigable waters, and gave no rights or privileges to him in respect of the river. The defendants went on with their works without objection by plaintiff until March, 1855, when he gave them notice that unless the sum awarded was paid without delay, he would resume possession. On the 16th April following he tendered a conveyance subject to the reservations in the patent, which they rejected, inasmuch as the sum awarded was almost entirely for rights claimed by plaintiff in the river, which he did not possess. He thereupon brought ejectment. In May a statute was passed authorizing defendants to make a fixed bridge over any river across which their railway might be carried. After action, defendants paid into court the sum awarded, with interest, but the plaintiff still proceeded:—Held, that defendants were lawfully in possession after the

award, and that upon the facts proved the plaintiff had no right to dispossess them. *Cotton* v. *Hamilton and Toronto R. W. Co.*, 14 U. C. R. 87.

A railway company having mortgaged land to secure purchase money, laid down rails upon the mortgaged land and worked the railway:—Held, that the mortgagees could eject, and that such mortgage was not ultra vires; but that, where land is taken under the compulsory clauses, the compensation must be obtained as prescribed by the statute. *Galt* v. *Erie and Niagara R. W. Co. and Great Western R. W. Co.*, 19 C. P. 357.

The plaintiff, having a notice from defendants that they required part of his land, refused to allow them to enter, but afterwards withdrew his opposition, on condition that it should not in any way prejudice his rights against them, and defendants then entered and constructed their railway. Arbitrators were appointed to determine his compensation, but before award made defendants desisted from their notice, and the plaintiff therefore failed in an action by him upon the award. The company afterwards served another notice, and, as the plaintiff did not appoint an arbitrator, the county court Judge appointed one D. as sole arbitrator, who inspected the land taken, and awarded £364 10s. to the plaintiff. This sum defendants paid into court, long before this suit, and they had continued in possession of the land. It appeared that two lines had been surveyed and staked off through plaintiff's lands before their first notice, and the line shewn by their plan and book of reference filed was the first, which was not adopted, though in the notices the land required was stated to be that "staked off by the said company according to the plan of the said railway." The deviation, however, of the two lines was slight, much less than a mile, and it was admitted that the land embraced in each award was that actually taken for the railway. The plaintiff having brought ejectment for this land:—Held, that he could not recover, for that, notwithstanding the deviation, he was confined, by what had been done, to his claim by arbitration for the land taken. *Grimshawe* v. *Grand Trunk R. W. Co.*, 19 U. C. R. 493.

Defendants in 1851 staked out their railway across the land in question, and in 1853 deposited their plan in the office of the clerk of the peace, and laid the rails and built their station on the land, which was then vested in the Crown; but this was without the consent of Her Majesty, under C. S. C. c. 66, s. 11, s.-s 31, and they had taken no other proceedings to obtain a right to the possession. In 1854 the commissioners of public works, under 13 & 14 Vict. c. 13, conveyed the land to the plaintiffs by deed, in which the railway was referred to as a proposed line, and for fourteen years after this defendants continued thus to use the land, with the knowledge of and without any interference by the plaintiffs:—Held, that the plaintiffs could not maintain ejectment, but must seek for compensation under the Railway Act. *County of Welland* v. *Buffalo and Lake Huron R. W. Co.*, 30 U. C. R. 147, 31 U. C. R. 539.

While the plaintiff, the true owner of certain land, was absent in Australia, the defendants agreed to purchase the land for the purposes of their railway—without arbitration—from the plaintiff's brother, believing him to be, as he professed to be, the owner, and paid him the full value therefor, and was by him let into possession:—Held, that the plaintiff could not maintain ejectment, but must look to defendants for compensation under the statutes. *McLean* v. *Great Western R. W. Co.*, 33 U. C. R. 198.

Defendants, requiring plaintiff's land for their railway, after plaintiff's refusal to accept the compensation offered, obtained from the county court Judge a warrant under s. 11, s.-s. 21, of C. S. C. c. 66, for immediate possession, upon giving the necessary security to pay and deposit the compensation to be awarded within one month thereafter. Subsequently the arbitrators awarded to the plaintiff $7,260, together with the costs of the reference, &c. On the 15th April, 1876, defendants petitioned the court of Queen's bench, under 38 Vict. c. 15 (O.), to set aside or reduce the award as excessive, which the plaintiff opposed, and the petition was dismissed with costs. On the 17th March, 1877, defendants gave notice of appeal to the court of appeal, and filed the usual bond. The defendants did not pay the compensation awarded, nor the costs of the reference, &c., but they paid the arbitrators' costs, and the costs of the petition. On 30th August, 1877, the plaintiff brought ejectment, contending that defendants, by nonpayment of the amount awarded, had lost their right to the possession:—Held, that ejectment would not lie, but that the plaintiff must proceed upon the award; and that he had all the rights of an unpaid vendor. *Norvall* v. *Canada Southern R. W. Co.*, 28 C. P. 309.

The owner of lands over which the Grand Trunk Railway would pass offered to convey a portion thereof for a station house upon certain conditions, which offer was rejected. Afterwards an agreement was made with the solicitor of the contractors, which was reduced into writing and signed by the owner, agreeing to convey a quantity of land not to exceed ten acres, upon condition that the station should be placed upon it. The owner afterwards refused to convey unless the contractors would secure to him three crossings over the railway track, and brought ejectment to turn the parties out of possession of the land so agreed to be conveyed. The court decreed specific performance of the agreement to convey and an injunction to stay the ejectment, notwithstanding that defendant swore that the condition upon which he agreed to convey was that the crossings should be secured to him. *Jackson* v. *Jessop*, 5 Gr. 524.

When lands are taken possession of by a railway company under the statutory powers, this court will not order possession to be restored in case of default in payment of the compensation awarded to the owners. The proper remedy is a sale of the land, and this will be granted under the prayer for general relief, though not asked for by the bill. *Slater* v. *Canada Central R. W. Co.*, 25 Gr. 363.

See, also, *Phillips* v. *Royal Niagara Hotel Co.*, 25 Gr. 358.

In an action by the attorney-general, upon the relation of the bursar of Toronto University, to recover possession of certain lands claimed to be vested in Her Majesty for the benefit of the university, the defendants pleaded that the said lands had been, with the assent of the university and bursar, taken possession of by them for the purposes of their railway under their statutory powers, and

that they had since retained and then were in possession thereof, and they also pleaded the Statute of Limitations:—Held, on demurrer, that it was not necessary to set out specifically the statutes alluded to, in the various proceedings connected with the expropriation of the land, and the defence was not objectionable, upon demurrer, on the ground of want of certainty, by reason of its merely general allegation of compliance with the statutory requirements. Held, also, that the mere allegation that the defendants were in possession afforded a good defence in law in such an action, and put the plaintiff to the proof of his cause of action, under rule 144. Held, also, that, even if, under R. S. O. 1877 c. 165, the assent of the lieutenant-governor in council to the expropriation of the lands by the railway company was necessary, which it was not, yet, after a user of the land by the company for ten years, coupled with the legislative recognition of the status of the railway company, and with the fact that the taking of it was with the assent of the university and colleges and bursar, the formal assent of the Crown must be held to have been dispensed with, and trespass or ejectment would not lie. Held, also, that the Statute of Limitations was no bar to the action, although brought by the Crown in its capacity as trustee of the land in question. Regina v. Williams, 19 U. C. R. 397, followed. *Attorney-General* v. *Midland R. W. Co.*, 3 O. R. 513.

See Clarke v. *Grand Trunk R. W. Co.*, 35 U. C. R. 57.

Injunction—*Neglect to Fence—Remedy.*]—A railway company who take possession of land under the compulsory powers conferred by the statute, are bound to erect fences for the proper separation of the railway from the remainder of the land, within six months from the time of possession being taken, not from the time of notice being given requiring such fences to be constructed, which need only be a reasonable notice to fence; and if they neglect to do so they may be enjoined from further using the line of railway. In such a case the owner is not required to erect the fences at his own expense and depend on his recovering damages from the company. *Masson* v. *Grand Junction R. W. Co.*, 26 Gr. 286.

This decision was reversed. The court of appeal, while adopting the construction of s. 22, s-s. 7, contended for by the plaintiff, in effect determined that a proper case had not been made out for granting an injunction peremptorily restraining the company from further constructing or working the line of railway; that under the circumstances the possible injury and loss to the defendants, by the sudden and immediate stoppage of their work, largely outweighed any possible advantage to the plaintiff; and that the proper relief was by a mandamus, or mandatory injunction, requiring the company to construct the fences; and that, if there was jurisdiction to restrain the further use of the road, as to which any expression of opinion was avoided, it should not be exercised except in the case of a contumacious refusal. *Ib.* 289 *n.*

Mortgage for Unpaid Purchase Money.]—The rights and franchises of a railway company do not prevail over a vendor's lien; and where land was sold to a railway company for the purposes of the road, and a mortgage taken to secure the unpaid purchase money:—Held, that the lien was not thereby lost. *Galt* v. *Erie and Niagara R. W. Co.*, 15 Gr. 637. See *S. C.*, 14 Gr. 499.

Trespass.]—Held, that under 4 Wm. IV. c. 29 the Great Western R. W. Co. might enter upon land for the purposes of their road, and could not be treated as trespassers there, though they must make compensation. *Sommerville* v. *Great Western R. W. Co.*, 11 U. C. R. 304.

On 26th October, 1852, the Buffalo and Brantford R. W. Co. took a deed from plaintiff's father, by which he agreed "to allow and permit the said company forthwith to take, occupy, possess, and enjoy of and through" the land in question. It appeared that the plaintiff had no title, but had merely been allowed by his father to occupy; that he had admitted that it was with his father, and not with him, that the company must settle; and that he had worked under the defendant, a contractor with the company, in making the fence along the line through this land. After the deed the plaintiff and his father forbade defendant to enter. Defendant entered in December, 1852, to make the railway, and the fences being insufficient, the plaintiff's wheat was injured by cattle. For this he sued in this action of trespass qu. cl. fr. The jury found for the plaintiff, on the ground, as they stated, that defendant had been forbidden to enter before any work was done. The company were established under the general Act 12 Vict. c. 84, and the deed was taken while under that Act; but before entering they were placed under the Railway Clauses Consolidation Act, by 16 Vict. c. 45:—Held (treating the question as one between the company and the owner), (1) that the deed was more than a mere agreement as to the price; the effect of it being to give the company permission forthwith to take and occupy a right of way through the land, of the ordinary width of the road. (2) That the company having, by their agreement previously made, a right to enter forthwith, 14 & 15 Vict. c. 51, s. 11, s-s. 2, would not apply. (3) That the company could enter forthwith, though they had not paid or tendered the money; that not being a condition precedent according to the deed, and there being nothing in 12 Vict. c. 84 to prevent it; and therefore that they could not be considered trespassers. Held, also, as to the plaintiff, that the verdict was wrong, taking the reasons given by the jury; for, looking upon the deed merely as a license, it was acted upon the moment the company entered into contracts for the work, on which they would be liable to others, and was therefore not revocable. (2) That on legal grounds, independently of his own conduct, which in justice should estop him, the plaintiff could not maintain trespass against any one claiming under the company; for he was not at any time more than a tenant at will, and the deed determined the will and left him tenant at sufferance only, with a right to enter and remove the crop. *Nelson* v. *Cook*, 12 U. C. R. 22.

The Great Western Railway Company are not entitled to enter upon lands with the intention of permanently appropriating them for their railway without the owner's permission, or a reference under the statute. Defendants having so entered upon plaintiff's land in defiance of him, though such intention was afterwards abandoned, were held liable in an action of trespass qu. cl. fr. *Jannetto*

v. *Great Western R. W. Co.*, 4 C. P. 488. See *Rankin* v. *Great Western R. W. Co.*, 4 C. P. 463.

An award under 14 & 15 Vict. c. 51 will not cover injuries done by the company in entering upon lands before filing their map and plan, when they had no legal right to enter. *Jeasler* v. *Bell*, 13 U. C. R. 176.

The Grand Trunk Railway Company gave a notice to the plaintiff under 14 & 15 Vict. c. 51, s. 11, s.-s. 5, of their intention to take about eleven acres through which their line passed. They afterwards withdrew this, and informed the plaintiff orally that a new notice would be given, but omitted to give it. The quantity marked on the company's map, which was duly filed, was only 2.25 acres. Defendants, contractors under the company, having entered upon this portion and constructed their railway:—Held, that the plaintiff was entitled to damages for the loss of occupation of such portion, and for the inconvenience to him in the use of his farm by its being thus intersected, up to this action. *Wilkes* v. *Gzowski*, 13 U. C. R. 308.

The Grand Trunk Railway Company gave notice to the plaintiff of requiring his land, after which an award was made by their arbitrator and the one appointed by the county court Judge, the arbitrator named by plaintiff not executing it. The amount awarded was paid into the office of the clerk of the Crown. Defendants justified taking possession, &c., in trespass, under a warrant by the county court Judge directed to the sheriff (defendant) reciting these facts and directing the sheriff to put the company in possession:—Held, that the sheriff was justified in acting under such warrant, and was not bound to ascertain if the award upon which it was granted was valid. *Miller* v. *Gzowski*, 6 C. P. 71.

The persons constructing a railway took gravel for ballast from a road allowance, at or near where the railway crossed it. The pathmaster of the corporation forbade them; and on compensation being demanded from the railway company, their superintendent wrote to the township clerk admitting that they should have got permission before taking it, and asking what damages they expected, saying that the company would of course do what was right. Afterwards they made an offer by way of settlement, which was not accepted:—Held, that the company were liable for the trespass; that the plaintiffs could maintain an action therefor; and that the six months' limitation clause, C. S. C. c. 66, s. 83, did not apply, the wrong complained of being an illegal act not necessarily connected with the construction of the railway, more than the appropriation of any other property to their use. *Township of Brock* v. *Toronto and Nipissing R. W. Co.*, 37 U. C. R. 372.

See Johnson v. *Ontario, Simcoe, and Huron R. W. Co.*, 11 U. C. R. 246; *Martini* v. *Gzowski*, 13 U. C. R. 298; *Bellor* v. *Grand Trunk R. W. Co.*, 15 U. C. R. 595; *North Shore R. W. Co.* v. *Pion*, 14 App. Cas. 612.

5. *Reference and Award.*

(a) *Arbitration and Reference—When Ordered.*

Disputed Title—*Action.*]—Where on an application for a mandamus to a railway company to appoint an arbitrator to determine the compensation to be paid for land taken, it appeared that the company disputed the applicant's title, and claimed title in themselves, the application was refused, and the applicant left to his action to try the title. *In re Jones and Erie and Niagara R. W. Co.*, 25 C. P. 559.

Lands Injuriously Affected — *Arbitration or Action.*]—Applications were made on behalf of A. and B. for a mandamus to the Galt and Guelph R. W. Co. to compel them to appoint an arbitrator on their part, to determine upon the compensation due for damages in reference to certain injuries specified in the notices, which had been previously served upon them. It appeared that the heads of claim made by A. were for consequential damages, chiefly from alleged omissions, and for neglect and improper conduct of the company in the construction of their work, or for alleged consequential injury to the property of the claimant, over which the railway passed:—Held, that these were not proper subjects for arbitration under 4 Wm. IV. c. 29, but for action. B.'s claim was for injury by the construction of the railway upon land which he at the time occupied as lessee; and a mandamus was granted, as it was not clear that he could recover such damages by action. *In re Shade and Galt and Guelph R. W. Co., In re McNaughton and Galt and Guelph R. W. Co.*, 13 U. C. R. 577.

Reference back.] — See *Demorest* v. *Grand Junction R. W. Co.*, 10 O. R. 515.

Reference to Master.] — The remedies pointed out by statute for the purpose of settling the claims of land owners to compensation for lands taken by a railway company becoming ineffectual, the court in such a case will direct a reference to the master for that purpose. *Malloch* v. *Grand Trunk R. W. Co.*, 6 Gr. 348.

See Bowen v. *Canada Southern R. W. Co.*, 14 A. R. 1.

(b) *Arbitrators—Appointment and Qualification of.*

Death of Arbitrator—*Replacing—Time—Statutes.*]—In relation to the expropriation of lands for railway purposes, and looking at ss. 151, 156, and 157 of the Railway Act, 51 Vict. c. 29 (D.):—Held, that the provisions of s. 157 apply to a case where the arbitrator appointed by the proprietor died before the award had been made and four days prior to the date fixed for making the same; that in such a case the proprietor was entitled to be allowed a reasonable time for the appointment of another arbitrator to fill the vacancy thus caused, and to have the arbitration proceedings continued, although the time so fixed had expired without any award having been made or the time for the making thereof having been prolonged. *Shannon* v. *Montreal Park and Island R. W. Co.*, 28 S. C. R. 374.

Disqualification — *Ratepayer of Shareholder Municipality—Appeal—Certiorari.*] — A motion was made to a Judge under R. S. C. c. 109, s. 8, s.-s. 28, to determine the validity of the cause of disqualification urged by land owners against the arbitrator appointed by a railway company under the provisions of the Act. The objection was, that the arbi-

trator was a ratepayer of a city largely interested in the railway company as a shareholder and creditor. He was not himself a shareholder, nor had he any personal interest in the matter, except as a resident of the city, in which he had no real estate, and was assessed on income only: — Held, that the arbitrator was not disqualified. Held, that no appeal lay to a divisional court from the decision of the Judge acting under the statute; and that a divisional court had no power to remove the proceedings by certiorari. *Re McQuillan and Guelph Junction R. W. Co.*, 12 P. R. 294.

Engineer of Railway Company.]—Remarks on the appointment by defendants of their own engineer as arbitrator, and upon the duty of an arbitrator. *Widder* v. *Buffalo and Lake Huron R. W. Co.*, 24 U. C. R. 520.

Making Appointment Rule of Court.]—The railway company served a notice on H. under 42 Vict. c. 9 (D.), offering a sum of money as compensation for land to be expropriated by them, and naming an arbitrator. H. served a notice on the company, naming his arbitrator, and the two appointed a third:—Held, that the notices of appointment of arbitrators and the appointment of the third arbitrator might be made a rule of court under C. L. P. Act, s. 201. Re Credit Valley R. W. Co. and Great Western R. W. Co., 4 A. R. 532, distinguished. *Re Herring and Napanee, Tamworth, and Quebec R. W. Co.*, 5 O. R. 349.

Notice Appointing—*Requisites of—Certificate—Seal.*]—It was objected that defendants' notice appointing their arbitrator was not accompanied by a surveyor's certificate, and it was denied that the plaintiff was entitled to any compensation:—Held, that, as no land was taken, and defendants denied the plaintiff's right to anything, the certificate was unnecessary. Held, also, that such notice need not be under the defendants' corporate seal. *Widder* v. *Buffalo and Lake Huron R. W. Co.*, 24 U. C. R. 520.

"Opposite Party" — *Mortgagor and Mortgagee.*]—The words "opposite party" in s. 150 of the Dominion Railway Act, 51 Vict. c. 29, s. 150, must be read so as to include both mortgagor and mortgagee, and both must concur in the appointment of an arbitrator to determine the compensation to be paid for mortgaged land required for the railway. *Re Toronto, Hamilton, and Buffalo R. W. Co. and Burke*, 27 O. R. 690.

Sole Arbitrator — *Ex Parte Appointment.*]—The provisions of the Railway Act, R. S. O. 1877 c. 165, apply as well to cases where a sole arbitrator is appointed by the Judge, as where the owner names an arbitrator on his own behalf, to value lands taken for railway purposes. Therefore, where the owner had omitted to name an arbitrator, and a sole arbitrator was appointed by the Judge of the county court, without notice of the intended application for his appointment having been given to the owner, and the arbitrator proceeded to ascertain the amount of compensation to be paid by the company:—Held, that the owner was not bound by the act of the arbitrator so appointed, and the company were restrained from proceeding with their works on land until a proper application was made upon the notice. *McGibbon* v. *North Simcoe R. W. Co.*, 26 Gr. 226.

Third Arbitrator — *Ex Parte Appointment.*] — Plaintiff and defendants each appointed an arbitrator to value lands of the plaintiff required for defendants' railway. The two arbitrators not being able to agree upon a third, the Judge of the county court upon their application appointed a third. No notice was given to the company of the intention to make such application, but it appeared that the arbitrator appointed by them was their general agent for obtaining the land required for the right of way: that on three other occasions the Judge, on his request as representing the company, had made similar appointments, and that on one the defendants had paid the award. The arbitrator, however, swore that he had no authority to apply in this case, and that on the other occasions his proceedings were sanctioned by the solicitor for the company. The plaintiff having sued the company upon the award made:—Held, that the third arbitrator was properly appointed; and the award was sustained. *Daly* v. *Buffalo and Lake Huron R. W. Co.*, 16 U. C. R. 238.

——— *Necessity for — Waiver of Objections.*] — See *Widder* v. *Buffalo and Lake Huron R. W. Co.*, 24 U. C. R. 520.

(c) *Award—Appeal from and Proceedings to Set aside.*

Appeal—*Forum.*]—Under s. 161 of the Dominion Railway Act, 51 Vict. c. 29 (D.), an appeal lies in this Province by either party from an award of compensation exceeding $400 either to the court of appeal or to the high court of justice, but if an appeal is taken to the latter tribunal, no further appeal lies by either party to the court of appeal. *Birely* v. *Toronto, Hamilton, and Buffalo R. W. Co.*, 25 A. R. 88.

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

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

——— *Interference on.*]—On an appeal to the supreme court from a judgment of the exchequer court increasing the amount awarded by the official arbitrators to the claimant for expropriation of land for the Intercolonial Railway:—Held, that, to warrant an interference with an award of value necessarily largely speculative, an appellate court must be

satisfied beyond all reasonable doubt that some wrong principle has been acted upon or something overlooked which ought to have been considered by the official arbitrators; and upon the evidence in this case the court refused to interfere with the amount of compensation awarded by the official arbitrators. *The Queen* v. *Paradis*, *The Queen* v. *Beaulieu*, 16 S. C. R. 716.

In the matter of expropriation of land for the Intercolonial R. W. Co. the award of the arbitrators was increased by the Judge of the exchequer court from $4,155 to $10,824.25 after additional witnesses had been examined by the Judge. On appeal to the supreme court:—Held, that, as the judgment appealed from was supported by evidence, and there was no matter of principle upon which such judgment was fairly open to blame, nor any oversight of material consideration, the judgment should be affirmed. *The Queen* v. *Charland*, 16 S. C. R. 721.

Where an award of compensation made in an arbitration under the Canadian Railway Act, 1888, 51 Vict. c. 29, was appealed from under s. 161, s.-s. 2:—Held, that the court rightly exercised its jurisdiction by reviewing the award as if it had been the judgment of a subordinate court, that is, by deciding whether a reasonable estimate of the evidence had been made. It was not authorized by the section to disregard the award and deal with the evidence de novo as if it had been a court of first instance. *Atlantic and North-West R. W. Co.* v. *Wood*, [1895] A. C. 257.

——— *Interference on — Mode of — Rule Nisi.*]—The most proper and convenient mode of appealing against an award under the Railway Act of Ontario, R. S. O. 1877 c. 165, ss. 19 and 20, is by rule nisi, upon reading the evidence taken by the arbitrators and transmitted by them under s.-s. 12. The court will not interfere with such award upon the merits unless it is clearly wrong; and where there was no imputation against the arbitrators, who had examined the property, and seen and heard the witnesses, whose evidence as to the value of the land was extremely contradictory, the court refused to interfere on the ground that the sum given was too small. *In re Hamilton and North-Western R. W. Co. and Boys*, 44 U. C. R. 626.

——— *Interference on—Principle.*] — On an arbitration in a matter of the expropriation of land under the provisions of the Railway Act, the majority of the arbitrators appeared to have made their computation of the amount of the indemnity awarded to the owner of the land by taking an average of the different estimates made on behalf of both parties according to the evidence before them:—Held, that the award was properly set aside on the appeal to the superior court, as the arbitrators appeared to have proceeded upon a wrong principle in the estimation of the indemnity thereby awarded. *Grand Trunk R. W. Co.* v. *Coupal*, 28 S. C. R. 531.

——— *Right of—Provincial Statute—Dominion Railway.*]—Quære, whether the finding of the arbitrators could be reviewed under 38 Vict. c. 15 (O.), the land having been taken under an Act of the Dominion parliament. *Norvell* v. *Canada Southern R. W. Co.*, 5 A. R. 13.

An appeal on petition will not lie from the award of arbitrators appointed under the Dominion Railway Act, 1879, 42 Vict. c. 9 (D.). The only mode of impeaching such an award is by an action to set it aside; or else by making the submission a rule of court, and then moving to set it aside. The appeal given by R. S. O. 1877 c. 165, s. 20, s.-s. 19, only applies to railways over which the provincial legislature has jurisdiction, and is not available in such a case as the present. Semble, that the court has no power to turn such a petition as the present into an action. *Re Lea and Ontario and Quebec R. W. Co.*, 8 O. R. 222.

Application to Set aside—*Interference on.*]—Semble, that, as the submission in such matters is in a measure compulsory, the court might interfere to prevent injustice where they would hesitate to do so in an ordinary case. *Great Western R. W. Co.* v. *Baby*, 12 U. C. R. 106.

——— *Time — Evidence — Appeal.*]—An award against a railway company under the Railway Act, R. S. O. 1877 c. 165, for land taken, was made on the 15th January, and a copy of the award served on the secretary on the 22nd. On the 18th February a rule nisi was obtained to set aside the award, the only material filed upon the motion being a copy of the award and an affidavit, merely stating what one of the arbitrators had informed the secretary of the company were the items constituting the sum awarded, but the evidence given before the arbitrators was not brought before the court until the 7th March, when the claimant in shewing cause produced what he stated to be the evidence:—Held, that the application was not an appeal under R. S. O. 1877 c. 165, s. 20, s.-s. 19, there being no evidence brought before the Judge to enable him to decide any question of fact, but the ordinary application to set aside an award, and that as such it was too late, the time for so doing having expired on 15th February, the last day of the term following the award. Quære, whether service of a copy of the award was a sufficient notice thereof, under s.-s. 19; but held, that even if so the only evidence of what took place before the arbitrators not having been produced in court for more than a month after such notice, the time allowed for appealing had expired. *In re Grand Junction R. W. Co. and Masson*, 44 U. C. R. 203.

Suit to Set aside — *Necessity for — Validity of Award.*]—Held, that the Canada Southern Railway, although brought under the jurisdiction of the Dominion before proceedings had been taken for expropriation, was still subject to the Railway Act then in force in Ontario, C. S. C. c. 66. An award having been declared void by the supreme court was amended so as to meet the objection given effect to by that court, and was re-executed by the arbitrators after the time limited for making the award had expired. The company having filed a bill to set aside such award, as well as the original award, the defendant, by his answer, asserted the validity of both. The bill was dismissed on the ground that it was unnecessary: — Held, that this, in effect, affirmed their validity, and an appeal was allowed. *Norvell* v. *Canada Southern R. W. Co.*, *Canada Southern R. W. Co.* v. *Norvell*, 9 A. R. 310.

See Masson v. *Robertson*, 44 U. C. R. 323, *post* (d); *Darling* v. *Midland R. W. Co.*, 11 P. R. 32, *post* XXV.

(d) Award—Enforcement of.

Action on Award—*Tender of Conveyance — Executors — Widow.*]—The plaintiffs were executors and trustees under the will of L., by which he devised a lot, of which the land in question formed part, to his wife during her life or widowhood; in case of her second marriage, he directed his executors to sell it and invest the price, and to pay to his wife one-third of the interest during her life; and in the event of her death, as soon as it could be done with due regard to the interest of the property, he directed them to sell the lot and divide the proceeds among his children and grandchildren, as specified. Some of them were infants, and the widow was in occupation of the farm, unmarried. Under these circumstances the plaintiffs, under the statutes relating to the defendants, entered into an arbitration with defendants, who required part of the lot for a gravel pit, and were unable to agree upon the price; and the arbitrators, on 29th November, 1872, awarded that defendants should pay to the respective persons entitled to receive the same $9,000 for said land, which they assessed and declared to be the full value of the fee simple. The widow was no party to the arbitration. On 3rd December defendants notified the plaintiffs that they would not take the land, of which they had never taken possession, and that they withdrew from the purchase. The widow, who continued in occupation, did not convey to the plaintiffs her interest until 7th January, 1874, and having tendered a conveyance to the defendants in February, 1874, they brought this action on the award on 23rd March following:—Held, that the plaintiffs could not recover on the award. *Mitchell* v. *Great Western R. W. Co.*, 38 U. C. R. 471. See *S. C.*, 35 U. C. R. 148.

——— *Tender of Conveyance—Title—Payment—Pleading.*]—A land owner to whom compensation has been awarded for land taken by a railway company, under the Railway Act, C. S. C. c. 66, cannot sue upon the award before tendering a conveyance of the land. A plea to such an action, that no such conveyance had been executed or tendered, was therefore held good. Defendants also pleaded, on equitable grounds, that after award they tendered the sum awarded to S. (with whom the arbitration had been had), who then appeared to be the owner in fee simple of the land according to the registered title; that he refused to receive it; that defendants had since received notice that S. had not a good title, and that the plaintiffs (his executors) were not entitled to the sum awarded; and that defendants had always been ready to pay the said sum on receiving a good and sufficient conveyance of the land:—Held, a bad plea, there being no averment that S. had not in fact a good title, nor that the defendants had paid the money into court under the statute, nor that they now brought it into court. *Cawthra* v. *Hamilton and North-Western R. W. Co.*, 41 U. C. R. 187.

——— *Pleading.*] — The eleventh plea to the third count (a common count for money awarded) was that the award mentioned and the money claimed there and in the first count (a special count on the award), were the same:—Held, no defence. *Widder* v. *Buffalo and Lake Huron R. W. Co.*, 24 U. C. R. 222.

Action on Bond — *Leasehold Lands — Annual Sum—Costs—Tender of Conveyance —Payment into Court—Pleading.*] — A bond given by defendants to plaintiff, after reciting the service of a notice on plaintiff by the Kingston and Pembroke Railway Company, requiring certain of his lands for railway purposes, and offering $2,000 as compensation, which plaintiff had refused, was conditioned for the payment, within one month after the making of an award under the Railway Act of 1868, of the sum to be found due him thereby, for damages sustained by him, and compensation due him, by reason of the railway company taking and retaining possession of his land, and for interest and costs lawfully payable to the plaintiff. The plaintiff's lands consisted of freehold and leasehold lands, the latter being held under leases from year to year, terminable by three months' notice, but, if resumed before the expiration of fifteen years from the commencement thereof, which would be on the 1st April, 1880, the lessee was to be paid for his improvements, but not otherwise. On the 29th April, 1874, the lands comprised in the plaintiff's leases were leased to the railway company, subject to the existing leases, but with all the rights and powers of the lessors thereunder. The plaintiff was awarded $708.64, with $67.22 interest, for his freehold land taken, and an annual sum of $349.70 for his leasehold land, from the date of the company's taking possession, 26th June, 1877, until the termination of said leases. In an action on the bond, alleging as a breach the non-payment of the amount awarded with interest and costs:—Held, that the bond would cover the amount awarded for the freehold land, but not the annual sum awarded for the leasehold. Held, also, that the amount awarded was less than the amount tendered; for, assuming that the company, as reversioners, would terminate the plaintiff's leases on the expiration of the fifteen years, the annual value up to that event, namely, for two years, nine months, and four days, amounted to $966.64, which with the $708.64 for the freehold land, only amounted to $1,675.18; and therefore the plaintiff could not recover the costs of the arbitration. Held, also, that before suing for compensation awarded for land taken, a conveyance thereof must be tendered or a readiness and willingness to execute one be averred. To the action the defendants pleaded an equitable plea of satisfaction and discharge, by payment into court, under the statute, of $683.89, being the amount found due for compensation. Quere, whether the plea must be treated as an ordinary plea of payment into court in the cause, or a payment merely for the person entitled to the money. If the former, it admitted the plaintiff's cause of action pro tanto; but in such case the amount paid in is considered as struck out of the declaration, and, so treating it here, a nonsuit was directed. *Anglin* v. *Nickle*, 30 C. P. 72.

——— *Merits of Award —Procedure — Time — Notice — Tender of Conveyance — Pleading.*] — A railway company requiring immediate possession of the plaintiff's land, procured defendants to give their bond to plaintiff for the purchase money, conditioned to be void on payment or deposit in court, under the provisions of the Railway Act, of the amount of the purchase money to be ascertained by arbitration proceedings then pending under the Act, within one month from the making of the award:—Held, that, an award having in fact been made, its merits could not be tried in an action upon

the bond. 2. That the award was not necessarily vitiated by reason of the arbitrators having allowed compensation for increased risk of loss by fire. 3. That in such an action the defendants could not examine one of the arbitrators to shew at what he estimated the value of the land, and whether general damages were awarded in addition to specific damages. 4. That it is not necessary before bringing such an action that a month should elapse after a written notice from one of the arbitrators to the defendants of the making of the award, as R. S. O. 1877 c. 165, s. 20, s.-s. 19, applies merely to the right of appeal from the award. No suggestion having been made as to any defect in title, and plaintiff's counsel offering at once to deliver a conveyance of the land to the company, the court refused to allow a plea to be added denying tender of conveyance before action. *Masson* v. *Robertson*, 44 U. C. R. 323.

Suit for Specific Performance — *Defence.*]—Held, that the plaintiff was entitled to specific performance of an award giving him damages for his lands taken by the defendants; that the sum awarded was not so excessive as to shew any fraudulent or improper conduct on the part of the arbitrators; and quære, whether, if shewn, it would be a defence in such a proceeding. *Norvall* v. *Canada Southern R. W. Co.*, 5 A. R. 13.

Summary Enforcement.]—The distinction between arbitrations under our Municipal and Railway Acts and the English Lands Clauses Consolidation Act pointed out, and remarks as to the right to enforce such awards summarily. *In re Colquhoun and Town of Berlin*, 44 U. C. R. 631.

——— *Order.*] — The proper mode of enforcing an award of compensation made under the Railway Act is by an order from the Judge. *Canadian Pacific R. W. Co.* v. *Little Seminary of St. Thérèse*, 16 S. C. R. 606.

(e) *Award—Execution by only Two Arbitrators.*

Refusal of Third to Act.]—The award in this case was bad, for under 14 & 15 Vict. c. 51, s. 11, s.-s. 15, an award cannot be made by two arbitrators, when the third refuses to act. *Grimshawe* v. *Grand Trunk R. W. Co.*, 15 U. C. R. 224.

——— *Notice.*]—In an action on an award, under the Railway Act, of compensation to the plaintiff for lands injuriously affected by the construction of defendants' railway, defendants pleaded that the award was made by two of the arbitrators after the other (the arbitrator appointed by them) had refused to act in and had withdrawn from the arbitration; to which the plaintiff replied that the arbitrator withdrew at defendants' request, after all the evidence on either side had been heard, whereupon the other two proceeded to consider the case and award, having first duly notified him of their intention so to do:—Held, on demurrer to the replication, that s. 11, s.-s. 15, of the Railway Act, C. S. C. c. 66, clearly did not apply to such a refusal and withdrawal, and that under s.-s. 11 the two arbitrators had power to proceed as they did. *Widder* v. *Buffalo and Lake Huron R. W. Co.*, 24 U. C. R. 222.

It was objected at the trial, that the award was made without the day's notice to defendants' arbitrator required by the Act:—Held, no objection, for it was made at the same meeting from which he withdrew. *S. C., ib.* 520.

Refusal of Third to Attend—*Notice.*]—Held, that where the company's arbitrator had not been notified pursuant to the statute of time and place appointed for signing awards between the company and land owners, such awards were invalid by the statute C. S. C. c. 66, s. 11, s.-s. 11, and that although he had notified the other arbitrators that he would not attend, and waived any notice. *Norvell* v. *Canada Southern R. W. Co.*, *Canada Southern R. W. Co.* v. *Norvell*, 9 A. R. 310.

Third Dissenting.]—The reference was before three arbitrators, and the award was executed by two of the three only. It appeared that at a meeting of the arbitrators a rough sketch of the award was drawn up and read over to them, and was agreed to and signed by two of them, but dissented from by the third; and on the following day the formal award in the terms of the draft was drawn up and signed by the two, without reference to the dissenting arbitrator:—Held, under s. 9, s.-s. 17, of the Railway Act, 1868, that the award was invalid; and, semble, it would be so apart from that Act. *Anglin* v. *Nickle*, 30 C. P. 72.

On an arbitration with regard to land taken by a railway company, the argument closed on the 10th August, and the arbitrators adjourned until the 11th, when, after discussion, one of them said he was sorry he could not concur with the others in the sum they had agreed upon, and withdrew. The other two then signed the award in the presence of each other, and reacknowledged it in the presence of a witness on the 14th August:—Held, that the meeting having been adjourned to the 11th, the case was within the terms of 42 Vict. c. 9, s. 9, s.-s. 17 (D.) Held, also, after reviewing the authorities, that the award was valid at common law. *Freeman* v. *Ontario and Quebec R. W. Co.*, 6 O. R. 413.

Third not Appointed.]—The court has no jurisdiction to set aside an award made under the Railway Act of 1868 (31 Vict. c. 28 (D.)) Held, that, even were there jurisdiction, the court would not have interfered in this case, as the instrument in question was in no sense an award under the statute, the provisions of the statute not having been observed, there having been only two arbitrators appointed, who had not been sworn, and s.-s. 26 of s. 9 not having been complied with. *In re Horton and Canada Central R. W. Co.*, 45 U. C. R. 141.

(f) *Award—Uncertain or Unauthorized Provisions of.*

Damages for Depreciation.] — Arbitrators appointed to assess the damages sustained by land owners whose lands have been taken for railway purposes, have a right to take into consideration matters other than the value of the mere quantity of land taken. Where, therefore, arbitrators allowed a sum "for depreciation to farm generally by the permanent occupation of the land as a railway," the award was held valid. *Great Western R. W. Co.* v. *Warner*, 19 Gr. 506.

Damages for Slashing.]—The submission—after reciting that the company had located their line so as to run across a portion of the land of the other party, and that disputes and differences existed as to the value of the land required by the company for the use of the road, and also the damage the said party might sustain thereby—referred "all disputes and differences which exist between the said parties." The arbitrators in their award included damages for slashing done on either side of the line taken by the company: —Held, that this was within their authority. *Re Great Western R. W. Co. and Chauvin*, 1 P. R. 288.

Description of Land.]—The submission recited in the award stated that the company "had set out and taken for the uses of the road a portion of M.'s land, being all his land lying immediately north of the land theretofore conveyed by him to the company;" and the award determined "that the value of the lands so set out and taken as aforesaid is," &c.:—Held, that the land to be taken was sufficiently described. *In re Miller* v. *Great Western R. W. Co.*, 13 U. C. R. 582.

In the award the plaintiff's freehold land was described as "the freehold portion of his lands taken:"—Held, a sufficient description, as it could be identified by the notice served by the company, and also by the plans filed. *Anglin* v. *Nickle*, 30 C. P. 72.

E. B. et al., joint owners of land situate in the city of Quebec, were awarded $11,900 under 43 & 44 Vict. c. 43, s. 9, for a portion of their land expropriated for the use of the North Shore Railway Company. On the 12th March, 1885, E. B. et al. instituted an action against the North Shore Railway Company, based on the award. The notice of expropriation and the award, both described the land expropriated as No. 1 on the plan of the railway company deposited according to law, but in another part of the notice it was described as forming part of a cadastral lot 2345, and in the award as forming part of lots 2344, 2345. On the 5th December judgment was rendered in favour of E. B. et al., for the amount of the award:—Held, that there was no uncertainty in the award, as the words of the award and notice were sufficient of themselves to describe the property intended to be expropriated, and which was valued by the arbitrators. *Beaudet* v. *North Shore R. W. Co.*, 15 S. C. R. 44.

In an award for land expropriated for railway purposes, where there is an adequate and sufficient description, with convenient certainty, of the land intended to be valued, such award cannot afterwards be set aside on the ground that there is a variation between the description of the land in the notice of expropriation and in the award. *Bigaouette* v. *North Shore R. W. Co.*, 17 S. C. R. 363.

——— *Necessity for Conveyance.*]—Where an award between the Great Western Railway Company and a person through whose lands the road passed, awarded a sum of money for damages, and, on payment for the land taken by the company, directed a conveyance of the land, the award was not set aside although it did not set out by metes and bounds the land for which the conveyance was to be given. Semble, that a conveyance was not necessary. *Great Western R. W. Co.* v. *Rolph*, 1 P. R. 50.

Distribution of Damages—*Executors.*]—Where the parties interested were devisees under a will:—Held, unnecessary to state how much each was to receive; for the money might be paid to the executors for them to divide. *Great Western R. W. Co.* v. *Baby*, 12 U. C. R. 106.

Form of Award.]—See *Great Western R. W. Co.* v. *Baby*, 12 U. C. R. 106.

Lessee's Interest — *Lumber.*] — Arbitrators awarded a certain sum for defendant's interest in the land as lessee, "and for the lumber taken by the said company now piled upon that portion of the wharf taken by the said company:"—Held, beyond the power of the arbitrators. *Great Western R. W. Co.* v. *Hunt*, 12 U. C. R. 124.

Maintenance of Water Supply.]—The following proviso was inserted in the award:—"It being understood that the Great Western Railway Company shall construct and maintain a public water tank south of the railway, sufficient at all times to supply the inhabitants of the front of said lots 79 and 80 with water from the Detroit river, and shall keep open Ferry street at its present width:"—Held, that the company could not object to this. *Great Western R. W. Co.* v. *Baby*, 12 U. C. R. 106.

Reservation of Road.]—It was expressed in the award that the land should be subject to the reservation of the Bordage road expressed in the patent to F. B. of the said land, and to any public or private right, excepting the right of the parties submitting to the arbitration, in respect of Water street and River street having been laid out on a certain plan:—Held, no objection. *Great Western R. W. Co.* v. *Baby*, 12 U. C. R. 106.

Right to Cross Track.]—The award stated:—"We have taken it for granted, in making this award, that the said C. H. shall have the right to cross the railway track from one part of his property to another:"—Held, not sufficiently definite or certain. *Great Western R. W. Co.* v. *Hunt*, 12 U. C. R. 124.

An award was held bad, for want of certainty and definiteness in the provisions respecting the right to cross the track and the manner of doing so. *Great Western R. W. Co.* v. *Dougall*, 12 U. C. R. 131.

The award contained the following reservation:—"Reserving to Dodds the right to cross the railway line from one portion of the said land to the other:"—Held, that such an absolute reservation was unauthorized, and that if it were not, so indefinite a provision would have been void; but, semble, that being unauthorized and void, it would not necessarily invalidate the whole award. *Great Western R. W. Co.* v. *Dodds*, 12 U. C. R. 133.

Separation of Damages.]—Quære, whether the award need distinguish between the price of the land and the damages. *Martini* v. *Gzowski*, 13 U. C. R. 298.

See Mitchell v. *Great Western R. W. Co.*, 38 U. C. R. 471.

(g) *Award—Other Objections to.*

Agreement Made pending Arbitration—*Evidence.*]—After the evidence had been closed, the construction committee of the railway company wrote a letter addressed to H., agreeing to certain things whereby the damage to his property would be lessened. This was delivered to the arbitrator for the company before the award was made, and by him to the umpire, but was not communicated to H. until after the award, which contained recitals of the benefits proposed by this letter, and assessed the compensation at the sum originally offered by the company. The award was not signed by H.'s arbitrator, who swore that the letter affected the award, and reduced the sum awarded, while the other two arbitrators swore it had no effect upon their finding:—Held, that the award was bad. Remarks as to the caution to be observed by arbitrators in such cases in considering or acting upon such agreements made pending the arbitration. *Re Herring and Napanee, Tamworth, and Quebec R. W. Co.*, 5 O. R. 349.

Finality — *Want of.*] — Arbitrators appointed to determine the value of certain land required for the Great Western Railway Company, and the damages the owner might sustain thereby, awarded that the company should pay £50 per acre for the land, £31 5s. for damages to the said land, and £13 15s. for other damages. It was admitted that damages to other land were claimed at the arbitration:—Held, that the award was bad, not being final on the matters submitted. *Great Western R. W. Co.* v. *Laderonte*, 1 P. R. 243.

Married Woman.]—The fact of one of the parties interested in the land being a married woman, was held no objection to the award, for it was known to the company when they referred, and both she and her husband were willing to convey in accordance with the award. *Great Western R. W. Co.* v. *Baby*, 12 U. C. R. 106.

Third Arbitrator — *Objection to — Waiver — Submission—Variance.*]—It was objected that there was no sufficient evidence of disagreement between the two arbitrators to warrant the appointment of a third by the county Judge:—Held, that this objection had been waived by defendants attending before the three arbitrators. Held, also, that there was no variance between the award, set out in the case, and the submission. *Widder* v. *Buffalo and Lake Huron R. W. Co.*, 24 U. C. R. 520.

See Moore v. *Central Ontario R. W. Co.*, 2 O. R. 647; *In re Ontario and Quebec R. W. Co. and Taylor*, 6 O. R. 338.

(h) *Costs.*

Appeal—*Costs of—Discretion.*]—Although C. S. C. c. 66 directs that when the sum awarded for lands taken for a railway is less than that tendered, the costs shall be borne by the owners, the same rule does not apply as to the costs of an appeal to the court, they being then in the discretion of the court, which, under the circumstances, dismissed an appeal without costs. *Re Credit Valley R. W. Co. and Spragge*, 24 Gr. 231.

Arbitrators' Fees — *Payment by one Party—Recovery.*]—Where it was determined that neither party was entitled to the costs of arbitration under the statute; but the company, in order to take up the award, paid the whole of the arbitrators' fees:—Held, that a summary order could not be made to recoup the company for one-half the fees out of the moneys payable to the land owner, and such order was refused without prejudice to an action for the same purpose. *Re Philbrick and Ontario and Quebec R. W. Co.*, 11 P. R. 373.

Recovery—*Order — Action.*] — Under 16 Vict. c. 99 s. 5, if a greater sum be awarded for land taken by the Great Western Railway Company than that tendered by them, "the company shall pay all costs and charges attending such arbitration;" but no provision is made for their recovery. The court refused to make an order on the company for payment of such costs; and, semble, that the only remedy is by an action of debt on the statute. *In re Foster and Great Western R. W. Co*, 32 U. C. R. 503.

Right to—*Divided Success.*]—A railway company, having taken certain lands for the purposes of their railway made an offer to the owner in payment of the same, which offer was not accepted, and the matter was referred to arbitration under the Consolidated Railway Acts, 1879. On the day that the arbitrators met, the company executed an agreement for a crossing over the said land, in addition to the money payment, and it appeared that the arbitrators took the matter of the crossing into consideration in making their award. The amount of the award was less than the sum offered by the company, and both parties claimed to be entitled to the costs of the arbitration, the company because the award was less than their offer, and the owner because the value of the crossing was included in the sum awarded, which would make it greater than the offer:—Held, affirming the judgment of the court of appeal, which affirmed that in 5 O. R. 674, that under the circumstances neither party was entitled to costs. *Ontario and Quebec R. W. Co.* v. *Philbrick*, 12 S. C. R. 288.

——— *Pleading.*]—The second count averred that the defendants, by their notice of arbitration, alleged that the plaintiff was entitled to no compensation, and that the arbitrators awarded him $10,000; whereby, and by force of the statute, defendants became liable to pay him the costs of the arbitration, but did not pay:—Held, on the authority of Welland R. W. Co. v. Blake, 6 H. & N. 410, that "never indebted" was a good plea to this count. *Widder* v. *Buffalo and Lake Huron R. W. Co.*, 24 U. C. R. 222.

See Anglin v. *Nickle*, 30 C. P. 72.

Separation from Rest of Award.]—It was held no objection to the award that the arbitrators awarded costs, for, if unauthorized, the award of costs was easily separable from the rest of the award. *Widder* v. *Buffalo and Lake Huron R. W. Co.*, 24 U. C. R. 520.

Taxation—*Forum.*]—Costs of an arbitration under the Railway Act, s. 11, can be taxed only by the county court Judge; and charges in the bill for business done in this court auxiliary to the arbitration, such as procuring an order for the attendance of

witnesses, will not authorize a reference to the master. Quære, whether such order can properly be granted in these arbitrations. *In re McDermott*, 25 U. C. R. 152.

——— *Forum—Delegation—Appeal.*]—By the Dominion Railway Act, R. S. C. c. 109, s. 8, s.-s. 22, the costs of an arbitration as to the value of land expropriated for a railway may be taxed by the Judge. The Judge in this case, by an order not appealed against, referred the taxation to a taxing officer:—Held, that the question whether the Judge had power to delegate the taxation could not be raised, and that an appeal lay from the taxing officer to the Judge. *Re McRae and Ontario and Quebec R. W. Co.*, 12 P. R. 282, 327.

Quære, whether "the Judge" named in s.-s. 22 could delegate the taxation of costs. *S. C.*, 12 P. R. 327.

——— *Quantum—Solicitor and Client—Preliminary Costs.*]—In expropriation cases the costs should be taxed liberally in favour of the proprietor; but where the statutes mention "costs" only, and not "full costs," costs as between solicitor and client are not intended. Where a railway company in expropriating land under the Dominion Railway Act agreed to pay to the land owners "all costs incidental to the arbitration" had to fix the compensation to be paid:—Held, that the words did not extend to costs as between solicitor and client, nor to costs preliminary to the arbitration. *Re Bronson and Canada Atlantic R. W. Co.*, 13 P. R. 440.

———*Witness Fees—Subpœnas.*]—By s.-s. 23 of s. 8 of R. S. C. c. 109 "the arbitrators . . . may examine on oath . . . the parties, or such witnesses as may voluntarily appear before them." In this case subpœnas were issued, and witnesses attended upon them and were examined:—Held, that there was no power to compel the attendance of witnesses, and those who attended must have done so voluntarily; there was no power, therefore, to tax the subpœnas as such, but, as they operated as notices, the proper costs of notices should be allowed, and also the costs of the attendance of the witnesses. *Re McRae and Ontario and Quebec R. W. Co.*, 12 P. R. 282.

(l) *Desistment, Abandonment, or Withdrawal.*

After Award.]—Quære, whether after an award the company can relinquish the land valued, and claim exemption from compliance with the award. *In re Miller and Great Western R. W. Co.*, 13 U. C. R. 582.

——— *Notice—Title—Pleading.*]—Section 4 of 4 Wm. IV. c. 29, defendants' Act of incorporation, provides that money awarded to be paid by them for lands taken shall be paid within three months from the award, and in case the company shall fail to pay the same within that period, their right to assume the property shall wholly cease; "and it shall be lawful for the proprietor to resume his occupation of such property, and to possess fully his rights and privileges in respect thereof, free from any claim or interference from said company." The plaintiffs sued the defendants for money awarded to be paid to the plaintiffs, as executors and trustees of one A., for land taken by defendants for the purposes of their railway. Defendants pleaded that they had never taken possession of or used the land, and that, forthwith after publication of the award, they gave notice to the plaintiffs that they had abandoned all intention of doing so, and withdrew from the purchase:—Held, bad on demurrer, for that defendants, under the enactments above stated, and the subsequent statutes affecting them, could not after the award was made withdraw from the purchase. In a second plea, after stating the same facts, defendants added that the plaintiffs then resumed their occupation of the land, and had ever since such notice occupied the same free from any claim or interference by defendants:—Held, a good plea; for that, if the notice was given before three months allowed for payment by s. 4 above referred to, the plaintiffs might accept it and elect to treat the contract as ended; and if after, the plaintiffs had taken advantage, as they might do, of the right which was given by the statute for their benefit. The third plea was, that the plaintiffs had no title to the land either at the time of the arbitration and award or at the commencement of the suit:—Held, a good defence. Quære, whether a title acquired after the award, but before suit, would enable them to recover. *Mitchell v. Great Western R. W. Co.*, 35 U. C. R. 148.

Arbitration Pending.]—Under 14 & 15 Vict. c. 51, s. 11, s.-s. 16, a notice for lands may be desisted from, and new notice given for the same lands, even after the arbitrators have met, and are engaged in the arbitration; and an award made by them after such notice is void. *Grimshawe v. Grand Trunk R. W. Co.*, 15 U. C. R. 224. See, also, *S. C.*, 19 U. C. R. 493.

——— *Notice.*]—In an arbitration under the Railway Act, C. S. C. c. 66, to determine the value of land taken, two of the arbitrators had agreed upon the sum to be awarded, and notice had been given by them to the other arbitrator on the 27th February, that they would meet on the 1st March to sign the award. On the 27th a notice of desistment, and that a new notice would be given, was served on them, and on the 1st March a new notice was given, but the two arbitrators proceeded, notwithstanding, and made their award:—Held, that the notice of desistment was effectual, and the award void. *Cawthra v. Hamilton and Lake Erie R. W. Co.*, 35 U. C. R. 581.

Grounds for.] — Where a railway company took possession of lands without consent of the owner, and held them for some time, and an arbitration was agreed on, by which it seemed probable that the price would be fixed at a sum very much larger than the company would be willing to pay:—Held, that the company could not, on this ground, revoke the submission. *Great Western R. W. Co. v. Miller*, 12 U. C. R. 654.

Lands Actually Taken.]—An abandonment of a notice to take lands for railway purposes must take place while the notice is still a notice, and before the intention has been carried out by taking the lands: R. S. C. c. 109, s. 8, s.-s. 26. *Canadian Pacific R. W. Co. v. Little Seminary of Ste. Thérèse*, 16 S. C. R. 606.

Lands Enclosed.]—Held, that the Great Western Railway Company could not be compelled to purchase land which had been enclosed by one of their engineers without the knowledge of the directors, but which they had never expressed any intention to acquire permanently. Quære, whether, if the company had gone to arbitration upon the value with the intention of taking the land, they could have been compelled to complete the purchase. *Baby* v. *Great Western R. W. Co.*, 13 U. C. R. 291.

Lands Injuriously Affected — *Notice.*]—Held, that the power to desist extends to a case of lands injuriously affected as well as lands taken; but that with the notice of desistment a new notice should be given, and without it the old notice remains in force to uphold an award duly made under it. *Widder* v. *Buffalo and Lake Huron R. W. Co.*, 24 U. C. R. 222.

Second Notice.]—Quære, whether the arbitration under the second notice can also be desisted from, or whether the power extends only to the first appointment. *Grimshawe* v. *Grand Trunk R. W. Co.*, 15 U. C. R. 224.

——— *Award.*]—Held, that a railway company having desisted once from their notice to take land, given under R. S. O. 1877 c. 165, s. 20, could not again desist, pending an arbitration proceeding, under a second notice. The company's arbitrator having withdrawn from such arbitration, in deference to a notice of desistment given by the company, after the amount to be awarded had been agreed upon by the other two:—Held, that the company could not object to the award on the ground that the company's arbitrator had not been asked to sign it. *Moore* v. *Central Ontario R. W. Co.*, 2 O. R. 647. See R. S. O. 1887 c. 170, s. 20 (16).

Third Notice — *Estoppel.*]—A railway company at different times served H. with several notices under the Dominion Railway Act, stating that portions of land owned by him were required for the company's line. To each of the first two notices H. replied by a notice appointing an arbitrator, but stating such appointment to be expressly without prejudice to his right to insist that the company had no right to take any part of his land. The company served successive notices of desistment from all their three notices, and H. gave notice that he objected to the third notice of desistment, and claimed that the company had no right to desist from their third notice of expropriation:—Held, that the company had not exhausted their powers of desistment, but had the right to desist from their third notice. H. could not be allowed to complain of the abandonment by the company of proceedings to compel him to sell his land to them, when he had notified them at every opportunity that he intended to contest their right to compel him to do so; after they had acted upon his expressed intention, and abandoned the notice to which he objected, it was too late for him to endeavour to insist upon its validity. Grierson v. Cheshire Lines' Committee, L. R. 19 Eq. 83, referred to. *Re Hooper and Erie and Huron R. W. Co.*, 12 P. R. 408.

See Wilkes v. *Gzowski*, 13 U. C. R. 308; *Mitchell* v. *Great Western R. W. Co.*, 38 U. C. R. 471; *Nihan* v. *St. Catharines and Niagara Central R. W. Co.*, 16 O. R. 459.

(j) *Notice to Refer.*

Sufficiency of — *Description—Objection.*]—The notice described the plaintiff's claim as being "in respect of the alleged damages claimed by you for the construction of their railway along the margin of the river Maitland, northerly of your land in the town of Goderich, as the same is now made and built:"—Held, a sufficient description of the subject matter of the dispute, and the property alleged to be injuriously affected. Held, also, that objections urged by a party to his own notice should be examined most strictly. *Widder* v. *Buffalo and Lake Huron R. W. Co.*, 24 U. C. R. 520.

——— *Price of Land—Consequential Damages — Premature Entry — Action.*] — The Grand Trunk Railway Company notified the plaintiff that they required a portion of his land (describing it), and their readiness to pay a certain sum "as compensation for the fee simple of the said piece of land hereinbefore described," and that in case of refusal they would proceed to obtain a title; and also notified him of their appointment of an arbitrator, "to act in pursuance of the provisions of the Railway Clauses Consolidation Act." The defendants, contractors under the company, entered, and commenced the work soon after. The plaintiff subsequently appointed an arbitrator, and an arbitration was held; but a few days before the award he brought trespass, and he refused to accept the sum awarded:—Held, that the notice was sufficient to entitle the company to an arbitration, both upon the price of the land and the consequential damage from taking it. Held, also, that neither the price nor such damage could be recovered in this action, but only damages caused by the entry and commencement of the work, which were premature. *Martini* v. *Gzowski*, 13 U. C. R. 298.

6. *Other Cases.*

Creditor — *Superfluous Lands—Inquiry.*]—The rule that railway companies, when acting in good faith, are the best judges of what lands, &c., are required for the railway, does not apply in a proceeding by a creditor against the company; in such a case the court is the proper authority to determine that point. The court in such a case ordered a reference to the master to inquire whether the company held any lands which were superfluous or not necessary for the use of the company; but the company were declared entitled to retain for their use a gravel pit, obtained under the compulsory powers in their Act, with necessary approaches thereto; and also to sufficient land for the erection of offices for the management of the business of the company. *Erie and Niagara R. W. Co.* v. *Great Western R. W. Co.*, 19 Gr. 43.

Mechanics' Lien—*Sale.*]—This court will not direct the sale of lands required for the use of a railway company to enforce the payment of a mechanics' lien for work done on the property; in such a case the decree will only be for payment of the amount found due, with costs. *Breeze* v. *Midland R. W. Co.*, 26 Gr. 225.

XVI. LEASE OF RAILWAY.

Powers of Company.] — A railway or canal company cannot lease the concern or delegate its powers for a specified term without the sanction of the legislature. This principle was held applicable to a railway company who had no power of taking land compulsorily, but had other special powers and privileges under their Act of incorporation. *Hinckley* v. *Gildersleeve*, 19 Gr. 212.

The respective legislatures of the state of New York and of Canada incorporated certain persons for the purpose of constructing a suspension bridge across the Niagara river, for railway and other purposes, with power to take lands, charge tolls, &c., and the two companies joined together in conveying to one railway company the exclusive use of the railway portion of their structure, with power to make arrangements with other railway companies:—Held, that such conveyance was ultra vires and void. *Attorney-General* v. *Niagara Falls International Bridge Co.*, 20 Gr. 34.

See Tate v. *Port Hope, Lindsay, and Beaverton R. W. Co.*, 17 U. C. R. 354.

XVII. LESSEES OR ASSIGNEES OF RAILWAYS, ACTIONS AGAINST.

Breach of Contract—*Agents and Directors—Jury.*]—Plaintiffs sued defendants for breach of an agreement to carry lumber for them from Peterborough to Port Hope at a stipulated price. The agreement, which was dated in November, 1865, recited that defendants were engaged in running the "Port Hope, Lindsay, and Beaverton Railway," and the Millbrook branch thereof, and by it defendants bound themselves to carry plaintiffs' lumber at a certain rate. Defendants pleaded that the agreement was made by them as agents and directors of the railway company, of which plaintiffs had notice, and that by 16 Vict., further amending the Act incorporating the Peterborough and Port Hope Railway Company, was adopted a clause enacting, in substance, that no undue advantage, privilege, or monopoly should be afforded to any person, which clause was contained in C. S. C. c. 66; and that by 18 Vict. the name of the company was changed to the Port Hope, Lindsay, and Beaverton Railway Company; that after the making of said agreement the rates of carriage were increased beyond those mentioned therein, and that the company made no other charge against plaintiffs than against every one else. It appeared at the trial that at the date of the agreement one of the defendants was president and the other managing director of the main line of railway from Port Hope to Lindsay, and lessees of the branch line leading from Millbrook, a station on the main line to Peterborough; that, by reason of the company having been long insolvent, the main line had been solely within defendants' control as principal bondholders of the company; and that what they did personally was in substance, therefore, done on the company's behalf. The jury were asked to find whether the agreement was made by defendants acting as agents for and directors of the company, of which plaintiffs had notice; and having found in the negative and assessed damages in favour of plaintiffs, the court refused a new trial. *McDougall* v. *Covert*, 18 C. P. 119.

Injury to Cattle—*Evidence—Objection.*]—Defendant, who was possessed of and worked a certain railway, was sued for killing a cow of the plaintiff. At the trial no evidence was adduced to prove defendant's connection with the railway, and no objection was taken to the absence of it. The court below ordered a nonsuit on the ground, among others, that there was no such evidence. On appeal:—Held, that defendant, not having taken the objection at the trial, was not entitled to take it afterwards. The judgment was therefore reversed, and a new trial ordered. *Bennett* v. *Covert*, 13 C. P. 555.

——— *Sublessee — Fences.*]—Held, that defendant, a sublessee of a railway company, was not liable under the Railway Act, C. S. C. c. 66, for neglect to maintain fences, by which plaintiff's cattle had been killed. *Bennett* v. *Covert*, 24 U. C. R. 38.

Injury to Lands—*Sublessees—Branch Line.*]—To obtain the means of constructing a branch line from Peterborough to Millbrook, the Port Hope, Lindsay, and Peterborough Railway Company agreed to lease their railway to T. and F., under the preamble to 27 Vict. c. 60, and the branch line was accordingly constructed by T. and F., and by defendants as their assignees:—Held, that the construction of the branch line under the authority of the company had been sanctioned by this Act, which had also confirmed to the lessees the right to maintain and use the road under the franchise of the company. Held, also, that the lessees, and defendants claiming under them, were not personally liable for anything done within the power given to the company under the Acts. Defendants had also maintained a cutting in the street in front of the plaintiff's house, which prevented the street being used as before:—Held, that, if the plaintiff had been more injuriously affected thereby than others, and was entitled to compensation, redress must be sought from the company, and not from defendants individually, as exercising its rights and franchise. *Hamilton* v. *Covert*, 16 C. P. 205.

——— *Taking Gravel — Agreement.*] — See *Pew* v. *Buffalo and Lake Huron R. W. Co.*, 17 U. C. R. 282, *ante* VII. 7.

See McCallum v. *Buffalo and Lake Huron R. W. Co.*, 19 C. P. 117.

See post XXVI.

XVIII. LIABILITY FOR ACTS OF AGENTS, CONTRACTORS, AND SERVANTS.

Carriage of Passengers—*Contracts.*]—Railway companies are bound by contracts entered into by their general agents as to the conditions of carrying passengers, although such contracts should, within the means of knowledge of the agent, be beyond the regulations of the company in relation to such matters. *Childs* v. *Great Western R. W. Co.*, 6 C. P. 284.

Construction of Railway — *Changing Road Line.*]—J. & Co. had contracted with the Grand Trunk Railway Company to obtain the land required by them, and to construct their road. The line was laid out so as to cross the Bath macadamized road several times, which being considered dangerous, the

contractors agreed to make a new line for the road company, and in doing so they encroached upon the plaintiff's land:—Held, that the railway company were not liable. *Purdy* v. *Grand Trunk R. W. Co.*, 15 U. C. R. 571.

Contract to Pay Costs — *Secretary.*]—A bank having executions against a railway company in the hands of the sheriff, the secretary of the company, in order to avert a seizure of a quantity of railway iron, signed a letter agreeing that the bank, out of moneys coming to their hands from certain garnishee proceedings taken by the bank against debtors of the company, might retain "a sufficient amount fully to cover all your solicitor's costs, charges, and expenses, against you or against you and us, as between attorney and client or otherwise; as well as the costs, charges, and expenses of your bank, of what nature or kind soever, and after the payment of such, in the second place, to hold the surplus, if any, to apply on your executions against us." This letter was signed without any authority from the board of directors of the company, although two members of the board were aware of it, and one of them, the vice-president of the company, authorized it:—Held, not such an act as the officers of the company were authorized in the discharge of their duties to perform; and that, although the bank granted the time asked for, they could not enforce payment of the amounts stipulated for. *Hamilton and Port Dover R. W. Co.* v. *Gore Bank*, 20 Gr. 190.

Conversion of Cattle—*Station Master.*]—Trover for conversion of five cattle, killed during their carriage by defendants, as to which defendants paid into court $52, being the price for which they were sold by defendants' station master after they had been killed: — Held, that such payment admitted only a cause of action, not the particular cause sued for; and that the evidence proved no conversion by defendants, the sale not being the ordinary duty of a station master. *O'Rorke* v. *Great Western R. W. Co.*, 23 U. C. R. 427.

Issuing Fraudulent Receipt — *Freight Agent.*]—C., a freight agent of respondents at Chatham, and a partner in the firm of B. & Co., caused printed receipts or shipping notes, in the form commonly used by the railway company, to be signed by his name as the company's agent, in favour of B. & Co., for flour which had never in fact been delivered to the railway company. The receipts acknowledged that the company had received from B. & Co. the flour addressed to the appellants, and were attached to drafts drawn by B. & Co. and accepted by appellants. C. received the proceeds of the drafts and absconded. In an action to recover the amount of the drafts:—Held, that the act of C. in issuing a false and fraudulent receipt for goods never delivered to the company was not an act done within the scope of his authority as the company's agent, and the latter were therefore not liable. *Erb* v. *Great Western R. W. Co.*, 5 S. C. R. 179.

See S. C., 42 U. C. R. 90, 3 A. R. 448; *Oliver* v. *Great Western R. W. Co.*, 28 C. P. 143, 3 A. R. 448.

Libel Published by General Manager.]—See *Tench* v. *Great Western R. W. Co.*, 33 U. C. R. 8.

Purchasing Right of Way—*Powers of Agents.*]—See *Schlichauf* v. *Canada Southern R. W. Co.*, 28 Gr. 236; *Clouse* v. *Canada Southern R. W. Co.*, 4 O. R. 28, 11 A. R. 287.

XIX. Limitation of Actions and Damages.

1. *Injury to Land.*

Erecting Bridge.]—Declaration charged defendants with wrongfully and unlawfully erecting a bridge across a certain stream. Defendants pleaded (seeking to take advantage of 16 Vict. c. 99, s. 10), as to such of the causes of action as accrued more than six months before the suit, that the plaintiffs ought not to maintain their action, because such causes did not accrue within six months. The plaintiff replied that the injury sued for was a continuing damage. It was not alleged or shewn in any way, either in the declaration or plea, that the bridge was erected under defendants' charter, or for their railway:—Held, therefore, that the plea was bad. Held, also, that if the defence had been properly pleaded, the replication would have been good. *Wismer* v. *Great Western R. W. Co.*, 13 U. C. R. 383.

See, also, *Regina ex rel. Trustees of St. Andrew's Church* v. *Great Western R. W. Co.*, 14 C. P. 462.

16 Vict. c. 99, s. 10, saves the right of action for the whole damage suffered, where the suit is brought within six months after the injury has ceased. *Smure* v. *Great Western R. W. Co.*, 13 U. C. R. 376.

Fire.]—In an action against a railway company for so negligently managing a fire which had begun upon defendants' track that it extended to the plaintiff's land adjoining:—Held, that the limitation clause did not apply, the injury charged being at common law, by one proprietor of land against another, independent of any user of the railway. *Prendergast* v. *Grand Trunk R. W. Co.*, 25 U. C. R. 193.

Plaintiff sued defendants for having negligently allowed dry wood and leaves to accumulate on their track, which became ignited by their engine, and extended to plaintiff's land, destroying his trees, &c.:—Held, that this was an injury sustained by "reason of the railway," within C. S. C. c. 66, s. 83; and that the plaintiff, suing more than six months after the injury, was therefore barred. *McCallum* v. *Grand Trunk R. W. Co.*, 30 U. C. R. 122. *S. C.*, in appeal, 31 U. C. R. 527.

See North Shore R. W. Co. v. *McWillie*, 17 S. C. R. 511.

Neglect to Fence.]—Held, that the fact of cattle from time to time getting upon the plaintiffs' land and destroying the crops, did not constitute a "continuation of damage," so as to entitle the plaintiffs to recover for more than six months' injury; for the continuation of the omission is not what is meant, but the damage resulting from it, and several unconnected acts of damage, each complete in itself, is not a continuation within the Act. *Brown* v. *Grand Trunk R. W. Co.*, 24 U. C. R. 350.

See Nichol v. *Canada Southern R. W. Co.*, 40 U. C. R. 583.

Overflow of Water.]—Declaration that plaintiff's farm was drained by a stream running through it and another lot to the east, &c., yet defendants constructed their railway across plaintiff's land, and across said stream, at a point to the east of plaintiff's land, in so careless, negligent, and unskilful a manner as to obstruct said stream, and prevent the water from flowing as it used and ought to do, and did not restore it to its former state, or in a sufficient manner not to impair its usefulness; and afterwards the stream, being increased by rains, and the passage being so obstructed, overflowed the plaintiff's land and injured his crops. Plea, as to so much of the causes of action, and all damages in respect thereof, as accrued more than six months before action, that defendants committed the grievances in the declaration mentioned in the construction of their railway, and that the said grievances in the introductory part of the plea mentioned did not accrue within six months next before this suit:— Held, on demurrer, a bad plea, the issue tendered being in fact whether those causes of action which accrued more then six months before the commencement of the suit did not accrue within six months before such commencement. Held, also, that the declaration was sufficient; that it sufficiently shewed the nature of the grievances, and that they were wrongful. *Matson* v. *Great Western R. W. Co.*, 14 U. C. R. 102.

At the trial it appeared that the breadth of this stream at high water was about forty feet, and the railway was carried across it by a bridge having a culvert of only seven feet wide. The witnesses said it would require a culvert of twenty feet wide to allow a free passage when the stream was full. About two years after the completion of the railway, very heavy rains having fallen, the plaintiff's land was overflowed and his crops injured, for which he sued the company, and recovered a verdict:—Held, that such verdict was warranted, and the action brought in time, the cause of action having first accrued when the injury was sustained, and not by the construction of the railway. *S. C., ib.* 109.

Declaration, that the plaintiff was possessed of land which was and of right should continue to be drained by a certain drain passing along the easterly boundary of said land, yet defendants constructed their railway across plaintiff's land, and across said drain adjacent thereto, in so careless, negligent, and improper a manner, and kept said railway so constructed, that said drain became interrupted and dammed up; by means whereof a large quantity of water which had fallen on plaintiff's said land and other lands adjoining, which had been also kept clear of water by means of said drain, passed into said drain and along the same to the railway, where it was obstructed, and overflowed plaintiff's land, &c. Plea, as to so much of the causes of action as accrued more than six calendar months before this suit, that defendants committed the same in the construction of their railway, and that the said supposed causes of action did not accrue to the plaintiff within six calendar months before this suit:—Held, on demurrer to the plea and exceptions to the declaration, plea bad, declaration sufficient. *Lesperance* v. *Great Western R. W. Co.*, 14 U. C. R. 187.

Plaintiff by written agreement allowed defendants to carry their road through his land, and in constructing it they made an embankment which rendered his access to the highway inconvenient, and prevented the water near and around his house from running off as before:—Held, an injury for which an action, if maintainable at all, would lie for any damage sustained within six months; but, semble, that the plaintiff was restricted to his remedy by arbitration, and could sustain no action. *Cameron* v. *Ontario, Simcoe, and Huron R. W. Co.*, 14 U. C. R. 612.

Defendants, in the construction of their railway, crossed a stream which emptied itself on the plaintiff's land, and to allow a passage they built a culvert, and caused the water to flow as before on to the plaintiff's land, none of the said land, however, being taken for railway purposes. The culvert being filled up, defendants caused (about six years before this action) a drain to be dug, which, with continuations made by adjoining owners, diverted the water so as to overflow a portion of plaintiff's land—and instead of being a benefit became an injury. The plaintiff sued after six years, claiming damages for a crop injured at the time of the diversion, and as a continuing injury to the land since:—Held, that the damage was not continuing, and that the action should have been brought within six months. *Patterson* v. *Great Western R. W. Co.*, 8 C. P. 89.

The Great Western Railway Company in constructing their line of road crossed plaintiff's land at a point where a watercourse draining plaintiff's land passed, by which the watercourse was obstructed, and plaintiff's land afterwards overflowed. Upon action brought after six months from the act done:—Held, that, as it was to be assumed that defendants constructed their railway upon plaintiff's land either upon agreement with the plaintiff, or upon a reference to arbitration under 4 Wm. IV. c. 3, and that plaintiff had been paid therefor, and that the damage resulted from the original construction, no subsequent claim for that damage as a continuing damage could be maintained. *Knapp* v. *Great Western R. W. Co.*, 6 C. P. 187.

The plaintiffs sued defendants for so negligently constructing their railway as to obstruct a watercourse by which his land had been drained, thereby causing the same to overflow and injure his crops:— Held, that an action would lie, and might be brought within six months from the injury. *Vanhorn* v. *Grand Trunk R. W. Co.*, 18 U. C. R. 356; *S. C.*, 9 C. P. 264.

Action for overflowing plaintiff's land by neglecting to make culverts and thus obstructing the water. Several acres were overflowed, the damage varying as to time and extent, but never wholly ceasing:—Held, that by C. S. C. c. 66, the plaintiff could not claim damages for more than six months next before the action. *McGillivray* v. *Great Western R. W. Co.*, 25 U. C. R. 69.

See Carron v. *Great Western R. W. Co.*, 14 U. C. R. 192.

See, also, VII.

Taking Earth.]—Held, that s. 34 of R. S. O. 1877 c. 165, which fixes a limitation of six months for bringing actions for any damage or injury sustained by reason of any railway, does not apply to an action brought against a railway company for damages for

wrongfully taking earth from the plaintiffs' land. Township of Brock v. Toronto and Nipissing R. W. Co., 37 U. C. R. 372, followed. *Beard* v. *Credit Valley R. W. Co.*, 9 O. R. 616.

Taking Gravel.]—The six months' limitation clause, C. S. C. c. 66, s. 83, does not apply to an action for a trespass to land by taking gravel from a road allowance. *Township of Brock* v. *Toronto and Nipissing R. W. Co.*, 37 U. C. R. 372.

Timber—*Cutting and Removing—Six Rod Belt—Dominion Statute—Intra Vires.*]—The defendants, a railway company incorporated by an Act of the parliament of Canada and subject to the provisions (among others) of s. 27 of the Railway Act of Canada, built their road through lands in the Province of Ontario, the fee of which was in the Crown, but over which the plaintiffs had for three successive years held timber licenses issued by the provincial government. These licenses, giving the right to cut timber and exclusive possession in the usual form, were dated respectively the 5th July, 1883, the 10th December, 1884, and the 22nd July, 1885, and each extended from its date to the 30th of the next April. The defendants entered upon the limits in question about the end of the year 1884, and the road was completed in July, 1886. In building the road the defendants cut down timber on the line and also both within and outside of the six rod belt mentioned in the statute. No timber was cut after December, 1885. The plaintiffs brought this action on the 9th September, 1886, to recover damages for the timber cut. It was admitted that, as to timber cut outside the six rod belts, they were entitled to recover, but it was contended that, as to timber cut on the line and within those belts, the action was barred. The defendants had filed their plan and book of reference, but they had not taken any of the statutory steps to acquire the interest of the plaintiffs:—Held, in the high court, that under R. S. C. c. 109, s. 6, s.-s. 12, the timber cut within the six rod limit became the property of the railway company, and that the loss of the trees was damage or injury sustained by the plaintiffs by "reason of the railway," under s. 27 of R. S. C. c. 109, and the action was therefore barred by that section by reason of its not having been brought within the six months. The court of appeal was evenly divided upon the question whether that section was intra vires the Dominion parliament, or ultra vires as being an unnecessary interference with property and civil rights within the Province. *McArthur* v. *Northern Pacific Junction R. W. Co.*, 15 O. R. 733, 17 A. R. 86.

Trespass.]—An action of trespass against a railway company for damage done in the construction of the line must be commenced within six months from the commission of the trespass. *Follis* v. *Port Hope, &c., R. W. Co.*, 9 C. P. 50.

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2. *Injury to Persons.*

Passenger—*Assault.*]—In an action for assault and false imprisonment, it appeared that defendant, a conductor, had detained the plaintiff under 18 Vict. c. 176, s. 10, to take him before a magistrate upon the charge of having obstructed defendant in the execution of his duty:—Held, that he was entitled to the protection of s. 26, and that the action, brought more than six months after the act complained of, was too late. *Lauzeau* v. *Leonard*, 20 U. C. R. 481.

——— *Negligence.*]—16 Vict. c. 99, s. 10, limiting the time for bringing actions, applies only to actions for damages occasioned in the exercise of the powers given to the company to construct and maintain their road, not to claims for negligence in conveying passengers. *Roberts* v. *Great Western R. W. Co.*, 13 U. C. R. 615.

In an action brought by the plaintiff for injuries received while being carried on a train, the defendants set up that the injuries complained of were sustained more than six months before action brought, and that the action was barred by s. 27 of the Consolidated Railway Act, to which the plaintiff demurred:—Held, that any damage done through negligence upon a railway in the carriage of passengers and the like, is damage done "by reason of the railway." Browne v. Brockville and Ottawa R. W. Co., 20 U. C. R. 202, McCallum v. Grand Trunk R. W. Co., 31 U. C. R. 527, and Kelly v. Ottawa Street R. W. Co., 3 A. R. 616, followed. Semble, that the concluding words of s. 27 of the Consolidated Railway Act, viz., that "the defendants may prove that the same" (that is the damage) "was done in pursuance of the authority of this Act and the special Act," should be read as meaning "in the course and prosecution of their business as a railway company, constituted in pursuance of," &c. *May* v. *Ontario and Quebec R. W. Co.*, 10 O. R. 70.

On 10th May, 1879, C. was seated in a car of the C. V. R. Co. standing on the railway of that company, when an engine of the defendants ran upon the railway of the C. V. R. Co., through gross negligence as alleged, and collided with the car in which C. was. He was injured in the collision, and died on 11th August, 1885, as alleged, from the injuries thus received. On 4th August, 1886, his executrix brought an action therefor:—Held, on demurrer, that the action was for injury sustained "by reason of the railway:" and that the limitation of six months provided by s. 83 of C. S. C. c. 66 (s. 27 of 42 Vict. c. 9 (D.)), applied and prevailed over the limitation of twelve months provided for by s. 5 of R. S. O. 1877 c. 128; and therefore the action was barred. *Conger* v. *Grand Trunk R. W. Co.*, 13 O. R. 160.

Person Crossing Track.]—Action for injury to plaintiff by a train running against him at a crossing, owing to neglect to sound the whistle, and to improper construction of the railway, it being too much above the level of the highway:—Held, that the injury, if arising from either cause alleged, was sustained "by reason of the railway:" that it was not a case within the exception as to "continuation of damage;" and that the action, having been brought more than six months from the accident, was therefore too late. *Browne* v. *Brockville and Ottawa R. W. Co.*, 20 U. C. R. 202.

——— *Repair of Bridge—Lord Campbell's Act.*]—The plaintiff's father was killed on the 10th February, 1891, by a fall from a bridge, part of a highway, which crossed the defendants' line, and had been negligently allowed by them to be out of repair. The action was

begun on the 14th November, 1891, more than six months after the accident, no letters of administration having been taken out:—Held, that this was not "damage sustained by reason of the railway," and that the limitation clauses of the Railway Act did not apply. Held, also, that the provisions of R. S. O. 1887 c. 135, Lord Campbell's Act, are not affected by special legislation of this kind, so that in that view also the action was begun in time. Judgment in 21 O. R. 628 affirmed on other grounds. *Zimmer* v. *Grand Trunk R. W. Co.*, 19 A. R. 693.

Person Lawfully on Highway—*Street Railway.*]—The plaintiff sued defendants for an injury sustained by him while engaged in his lawful occupation on the street, by defendants' car being so carelessly and rapidly driven that he was obliged to jump into a drain to save himself, and was hurt:—Held, that s. 83 of C. S. C. c. 66 applied to a suit of this nature, and that the action should have been brought within six months. Auger v. Ontario, Simcoe, and Huron R. W. Co., 9 C. P. 164, and Browne v. Brockville and Ottawa R. W. Co., 20 U. C. R. 202, followed. *Kelly* v. *Ottawa Street R. W. Co.*, 3 A. R. 626.

Servant—*Death of—Widow's Right of Action.*]—The husband of the plaintiff was injured while engaged in his duties as the defendants' employee, and the injury resulted in his death about fifteen months afterwards. No indemnity having been claimed during the lifetime of the husband, the plaintiff, acting for herself as well as in the capacity of executrix for her minor child, brought an action for compensation within one year after his death:—Held, by the supreme court of Canada, that at the time of the death of the plaintiff's husband all right of action was prescribed under art. 2262, C. C., and that this prescription is one to which the tribunals are bound to give effect, although not pleaded: arts. 2267 and 2188, C. C. Held, by the judicial committee of the privy council, that the civil code of Lower Canada does not make it a condition precedent to the right of action given by art. 1056 to the widow of a person dying as therein mentioned, that the deceased's right of action should not have been extinguished in his lifetime by prescription under art. 2262 (2). The death is the foundation of the right given by the former section, which is governed by the rule of prescription contained therein, and is exempt from the rule of prescription which barred the claim of the deceased. *Robinson* v. *Canadian Pacific R. W. Co.*, 19 S. C. R. 292, [1892] A. C. 481.

See Soule v. *Grand Trunk R. W. Co.*, 21 C. P. 308.

3. *Lands Taken.*

Compensation.]—The right of compensation for land taken by a railway company is not barred short of twenty years, and is not barred by the claimant's title to the land being extinguished by reason of the railway company having been in possession for ten years. *Ross* v. *Grand Trunk R. W. Co.*, 10 O. R. 447.

The right to compensation is not barred until the expiration of twenty years from the time the land is entered upon and taken for railway purposes. Ross v. Grand Trunk R. W. Co., 10 O. R. 447, followed. *Essery* v. *Grand Trunk R. W. Co.*, 21 O. R. 224.

Where compensation money was paid by a railway company to a tenant for life in 1871, the company were ordered to pay the amount over again to the persons entitled in remainder whose title accrued within six years of the time of bringing the action. Cameron v. Wigle, 24 Gr. 8, approved. *Young* v. *Midland R. W. Co.*, 19 A. R. 265, 22 S. C. R. 190.

Title by Possession against Railway Company.]—A title by possession may be acquired as against a railway company to lands originally obtained by them for railway purposes. Bobbett v. South Eastern R. W. Co., 9 Q. B. D. 424, approved. *Erie and Niagara R. W. Co.* v. *Rousseau*, 17 A. R. 483.

Title by Possession in Favour of Railway Company.]—The plaintiff, being the owner of a tract of land near Prescott, on the 29th October, 1849, agreed with the contractors engaged in the laying out of the railway of the defendants, and in acquiring lands and rights of way for the construction thereof, in consideration of their placing the station of the railway for Prescott upon his land, to convey to the contractors, their heirs, &c., six acres of such land for that purpose, and, if necessary, for the purpose of such station, to allow them to take an additional quantity, not exceeding in all ten acres. The station was erected in 1855 on these lands, and used by the company until 1864, when it was closed, and a station erected about one-and-a-half miles from the plaintiff's lands, and station buildings erected thereon, in consequence of which the plaintiff's remaining lands became depreciated in value:—Held, that the defendants having entered upon and retained possession of the lands, so agreed to be conveyed, for more than twenty years before the filing of the present bill (1876), afforded no defence under the Statute of Limitations, as up to a period much within the twenty years their possession could not be questioned, and no right of suit had accrued to the plaintiff until the use of the lands for the purposes of the station was discontinued in 1864. *Jessup* v. *Grand Trunk R. W. Co.*, 28 Gr. 583.

Operation of statute in case of lands taken by railway for right of way. *Thompson* v. *Canada Central R. W. Co.*, 3 O. R. 136.

4. *Other Cases.*

Diversion of Watercourse—*Prescriptive Right.*]—See *Tolton* v. *Canadian Pacific R. W. Co.*, 22 O. R. 204.

Easement—*Enjoyment against Railway Company.*]—See *Canada Southern R. W. Co.* v. *Town of Niagara Falls*, 22 O. R. 41.

Injury to Animals.]—An action for negligence in killing plaintiff's horses which had got on the defendants' track, under 12 Vict. c. 196, ss. 20, 47, must be brought within six months. *Auger* v. *Ontario, Simcoe, and Huron R. W. Co.*, 9 C. P. 164.

Libel.]—An action for libel on the plaintiff, a conductor, published by defendants'

general manager within the scope of his duty: —Held, not an action within 16 Vict. c. 99, s. 10, which must be brought within six months. *Tench* v. *Great Western R. W. Co.*, 33 U. C. R. 8; *S. C.*, 32 U. C. R. 452.

Loss of Luggage.]—See *Anderson* v. *Canadian Pacific R. W. Co.*, 17 O. R. 747.

XX. Powers of Companies.

Bills of Exchange and Promissory Notes.]—Under 1 Vict. c. 30, and 7 Vict. c. 16, the Kingston Marine R. W. Co. may give and receive promissory notes in the course of transacting their legitimate business. *Kingston Marine R. W. Co.* v. *Gunn*, 3 U. C. R. 368.

The Buffalo, Brantford, and Goderich R. W. Co. have no power under their Act of incorporation, or under the general Railway Act, to make promissory notes. *Topping* v. *Buffalo, Brantford, and Goderich R. W. Co.*, 6 C. P. 141.

The defendants, desiring to raise money, drew a bill and requested the plaintiffs to indorse for their accommodation, which the plaintiffs did, and defendants having discounted and failed to meet it, the plaintiffs paid it to the bank:—Held, that, assuming that the defendants had no power to draw the bill, they were nevertheless liable to the plaintiffs as for money paid for them. *Brockville and Ottawa R. W. Co.* v. *Canada Central R. W. Co.*, 41 U. C. R. 431.

Chattel Mortgage—*After-acquired Property—Bill of Lading.*]—The Brockville and Ottawa R. W. Co., by indenture dated the 7th March, 1854, hypothecated, mortgaged, and pledged unto the municipalities of Lanark and Renfrew, Elizabethtown, and Brockville, to secure loans obtained from them, the lands, roads, depots, wharves, stations, terminal and otherwise, tolls, revenues, and all other property of the said company now or during the existence of the said mortgage to be acquired. The statute 20 Vict. c. 144, s. 5, recited these loans and declared the said mortgages valid: that the said intended railway and all stations, buildings, carriages, engines, and other property belonging to said railway, were thereby mortgaged to said municipalities according to the terms of said mortgages; and that the Chattel Mortgage Act should not apply to them. A quantity of iron was purchased for the said railway, the vendors stipulating "these rails to be laid down upon the Brockville and Ottawa Railway Company of Canada," to which the vendees, by their agent, assented. The iron was shipped to the vendees, who indorsed the bills of lading to the municipality of Lanark and Renfrew, who paid the shipping charges and freight out of moneys which formed part of the advances secured by the mortgage of the 7th March, 1854, and the municipality having the iron in their possession at Brockville ready to be placed on the railway, it was seized under an execution against the railway company: —Held, that, as the mortgages covered chattel as well as real property, the words "other property" in them were not restricted to real property, for the statute placed a legislative and different construction on the mortgage; and that under the indorsement of the bill of lading to the municipality, who obtained possession of the iron by such indorsement, together with the stipulation of the vendors, and the assent thereto of the vendees, the plaintiffs acquired the possession and the property in the said iron, and it became a part of the property mortgaged. *Counties of Lanark and Renfrew* v. *Cameron*, 9 C. P. 109.

Construction of Railway of Another Company.]—Defendants being unable to finish their railway, and plaintiffs desiring it as a feeder to their line, a correspondence was had and resolutions were passed by the plaintiffs, and communicated to defendants, authorizing an arrangement by which the plaintiffs should work the road for a certain period and share the profits with defendants. No formal agreement was made, and the terms were not definitely settled, but the plaintiffs went on and completed defendants' line, and ran it for some time at a loss. They then sued defendants for the work done, and for the money expended above the receipts:—Held, that they could not recover; for, as to the first demand, the constructing defendants' road was a matter without the scope of their charter. *Great Western R. W. Co.* v. *Preston and Berlin R. W. Co.*, 17 U. C. R. 477.

Contract—*Bonus — Judgment — Setting aside.*]—Where, by contract ex facie legal and regular, the appellant company purported to incur liability to the respondent for railway construction in an amount which was in reality calculated to cover the amount of bonus and of price of issued shares payable by agreement between the respondent and all the shareholders of the company irrespective of either actual or estimated cost of construction:—Held, that the contract was ultra vires of the company. Held, further, that a consent judgment obtained on the contract declaring the respondent's lien on the company's railway and other property, the question of ultra vires not having been raised either in the pleadings or on the facts stated, was of no greater validity than the contract. The contract and judgment were set aside upon terms. Question of parties considered. Judgment in 26 S. C. R. 221, sub. nom. Charlebois v. Delap, varied. *Great North-West Central R. W. Co.* v. *Charlebois*, [1899] A. C. 114.

Expenditure—*Award.*]—The inability of a railway company under their charter to expend their funds in paying an award, would be no ground for setting it aside. *In re Town of Barrie and Northern R. W. Co.*, 22 U. C. R. 25.

International Bridge—*Exclusive Use.*]—The respective legislatures of the state of New York and Canada incorporated certain persons for the purpose of constructing a suspension bridge across the Niagara river for railway and other purposes, with power to take lands, charge tolls, &c., and the two companies joined in conveying to one railway company the exclusive use of the railway portion of their structure, with power to make arrangements with other railway companies:—Held, that such conveyance was ultra vires and void. *Attorney-General* v. *Niagara Falls International Bridge Co.*, 20 Gr. 34.

Mortgage—*Advances for Construction of Railway—Scope of Lien—Reference.*]—The plaintiffs, a corporate body, having the statutory power to borrow money, issue debentures, bonds, or other securities for the

sum so borrowed, to sell, hypothecate, or pledge the lands, tolls, revenues, and other property of the company, and also power to purchase, hold, and take any land or other property for the construction, maintenance, accommodation, and use of the railway, and to alienate, sell, or dispose of the same, entered into a contract with one Brooks for the construction of their road. When Brooks required the iron necessary for the undertaking, he was unable to purchase it without the assistance of the company, and he thereupon authorized the officers of the company to negotiate for its purchase. In consequence, the solicitor for the company, as agent of Brooks, and with the approval, in writing, of the president of the company, entered into an agreement, dated 9th June, 1874, with the defendants for the purchase of the iron, which was to be paid for as delivered on the wharf at Belleville by the promissory notes of Brooks, and a credit of six months was to be given from the time of the several deliveries of the iron. By that agreement, also, Brooks agreed to obtain from the railway company an irrevocable power of attorney enabling the Bank of Montreal, who advanced to the defendant Bickford the money necessary for the purpose of buying the iron, to receive the government and municipal bonuses, and to procure from the company a mortgage for $200,000 on that portion of their road (44 miles) on which the iron was to be laid—the mortgage to be sufficient in law to create a lien on the 44 miles of railway, as security for the due payment of the notes of the said Brooks, but not to contain a covenant for payment by the company. On the 30th June, 1874, a mortgage was executed by the company under their corporate seal to one Buchanan, then manager of the Bank of Montreal, in Toronto, as a trustee. The Bank of Montreal having made advances to Bickford in the ordinary course of their business dealings to enable him to purchase the iron, it was all consigned to their order by the bills of lading, and, when delivered on the wharf at Belleville, was held by the wharfingers subject to the order of the bank, the whole quantity stipulated for by the contract being so delivered ready for laying on the track as required. The Bank of Montreal and the defendant Bickford caused to be delivered from time to time to Brooks, by the wharfingers at Belleville, all the iron he required to lay on the track, being about 2,000 tons, and about an equal quantity remained on the wharf unused. Brooks having failed to meet his promissory notes for the price of the iron, Bickford recovered judgment at law against him to the amount of $164,852.96. The bank then sold the iron remaining on the wharf for the purpose of realizing their lien, when Bickford became the purchaser thereof at $33.50 per ton for the rails and $50.50 for track supplies. Bickford was removing the iron when the company filed a bill in chancery asking for an injunction to restrain the removal of iron. A motion to continue the injunction was refused on the 11th October, 1875. The defendants (Bickford, Cameron, and Buchanan) then answered the bill, and on the 18th January, 1876, by consent, a decree was made referring it to the master to take the mortgage account, to ascertain and state the amount due to Bickford and Cameron for iron laid or delivered to or for plaintiffs' use on the track, and also the amount due (if anything), in respect of iron delivered at Belleville, but since removed, and to report special circumstances, if requisite. The master found due upon the mortgage $46,841.10, the price of iron actually laid on the track, and interest: and that nothing was due in respect of the iron delivered at Belleville but subsequently removed. On appeal the master's report was affirmed, and, on an appeal to the court of appeal, it was held that the mortgage was ultra vires, and the master's report was affirmed. (See Grand Junction R. W. Co. v. Bickford, 23 Gr. 302.) Held (reversing the judgment of the court of chancery), that the proviso in the mortgage was in its terms wide enough to sustain the contention of the mortgagee to claim the price of all the iron delivered on the wharf at Belleville, and that the memorandum indorsed by Brooks on the mortgage should not be construed as cutting down the terms of the proviso, but was intended as written evidence of Brooks's consent to the mortgage and to the loss of priority in respect to the mortgage bonds to be delivered to him under the contract. Held, also, (reversing the judgment of the court of appeal), that the statutory power to borrow money and secure loans cannot be considered as implying that the company's powers to mortgage are to be limited to that object; and, therefore, that the mortgage executed by the company on a portion of their road in favour of the trustee Buchanan, being given within the scope of the powers conferred upon the company to "alienate, sell, or dispose of" lands for the purpose of constructing and working a railway, was not ultra vires. Quere, whether the rights of a corporation to take lands, operating the railway, taking the tolls, &c., are susceptible of alienation by mortgage in this country? Held, also, that under the pleadings and decree in the cause, the objection that the mortgage was ultra vires was not open to the company in the master's office, or on appeal from the master's report. *Bickford* v. *Grand Junction R. W. Co.*, 1 S. C. R. 696.

Traffic Arrangements.] — See *post* XXVI.

XXI. Powers of Dominion and Provincial Legislatures.

Crown Lands — *Timber* — *Provincial Rights.*]—Held, that the timber licenses claimed by the plaintiff as licensee of the Ontario government were subject to the right of the Canada Central Railway Company, acquired before Confederation, to construct their road across the Crown lands over which the licenses in question extended, and that the defendants, assignees of the railway company, were, therefore, not liable in trespass for entering upon, and cutting the timber on, the limits, in prosecution of the work of building said railway. *Foran* v. *McIntyre*, 45 U. C. R. 288.

——— *Timber—Provincial Rights—Consent of Lieutenant-Governor.*]—Held, that the Canada Central Railway Company acquired under their charter granted by the Act 19 & 20 Vict. c. 112, and subsequent Acts relating thereto passed prior to Confederation, the right, which was preserved by s. 109 of the B. N. A. Act, to enter on the Crown lands in the Province of Ontario on the line of the railway included in a subsequent timber license granted to the plaintiff, and to cut the timber, within six rods of either side thereof, without any restriction as to obtaining the consent of the lieutenant-governor in coun-

cil. Semble, that, in the case of railway companies within its exclusive jurisdiction, the Dominion parliament has the power to confer upon them the right of constructing their lines through the Crown lands of the several Provinces through which they may pass, without such consent of the lieutenant-governor in council. *Booth* v. *McIntyre*, 31 C. P. 183.

Debentures—*Foreign Domicil of Holder—Conversion into Stock by Provincial Statute.*]—The plaintiff, being the holder of a debenture issued by the B. and O. R. W. Co. under 23 Vict. c. 109, sued thereon. By 27 Vict. c. 57, the railway company were authorized to issue preferential bonds, and to execute a mortgage to a trustee to secure payment thereof. The railway being at the time of Confederation a local work, 31 Vict. c. 44 (O.) was passed, which recited that the trustee was in possession and about to foreclose the mortgage, and, amongst other things, directed that the debentures (therein called ordinary bonds) should be converted into stock at a certain rate on the dollar; and that the holders thereof should have no other claim on the company than for conversion of their debentures into stock. By 41 Vict. c. 36 (D.), the B. and O. R. W. Co. and the defendant company were amalgamated. The defendants set up that their liability on the debentures in question was extinguished by 31 Vict. c. 44 (O.), and that they were ready and willing to take the debentures in exchange for reduced stock thereunder. Third replication, that the Act was not binding because it was a private Act, and the plaintiff was not named therein, nor a petitioner therefor, nor were his rights specially taken away thereby. Fourth replication, that the Act was ultra vires, because the debenture was payable in London, England, and was there domiciliated, and the holder resided there at the time of the passing of the Act, beyond the jurisdiction of the Ontario legislature:—Held, third replication bad; for, though the Ontario Act was in the nature of a private Act, it sufficiently referred to the plaintiff by referring to the class of bondholders to which he belonged, and that he was therefore bound thereby. Held, also, fourth replication bad, for the Provincial legislatures were not restricted by the term "property and civil rights in the Province" to legislation respecting bonds held therein; and that where debts or other obligations are authorized to be contracted under a Provincial Act, passed in relation to a matter within the power of the provincial legislature, such debts may be dealt with by subsequent Acts of the same legislature, notwithstanding that by a fiction of law they may be domiciled out of the Province. *Jones* v. *Canada Central R. W. Co.*, 46 U. C. R. 250.

Highway across Railway — *Railway Committee of Privy Council—Railway Act of Canada, s. 14—Intra Vires.*]—In an action to restrain the defendants from acting upon an order of the railway committee of the privy council, made under s. 14 of the Railway Act of Canada, giving them the option to open a new street, by means of a subway, across the property and under the tracks of a Dominion railway company, but without compensation, and requiring the company to pay a portion of the cost of construction, and meanwhile allowing a temporary crossing for foot passengers only, and making certain other provisions upon the subject: — Held, that the provincial legislature alone had power to confer upon the defendants legal capacity to acquire and make the street in question. 2. It has conferred such capacity. 3. In virtue of its power over property and civil rights in the province, the provincial legislature has power to authorize a municipality to acquire and make such a street, and to provide how and upon what terms it may be acquired and made. 4. But that power is subject to the supervention of federal legislation respecting works and undertakings such as the railway in question. 5. The manner and terms of acquiring and making such street, and also the prevention of the making or acquiring of such a street, are proper subjects of such supervening legislation. 6. Such legislation may rightly confer upon any person or body the power to determine in what circumstances, and how and upon what terms, such a street may be acquired and made, or to prevent the acquiring and making of it altogether; and therefore s. 14 of the Railway Act is not ultra vires. 7. Such legislation, in virtue of its power over such railway corporations, as well as such works and undertakings, may confer power to impose such terms as have in this case been imposed upon the plaintiffs, and to deprive such corporations of any right to compensation for lands so taken or injuriously affected; and has conferred such power on the railway committee, under s. 14, in such a case as this. 8. Such legislation has not conferred upon the committee power to give the temporary foot-way in question. 9. Nor any authority to delegate its powers. 10. The work it directs must be constructed under the supervision of an official appointed for that purpose by the committee. 11. The railway company may, if they choose, construct the works directed, under such supervision, instead of permitting the municipality to do so. *Grand Trunk R. W. Co.* v. *City of Toronto*, 32 O. R. 120.

Incorporation of Company.] — The Grand Junction Railway being wholly within the province of Ontario, the Dominion parliament has no power, under the B. N. A. Act, to incorporate the company without expressly declaring the work to be one for the general advantage of Canada or of two or more of the provinces. *Re Grand Junction R. W. Co.* v. *County of Peterborough*, 6 A. R. 339. See *S. C.*, 45 U. C. R. 302, 8 S. C. R. 76.

Liability for Negligence — *Contracts against.*] — The legislation of the Dominion parliament forbidding the defendants contracting against liability for their own negligence, is not ultra vires. *Vogel* v. *Grand Trunk R. W. Co.*, *Morton* v. *Grand Trunk R. W. Co.*, 10 A. R. 162.

Limitation of Actions — *Damages by Reason of Railway.*] — The court of appeal was evenly divided upon the question whether s. 27 of R. S. C. c. 109, was ultra vires as being an unnecessary interference with property and civil rights within the Province. *McArthur* v. *Northern Pacific Junction R. W. Co.*, 17 A. R. 86. See *S. C.*, 15 O. R. 733.

Packing Railway Frogs.]—The proviso of s.-s. 4 of s. 262 of the Railway Act, 51 Vict. c. 29 (D.), does not apply to the fillings referred to in s.-s. 3, and confers no power upon the railway committee of the privy council to dispense with the filling in of the spaces behind and in front of railway frogs or crossings and the fixed rails and switches

during the winter months. Judgment in 24 A. R. 183 reversed. *Washington* v. *Grand Trunk R. W. Co.*, 28 S. C. R. 184. Affirmed by judicial committee of privy council, [1899] A. C. 275.

Railway Crossings — *Maintenance of Gates — Apportionment of Cost — Railway Committee of Privy Council.*] — The railway committee of the privy council, on the application of the city of Toronto, ordered the Canadian Pacific Railway Company to put up gates and keep a watchman where the line of railway crossed a highway running from the city of Toronto into the township of York, the line of railway being at the place in question the boundary between the two municipalities, and ordered the cost of maintenance to be paid in equal proportions by the railway company and the city. On a subsequent application by the city, representing that the township was equally interested, and asking for contribution from the township, the township brought in the county, and an order was made by the railway committee that the county and township should contribute in certain proportions:—Held, in the high court, that the legislation of the parliament of Canada with reference to the guarding of the crossings of a railway, which, under s.-s. 10 of s. 92 of the British North America Act, is under the exclusive legislative authority of parliament, is within the scope of necessary legislation. Under ss. 11, 18, 21, 187, and 188 of the Railway Act of 1888, parliament conferred upon the railway committee the power to order that gates and watchmen should be provided and maintained at crossings of highways traversing different adjacent municipalities; to decide which municipalities are interested in the crossings; to fix the proportion of the cost to be borne by the different municipalities; to vary any order made by adding other municipalities as interested; and to re-adjust the proportion of the cost; and the decision of the committee cannot be reviewed by the court. Municipalities are subject to such legislation and the orders of the committee in the same way as private individuals. In the court of appeal there was a disagreement as to the validity of the legislation and of the order of the committee upon the township and county. But held, per curiam, that the decision of the railway committee upon a subject, and in respect of persons, within its jurisdiction, cannot be reviewed or interfered with by the court. In the result the appeal was allowed as to the county of York, and dismissed as to the township of York. *In re Canadian Pacific R. W. Co. and County and Township of York*, 27 O. R. 559, 25 A. R. 65.

——— *Railway Committee of Privy Council.*]—Sections 4, 306, and 307 of the Railway Act, 51 Vict. c. 29 (D.), enacting that the plaintiffs' railway and other railways, and any railways whatever crossing them, are works for the general advantage of Canada, and are to be subject thereafter to the legislative authority of parliament, and 56 Vict. c. 27 (D.), s. 1, enacting that no railway shall be crossed by any electric railway whatever, unless with the approval of the railway committee, are intra vires, and therefore the committee could authorize the defendants, contrary to the provisions of their provincial Act of incorporation, to cross the plaintiffs' railway at grade, against the will of the latter. *Grand Trunk R. W. Co.* v. *Hamilton Radial Electric R. W. Co.*, 29 O. R. 143.

Transfer of Railway— *Agreement—Extinguishment of Rights.*]—Under the British North America Act, 1867, s. 108, read in connection with the third schedule thereto, all railways belonging to the province of Nova Scotia, including the railway in question, passed to and became vested on the 1st July, 1867, in the Dominion of Canada; but not for any larger interest therein than at that date belonged to the province. The railway in question being at the date of the statutory transfer subject to an obligation on the part of the provincial government, confirmed by 30 Vict. c. 36 (N.S.), to enter into a traffic arrangement with the respondent company; the Dominion government, in pursuance of that obligation, entered into a further agreement relating thereto, of the 22nd September, 1871: —Quære, whether it was ultra vires the Dominion parliament by an enactment to that effect to extinguish the rights of the respondent company under the said agreement. But held, that 37 Vict. c. 16 (D.) did not, upon its true construction, purport so to do. And, although it authorized a transfer of the railway to the appellants, it did not enact such transfer in derogation of the respondents' rights under the agreement of the 22nd September, 1871, or otherwise. *Western Counties R. W. Co.* v. *Windsor and Annapolis R. W. Co.*, 7 App. Cas. 178.

Works of Railway—*Ditch — Structure —Cleaning.*]—By the true construction of the B. N. A. Act, s. 91, s.-s. 29, and s. 92, s.-s. 10, the Dominion parliament has exclusive right to prescribe regulations for the construction, repair, and alteration of the Canadian Pacific Railway; and the provincial legislature has no power to regulate the structure of a ditch forming part of its authorized works. But the provisions of the Quebec municipal code prescribing the cleaning of the ditch and the removal of an obstruction which had caused inundation on neighbouring land, are intra vires of the provincial legislature. *Canadian Pacific R. W. Co.* v. *Parish of Notre Dame de Bonsecours*, [1899] A. C. 367.

——— *Roadbed—Crossings.*]—The provincial legislatures have no jurisdiction to make regulations in respect to crossings or the structural condition of the roadbeds of railways subject to the provisions of the Railway Act of Canada. Canadian Pacific R. W. Co. v. Parish of Notre Dame de Bonsecours, [1899] A. C. 367, followed. *Grand Trunk R. W. Co.* v. *Therrien*, 30 S. C. R. 485.

——— *Fences—Erection.*]—The provision in the British Columbia Cattle Protection Act, 1891, as amended in 1895, to the effect that a Dominion railway company, unless they erect proper fences on their railway, shall be responsible for cattle injured or killed thereon, is ultra vires of the provincial legislature. Canadian Pacific R. W. Co. v. Parish of Notre Dame de Bonsecours, [1899] A. C. 367, distinguished. *Madden* v. *Nelson and Fort Sheppard R. W. Co.*, [1899] A. C. 626.

See Monkhouse v. *Grand Trunk R. W. Co.*, 8 A. R. 637; *Norvell* v. *Canada Southern R. W. Co.*, 9 A. R. 310; *Attorney-General for British Columbia* v. *Attorney-General for Canada*, 14 App. Cas. 295; *City of Toronto* v. *Metropolitan R. W. Co.*, 31 O. R. 367 (*post* STREET RAILWAYS).

See also *post* XXV.

XXII. Service of Process on Railway Companies.

Head Office out of Jurisdiction.]—A railway company cannot be said to "reside or carry on business" except where the head office is situated. *Ralph* v. *Great Western R. W. Co.*, 14 C. L. J. 172; *Ahrens* v. *McGilligat*, 23 C. P. 171.

Held, following Ahrens v. McGilligat, 23 C. P. 171, that a railway company does not "live and carry on business," within the meaning of 32 Vict. c. 23, s. 7 (O.), at any other place than its head office at which its business is carried on. Held, also, that the fact of the company having, in addition to its local station, a factory for the making and repair of the rolling stock used on the road, and employing a number of workmen therein, did not bring such place within the section. The Imperial Act 9 & 10 Vict. c. 95, s. 60, commented on. *Westover* v. *Turner*, 26 C. P. 510.

See Wilson v. *Detroit and Milwaukee R. W. Co.*, 3 P. R. 37; *Taylor* v. *Grand Trunk R. W. Co.*, 4 P. R. 300.

[But see con. rule (1897) 160.]

Injury to Land in Another Province —*Local or Transitory Action.*]—The plaintiff complained that the defendants, by negligent use or management of their line of railway, allowed fire to spread from their right of way to the plaintiff's premises, whereby his house and furniture were burnt. These premises were alleged to be in the province of Manitoba, where the plaintiff himself resided, and in which the defendants were legally domiciled, and actually carried on business. The defendants denied the plaintiff's title to the land upon which the house and furniture were situate:—Held, that the action, as regards the house, was in trespass on the case for injury to land through negligence, and this form of action was, like trespass to land, local, and not transitory, in its nature. The action, therefore, so far as the house was concerned, could not be entertained by the Ontario court; but aliter as to the furniture, on abandonment of the claim for destruction of the house. Companhia de Mocambique v. British South Africa Co., [1892] 2 Q. B. 358, [1893] A. C. 602, followed. Campbell v. McGregor, 29 U. C. R. Rep. 644, not followed. *Brereton* v. *Canadian Pacific R. W. Co.*, 29 O. R. 57.

Negligence in Another Province— *Cause of Action.*]—A writ of summons in an action to recover damages against the Canadian Pacific Railway Company for negligence of the servants of the company, alleged to have occurred in British Columbia, causing the death of a person, was issued out of the high court of justice for Ontario, by the personal representative of the deceased, appointed in Ontario, and was served on the defendants' claims agent in Toronto, Ontario. The head office of the railway company, incorporated by Dominion legislation, was in the Province of Quebec, but the company carried on business in Ontario, through which its railway ran, and where large numbers of its officers and servants resided:—Held, that the action was properly brought in Ontario, and the service of the writ therein was valid. *Tytler* v. *Canadian Pacific R. W. Co.*, 29 O. R. 654, 26 A. R. 467.

XXIII. Special Acts Relating to Particular Railways.

[The cases under this head are only those which seem to relate exclusively to the particular company. Other cases regarding the same companies will be found under the general heads.]

1. *Brockville and Ottawa Railway Company.*

See Counties of Lanark and Renfrew v. *Cameron*, 9 C. P. 109.

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2. *Buffalo, Brantford, and Goderich Railway Company.*

Stock.] — This railway company is to be treated as acting under 16 Vict. c. 46, and not under the Joint Stock Road Acts—at all events as regards shareholders taking their stock since the first named statute was passed. *Buffalo, Brantford, and Goderich R. W. Co.* v. *Parke*, 12 U. C. R. 607.

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3. *Buffalo and Lake Huron Railway Company.*

Transfer of Property — *Execution.*]—Held, that the taking possession by the Buffalo and Lake Huron Railway Company, under 19 Vict. c. 21, of the property previously owned by the B. B. and G. R. Co., operated to transfer the same to the former, so as to prevent its being seized under a fi. fa., even although the goods were on the way from England to their line of road. *Buffalo and Lake Huron R. W. Co.* v. *Corbett*, 8 C. P. 536.

On the 18th March, 1855, the Buffalo, Brantford, and Goderich Railway Company mortgaged the goods in question, a quantity of railway iron, cars, &c., to Her Majesty to secure £15,000; and on the 17th April, 1855, they executed a second mortgage of them to other persons. These mortgages were duly filed. On the 20th February, 1856, an execution was issued at the suit of Her Majesty for the same debt, under which the property was seized, and afterwards other executions came into the sheriff's hands. The sheriff put defendant, a division court bailiff, in possession on the 29th April, 1856, to hold, first, on account of the sheriff, and next on account of several executions which defendant had in his hands from division courts. On the 11th February, 1856, the B. B. and G. R. Co. sold out to the B. and L. H. R. Co. (the plaintiffs); the sale was confirmed by 19 Vict. c. 21; and that company having arranged the executions, the sheriff afterwards delivered possession to their agent, of the property at Brantford, in the name of the whole. Defendant, however, claimed to hold, notwithstanding, under the division court executions. These executions were all subsequent to the sale made on the 11th February, 1856, and had expired before the sheriff gave up possession. The plaintiffs, having replevied, were held entitled to recover. *Buffalo and Lake Huron R. W. Co.* v. *Brooksbanks*, 16 U. C. R. 337.

——— *Lien for Freight.*]—Replevin for railway iron. It appeared that the iron had been imported from England by the Buffalo,

Brantford, and Goderich Railway Company, and was shipped from Kingston to Port Colborne, subject to ocean freight and the freight by schooner from Kingston. On arriving at Port Colborne, no one being ready to pay, the iron was left by the master in defendant's charge, to hold subject to the freight, and was piled on a piece of ground belonging to government, where other iron belonging to the company was also lying, but separate from this. Afterwards the Buffalo and Lake Huron Railway Company, the plaintiffs, bought out the old company under 19 Vict. c. 21, and arranged certain writs of fi. fa. under which the sheriff had seized this and the other iron; and they thereupon demanded the iron in question from defendant, who refused to give it up, claiming the ocean freight, which had in fact been paid, and the freight from Kingston, as well as demurrage, and some other charges not recoverable. The plaintiffs, however, refused to pay anything, and replevied:—Held, (1) that the iron could not be considered as having been delivered to the old railway company, when landed, as it was, at Port Colborne. (2) That 19 Vict. c. 21 did not take away the right of lien; nor could anything done by the sheriff have that effect. (3) That defendant having a clear right to detain for the freight from Kingston, of which no tender had been made, his right was not prejudiced by having demanded more than was due. *Buffalo and Lake Huron R. W. Co.* v. *Gordon*, 16 U. C. R. 283.

——— *Lien on Land Sold — Parties.*]—19 Vict. c. 21, incorporating the Buffalo and Lake Huron Railway Company, with power to purchase the railway therein mentioned, did not deprive unpaid owners of any lien they had for the price of land theretofore sold to the old company. The old company was held to be a necessary party to a suit by a land owner to enforce a lien for purchase money in respect of land sold to the old company before the transfer of the railway to the new company; it not appearing but that the old company was interested in the question to be litigated. *Paterson* v. *Buffalo and Lake Huron R. W. Co.*, 17 Gr. 521.

Working Agreement — *Acceptance — Fencing.*]—The Grand Trunk and the Buffalo and Lake Huron Railway Companies entered into an agreement by which the net receipts of the two undertakings were to be divided between them in specified proportions, the G. T. R. Co. to have the option, within six years, of purchasing the share capital of the other on certain terms, and the control and working of the B. and L. H. R. Co. undertaking to be placed in the hands of the G. T. R. Co., under a joint committee of two nominees from each board; the agreement to subsist for twenty-one years, during which the B. and L. H. R. Co. and its appurtenances were to be kept in repair by the G. T. R. Co. 29 & 30 Vict. c. 92 confirmed this agreement, and enacted that the G. T. R. Co., in working the other railway, should have all the powers conferred on the B. and L. H. R. Co., by statute or otherwise. It provided, also, that the Act should not come into operation until accepted by the shareholders of the two companies, and such acceptance certified in the manner directed, of which acceptance and certifying a notice in the Canada Gazette should be conclusive proof. By a private Act of the Dominion, afterwards passed, 31 Vict. c. 19, it was recited that this agreement had been duly accepted. In an action against the B. and L. H. R. Co. for an accident caused by defect of fences on their line in 1867, it was proved that the G. T. R. Co. were supposed to own, and were managing and running, that railway:—Held, that on these facts—either with or without 31 Vict. c. 19, which, however, was receivable, and entitled to some weight—there was evidence for the jury from which an acceptance of the agreement might be presumed. Held, also, that the G. T. R. Co., being in possession of and working the railway under the agreement, were bound to fence; and that the defendants were not liable. Van Natter v. Buffalo and Lake Huron R. W. Co., 27 U. C. R. 581, followed as to the obligation to fence. *Holmes* v. *Grand Trunk R. W. Co.*, 27 U. C. R. 595.

——— *Effect of—Bonds.*]—The Buffalo and Lake Huron Railway Company, being liable upon certain bonds secured by mortgage, entered into an agreement with the Grand Trunk Railway Company, confirmed by 29 & 30 Vict. c. 92, by which the latter company were to undertake the working of their railway, the net receipts of the two companies to be divided between them in specified proportions. One clause of this agreement provided that, as between the B. and L. H. R. Co. and the holders of these securities, the interest on such securities should be a first charge on the proportion of net receipts payable to that company, and, so long as such proportion was duly paid to the company, none of the holders should exercise any of their powers or rights against the property or effects of the company, except their proportion of net receipts, but those powers and rights should be suspended. By another clause the agreement was declared to be subject and without prejudice to the securities, rights, and interest of the bond creditors of the company:—Held, assuming that the right to sue on the bonds was included in the powers and rights mentioned, that the effect of the agreement was not to suspend such right so as to be pleadable in bar to an action, though it might give a right of action for the damages sustained by suing in breach of it, or afford ground in equity to restrain the plaintiffs from enforcing the judgment. Held, also, that the effect of 19 Vict. c. 21 was to make defendants liable upon the bonds given by the Buffalo, Brantford, and Goderich R. W. Co. as if originally given by defendants. Quære, as to the meaning of the proviso to s. 1 of 29 & 30 Vict. c. 92, confirming the agreement. *Town of Brantford* v. *Buffalo and Lake Huron R. W. Co.*, 29 U. C. R. 607.

See In re Widder and Buffalo and Lake Huron R. W. Co., 20 U. C. R. 638.

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4. *Canada Atlantic Railway Company.*

Construction of Railway — *Point of Commencement.*]—The charter of the Canada Atlantic Railway Company, reciting in the preamble that the line of railway which it was proposed to construct would afford the shortest and most convenient connection between the cities of Ottawa and Montreal, authorized the company to construct their track from the city of Ottawa to, &c. The head office was to be in Ottawa:—Held, that they had the right to enter the city and construct from a point within the limits. *In re Bronson and City of Ottawa*, 1 O. R. 415.

5. *Canada Central Railway Company.*

See Foran v. *McIntyre*, 45 U. C. R. 288; *Booth* v. *McIntyre*, 31 C. P. 183; *Jones* v. *Canada Central R. W. Co.*, 46 U. C. R. 250.

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6. *Canada Southern Railway Company.*

See Norvell v. *Canada Southern R. W. Co.*, 9 A. R. 310; *Bowen* v. *Canada Southern R. W. Co.*, 14 A. R. 1; *Wealleans* v. *Canada Southern R. W. Co.*, 21 A. R. 297, 24 S. C. R. 309.

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7. *Canadian Pacific Railway Company.*

Extension of Line.]—Held, that the Canadian Pacific Railway Company have power, under their charter, to extend their line from Port Moody, in British Columbia, to English Bay. *Canadian Pacific R. W. Co.* v. *Major*, 13 S. C. R. 233.

See City of Vancouver v. *Canadian Pacific R. W. Co.*, 23 S. C. R. 1.

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8. *Cobourg and Peterborough Railway Company.*

Bondholders—*Amalgamation of Companies.*]—A statute gave the bondholders of the Cobourg and Peterborough Railway Company an option to convert their bonds into stock, and enacted that this "converted bonded stock," and any new subscribed stock, should be preferential to the ordinary stock, and be entitled to dividends of eight per cent. per annum in priority to any dividend to the ordinary shareholders. By a subsequent Act the company were authorized to unite with another company, and it was declared that the two companies, and those who should become shareholders in the new company under the Acts relating to the C. and P. R. Co. and under the deed of union, should constitute the new company:—Held, that the union did not extinguish the right of the bondholders to elect. The Act authorizing the union of two incorporated companies declared that any deed the companies executed under the Act should be valid to "all intents and purposes in the same manner as if incorporated in the Act:"—Held, that this enabled the companies to bargain together in respect of the rights which each had, and to make such arrangements as their union rendered necessary; but gave them no legislative authority over the rights of other persons. A statute authorized two companies to unite into one company by either a complete or partial union; and of either joint or separate, or absolute, or limited liability to third persons. The companies agreed to an absolute union, and made no provision for limiting the liability of the new company in respect of past transactions of the old companies:—Held, that the new company thereby assumed all the liabilities of the old company to third persons. *Cayley* v. *Cobourg, Peterborough, and Marmora R. W. and Mining Co.*, 14 Gr. 571.

Insolvent Company—*Distribution of Assets.*]—The railway company having become insolvent, an Act was passed estimating the claims of creditors for land taken by the company at $30,000, and the value of the whole railway property at $100,000, and directing that $30,000 should be applied on debts for land and the balance of the $100,000 divided pro ratâ among the other creditors. The $30,000 proved more than sufficient to pay the land debts in full, and the company claimed the balance:—Held, that the other creditors were entitled to it. *In re Cobourg and Peterborough R. W. Co.*, 16 Gr. 571.

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9. *Erie and Huron Railway Company.*

Debentures—*Trustees.*]—By the Municipal Act, R. S. O. 1877 c. 174, s. 550, s.-s. 4, authority is given to grant bonuses and issue debentures in aid of a railway company, payable at such times, &c., as the municipal council may think meet. By the defendants' special Act of incorporation, 36 Vict. c. 70 (O.), the debentures were to be issued and delivered within six months after the passing of the by-law to trustees, who were to receive and convert the same into money, and deposit the proceeds in a chartered bank and pay the same out on the certificate of the chief engineer of the railway company:—Held, that a compliance with the terms of the general Act was sufficient, for that the provisions of the special Act were not restrictive, but enabling and enlarging the powers under the general Act; and that under the circumstances the appointment of trustees would have been useless. *Bickford* v. *Town of Chatham*, 10 O. R. 257, 14 A. R. 32, 16 S. C. R. 235.

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10. *Grand Junction Railway Company.*

See Grand Junction R. W. Co. v. *Bickford*, 23 Gr. 302, 1 S. C. R. 696; *Counties of Peterborough and Victoria* v. *Grand Trunk R. W. Co.*, 18 U. C. R. 220; *Demorest* v. *Midland R. W. Co.*, 10 P. R. 73; *Grand Junction R. W. Co.* v. *County of Peterborough*, 6 A. R. 339, 8 S. C. R. 76; *Grand Junction and Midland R. W. Cos.* v. *Corporation of Peterborough*, 13 App. Cas. 136.

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11. *Grand Trunk Railway Company.*

Liability for Debts of Grand Junction Railway Company—*Pleading.*]—Declaration, that before 16 Vict. c. 43, the plaintiffs, with others, promoters of the Grand Junction Railway Company incorporated thereby, had caused certain preliminary plans and surveys of the said railway to be prepared; that the line of the said railway passed through plaintiffs' territory, and the plaintiffs under that Act defrayed their fair proportion of the expense of such plans, &c., which sum said company, by force of said statute, s. 5, became liable to refund to the plaintiffs; that, while so liable, the said company and the defendants were, under 16 Vict. c. 76 and a certain deed of amalgamation, formed into one company, and defendants became amalgamated, and the Grand Junction Railway Company did intersect the main line, and said surveys had been appropriated by defendants to their own use, and by force of said Acts defendants had become liable to pay to the plaintiffs the said proportion so paid by them as aforesaid. Plea, that the

capital stock in said Grand Junction Railway Company was not taken by the persons in said Act named, or any others, nor was any money ever paid upon it, and defendants never became stockholders in said company. Replication, that defendants should not be allowed so to plead, because, by the deed of amalgamation mentioned in the declaration, they united themselves with the Grand Junction Railway Company, and recognized it as an existing company, and the same thereby became and had since existed as a part of defendants. Rejoinder, that defendants should not be precluded from their plea, because said deed was made only by authority of the provisional directors in 16 Vict. c. 43 named, but there never were any shareholders in said company, nor was said deed ever duly ratified by them, as required by the statute:—Held, on demurrer, rejoinder good, for (1) there was no such estoppel as relied on by the plaintiffs; and (2) the plaintiffs, not having taken stock in the Grand Junction Railway Company, were not within 16 Vict. c. 43, s. 5, and therefore not entitled to recover. *Counties of Peterborough and Victoria* v. *Grand Trunk R. W. Co.*, 18 U. C. R. 220.

Lien of Bondholders.]—Held, (1) that under 12 Vict. c. 29, 18 Vict. c. 174, and 19 & 20 Vict. c. 111, the preference bondholders of the Grand Trunk Railway Company are in the position of preferred creditors, having a lien on the road and all the works and property of the railway; (2) that the rights of the preference bondholders, thus created, are not impaired by any subsequent enactments, and are, if anything, confirmed by 22 Vict. c. 52; (3) that the bondholders can institute a suit to restrain the directors from applying the earnings of the road in any other way than in the order appointed by the Acts; (4) that the bondholders having a lien are not obliged to submit to payment of past debts which the directors neglected to pay. *In re Herrick* v. *Grand Trunk R. W. Co.*, 7 L. J. 240.

See, also, *Bank of Upper Canada* v. *Grand Trunk R. W. Co.*, 13 C. P. 304; *Pratt* v. *Grand Trunk R. W. Co.*, 8 O. R. 499.

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12. *Great Western Railway Company.*

Bridge over Canal—*Pleading—Evidence—Negligence.*]—Held, that, by the various Acts referring thereto, the erection of the defendants' drawbridge over the Desjardins canal was sanctioned and recognized; and that it must be assumed to have been lawfully erected, though the formalities required by ss. 136, 137, and 138 of the Railway Act might not have been complied with. Held, that the first count of the declaration, charging defendants with neglect and refusal to open the bridge and permit vessels to enter or leave the canal, was defective, in not alleging that it was not at such times being actually used by defendants for the passage of their trains; and that the second count was good. *Desjardins Canal Co.* v. *Great Western R. W. Co.*, 27 U. C. R. 363.

The Desjardins Canal Company having been indicted for not keeping in repair the bridge over their canal where it crosses the highway, built for them by the Great Western Railway Company:—Held, that they, and not the railway company, were bound to keep such bridge in repair. Held, also, that evidence of the state of the bridge a few days before the trial was admissible, not as a proof of that fact, but as confirming the witnesses who swore to its state at the time laid in the indictment, and as shewing such state by inference. *Regina* v. *Desjardins Canal Co.*, 27 U. C. R. 374.

Bridges over Navigable Waters.]—See *Wismer* v. *Great Western R. W. Co.*, 17 U. C. R. 510.

Construction of Railway.]—See *Connors* v. *Great Western R. W. Co.*, 6 C. P. 108.

Highways.]—See *Hamilton and Brock Road Co.* v. *Great Western R. W. Co.*, 17 U. C. R. 567; *In re Foster and Great Western R. W. Co.*, 32 U. C. R. 503.

Lands and their Valuation.]—See *Sommerville* v. *Great Western R. W. Co.*, 11 U. C. R. 304; *In re Shade and Galt and Guelph R. W. Co.*, 13 U. C. R. 577; *Secretary of State for War Department* v. *Great Western R. W. Co.*, 13 Gr. 503.

Obligation to Fence and Put up Gates.]—See VII. 5; XII.

Special Conditions for Carriage of Goods.]—See V. 4 (a).

See Regina v. *Great Western R. W. Co.*, 21 U. C. R. 535; *Regina ex rel. Trustees of St. Andrew's Church* v. *Great Western R. W. Co.*, 14 C. P. 462; *Erie and Niagara R. W. Co.* v. *Great Western R. W. Co.*, 21 Gr. 171.

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13. *Kingston Marine Railway Company.*

See Kingston Marine R. W. Co. v. *Gunn*, 3 U. C. R. 368.

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14. *Midland Railway Company.*

Amalgamation — *Creditors' Claims.*]—Under 45 Vict. c. 67, s. 6 (D.), the Midland Railway Company, as constituted by the Act, is the company that strangers or persons having claims, &c., upon any of the companies incorporated by the Act, should proceed against for the enforcement of their rights. *Demorest* v. *Midland R. W. Co.*, 10 P. R. 73.

Registration of Deeds—*Fees.*]—By 10 Vict. c. 109, the registrar was entitled to receive only the sum of 2s. 6d. from defendants for registering deeds made to them in the form given by the Act. In 1865 the registry law was changed, and deeds were required to be registered in full, instead of by memorial, as before. In 1873 and 1874 defendants brought for registry deeds made to them, which contained covenants for title not in the statutory form:—Held, that for such deeds the registrar was entitled to charge his full fees, and was not restricted to the 2s. 6d. *Ward* v. *Midland R. W. Co.*, 35 U. C. R. 120.

15. *Northern Railway Company of Canada.*

As to Obligation to Fence.]—See *ante* VII. 5; XII.

As to Stock.]—See *post* XXIV.

See, also, *In re Town of Barrie and Northern R. W. Co.*, 22 U. C. R. 25; *Grand Trunk R. W. Co.*, v. *Credit Valley R. W. Co.*, 27 Gr. 232; *Re Watson and Northern R. W. Co.*, 5 O. R. 550.

16. *Ontario and Sault Ste. Marie Railway Company.*

Expenditure—*Capital.*]—By the general Railway Act, R. S. O. 1877 c. 165, which was by the plaintiffs' special Act incorporated therein, except as varied by the latter, ten per cent. of the capital of the plaintiffs was by s.-s. 5 of s. 36 required to be expended within three years, and the railway was to be completed within ten years of the passing of the special Act, in default of which the corporate existence of the company ceased, and by s. 4 of the General Act, ss. 4 to 36 thereof, inclusive, were to apply to all railways authorized to be constructed by any special Act of the Province, and to be construed therewith as forming one Act:—Held, that s. 4 of the general Act did not apply to the plaintiffs, and that s. 23 of their special Act must be read in substitution for s.-s. 5 of s. 36 requiring the expenditure of ten per cent. of the capital within the three years. *Ontario and Sault Ste. Marie R. W. Co.* v. *Canadian Pacific R. W. Co.*, 14 O. R. 432.

17. *Port Dover and Lake Huron Railway Company.*

See Port Dover and Lake Huron R. W. Co. v. *Grey*, 36 U. C. R. 425.

18. *Port Hope, Lindsay, and Beaverton Railway Company.*

Held, that the Port Hope, Lindsay, and Beaverton Railway Company is an established corporation, it being recognized as such by 16 Vict. c. 241, and 18 Vict. c. 36. *Smith* v. *Spencer*, 12 C. P. 277.

19. *Toronto, Grey, and Bruce Railway Company.*

See In re Gibson and County of Bruce, 20 C. P. 398.

20. *Woodstock and Lake Huron Railway Company.*

See Town of Woodstock v. *Woodstock and Lake Erie R. W. Co.*, 16 U. C. R. 146; *Parsons* v. *Port Dover and Lake Huron R. W. Co.*, 28 C. P. 84.

XXIV. Stock.

1. *Actions by Creditors against Shareholders.*

(a) *Judgment, Execution, and Return—Proof of by Plaintiff.*

Calls—*Parties.*]—The making of calls by the directors is not a condition precedent to the plaintiff's right to recover, and the remedy given by the statute may be pursued by a single creditor. *Moore* v. *Kirkland*, 5 C. P. 452. See *Jenkins* v. *Wilcocks*, 11 C. P. 505.

Execution—*Return Unsatisfied.*]—In an action by a creditor, the plaintiff must shew an execution against the company returned unsatisfied, and that it was not in plaintiff's power by any reasonable exertion to have obtained satisfaction. *Moore* v. *Kirkland*, 5 C. P. 452.

Judgment—*Issue as to—Validity—Sheriff's Return.*]—Defendant pleaded, among other pleas, nul tiel record as to the judgment obtained against the company, and issue was joined thereon. It did not appear at the trial that this issue had been disposed of:—Held, that the plaintiff not being shewn to be a creditor of the company could not recover. *Tyre* v. *Wilkes*, 18 U. C. R. 46.

The record of the judgment against the Company shewed it to have been obtained on their confession in an action on a promissory note:—Held, that defendant could not object to the validity of such judgment on the ground that the company could not make a note. Held, also, that it was sufficient to prove a return of nulla bona by the sheriff to the fi. fa., though such return had not been filed. *S. C., ib.* 126.

Return—*Different Counties.*]—It is not necessary that a fi. fa. goods should be returned nulla bona from all the counties through which the railway runs, but the onus of proof of fraud, or of there being goods of the company to satisfy the judgment, lies on defendants, the plaintiff having obtained one such return. *Jenkins* v. *Wilcocks*, 11 C. P. 505.

——— *Director — Sheriff.*]—Held, that a fi. fa. against a railway company, which was directed to the sheriff before he became a director of the company, was properly directed to and was returnable by him, and his becoming a director before the return of the writ did not invalidate it. *Smith* v. *Spencer*, 12 C. P. 277.

——— *Judgment — Impeaching.*] — The sheriff, being president of a railway company, returned a fi. fa. against the company nulla bona. Upon an action brought against a stockholder founded upon that return:—Held, that the writ and return were not nullities on account of the sheriff (being president) executing and making them; and no application having been made to set either aside, the objection failed. Held, also, that the defendant could not go behind the judgment except in a case of fraud or collusion, and could not therefore raise a question as to the judgment being properly recoverable against the company. *Ray* v. *Blair*, 12 C. P. 257.

(b) *Pleas and Defences to.*

Assignment in Insolvency.]—The defendant was named as one of the provisional directors of the Toronto, Grey, and Bruce Railway Company, by their Act of incorporation, and was afterwards elected and acted as director thereof, having subscribed for stock to the amount of $1,000, on which he paid

partly in money and partly by certain allowances made for his services as such director and otherwise, the sum of $400. Subsequently to this, defendant made an assignment under the Insolvent Act of 1869. Before doing so, however, he had procured the execution by the required majority of his creditors of a deed of composition and discharge, apparently under s. 94 of the Act. The plaintiff, as a creditor of the same company, sued out a writ of sci. fa. against the defendant to compel payment to him of the balance due upon the said stock. The defendant pleaded that he was not a shareholder in the said company, his contention being that the property in said stock had passed to the assignee. It did not appear whether or not the assignee had accepted or rejected this stock, or had done any act beyond accepting the assignment made to him. The defendant had obtained his discharge in the usual way, the unpaid balance upon the stock, however, not having been scheduled as a liability of defendant, and no claim having been proved in respect of it:—Held, that the plaintiff was entitled to recover, and that the property in the said stock had not passed to the official assignee. *Denison* v. *Smith*, 43 U. C. R. 503.

Cessation of Company — *Statutes.*]—Held, that the cessation of a company by nonperformance of the conditions of its charter within three years did not extinguish its liability or that of its stockholders to pay the debts contracted during its existence. Held, also, that s. 21 of 20 Vict. c. 145 does not exempt the shareholders of the company by that Act revived (Port Whitby and Lake Huron Railway Company) from personal liability for debts contracted under the previous statute. *Ray* v. *Blair*, 12 C. P. 257.

Forfeiture of Stock.]—To an action by a judgment creditor of a railway company against a shareholder for the amount of his unpaid stock, the defendant set up that the full amount of stock required by the Act of incorporation had never been subscribed, or the first instalment paid thereon; that the original design of the company had been changed by statute after defendant subscribed; that the stock subscribed for by the defendant had long since become forfeited for non-payment of calls; that on the 14th May, 1853, the directors passed a resolution declaring that the shares mentioned in a schedule intended to be annexed (but which was not annexed) to the resolution, which had become forfeited by non-payment of a call made on the previous 21st January, should be sold on the 20th June, unless previously redeemed; and that the company had not afterwards treated the defendant as a shareholder, nor had he acted as such. The resolution for sale of the stock had not been acted on by the company, a statute having been passed before the day named for sale, making new provisions as to forfeiture or abandonment of shares, which had not been complied with:—Held, that the defendant was still liable as a shareholder. *Smith* v. *Lynn*, 3 E. & A. 201. See also *Fraser* v. *Robertson*, 13 C. P. 184, *infra*.

Impeaching Creditor's Judgment.]—Declaration, setting out the recovery of a judgment against a company, return of writ nulla bona, and that defendant holds twenty-five shares of stock in said company unpaid. Pleas: (1) never indebted; (2) defendant not a shareholder. On the trial, plaintiff proved a judgment against the company for £3,000, and that a fi. fa. had been returned nulla bona. It was objected that the contract under which the plaintiff recovered his judgment was illegal, being usurious:—Held, that if defendant wished to impeach the judgment for fraud or collusion, he should have pleaded such defence. Semble, that the court will intend the judgment to be right and well founded until the contrary be shewn. *Fraser* v. *Hickman*, 12 C. P. 584. See also *Ray* v. *Blair*, 12 C. P. 257.

Payment.]—The plaintiff, a creditor of a railway company, having had his execution returned nulla bona, sued defendant, a shareholder, for the amount unpaid on his stock. Defendant pleaded that, before this suit, the company sued him for the same moneys; and that after service of the writ of summons in that case, and before declaration in either case, and after commencement of this suit, he paid the company in full:—Held, no defence, as it was not averred that such payment was made in ignorance of the plaintiff's claim. *Tyre* v. *Wilkes*, 13 U. C. R. 482.

In an action by judgment creditors of a railway company against a municipal corporation as shareholders, it appeared that the contractors for a portion of the road had received a lease from the railway company of that part for 999 years at a nominal rent, and, as an inducement to defendants and two other municipalities to take stock, they had mortgaged their lease to trustees to secure payment to such municipalities of six per cent. on the sums subscribed by them. This mortgage, to which the company were parties, provided for the payment by the municipalities of the amount of stock taken by each, to the contractors as the work progressed, upon the estimates of the company's engineer, and the full amount of defendants' subscription had been thus paid:—Held, that this was a payment of defendants' stock as against the plaintiffs, who therefore could not recover. *Woodruff* v. *Town of Peterborough*, 22 U. C. R. 274.

Sci. fa. on a judgment against a railway company, alleging that defendants held thirty shares therein, on which $1,800 remained unpaid. Plea, for a defence which arose after this action, alleging payment of $1,800, the balance due on defendants' stock, to one G. H., a judgment creditor of the company, under a judgment recovered by him against defendants as shareholders. Replication, that G. H. was a creditor only in respect of a claim which he held as trustee for the defendant N. D., and recovered his judgment, and received the money paid to him, as such trustee, of which defendants had notice:—Held, a good replication, for the payment to N. D., a shareholder, was of no avail as against the plaintiff, an outside judgment creditor. *Nasmith* v. *Dickey*, 42 U. C. R. 350.

——— *Interest.*]—N. D., one of the defendants, having a claim against a railway company for $1,800, assigned it to one H. by an instrument absolute in form, but really in trust, to enable H. to sue first the railway company, and then the defendants, as shareholders of unpaid stock of the company. H. accordingly recovered judgments against both the company and the defendants, but made no effort to realize on that against the latter. After the commencement of this action, however, which was by a judgment creditor of the

railway company, against the defendants as shareholders of the company, for their unpaid stock, defendants' solicitors gave a cheque for the $1,800 to H., who, after retaining $127, the amount of a claim he had against N. D., handed over the balance to him, and the defendants then set up as a defence to the action this payment under the judgment recovered by H. against them:—Held, on the evidence, that the judgment so recovered against the defendants, and the alleged payments thereunder, constituted no defence to the claim of an ordinary judgment creditor, and that in fact the stock of the present defendants had not been paid up to the extent of $1,800, which was therefore liable to the plaintiff's claim. Held, also, that the plaintiff could recover the interest on the calls made by the company for that amount of the stock. *Nasmith* v. *Dickey*, 44 U. C. R. 414.

Set-off.] — To an action by a judgment creditor of a railway company against a shareholder, defendant pleaded, on equitable grounds, (2) a set-off for land sold by him to the company, and (3) a similar defence, setting out that he had agreed to sell the land to the company for a sum named, out of which his stock was to be deducted, and the balance paid to him in cash; and that the company had entered and taker possession of the land:—Held, both pleas bad, for it was not averred that the land had been conveyed, and until then the company would not be liable to pay for it. Quære, whether set-off can be pleaded at all to such an action, or to a suit by the company for calls. *Moore* v. *McKinnon*, 21 U. C. R. 140.

The plaintiff claimed, by virtue of a judgment recovered against a railway company, a sum due by the defendant as a stockholder in the company upon unpaid stock held by defendant. Defendant pleaded on equitable grounds a set-off against the company upon the common counts, claiming that the amount so due paid the amount due by him upon the stock:—Held, bad (1) as not disclosing a good defence at law, the plaintiff being an entire stranger to the claim. (2) Because the plea did not offer to set off defendant's claim against the company in payment of the plaintiff's debt. (3) Because it did not aver that the amount so unpaid upon the stock was the only debt due by defendant to the company. Held, also, that defendant, upon the facts stated, would not be entitled in equity to an unconditional injunction, and therefore the plea must be bad in law. *Smart* v. *McBeth*, 13 C. P. 27.

The Railway Act declared a shareholder liable to judgment creditors of the company for "an amount equal to the amount unpaid on the stock held by him:"—Held, that a shareholder, in an action against him by a judgment creditor of the company, could not set off in equity a debt due to him by the company before the judgment was recovered. *McBeth* v. *Smart*, 14 Gr. 298.

——— *Forfeiture of Stock.*]—Plaintiff, as a creditor of the P. H. L. and B. R. Co., sued defendant, as a stockholder therein, the declaration containing the usual allegations. Defendant pleaded, on equitable grounds, that in a cause in chancery between himself, as plaintiff, and the company and others, defendants, he recovered against the company, by a decree of the court, £244 2s. 6d., and costs, which he claimed to be entitled to, and offered, to set-off against the plaintiff's claim. The plaintiff replied, equitably, that in that cause defendant filed his bill to compel the company to perform an agreement for the purchase by them from defendant, of land, for £220, and did not pray in the bill that his indebtedness to the company might be set off against so much of the purchase money, but prayed that he might be paid the whole purchase money; that a decree was made for a conveyance by defendant to the company upon payment of the money, but no direction was given should the company fail to pay; that the land was still defendant's property; and the plaintiff denied that the company were unable to pay. A resolution of the directors, on 14th May, 1855, that all forfeited stock of the company should be sold on a certain day, unless previously redeemed, pursuant to the statute, was put in evidence:—Held, (1) that defendant was a shareholder, and liable to be sued. (2) That he was not entitled to set off the purchase money of the land sold, but not conveyed, as claimed in his plea. (3) That he was not discharged from liability by reason of the alleged forfeiture. *Fraser* v. *Robertson*, 13 C. P. 184.

Transfer of Shares.]—See *Hamilton* v. *Grant*, 30 S. C. R. 566.

(c) *Practice.*

Amendment.]—Defendant having moved in arrest of judgment, on the ground that the declaration claimed the amount of the judgment against a railway company, instead of the amount of stock subscribed by defendant, the court allowed plaintiff to amend. *Smith* v. *Spencer*, 12 C. P. 277.

Venue.]—Declaration for the amount of ten shares of £10 each in a company, alleging a judgment recovered, and fi. fa. returned in one county nulla bona:—Held, that the judgment recovered in the court in Toronto was not the foundation of the action, and therefore the venue was not local. *Jenkins* v. *Wilcocks*, 11 C. P. 505.

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2. *Calls.*

Action for—*Right of.*]—The City of Toronto and Lake Huron Railway Company have, under the operation of 8 Vict. c. 83, amending the original Act, 6 Wm. IV., a right to sue in debt one of the original stockholders for an instalment due upon the stock originally subscribed and called in by the directors appointed under the original Act of incorporation. *City of Toronto and Lake Huron R. W. Co.* v. *Crookshank*, 4 U. C. R. 309.

Interest.]—See *Nasmith* v. *Dickey*, 44 U. C. R. 414.

Intervals between Calls.]—By the Railway Act, 14 & 15 Vict. c. 51, no call shall be made "at a less interval than two months from the previous calls:"—Held, that calls on the 1st September, November, January, &c., were bad. *Buffalo, Brantford, and Goderich R. W. Co.* v. *Parke*, 12 U. C. R. 607. See *Moore* v. *McLaren*, 11 C. P. 534.

Notice of Calls — *Amount—Intervals between—Mala Fides—Pleading.*]—Declaration by the Port Dover and Lake Huron Railway Company against defendant as a shareholder, alleging that defendant holds four shares, and has paid ten per cent. thereon, and is indebted to the company in $80, in respect of two several calls of $10 each on each of said shares. The fourth, fifth, and sixth pleas set up that notice of the calls was not duly given and published; that the call exceeded ten per cent. on the subscribed capital, contrary to plaintiffs' Acts of incorporation; and as to the second call, that it was made payable at a less interval than two months from the previous call:—Held, good, under 35 Vict, c. 53, ss. 13, 14, and C. S. C. c. 66, s. 48. The ninth plea, on equitable grounds, set out, in substance, that the road and extension would cost $900,000; that the assets which the company had or could acquire would not exceed half that sum; that there was no possibility of making the road therewith, as the directors and plaintiffs well knew, but that they were proceeding to construct part, and to expend all said assets, in bad faith, for improper purposes, and with the view of personal gain to the directors and others in collusion with them, &c.:—Held, no defence to this action; that the charges were too loose and indefinite; and that, if sustainable, they would form proper ground for a bill in equity only. *Port Dover and Lake Huron R. W. Co.* v. *Grey*, 36 U. C. R. 425.

Time for Expiry of—*Injunction—Shareholder.*]—A company authorized to construct a certain railway, or part of it, built and put in operation part in due time; and after the ten years limited by the Railway Act, C. S. C. c. 66, made calls, with a view of constructing the remainder:—Held, illegal; and that, consequently, any shareholder was entitled to restrain proceedings, though he might be the only shareholder objecting thereto. *Dumble* v. *Peterborough and Lake Chemung R. W. Co.*, 12 Gr. 74.

See Moore v. *Kirkland*, 5 C. P. 452; *Jenkins* v. *Wilcock*, 11 C. P. 505.

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3. *Charging Order.*

Enforcement — *Action — Evidence.*] — A charging order was made against stock in a railway company to which a person was entitled, but such stock, it was shewn, had, by his direction, been issued to his son, so that in a suit against the father the sheriff could not dispose of it under execution. Thereupon a bill was filed against the father and son stating these facts, and charging that the son gave no consideration for the stock; that the same was issued to him to hold for the use of the father, and was so issued to defeat, hinder, and delay the plaintiffs and other creditors of the father. At the hearing no evidence was given in support of the plaintiffs' case other than the pleadings and proceedings in the suit against the father, and in which such charging order had been made; but the depositions of the son, who had been examined in that suit, were not read:—Held, that, as the son had not been a party to that cause, he was not bound by the evidence therein. The court, therefore, refused to make any decree against him, and, as any decree against the father would not give the plaintiffs any greater benefit than they had by the charging order, dismissed the bill with costs. *Allan* v. *Phelps*, 23 Gr. 395.

Right to—*Fraudulent Assignment.*]—The Imperial statute 1 & 2 Vict. c. 110, if in force in this Province, authorizes the issuing of a charging order against stocks standing in the name of a debtor "in his own right or in the name of any person in trust for him," but does not apply where such stocks have been fraudulently assigned in order to avoid execution. *Caffrey* v. *Phelps*, 24 Gr. 344.

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4. *Interest on Amount Paid.*

By-law—*Seal.*]—Defendants were sued on a by-law, alleged to have been made by them, enacting that all persons who at the time of subscribing should pay up their stock in full, should be entitled to interest on the amount of their investment. Defendants' book of by-laws was produced, in which this by-law was written out, but not sealed, and in the margin was written "expunged," signed with the president's initials:—Held, that such proof, even without the entry in the margin, would have been insufficient to shew a by-law. And semble, that the claim could only have been supported by an engagement under the corporate seal. *McDonell* v. *Ontario, Simcoe, and Huron R. W. Co.*, 11 U. C. R. 271.

See Nasmith v. *Dickey*, 44 U. C. R. 414.

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5. *Repayment of Instalments Paid by Shareholders.*

Estoppel.]—An original shareholder in the Ontario, Simcoe, and Huron Railway Company having, after 16 Vict. c. 51, paid the calls before then made on his shares, and voted at a meeting of shareholders, was held precluded from claiming the repayment of his instalments under s. 4 of the Act. *Barrow* v. *Ontario, Simcoe, and Huron R. W. Co.*, 11 U. C. R. 124.

Shares Received for Price of Land.]—The plaintiff sold certain land to S. & Co., contractors for the Ontario, Simcoe, and Huron Railway, for the purposes of that road. By their contract S. & Co. took a number of shares in the company, for which they did not receive scrip, but were to pay in work. The plaintiff received in stock the price of the land, and the certificate for the shares was given to her by the defendants. 16 Vict. c. 51 was subsequently passed, and the fourth clause provided that any original shareholders in the company (S. & Co. and some others excepted) might, within a given time, apply for and obtain repayment of any instalment paid by them in cash, and have their shares cancelled:—Held, that the plaintiff was not within this proviso, and could not claim from the company the amount of her shares so obtained. *McDonell* v. *Ontario, Simcoe, and Huron R. W. Co.*, 11 U. C. R. 271.

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6. *Sale and Transfer.*

Note for Purchase Money—*Omission to Assign Part—Preparation of Transfer—Ad-*

ministration of Justice Act.]—To a declaration against maker and indorser of a note, defendants pleaded separately, that before the making of the note the plaintiff and her husband sold all their interest and stock in a certain railway company to defendant H., for $55,000, and, in consideration that the plaintiff and her husband should assign, convey, assure, and transfer the same to H., H. agreed to pay the said $55,000 on certain days, and to give his notes therefor indorsed by the other defendant, B., and that until the whole of the said stock, &c., had been conveyed to H. neither H. nor the other defendant should be required to pay said notes or any part thereof; that this was one of the notes, and was made on the faith that the stock had been conveyed; and that afterwards the plaintiff and her husband refused to complete the conveyance of all their stock, and only assigned part thereof, and retained thirty shares. The plaintiff replied that at the time of making said agreement, and from thence hitherto, she and her husband were, and still are, ready and willing, and hereby offer, to assign to H. the said thirty acres, on his request, of which he had notice, but that H. never requested such transfer:—Held, on demurrer to this replication, (1) that if no conveyance had ever been executed it would have been the duty of H. to prepare the necessary transfer for execution; but (2) that the plaintiff having conveyed all that she professed to have in the company, it was her duty to prepare, at her own cost, the extra conveyance of the thirty shares rendered necessary by her own default in not transferring them before. Semble, that, under the Administration of Justice Act, 1873, if all the other issues had been disposed of, the court might have allowed the plaintiff to convey the thirty shares, paying the costs of suit, and directed the defendant then to pay the note, and that plaintiff's husband should be made a party; but, there being other issues to be tried, judgment was given for defendants on demurrer, reserving judgment on the equitable rights of the parties. *Boulton* v. *Hugel*, 35 U. C. R. 402.

Registration—*By-law.*]—Held, that under 12 Vict. c. 196, s. 35, the clerk of the Northern Railway Company could not refuse to register a transfer of stock from one municipal corporation to another, on the ground that no by-law had been passed sanctioning such transfer. *Townships of Vespra and Sunnidale* v. *Beatty*, 17 U. C. R. 540.

——— *Necessity for—Statute.*]—Judgment creditors of an incorporated company, being unable to realize anything on their judgment, brought an action against H. as a shareholder, in which they failed from inability to prove that he was owner of any shares. They then brought an action against G., in which evidence was given, not produced in the former case, that the shares once held by G. had been transferred to H., but that the transfer was not registered in the company's books:—Held, nevertheless, that the shares were duly transferred to H., as it appeared that H. had acted for some time as president of, and executed documents for, the company, and the only way he could have held shares entitling him to do so was by transfer from G. Held, also, that, although there appeared to be a failure of justice from the result of the two actions, the inability of the plaintiffs to prove their case against H. in the first could not affect the rights of G. in the subsequent suit. The company in which G. held stock was incorporated in 1886 and empowered to build a certain line of railway. In 1890 an Act was passed intituled "An Act to consolidate and amend" the former Act, but authorizing additional works to be constructed, increasing the capital stock, appointing an entirely different set of directors, and giving the company larger powers. One clause repealed all Acts and parts of Acts inconsistent therewith. G. had transferred his shares before the latter Act came into force. The judgment against the company was recovered in 1895. Held, that G. was never a shareholder of the company against whom such judgment was obtained. *Hamilton* v. *Grant*, 30 S. C. R. 566.

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7. *Subscription.*

(a) *Conditional Subscription.*

Acceptance of Municipal Debentures.]—To a declaration under 14 & 15 Vict. c. 51, s. 19, by judgment creditors of a company against a municipality as shareholders, defendants pleaded, in substance, that they subscribed for the stock under a by-law which provided that their debentures, payable in 1877, should be issued for the sum subscribed as the same should become payable, and that the company should take such debentures at par; and that the plaintiff knew this before he became a creditor:—Held, a good defence. Section 19 does not apply in the case of a subscription under s. 18, unless such subscription is made in the ordinary manner. *Higgins* v. *Town of Whitby*, 20 U. C. R. 296.

Complete Subscription of Capital.]—Action by a creditor against defendant as shareholder. Plea, on equitable grounds, that, by 16 Vict. c. 102, the company were incorporated for certain purposes, and it was enacted that the capital stock should be £500,000; that defendant subscribed on the understanding that the whole stock was to be subscribed; that the directors in the name of the company contracted with the plaintiffs and one C. P. for the performance of certain work before said capital stock was subscribed, or enough to afford a reasonable prospect that the company could complete the railway; that defendant never agreed that the railway or any portion thereof should be constructed, or any contract entered into by the company or directors without the whole capital stock being subscribed; and so defendant never was a shareholder:—Held, that by 16 Vict. c. 102, and the Railway Act, it was not intended to make the subscription of the whole number of shares a condition precedent to the exercise of the powers conferred by the Act, and that defendant, by subscribing and paying his deposit, rendered himself liable to all the provisions thereof. *Moore* v. *Murphy*, 11 C. P. 444.

——— *Authority of Partner—Ratification—Alteration—Insertion of Figures.*]—To an action by creditors against shareholders, defendants pleaded, on equitable grounds, in substance, that when the company entered into certain contracts specified, for the construction of the road, the company had no means and no reasonable hope of obtaining the means to complete the whole line, enough stock not having been subscribed, of which the plaintiffs then had notice; that no portion of the road had been completed; that the

plaintiffs' judgment was obtained upon one of these contracts; that defendants never consented to the construction, or to any contract for the construction, of any portion of the railway without the whole stock having been subscribed for; and that they never waived the implied condition on which they subscribed, namely, that they were only to be liable provided the whole stock was subscribed for; and so they said that they never were shareholders, nor liable to pay for their shares. Another plea was, that defendants (three in number) at the time of the alleged subscription were in partnership as ironmongers; that by the terms of their partnership no one of them could thus bind the others without their consent; that the subscription was signed by C., one of them, in the name of the firm, without the consent of G., another of the partners, but on the express condition that unless he should ratify it the same should not bind any of them, and that G. refused to ratify; and defendants denied that they had ever paid anything on account of the shares, as alleged in the declaration:—Held, both pleas bad; for, as to the first, the facts alleged would clearly not entitle defendants to a perpetual injunction, if to any relief in equity; and as to the second, though one partner could not bind the others in such a matter, it should have been averred that when the calls were made upon defendants as alleged, they refused to pay on the ground that they were not shareholders or liable. Semble, that the second plea was bad also, as being pleaded as a defence by all, when it was a defence for G. only, by reason of the facts pleaded. *Moore* v. *Gurney*, 21 U. C. R. 127.

In an action by a creditor of the company for calls, alleging defendants to have subscribed for forty shares, the defence was: (1) that the name of the firm, consisting of three members, was signed by one of the partners, on the oral condition that unless G., another partner, who was out of the country, should assent on his return, it was not to bind, and that G. refused to ratify it; and, (2) that the figures "40," shewing the number of shares, had been inserted after the subscription by some stranger. The name of G. was allowed to be struck out as a defendant, and the jury were asked to say whether the figures "40" had been inserted by the defendants or any one authorized by them. They found for defendants, and that the figures were not written by the partner who subscribed nor any one authorized by him. On motion for a new trial the plaintiff's attorney swore that this objection, as to the figures, had taken him by surprise, and that he thought he would be able to meet it by satisfactory evidence on another trial. In answer, the defendant who subscribed confirmed by his affidavit the finding of the jury. The court refused to interfere. Quære, as to the effect of such a conditional subscription. See the last case. *Moore* v. *Gurney*, 22 U. C. R. 269.

——— *Colourable Subscription.*]—Declaration against defendant for calls on stock. Plea, that by the plaintiffs' charter it was provided that so soon as $100,000 stock should be taken, and ten per cent. thereon paid into a chartered bank, the provisional directors might call a general meeting, and the shareholders who had paid such ten per cent. should elect directors and organize the company; that one D., acting in collusion with the provisional directors, to enable them to make a colourable compliance with the Act, agreed to and did enter his name as a subscriber for $30,000 stock, and to pay $3,000 thereon, and it was agreed that he should not be called on for any further payment on said stock, and that any payment he might colourably make should be restored to him by means of a contract for building a railway for the plaintiffs, which the provisional directors then agreed to give him on such terms as would yield a large profit; that the said subscription was not bonâ fide, but in fraud of the Act; and before $100,000 stock had been taken, exclusive of such fraudulent subscription, the provisional directors called a meeting, at which D. was present and assumed to rate as a shareholder, and chose directors, who made the alleged calls; wherefore the said company had never been legally organized, and the said calls were not authorized:—Held, no defence, for D. could not dispute his being a shareholder, and the alleged agreement with him, being contrary to the statute, could not operate. *Port Whitby and Port Perry R. W. Co.* v. *Jones*, 31 U. C. R. 170.

——— *Construction of Branch.*]—Declaration against defendant as a shareholder, alleging that defendant holds four shares, and has paid ten per cent. thereon, and is indebted to the company in $80, in respect of two several calls of $10 each on each of said shares. Seventh plea, in substance, that defendant subscribed for the shares on the express condition that $100,000 should be subscribed applicable wholly to the construction of the road from Port Dover to Woodstock before any calls should be made in respect of his shares; that he never waived this condition, and that said sum had not been so subscribed. The company were incorporated to build a road from Port Dover to Woodstock, with power to extend the same to Stratford:—Held, plea good, for that it was competent for the company to receive subscriptions of stock to be applied to the main line and the extension separately, provided the condition was expressed in the subscription, and was not a secret qualification. Eighth plea, that by plaintiffs' charter, the capital stock was declared to be $250,000; that defendant never subscribed except on the terms expressed in the said charter, that the full amount of said stock should be subscribed for before the road should be commenced; that not one-third of such stock was subscribed for; that the ten per cent. actually subscribed was sufficient for the expenses in procuring the Act, and making the surveys and estimates for the works; and that defendant subscribed before the general meeting required by s. 8 of the Act, on the day of which meeting $100,000 was subscribed, &c.:—Held, no defence. *Port Dover and Lake Huron R. W. Co.* v. *Grey*, 36 U. C. R. 425.

Promise of Contract.]—The plaintiff, as a creditor of the company, sued defendant as a shareholder for the amount remaining due on his shares. Defendant pleaded that it was agreed between defendant and the company that if he would sign an agreement to take the shares the company would give him a contract for the construction of the railway then to be constructed, and that unless and until the contract should be so given defendant should not be bound by the agreement or become thereby a shareholder; and in pursuance of said agreement, and not otherwise, defendant signed the agreement. And defendant alleged that without any default on his

part, the company refused to give him the contract, and gave it to another; and that, except as aforesaid, he never subscribed for or became the owner of the shares. In another plea defendant alleged that he did subscribe for the shares on the same agreement; and that until the contract should be given to him he was not to be bound by such subscription; that the contract was given to another (as in the former plea); and that defendant had never paid, nor been asked to pay, anything on the shares, nor had he been recognized or treated, or done any act, as a shareholder in respect of said shares; and that, other than as aforesaid, he never subscribed for or became the owner of said shares:—Held, that both pleas were good, as shewing that defendant never became a shareholder so as to be liable to creditors, there being here no such provision as in the English Companies Act of 1867, requiring such agreements to be registered in order to bind creditors. *Bullivant* v. *Manning*, 41 U. C. R. 517.

The plaintiff, a creditor of a railway company, sued defendant as a shareholder for the amount unpaid on his shares. It appeared that the defendant had signed the stock book of the company for forty shares, but he alleged that this was done upon the faith of an oral agreement with one L., a provisional director and chief promoter of the company, that defendant and another should receive the contract for building the road. There was no proof that defendant had received any formal notice of the allotment of the shares, but he paid ten per cent. thereon, because, as he alleged, L. told him that he would not get the contract unless he paid it. He also attended a meeting of the shareholders, and seconded a resolution granting an allowance to the directors:—Held, that the payment of the ten per cent. made him a shareholder, and that he could not repudiate his liability on the ground that he had not been awarded the contract, for L. had no power to bind the company by annexing such an agreement to his subscription. *Wilson* v. *Ginty*, 3 A. R. 124.

In an action against defendant, as the holder of forty shares of unpaid stock in a railway company, it appeared that the defendant signed the stock book, which was headed with an agreement by the subscribers to become shareholders of the stock for the amount set opposite their respective names, and upon allotment by the company "of my or our said respective shares," they covenanted to pay the company ten per cent. of the amount of said shares and all future calls. The company subsequently passed a resolution instructing their secretary to issue allotment certificates to each shareholder for the shares held by him. The secretary accordingly prepared such certificate, the one for the defendant representing that the company "in accordance with your application for forty shares," &c., "have allotted to you shares amounting to $4,000." The certificates were handed to the company's brokers to deliver to the shareholders. The company published a notice in a daily paper that these certificates were lying at their brokers, who were authorized to receive the ten per cent. The defendant went to the brokers and paid them ten per cent. upon the forty shares; and his name was thereupon entered upon the books of the company as the owner of forty shares, with a credit of ten per cent. as paid thereon, and he attended the first meeting of shareholders for the election of directors and seconded a resolution, which was carried, for the payment of the provisional directors for their services. The defendant set up also that he was not a shareholder, because he signed the stock list on the faith of a parol agreement made with one of the provisional directors of the company, that unless he obtained a contract from the company he was not to become a shareholder, but the evidence shewed, not that the parol agreement made the obtaining of the contract a condition precedent to his becoming a shareholder, but that defendant's intention and agreement was to become a shareholder forthwith on allotment, and the parol agreement was merely a collateral one, as to the effect of his status as a shareholder on his obtaining a contract at a future day:—Held, that the defendant was a shareholder, and liable to the plaintiffs under s. 80 of the Railway Act, C. S. C. c. 66; that the agreement formed no defence; and that being made with a provisional director, it would not bind the company. *Newman* v. *Ginty*, *Nasmith* v. *Ginty*, *Denison* v. *Ginty*, 29 C. P. 34.

See Woodruff v. *Town of Peterborough*, 22 U. C. R. 274.

(b) *Validity and Requisites of.*

Alteration — *Number of Shares.*]—See *Moore* v. *Gurney*, 21 U. C. R. 127, *ante* (a).

Declaration, setting out the recovering of a judgment against a railway company, return of a writ nulla bona; and that defendant holds 25 shares of stock in said company unpaid. Pleas: (1) Never indebted. (2) Never was or is a shareholder in said company. On the trial, among other things, plaintiff proved a judgment against the company for £3,000; that a fi. fa. had been issued and returned nulla bona; also, that defendant had signed the stock book of the company for 25 shares, and paid 2½ per cent., £6 5s. The jury having found for plaintiff, on motion for nonsuit, on several grounds, among them, that on the trial it appeared that the words "twenty-five" had been written over the word "ten," opposite the defendant's name, and that the alteration should be accounted for:—Held, that the objection was rebutted by the facts proved at the trial, as the defendant had paid the sum, £6 5s., being the correct sum to be paid on the first call on twenty-five shares of £10 each, being 2½ per cent. *Fraser* v. *Hickman*, 12 C. P. 584.

——— *Number of Shares—Misnomer.*]—A person having signed his name in a stock book, the number of shares subscribed for being filled in by another person, who swore that he did it with the sanction of the subscriber, and the jury upon the evidence having found the subscription sufficient, the court refused to interfere:—Held, that the naming of a railway, "railroad," at the heading of the page of a stock book, did not vitiate the subscription. *Smith* v. *Spencer*, 12 C. P. 277.

Issue of Scrip — *Necessity for.*] — Held, that the subscription to a stock book of a railway company was sufficient evidence of the person subscribing being a shareholder under the definition of that term, and the Railway Clauses Consolidation Act, and that it was

not necessary that scrip should be issued for the stock to constitute such a subscriber a shareholder. *Smith* v. *Spencer*, 12 C. P. 277.

Payment of Percentage — *Commencement of Work.*]—Declaration against defendant as a shareholder, alleging that the defendant holds four shares, and has paid ten per cent. thereon, and is indebted to the company in 880, in respect of two several calls of $10 each on each of said shares. Second plea, that after the passing of the Act incorporating the company, 35 Vict. c. 53 (O.), and before 37 Vict. c. 57 (O.), amending it, defendant subscribed for said shares, but did not, within five days next thereafter, pay ten per cent. thereon, whereby the subscription became void. 35 Vict. c. 53, s. 7, enacts that no subscription of stock shall be valid, unless ten per cent. shall have been paid thereon within five days after subscription; and by 37 Vict. c. 57, s. 1, all subscriptions of stock shall be valid on which ten per cent. shall have been actually and bonâ fide paid:—Held, plea bad, for the payment after the five days was sufficient. Third plea, that the Act of incorporation provides that $25,000 of stock shall be subscribed, and fifty per cent. be paid thereon, and the railway be bonâ fide commenced within two years, otherwise the charter shall be forfeited and be void: and that this requirement was not complied with:—Held, bad, on the authority of City of Toronto and Lake Huron R. W. Co. v. Crookshank, 4 U. C. R. 369. *Port Dover and Lake Huron R. W. Co.* v. *Grey*, 36 U. C. R. 425.

——— *Notice of Allotment.*]—In an action against defendant as the holder of ten shares of unpaid stock, it appeared that defendant signed the stock book, which was headed with an agreement by the subscribers to become holders of the stock for the amounts set opposite their respective names, and, upon allotment by the company "of any or our said respective shares," to pay the company ten per cent. of the amount of said shares, and all future calls. The company subsequently passed a resolution instructing the secretary to issue allotment certificates to each shareholder for the shares held by him. The secretary accordingly prepared such certificates, which respectively represented that the company, "in accordance with your application for — shares, have allotted to you shares amounting to," &c. These were handed to the company's broker to deliver to the shareholders and collect the ten per cent. It did not appear that the certificate was ever delivered to the defendant, or that he was ever expressly notified of the allotment, but he was, with the rest of the shareholders, from time to time notified of the calls, to which he paid no attention, and had never paid anything on the stock; and some years afterwards, on being requested by the secretary to pay up his stock, he stated that he did not consider that he ought to pay anything, but gave no reason why:—Held, that there was sufficient evidence of notice to defendant of the allotment; and that it was ultra vires of the directors to take defendant's subscription for stock without at the same time receiving payment of the ten per cent. thereon. The defendant was therefore held liable. *Denison* v. *Lesslie*, 43 U. C. R. 22, 3 A. R. 536.

Signature.]—There being some doubt attempted to be thrown upon the signature of defendant to the stock book, the jury found against the plaintiff. The evidence of the witness to the signature being very clear, and not impeached, the court granted a new trial. *Ray* v. *Blair*, 12 C. P. 257.

Withdrawal—*Notice.*]—A stock book for a railway company having been opened and signed and a new one substituted therefor, with a provision that any subscriber to the old one might withdraw by giving notice to the president of the company:—Held, that a subscriber who omitted to avail himself of the provision by giving such notice, was not relieved from the original subscription. *Smith* v. *Spencer*, 12 C. P. 277.

See, also, *Kiely* v. *Smyth*, 27 Gr. 220; *Nasmith* v. *Manning*, 5 A. R. 126.

XXV. Tolls.

[*See* R. S. O. 1877 c. 165, s. 23; R. S. O. 1897 c. 207, s. 31; R. S. C. c. 109, s. 16; 51 Vict. c. 29, ss. 223-237 (D.)]

Approval by Governor-General—*Absence of—Passenger—Fares.*]—The fact that a railway company have not had their tolls approved by the governor-general under 51 Vict. c. 29, s. 227 (D.), does not in itself entitle a passenger who has paid such tolls to recover three times the amount under s. 280, in the absence of evidence that the fares charged were unreasonable or excessive; nor is such passenger entitled to recover back the amount so paid by him as paid under a mistake of fact, where it was such as in equity and good conscience he ought to have paid. *Lees* v. *Ottawa and New York R. W. Co.*, 31 O. R. 567.

Discrimination — *Prejudice—By-laws.*]—In 1865 and 1866 defendants charged plaintiffs' testator and other lumber dealers at Lindsay, $1.60 per thousand feet to carry lumber over their line to Port Hope; in 1867, $1.90, which was authorized by defendants' by-law passed in that year, and sanctioned by the governor in council; and in 1868, 1869, and 1870, $1.80. In 1865 and 1866 defendants carried lumber for certain lumber dealers at Port Perry, thirty miles beyond Lindsay, from Port Perry to Port Hope at $2 per thousand, defendants paying the steamboat charges for carriage between Port Perry and Lindsay, and the harbour dues at Port Hope, which left $1.38 net to defendants for the carriage from Lindsay to Port Hope. This arrangement was made in order to obtain the Port Perry trade, which would otherwise have gone by waggon to Whitby, and the same terms were offered to all shippers at Port Perry. In 1867, 1869, and 1870, the arrangement with the Port Perry dealers left for the same service $1.05 net to defendants; and in 1868, $1.55. In 1870 defendants entered into special contracts with several dealers to carry for different terms of years at $1.50 per thousand, from defendants' wharf in Lindsay to the wharf at Port Hope, all the lumber that the dealers might manufacture for the American market, or for delivery at the Port Hope wharf. The testator declined such a contract, which was open to all dealers, and paid $1.80 under protest. These contracts were made by defendants in order to secure the freight from a new road which was about to be opened from Port

Perry to Whitby. Plaintiffs having sued defendants on the common counts for the freight paid by their testator from 1865 to 1870 inclusive, from Lindsay to Port Hope, in excess of that paid by the Port Perry dealers to defendants for carriage over that distance:—Held, that defendants were justified in entering into the general arrangement with the Port Perry dealers from 1865 to 1869, and the contracts in 1870; and that there was no evidence to shew that the Port Perry dealers gained any undue advantage over plaintiffs' testator, within s. 25 of the Railway Act, C. S. C. c. 66. Held, also, that to support the action it should have been shewn clearly, and not left to inference, that plaintiff's testator was prejudiced in fact. Semble, that until the by-law was passed defendants had no right to levy any tolls, but were only entitled as common carriers to a reasonable compensation. *Scott* v. *Midland R. W. Co.*, 33 U. C. R. 580.

Illegal Contract — *Discrimination—Injunction.*]—The charter authorized the company to levy such tolls only as should be fixed by by-law of the company, to be sanctioned by the governor, and that the same tolls should be charged at all times equally to all persons. The company, from the circumstances of a firm covenanting to furnish certain quantities of lumber to be transported over their line of railway, contracted to carry the same at a lower rate than that fixed by their tariff for the public generally; but no by-law to this effect had been passed. The court, upon a bill filed, declared such contract illegal, and enjoined the company from continuing to carry at other rates than were charged for the like services to the public generally. *Attorney-General* v. *Ontario, Simcoe, and Huron R. W. Co.*, 6 Gr. 446.

See McDougall v. *Covert*, 18 C. P. 119.

XXVI. Traffic and Working Arrangements.

1. *Between Railway Companies.*

[*See* C. S. C. c. 66, s. 131; R. S. O. 1877 c. 165, s. 69, et seq.; R. S. O. 1897 c. 207, s. 77; 31 Vict. c. 68, s. 48, et seq. (D.); R. S. C. c. 109; 51 Vict. c. 29, ss. 238-242; 61 Vict. c. 22 (D.)]

Assimilation of Rates—*Division of Profits—Consent of Shareholders—Ratification—Public Policy—Pleading.*] — The Great Western and Grand Trunk Railway Companies on the 27th February, 1860, with a view to avoid competition, entered into an agreement under their respective corporate seals, providing for the same rates on through traffic to be charged by each, for the division of the profits from such traffic in specified proportions, and for the rendering of mutual monthly accounts, &c. To a declaration by the G. W. R. Co. against the G. T. R. Co. on the common counts, defendants pleaded this agreement, alleging that it had not been consented to by two-thirds of the shareholders of either company, as required by the statute, and that the moneys sought to be recovered by the plaintiffs accrued to them only under such agreement:—Held, on demurrer, a good defence, for that the agreement was clearly within the Railway Act, C. S. C. c. 66, s. 131 (a consolidation of 22 Vict. c. 4, then in force), which makes such consent a condition precedent to its validity. *Great Western R. W. Co.* v. *Grand Trunk R. W. Co.*, 24 U. C. R. 107.

To a count on such an agreement, defendants pleaded that the agreement was never submitted to the shareholders, nor did two-thirds of the shareholders assent thereto, as required by the Railway Act. The plaintiffs replied, on equitable grounds, that defendants should not be allowed to make this objection, because, after the agreement had been made and its provisions entered upon, its existence and working were communicated in written reports by the directors of each company to their shareholders, and announced to them at a regular meeting of shareholders, who then had full notice thereof, and did not dissent therefrom, but ratified and approved of the same, and permitted it to be continued and acted on; and that defendants' stockholders, at a regular meeting, approved of the sums found as balances struck in favour of the plaintiffs on the monthly settlements provided for in such agreement, which sums were now sued for:—Held, such an agreement being only authorized by the statute, "subject to the consent of two-third of the stockholders, voting in person or by proxy," that the replication afforded no answer to the plea. The rule of law and equity in such a case is the same. Held, also, that in declaring on such an agreement the general averment of the performance of all conditions precedent was sufficient, without alleging specially that the statutable consent had been obtained. The contract declared on, being for an assimilation of rates, and a division of the net profits on certain classes of traffic, between certain points, was objected to as illegal and contrary to public policy, but was upheld. Hare v. London and North-Western R. W. Co., 30 L. J. N. S. Ch. 817, followed. *S. C.*, 25 U. C. R. 37.

——— *Division of Profits—Powers.*]—The Railway Act of 1868 enacts that "the directors of any railway company may at any time make agreements or arrangements with any other company, either in Canada or elsewhere, for the regulation and interchange of traffic passing to and from their railways, and for the working of the traffic over the said railways respectively, or for either of those objects separately, and for the division and apportionment of tolls, rates, and charges in respect of such traffic, and generally in relation to the management and working of the railways or any of them, or any part thereof, and of any railway or railways in connection therewith, for any term not exceeding twenty-one years; and to provide either by proxy or otherwise for the appointment of a joint committee or committees for the better carrying into effect any such agreement or arrangement, with such powers and functions as may be necessary or expedient, subject to the consent of two-thirds of the stockholders voting in person or by proxy," the word "traffic" being interpreted by the Act as meaning "not only passengers and their baggage, goods, animals, and things conveyed by railways, but also cars, trucks, and vehicles of any description adapted for running over any railway:"—Held, that the powers of a railway company to make such arrangements were not qualified by a subsequent Act, which conferred similar powers with others, and "provided also that the

powers hereby granted shall not extend to the right of making such agreements with respect to any competing lines of railways." Under the special powers conferred on the Northern Railway Company of Canada, by 38 Vict. c. 65, s. 61 (D.), and the similar powers of the Hamilton and North Western Railway Company, conferred on them by 35 Vict. c. 55, s. 32 (D.), those companies are authorized to combine their rolling stock and to work their lines jointly as if they were one railway, under the management of a joint committee appointed by the boards of both companies, and to divide the gross revenue after deducting all expenses of working, maintenance, management, and compensation for damages, in certain agreed proportions. *Campbell* v. *Northern R. W. Co.*, 26 Gr. 522.

Carriage of Goods.]—See *ante* V.

Lease to Another Company — *Negligence—Fire.*]—In this case the plaintiff sued the B. and L. H. R. Co. for injury to his land caused by fire emitted from a steam engine, which was being propelled along defendants' line of road. The evidence at the trial clearly shewed that since 1864 the G. T. R. Co. had worked the line; that defendants, as a company, had had nothing to do with the working; that all the alleged damage was caused by the G. T. R. Co.'s engines and servants; and that defendants, beyond their ownership of the road, were unconnected with the injuries complained of:—Held, that defendants were not liable; and that under the plea of "not guilty" the defence was admissible. Held, also, that s. 6 of 31 Vict. c. 19 not merely recited the fact of the agreement of 1864 being accepted, but that it legislated upon it as accepted and binding, in its enacting part; but semble, that, even if merely recital, it would be good *primâ facie*, though not conclusive, evidence of the fact. Held, also, that because defendants were to receive a portion of the net profits, they were not, on that account, to be considered partners and liable as such. *McCallum* v. *Buffalo and Lake Huron R. W. Co.*, 19 C. P. 117.

Lease to Foreign Company—*Negligence—Fire.*]—Held, by the court of appeal, that a railway company incorporated under the laws of this Province cannot, without legislative sanction, confer upon a foreign railway company the immunities and privileges which they possess, and the foreign railway company, in running engines over the line of railway in this Province, are subject to the common law liability imposed upon a person using a dangerous and fire-emitting machine, and are liable for damages without proof of negligence. An insurance company by whom a fire loss has been paid have no locus standi as co-plaintiffs in an action by the assured against the wrongdoer whose negligence has caused the fire. The Canada Southern Railway Company, by their charter and amendments thereto, have authority to enter into an agreement with any other railway company with respect to traffic arrangements or the use and working of the railway or any part thereof, and by the Dominion Railway Act of 1879 they are authorized to enter into traffic arrangements and agreements for the management and working of their railway with any other railway company, in Canada or elsewhere, for a period of twenty-one years:—Held, by the supreme court of Canada, reversing the decision of the court of appeal, that authority to enter into an arrangement for the "use and working" or "management and working" of their road conferred upon the company a larger right than that of making a forwarding agreement or of conferring running powers; that the company could lawfully lease a portion of their road to a foreign company and transfer to the latter all their rights and privileges in respect to such portion, and the foreign company in such case would be protected from liability for injury to property occurring without negligence in their use of the road so leased, to the same extent as the Canada Southern Railway Company are protected. *Wealleans* v. *Canada Southern R. W. Co.*, 21 A. R. 297; *Michigan Central R. R. Co.* v. *Wealleans*, 24 S. C. R. 309.

Pledge — *Lien — Creditors — Registry Laws.*]—The respondent obtained against the Montreal and Sorel Railway Company a judgment for the sum of $675 and costs, and caused a writ of venditioni exponas to issue against the railway property of that company. The appellants, who were in possession and working the railway, claimed under a certain agreement in writing to be entitled to retain possession of the railway property pledged to them for the disbursements they had made on it, and filed an opposition à fin de charge for the sum of $35,000 in the hands of the sheriff. The respondent contested the opposition. The agreement relied on by the appellant company was entered into between the Montreal and Sorel Railway Company and the appellant company, and stated amongst other things that "the Montreal and Sorel Railway Company was burdened with debts, and had neither money nor credit to place the road in running order," &c. The amount claimed for disbursements, &c., was over $35,000:—Held, that such an agreement must be deemed in law to have been made with intent to defraud, and was void as to the anterior creditors of the Montreal and Sorel Railway Company. (2) That, as the agreement granting the lien or pledge affected immovable property and had not been registered, it was void against the anterior creditors of the Montreal and Sorel Railway Company: arts. 1977, 2015, and 2094, C. C. (3) That art. 419, C. C., does not give to a pledgee of an immovable who has not registered his deed a right of retention as against the pledgor's execution creditors for the payment of his disbursements on the property pledged, but the pledgee's remedy is by an opposition à fin de conserver to be paid out of the proceeds of the judicial sale: art. 1972, C. C. *Great Eastern R. W. Co.* v. *Lambe*, 21 S. C. R. 431.

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2. *With Other Companies.*

Express Companies—*Discrimination.*]—Held, affirming the judgment in 9 O. R. 251, that the railway company, having granted to one incorporated express company the privilege of employing their station agents to act as agents of that express company, such agents having, as employees of the railway company, the right to use the company's trucks and baggage house as places for storing goods, and refused the same privilege to another incorporated express company, had brought themselves within the provisions of s.s. 3 of s. 60 of 42 Vict. c. 9 (D.), which enacts that any railway company granting any facilities to any incorporated express

company shall grant equal facilities on equal terms and conditions to any other incorporated express company demanding the same. *Vickers Express Co.* v. *Canadian Pacific R. W. Co.*, 13 A. R. 210.

International Bridge Company — *Exclusive Use of Bridge.*]—See *Attorney-General* v. *Niagara Falls International Bridge Co.*, 20 Gr. 34, *ante* XX.

Steamship Company — *Joint Rates — Division of Profits — Validity.*]—By an agreement entered into between the plaintiffs and the Toronto, Grey, and Bruce Railway Company, it was agreed that there should be certain joint rates chargeable to passengers and freight by the steamship company and the railway company, to be divided in certain proportions; and if it should be found that the proportion payable to the steamship company did not at the end of the season amount to the sum therein stipulated, then that the deficiency should be made good by a rebate from the share of the railway company; and, on the other hand, if the steamship company received more than the sums mentioned in the agreement, the railway company were entitled to a share of the surplus. Subsequently, an agreement was entered into whereby the Toronto, Grey, and Bruce Railway Company leased their line to the Ontario and Quebec Railway Company, the latter agreeing to assume the contract with the plaintiffs. This agreement was ratified by Act of parliament. The Ontario and Quebec Railway Company made a lease of their line to the Canadian Pacific Railway Company, which was confirmed by Act of parliament, by which Act the Canadian Pacific Railway Company were to assume all contracts of the Toronto, Grey, and Bruce Railway Company, including the one with the plaintiffs:—Held, that, even if the agreement between the plaintiffs and the Toronto, Grey, and Bruce Railway Company were ultra vires the latter company, it was made valid by the subsequent legislation; but, apart therefrom, it was in no sense objectionable. *Owen Sound Steamship Co.* v. *Canadian Pacific R. W. Co.*, 17 O. R. 691.

Telegraph Companies — *Foreign Company — Public Policy.*]—In 1869 the E. and N. A. R. Co., owning the road from St. John, N.B., westward to the United States boundary, made an agreement with the W. U. Telegraph Co. giving the latter the exclusive right for 99 years to construct and operate a line of telegraph over their road. In 1876 a mortgage on the road was foreclosed and the road itself sold under decree of the equity court of New Brunswick to the St. J. and M. R. Co., which company, in 1883, leased it to the N. B. R. Co. for a term of 999 years. The telegraph line was constructed by the W. U. Telegraph Co., under the said agreement, and had been continued ever since without any new agreement being made with the St. J. and M. R. Co., or the N. B. R. Co. The W. U. Telegraph Co. were an American company incorporated by the State of New York, for the purpose of constructing and operating telegraph lines in the State. Their charter neither allowed them to engage, nor prohibited them from engaging, in business outside of the State. In 1888 the C. P. R. Co. completed a road from Montreal to St. John, a portion of it having running powers over the line of the N. B. R. Co., on which the W. U. Telegraph Co. had constructed their telegraph line. The N. B. R. Co. having given permission to the C. P. R. Co. to construct another telegraph line over the same road, the W. U. Telegraph Co. applied for and obtained an injunction to prevent its being built:—Held, that the agreement made in 1869 between the E. and N. A. R. Co. and the W. U. Telegraph Co. was binding on the present owners of the road. (2) That the contract made with the W. U. Telegraph Co. was consistent with the purposes of their incorporation, and not prohibited by their charter nor by the local laws of New Brunswick, and their right to enter into such a contract and carry on the business provided for thereby is a right recognized by the comity of nations. (3) That the exclusive right granted to the W. U. Telegraph Co. did not avoid the contract as being against public policy, nor as being a contract in restraint of trade. *Canadian Pacific R. W. Co.* v. *Western Union Telegraph Co.*, 17 S. C. R. 151.

XXVII. Work for General Advantage of Canada—Effect of Declaring.

Appeal from Award.]—Land was expropriated by the defendants in 1876, and proceedings to obtain compensation therefor were begun in 1884. On the 25th May, 1883, the defendants' railway became by statute a Dominion road, having previously been an Ontario road:—Held, that the procedure provided by the Dominion Consolidated Railway Act, 1879, applied to the proceedings, and therefore an appeal from the award under the provisions of the Ontario Railway Act could not be prosecuted. *Darling* v. *Midland R. W. Co.*, 11 P. R. 32.

Application for Warrant of Possession.]—In an application for an injunction to restrain the defendants, who were incorporated by statutes of the Ontario legislature, from applying to a county court Judge for a warrant for possession of certain lands required by them, and being expropriated by them under the provisions of the Ontario Railway Act, on the ground that the defendants' railway had been declared a work for the general advantage of Canada, and that no notice of expropriation had been served as required by the provisions of the Ontario Railway Act:—Held, under the circumstances of this case, and following Clegg v. Grand Trunk R. W. Co., 10 O. R. at p. 713, and Darling v. Midland R. W. Co., 11 P. R. 32, that the defendants were no longer within the operation of the Ontario statutes. Held, also, that a notice of requiring the lands, given under the Dominion Railway Act, was not sufficient notice under the Ontario Railway Act. *Barbeau* v. *St. Catharines and Niagara Central R. W. Co.*, 15 O. R. 586.

A railway company, incorporated by an Act of the Ontario legislature, were thereby authorized to construct, equip, and operate a railway, between certain points. By an Act of the Dominion parliament the Governor in council was authorized to grant a subsidy to the company; and by another Act of the Dominion parliament the company's railway was declared to be a work for the general advantage of Canada, and the company were authorized to build a branch line. No further powers of any kind were conferred upon the company by the Dominion parliament:—Held, that the effect of the declaration that the railway was

a work for the general advantage of Canada was to bring it under the exclusive legislative authority of the parliament of Canada, but that the Acts of the Ontario legislature, previously passed, were in no way affected; that the railway in question was not one "constructed or to be constructed under the authority of any Act passed by the parliament of Canada" (see R. S. C. c. 100, s. 3); and therefore ss. 4 to 39 of R. S. C. c. 109 did not apply to it; and a motion to a Judge of the high court under s. 8 for a warrant of possession of certain lands were refused. *Re St. Catharines and Niagara Central R. W. Co. and Barbeau*, 15 O. R. 583.

Part I. of R. S. C. c. 109 does not apply to the applicants, a company incorporated under an Ontario Act, 52 Vict. c. 82, though under Dominion control, as being a railway for the general advantage of Canada, it being only applicable to railways constructed or to be constructed under the authority of a Dominion Act. *Toronto Belt Line R. W. Co. v. Lauder*, 19 O. R. 607.

Arbitration—*Security—Notice of Desistment.*]—The defendants, who were originally incorporated under an Ontario Act, gave notice of their intention to expropriate certain lands, and also executed the usual bond, which was duly allowed by a county court Judge, and possession taken by them. Subsequently, 51 Vict. c. 78 (D.) was passed, bringing the railway under the legislative authority of the Dominion, and incorporating the provisions of the Dominion Railway Act as to expropriation of lands, except where inconsistent with the Ontario Act, but ratifying all acts already done in that regard. Afterwards, the arbitrators who had been appointed in the matter of the above lands to fix the compensation therefor, gave notice of intention to proceed with the arbitration, immediately after which defendants gave notice of desistment, and then a new notice of intention to expropriate the same with other lands, and subsequently another notice specifying the original lands only:—Held, that the notice of desistment served avoided the original bond, and the defendants must now give security by deposit of money in a bank, instead of a bond, that being the mode of giving security under the Dominion Railway Act, and unless they did so, the plaintiff was entitled to an injunction restraining the defendants from using the lands. *Nihan v. St. Catharines and Niagara Central R. W. Co.*, 16 O. R. 459.

See Clegg v. Grand Trunk R. W. Co., 10 O. R. 708; *Re Grand Junction R. W. Co. v. County of Peterborough*, 6 A. R. 339.

XXVIII. Miscellaneous Cases.

Assessment and Taxes.]—Under the assessment Act of 1869, 32 Vict. c. 36 (O.), the lands of railways might be sold for non-payment of taxes. *Smith v. Midland R. W. Co.*, 4 O. R. 494.

——— *Construction of Railway by Mining Company.*]—By R. S. N. S., 5th ser., c. 53, s. 9, s.-s. 30, the roadbed, &c., of all railway companies in the Province is exempt from local taxation. By s. 1, the first part of the Act, from ss. 5 to 33 inclusive, applies to every railway constructed and in operation or thereafter to be constructed under the authority of any Act of the legislature; and by s. 4, part 2 applies to all railways constructed or to be constructed under the authority of any special Act, and to all companies incorporated for their construction and working. By s. 5, s.-s. 15, the expression "the company" in the Act means the company or persons authorized by the special Act to construct the railway:—Held, that part I. of this Act applied to all railways constructed under provincial statutes, and was not exclusive of those mentioned in part II.; that a company incorporated by an Act of the legislature as a mining company, with power "to construct and make such railroads and branch tracks as might be necessary for the transportation of coals from the mines to the place of shipment and all other business necessary and usually performed on railroads," and with other powers connected with the working of mines "and operation of railways," and empowered by another Act, 49 Vict c. 45 (N. S.), to hold and work the railway "for general traffic and the conveyance of passengers and freight for hire, as well as for all purposes and operations connected with said mines in accordance with and subject to the provisions of part II. of c. 53, R. S. N. S., 5th ser., intituled 'of railways,'" was a railway company within the meaning of the Act; and that the reference in 49 Vict. c. 145, s. 1, to part II., did not prevent said railway from coming under the operation of the first part of the Act. *International Coal Co. v. County of Cape Breton*, 22 S. C. R. 305.

Closing Highway—*Municipal By-law—Quashing—Parties.*]—Quære, as to the power of a municipal council to close up highways and grant them to a railway company without notice. On an application to quash a by-law to that effect, the company should be made a party to the rule. *Re McKinnon and Village of Caledonia*, 33 U. C. R. 502.

Closing Public Lane in City.]—Article 997 of the Civil Procedure Code relates, on its true construction, not to every illegal act done by an association therein mentioned, but only to such acts as are professedly or manifestly done in the assertion of some special power, franchise, or privilege not conferred upon it by law. Where an information under that article alleged that the respondent company had closed a public lane under the pretext that they had acquired private interests therein which entitled them so to do:—Held, that this did not amount to an allegation that they closed it in the exercise of any power, franchise, or privilege within the meaning of the article. Held, also, that the court had jurisdiction under art. 998 to prohibit the issue of a writ of information under art. 997; but that after issue the attorney-general is dominus litis, and can discontinue proceedings or control their conduct and settlement independently of any private relator. Held, that, assuming the lane in question to have been a public one, the respondent company were entitled to close, occupy, and use it with the assent of the city council, which assent was empowered by s. 12 of the Railway Act of Canada, 1888. *Casgrain v. Atlantic and North-West R. W. Co.*, [1895] A. C. 282.

Conveyance of Easement—*Resolutions—Ultra Vires — Estoppel—Prescription.*]—The Act of incorporation of a railway com-

pany, the predecessors in title of the plaintiffs, who were incorporated for the purpose of constructing and operating a certain line of railway, conferred upon the company, in respect of the disposition of lands acquired by them, powers of "letting, conveying, and otherwise departing therewith, for the benefit and on account of the company, from time to time, as they should deem necessary." Nearly forty years before the commencement of this action the predecessors in title of the defendants laid pipes for conveying water along the railway track of the plaintiffs' predecessors, and used them for such purpose almost continuously up to the time of the action, such privilege having been given to them by resolution of the directors of the company, who, a few years subsequently, passed another resolution, and in pursuance thereof executed a deed granting, releasing, and confirming such right and privilege, which at the time this action was brought had become vested in the defendants. The undertaking of the original railway company became vested in the plaintiffs, who, a few years before the commencement of this action, desiring to alter the position of their track, gave notice of expropriation to the immediate predecessors in title of the defendants, and placed the track over the water pipes. The plaintiffs now sought to have the resolution and deed mentioned declared ultra vires, and also claimed an injunction restraining the user of the water pipes, and, if necessary, an order for their removal:—Held, that the resolution and deed were ultra vires as not within the powers specified by the charter, or such as could fairly be regarded as incidental thereto, or reasonably derived by implication therefrom. Held, also, that the plaintiffs were not estopped from asserting their own title and denying the defendants'. Held, lastly, that the defendants, not having used and enjoyed their easement for forty years, had not acquired a title thereto by prescription under R. S. O. 1887 c. 111, s. 35. *Canada Southern R. W. Co.* v. *Town of Niagara Falls*, 22 O. R. 41.

Ditches and Watercourses Act.]—Held, that the defendants, a railway company, were not subject to the provisions of the Ditches and Watercourses Act, R. S. O. 1877 c. 199. *Miller* v. *Grand Trunk R. W. Co.*, 45 U. C. R. 222.

Forfeiture of Charter.]—See *City of Toronto and Lake Huron R. W. Co.* v. *Crookshank*, 4 U. C. R. 309; *Port Dover and Lake Huron R. W. Co.* v. *Grey*, 36 U. C. R. 425.

Injury to Railway Lands by Water—*Construction of Permissive Statute.*] — See *Canadian Pacific R. W. Co.* v. *Parke*, [1899] A. C. 535.

Nuisance—*Interference with Railway—Attorney-General.*]—The attorney-general is the proper person to file an information in respect of nuisance caused by interference with a railway. *Attorney-General* v. *Niagara Falls International Bridge Co.*, 20 Gr. 34.

Plans and Surveys.]—See *Counties of Peterborough and Victoria* v. *Grand Trunk R. W. Co.*, 18 U. C. R. 220; *In re Stratford and Huron R. W. Co. and County of Perth*, 38 U. C. R. 112, 140.

Railway Committee of Privy Council—*Order—Making Rule of Exchequer Court.*]—By s. 29 of the Railway Act, 51 Vict. c. 29 (D.), the exchequer court of Canada is empowered to make an order of the railway committee of the privy council a rule of court; but where there are proceedings depending in another court in which the rights of the parties under the order of the railway committee may come in question, the exchequer court, in granting the rule, may suspend its execution until further directions. (2) The court refused to make the order of the railway committee in this case a rule of court upon a mere ex parte application, and required that all parties interested in the matter should have notice. *In re Metropolitan R. W. Co.*, 6 Ex. C. R. 351.

Repair of Bridge—*Liability for.*]—Notwithstanding any liability which may be cast by statute upon a railway company to maintain and repair a bridge and its approaches by means of which a highway is carried over their railway, such highway is still a public highway, within the provisions of the Municipal Act, R. S. O. 1887 c. 184, s. 531, requiring every public road, street, bridge, and highway to be kept in repair by the municipal corporation, who are not absolved from liability for default, by the liability, if any, of the railway company. *Mead* v. *Township of Etobicoke and Grand Trunk R. W. Co.*, 18 O. R. 438.

Servant of Company—*Drinking on Duty—Dismissal.*]—It is good cause for the summary dismissal by a railway company of one of its employees that he was proved while on duty to have drunk intoxicating liquor with other employees; and, although only a recipient of the intoxicating liquor, such conduct constitutes a participation in a criminal offence under s. 283 of the Railway Act, 51 Vict. c. 29 (D.), which prohibits anyone selling, giving, or bartering spirits or intoxicating liquor while on duty. *Marshall* v. *Central Ontario R. W. Co.*, 28 O. R. 241.

——— *Engine Driver—Manslaughter—Acquittal—Civil Action—Defence.*]—See *Ham* v. *Grand Trunk R. W. Co.*, 11 C. P. 86.

——— *Lord's Day Act—Application of.*]—The defendant was convicted of following his ordinary calling of foreman of the Grand Trunk Railway Company elevator in superintending the unloading of grain from a vessel into the elevator on Sunday:—Held, that R. S. O. 1897 c. 246 does not apply to that railway, and as it did not apply to the employer it did not apply to the employee. Conviction quashed, with costs against the prosecutor. *Regina* v. *Reid*, 30 O. R. 732.

Servants of Company—*Examination of as Officers.*]—See EVIDENCE, VII. 2 (e).

Ticket—*Copyright.*]—A railway ticket is not a subject of copyright under C. S. C. c. 81. *Griffin* v. *Kingston and Pembroke R. W. Co.*, 17 O. R. 660.

Trespass—*Arrest—Justice of the Peace.*]—Section 283 of the Railway Act of Canada, 51 Vict. c. 29, enabling a justice of the peace for any county to deal with cases of persons found trespassing upon railway tracks, applies only where a constable arrests an offender and takes him before the justice. A summary conviction of the defendant by a justice for the

county of York, for walking upon a railway track in the city of Toronto, was quashed where the defendant was not arrested, but merely summoned. *Regina* v. *Hughes*, 26 O. R. 486.

See ASSESSMENT AND TAXES, II.—CONSTITUTIONAL LAW, II. 18, 23—CROWN, III. 1, 3, 4—MORTGAGE, IX.—PETITION OF RIGHT—STATUTES, X. 1, 2, 3.

RAILWAY COMMITTEE OF PRIVY COUNCIL.

See RAILWAY, XXI.

RAPE.

See CRIMINAL LAW, IX. 40.

RATES.

See LANDLORD AND TENANT, XXI.—MANDAMUS, II. 4 (e)—MUNICIPAL CORPORATIONS, VIII. 2 (c), 3.

RATIFICATION.

See PRINCIPAL AND AGENT, I. 5.

REASONABLE AND PROBABLE CAUSE.

See MALICIOUS PROCEDURE, II. 6.

RECEIPTS.

I. EFFECT OF AS PROOF OF PAYMENT, 6049.

II. RECEIPTS FOR RENT, 6050.

III. MISCELLANEOUS CASES, 6051.

I. EFFECT OF AS PROOF OF PAYMENT.

Date of Payment.]—"$35. Fergus, 9th Nov., 1867. Received from R. M. the sum of thirty-five dollars, being the amount due of him for the instalment ending 1st November, 1867, of a bond. R. L."—Held, no evidence of payment on 1st November, for the construction of the receipt (and the question was one of construction, not of presumption) was an acknowledgment of payment, made on the day it bore date, of a sum of money due on 1st November. *Lowe* v. *Morice*, 19 C. P. 123.

Execution—*Stay.*]—Where, with a view of giving defendant time, the plaintiff had, upon the misinformation of the deputy sheriff, given a receipt for the debt, as the only proper mode of staying the execution, which receipt the sheriff had stated in the return of the writ of fi. fa., the court ordered an alias to issue. *Hinnerley* v. *Gould*, Tay. 143.

Explanation of Purpose.] — A receipt in full is not conclusive evidence of payment, but is a mere admission, which is always susceptible of explanation in respect to the circumstances under which it was given, and the purposes which it was intended to answer. *Montforton* v. *Bondit*, 1 U. C. R. 362; *Curillier* v. *Browne*, 4 U. C. R. 105.

Indorsements on Mortgage — *Mortgagor—Executor of Mortgagee.*]—A mortgagee appointed the mortgagor one of his executors, and the mortgagor became the acting executor. The mortgagor afterwards entered into an agreement with B., the owner of other property, for an exchange free from incumbrances, and that B. should pay $2,000 for the difference in value. The mortgagor had indorsed on the mortgage certain sums as paid by him thereon after the mortgagee's death, reducing thereby the amount appearing to be due on the mortgage to $1,000, no part of which, however, was payable. B. satisfied the $1,000, partly in money paid to the mortgagor, partly by a debt owing to B. by the mortgagor, and partly by moneys which had theretofore been lent by B. for the purposes of the mortgagee's estate, and the mortgagor thereupon indorsed on the mortgage a receipt for $1,000 in full of the mortgage money; the contemporaneous payment of money was made with the assent of the other executor. It afterwards appeared that the mortgagor was largely indebted to the mortgagee's estate at the date of all these transactions:—Held, that the contemporaneous payment was a valid payment pro tanto, the same having been made with the assent of the co-executor; but that the estate (or the co-executor) was not bound by the receipts indorsed on the mortgage; and that B. was not entitled to credit, as against the estate, for the private debt due to him by the mortgagor, nor for his antecedent loan. *Bacon* v. *Shier*, 16 Gr. 485.

Settlement of Account — *Resolution — Payment of Part.*]—The court house in which the plaintiff, the county attorney and clerk of the peace, previously had his office, was burned, and the county council informally offered him certain rooms in another building leased by them. The plaintiff, considering them insufficient, as in fact they were, hired others at $11 per month; and having sent in his bill to the council for seventeen months, they passed a resolution to pay him $93.50 (being one-half), in full of his claim, which sum he afterwards received, and signed the receipt and indorsed a cheque therefor, which purported to be in accordance with the resolutions:—Held, that he was bound by such settlement, and could not recover more in respect of the seventeen months' rent; but that he might recover the full rent paid by him subsequent to the resolution. *Lees* v. *County of Carleton*, 33 U. C. R. 409.

II. RECEIPTS FOR RENT.

Effect of, as to Tenancy.]—Ejectment. Defendant in his notice of title, besides denying the plaintiffs' title, claimed title in himself as their tenant. The plaintiffs, under this

notice of defence, alleged that defendant was thereby debarred from disputing their title as landlord, and proved a receipt for rent in full to the 31st March, 1861. This action was commenced on the 12th October, 1861. The defendant, in reply, proved that his tenancy commenced in May, and that one of the plaintiffs in April, 1861, while visiting the farm, expressed his satisfaction as to its state, and told him he wished him to remain on. The jury having found for the plaintiffs, and that defendant was their agent on the premises:—Held, that the direct evidence of the commencement of the tenancy in May was entitled to greater weight than a receipt dated the 30th March for rent up to date. *Colby* v. *Wall*, 12 C. P. 95.

Defendant asserted that he was a yearly tenant, while the plaintiff alleged that he was tenant only from one year's end to the other:—Held, that, on the facts stated in the case, the receipts for rent set out afforded no inference as to the nature of the tenancy. *Houghton* v. *Thompson*, 25 U. C. R. 557.

III. Miscellaneous Cases.

For Certificate of Deposit—*Effect of—Sale of Land.*] — The plaintiff in ejectment produced two receipts for certificates of deposits to the credit of the receiver-general, on a purchase of certain lands. In both the money was expressed to have been received from the plaintiff. In the first a blank was left for the name of the vendee, the words "sold to" being inserted. In the second no mention was made of the purchaser:—Held, that the receipts primâ facie imported a sale to the plaintiff. *Young* v. *Scobie*, 10 U. C. R. 372.

For Consideration in Deed—*Effect of Absence of.*]—A vendor took from the purchaser a mortgage for part of the consideration money, but did not register the conveyance until several months after the deed to the purchaser had been registered; in the meantime the mortgagor created a second incumbrance in favour of bonâ fide mortgagees, which was registered long prior to the first mortgage, without notice of the vendor's incumbrance:—Held, that the want of a receipt for the consideration money upon the deed to the purchaser was not sufficient to postpone the second incumbrance. *Baldwin* v. *Duignan*, 6 Gr. 595.

For Goods—*Effect of—Third Person.*]—A receipt by A. for flour as in store for B., given and accented, is not conclusive upon the person accepting it from B. *Muir* v. *Holton*, 4 U. C. R. 505.

For Legacy—*Sufficiency.*] — Legatee having given a receipt not bound to execute a release. *Kaiser* v. *Boynton*, 7 O. R. 143.

For Money Lent—*Partnership.*] — See *Mendelssohn Piano Co.* v. *Graham*, 19 O. R. 83.

For Note—*Effect of Promise.*]—The following receipt: "Received of Bradford & Cutler a note they held against A. Ladd, on which there was a balance due, September 1st, 1842, of $400.33, which is to be paid to them in Michigan treasury warrants; also, a balance of accounts of $57.17, which is to be paid in current money if enough is collected, if not, in warrants. Dennis O'Brien:"—Held, not to be, on the face of it, evidence of a promise by D. O'Brien personally to pay these debts. *Bradford* v. *O'Brien*, 7 U. C. R. 562.

For Price of Timber—*Effect of, as Contract.*]—A receipt quâ receipt is not a contract, but a mere acknowledgment, and is open to explanation and contradiction by parol. S. sold all the elm and soft maple trees on a certain lot to T., and at the time of sale gave T. the following receipt: "Received from J. L. for T., the sum of $500, on account of elm and soft maple on," &c., the said lot, describing it. Parol evidence was admitted to shew, and the jury found, that one of the conditions of the sale was that the timber was to be removed by T. within two years:—Held, that the receipt here was not the contract between the parties, but a mere acknowledgment of so much money; and therefore the parol evidence was properly admitted. Held, also, that the effect of the condition was, that T. was only to have the right to cut and remove the timber within the two years from the date of the agreement. Johnston v. Shortreed, 12 O. R. 633, followed. *Steinhoff* v. *McRae*, 13 O. R. 546.

For Purchase Money—*Joint Devisees.*]—Devisees in trust for sale of real estate must jointly receive or unite in receipts for the purchase money, unless the will provides otherwise, and the case is not affected by the property being charged with debts, and the power of sale being to the executors eo nomine. *Ewart* v. *Snyder*, 13 Gr. 55.

Hire Receipts.]—See Collateral Securities—Sale of Goods.

See Estoppel, I. 4, III. 5—Money, II. 10.

RECEIVER.

I. Appointment of,
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I. APPOINTMENT OF.

1. *Appointee.*

Fitness and Acceptability.] — A receiver, though an officer of the court, stands in the position of trustee to all interested in the estate or fund. Therefore, in making the appointment the court will endeavour to select a person unexceptionable to all parties, not only fit and competent, but also acceptable. *Simpson* v. *Prescott and Ottawa R. W. Co.*, 1 Ch. Ch. 99.

Although the appointment of a receiver should not be lightly disturbed, still where there was personal ill-feeling between the person appointed and some of those interested, and a person who had been proposed by other parties to the cause was, owing to his business habits, likely to be better qualified to discharge the duties of receiver, and was entirely unexceptionable, the court vacated the appointment made by the master, and ordered the other to be appointed. *Brant* v. *Willoughby*, 17 Gr. 627.

2. *In What Cases Appointed.*

(a) *Claims against Estates of Deceased Persons or Trust Estates.*

Fraud of Trustee.] — The court will grant an injunction to restrain a trustee from interfering with the trust estate where fraud is charged, and by the same order appoint a receiver. *Vernon* v. *Kinzie*, 2 O. S. 40.

Improper Management by Executor.] —A bill was filed in 1846, by devisees against executors, charging them with improper conduct in the management of the estate; and the answers were all filed within a year. No further proceeding was had thereon until 1851, when the plaintiffs moved on affidavit for the appointment of a receiver of the real and personal estate. The court refused the application as to the personal estate, as no new grounds were stated in the affidavit, but granted it in respect of the real estate. *Meacham* v. *Draper*, 2 Gr. 316.

Insolvency of Executor.]—As a general rule, an assignment for the benefit of creditors will be taken as a declaration of insolvency and equivalent to bankruptcy in England. Where, therefore, some of the legatees of a testator filed a bill against his executor and two of the legatees, charging maladministration, and alleging that the executor, subsequently to the death of the testator, had made an assignment for the benefit of his creditors, and that he was insolvent, the court, upon motion for an injunction and receiver before answer, under the circumstances, granted an interim injunction and receiver, notwithstanding that the executor denied any maladministration of the estate, or that his insolvency was the reason for his making the assignment of his estate. *Harrold* v. *Wallis*, 9 Gr. 445.

Insufficiency of Personal Estate — *Rents and Profits.*]—Upon a creditor's bill, a receiver of the rents and profits of the testator's real estate will not be appointed where the plaintiff does not allege in his bill and clearly prove the insufficiency of the personal estate to pay the debts, and does not pray for the application of the realty, or the rents and profits thereof, to that object. *Sanders* v. *Christie*, 1 Gr. 137.

Misconduct of Executor — *Summary Administration Order.*] — When the misconduct is such as would entitle a plaintiff at the outset to apply for an injunction or a receiver, an action should be brought. *Sullivan* v. *Harty*, 9 P. R. 500.

See McLean v. *Bruce*, 13 P. R. 504.

Waste by Executor.]—A general charge in a bill, that the defendant, an executrix and trustee, is committing waste on the testator's property, without specifying any act of waste, is not sufficient to sustain an injunction or a receiver. *Sanders* v. *Christie*, 1 Gr. 137.

See Callaghan v. *Howell*, 29 O. R. 329.

(b) *Mortgage Cases.*

Mortgagee in Possession—*Removal of Timber.*] — In a redemption suit by the second mortgagee against the first, it appeared that the equity of redemption had become vested in the first mortgagee, and that he had entered into possession, and had cut and removed timber to a greater value than the amount due on his mortgage:—Held, that the second mortgagee might ask for a receiver. *Steinhoff* v. *Brown*, 11 Gr. 114.

Mortgagor in Possession — *Equitable Mortgage—Foreclosure—Defence.*] — Defendant, in a foreclosure suit, cannot defeat a motion for a receiver by a general affidavit that he has a good defence to the suit; he must specify the defence distinctly to enable the plaintiff to meet it, and the court to judge of it. An equitable mortgagee is after default entitled to a receiver where the mortgagor is in possession, whether the security is scanty or not; and he need not make a prior mortgagee who has the legal estate a party to the suit. *Aikins* v. *Blain*, 13 Gr. 646.

Purchaser of Equity—*Covenant to Indemnify.*]—A judgment creditor of a mortgagor upon covenants in the mortgage cannot obtain a receivership order to enforce payment by a purchaser of the equity, who, on purchasing, has agreed to assume and pay the mortgage, though he sue and make the application on behalf of himself and all other creditors of the mortgagor. *Palmer* v. *McKnight*, 31 O. R. 306.

(c) *Partnership Cases.*

Death of Partner—*Exclusion of Representatives—Differences.*]—A surviving partner, by reason of his liability to pay the debts due by the partnership, is entitled to receive all moneys and collect all debts due to, and dispose of all the effects of, the firm for that purpose. The representatives of the deceased partner have a right to inspect the books of the partnership, and to be informed of the proceedings of the survivor; and any exclusion of them in these respects will entitle them to an injunction and receiver. *Bilton* v. *Blakely*, 6 Gr. 575.

Although a surviving partner may not be chargeable with any fraud or misconduct, still when there is a difference of opinion between him and the representatives of his deceased

partner as to the mode of winding up the estate, they are entitled to the assistance of this court for that purpose, through the medium of a receiver and sale. *S. C.*, 7 Gr. 214.

Dissolution—*Claim to Assets.*] — After the dissolution of a partnership, one of the partners claimed the greater portion of the partnership property as his own by reason of certain misconduct which he charged against the plaintiff, and made use of the partnership property in carrying on business on his own account:—Held, that such proceedings were wrong, and entitled the other partner to a receiver. *Doupe* v. *Stewart*, 13 Gr. 637.

——— *Failure to Agree.*]—Where partnership articles provide that on dissolution the partners shall appoint a person to collect the accounts and settle the partnership affairs, the court will, on failure of the parties to agree on some person, appoint a receiver. *Mitchell* v. *Lister*, 21 O. R. 22.

Exclusion of Co-partner.] — Where a managing partner was charged, on affidavit of his co-partner, with excluding the latter from access to the books and papers of the partnership, and with not delivering to him accounts, which the partnership articles stipulated for, an injunction and a receiver were granted against such managing partner, though his affidavit denied the principal charges, but not satisfactorily. *Prentiss* v. *Brennan*, 1 Gr. 371.

Two partners dissolved. On a bill afterwards filed by one for exclusion, defendant justified the exclusion on the ground of a parol agreement, which the other denied, and it was not otherwise proved:—Held, that the plaintiff was entitled to a receiver for his security until the hearing. *Steele* v. *Grossmith*, 19 Gr. 141.

Inquiry as to Lands.]—Where there is a reference to the master to inquire what lands are partnership property, a motion to appoint a receiver is informal. *Bates* v. *Tatham*, 5 L. J. 40.

(d) *Other Cases.*

Chattel Mortgage — *Possession — Payment.*]—The plaintiff, carrying on the business of a druggist, mortgaged his stock-in-trade to the defendant; the instrument by which it was effected stipulating that the defendant should take possession of the stock and premises, to hold for four months in order to secure repayment of money advanced, and power was given to the mortgagee to add new stock so as to keep up the business. Default was made in payment, and thereafter a large amount of stock was added, some of the money being expended by the defendant with the assent of the plaintiff; other money, being part of the profits of the business, was thus reinvested in new stock; some of the old stock remaining in specie. The matter was referred to the master at Belleville, to take the accounts of the dealings between the parties. Before the master made his report, the plaintiff applied on petition for the appointment of a receiver, on the ground that the mortgage had been paid in full:—Held, (1) that, as the new stock belonged to the mortgagee himself, and the plaintiff could therefore have no claim upon it, and as the master had not yet found which party was indebted to the other, his finding would not be anticipated by the appointment of a receiver. (2) That, although the defendant's right on default was to sell the original stock en bloc after notice, still the defendant was at liberty to add further capital and stock to the business, but not to the prejudice of the mortgagor so as to improve him out of his estate; and so long as the plaintiff chose to allow the business to go on under the defendant's control, he had the right so to conduct it, subject to being called to account. *Foster* v. *Morden*, 29 Gr. 25.

Company—*Bondholder — Liquidation — Concurrent Proceedings abroad.*]—The holder of bonds of a joint stock company (limited), after instituting proceedings in the court of chancery in England, for the sale of the partnership property, which was situated in Canada, and after the appointment of a receiver in England of the estate in England and Canada, filed a bill in this Province for the like purpose, and the court appointed the agent of the receiver receiver here; after which it appeared that the company went into liquidation, the liquidator being the same person who had been appointed receiver in England. The plaintiff, after an amendment of his bill stating these proceedings, moved for a decree in the terms of the prayer of his bill; but the court refused to make any decree until it was shewn what the position of matters was in England, and the steps about to be taken there, so as to avoid any conflict between the two courts, and mould the order here to give the appropriate relief, without interfering with the steps which were being taken in England for the same object. *Louth* v. *Western of Canada Oil Lands and Works Co.*, 22 Gr. 557.

Equitable Execution.] — See EXECUTION, III. 2.

Loan by Municipality to Navigation Company—*Interest—Tolls.*] — The municipality of B., being authorized by statute to lend £40,000 to a navigation company in the debentures of the municipality, payable in twenty years, issued debentures to that extent, of which debentures to the amount of £16,500 were deposited by the navigation company in a bank. The municipality, with the consent of the navigation company, redeemed the debentures so deposited, and then instituted proceedings against the company to compel payment or foreclose the interest of the company under their Act of incorporation. The court refused this relief, but appointed a receiver of the tolls, &c., of the company, which he was to apply in maintaining the works and payment of salaries of the servants of the company, and then in payment of the arrears of interest paid, and payment of interest on outstanding debentures. *Town of Brantford* v. *Grand River Navigation Co.*, 8 Gr. 246.

Partition — *Summary Application.*]—A notice of motion for partition having been served, the plaintiff moved for an injunction restraining the defendant from collecting rents, and for a receiver. It appeared that the defendant was a stranger, whose right to be in possession was denied:—Held, that no relief could be had against him without bill filed. *Young* v. *Wright*, 8 P. R. 198.

Property in Possession of Agent—*Claim to Indemnity — Agreement.*] — An agent

claimed to retain possession of property to indemnify him against certain accommodation notes given to his principals before their bankruptcy, on which, however, he had paid nothing, and disputed his liability to the holders:—Held, that the assignee in bankruptcy under the English law was entitled to a receiver. The defendant set up a defence founded upon an oral agreement proved by his own affidavit only, and inconsistent with a written instrument purporting to contain the agreement between the parties, drawn by the defendant himself, a practising attorney, and executed by all parties. The oral agreement was said to have been omitted from the writing through the confidence existing between the parties:—Held, that the defence ought not to prevail on a motion for a receiver. *Kemp* v. *Jones*, 12 Gr. 260.

II. Discharge and Removal of.

Injunction—*Notice.*]—A defendant may move to dissolve an injunction without moving at the same time to discharge a receiver, previously appointed, of the funds to which the injunction related. The court will entertain a motion to discharge an order for a receiver, though such order was made upon notice. *Sanders* v. *Christie*, 1 Gr. 137.

See Brown v. *Perry*, 1 Ch. Ch. 253; *Simpson* v. *Prescott and Ottawa R. W. Co.*, 1 Ch. Ch. 337; *Brant* v. *Willoughby*, 17 Gr. 627; *Lee* v. *Credit Valley R. W. Co.*, 29 Gr. 480.

III. Liabilities of.

Accounts—*Rents — Security.*] — On the 29th January, 1878, an order was made directing that D. be receiver in the suit, he first giving security to the satisfaction of the registrar. At the date of the order, and previously thereto, D. was the agent of the mortgagor, and as such collected the rents of the property in question. D. received oral notice of the order, and executed his own bond as security, which the registrar declined to accept, and D. continued to receive the rents and pay them to the mortgagor. On the 29th May D. executed a second bond, reciting the order of the 29th January, and conditioned that he "do and shall account for every sum of money which he shall receive on account of rent," which was filed on the 22nd May, and on the 3rd June a copy of the order of the 29th January was served on him, and he was notified that his security had been accepted:—Held, that D. was accountable for the rents received since the 29th January, but was entitled to be allowed for any disbursements properly made by him. *Western Canada, &c., Co.* v. *Ince*, 8 P. R. 262.

Attachment for Non-payment.] — Where an order is made upon a receiver for payment of money, the court on default will commit for a contempt of such order, without requiring any further order to be served. *McIntosh* v. *Elliott*, 2 Gr. 396.

——— *Order—Rescission—Punishment—Claim of Receiver.*]—An attachment lies against a receiver as an officer of the court, for default in compliance with an order to pay into court money found to be in his hands as receiver. The powers of the court are not invoked nor its process issued for the purpose of recovering or enforcing payment of a civil debt or claim inter partes, but for punishing its officer, who has disobeyed its order; and ss. 6 and 11 of R. S. O. 1887 c. 67 are inapplicable. An understanding between the receiver and the solicitor of one of the parties ought not to be accepted as an excuse for non-compliance with the order to pay in, more especially when the authority to waive the order is not admitted, but denied. Nor can the receiver be permitted to discharge himself by setting up claims upon the money which, had they been put forward in the first instance, would probably have prevented his appointment. Where, upon an application in such a case to rescind an order for an attachment, no objections are taken to the regularity of the proceedings, the court of appeal should not be astute to discover them or permit them to be raised for the first time on the argument of the appeal. In this case, a letter written by the receiver, before the order for his attachment was made, stating that he was ready to pay the money into court as soon as a specific order for that purpose was made, was regarded as an answer to his subsequent application for relief against it, as shewing that the grounds urged upon appeal were a mere afterthought. Semble, that a specific order to pay over the balance is the proper course in the first instance. *Fawkes* v. *Griffin*, 18 P. R. 48.

Payment of Profits.]—Where a receiver had made an investment unauthorized by the court, by which a profit had been made, the amount realized was directed to be added to the principal. *Baldwin* v. *Crawford*, 2 Ch. Ch. 9.

IV. Rights of.

1. *Costs.*

Action Brought without Leave.]—A receiver is entitled, as against the defendants, to the costs of a suit in which he succeeds, though the action has been brought without the sanction of the court. *Re Neill, Dickey* v. *Neill*, 9 P. R. 176.

Petition—*Notice of, to Receiver.*]—The receiver was served with notice of the presentation of the petition, and appeared thereon by counsel. The petition, besides praying for the relief which was granted, asked in the alternative that the receiver might be discharged or that he might be ordered to pay the petitioners the arrears of principal and interest due on their mortgages and the costs of the actions and the petition:—Held, that, if the petitioners wished to protect themselves from paying costs, they should have proceeded under con. rule 1193 and tendered the receiver $5 with the petition; and this not having been done, and the relief asked in the alternative prayers being such as justified the appearance of the receiver, the receiver was entitled to be paid his costs by the petitioners; and the petitioners were allowed to add the sum so paid and their own costs to the mortgage debt. *Gardner* v. *Burgess*, 13 P. R. 250.

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2. *Making Assessments on Premium Notes.*

Powers of Directors — *Statutes.*] — Where application was made to the court to

add the persons who had signed premium notes as parties in the master's office, and to direct the master to assess the amounts due upon the notes, and to order payment of the same to the receiver from time to time, it was shewn that the directors had not made any assessments upon the notes pursuant to R. S. O. 1877 c. 161, s. 45 et seq:—Held, that, as the liability attached only upon such assessment by the directors, the court should not add to or alter the liability of the persons who had made the notes by referring it to the master or receiver to do that which the directors only could do; clause 75 of 36 Vict. c. 44, which gave power to a receiver to do this, having been omitted from the statute on revision. *Hill* v. *Merchants and Manufacturers' Ins. Co.*, 28 Gr. 560.

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3. *Possession of Property.*

(a) *Order to Deliver.*

Partnership—*Misconduct of Partner—Property in Possession of Third Person.*]—Where it was proved that a partner had purchased a house and a large part of the furniture thereof, with partnership funds, improperly withdrawn by him for that purpose; and such partner, being the defendant in the cause, had withdrawn all the partnership books and papers from the jurisdiction, in breach of an injunction, the court ordered the mother and sister of the defendant, whom he left in possession, to deliver up to the receiver, already appointed, the house and all the furniture, as partnership property. *Prentiss* v. *Brennan*, 1 Gr. 484.

Where, in consequence of the misconduct of a managing partner, a receiver had been appointed, a person in possession of property of the partnership (the legal estate in which property was in such partner) was ordered to deliver up possession or attorn to the receiver, though such person swore that the conveyance by which the legal estate became vested, though absolute in form, was executed by the deponent as a security only. *Prentiss* v. *Brennan*, 2 Gr. 18.

In a suit in which a receiver of partnership effects had been appointed and a sequestration issued against the defendant for contempt, the court retained a motion against third persons for delivery or payment to the receiver or sequestrators of a promissory note, the property of the partnership, transferred subsequently to the issuing of the injunction and sequestration, but before the note became due, by the defendant, in a foreign country, the affidavits as to the bona fides of such transfer being contradictory; the court giving leave to file a bill against such third persons. Where, after the issuing of an injunction and sequestration in a partnership suit against the defendant, a transfer was made of a promissory note, part of the assets of the partnership, the plaintiff having filed affidavits impugning the bona fides of the transfer, the court gave leave to the plaintiff to serve a notice of motion to compel the delivery or payment of the note to the receiver or sequestrators in the cause, upon the person to whom the note had been transferred, out of the jurisdiction: and such person having appeared upon and opposed the motion, substitutional service of the subpœna to answer was ordered to be made on his solicitor's agent in a suit afterwards brought against him, by leave of the court, for the same purpose. *Prentiss* v. *Brennan*, *Re Bunker*, 2 Gr. 322.

(b) *Other Cases.*

Partnership—*Sale of Assets—Claims of Third Persons.*]—Where a receiver of partnership property had been appointed, and certain chattels had been seized under a sequestration against the defendant for contempt of the injunction, and the chattels so seized were alleged to be the property of the defendant and his co-partner, but it appeared that third persons claimed an interest therein, the plaintiff having moved to sell this property, a reference was directed on such motion (on which the claimants had appeared) to inquire as to their interests, and any further order on the motion was reserved, the parties to the motion electing to have a reference instead of issues to try the questions in dispute. *Re Brennan*, 2 Gr. 274.

Where, after the appointment of a receiver, or the issuing of a sequestration, a question arises on an interlocutory application with persons not parties to the suit, as to the right to property claimed by the receiver or sequestrators, the court may either dispose of the matter at once upon the affidavits filed, or, if the matter is not ripe for discussion, will direct such proceedings to be had as appear on the whole to be best fitted for the determination of the question of right. *Prentiss* v. *Brennan*, 2 Gr. 582.

——— *Timber — Third Persons.*]—Replevin. Defendants made cognizance, and alleged that under a decree of the court of chancery in a cause in which defendant L. was plaintiff and one V. was defendant, defendant A. was appointed receiver of the partnership property of the late firm of L. and V., who "were the parties to the said suit in chancery, and A. as receiver, and L. as his servant and by his command, took and distrained the timber in the declaration mentioned as and being a portion of the said partnership property, which," &c.:—Held, on demurrer, bad, as shewing no justification. *Campbell* v. *Lepan*, 19 C. P. 31.

Plaintiffs contracted with V., who was at the time in partnership with L., for the sale and delivery to them of a quantity of timber. Subsequently L. obtained a decree in chancery against V., which, after declaring them to have been partners in getting out the timber, directing an account, and restraining V. from removing or intermeddling with the timber, referred the suit to the master to appoint a receiver. Before this decree was acted upon by L., V. delivered the timber, as the jury found, to the plaintiffs, by whom, as they also found, it was accepted without objection on L.'s part, who in fact was present at the time. Some months after this a receiver was appointed under the decree in chancery, and at L.'s instance he took possession of the timber in question:—Held, that the receiver's act was wrongful, as the property in the timber had passed to the plaintiffs before his appointment, and that they could therefore maintain replevin against him

and L. for it. *Campbell* v. *Lepan*, 21 C. P. 363.

——— *Creditor of Partner—Assignee of Firm.*]—The court has jurisdiction, and will exercise it, to prevent the creditor of one partner from obtaining an undue preference over the creditors of a firm by means of proceedings in chancery. Where a purchaser at a sheriff's sale of the interest of one partner filed his bill for an account and a receiver, and the receiver obtained possession of the stock-in-trade, leave was granted to a creditor of a firm to take proceedings in insolvency, and the receiver was directed to hand over the assets to the assignee in insolvency when he should be appointed. *Felan* v. *McGill*, 3 Ch. Ch. 68.

Sale for Taxes.]—Chattels in the possession of a receiver were seized and sold by a bailiff for municipal taxes. Neither the bailiff nor the purchaser was aware until after the completion of the sale that the property was in the receiver's possession, or was intended to be affected by the order appointing the receiver; and both had been informed to the contrary in good faith by the person in charge. The court refused to hold the sale void. *Gibson* v. *Lovell*, 19 Gr. 197.

V. SUITS AND PROCEEDINGS AGAINST AND BY.

1. *Against.*

Illegal Distress.]—The receiver in a cause distrained for rent. On the following day notice was given by a prior incumbrancer that he claimed the rent, and three days afterwards the bailiff was withdrawn. The tenant whose goods had been distrained thereupon began an action of trespass against the receiver. The court, under the circumstances, restrained the action. *Simpson* v. *Hutchison*, 7 Gr. 308.

Tenant of Receiver—*Dower.*]—A widow entitled to dower commenced an action therefor against a tenant to whom, without express authority, the property had been leased by a receiver in a suit in chancery:—Held, that she was not at liberty to proceed in such action without the leave of the court. *Coleman* v. *Glanville*, 18 Gr. 42.

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2. *By.*

Administration—*Receiver of Legatee's Interest.*]—A summary order was made for the administration of the estate of M., deceased. A company, who were execution creditors of a legatee, obtained an order appointing them receivers of his legacy, and applied for the carriage of the administration proceedings:—Held, that the company were not in the position of assignees of the legatee, but only of chargees upon the fund or property to which he was entitled, and were therefore not in a position to ask in invitum for a summary order for administration. Leave, however, was given to the company to assert their claim by an action, a contention having been raised as to a forfeiture of the legatee's interest. *Re Morphy, Morphy* v. *Niven*, 11 P. R. 321.

The right of a judgment creditor of a legatee or devisee under a will to bring an action for the administration of the estate of the testator is doubtful. A receiver, appointed at the instance of a judgment creditor to receive the interest of the judgment debtor in the estate of his father for satisfaction of the judgment debt, was given leave to bring an action for administration, no opinion being expressed as to his status. *Mones* v. *McCallum*, 17 P. R. 102. See the next case.

——— *Receiver of Legatee's Interest—Judgment Debtor—Use of Name.*]—A receiver appointed by the court to aid a judgment creditor in recovering his claim, by receiving the judgment debtor's share in an estate which could not be reached by execution, after the refusal of the judgment debtor to allow the use of his name, was authorized, on giving security to him, to take proceedings in his name for the administration of the estate, and if necessary for the removal of the executor. Decision in 17 P. R. 356 reversed. *Mones* v. *McCallum*, 17 P. R. 398.

Debt—*Leave of Court.*]—Where a receiver appointed to manage an estate finds it necessary to sue for debts due to it, an application for permission to do so must be made, supported by affidavits shewing the expediency of instituting such proceedings. *Thomas* v. *Torrance*, 1 Ch. Ch. 9.

——— *Leave of Court—Calls.*]—In these cases an objection was taken that there was no power to sue because the company's license under 42 Vict. c. 25 (O.) had been revoked, but it was shewn that one B. had been appointed receiver, and was specially required by order of the chancery division to prosecute all members in arrears for calls, and was prosecuting them as receiver:—Held, that the objection was not tenable. *Union Fire Ins. Co.* v. *Fitzsimmons, Union Fire Ins. Co.* v. *Shields*, 32 C. P. 602.

——— *Leave of Court — Security for Costs.*] — Where an incorporated company, after they had commenced an action at law, became bankrupt, and a receiver was appointed, by the court of chancery, in a suit in that court, and authorized to proceed in the action at law:—Held, that neither the company nor the receiver should be ordered to give security for costs. *Provincial Ins. Co.* v. *Gooderham*, 14 C. L. J. 121.

A receiver had no right to sue in his own name for a debt due to the person or corporation whose assets he has been appointed to receive; nor can that right be conferred on him by order. But where, by an ex parte order made in the action in which the plaintiff was appointed receiver, he was authorized to bring actions in his own name for the collection of debts due to a certain grange, and brought this action pursuant thereto:—Held, that an amendment should be made adding the grange as co-plaintiffs without security being given for their costs, they being insolvent. If there were no person in whose name the action could be brought, there would perhaps be jurisdiction to direct it to be brought in the name of the receiver. *McGuin* v. *Fretts*, 13 O. R. 699.

——— *Leave of Court — Use of Debtor's Name.*]—S. recovered a judgment against S.

S., and plaintiff was appointed the receiver in that suit to receive S. S.'s share of his father's estate to which he was entitled under the will of the latter. The share not being paid over, plaintiff brought action in his own name against the father's executors to recover the amount. The defendants demurred on the ground that the cause of action, if any, was vested in S. S., and that plaintiff had no right to bring the action:—Held, that the right of action was in S. S. and not the plaintiff; by his appointment the plaintiff became entitled to receive the amount, and the defendants the executors, having notice of his appointment, could not safely pay over the money to any other, and in case of their refusal to pay, the plaintiff's duty was to apply for leave to bring an action in S. S.'s name. McGuin v. Fretts, 13 O. R. 699, followed. *Stuart* v. *Grough*, 14 O. R. 255. See *S. C.*, 15 O. R. 66, 15 A. R. 299.

Distress for Rent—*Leave of Court.*]—An order had been made giving a receiver liberty to distrain for arrears of rent. Upon the application of a tenant distrained upon for discharge of this order, it appeared that the tenancy had determined more than six months before the order to distrain was made, so that distress could not be made under 8 Anne c. 14, ss. 6 and 7. The order to distrain was therefore discharged. No notice need be given to a tenant of an application for an order giving a receiver leave to distrain. *Paxton* v. *Dryden*, 6 P. R. 127.

Ejectment of Overholding Tenant.]—Held, that if a receiver has been appointed by the court of chancery to whom the tenant has attorned, or if the interest of the original landlord has been sold to another, in either case the original landlord is not the proper person to take proceedings to turn the overholding tenant out of possession, but the receiver or vendee. *In re Babcock and Brooks*, 9 L. J. 185.

Setting aside Preference.]—After a decree had been pronounced directing the appointment of a receiver, but before the appointment was completed, the defendant company had made a payment to a creditor, which the plaintiff F., a judgment creditor, alleged to be a fraudulent preference, and moved for an order that the receiver should take proceedings to recover the money so paid:—Held, that, as the payment complained of took place before the actual appointment of the receiver, it was more reasonable that those who were interested at the time the payment was made, parties to the suit, and who objected to what had been done, should in person apply for the appropriate relief. *Fox* v. *Nipissing R. W. Co.*, *Gooderham* v. *Nipissing R. W. Co.*, 29 Gr. 11.

See McLean v. *Allen*, 18 P. R. 255.

VI. Surety of.

Death of.]—Where a surety of a receiver dies pending the suit, the receiver may obtain ex parte an order referring it to the master to approve of a new one. *Baldwin* v. *Crawford*, 1 Ch. Ch. 264.

Recognizance — *Discharge.*]—A receiver being appointed for the benefit of all parties to a cause, he should, on moving to vacate his recognizance, give notice to all parties. *Brown* v. *Perry*, 1 Ch. Ch. 253.

——— *Necessity for Sureties.*]—The recognizance of the committee of a lunatic, or of a receiver, will not be deemed sufficient security under the statute. *Re Ward*, 2 Ch. Ch. 188.

VII. Miscellaneous Cases.

Attachment of Moneys in Hands of Receiver.]—See *Stuart* v. *Grough*, 15 A. R. 299.

Death of Receiver—*Sale of Assets after —Adoption by Court.*]—A testator devised his real estate in trust for sale. Shortly after his death a friendly suit was instituted in the court of chancery in England, for the administration of the estate, to which suit the trustee was a defendant; in this suit an order was made for the appointment of a receiver to collect the assets in Canada, and sell the lands there. After the death of a receiver appointed under this order, the agents of the trustee in Canada, who had managed the estate for the deceased receiver, continued to collect the assets and make sales, with the knowledge and concurrence of the trustee and the parties in England:—Held, that such sales were not void, and would be enforced or not, according as to this court appeared, in view of the circumstances, to be proper; and a decree was made for the purchaser in respect of the sale in question. *Stickney* v. *Tylee*, 13 Gr. 193.

Mortgage—*Interference with Receiver—Leave to Proceed.*] — Where actions were brought by mortgagees without the leave of the court for sale of mortgaged premises after the appointment of a receiver to receive the rents and profits of such premises, an order was made, upon the petition of the mortgagees, allowing the proceedings in the actions to stand, and allowing the petitioners to proceed with the actions notwithstanding the appointment of the receiver. *Gardner* v. *Burgess*, 13 P. R. 259.

Partnership—*Interim Sale of Assets.*]—Under special circumstances an order may be made, in an action for the dissolution and winding-up of an insolvent partnership, for the sale of the assets by the receiver before the trial. *McLaren* v. *Whiting*, 16 P. R. 552.

See Wallace v. *Wallace*, 11 O. R. 574.

See Execution, III. 2—Payment, I. 8—Partnership, XI. 2 (b)—Railway, IX. 1.

RECEIVER-GENERAL.

Action against.] — The receiver-general for this Province is not liable to actions, at the suit of individuals, for money placed in his hands by the executive to be distributed among them. *Butler* v. *Dunn*, Tay. 415.

Action on Behalf of.]—Held, no objection to the declaration for not returning a conviction that the plaintiff sued for the receiver-general, and not for Her Majesty, inasmuch as

suing for a penalty for the receiver-general, for the public uses of the Province, is in fact suing for the Queen. Besides, C. S. U. C. c. 124 authorizes a party to sue qui tam for the receiver-general. *Bagley q. t.* v. *Curtis*, 15 C. P. 366.

Winding-up Act—*Payment out of Court—Right to Compel Repayment.*]—Where the liquidators of an insolvent bank have passed their final accounts and have paid into court the balance in their hands, and that balance is by inadvertence paid out of court to a person not entitled to it, the receiver-general has such an interest in the fund that he may, even before three years from the time of payment in have expired, apply to the court for an order for repayment into court of the fund. The court has also inherent jurisdiction to compel the repayment into court of money improperly obtained out of court. *In re Central Bank of Canada, Hogaboom's Case*, 24 A. R. 470. Affirmed, *Hogaboom* v. *Receiver-General for Canada, In re Central Bank of Canada*, 28 S. C. R. 192.

The judgments of the court of appeal and of the supreme court in this case (24 A. R. 470, 28 S. C. R. 192), are conclusive on the point that the moneys repaid into court in this matter, pursuant to those judgments, after having been erroneously paid out to certain applicants, being the balance unclaimed in the hands of the liquidator of an insolvent bank after passing their final accounts, are the property of the receiver-general of Canada under R. S. C. c. 129, s. 41, subject to the liability of paying it over to the persons entitled thereto. *In re Central Bank of Canada*, 30 O. R. 320.

RECEIVING STOLEN GOODS.

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II. ESTREAT, 6066.

III. OF BAIL, 6067.

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V. MISCELLANEOUS CASES, 6068.

I. ENTERING INTO.

Commissioner's Affidavit.]—A commissioner who takes a recognizance of bail, cannot himself make the affidavit of such taking. *Wallbridge* v. *Lunt*, Tay. 462.

Notice — *Allowance.*]—Where the notice given to the plaintiff was, that special bail had been put in, and the recognizance produced was only for defendant's remaining on the limits, the application for allowance was refused with costs. *Clegg* v. *McNab*, 1 P. R. 150.

Open Court — *Filing.*]—Where a recognizance of bail had been taken in open court before the Judge of the district court:—Held, that under 8 Vict. c. 13, ss. 20, 23, and 50, filing in the office of the clerk was not necessary to perfect it. *Cockrane* v. *Eyre*, 6 U. C. R. 289.

II. ESTREAT.

Discharge—*Notice.*]—It is no ground for discharging the estreat of a recognizance to appear as a witness, that the magistrate who bound the witness over did not give him notice of the time he was to appear, according to 7 Wm. IV. c. 10, s. 8. *Regina* v. *Thorpe*, H. T. 6 Vict.

Nor that the bail did not receive from the magistrate such notice. *Regina* v. *Schram*, 2 U. C. R. 91.

Where a witness on entering into a recognizance to appear at the assizes was misinformed by the magistrate as to the day, and thus prevented from attending, the court on application relieved him. *Regina* v. *Mayer, Re Boughner*, 14 U. C. R. 621.

——— *Return—Payment.*]—Where the recognizance of a criminal witness is estreated for non-appearance, the court will not interfere after the return of the writ and payment of the estreat to the sheriff, even on grounds which would probably have satisfied a Judge presiding at the criminal court. *Regina* v. *McClerc*, 4 Vict.

——— *Sheriff's Fees.*]—Where on a levy on an estreated recognizance, the Crown discharges the estreat on payment of the sheriff's fees, the sheriff is entitled to poundage. *Regina* v. *Vinning*, H. T. 3 Vict.

——— *Statute.*]—Where a recognizance of a person charged with a criminal offence is estreated for his non-appearance, the court, on an application to discharge the estreat under 7 Wm. IV. c. 10, s. 10, will act only on the grounds set forth in the statute. *Regina* v. *Matthews*, 6 O. S. 152.

——— *Sureties—Court of Chancery.*]—The court of chancery has no jurisdiction to give relief to sureties on a recognizance in a criminal proceeding. A recognizance which was expressed to be the joint and several recognizance of the prisoner and his sureties was acknowledged by the sureties only, and the prisoner was discharged without his acknowledgment first having been obtained:—Held, that the sureties were liable. *Rastall* v. *Attorney-General*, 18 Gr. 138; *S. C.*, 17 Gr. 1.

——— *Terms.*]—Defendant, under a recognizance to appear at a certain assizes, attended until the last day, when he left, assuming, as no indictment had been found, that the charge against him, of a breach of the Foreign Enlistment Act, was not intended to be prosecuted. He was, however, called, and his recognizance estreated. The court, under the

circumstances, relieved him and his sureties, under C. S. U. C. c. 117, s. 11, on payment of costs, and on his entering into a new recognizance to appear at the following assizes. *Regina* v. *McLeod*, 24 U. C. R. 458.

Order for—*Defect in Recognizance.*]—A recognizance of bail put in on behalf of a prisoner recited that he had been indicted at the court of general sessions of the peace for two separate offences, and the condition was, that he should appear at the next sittings of said court, and plead to such indictment as might be found against him by the grand jury. At the next sittings the accused did not appear, and no new indictment was found against him:—Held, that the recitals sufficiently shewed the intention to be that the accused should appear and answer the indictments already found, and that an order estreating the recognizance was properly made. *Re Gauthreaux's Bail*, 9 P. R. 31.

See Re Talbot's Bail, 23 O. R. 65.

III. Of Bail.

Action on.]—Semble, that the recognizance of bail taken in a district court may be sued on in the Queen's bench. *Cockrane* v. *Eyre*, 6 U. C. R. 289. See *S. C.*, *ib.* 594.

Commissioner—*Authority—Estoppel.*] —Defendants, who had gone before one A., who was bonâ fide supposed to be a commissioner for the county of Lennox, and acknowledged a recognizance of bail:—Held, not estopped from disputing the authority of A. as commissioner. *Macfarlane* v. *Allan*, 6 C. P. 496.

Condition — *Sheriff.*]—Semble, since 4 Wm. IV. c. 5, s. 1, a recognizance of bail, conditioned to render the defendant to a sheriff of a district in which the venue is not laid, is not void. *Billings* v. *Barry*, E. T. 2 Vict.

Crown—*Lien on Land—Notice—Priority.*] —One M. gave a recognizance to the Crown, with two sureties, D. and McK., for the appearance of M. to answer certain criminal charges. The recognizance was estreated, but had not been registered under the Crown Debts Act. M., the cognizor, about the same time, gave to D., one of his sureties, a mortgage on his lands as security. M. absconded, and died abroad; and then D., under a power of sale, sought to enforce the mortgage against the lands. Upon an information filed by the attorney-general:—Held, (1) that the recognizance to the Crown bound M.'s lands from the acknowledgment, and that the Crown could enforce the lien. (2) That D., being one of the sureties in the recognizance, had actual notice of the lien of the Crown, and that he must be postponed to the Crown, notwithstanding the registration of his mortgage and the non-registration of the recognizance. *Attorney-General* v. *Daniell*, 7 L. J. 122.

Setting aside.]—The court of King's bench will set aside a recognizance not warranted by the proceedings, after comperuit ad diem pleaded to an action on the bail bond. *McDonell* v. *Rutter*, 2 O. S. 340.

IV. To Keep the Peace.

Sci. Fa.—*Civil Proceeding — Declaration —Venue.*]—A proceeding by sci. fa. on a recognizance to keep the peace, is a civil and not a criminal proceeding. Where the recognizance is removed into one of the superior courts at Toronto, the united counties of York and Peel are the proper counties in which to lay the venue. In such a proceeding the venue cannot be changed without the consent of the attorney-general. As the declaration would only be a transcript of the writ, no declaration need be either filed or served. *Regina* v. *Shipman*, 6 L. J. 19.

——— *Defence—Conviction.*]—To sci. fa. on a recognizance to keep the peace towards H. M., charging an assault and breach of the peace, defendant pleaded that he had been summarily convicted before a magistrate for the said assault and paid the fine imposed:—Held, no defence. *Regina* v. *Harmer*, 17 U. C. R. 555.

V. Miscellaneous Cases.

Action—*Omission.*]—A recognizance taken before a police magistrate under 32 & 33 Vict. c. 30, s. 44 (D.), form Q. 2 (sched.), omitted the words "to owe:"—Held, fatal, and that an action would not lie upon the instrument as a recognizance. *Regina* v. *Hoodless*, 45 U. C. R. 556.

Attachment — *Absconding Debtor—Debt on Forfeiture.*]—The forfeiture of a recognizance to appear is a debt sufficient to support the application for an attachment under the Absconding Debtors Act, and such writ may be granted at the suit of the Crown, where the defendant absconds to avoid being arrested for a felony. *Regina* v. *Stewart*, 8 P. R. 297.

Motion to Quash Municipal By-law.] —See *Re Burton and Village of Arthur*, 16 P. R. 160.

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——— *Qui Tam Information against—Falsifying Records.*] — See *Regina ex rel. Stark* v. *Ford*, 3 C. P. 209.

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I. EFFECT OF REGISTERING OR OMITTING TO REGISTER.

1. *Equitable Interests.*

[*See* R. S. O. 1877 c. 111, s. 81, and R. S. O. 1897 c. 136, s. 98.]

Easement — *Notice — Purchaser for Value.*] — R. (the appellant) brought an

action against H. (the respondent) for having erected a brick wall over and upon the upper part of the south wall or cornice of R.'s store, pierced holes, &c. H. pleaded, inter alia, special leave and license, and that he had done so for a valuable consideration paid by him, and an equitable rejoinder alleging that R. and those through whom he claimed had notice of H.'s title to this easement at the time they obtained their conveyances. In 1859 one C., who then owned R.'s property, granted by deed to H. the privilege of piercing the south wall, carry his stovepipe into the flues, and erecting a wall above the south wall of the building, to form at that height the north wall of H.'s building, which was higher than R.'s. R. purchased the property in 1872 from the Bank of Nova Scotia, who got it from one F., to whom C. had conveyed it—all these conveyances being for valuable consideration. The deed from C. to H. was not recorded until 1871, and R.'s solicitor, in searching the title, did not search under C.'s name after the registry of the deed by which the title passed out of C. in 1862, and did not therefore observe the deed creating the easement in favour of R. There was evidence, when attention was called to it, that H. had no separate wall, and the northern wall above R.'s building could be seen:—Held, that the continuance of illegal burdens on R's property since the fee had been acquired by him, were, in law, fresh and distinct trespasses against him, for which he was entitled to recover damages, unless he was bound by the license or grant of C. That the deed creating the easement was an instrument requiring registration under the provisions of the Nova Scotia Registry Act, R. S. N. S., 4th ser., c. 79, ss. 9 and 19, and was defeated by the prior registration of the subsequent purchaser's conveyance for valuable consideration, and therefore from the date of the registration of the conveyance from N. to F., the deed of grant to H. became void at law against F. and all those claiming title through him. That to defeat a registered deed there must be actual notice or fraud, and there was no actual notice given to R. in this case, such as to disentitle him to insist in equity on his legal priority acquired under the statute. *Ross* v. *Hunter*, 7 S. C. R. 289.

Where the defendants in 1871, without authority, diverted a watercourse on certain land, and afterwards made compensation therefor to the then owner of the land, the plaintiff's predecessor in title:—Held, that the equitable easement thereby created in favour of the defendants was not valid against the registered deed of the plaintiff, a bonâ fide purchaser for value without actual notice; the defendants having shewn no prescriptive right to divert the watercourse, and the diversion being wrongful as against the plaintiff. *Tolton* v. *Canadian Pacific R. W. Co.*, 22 O. R. 204.

R. S. O. 1877 c. 114, s. 83, providing that no lien, charge, or interest affecting land shall be valid as against a registered instrument executed by the same party, his heirs or assigns, is not restricted to interests derived under written instruments susceptible of registration, but applies to all interests. If the owner of land gives permission to the municipality to construct a drain through it, the municipality, after the work has been done, has an interest in the land to which the registry laws apply, whether the agreement conveys the property, creates an easement, or is a mere license which has become irrevocable, and if there has been no by-law authorizing the land to be taken, such interest is, under the section, invalid as against a registered deed executed by an assignee of the owner, a purchaser for value without notice. Ross v. Hunter, 7 S. C. R. 289, distinguished. Judgment in 21 A. R. 395 affirmed. *City of Toronto* v. *Jarvis*, 25 S. C. R. 237.

Equitable Mortgage — *Memorandum—Necessity for Registration.*]—Where a mortgage was created by the deposit of title deeds, and the borrower signed a memorandum stating the sum lent and times for repayment, and agreeing to execute a writing to enable the lender to transfer or control certain mortgages so deposited:—Held, that this memorandum did not require registration to secure its priority over a subsequently registered incumbrance, such memorandum not being, in the language of the Act, "a deed, conveyance, or assurance affecting lands." *Harrison* v. *Armour*, 11 Gr. 303.

Incumbrances—*Priorities — Notice.*]—Priority may be gained by means of prior registration as between equitable incumbrances, but this priority will be defeated by notice. *Bethune* v. *Caulcutt*, 1 Gr. 81.

13 & 14 Vict. c. 63 made no change in the rights of equitable incumbrancers. *McMaster* v. *Phipps*, 5 Gr. 253.

Right to Purchase—*Assignment—Purchaser for Value.*]—A lessee of the Canada Company, with a right to purchase, assigned his claim to the plaintiff, and afterwards, in fraud of the plaintiff, obtained a deed to himself from the company, and conveyed to defendant, a bonâ fide purchaser, without notice, who paid part of the purchase money, and registered the deed to himself. The plaintiff omitted to register the assignment to him:—Held, that defendant was entitled to hold the lands freed from any claim of the plaintiff. *Ferrass* v. *McDonald*, 5 Gr. 310.

Statute—*Action of.*]—The 66th section of the Registry Act, 1865, which enacts that "no equitable lien, charge, or interest affecting land shall be deemed valid in any court in this Province after this Act shall come into operation, as against a registered instrument executed by the same party, his heirs or assigns; and tacking shall not be allowed in any case to prevail against the provisions of this Act."—is not retrospective. *McDonald* v. *McDonald*, 14 Gr. 133.

——— *Effect of—Notice.*]—The Registry Act of 1865 does not avoid a prior equity against a subsequent registered deed, where the latter was taken with notice. W. mortgaged his land to S., and afterwards sold and conveyed the equity of redemption to A.; but by mutual mistake the land was so described in the conveyance to A. as to comprise part only. A. sold and conveyed to S. by the same description. The plaintiff afterwards discovered the omission, procured W. to sell and convey the omitted portion to him, and filed a bill against S. for a conveyance thereof. It was proved that, before the sale to the plaintiff, W. had sold all he purchased to A.:—Held, sufficient proof of that actual notice which is requisite in this class of cases. *Wigle* v. *Setterington*, 19 Gr. 512.

R. S. O. 1877 c. 111, s. 81, declares that "no equitable lien, charge, or interest affect-

ing land shall be deemed valid in any court in this Province after this Act shall come into operation as against a registered instrument executed by the same party, his heirs or assigns:"—Held, that this section does not apply to a case in which the party registering such instrument has notice of the equitable lien, charge, or interest, even though the same has been created by parol. *Rose* v. *Peterkin*, 13 S. C. R. 677. See *S. C., sub nom. Peterkin* v. *McFarlane*, 9 A. R. 429.

——— *Effect of—Purchaser for Value without Notice—Mistake.*]—Y., being the owner of certain land, mortgaged it with other lands to the M. P. B. Society, by mortgage dated 12th July, 1873, registered 14th July, 1873. Subsequently, being desirous of selling part and paying off the mortgage and getting a new loan, he, by an agreement in writing, arranged with the society to leave the mortgage standing, take a further loan of $700, and have certain of the lands (of which the lot in question was part) released by the society. A second mortgage for the $700 advance was prepared and executed, dated 1st February, 1875, registered 11th February, 1875, which, by mistake, as was alleged, included all the lands in the first mortgage; and a release dated 9th February, 1875, was duly executed by the society releasing the lot in question from the operation of the mortgage of 12th July, 1873, and was afterwards registered 20th March, 1876. B., the plaintiff, being aware of the agreement, but unaware that the second mortgage included the lot in question, which should have been omitted, lent Y. certain moneys, and took a mortgage, dated 21st May, 1877, registered 6th June, 1877, to secure the payment thereof. The society assigned the second mortgage and all moneys secured thereby to the defendants by assignment dated 1st March, 1880, registered 17th January, 1881, and by deed dated 1st March, 1882, registered 2nd June, 1883. Y. conveyed his equity of redemption to B. In an action by B. to correct the mistake by compelling the defendants to convey the lot in question to B.:—Held, that the combined operation of R. S. O. 1877 c. 111, s. 81, and R. S. O. 1877 c. 95, s. 8, formed a complete defence, and that the defendants, as assignees of the mortgage for value, having the legal estate, might defend as purchasers for value without notice, and claim also the protection of the Registry Act, as against the plaintiff, a subsequent purchaser or mortgagee from the original mortgagor. Semble, that, even as against the mortgagor, the defendants would also be entitled to prevail. *Bridges* v. *Real Estate Loan and Debenture Co.*, 8 O. R. 493.

——— *Effect of—Purchaser for Value without Notice—Statute of Limitations.*]—In 1851 the defendant's father bought for defendant the land in question, and, in pursuance of his instructions, to prevent the defendant disposing of the land, the deed, which was registered, was made to defendant's son W., then about twelve years old. The defendant and his family thereupon took possession, and lived there up to the time of this action, the defendant being assessed and paying the taxes. The family residence, with the garden and orchard, which was fenced off from the rest of the land and comprised from two to four acres, was always deemed to be the defendant's special property, and he had always exclusive possession thereof, with the consent of the others. W. resided with his father for several years, and then went to the United States, but returned in 1869, when he conveyed by deed in fee simple, which was registered, to one H., his step brother, who had full knowledge of all the facts and circumstances, and who had been working the land on shares with the defendant and another. Defendant complained to him of the sale, and denied W.'s right to sell, whereupon it was arranged that things were to go on as before, and defendant was to have his share. H., in 1870, and again in 1874, without the defendant's knowledge, mortgaged the land, by mortgages duly registered, to the plaintiffs, who had no notice or knowledge of any of the circumstances, or of the defendant's possession. In February, 1881, ejectment was brought by the plaintiffs:—Held, that the plaintiffs, being purchasers for value without notice, claiming under the registered paper title, were, under R. S. O. 1877 c. 111, s. 81, entitled to recover, except as to the house and plot, to which the defendant by his exclusive possession had acquired a title under the Statute of Limitations. *Canada Permanent L. and S. Co.* v. *McKay*, 32 C. P. 51.

Surety—*Equitable Charge.*]—W. and his son, W. W., mortgaged separate parcels of land owned in severalty to the defendant company for $4,000, with a proviso for releasing W. W.'s land on payment of $500, and the other parcels on payment of sums named. The covenant for payment was joint. W. W. afterwards sold his land to J. W., subject to the payment of $500 to the company. W. then mortgaged his land to the plaintiff, by an instrument which declared it subject to the company's mortgage, and the manner in which the $4,000 was distributed upon the lands. The various conveyances were registered. It was proved that W. W. was merely a surety for his father in the mortgage transaction with the company, but the plaintiff had no notice of this:—Held, that the plaintiff's registered title prevailed over the equity of W. W. to charge his father's lands with the $500 for which he (W. W.) had made his land liable, and the land of the son was charged in favour of the plaintiff with the $500 and interest. Gray v. Ball, 23 Gr. 390, approved and followed. *Core* v. *Ontario Loan and Debenture Co.*, 9 O. R. 236.

——— *Equitable Charge—Dower—Priorities.*]—R. G. and J. G., being the owners, subject to the dower of their mother, R., and an annuity in her favour, of certain lands, mortgaged them to one C. to secure advances made by him to them. R. knew of the mortgage, and was asked, but refused to execute it. Subsequently R. G. and J. G. mortgaged the lands to M. to secure advances made by him. R. released all her claims for the purpose of this mortgage, but received no benefit from the advances. This mortgage was taken by M. without any notice of the mortgage to C., and was registered before it, and gained priority over it. Under this mortgage the lands were sold, and after payment of the claim of the plaintiffs a surplus remained, which R. claimed in priority to C.:—Held, reversing the decision in 16 O. R. 321, that she was not entitled to priority. The priority gained by M. by force of the Registry Act did not enure to her benefit, as she was not the purchaser or mortgagee, nor did that priority enure to her benefit as surety by virtue of the doctrine of subrogation, because that doctrine could not be invoked to defeat the honest claims

and superior equities of third persons. *Maclennan* v. *Gray*, 16 A. R. 224.

Held, reversing the judgment in 16 A. R. 224, that the security for which the dower had been barred and the annuity released having been satisfied, the widow was entitled to the fund, as representing her interest in the land, in priority to C. *Gray* v. *Coughlin*, 18 S. C. R. 553.

Trust—*Notice—Parol Evidence.*] — In an action for the possession of lands under a mortgage by defendant's brother W., and the foreclosure thereof, the defendant claimed under a trust of the lands by W. in his favour; and also a title by possession. The trust was a parol one, namely, that W. should procure a release of the lands for defendant, who was then under age, from the Canada Company, the lease apparently containing a right of purchase; and should afterwards pay the purchase money and take the deed in his, W.'s, name, and hold it until defendant became well, when he was to transfer it to the defendant, he having been ill at the time. The defendant paid the money for the lease and the purchase money for the land:—Held, that the parol evidence was not sufficient to support the trust; but, in any event, as the trust was to be enforced against W. and his grantees, it could not prevail against plaintiff's mortgage, it having been registered without notice of the trust. *Bank of Montreal* v. *Stewart*, 14 O. R. 482.

See Cooley v. *Smith*, 40 U. C. R. 543; *Grey* v. *Ball*, 23 Gr. 390; *Johnston* v. *Reid*, 29 Gr. 293, *post*.

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2. *Notice.*

(a) *Actual Notice of Unregistered Instrument.*

Effect of.]—A. conveyed in fee to B. and died, and afterwards his heir conveyed the same land in fee to C., whose deed was registered before the deed to B.:—Held, that C.'s deed, being first registered, secured him the title, although he had notice of the deed to B. *Doe d. Pell* v. *Mitchener*, Dra. 471.

——— *Court of Law—Time for Notice.*]—The Registry Act of Ontario, 31 Vict. c. 20, does not make notice effectual at law, but confines the relief in equity to cases of actual notice. *Bondy* v. *Fox*, 29 U. C. R. 64. But see the next case.

Held, that under the Registry Act of Ontario, 31 Vict. c. 20, the effect of actual notice is not confined to a court of equity, but is available in a court of law; and therefore a non-registered deed is not defeated by a subsequent registered one, where before such registration the person claiming under it had actual notice of the prior conveyance. The last case as to this point, distinguished. Remarks as to the obvious error in the statute, s. 47, by which the notice is referred to the time of registration of the subsequent deed; so that a purchaser for value without notice of the prior deed might be defeated by notice of it between the time of getting his deed and registering it. *Millar* v. *Smith*, 23 C. P. 47.

——— *Timber.*]—Mere notice of a previous deed for the sale of growing timber will not defeat a subsequent conveyance of the land, if the latter be registered first. *Ellis* v. *Grubb*, 3 O. S. 611.

Semble, that standing timber is within the provisions of the registry laws; and that the purchaser of a right to cut the same is affected by notice of the conveyance from the original owner and a mortgage back from his vendee. *McLean* v. *Burton*, 24 Gr. 134.

——— *Unascertained Land.*]—A registered purchaser, buying with actual notice of an unregistered deed of an unascertained part of the land, takes subject to whatever such deed conveyed; and, if he chooses to purchase without proper inquiries as to its contents, his erroneous supposition as to the land thereby conveyed, or his ignorance of the names of all the persons interested under the deed, does not vary the case. *Severn* v. *McLellan*, 19 Gr. 220.

——— *Unpatented Land.*] — Express notice of an unregistered assignment of unpatented land has the same effect as like notice of an unregistered conveyance after patent issued. *Goff* v. *Lister*, 13 Gr. 406, *S. C.*, 14 Gr. 451.

Evidence of.]—To postpone a registered title on the ground of notice of a deed having been previously executed though not registered, the evidence of notice must be quite satisfactory and distinct. *Hollywood* v. *Waters*, 6 Gr. 329.

To postpone a deed which has acquired priority over an earlier conveyance by registration, actual notice, sufficient to make the conduct of the subsequent purchaser in taking and registering his conveyance fraudulent, is indispensable. *New Brunswick R. W. Co.* v. *Kelly*, 26 S. C. R. 341.

——— *Misleading Communication to Purchaser.*]—A testator by his will directed his executors to pay his widow an annuity for the support and maintenance of one of his sons until he became of age; and he also directed that if there were not sufficient funds therefor, it was to be a charge on separate parcels of land severally devised to three of his other sons. There were sufficient funds in the executors' hands for the payment of the annuity, but by an agreement, for valuable consideration, made between the widow and the devisees of the lands, it was agreed that the annuity should not be paid out of the moneys but should be a charge upon the lands, the intention being that the moneys should be kept in hand for the payment of a legacy payable to the first named son on his attaining his majority. This agreement was not registered. A sale was subsequently made by one of the sons of the parcel of land devised to him, the purchaser being informed as to an agreement having been entered into with reference to the annuity, but being at the same time told that it in no way affected the land, merely creating a personal obligation to pay the annuity, and he made no further inquiry with regard to it:—Held, that the purchaser could not be deemed to have purchased the land with actual notice of the contents of the agreement so as to be affected thereby. *Coolidge* v. *Nelson*, 31 O. R. 646.

Repudiation of Unregistered Deed.]—*Lease.*]—S. S., the owner of certain land,

agreed to convey the same to his son T. S., on his paying certain moneys for S. S., and forthwith granting a life-lease thereof to S. S. and his wife. The conveyance and lease were accordingly executed. The latter, containing, amongst others, covenants to be performed by the lessees, was executed by T. S. and S. S., but not by the wife. The lease was put on registry, but not the deed, which was proved to have been destroyed. Subsequently S. S. and T. S. joined in a mortgage of the land to the plaintiff, which was registered. The plaintiff, on inquiries made by him on finding the lease on record, obtained actual notice of the deed to T. S., but did not deem it of any importance, believing the transaction to have fallen through, in consequence, as he understood, of the wife's repudiation during her husband's lifetime of the lease, and the destruction of the deed. After the death of S. S. the wife asserted her right to the life lease, and held possession of the land; and on the plaintiff bringing ejectment she defended in such right:—Held, that the plaintiff could not claim by reason of the non-registration of T. S.'s deed and the registration of the plaintiff's mortgage, because, as he had actual notice of such prior deed, the Registry Act would not apply; but, even if applicable, the plaintiff was bound by the prior registration of the life lease. *Britton v. Knight*, 20 C. P. 567.

Want of Notice—*Declaration of Priority—Right to.*]—Held, following Truesdale v. Cook, 18 Gr. 532, and Dynes v. Bales, 25 Gr. 503, that the grantee in a subsequent conveyance, registered before the registry of a previous conveyance from the same grantor, of which the grantee had no actual notice, could maintain an action to have the subsequent conveyance declared entitled to priority over the previous conveyance, and that the court had power so to order upon such terms as seemed just. *Weir v. Niagara Grape Co.*, 11 O. R. 700.

See Peterkin v. McFarlane, 4 A. R. 25.

(b) *By Possession.*

Adverse Claimant—*Actual Notice.*]—In the case of a registered title, actual notice of the title of an adverse claimant is required to affect the grantee holding under a registered instrument. The mere fact that such adverse claimant is in actual possession of the land is not sufficient notice; nor will it be actual notice if the grantee is aware of the fact that a person other than his grantor is in possession. *Roe v. Braden*, 24 Gr. 589.

Owner of Equitable Interest.] — In case of an unregistered interest of a date antecedent to the Registry Act of 1865, and not founded upon a deed or conveyance which was capable of registration, constructive notice is sufficient against a subsequent registered conveyance; and possession of the property by the person having such unregistered interest is sufficient constructive notice for this purpose. *Moore v. Bank of British North America*, 15 Gr. 308.

The plaintiff's brother bought certain lands for her, and put her in possession thereof, but afterwards obtained the patent therefor in his own name, and procured incumbrances to be created thereon, which were duly registered:—Held, that the equitable interest of the plaintiff could not prevail against the title of the incumbrancers, possession not being such notice of title as will affect the right of a person claiming under a registered conveyance. Bell v. Walker, 20 Gr. 558 (post (c)), approved of. Section 66 of the Registry Act of 1865, and s. 68 of the Registry Act of 1868, considered. *Grey v. Ball*, 23 Gr. 390.

In ejectment it appeared that M., owning the land in question, conveyed it in 1852 to W. J. M., who in the same year mortgaged to the Trust and Loan Co. They, in 1858, conveyed to W., who in 1859 mortgaged it again to them, and in 1860 they conveyed to C., who devised it to the plaintiffs. All these conveyances were duly registered. Both W. J. M. and W. were acting as trustees or agents for M. For the defence it was shewn that M., in 1852, orally agreed to sell the land to one P. S., who paid the purchase money and took possession as a purchaser. In 1859 he received a bond from M. to convey to him in two months, but he never obtained a conveyance, and the bond was never registered, nor could it be under the registry law when it was given. He died in 1859, and his wife and children, the defendants, had continued to hold possession ever since. C., when he purchased in 1860, had notice of such possession:—Held, following the previous case, the last decision in chancery, though opposed to earlier cases, that knowledge of the possession held by the plaintiffs, having an equitable interest, was not sufficient to affect the registered title, and that the plaintiffs therefore were entitled to recover; but a new trial was granted, with costs to abide the event, to enable defendants to shew, if possible, that C. in fact bought subject to M.'s equity of redemption. *Cooley v. Smith*, 40 U. C. R. 543.

The relationship arising out of an agreement for the sale of land on payment of the purchase money and the taking of possession by the purchaser is that of trustee and cestui que trust, and, as the former has no effective right of entry, the Statute of Limitations does not apply in favour of the possession of the cestui que trust. The principle of the decision in Warren v. Murray, [1894] 2 Q. B. 648, applied. A mortgagee from the trustee under the above circumstances, who takes and registers his mortgage in ignorance that any one other than the mortgagor is in occupation of the land, and without notice, actual or constructive, of any equitable right of the cestui que trust, is entitled to set up the Registry Act, which is retrospective, and to plead it, if it is necessary to do so. Bell v. Walker, 20 Gr. 558, and Grey v. Ball, 23 Gr. 390, followed. *Building and Loan Association v. Poaps*, 27 O. R. 470.

Prior Purchaser—*Joint Possession with Vendor.*]—Where a father and son lived together on certain land of the father, and continued to do so after a conveyance by the father to the son:—Held, that the son's possession after the conveyance, did not affect a subsequent purchaser from the father. Possession is not such notice as, under the Registry Act, 31 Vict. c. 20 (O.), postpones a registered deed to the prior unregistered title of the party to such possession. *Sherboneau v. Jeffs*, 15 Gr. 574.

See Cope v. Crichton, 30 O. R. 603, *post* (c).

——— *Registered Title.*]—The possession of an estate by the first, but unregistered, purchaser from a registered owner, is not of itself notice to a subsequent purchaser. *Waters* v. *Shade*, 2 Gr. 457.

——— *Unregistered Title.*] — The plaintiff purchased land from J., who had purchased from G., no conveyance having been made to J. by G., who afterwards conveyed to T., a son of the plaintiff, who mortgaged the property and represented it as his own; the plaintiff being all the while in possession. The title was not a registered one:—Held, that the mortgagees were affected with notice of plaintiff's title by reason of his possession, although there was no pretence of actual notice to them; and they having omitted to set up the registry laws as a defence, liberty was given them to apply for leave to do so, if so advised. The rule that possession is notice of the title of the party so in possession considered and acted on. *Grey* v. *Coucher*, 15 Gr. 419.

(c) *By Registration.*

[*See* R. S. O. 1877 c. 111, s. 78, and R. S. O. 1897 c. 136, ss. 44, 92.]

35 Geo. III. c. 5.]—Under 35 Geo. III. c. 5, registration was not notice in this country. *Street* v. *Commercial Bank*, 1 Gr. 169, 1 E. & A. 246.

[It was made notice by 13 & 14 Vict. c. 63, s. 8.]

13 & 14 Vict. c. 63—*Innocent Purchaser.*]—Semble, under the facts stated in this case, that the fact of S. having been an innocent purchaser at a time when registration was not notice, would have afforded a good ground of defence if it had been taken by the answer. *Kay* v. *Wilson*, 24 Gr. 212.

C. S. U. C. c. 89—*Application of—Mortgage—Unpatented Lands.*]—Under C. S. U. C. c. 89, registration is notice of all instruments registered before, as well as since, registration was made notice. Since that Act, registration of a mortgage of unpatented lands under 8 Vict. c. 8, s. 9, is notice to subsequent purchasers, whether the patent has issued under or without a decision of the heir and devisee commissioners. *Vance* v. *Cummings*, 13 Gr. 25.

Duty to Search.] — The principle upon which the Registry Act proceeds is, that a person acquiring land ought to see whether there is anything registered against the land he is about to acquire, and that he is assumed to search the registry for that purpose; but this does not apply to one who is not acquiring, but parting with, an interest in land, and registration is not notice in such a case. *Trust and Loan Co.* v. *Shaw*, 16 Gr. 446.

Equitable Interest—*Assignment—Joint Possession with Assignors—Mortgage.*]—The plaintiff's father, being in possession of a farm under an unregistered agreement for the sale thereof to him, assigned the agreement and all his interest thereunder by way of security to one who gave a bond to reassign upon repayment of a small sum advanced. Neither the assignment nor the bond was registered. The money was repaid, but there was no reassignment. Subsequently, on the 3rd April, 1886, the father assigned all his interest in the land to the plaintiff for valuable consideration, the plaintiff having no notice or knowledge of the previous assignment. This assignment was duly registered. The plaintiff lived on the farm with his father and mother, whom he had covenanted to maintain during their lives, until July, 1888, when he went away, leaving his parents on the farm, with no definite agreement or understanding, but with the expectation, as he said, that they would remain on the place and make the last two payments under the original agreement, and that when this was done the place would be his. In February, 1891, the father mortgaged the land to the person who had made the first advance, to secure a larger sum, and the mortgage deed was registered. A few days later the original vendor conveyed the land to the father, the purchase money having been paid in full, and the conveyance was registered. In February, 1892, the mortgagee died. In September, 1893, the plaintiff's father conveyed the land absolutely to the administrator of the mortgagee's estate, and this conveyance was also registered:—Held, that the assignment to the plaintiff in 1886 gave him an equitable estate in fee and the right to possession, and after its execution, the father and son both being on the place, the possession would be attributed to the son. 2. That the registration of that assignment constituted notice to the mortgagee, and the mortgage did not affect the plaintiff's title or right to possession. *Cope* v. *Crichton*, 30 O. R. 605.

Indian Lands—*Mortgage before Patent.*]—A patent of Indian lands was obtained by the patentee by virtue of his title under certain assignments from the original locatee, duly registered in the Indian Department, and it appeared that certain prior assignees from the locatee had executed a mortgage on the lands to the plaintiff, of which the patentee had no actual notice, neither the assignment to the mortgagors nor the mortgage having been registered in the department, though the mortgage was registered in the county registry office; and the plaintiff now sought to foreclose his mortgage:—Held, that the patentee was entitled to priority over the mortgage to the extent of the moneys paid for obtaining the patent, and that the registration of the mortgage in the county registry office was not notice to him. *Re Reed* v. *Wilson*, 23 O. R. 552.

Infant—*Conveyance by — Representation as to Age.*]—A married woman, while yet under twenty-one years of age, but representing herself to be of full age, conveyed land to a bonâ fide purchaser for value, and the conveyance was duly registered. After attaining majority, the married woman and her husband joined in a voluntary deed to another person as trustee for her, and he subsequently sold the land, and his vendee (on the same day) created a mortgage thereon:—Held, that the married woman, notwithstanding her nonage, was bound by her representations as to her being of age; and that the other parties, having acquired their interests with full knowledge of the existence of the deed by her to the purchaser, and after the registration thereof, took subject to all the rights of the purchaser. *Benvetto* v. *Holden*, 21 Gr. 222.

Life Tenant — *Conveyance by — Acquiescence of Remainderman—Equitable Interest.*]—By a deed duly executed and registered, lands with a water frontage were vested in a

man for life—remainder to his son in fee. The deed contained an agreement or stipulation that neither party should be at liberty to dispose of or incumber the property in any way without the consent of the other. The father, with the knowledge, but without the consent, of his son, sold portions of the water frontage, and the purchaser, with the knowledge of the son, improved thereon. After the death of the father the son sold and conveyed the lands, including the whole water frontage, to W., whereupon a bill was filed by the vendee under the father against the son and W., claiming absolutely the part of the water frontage which had been conveyed by the father, on the ground of acquiescence by the son, and that W. had notice of the plaintiff's interest:—Held, that the registration of the deed under which the father and son claimed was actual notice of the son's title, and that his acquiescence or lying by could not affect his interest, but at most could only be construed into a consent by him to the sale by the father of his own interest; and semble, that under the circumstances, if even registration were not actual notice, the acquiescence would not bind his reversionary interest; and that, even if the plaintiff had acquired any equitable interest arising out of such acquiescence, he could not enforce it against W. without proving actual notice to him of such equitable interest. *Bell* v. *Walker*, 20 Gr. 558.

Mistake in Description — *Notice of Claim.*]—The owner of two town lots, 25 and 26, sold a portion of 26 to one P., but by mistake the description in the deed was such as at law to pass the whole lot. He subsequently sold lot 25, and all of lot 26 not before sold to P., to the plaintiff, and the deed thereof was duly registered. Subsequently to such registration, defendant obtained a conveyance from P., the description of the land being the same as in the deed to P.:—Held, that the registration of the plaintiff's deed was notice to defendant of the plaintiff's claim to that part of lot 26 not sold to P., and that the plaintiff was entitled to a reconveyance thereof. *Haynes* v. *Gillen*, 21 Gr. 15.

Mortgage — *Assignment of — Pleading—Amendment.*]—B., being the owner of lot A., mortgaged the same to C., who assigned the security to J., covenanting for the payment of the mortgage money, which assignment was duly registered. Afterwards B. agreed with W., the owner of lot B., to exchange properties, B. undertaking to have his mortgage to C. transferred from lot A. to lot B., to which C. assented, not informing either of them of the assignment. C., who was a solicitor, was employed by both parties to prepare the several conveyances, including the mortgage from B. to himself on the newly acquired property. No mention was made or production demanded of the first mortgage, which remained undischarged. B. paid off and obtained from C. a discharge of the new mortgage given by him on lot B.; and C. paid the interest to J. for several years, when he made default, and the plaintiffs, the representatives of J., then applied to B., when he, for the first time, was made aware of the assignment:—Held, that the payments so made by B. to C. had not the effect of discharging the mortgage on lot A., and that the plaintiffs were entitled to a foreclosure. Held, also, that W. was affected with notice of the assignment by the registration; and with constructive notice, by his omission to inquire for the mortgage. Held, also, that it was not necessary to set up the registration of the assignment in the bill in order to prove notice; and that, if necessary, an amendment should have been allowed under the A. J. Act, 1873, s. 50. *Gilleland* v. *Wadsworth*, 1 A. R. 82. *S. C.*, 23 Gr. 547.

——— *Balance of Purchase Money—Estoppel.*]—See *McMillan* v. *Munro*, 25 A. R. 288.

——— *Further Advances — Subsequent Mortgage.*]—After purchasing land under an agreement which provided that $2,000 of the purchase money was to be secured by mortgage subsequent to a building loan not exceeding $12,000, the purchaser executed a building mortgage to a loan company for $11,500, which was at once registered, but only part of that sum was then advanced. The plaintiff, who had succeeded to the rights of the vendor under the above agreement, then registered her mortgage for $2,000, and claimed priority over subsequent advances made by the loan company under their mortgage, but without actual notice of the plaintiff's mortgage, or of the terms of the agreement for the sale of the land:—Held, that the plaintiff was not entitled to the priority claimed by her. Decision in 24 O. R. 426 reversed. The further advances were made upon a mortgage providing for such advances, and to secure which the legal estate had been conveyed, and equity as well as law protected the first mortgage so advantageously placed, as against the subsequent mortgage, even though registered, where notice had not as a fact been communicated to the first mortgagee respecting the subsequent instrument, and the Registry Act did not apply. *Pierce* v. *Canada Permanent Loan and Savings Co.*, 25 O. R. 671. Affirmed by the court of appeal, 23 A. R. 516.

See R. S. O. 1897 c. 136, s. 99.

——— *Several Parcels — Rights of Purchasers.*]—Several parcels of land were embraced in one mortgage. Subsequently the mortgagor further mortgaged some of them to the plaintiffs, with the usual mortgagor's covenants. He afterwards conveyed another parcel to S., who, when he took his conveyance, was not aware of the plaintiffs' mortgage, but it was registered against the parcels embraced in it, though not against the other parcels:—Held, that the registration of the prior mortgage against the parcel bought by S. was notice to him of the right of persons who purchased other parcels before he purchased, to throw the mortgage upon his parcel, and that S. was affected with notice of the plaintiff's mortgage, and the right it conferred. *Clark* v. *Bogart*, 27 Gr. 450.

Neglect to Search — *Discharge of Mortgage—Subrogation.*]—The plaintiff registered a lien against certain lands. On the day before such registration the defendant, an intending purchaser, had searched the registry office and found only two incumbrances registered against the property. Shortly afterwards the defendant completed his purchase, and, having paid off the two incumbrances, registered discharges thereof with his deed of purchase, but, as he did not make any further search, he did not discover the plaintiff's lien:—Held, that the defendant was entitled to stand in the place of the incumbrancers whom he had paid off, and to priority over the plaintiff's lien. The Registry Act does not preclude inquiry as to whether there was knowledge in fact; and

the court was not compelled as a conclusion of law to say that the defendant had notice of what he was doing, and so could not plead mistake. Brown v. McLean, 18 O. R. 533, specially considered. *Abell* v. *Morrison*, 19 O. R. 669.

See Menzies v. *Kennedy*, 23 Gr. 360; *Merchants Bank* v. *Morrison*, 18 Gr. 382, 19 Gr. 1; *Dilke* v. *Douglas*, 5 A. R. 63; *Platt* v. *Grand Trunk R. W. Co.*, 12 O. R. 119.

(d) *Constructive Notice.*

Bona Fides.]—Constructive notice is insufficient in any case to postpone a registered conveyance executed bonâ fide. *Ferrass* v. *McDonald*, 5 Gr. 310.

Circumstances for Inquiry.] — Such circumstances as are sufficient notice to put a party upon inquiry, will not prevail over a registered title. *Soden* v. *Stevens*, 1 Gr. 346.

Insufficiency — *Defect in Subsequent Indorsement.*]—B. and wife, after executing a mortgage in favour of D., conveyed the premises comprised therein to J., subject to the mortgage, which was referred to in the conveyance, as also in the memorial thereof registered. After the registration of this conveyance, J. and his wife executed a quit claim deed of the premises to the wife of B. A mortgage was subsequently made in favour of S., which was signed and sealed by B. and his wife, but she was the only granting party named therein, and the same was registered before the mortgage to D.:—Held, that constructive notice of the mortgage to D. was the most that could have been imputed to S., which was insufficient to postpone a prior registration; but that his mortgage was wholly inoperative in consequence of B. not being named as a granting party therein. *Foster* v. *Beall*, 15 Gr. 244.

——— *Instrument Capable of Registration.*]—The court of chancery in this country having frequently held constructive notice of an unregistered interest to be insufficient, where such unregistered interest was founded on an instrument capable of registration, and the want of actual notice was not wilful or fraudulent, this rule will continue to be acted on until the different doctrine lately held in England and Ireland, is adopted in appeal, either in England or here. *Moore* v. *Bank of British North America*, 15 Gr. 308.

Sufficiency — *Fraud.*] — Where the registered owner of land had parted with his interest therein by an unregistered deed, a person who afterwards fraudulently took and registered a conveyance from such registered owner, prior to the Registry Act of 1865, knowing or believing that his grantor had parted with his interest, was held not entitled to priority over the true owner, though he did not know, or had no correct information, who the true owner was. *McLennan* v. *McDonald*, 18 Gr. 502.

(e) *Other Cases.*

Execution Creditor.] — An execution creditor does not occupy as favourable a position under the Registry Act as a purchaser for value without notice: and he may be defeated by a deed made before, though registered after, the lodging of the execution in the hands of the sheriff. *Russell* v. *Russell*, 28 Gr. 419.

Purchaser for Value without Notice —*Fraud.*] — Where a subsequent deed was registered first, a prior one from the same person was held fraudulent and void, although its registration had been prevented by the fraud of the subsequent purchaser, he having in the meantime conveyed to a third party for a valuable consideration without notice. *Doe d. Nellis* v. *Matlock*, 2 O. S. 487.

Vendee under Sheriff's Sale.]—Held, that a purchaser for value with a registered title under a sheriff's sale of A.'s interest in land, was entitled to prevail against a non-registered conveyance made by A. prior to such sale. *Bruyere* v. *Knox*, 8 C. P. 520.

3. *Particular Instruments.*

(a) *Conveyances of Growing Timber.*

Application of Act.]—A conveyance or devise of growing timber is within the Registry Act. *Ellis* v. *Grubb*, 3 O. S. 611. Approved in *Ferguson* v. *Hill*, 11 U. C. R. 539.

The plaintiff and W. entered into an agreement, by which the plaintiff was to make advances upon certain conditions to W., to enable him to draw out, and to make and get to market, a quantity of timber. It was agreed that the timber then made, and all that might thereafter be made, should be delivered to the plaintiff as security, and in proof of such delivery should be marked as specified, and that it should be rafted to market under W.'s directions. The timber was seized under an execution by the defendant as sheriff; and the plaintiff, claiming under this deed, replevied:—Held, that the statute requiring registration could apply only to that part of the timber in existence, as timber, and owned by W. at the execution of the instrument, but that it clearly applied to that portion, and therefore for want of registration the deed must be held void altogether; but, at all events, it could have operated to pass only that part of the timber which was made and capable of delivery at the time of the execution, and such as, being made afterwards, was delivered to the plaintiff and marked for him. *Short* v. *Ruttan*, 12 U. C. R. 79.

Semble, that standing timber is within the provisions of the registry laws; and that the purchaser of the right to cut the same is affected with notice of the conveyance from the original owner and a mortgage back from his vendee. *McLean* v. *Burton*, 24 Gr. 134.

(b) *Mortgages.*

Consideration—*Variance from Proviso for Redemption—Notice.*]—The holder of several promissory notes applied to the plaintiff to indorse the same for his accommodation, which he did on the promise of the holder to execute a mortgage on certain lands to one L., to whom he was indebted in $1,200 on account of the purchase money of these

lands, securing the payment thereof, as also of the notes. The consideration expressed in the mortgage was $1,200 only, but the proviso for redemption embraced the notes as well as the $1,200. L. also indorsed the notes, and on maturity retired them, and the plaintiff, having paid L. the amount of the notes, obtained from him an assignment of the mortgage:—Held, (1) that the transactions rendered L. and the plaintiff in effect co-sureties, and that the plaintiff was entitled to the benefit of the security held by L. by way of indemnity; and (2) that the plaintiff was entitled to enforce the mortgage against the purchaser who took his conveyance after searching the registry office, and upon the assurance that the mortgage was made to secure $1,200 only. *Menzies* v. *Kennedy*, 23 Gr. 360.

Power of Sale—*Prior Conveyance.*]—Held, that the prior registration of a mortgage with a power of sale enabled the mortgagee, in the proper exercise of such power, to sell free from the claim of a purchaser under a prior unregistered conveyance. *Daniels* v. *Davidson*, 9 Gr. 173.

Registration before Delivery—*Beneficiaries—Assignee for Value.*]—Where a person executed a mortgage and had it registered, but did not, for some time, give it to the mortgagee, and this security was afterwards sold to a third person who was not aware of the facts, it was held entitled to priority over another mortgage previously executed, but not registered till after the other security had been registered, although registered before the other had been delivered to the mortgagee. Mortgage held good in the hands of an assignee for value without notice, though the persons for whose benefit it was given were not named in it or shewn by any writing. *Muir* v. *Dunnet*, 11 Gr. 85.

Subsequent Mortgagee — *Insufficient Memorial.*]—A subsequent mortgagee who had not actual notice:—Held, not bound by the registration of a prior mortgage, the memorial of which insufficiently described the premises. *Reid* v. *Whitehead*, 10 Gr. 446.

See McMillan v. *Munro*, 25 A. R. 288.

(c) *Plans.*

Dedication of Lanes.]—The registration of a plan of a subdivision of a town lot, and sales made in accordance with it, do not constitute a dedication of the lanes thereon to the public. *In re Morton and City of St. Thomas*, 6 A. R. 323.

Dedication of Public Square—*Municipal Corporation—Closing up.*]—A municipal corporation laying out a square or park, on land acquired by them untrammelled by any trust as to its disposal, may deal with it in any manner authorized by s. 509 of the Municipal Act, R. S. O. 1877, c. 174, at least where no private rights have been acquired in consequence of their action; but they cannot so deal with lands dedicated by the owner for a special purpose, which case is provided for by s. 467. Whether the dedication arises only from the act of the owner, or by express grant, the municipality must accept it, if at all, for the purpose indicated. The owner of land dedicated to the public a square by filing a plan upon which were the words, "Square to remain always free from any erection or obstruction:"—Held, that the municipality had no power to close up part thereof, and to dispose of it to trustees of a church. *In re Peck and Town of Galt*, 46 U. C. R. 211.

Effect of Registration—*Absence of Certificate—Description.*] — Though a plan not certified as required by the Registry Act, R. S. O. 1877 c. 111, s. 82, s.-s. 2, has, even when deposited in the registry office, no effect under the registry law, yet in a deed reference may be made to it, as it may to any other document in the registry office or elsewhere, for the description or designation of a lot. *Ferguson* v. *Winsor*, 10 O. R. 13. See *S. C.*, 11 O. R. 88.

Obligation to Register—*Reference to, in Deed.*]—M. was owner of the east half of a certain lot of land. In 1872 he employed one S. to draw a plan of a portion of the lot, and S. drew a plan upon which some lots were lettered and others numbered. The land in question was marked on the plan as "The Parsonage," but was neither numbered nor lettered. The plan so marked was never registered. In 1874 M. mortgaged to B., one of the defendants, the said half lot, "reserving thereout lots numbered from 1 to 181, both inclusive, as shewn on a plan made by S., and dated 1872;" and during negotiations for the loan M. left a lithographed copy of the plan in B.'s possession. B. registered the mortgage, but took no steps to register the plan. Subsequently M. altered his plan by running a street through lots 106 and 115, and transferred the number 106 to the parsonage lot. The date of the plan remained as 1872, and M. then registered it in its altered state. In 1876 M. applied to the plaintiff for a loan of $600 upon lot 106, or the parsonage lot. An abstract was obtained by the plaintiff from the registrar, from which the prior mortgage from M. to B. was omitted, the registrar considering that, inasmuch as lots 1 to 181 inclusive were excepted from B.'s mortgage, the property in question was not affected by it. A mortgage was then made by M. to the plaintiff. In ejectment by plaintiff against B.:—Held, that defendant's title must prevail; that no obligation was cast upon B. under the registry laws or otherwise to register the plan, which was only referred to in describing the reservations from the mortgage. (2) That B.'s title was complete by registration of his mortgage on the township lot. (3) That if from any cause the exception or reservation from the property mentioned in B.'s mortgage proved abortive or ineffectual, B. was entitled to the excepted portion also. *Muttlebury* v. *King*, 44 U. C. R. 355.

Person Registering — *Assignee — Amendment.*]—Held, reversing the judgment in 9 O. R. 274, that the status of C., as a person, or the assignee of a person, who registered a plan, was a question of law and fact combined for the county Judge to determine upon C.'s application to him, under R. S. O. 1877 c. 111, s. 84, to amend the plan, and that his decision was not examinable in prohibition. Semble, a person not the owner of the property may register a plan, and although this would be at the time a futile proceeding, yet if he afterwards became the owner of the property and adopted the plan, he

would be entitled under the Act to have it amended. *In re Chisholm and Town of Oakville*, 12 A. R. 225.

See Nevitt v. *McMurray*, 14 A. R. 126.

(d) *Sheriffs' Deeds.*

Application of Act.]—The Registry Act, 9 Vict. c. 34, applied to sheriffs' deeds to purchasers at sheriffs' sales. *Doe d. Brennan* v. *O'Neill*, 4 U. C. R. S. See *Waters* v. *Shade*, 2 Gr. 457.

Conveyance after Sale—*Priority of Execution.*]—A.'s land was sold under execution in 1843, but the sheriff did not execute a deed to the purchaser until 1853. In 1852 A. conveyed to one C., who conveyed to the plaintiff. The last two deeds were registered, but that from the sheriff was not:—Held, that the prior registry of the plaintiff's title could not defeat the sheriff's deed, for the lands were bound by the execution and sale, and therefore out of A.'s power to convey. *Burnham* v. *Daly*, 11 U. C. R. 211. See *Smith* v. *Brown*, 14 U. C. R. 12.

Married Woman—*Sale of Husband's Interest.*]—A mortgage by husband and wife of the wife's lands was registered without any examination of the wife, as required by the statute. The sheriff afterwards sold and conveyed the husband's interest in the lands under a fi. fa.; and the deed to the purchaser was registered after the re-execution of the mortgage, and the due acknowledgment by the wife, which mortgage, however, was not re-registered after such re-execution and acknowledgment:—Held, that the interest of the husband in the land passed to the purchaser under the sheriff's deed, to the exclusion of the mortgage. *Moffat* v. *Grover*, 4 C. P. 402.

Territories Real Property Act—*Priorities.*]—The provisions of s. 94 of the Territories Real Property Act R. S. C. c. 51, as amended by 51 Vict. c. 20 (D.), do not displace the rule of law that an execution creditor can only sell the real estate of his debtor subject to the charges, liens, and equities to which the same was subject in the hands of the execution debtor, and do not give the execution creditor any superiority of title over prior unregistered transferees, but merely protect the lands from intermediate sales and dispositions of the execution debtor. If the sheriff sells, the purchaser, by priority of registration of the sheriff's deed, would under the Act takes priority over previous unregistered transfers. *Jellett* v. *Wilkie*, *Jellett* v. *Scottish Ontario and Manitoba Land Co*, *Jellett* v. *Powell*, *Jellett* v. *Erratt*, 26 S. C. R. 282.

See Rathbun v. *Culbertson*, 22 Gr. 465.

(e) *Tax Deeds.*

Certificate of Title — *Priority over Earlier Certificate—R. S. B. C. c. 111.*]—Section 13 of the British Columbia Land Registry Act, R. S. B. C. c. 111, provides that a person claiming ownership in fee of land may apply for registration thereof, and the registrar, on being satisfied, after examination of the title deeds, that a primâ facie case is established, shall register the title in the "Register of Absolute Fees." Section 19, which authorizes the registrar to issue a certificate of title to the person so registering, contains this provision: "Every certificate of title shall be received as primâ facie evidence in all courts of justice in the Province, of the particulars therein set forth." And by s. 23 "the registered owner of an absolute fee shall be deemed to be the primâ facie owner of the land described or referred to in the register for such an estate of freehold as he may possess?"—Held, affirming the judgment in 7 B. C. Rep. 12, sub nom. Kirk v. Kirkland, that a certificate of title issued on registration of a deed from the assessor of taxes to a purchaser at a tax sale, does not of itself oust the prior registered owner of the land described in the register, but the holder must prove that all the statutory provisions to authorize a sale for taxes have been complied with. *Johnson* v. *Kirk*, 30 S. C. R. 344.

Delay in Registering—*Protecting Statutes.*]—The sheriff, on the 9th October, 1860, sold to the plaintiff the land in question for taxes, and gave a certificate of the sale, but for some reason not explained the plaintiff did not obtain his deed until the 17th September, 1866, and he registered it on the same day, within one year from the passing of 29 Vict. c. 24. There was no proof of any neglect or misconduct on his part in not procuring the deed sooner:—Held, that the delay in registering did not, under 29 Vict. c. 24, s. 57, avoid the deed as against the purchaser of the land who had first registered; that the deed, not having been questioned within the time limited by the protecting statutes, was within their operation; and that the plaintiff, bringing ejectment in 1870, was entitled to recover. *Carroll* v. *Burgess*, 40 U. C. R. 381.

——— *Subsequent Purchaser—Mortgage.*]—One H., being indebted to a bank, mortgaged his lands thereto as security for his indebtedness, and the bank subsequently foreclosed his interest, but continued to allow H. to negotiate sales of the lands, and consulted him respecting sales effected by the bank. Some of the lands were specifically pledged to indemnify a certain indorser, and the notes upon which his name appeared had all been retired. One of the lots so mortgaged was afterwards sold for taxes, but the purchaser omitted to register his deed for more than eighteen months after the sale, as prescribed by 31 Vict. c. 20, s. 28 (O.). Meanwhile H., the mortgagor, sold and conveyed the land to a bonâ fide purchaser, without notice, which sale was subsequently ratified and confirmed by the bank, and the conveyance duly registered, before the purchaser at the tax sale registered his deed:—Held, that the purchaser at the tax sale had thus lost his priority; and a bill filed by him impeaching the sale by the mortgagor was dismissed with costs. *Smith* v. *McLandress*, 26 Gr. 17.

Successive Sales — *Purchasers — Priorities.*]—The provision of 31 Vict. c. 40, s. 58 (O.), as to the registering of a deed given upon a sale for taxes, applies as well between several purchasers at successive sales for taxes, as between a purchaser thereat and the vendee of the owner. *Aston* v. *Innis*, 26 Gr. 42.

See Jones v. *Cowden*, 34 U. C. R. 345.

(f) *Wills.*

Deed by Devisee—*Prior Deed by Testator—Omission to Register.*]—M., having conveyed certain land to the plaintiff, willed one-half of it to his nephew, and the remaining half to others, and the nephew conveyed the whole to a purchaser for value without notice of the plaintiff's deed, both will and deed to this purchaser being registered before the plaintiff's deed: — Held, that the registration of the will and of the deed prevailed over plaintiff's unregistered deed as to the moiety conveyed by the nephew: but as to the other moiety devised, plaintiff was entitled to hold this part under the deed from M. as against the devisees under the will. *McDonald* v. *McDonald*, 44 U. C. R. 291.

Deed by Heir-at-law — *Proof of Consideration—Prior Registration.*] — Where the plaintiff claimed under a will, and defendant under a deed from the heir-at-law, registered before the will:—Held, (1) that to give the deed priority it must be proved to have been for valuable, though not necessarily for a money, consideration: but that the plaintiff, by calling for the deed under a notice to produce, and putting it in on another branch of the case, furnished primâ facie evidence of the consideration mentioned in it. The deed was by the heir-at-law and his brother, describing themselves as devisees under the will (by which the plaintiff took a life interest in the land, and it then went to the grantors, who were to make certain payments to the other children.) It was a quit claim by deed poll of their interest only, and the consideration was expressed to be £43 15s. in money, and the grantee becoming responsible to the family of the testator for the payment of any money or the performance of any services required of the grantors by the will:—Held, that nevertheless, by the prior registry of this deed, the plaintiff's claim under the will was cut out. *Bondy* v. *Fox*, 29 U. C. R. 64.

Inevitable Difficulty — *Infancy.*]—Infancy is not an inevitable difficulty within s. 15 of the Registry Act, 35 Geo. III. c. 5, so as to preclude the necessity of an infant devisee registering the will within six months of the death of the devisor, to avoid a conveyance by the heir-at-law. *McLeod* v. *Truax*, 5 O. S. 455.

——— *Infancy—Execution.*] — M. devised lands to his two sons, John and James, and died in 1834. The will was registered in 1852, soon after James came of age, the title having been a registered one since 1833. In 1850 John, the eldest son and heir-at-law of M., conveyed the south half of the land to the defendant, who registered his deed the same year. In 1856 the other half was sold to defendant, under an execution against the executors, obtained on their confession:—Held, that defendant was entitled to the whole; for as to the south half, the deed by the heir-at-law must prevail, the infancy of James being no excuse for not registering the will; and as to the north half, that the court could not go behind the judgment. *Mandeville* v. *Nicholl*, 10 U. C. R. 909.

Mortgage by Heirs-at-law — *Omission to Register Will.*] — In 1831 A. devised his farm to his widow in fee, and left her in possession. The will was never registered; and shortly after the testator's death his eldest son and heir went into possession with his mother, and so continued until his mother's death in 1854; the son managing the farm, and being reputed owner during this period. After his mother's death he was in sole possession, and in 1862 he mortgaged to a person who had no notice of the will or of the widow's title:—Held, that the widow's heirs could not claim the property against the mortgagee. *Stephen* v. *Simpson*, 15 Gr. 594, 12 Gr. 493.

See Rykert v. *Miller*, 14 Gr. 25; *Re Davis*, 27 Gr. 199.

(g) *Other Instruments.*

Assignment of Lease.]—See *Baldwin* v. *Wanzer*, 22 O. R. 612.

Conveyance to Married Woman—*Examination after — Re-registration, Necessity for.*]—A mortgage at the date of its execution, the same having been registered, was ineffectual to pass the wife's estate, by reason of her not having been examined apart from her husband; and subsequently such mortgage was re-executed by the husband and wife, and the fact of the wife having been duly examined indorsed thereon, so that the deed was made effectual to pass her estate, but no re-registration took place:—Held, in equity, that the registration of such mortgage was sufficient under the statute, but that the examination of the wife upon the re-execution of the mortgage could not relate back to the first execution thereof, so as thereby to gain for it priority of an instrument which had been subsequently executed by the husband and wife, and duly registered. *Beattie* v. *Mutton*, 14 Gr. 686.

Conveyance to Railway Company.]—The registry law is binding on railway companies. Where it appeared that, after an owner of land had contracted with the Grand Trunk Railway Company for the conveyance of parts of the land for a roadway and station ground, he mortgaged the same land to a creditor without notice; and the mortgage was registered before the conveyances to the railway company:—Held, that the mortgagee was entitled to priority, and that the company were entitled, under their special Act, to retain the land on paying to the mortgagee its value at the time the company became entitled to it. *Harty* v. *Appleby*, 19 Gr. 205. See also *Regina* v. *Smith*, 43 U. C. R. 369.

Conveyance to Religious Institution.]—Under the Provincial statute 9 Geo. IV. c. 2, s. 3, a deed conveying land to trustees for the use of a religious society is invalid for want of registration. *Doe d. Bowman* v. *Cameron*, 4 U. C. R. 155.

A deed, to come within the statute 24 Vict. c. 43, relating to conveyances to religious institutions, must have been registered within a year after the passing of it. *In re Baptist Church Property of Stratford*, 2 Ch. Ch. 388.

Crown Bond — *Non-registration—Mortgage—Priorities.*]—One M. gave a recognizance to the Crown with two sureties, D. and McK. The recognizance was estreated, but had not been registered under the Crown Debts Act. N., the cognizor, about the same time gave to D., one of his sureties, a mortgage on his lands as security. M. absconded

and died abroad; and then D. under a power of sale sought to enforce the mortgage against the lands. Upon an information filed by the attorney-general:—Held, (1) that the recognizance to the Crown bound M.'s lands from its acknowledgment; and that the Crown could enforce its lien. (2) That D., being one of the sureties in the recognizance, had actual notice of the lien of the Crown; and that he must be postponed to the Crown, notwithstanding the registration of his mortgage and the non-registration of the recognizance. *Attorney-General* v. *Daniell*, 7 L. J. 122.

Dation en Paiement — *Warranty—Forfeiture for Non-registration.*]—See *Lacoste* v. *Wilson*, 20 S. C. R. 218.

Discharge of Mortgage.]—See *Dilke* v. *Douglas*, 5 A. R. 63; *Trust and Loan Co.* v. *Gallagher*, 8 P. R. 97.

Judgment — *Mortgage — Priorities — Rectification.*]—By R. S. N. S., 5th ser., c. 84, s. 21, a registered judgment binds the lands of a judgment debtor, whether acquired before or after such registration, as effectually as a mortgage; and deeds or mortgages of such lands, duly executed but not registered, are void against the judgment creditor who first registers his judgment. A mortgage of land was made, by mistake and inadvertence, for one-sixth of the mortgagor's interest instead of the whole. The mortgage was foreclosed and the land sold. Before the foreclosure, a judgment was registered against the mortgagor, and two years afterwards an execution was issued, and an attempt made to levy on the five-sixths of the land not included in the mortgage. In an action for rectification of the mortgage and for an injunction to restrain the judgment creditor from levying:—Held, that as to the said five-sixths of the land the plaintiff had only an unregistered agreement for a mortgage, which, by the statute, was void as against the registered judgment of the creditor. Grindley v. Blakie, 19 N. S. Rep. 27, approved and followed. *Miller* v. *Duggan*, 21 S. C. R. 33.

Memorandum of Equitable Mortgage.]—Where a mortgage was created by the deposit of mortgages, and the borrower signed a memorandum stating the sum lent and times for repayment, and agreeing to execute a writing to enable the lender to transfer or control the mortgages so deposited:—Held, that this memorandum did not require registration, not being, in the language of C. S. U. C. c. 89, s. 17, "a deed, conveyance, or assurance affecting lands." *Harrison* v. *Armour*, 11 Gr. 303.

Proceedings in Expropriating Lands for Railway Purposes — *Quebec Law.*]—See *Quebec, Montmorency, and Charlevoix R. W. Co.* v. *Gibsone*, 29 S. C. R. 340.

Substitution — *Prescription — Quebec Law.*]—See *Meloche* v. *Simpson*, 29 S. C. R. 375.

Trust Deed for Creditors.]—The Registry Act, 35 Geo. III. c. 5, did not apply to deeds given to trustees for the benefit of creditors. *Neeson* v. *Eastwood*, 4 U. C. R. 271.

An assignee in insolvency cannot acquire priority over a prior vendee of the insolvent by prior registration of the instrument appointing such assignee. *Collver* v. *Shaw*, 19 Gr. 599.

Voluntary Conveyance.]—As against a purchaser for value, a voluntary deed, though registered, is void; and, as this objection will avail the purchaser in any proceeding adopted by or against him, the court will not interfere to remove the registration of the void deed as a cloud on the title. *Buchanan* v. *Campbell*, 14 Gr. 163.

See McCarthy v. *Arbuckle*, 29 C. P. 529; *Ross* v. *Harvey*, 3 Gr. 649.

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4. *Proof of Consideration of Prior Registered Deeds.*

Absence of Consideration — *Jury — Finding.*]—Held, that the prior registration of the deed under which the plaintiff claimed in this case, could have no effect, the jury having found it to be without consideration. *Leech* v. *Leech*, 24 U. C. R. 321.

Mortgage—*Security for Purchase Money — Conveyance — Receipt.*] — A vendor took from the purchaser a mortgage for part of the consideration money, but did not register it until several months after the deed to the purchaser had been registered; in the meantime the mortgagor created a second incumbrance in favour of bonâ fide mortgagees, which was registered long prior to the first mortgage, without notice of the vendor's incumbrance:—Held, that the want of a receipt for the consideration money in the deed to the purchaser was not sufficient to postpone the second incumbrance. *Baldwin* v. *Duignan*, 6 Gr. 595.

Nominal Consideration.] — Where A. holding land under a registered title sold to B., whose deed was not registered, and B. sold to C., and after such sale sold again to D., who registered his deed, the deed to C. not having been registered:—Held, that C. could not, by obtaining and registering a release for a nominal consideration from the heir of A., obtain priority over D., for C. could not be considered, as to the release, a subsequent purchaser for a valuable consideration. *Doe d. Major* v. *Reynolds*, 2 U. C. R. 311.

A conveyance by an heir-at-law for a nominal consideration, registered prior to a will:—Held, not to cut out the will. *Wilkinson* v. *Conklin*, 10 C. P. 211.

Value—*Creditor's Security.*]—A mortgage to creditors, to secure their debts, is a sufficient valuable consideration to give a registered conveyance precedence over a conveyance previously executed, but registered subsequently. *Fraser* v. *Sutherland*, 2 Gr. 442.

———*Onus.*] — The non-registry of the sheriff's deed in this case was held immaterial, it not having been shewn that the prior registered deed from B. to D. was for a valuable consideration. *Doe d. Russell* v. *Hodgkiss*, 5 U. C. R. 348.

——— *Onus—Infant.*]—A. in 1842 conveyed to B.'s son, then a minor. This deed was never registered. B. swore that he bought the land from A., but being in difficulty had the deed made to his son, and that

he had always continued in possession, but upon this point the evidence was contradictory. A.'s heir in 1849 made a deed of release to B., and B. conveyed to the lessors of the plaintiff. Both these deeds were registered:—Held, that there being no evidence that the deed from A.'s heir to B. was for valuable consideration, B. could not displace his son by reason of the prior registry of that deed; and, for the same reason, the lessors of the plaintiff could not claim to be preferred. *Doe d. Prince* v. *Girty*, 9 U. C. R. 41.

——— *Onus — Statement in Deed.*] — A person who claims under a subsequent conveyance, by reason of prior registry, must, before he can recover in ejectment, give some proof that he is a purchaser or mortgagee for valuable consideration. The production of the subsequent deed, stating on the face of it a valuable consideration, affording no evidence of consideration as against a stranger, will not do. *Doe d. Cronk* v. *Smith*, 7 U. C. R. 376.

See McKenney v. *Arner*, 8 C. P. 46.

Registration of a subsequent deed will not give priority over another unregistered deed from the same grantor, prior in point of time, unless a valuable consideration for the former is proved. Mere production or registration of the instrument by the person claiming under it is not sufficient proof for this purpose. *Barber* v. *McKay*, 19 O. R. 46.

Voluntary Mortgage—*Assignment of.*] —O., requiring money, mortgaged land to B., in 1854, for £50, to enable B. to obtain it for him, which mortgage was registered in the same year. B. having done nothing, O., in 1856, got him to assign the mortgage to S., who paid B. £25, but neglected to register the assignment until 1864. In the meantime O. conveyed, for value, to M., to whom B., for a nominal consideration, conveyed his interest:—Held, that the mortgage to B., being voluntary, was void under 27 Eliz. c. 4, as against the conveyance for value to M., and that the fact of its being first registered could only give it validity in this respect. (2) That the assignment by B. to S. was fraudulent and void under the registry law as against M., a subsequent purchaser for value who had first registered. *Miller* v. *McGill*, 24 U. C. R. 597.

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5. Tacking and Consolidation.

[See R. S. O. 1877 c. 111, s. 81; R. S. O. 1897 c. 136, s. 98.]

Mortgage — *Judgment.*] — A mortgagor's devisee was held not entitled to redeem the mortgage without also paying a judgment held by the owner of the mortgage against the mortgagor. This is not such tacking as the Registry Act forbids. *McLaren* v. *Fraser*, 17 Gr. 533.

Several Mortgages.]—The rule of equity which allows the holder of several mortgages created by the same mortgagor on separate properties to consolidate the debts, and insist on being redeemed in respect of all before releasing any one of his securities, is not "tacking," and is not such a claim as the Registry Act declares shall not be allowed to prevail against the provisions thereof.

Dominion S. and I. Society v. *Kittridge*, 23 Gr. 631.

——— *Assignment of Equity.*] — Where two mortgages on different properties by the same mortgagor came into C.'s hand before the Registry Act of 1865, and the mortgagor, after the passing of that Act, assigned the equity of redemption to M. by a registered instrument:—Held, on M.'s suing for redemption, that the registered conveyance to M. prevailed under s. 66 of the Act, over C.'s equitable right to consolidate the two mortgages. *Miller* v. *Brown*, 3 O. R. 210.

——— *Foreclosure — Hidden Equities.*] — The rule that a mortgagee shall not be redeemed in respect of the mortgage without being redeemed also as to another mortgage created by the same mortgagor, applies as well in a suit to foreclose as to redeem. In such a case the property embraced in one mortgage realized more than sufficient to discharge it. The plaintiff, an execution creditor of the mortgagor, obtained a security on the lands comprised in such mortgage, which was registered after it, but without notice thereof. On a sale of the lands embraced in another mortgage a loss was sustained by the mortgagee:—Held, that the defendant, the mortgagee, had not the right, as against the plaintiff, to consolidate his mortgages, and make good the loss on the one out of the surplus on the other sale, the policy of the Registry Act being to give no effect to hidden equities. *Johnston* v. *Reid*, 29 Gr. 293.

See McDonald v. *McDonald*, 14 Gr. 133.

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6. Unregistered Titles.

Application of Acts.] — The Registry Acts 35 Geo. III. s. 5 and 9 Vict. c. 34 did not apply where no deed had been previously registered. *Doe d. Hennesy* v. *Myers*, 2 O. S. 424. See *Doe d. Adkins* v. *Atkinson*, 4 O. S. 140; *Doe d. Shibley* v. *Waldron*, 2 C. P. 189; *Campbell* v. *Fox*, 26 U. C. R. 631.

Effect of Priority of Registration—*Remedial Acts.*]—L. conveyed to D. in 1832, and D. to C. in 1833. Plaintiff was C.'s heir. These deeds were registered in 1833, but not in accordance with the Acts. D.'s heir, in 1857, conveyed to K., who had notice of the previous deeds, and through whom defendant claimed. K. registered his deed in 1857; and in 1866 the plaintiff had his two deeds "examined and re-entered" under 9 Vict. c. 12, 10 & 11 Vict. c. 38, passed to remedy the errors in previous registrations: — Held, that the plaintiff's title clearly must prevail, for under the then Registry Acts, as the title first became a registered one in 1857, K. gained nothing by his prior registration, and, if he had, his interest so acquired would not be protected by the remedial Acts. *Campbell* v. *Fox*, 26 U. C. R. 631.

Lost Records — *Re-registration—Priorities—Consideration.*]—A., the grantee of the Crown, conveyed to B., and B. conveyed to C. The conveyance from B. to C. was registered in the Niagara district before the war of 1812; the record of registration was burnt during the war; C.'s deed was not re-registered according to 56 Geo. III. c. 16; C. after the war conveyed to D., who did not register his deed; C. again conveyed to E., without con-

sideration, who registered; E. conveyed, for a valuable consideration, to F., who also registered:—Held, that C.'s not having registered his title in compliance with 56 Geo. III. c. 16, had not the effect of securing the title to D., by making C.'s title an unregistered title at the time of his conveyance to E. Held, also, that F. having given a valuable consideration for his deed from E., the fact that E. had given no consideration for his deed from D. would not defeat the operation of the Registry Act, 35 Geo. III. c. 5, in favour of F.'s registered title as against D.'s prior unregistered one. *Doe d. Mallock* v. *Disher*, 4 U. C. R. 14.

Necessity for Evidence of Registered Title.]—Under 35 Geo. III. c. 5, in order to postpone a prior deed on account of non-registration, evidence must be given at the trial to shew that the title was a registered one before the prior deed was given. *Accson* v. *Eastwood*, 4 U. C. R. 271.

Plaintiff sold to E. and took back a mortgage, which he neglected to register, and in the meantime E. sold to defendant, who recorded his deed first. In ejectment on the mortgage, defendant objected to the want of registry, but closed his case without having put in and proved the plaintiff's deed to E., to shew that the title was a registered one when defendant got his deed. The Judge at the trial would not allow the defence to be re-opened; and, as it appeared that defendant was aware of the mortgage when he purchased from E., and was therefore setting up a dishonest defence, the court refused to interfere. *Blakely* v. *Garrett*, 16 U. C. R. 261.

Necessity for Priority of Registration—*Tax Deed.*]—In ejectment the plaintiff claimed under a tax sale made in 1839. The sheriff's deed was made on the 10th July, 1840, but not registered until the 18th July, 1861. Defendant claimed under the heir-at-law of the patentee, by deed dated the 18th May, and registered on the 5th July, 1855, being the first deed registered upon the land:—Held, that the title being an unregistered one when the sheriff's deed was given, that deed did not then require registration to preserve its priority; that having been registered before 29 Vict. c. 24, s. 57, and 31 Vict. c. 20, s. 59 (O.), it was unnecessary to re-register under those Acts; and that the plaintiff's title must therefore prevail. *Jones* v. *Cowden*, 34 U. C. R. 345.

——— *Will.*]—13 & 14 Vict. c. 63 applies only to instruments executed after 1st January, 1851. Therefore, where a testator in 1831, by his will, created a charge upon lands, and the patent for the land issued to his devisees in 1852, who sold and conveyed the property absolutely, and registered the conveyance:—Held, that the land was subject to the charge created by the testator, although his will had not been registered. *Campbell* v. *Campbell*, 6 Gr. 609.

Unregistered Mortgage—*Redemption—Subsequent Incumbrancers.*]—A mortgagee whose mortgage was made before the registry laws required registration to insure priority, filed a bill to foreclose. The mortgage had not been registered:—Held, that subsequent mortgagees were bound to redeem him, his application being to fix a time for them to redeem; and that purchase for valuable consideration without notice could not be pleaded against him. *Vansickler* v. *Pettit*, 5 L. J. 41, 164.

Will — *Heir-at-law — Conveyance.*]—The conveyance by the heir-at-law being executed in 1833, and the title then unregistered:—Held, clearly not requisite to register the will. *Scott* v. *McLeod*, 14 U. C. R. 574.

See Dumble v. *Johnson*, 17 C. P. 9, *post* 8; *Major* v. *Reynolds*, H. T. 6 Vict., *post* 8.

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7. *Unpatented Lands.*

Application of Acts—*Purchase for Value without Notice.*]—The Registry Acts do not apply to instruments executed previously to the grant from the Crown. Where, therefore, the locatee of land executed a bond to convey, and after the issuing of the patent sold and conveyed the property to a third person, who again sold and executed a conveyance to a purchaser for value, but before either had paid his purchase money, the holder of the bond, having registered the same, filed and served a bill for specific performance:—Held, that neither vendee was in a position to plead a purchase for value without notice, and that the plaintiff was entitled to specific performance with costs. *Casey* v. *Jordan*, 5 Gr. 467.

Incumbrance.]—The only instruments executed before patent which can be registered are such as create a mortgage, lien, or incumbrance on the land. *Holland* v. *Moore*, 12 Gr. 296.

Notice of Assignment.]—Express notice of an unregistered assignment of unpatented land has the same effect as like notice of an unregistered conveyance after patent. *Goff* v. *Lister*, 13 Gr. 406, 14 Gr. 451.

See Vance v. *Cummings*, 13 Gr. 25.

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8. *Other Cases.*

Bar of Entail—*Unregistered Deed—Impeaching—Registered Title — Purchaser for Value.*]—A testator seised in fee having devised to one of three sons, "to be by him entailed to any of his issue he may think proper," with the further provision that if any of the three should die without issue, the property should "be divided equally between their successors, subject to entailment," died before the 6th March, 1834. In November, 1851, two of the sons, D. and R., by deed conveyed their estates in the land to the third son, C. This deed was not registered. C. had a child who pre-deceased him. By several deeds executed respectively in February and March, 1865, D. and his assignee in insolvency conveyed to plaintiff. Both these conveyances were duly registered:—Held, that, although the deed of November, 1851, might not, for want of registration, under C. S. C. c. 83, s. 31, have barred the entail as against their issue, it did pass the individual rights of the grantors during their lives; and that, as D., under whom alone plaintiff claimed, was still alive and could not impeach this deed, no more could the plaintiff, who took no higher interest than D. had it then in his power to transfer. Held, also, that if the title had been a registered one before 1851, of

which there was no evidence, and if plaintiff had relied on the non-registration of this deed under the general Registry Act, he would, upon proof that he was a purchaser for valuable consideration (as to which, however, the evidence was otherwise), have been entitled to succeed as to that portion of the land which D. himself could have claimed, just as if the deed of 1851 had never been executed. *Dumble v. Johnson*, 17 C. P. 9.

Completion of Title.]—A vendor does not complete his title until his deed is registered, i. e., registration is essential to the title. *Laird v. Paton*, 7 O. R. 137.

Defect in Registered Title — *Possession.*]—After 30 years' possession of land by a person to whom the owner, who was grantee of the Crown, had conveyed the property in exchange for other lands, the vendor discovered a defect in the title by reason of the non-registry of the conveyance in the proper office, and executed a deed to a person who was in possession of a portion of the property for several years under the vendee's heir. To a bill filed to set aside this conveyance, the vendor and the second vendee set up the non-heirship of the plaintiff; purchase for value without notice; and that the original vendee was a minor at the time of the exchange, and had repudiated the transaction on becoming of age; and further, that he had no title to the land conveyed in exchange. The court considered that the long possession, and the absence of proof of the facts alleged by the defendants, were sufficient to entitle the plaintiff to a decree with costs. *Harkin v. Rabidon*, 6 Gr. 405, 7 Gr. 243.

Pledge of Immovable—*Right of Retention as against Execution Creditors.*] — See *Great Eastern R. W. Co. v. Lambe*, 21 S. C. R. 451.

Priorities—*Title.*]—The registration of a deed from a person having no title, or a fraudulent title, will not give priority over a deed from a person having a good title. *Doe d. Spafford v. Breakenridge*, 1 C. P. 492.

Purchase of Pretended Title.]—In registering titles a conveyance by deed registered after a prior conveyance by deed not registered, is not a purchase of a pretended title within 32 Hen. VIII. *Major q. t. v. Reynolds*, H. T. 6 Vict.

Recital in Unregistered Agreement.]—The plaintiff proved a deed to himself from D., dated 3rd July, 1851, registered on the 7th of the same month. Defendant put in an instrument under seal, dated 3rd June, 1847, between one M. and D., reciting that differences had arisen between them, and that M. had brought ejectment to recover possession of this lot, "belonging to the said M.," and, in consideration of M. withdrawing the record, D. agreed that the lot should be valued by certain persons, and covenanted to pay to M. or secure by mortgage on the land whatever the value might be. No valuation was made:—Held, this agreement being unregistered, that the recital in it could not affect the plaintiff's title. *Ratledge v. McLean*, 12 U. C. R. 205.

Time—*Relation back.*]—The registry of a deed of bargain and sale relates back to the time the conveyance was made. *Doe d. Spafford v. Brown*, 3 O. S. 92.

II. Evidence of Registration.

Certificate of Registrar.]—Semble, that the certificate of the registrar of the discharge of the mortgage indorsed on the mortgage deed, is sufficient evidence of a reconveyance under the statute, without shewing the execution of the discharge itself. *Doe d. Crookshank v. Humberstone*, 6 O. S. 103.

The certificate of registration indorsed on a deed is conclusive of the registration, and cannot be impeached by evidence that it has been irregularly done. *Doe d. Russell v. Gillett*, M. T. 3 Vict. But see the next case.

The certificate of registration indorsed on a deed under 35 Geo. III. c. 5, s. 5, is primâ facie evidence only of the fact of registration, and not incontrovertible. *Doe d. McLean v. Manahan*, 1 U. C. R. 491.

Production of Registrar's Book.]—The production of the registrar's book in which a memorial is recorded, is good evidence of the title being a registered title; and semble, that the registrar producing an examined copy from his book, without either his book or memorial, would be good evidence. *Doe d. Prince v. Girty*, 9 U. C. R. 41.

III. Instruments Which May be Registered.

1. *Instruments Capable of Registration.*

By-law — *Plans* — "*Instrument*" — *Notice.*]—A municipal by-law, passed in 1888, providing for the opening of a road was received at the proper registry office, and the fee for registration was paid, but the by-law was never entered or registered, because it did not conform and refer to the plans filed with the registrar of the lands through which the road was opened, as required by R. S. O. 1887 c. 114, s. 84, s.-s. 2:—Held, that the by-law was an "instrument" within the meaning of that section, and as defined by s. 2, but was not an "instrument capable of registration" within the meaning of s. 96 of R. S. O. 1897 c. 136, and the registrar was right in refusing to register it; and, never having been registered, it never became "effectual in law" for any purpose; and a subsequent by-law providing for the cost of opening the road was, therefore, invalid. The requirement of the Municipal and Registry Acts (R. S. O. 1897 c. 223, s. 633, and c. 136, s. 86), that such a by-law shall be registered before it "becomes effectual in law," is not merely for the purpose of notice under the registry laws. *Re Henderson and City of Toronto*, 29 O. R. 669.

Certificate of Lis Pendens — *Subdivision of Lot.*]—The registrar was required to record a certificate of lis pendens affecting lot 16, 9th con. of Erin, and lots 14 and 15, 10th con. of the same township, which he refused to do, as the west halves of lots 14 and 15 had been laid out into village lots according to a plan filed in his office. On application for a mandamus:—Held, that so far as regarded the west halves he was right, for by 29 Vict. c. 24, s. 73, the certificate should shew the village lots affected. The point being new, and there being no difficulty in recording the certificate against lot 16, the rule for a mandamus was discharged without

costs. *In re Thompson and Registrar of County of Wellington*, 25 U. C. R. 237.

Charge—*Letter.*]—A letter in the following form, "I agree to charge the east half of lot number nineteen . . with the payment of the two mortgages . . amounting to $750 . . and I agree on demand to execute proper mortgages of said land to carry out this agreement or to pay off the said mortgages," is not a mere executory agreement, but operates as a present charge in favour of the mortgagees named, upon the lands described, and may be registered against them. *Hoofstetter* v. *Rooker*, 22 A. R. 175. Affirmed by the supreme court of Canada, 26 S. C. R. 41.

——— *Mutual Fire Insurance Company—Notice.*]—By s. 67 of C. S. U. C. c. 52, all the right or estate of any party effecting an insurance with a mutual insurance company, in the property insured, at the time of effecting the same, is subjected to all claims against the insured under such insurance; and a purchaser, taking a conveyance from the assured, will take subject to the charge of the company, although without notice; and so although such charge does not appear on the registry affecting the property, the registry laws not providing for the registration of such charge. *Montgomery* v. *Gore District Mutual Ins. Co.*, 10 Gr. 501.

Conveyance Affecting Lands.] — 13 & 14 Vict. c. 63 is not confined to regular legal conveyances, but embraces every species of conveyances by which lands are in any way affected in law or in equity. *McMaster* v. *Phipps*, 5 Gr. 253.

Deed without Description.] — Quære, whether a deed of land not specifying any particular lot by description is capable of registration. *Russell* v. *Russell*, 28 Gr. 419.

Sheriff's Act and Warrant — *Bankruptcy.*]—In September, 1860, by the "act and warrant" (under Imperial Act 19 & 20 Vict. c. 79) of the sheriff depute of Lanarkshire, in Scotland, all the real and personal estate of R. M. & Co. in Canada, as well as in Scotland, became vested in R., under the bankruptcy laws of that country, as trustee: —Held, that this "act and warrant," though containing no attestation clause, without a witness to its execution, and specifying no lands in Upper Canada, was capable of registration. Held, further, that the transferee of real estate in general terms must, at his peril, register the instrument under which he claims, in the city, town, township, or place in which the land lies. *Robson* v. *Carpenter*, 11 Gr. 293.

Sheriff's Deed—*Subdivision of Lot.*]—Although portions of township lots have been laid off into village lots, this forms no objection to an undivided interest in the township lots, as originally described, being sold under execution; and the purchaser at sheriff's sale is entitled to hold the interest acquired under such sale, notwithstanding that the sheriff's deeds, so far as they concern the village lots, do not comply with the provisions of the Registry Acts of 1846 (9 Vict. c. 34) and 1868 (31 Vict. c. 20 (O.)), the latter of which prohibits the registration of deeds of any portions of lots so laid out, unless they conform to the plan of the property registered under such Act. *Rathbun* v. *Culbertson*, 22 Gr. 465.

See Harrison v. *Armour*, 11 Gr. 303; *Ontario Industrial Loan and Investment Co.* v. *Lindsey*, 3 O. R. 66.

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2. *Leases—Necessity for Registration.*

[*See* R. S. O. 1877 c. 111, s. 37; R. S. O. 1897 c. 136, s. 39.]

Covenant for Renewal — *Priorities —Mortgage.*]—A lease for four years, with covenant for renewing for four years more: —Held, not to require registration, actual possession having gone along with the lease; and such a lease, though not registered, was held valid as respects the covenanted renewal as between the lessee and subsequent mortgagees of the lessor. *Latch* v. *Bright*, 16 Gr. 653.

——— *Unnecessary Registration — Effect of.*]—A. leased to B. and C. for fourteen years, giving a covenant to renew at the end of that time for a similar term, unless he should choose to pay for the improvements. This lease was registered. The lessees then assigned part of the premises, and the assignee did not register. C. devised his interest to B., who subsequently mortgaged the whole premises to the plaintiffs; this mortgage was registered:—Held, that the covenant for renewal did not extend the term so as to bring the lease within 9 Vict. c. 34; that the unnecessary registration of it did not make it requisite to register the assignment; and therefore that the mortgage to the plaintiffs could not affect the premises assigned. *Doe d. Kingston Building Society* v. *Rainsford*, 10 U. C. R. 236.

Prior Possession — *Priorities — Mortgage.*]—In ejectment the plaintiff claimed through a mortgage from B., dated 31st May, and registered 3rd June, 1864. Defendant had held a lease from B. for five years from 18th April, 1861, and while it was current, before the execution of the mortgage, he obtained another lease for four years from 18th April, 1866. Neither lease was registered, but defendant, who had continued in possession, claimed to hold it under the latter, as being a lease for less than twenty-one years "where the actual possession goeth along with the lease," and therefore not requiring registration under C. S. U. C. c. 89, s. 45:—Held, however, that the exception in the clause extends only to unregistered leases, under which the tenants had actual possession at the execution of the conveyance, which, being registered, would prevail but for such exception; and that, as the defendant was then in possession under the first lease only, the second, being unregistered, had lost its priority. *Davidson* v. *McKay*, 26 U. C. R. 306.

IV. MANNER OF REGISTERING.

Discharge of Mortgage—*Number.*]—A discharge of mortgage referred to the mortgage as 5,764, whereas it was registered as 5,764 C. W.:—Held, that it was, nevertheless, a valid discharge properly registered. The Registry Act, though requiring every instrument to be numbered, says nothing about adding letters, which appear to be only arbitrary marks adopted by the official for convenience of reference. *Re Clarke and Chamberlain*, 18 O. R. 270.

Mortgage — *Certificate of Registry.*]—A registrar indorsed on a mortgage sent to him for registration: "No. 44,322, purporting to be a duplicate hereof, was recorded" at, &c., on, &c.:—Held, clearly not a compliance with 29 Vict. c. 24, s. 53, under which the registrar must examine the instruments and certify without qualification the facts which he is required to state. *In re Bradshaw and Registrar of County of Simcoe*, 26 U. C. R. 464.

——— *Proviso — Memorial.*]—It was not necessary, under 35 Geo. III. c. 5, in the memorial of a mortgage to notice the proviso for redemption. *Hamilton* v. *Lyons*, 5 O. S. 573.

V. Proof for and Defects in Registration.

[See R. S. O. 1877 c. 111, ss. 41, 78, 87, 90; R. S. O. 1897 c. 136, ss. 44, 92, 114, 117.]

Addition of Witness — *Omission.*] — Held, under 9 Vict. c. 34, that registry in accordance with the Act was imperative; and a deed registered upon a memorial in which the addition of the witness to the deed was omitted, was therefore held fraudulent and void as against a subsequent mortgagee. *Robson* v. *Waddell* 24 U. C. R. 574. [See 36 Vict. c. 17 (O.)]

Affidavit of Execution.]—The registrar having recorded a certificate of discharge, upon an affidavit which did not state the place of execution, as required by the statute:—Held, that though he should properly have refused to register it, yet being registered it was effectual as a reconveyance of the legal estate to the mortgagor. Robson v. Waddell, 24 U. C. R. 574, distinguished, on the ground that there the defect was patent on the face of the registry book where the memorial was copied. *Magrath* v. *Todd*, 26 U. C. R. 87.

Under 9 Vict. c. 34, s. 7, the execution of deeds within the county, as well as without, might be proved by affidavits sworn before a commissioner. *In re Registrar of County of York*, 3 U. C. R. 188.

Held, sufficient for the witness's affidavit, proving execution of the deed and memorial, to state that "he had seen the due execution of the deed." *Reid* v. *Whitehead*, 10 Gr. 446.

One of the witnesses swore to the affidavit proving the execution of the memorial before the other witness:—Held, no objection. *Ib.*

——— *Informality.*]—The solicitor of the mortgagee wrote a memorandum of charge on one of his letter forms, under the printed words "Dear Sir," his own name being at the bottom on the left side, and he made an affidavit, as subscribing witness, to have it registered. The memorandum was signed by the owner. It was contended that the solicitor was not a subscribing witness, but only the person to whom the letter was addressed:—Held, affirming the judgment in 22 A. R. 175, that the solicitor signed the agreement as a witness, and the registration was, therefore, regular, but if not, as the document was upon the registry, the subsequent purchaser had actual notice by which he was bound, notwithstanding the informality in the proof of execution, which did not make the registration a nullity. *Rooker* v. *Hoofstetter*, 26 S. C. R. 41.

Curing Defects—*Omissions—Statute.*]—The absence of the residence and occupation of the subscribing witness to a certificate of discharge of mortgage, on the face of the certificate, though stated in the affidavit:—Held, clearly no objection, being cured by 36 Vict. c. 17, s. 8 (O.) *Stoddart* v. *Stoddart*, 39 U. C. R. 203.

——— *Re-entry — Statutes — Retroactivity.*]—Plaintiffs claimed certain land in the county of Hastings through A., whose ancestor in 1833 took by conveyance from B., who took by conveyance from the patentee. These two conveyances were defectively registered. Defendant claimed through the purchaser from the heir-at-law of B., whose deed was registered, as also that from the patentee to B. in 1857:—Held, that plaintiff's title, if considered unregistered, must prevail, but if defectively registered, such defect was removed by subsequent re-entry of the deeds under 9 Vict. c. 12 and 10 & 11 Vict. c. 38, relating to this county; that this was retroactive; and the plaintiffs had therefore a good registered title. *Campbell* v. *Fox*, 17 C. P. 542. See S. C., 26 U. C. R. 631.

——— *Statute—Notice.*]—Execution of a document creating a further charge was proved by affidavit, and attached to it, but without any proof of execution, were the agreement by the attorney to pay the charge and a transfer by the chargee to the plaintiff of the charge, and all the documents were accepted by the registrar and registered:—Held, affirming the judgment in 27 O. R. 511, that the defect in registration was cured by s. 80 of the Registry Act, R. S. O. 1887 c. 114, and that the attorney, who subsequently became the purchaser of the lands in question, was affected with notice of the plaintiff's rights. *Armstrong* v. *Lye*, 24 A. R. 543.

Declaration of Execution.]—The court refused a mandamus to register a deed on a declaration of its execution made in England under 5 & 6 Wm. IV. c. 62, substituting declarations for oaths. *In re Lyons*, 6 O. S. 627.

Description of Land — *Insufficiency—Memorial.*]—A subsequent mortgagee, who had not actual notice:—Held, not bound by the registration of a prior mortgage, the memorial of which insufficiently described the premises. A memorial described the land in the same words as the deed, which, however, did not sufficiently identify the premises, and concluded with a reference to a mortgage not imported into the memorial:—Held, insufficient. *Reid* v. *Whitehead*, 10 Gr. 446.

Held, reversing the above judgment, that when the memorial follows the description in the deed, the deed itself being operative, the registration is effectual. *S. C.*, 2 E. & A. 580.

Description of Parties.]—The grantors in the memorial were described as "of the city of London," and one witness described as "of London:"—Held, sufficient. *Reid* v. *Whitehead*, 10 Gr. 446.

Error in Date—*Memorial.*]—A mortgage and memorial were executed on the 26th February, 1855, but by a clerical error the date in the mortgage was written as 1851. The memorial stated the date of the mortgage as 1855:—Held, registration good. *Harty* v. *Appleby*, 19 Gr. 205.

Mandamus to Witness.]—A mandamus will lie to compel a witness to prove the execution of a deed and memorial for registry. *Regina* v. *O'Meara*, 15 U. C. R. 201.

Omission in Abstract Book—*Effect of.*]—The plaintiff claimed lot 25 under a deed from the heirs-at-law of S., the patentee, executed in 1875. Defendants claimed under a deed from S., dated and registered in 1867, but the registrar had omitted to enter defendants' deed in the abstract index, and, in consequence, when the plaintiff inquired at the registry office before taking his deed, he was told that the patentee had made no conveyance:—Held, under 29 Vict. c. 24, that the registrar's omission did not invalidate the registration, or deprive defendants' deed of its priority. *Lawrie* v. *Rathbun*, 38 U. C. R. 255.

Omission of Name—*Effect of.*]—The omission in the memorial of the Christian name of the mortgagee's wife, who executed to bar dower, vitiated the registration. *Boucher* v. *Smith*, 9 Gr. 347.

Sheriff's Certificate—*Informalities.*]—The sheriff's certificate on which the deed was registered, though dated 10th July, 1840, had written on it, in the handwriting of R., who was sheriff in 1840, but had gone out of office before 1861, "Duplicate 1861," and in it the sheriff was described as sheriff of the United counties of N. and D., which were not united until 1850:—Held, that these informalities were insufficient to avoid the registration. *Jones* v. *Cowden*, 34 U. C. R. 345.

Signature after Registration.]—Registration of a mortgage held not to be invalidated by the mortgagee signing it, and the witness to it subscribing his name to it, after it had been registered. *Muir* v. *Dunnett*, 11 Gr. 85.

See Beattie v. *Mutton*, 14 Gr. 686.

VI. Registrars and Deputies.

1. *Duties, Omissions, and Liabilities of.*

Abstract of—*Form of.*]—Upon application to a registrar for an abstract of registries on a lot of land, he gave a list of deeds affecting the lot, adding, "I hereby certify that the above conveyances appear of record:"—Held, that such abstract was not a compliance with C. S. U. C. c. 89, s. 67, it not being certified to shew all the registrations which were on record in the office upon the lot; and a mandamus was granted for a proper certificate. *In re Registrar of County of Carleton*, 12 C. P. 225.

Abstract—*Omission of Indorsement—Notice—Damages.*]—A registrar gave to an intending purchaser an abstract of title, which by mistake omitted an outstanding mortgage:—Held, that the purchaser, who had notice of the omitted mortgage, could not claim against the registrar in respect of payments made after such notice; and the registrar, who on finding his mistake had bought the outstanding mortgage, was held entitled to foreclose the same. *Brega* v. *Dickey*, 16 Gr. 494. *See Lawrie* v. *Rathbun*, 38 U. C. R. 255.

——— *Omission of Indorsement—Notice of Action—Limitation—Damages—Costs.*]—A registrar, being applied to by the plaintiff for a certificate of the registries on a lot, gave one in which he omitted to mention a mortgage for $600, prior to that which the plaintiff purchased, supposing it, from the certificate, to be a first incumbrance. The first mortgagee obtained a decree for sale, and the plaintiff purchased the land at less than what would satisfy the two mortgages, but he soon afterwards sold at a considerable advance, so that in the end he would receive all that he had paid for his mortgage. In an action against the registrar for this omission, the jury gave $500 damages:—Held, that the registrar was not entitled to notice of action, and that the six months' limitation clause did not apply, for, though an officer within the meaning of C. S. U. C. c. 126, this was not an act committed but a negligent omission. Held, also, that the damages were moderate, the plaintiff having in fact sustained loss to the full amount of the first mortgage. The plaintiff, having been made a party to a suit in chancery on the first mortgage, endeavoured to obtain priority, but failed in his defence, and was compelled to pay costs. Whether these costs could be recovered from the registrar was a point raised, but not decided, as it was uncertain whether they were included in the verdict. *Harrison* v. *Brega*, 20 U. C. R. 324.

Abstract Index—*Omission of Instrument—Damages.*]—A will relating to certain land, though registered, was not entered on the abstract index, whereby the plaintiff alleged that he was damnified in purchasing a mortgage on the land, the mortgagor having no title. The mortgage was first purchased by S., a solicitor, for himself, and the assignment of it made to the plaintiff, for whom he was accustomed to act, and to whom he afterwards sold. S. was not retained by plaintiff to search the title for him; it was not searched when he sold to the plaintiff; and the Judge before whom the case was tried held that he relied on the supposed title acquired by the mortgagor by possession:—Held, that the plaintiff could not claim that he was damnified by defendant's omission; and that he could found no action on the search made by S. *Green* v. *Ponton*, 8 O. R. 471.

Deputy—*Profits of Conveyancing—Fees.*]—A deputy registrar did business for many years as a conveyancer, for his own benefit, with the knowledge of the registrar, and without objection by him:—Held, that the registrar could not afterwards claim the profits. The deputy was said to have searched a title for certain persons, and not to have given to the registrar credit for the search, or made any charge for it to these persons. The registrar not appearing to have been aware of this practice, the deputy was held chargeable with the ordinary search fee, as the registrar's share of the transaction. It was said that the deputy had not charged other persons with all the fees which the law allowed; but the court considered him not liable to the registrar for these fees, where the omission to make the charge was not in view of any personal advantage to the deputy himself. The Statute of Limitations was held to be no bar to the claims of the principal in respect of these and other transactions between them. *Smith* v. *Redford*, 19 Gr. 274.

Indictment for Misdemeanour—*Joint Offence—Deputy.*]—An indictment charging a misdemeanour against a registrar and his

deputy jointly, is good, if the facts establish a joint offence. A deputy is liable to be indicted while the principal legally holds the office, and even after the deputy himself has been dismissed from office. *Regina* v. *Benjamin*, 4 C. P. 179.

Search by Stranger — *Inspection of Books.*]—A registrar is not obliged to place his books and indices in the hands of any person desiring to make a search, but may do so in his discretion, and on his own responsibility. In this case one W. desired to ascertain the judgments recorded against Y., and the registrar gave him the number of certain judgments, which he said were all that related to Y., and offered to shew him the corresponding certificates, but he refused to allow him to inspect the index or the registry book of judgments:—Held, that he was justified in such refusal. *In re Webster and Registrar of Brant*, 18 U. C. R. 87.

The registrar is the person by whom all searches are to be made. A person inquiring into the state of a title has no right to make searches and inspect the registry books, but he may require the registrar to make the searches and produce the instruments and books of the office relating thereto for his inspection. Semble, that under s. 20 the registrar is bound to exhibit the abstract index when required to do so. *Ross* v. *McLay*, 26 C. P. 190.

Treble Damages—*Conviction.*] — An action cannot be brought against a registrar for treble damages, under 35 Geo. III. c. 5, s. 10, until he has been convicted under that section of some offence for which he shall forfeit his office. *Hamilton* v. *Lyons*, 5 O. S. 503.

Wrongful Registration — *Action for Removal — Parties.*] — S., believing that his father (still living, but of unsound mind) was entitled to certain lands to which the plaintiffs claimed title, took the advice of his solicitor, C., who, being advised by counsel instructed by S., prepared and registered an instrument, whereby he, S., stated that he claimed the lands, and would, upon the demise of his father, commence proceedings for their recovery. The plaintiffs were thus obstructed in the sale of their lands, and brought an action against S., C., and the registrar, to remove the instrument from the register, as being a cloud on the title, and for damages. At the trial the action was dismissed as against the registrar, but judgment granted with a reference to assess damages, against S. and C. (4 O. R. 473):—Held, that the Registry Act did not authorize the registration of such an instrument; and that an action would lie for its removal. The act of registration was a wrongful one, and all parties concerned in it were responsible to the plaintiffs, and the registrar was therefore a proper party. *Ontario Industrial Loan and Investment Co.* v. *Lindsey*, 3 O. R. 66.

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2. *Fees.*

The fees to be taken by registrars were regulated by R. S. O. 1877 c. 111, ss. 92, 105; R. S. O. 1897 c. 136, ss. 118, 131. For the decisions as to such fees under 9 Vict. c. 34 and C. S. U. C. c. 80, see *Keele* v. *Ridout*, 5 U. C. R. 240; *Smith* v. *Ridout*, 5 U. C. R. 617; *Hope* v. *Ferguson*, 17 U. C. R. 219; *McDonald* v. *Bell*, 21 U. C. R. 33; *In re Lount*, 11 C. P. 97.

(a) *For Particular Services.*

Abstract—*Copy of Index.*]—Where an abstract of title to a lot is applied for, and the registrar furnishes only a copy of the abstract index, making no search or reference to the registrations:—Held, that he can charge only as for such copy, namely, 25 cents for the first 100 words and 15 cents for each subsequent 100. *Ross* v. *McLay*, 26 C. P. 190.

The registrar charged $2.05 for an abstract of five folios—i. e., $1.20 for searches, the remainder being for copying at the usual rate:—Held, that the registrar was entitled to those fees, though he only copied it from the index. A registrar when preparing an abstract is not bound to rely on the correctness of the abstract index, but may properly test its correctness by making all searches necessary for the preparation of the abstract: he may rely, however, on the index if he thinks proper, and charge the same fees as for searches. But if he gives a certified copy of the abstract index only, he can charge no more than the rate per folio. *MacNamara* v. *McLay*, 8 A. R. 319.

——— *Searches.*] — A registrar's abstract having been demanded of all instruments registered upon two township lots comprised in a certain mortgage:—Held, that the registrar was entitled to charge $2 on each general search of the township lots and twenty-five cents for the first hundred words and fifteen cents for each additional hundred words of the abstract, as provided in R. S. O. 1887 c. 114, s. 95, s.-ss. 2 and 4; but the fact that the lots had, subsequently to the mortgage, been subdivided by the mortgagors, without the assent of the mortgagee, into a number of lots upon registered plans, did not, under s.-s. 2, justify him in charging also as for a separate search on each of the lots as shewn on the said plans. *Morse* v. *Lamb*, 23 O. R. 167. Reversed by a divisional court, 23 O. R. 608.

Registration of Deeds—*Special Tariff—Extra Covenants.*]—By 10 Vict. c. 109, the registrar was entitled to receive only 2s. 6d. from defendants for registering deeds made to them in the form given by the Act. In 1865 the registry law was changed, and deeds were required to be registered in full, instead of by memorial, as before. In 1873 and 1874 defendants brought for registration deeds made to them, which contained covenants for title not in the statutory form:—Held, that for such deeds the registrar was entitled to charge his full fees, and was not restricted to the 2s. 6d. *Ward* v. *Midland R. W. Co.*, 35 U. C. R. 120.

Search of Abstract Index.] — Semble, that under s. 20 of 31 Vict. c. 20 (O.), the registrar is bound to exhibit the abstract index when required to do so, and the fee for so doing, including reference to four of the registered instruments therein referred to, is 25 cents. Where such abstract index, containing thirty-one entries, was shewn to an applicant, who looked at the same, and on request was shewn four of the registrations in it:—Held, that the registrar could only charge 25 cents, and not as for a search on

each of such thirty-one entries. *Ross* v. *McLay*, 26 C. P. 390.

——— *Recovery of Fee Paid.*]—In an action brought against a county registrar to recover back alleged overcharges, it was shewn that the plaintiff had called upon the registrar to search the books and indexes in his office, and inform him of the persons named as grantees in the last executed deed of a certain lot; and also what incumbrances there were registered against it. There were twenty-eight entries on the abstract index, and the registrar charged for these services $1.45, being at the rate of twenty-five cents for the first four entries, and five cents for each of the other entries. Quære, whether the registrar was bound to do, or could recover for doing, what the plaintiff required of him. Held, that, as he had done it, the charge which the plaintiff had paid, and which was reasonable on the principle of the tariff, could not be recovered back. The registrar was required to produce the abstract index of a lot, which contained 180 entries, and he insisted on being paid $2 as for a general search, the plaintiff offering to pay twenty-five cents:—Held, that the registrar had charged $1.75 too much. *Macnamara* v. *McLay*, 8 A. R. 319.

Search of General Index—*Instrument.*]—The plaintiff asked to examine an original conveyance in the registry office, informing the officer of the names of the parties thereto and the lands affected thereby, but did not tell him the number of the conveyance. The registrar examined the index, for which he charged twenty-five cents, and ten cents for producing the document:—Held, to be proper charges. *Macnamara* v. *McLay*, 8 A. R. 319.

Search of Plan—*Abstract Index.*]—The plaintiff told the registrar that one A. owned a lot in the township of B., but was ignorant as to the number of the lot, and asked the registrar to tell him what incumbrances there were against it, which the registrar did, and charged for those services twenty-five cents for ascertaining the number of the lot, and twenty-five cents for searching for the incumbrances:—Held, that both were proper charges. *Macnamara* v. *McLay*, 8 A. R. 319.

——— *Charge by Lots.*]—The plans filed in the registry office of the city of Toronto were exhibited to two assessors of the city assessment department, who used them in order to check, for assessment purposes, the dimensions of the various lots shewn on them:—Held, that the registrar was not entitled to charge as for a search on each lot shewn on such plans. Quære, whether, unless a plan is an original registered instrument under 31 Vict. c. 20, s. 70, s.-s. 11, any fee is chargeable. In this case the charge of ten cents for exhibiting each plan was not objected to. *Lindsey* v. *City of Toronto*, 25 C. P. 335.

Search of Registered Instrument.]—On an application at a registry office to search as to the registration of a deed, the applicant gave the names of the party to the deed and the lot described therein, and was shewn the original registered instrument:—Held, that there was a sufficient description given to enable the registrar to find the required deed without giving the number of the registration, and that under 31 Vict. c. 20, s. 70, s.-s. 11, the fee for exhibiting such original instrument was only 10 cents. *Ross* v. *McLay*, 26 C. P. 390.

See Smith v. *Redford*, 19 Gr. 274.

See, also, *post* VII.

(b) *Proportion Payable to Municipality.*

Construction of R. S. O. 1877 c. 111, s. 98.]—Held, that, on the proper construction of s. 98 of R. S. O. 1877 c. 111, each registrar is bound to account to the county as therein mentioned only after he has first received the sum of $2,500, and not before, and this whether there be successive holders of the position in any one year or not. The Act, being in derogation of the rights of registrars as they previously existed under the common law, must be construed strictly. *Re Ingersoll, Gray* v. *Ingersoll*, 16 O. R. 194.

Dismissal during Year.]—Where a registrar of deeds was dismissed before the expiration of the year, having received in fees an amount in excess of that specified in the statute (R. S. O. 1877 c. 111, s. 104):—Held, affirming the judgment in 3 O. R. 23, that he was bound to return and pay over to the treasurer of the municipality a proportionate amount of such excess, although not in office at the time prescribed by the statute for making his return; but, semble, that the treasurer could not maintain an action for such fees before the 15th January, the day named in the Act for the registrar sending in his return. Held, also, that the defendant was not entitled to notice of action. *County of Bruce* v. *McLay*, 11 A. R. 477.

Liability of Sureties for.]—Action upon a bond of the defendants as sureties for a registrar of deeds, dated 8th January, 1886, to recover the portion of fees received by him which he should have paid to the plaintiffs under the Registry Act, R. S. O. 1887 c. 114, s. 107. The bond was in the form prescribed by schedule A. of the Act, and was conditioned for the performance of the duties of the registrar's office and against neglect or wilful misconduct in office to the damage of any person or persons. The form was prescribed before the introduction of the provisions now contained in s. 107 of the Registry Act, which by s. 13 makes provision for the giving of special security for the payment of moneys under s. 107:—Held, that, the bond being in the form prescribed by the Act in force prior to the introduction of the provisions giving the municipalities a share in the fees, the sureties were not liable for the non-payment over of the municipality's share of the fees. Decision in 19 O. R. 349 affirmed. *County of Middlesex* v. *Smallman*, 20 O. R. 487.

Powers of Provincial Legislature.]—The plaintiffs sued the defendant for the proportion of fees received by the defendant as registrar, to which they were entitled under R. S. O. 1877 c. 111, ss. 98-103. The defendant demurred to the declaration on the ground that these sections were ultra vires the provincial legislature, as they imposed an indirect tax, and not a tax for raising a revenue for provincial purposes:—Held, that having received the money in question under the above Act, the defendant could not deny that he re-

ceived it for the purposes therein provided. Held, also, that if a tax at all, it was clearly a direct tax, and intra vires. *County of Hastings* v. *Ponton*, 5 A. R. 543.

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3. *Notice of Action.*

Fees—*Neglect to Furnish Statement—Excessive Fees.*]—Held, that a registrar was not entitled to notice of an action against him for neglecting and refusing to furnish a statement in detail of fees charged by him, as required by 38 Vict. c. 15, s. 7 (O.), and for a mandamus; such neglect and refusal being an act of omission. *Ross* v. *McLay*, 40 U. C. R. 83.

A registrar is entitled to notice of an action to recover back fees charged by him in excess of those allowed by 31 Vict. c. 20 (O.) *S. C., ib.* 87.

See Ontario Industrial L. and I. Co. v. *Lindsey*, 3 O. R. 66; *County of Bruce* v. *McLay*, 11 A. R. 477; *Harrison* v. *Brega*, 20 U. C. R. 324.

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4. *Tenure of Office.*

[By R. S. O. 1877 c. 111, s. 7 (R. S. O. 1897 c. 136, s. 11), every registrar heretofore appointed or hereafter to be appointed, holds office during pleasure only.]

Quo Warranto—*Action for Fees.*]—A quo warranto information was refused to try the right to the office of registrar, and the applicant left to his action for the fees against the alleged intruder. *In re Hammond and McLay*, 24 U. C. R. 56.

Removal—*Misconduct—Appointment during Pleasure.*]—Plaintiff in 1859 was appointed registrar, under 9 Vict. c. 34, which authorized the governor in general terms to appoint, saying nothing as to tenure, but providing for removal in certain events, to be proved in a specified manner. His commission expressed the appointment to be during pleasure, and in 1864 he was removed and defendant appointed, the admitted cause of such removal being plaintiff's alleged misconduct as returning officer at an election. The court of Queen's bench held that the plaintiff could be removed only for the reasons and in the manner pointed out by the statute; that the words "during pleasure" in his commission could not deprive him of his statutory rights; and that 29 Vict. c. 24, by which every registrar then in office was continued therein, would not confirm defendant's appointment, if illegal. Held, reversing the judgment, that the office being one to which at common law the appointment might be during pleasure, and the statute not providing expressly for the tenure, the plaintiff's appointment during pleasure and his removal were valid. (2) That if the office was one of freehold, then the grant of it during pleasure was void, and the plaintiff was never appointed. *Hammond* v. *McLay*, 28 U. C. R. 463, 26 U. C. R. 434.

VII. Registry Offices and Books.

1. *Books of Office.*

Alteration of Registration Divisions.]—When a separate registry office is established in a city or town, the books which have been kept for it must be delivered to the registrar, although memorials relating to land without the city have been improperly entered in such books. *In re Registrar of London and Registrar of Middlesex*, 17 U. C. R. 382.

Where the plaintiff, the registrar of the county of F., after the city of K. was separated therefrom for registration purposes, furnished to the registrar for the city a statement of titles to land before separate books were kept for the city:—Held, that the plaintiff was not bound to furnish the matter he had supplied, and that defendants were not obliged to pay for it, this being a casus omissus from C. S. U. C. c. 89. *Durand* v. *City of Kingston*, 14 C. P. 439.

Under the Registry and Municipal Acts, 29 Vict. c. 24, and 29 & 30 Vict. c. 51:—Held, that the counties of York and Peel were jointly liable to the registrar of Peel for services rendered by him, under ss. 26 and 33 of the Registry Act, before the separation of these counties. Held, that s. 70 of the Registry Act, authorizing the inspector to certify the amount, made the general averment in the declaration of services rendered sufficient. *Campbell* v. *Counties of York and Peel*, 26 U. C. R. 635. Affirmed, 27 U. C. R. 138.

Held, that a demand of payment on the treasurer of the counties and refusal by him were sufficiently shewn by the evidence in this case; and that the inspector's certificate under s. 70, though given after the separation, was sufficient, it not being a condition precedent to the right of action on such refusal. Held, also, no objection that the memorials copied by the plaintiff had been received by his predecessor, not by himself. *S. C.*, 27 U. C. R. 138.

Delivery up to Claimant of Office—*Mandamus.*]—The affidavits stated that M., who claimed the office of registrar, obtained a mandamus nisi directed to H., to deliver up to him the books and papers; that he went to the office with two constables in H.'s absence, and demanded them of his wife, reading what purported to be a peremptory mandamus as his authority, but refusing to allow her or her solicitor to examine it; and that they then took away the books, &c. Upon these affidavits the court granted a rule nisi for an attachment against M., but refused it against the constables, there being nothing to shew that they were aware of the fraud. A rule for an order on M. to return the books, &c., thus obtained, was refused, as H. might bring trespass, claiming a mandamus in the action; and when full redress can be had by an ordinary suit, applications for summary remedies should not be encouraged. A writ of replevin had previously been refused. *In re McLay*, 24 U. C. R. 54.

Payment for Books—*Liability of County Council.*]—A., the registrar of Kent, applied to G., the registrar of Huron, to order books for his office; G. ordered two books from the plaintiff in A.'s name, and these were charged to A.; three others were afterwards furnished, which the plaintiff charged in his books to the county of Kent, for Mr. A.:—Held, that the plaintiff, under 16 Vict. c. 157, s. 3, had no right of action against the county council. *Read* v. *County of Kent*, 13 U. C. R. 572.

2. *Office Buildings.*

Obligation of Municipality to Provide.]—The county of Northumberland having been on the 1st December, 1859, divided for registry purposes, and the county council having for eighteen months neglected to provide offices, vaults, &c., for the safe keeping of the books, &c.:—Held, that s. 3 of C. S. U. C. c. 89 is declaratory of s. 19 of 9 Geo. IV. c. 34, and governed cases before the passing thereof; and that defendants were under said Act obliged to furnish offices, vaults, &c. *Regina* v. *Counties of Northumberland and Durham*, 10 C. P. 526.

C. S. U. C. c. 89 makes it the duty of the county council to erect fire proof offices and vaults for the registry office of the county. The defendants having neglected so to do:—Held, that the plaintiff, the registrar of the county, having furnished the requisite vaults and offices, could not sue the county council for the rent of the same; but that his remedy was to compel the council by the aid of the court to furnish such offices, &c. *Ward* v. *Counties of Northumberland and Durham*, 12 C. P. 54.

Removal of.]—The power with respect to the removal of registry offices, given to the district councils by 9 Vict. c. 34, was by 12 Vict. cc. 78, 81, vested in county councils. *Fraser* v. *Counties of Stormont, Dundas, and Glengarry*, 10 U. C. R. 286.

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VIII. Miscellaneous Cases.

Decree — *Registration of* — *Reversal* — *Lien.*]—A decree made on further directions was registered against the lands of the defendants. Subsequently the original decree was reversed on rehearing. The order then made did not specifically reverse the decree on further directions. Upon an application to discharge the lien created by the registration:—Held, that the order reversing the original decree destroyed the lien, but that the court could not make an order directly affecting it. *Graham* v. *Chalmers*, 2 C. L. J. 269.

Enrolment — *Dispensing with* — *Retroactivity of Statute.*]—4 Wm. IV. c. 1, s. 47, which dispenses with enrolment or registration of a deed of bargain and sale for the mere purpose of passing the land, applies to such deeds executed before as well as since the passing of that statute. *Doe d. Loucks* v. *Fisher*, 2 U. C. R. 470; *Rogers* v. *Barnum*, 5 O. S. 252. See, also, *Doe d. Adkins* v. *Atkinson*, 4 O. S. 140.

——— *9 Geo. II. c. 36.*]—Held, following the series of authorities from Doe d. Anderson v. Todd, 2 U. C. R. 82, down to Davidson v. Boomer, 15 Gr. 218, that 9 Geo. II. c. 36, is in force in this Province, but that enrolment in chancery is not necessary to validate a deed in other respects executed in compliance with that Act. *Hambly* v. *Fuller*, 22 C. P. 141.

Evidence of Title — *Registration by Vendor.*]—In case of a registered title, a purchaser is in this country entitled to require the registration by his vendor of all the instruments through which his title is derived. *Brady* v. *Walls*, 17 Gr. 699. See, also, *Laird* v. *Paton*, 7 O. R. 137.

——— *Registrar's Certificate.*]—A certificate purporting to shew the registered conveyances of land from the county registrar's office, under the hand of the deputy registrar:—Held, not admissible evidence of the title under 13 & 14 Vict. c. 19, s. 4. *Gamble* v. *McKay*, 7 C. P. 319.

——— *Unregistered Deed.*]—Held, that the title in this case, being a registered one, had not been deduced, inasmuch as one of the deeds in its chain was not upon registry. *Ketchen* v. *Murray*, 16 C. P. 69.

Judgment—*Registration against Vendee* —*Rescission.*]—Where judgments are registered against the vendee of lands prior to the conveyances being executed in pursuance of the contract, the vendor is not entitled to a rescission of the contract in default of payment, but may obtain a decree of foreclosure or sale. *Galt* v. *Bush*, 8 Gr. 360.

Loss of Unregistered Duplicate Mortgage — *Payment—Protection — Discharge.*]—Action by the plaintiff, administrator of M., against defendant, on his covenant in a registered mortgage to pay M. the amount due thereon. Plea, on equitable grounds, in substance, that the plaintiff told defendant before the instalment sued for fell due that he could not find the mortgage, and defendant then informed him that he would be prepared to pay when it fell due; that when he received notice of this action he notified the plaintiff's attorneys that he was prepared to pay on production of the duplicate copy of the mortgage, which was held by M., or on proof of the loss; and that he was and is so prepared; but the plaintiff refused to shew said copy or furnish any proof of the loss. The plea also averred that the testator had made a will, and appointed certain persons executors, who had possession of the will; and defendant submitted that he was entitled to such duplicate or proof of loss, and alleged that he was prepared to pay or deposit the money as the court should direct, to be paid over to plaintiff on such production or proof:—Held, plea bad, for it must be assumed that the mortgage was recorded at length; no assignment either directly or by deposit was averred; and under the Registry Act defendant would be fully protected on payment of the mortgage and recording the discharge; and the alleged will was not said to be valid or existing. *Macauley* v. *Boyle*, 25 C. P. 239.

Mortgage by Purchaser — *Fees for Registration.*]—A purchaser who to secure a balance of purchase money has given a mortgage to the court, must pay the fees for registration of his mortgage. *Sweetnam* v. *Sweetnam*, 6 P. R. 83.

Plan—*Amendment—Closing up Streets— R. S. O. 1877 c. 111, ss. 82, 83, 84, 86.*]—See *In re Waldie and Village of Burlington*, 13 A. R. 104.

Production of Registered Deed—*Alteration in—Proof of Execution.*]—The production of the registered duplicate original of an instrument with the registrar's certificate indorsed thereon is, by virtue of s. 63 of the Registry Act, R. S. O. 1897 c. 136, primâ facie evidence of the due execution thereof,

notwithstanding the fact that material alterations appear on the face of the instrument, all questions as to these alterations being, however, still left open. *Graystock* v. *Barnhart*, 26 A. R. 545. See, also, *Canada Permanent L. and S. Co.* v. *Page*, 30 C. P. 1.

Registry Act — *Retroactivity.*] — The Registry Act of 1865, s. 66, and the Registry Act of 1868, s. 68, are retrospective. *Miller* v. *Brown*, 3 O. R. 210.

Renewal of Registration — *Necessity for—Quebec Law.*]—See *Vadeboncœur* v. *City of Montreal*, 29 S. C. R. 9.

See MORTGAGE, XV. 3 (a), (b), (c)—RAILWAY, XV. 2 (e)—SHIP, XII.—WILL, VII.

RE-INSURANCE.

See INSURANCE, III. 10.

RE-ISSUE.

See PATENT FOR INVENTION, VIII.

RELATOR.

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RELEASE.

I. OF LAND, 6113.

II. OF PERSONAL CLAIMS AND CAUSES OF ACTION,

1. *By Whom Release may be Given*, 6115.
2. *Construction and Operation*, 6117.
3. *Mistake or Fraud*, 6119.
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I. OF LAND.

Deed of Release—*Interest to Operate on.*] —A. in 1846 conveyed to B.'s son, then a minor. B. swore that he bought the land from A., but, being in difficulty, had the deed made to his son; and that he had always continued in possession, but upon this point the evidence was contradictory. A.'s heir in 1849 made a deed of release to B., and B. conveyed to the lessors of the plaintiff:—Held, that the deed from A.'s heir to B., being a mere release, and (if B.'s son were in possession) there being no estate on which it could take effect, it was inoperative. *Doe d. Prince* v. *Girty*, 9 U. C. R. 41.

The title acquired by a purchaser at a sheriff's sale of the husband's interest in his wife's lands, is sufficient for a release from the husband and wife to operate upon. *Beattie* v. *Mutton*, 14 Gr. 686.

Dower—*Release of.*]—See DOWER.

Invalidity—*Absence of Consideration—Registry Laws.*]—Where A., holding land under a registered title, sold to B., whose deed was not registered, and B. sold the land to C., and after sale sold it again to D., who registered his deed, the deed to C. not having been registered:—Held, that C. could not, by obtaining and registering a release for a nominal consideration from the heir of A., obtain priority over D., as C. could not be considered, as to the release, a subsequent purchaser for a valuable consideration. *Doe d. Major* v. *Reynolds*, 2 U. C. R. 311.

Joint Tenant.]—A release by one joint tenant to another conveys a fee without words of inheritance. *Ruttan* v. *Ruttan*, M. T. 4 Vict.

Lease for Life—*Operation as Release.*]—A. died, leaving the plaintiff, his widow, and defendant, his heir-at-law. The plaintiff being in possession of part of the property, defendant executed the following instrument under seal:—"Know ye, all men, that I, John G. Hall, do bind myself, my heirs, executors, and assigns, in the sum of £300 to let my mother, Leah Hall, retain quiet and peaceable possession of the lot of land now in her possession, the same being fifty acres more or less, for the term of her natural life:"—Held, a lease for life. Semble, that the writing might also be supported as a release. *Hall* v. *Hall*, 15 U. C. R. 637.

Quit Claim Deed—*Assignee of Bond.*]—The plaintiff, having a bond for a deed from one W., assigned the same to C. by way of security only:—Held, that a quit claim deed by which C. conveyed to K., did not place K. in any better position than his assignor. *Graham* v. *Chalmers*, 7 Gr. 597.

——— *Interest to Operate on.*] — A. received possession from B.; A. died in 1846, and before his death A. and B. had been in continued possession for more than twenty years. A. died without issue and intestate, leaving his wife upon the land. C., his heir-at-law, brought ejectment against A.'s wife, who defended, relying on a quit claim deed from B., who, upon giving up possession to A., had exchanged lands, and never having given A. his deed, as was alleged, now conveyed to his wife:—Held, that A.'s wife, upon the death of her husband, being merely a tenant at sufferance, and having no interest upon which a simple release could operate, the release conveyed nothing, and the plaintiff was entitled to recover. *Doe d. Connor* v. *Connor*, 6 U. C. R. 298.

Where the grantor does not grant all his interest in the land to the grantee, but merely gives up his right, this is a mere release, and it must have a previous estate or interest in possession on which it can operate. *Doe d. Phelan* v. *Kinnally*, 7 U. C. R. 480.

A. died in possession intestate in July, 1851, leaving his widow, and the plaintiff, his eldest son. The plaintiff, on the 15th October, 1851,

by deed poll, in consideration of £50, "remised, released, and forever quit-claimed" the land, in fee simple, to his mother, who was still living on the place. Defendants claimed under her:—Held, that the deed could take effect as a release only; that the widow, being a tenant at sufferance, had no estate upon which it could operate; and that it therefore passed nothing. Held, also, that 14 & 15 Vict. c. 7, s. 2, enacting that all corporeal tenements and hereditaments shall be deemed to lie in grant as well as in livery, could not help: for it was not intended to alter the construction of the language of deeds, but to enable words which would only have passed incorporeal to pass corporeal hereditaments. *Acre* v. *Livingston*, 26 U. C. R. 282.

——— *Operation as Conveyance of Fee.*]—S., being owner in fee, by deed expressed to be made in pursuance of the Act to facilitate the conveyance of real property, in consideration of £75, did quit claim to one G., his heirs and assigns forever, all his right and title to the land in question. It was added that G. might take possession, that S. would execute such further assurances as might be requisite, that he had done no act to incumber, and he released and quitted claim to G. all his claim upon said lands:—Held, sufficient to pass the title in fee. *Nickolson* v. *Dillabough*, 21 U. C. R. 591.

——— *Operation as Conveyance of Fee—Interest to Operate on.*]—Defendant, being in possession of land, by deed, in consideration of 5s., remised, released, and for ever quitted claim to the plaintiff, his heirs and assigns for ever, the said land, to hold to the plaintiff, his heirs and assigns, to and for his and their sole and only use forever:—Held, that the deed could not operate as a release, there being no estate or possession in the plaintiff to support it, nor as a conveyance, for want of apt words; and therefore that nothing passed by it. The last case distinguished. *Cameron* v. *Gunn*, 25 U. C. R. 77.

——— *Purchaser for Value.*] — Where a person claims under a quit claim deed, he is in general not protected as a purchaser for value without notice. *Goff* v. *Lister*, 14 Gr. 451.

Sheriff's Deed—*Interest to Operate on.*]—A deed given by a sheriff after a sale of lands under a fi. fa., whereby he conveys all the estate and interest of the debtor, is not to be considered as a mere deed of release in the strict sense of the term, so as to be inoperative for want of a previous estate in the grantee. *Doe d. Dissett* v. *McLeod*, 3 U. C. R. 297.

II. Of Personal Claims and Causes of Action.

1. *By Whom Release May be Given.*

Agent—*Authority—Estoppel.*]—To an action by L. against A. the defence was release by deed. On the trial it was proved that A. had executed an assignment for the benefit of creditors and received authority by telegram to sign the same for L. The deed was dated 8th October, 1881, and afterwards, with knowledge of it, L. continued to send goods to A., and on 5th November, 1881, he wrote to A. as follows: "I have done as you desired by telegraphing you to sign deed for me, and I feel confident that you will see that I am protected and not lose one cent by you. After you get matters adjusted I would like you to send me a cheque for $800". . . . In April, 1885, A. wrote a letter to L., in which he said: "In one year more I will try again for myself and hope to pay you in full." In November, 1886, the account sued upon was stated:—Held, that, the execution of the deed on his behalf being without sufficient authority, L. was not bound by the release contained therein, and, never having subsequently assented to the deed, or recognized or acted under it, he was not estopped from denying that he had executed it. *Lawrence* v. *Anderson*, 17 S. C. R. 349.

Bargainor—*Rights of Person for whose Benefit Bargain Made.*]—In consideration of a conveyance to him of a certain farm, the petitioner agreed with his mother that he would during her life provide her with a house on the farm, and with necessaries, and support his brothers and sisters thereon until they reached sixteen years of age, so long as they remained at home on the said farm, and assisted him so far as they were able in the management of it:—Held, that the mother had no right or power to release the petitioner from the obligations undertaken by him with reference to his brothers and sisters under the above agreement, and if the children did their part they could hold their brother to his promise, though the agreement was not in terms made with them as parties. *Re McMillan*, 17 O. R. 344.

Joint Tenant — *Fire Insurance—Claim for Rebate.*]—J. M. and F. M., his wife, were jointly insured in the defendant company, whose deposit was being administered under R. S. O. 1877 c. 160, ss. 21, 22. On 4th February J. M., without the assent of F. M., signed and sent to the receiver a claim for rebate as empowered under that Act. No acknowledgment of the receipt of this claim was given by the receiver, who, on 27th February, sent J. M. and the other policy holders a circular notifying them of an agreement for reinsurance, and that if they objected thereto, and desired to claim for rebate, they were to do so before 15th March. On 24th February the property was burnt, and J. M. forthwith claimed for the whole loss:—Held, that neither J. M. nor F. M. was bound by the former's claim for rebate; that it was not a release, but an invalid attempt by one to exercise a joint statutory power; or else an attempt to make a new contract, which was not authorized by one of the parties, and was not accepted by the receiver before the loss occurred. Granting that a release by one joint tenant would extinguish the right of both, it does not follow that entering into a new agreement by one will prejudice the right of the other. *Clarke* v. *Union Fire Ins. Co., McPhee's Claim*, 6 O. R. 635.

Joint Tort-feasor.]—Quære, in the present state of the law, is a release to or satisfaction from one of several joint tort-feasors, a bar to an action against the others. *Grand Trunk R. W. Co.* v. *McMillan*, 16 S. C. R. 543.

Lessor in Ejectment.]—A lessor of the plaintiff in ejectment will not be allowed to release the action. *Doe d. Boyer* v. *Claus*, 3 O. S. 46.

Nominal Plaintiff.] — A release by the nominal plaintiff, made after the action is commenced by his assignee, cannot be pleaded

as a defence to such action. *Barclay* v. *Adair*, 3 L. J. 88.

One of Two Plaintiffs.] — After issue joined one of two plaintiffs gave to the defendant a release under seal of all actions and demands. The defendant thereupon moved to stay all proceedings in the suit:—Held, that the defendant should plead the release, and that he was entitled to a stay of proceedings, and the remaining plaintiff was allowed to strike out the name of the other plaintiff. *McAlpine* v. *Carling*, 8 P. R. 171.

See Canadian Bank of Commerce v. *Jenkins*, 16 O. R. 215.

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2. Construction and Operation.

Bond for Transfer of Vessel — *Action on—Plea of Discharge.*] — Declaration on a bond, reciting an agreement to sell a vessel to plaintiffs for a sum payable by instalments, for which notes were to be given, and conditioned to convey the vessel within a specified time, and for quiet enjoyment. Breaches, refusal to convey, and eviction of the plaintiffs by one G., alleging as special damage payment of costs in a replevin suit brought by G. Second plea, to the first breach, that, at the execution of the bond, the boat, as the plaintiffs knew, was mortgaged to one C. to secure the same sums as the notes, and payable at the same times; and thereupon, in consideration that the obligors would deliver the notes to C., to apply the proceeds on the mortgage when paid, and that the plaintiffs would forbear to require the conveyance, C. agreed with the plaintiffs, with the consent of the obligors, to hold said mortgage only as a security for and until payment of said notes, and on such payment to release said boat to the plaintiffs; that the obligors then, at the plaintiffs' request, and in pursuance of said agreement, transferred the notes to C., and the plaintiffs thereupon discharged the obligors from procuring the conveyance. Third plea, to the second breach, that after said agreement and transfer of the notes, C. transferred all his interest in the notes and mortgage to said G.; that one of the notes being unpaid, G. brought the action of replevin, and thus obtained possession, claiming under C.:—Held, on demurrer, both pleas bad, for such a discharge as alleged did not necessarily arise from what was shewn, and the actual discharge asserted was not alleged to be by deed. *Corby* v. *Paterson*, 15 U. C. R. 575.

Covenant to Manufacture — *Action on—Plea of Release.*]—Declaration on a covenant to manufacture a certain number of patented waggon seats per day, and to pay plaintiffs a certain royalty on each. The fourth plea, on equitable grounds, alleged that, in consideration that defendant would release the plaintiffs from performance of said covenants on their part, and from all causes of action in respect thereof, the plaintiffs agreed to release defendant from performance of said covenants on his part; and that defendant accordingly did release the plaintiffs from the performance of said covenants on their part:—Held, bad, for not averring a release of the plaintiffs from all causes of action; and because such a verbal concord under these circumstances could be no defence in equity, unless the plaintiffs accepted the release or by their conduct and acquiescence led defendant to believe the first agreement at an end. *McGiverin* v. *Turnbull*, 32 U. C. R. 407.

Joint Judgment Debtors — *Agreement not to Sue One—Settlement of Suit—Fraudulent Conveyance.*]—A stipulation not to sue one of two judgment debtors is no discharge of the other, though there should be no express reservation of rights as against such other. The plaintiff recovered a judgment against two defendants, each of whom made a conveyance of his property. The plaintiff filed bills impeaching the conveyances respectively as fraudulent; in the one suit the plaintiff obtained a decree; and the other suit he settled, consenting to the bill therein being dismissed without costs: — Held, that these circumstances did not necessarily imply a settlement or discharge of the debt. The only further evidence of the terms of the settlement was contained in a letter from the plaintiff to his solicitors stating, as to the second suit, that he had settled with the defendants, taking $45 costs, and agreeing not to prosecute the suit, or look to the defendants therein for any portion of the judgment; and the letter inquired, "What about lis pendens? Will not bill have to be dismissed to have it removed:"—Held, that the judgment against the other debtor was not discharged. *Dewar* v. *Sparling*, 18 Gr. 633.

——— *Discharge of One.*]—The discharge of one of two defendants in execution under a ca. sa., on a joint judgment, operates as a discharge of both. *Fisher* v. *Patton*, 5 O. S. 741.

Joint Trespassers — *Discharge of One—Pleading—Award.*]—Where the plaintiff by his own act, as by a reference and an award, has knowingly discharged one of two joint trespassers, he cannot bring an action against the other. A verdict or an award specifying the amount of damages against one of two joint trespassers, is in itself a bar, whether paid or not, and has the same effect as a satisfaction by him would have had in precluding any action against his co-trespasser. It is therefore unnecessary in the plea to an action of trespass, setting out the award of the damages, to aver that the sum awarded has been paid. It would be different, however, in pleading an award to an action of debt, in which two are jointly bound; there, unless payment of the award be averred, it is no bar. *Adams* v. *Ham*, 5 U. C. R. 292.

Partners—*Release of One.*]—A release by creditors to one of two partners of all actions and causes of action, suits, debts, &c., which they now have, or ever had, or are entitled to in respect of any act, matter, or thing from the beginning of the world, is a release of individual as well as partnership liabilities. *Hall* v. *Irons*, 4 C. P. 351.

Several Obligors—*Release of One.*] — A release by plaintiff to one of several obligors in a replevin bond to the sheriff, after an assignment to the plaintiff, releases all; and, having released the sureties, the plaintiff cannot sue the sheriff for taking insufficient sureties. *Kirkendall* v. *Thomas*, 7 U. C. R. 30.

See Clarke v. *Union Fire Ins. Co., McPhee's Claim*, 6 O. R. 635, *ante* 1.

3. *Mistake or Fraud.*

Cestui que Trust to Trustee—*Concealment of Facts.*]—See *Hope* v. *Beard*, 8 Gr. 380.

Contract—*Release of Claim on—Mistake or Surprise — Pleading.*] — Action for work and labour. Plea, release. Replication, on equitable grounds, that plaintiff had contracted to make certain railway bridges for defendant, according to certain plans and specifications, by which the girders for one bridge were to be 60 feet in length; that defendant afterwards directed him to make these girders 80 feet, agreeing to pay him a fair price therefor, which the plaintiff did; that after the completion of all work under the contract, defendant procured a release under seal from the plaintiff in the following words; setting out the release, by which, in consideration of £1,118, then paid, the plaintiff released defendant from all claims and demands whatsoever arising out of his agreement with defendant for constructing bridges, and in full of all extras thereon—which is the release pleaded; that connected with such release, and intended as the basis and part thereof, was the following account of the claims arising out of said agreement; giving the account, which covered between £30,000 and £40,000, shewing large sums paid to the plaintiff, allowances made for extras, and a balance due of £1,118. The plaintiff then alleged that in this account the value of the 80 feet girders was not included, nor was the release intended to apply to or cover the same; that he had never seen such account until he was required by defendant to execute the release, nor had he ever made any claim for such girders; and he was induced to execute such release, without examining the account or any opportunity for doing so, by his confidence in defendant, who refused to pay him the balance appearing due until he had executed such release, which the plaintiff alleges was obtained from him by surprise, and was not intended to include or apply to the cost of such girders, for which alone this suit is brought:—Held, on demurrer, that the replication shewed no sufficient grounds to avoid the release. *Coulson* v. *McPherson*, 23 U. C. R. 129.

Debt—*Surety.*]—A creditor by mistake executed an absolute release to his debtor, but the agreement was, that the creditor's right against a surety should be reserved:—Held, that the surety was not discharged, and that the creditor was entitled to a decree in equity to that effect. *Bank of Montreal* v. *McFaul*, 17 Gr. 234.

Judgment—*Seizure after Release — Mistake—Costs.*] — Declaration, that defendant recovered judgment against the plaintiff, and issued a fi. fa., and afterwards, by deed, duly released the plaintiff therefrom, but maliciously caused the sheriff to seize plaintiff's goods under the writ, and would not direct him to stay. Plea, on equitable grounds, that before the release the fi. fa. was issued; that in ignorance of the issuing of said writ, and believing that all the costs on said judgment did not exceed £6 5s., defendant consented to refer all matters between himself and the plaintiff; that the arbitrators awarded that the plaintiff should pay defendant £202, and the said costs, which they believed amounted to only £6 5s., and they directed that sum to be paid, in ignorance of the fact that said costs, with the sheriff's fees, amounted to £15; that it was the intention that all said costs should be paid by plaintiff, but neither the arbitrators nor defendant knew of the mistake until too late to move against the award; that in similar ignorance mutual releases were directed by the arbitrators, and defendant executed the release mentioned; that before the trespass complained of defendant discovered the mistake, and requested the plaintiff to pay the balance of said costs to the sheriff, which he promised but afterwards refused to do; and defendant thereupon, with the knowledge and privity of the plaintiff, who took no means to prevent the same, allowed the sheriff to obtain satisfaction of the said balance, as he lawfully might:—Held, on demurrer, plea bad, as shewing no defence. Held, also, that it sufficiently appeared from the declaration that the seizure took place after the release, and that the objection was at all events removed by the plea. *Durass* v. *Durass*, 19 U. C. R. 77.

Promissory Note—*Release of Claim on —Pleading.*] — Declaration on a note made by defendants P., W., and D., jointly and severally, payable to plaintiff. Equitable pleas: (1) by defendant D., that he made the note as surety for defendant P., of which the plaintiff was aware when he took it, and that after it became due the plaintiff, without his knowledge, by deed released P. therefrom; (2) by defendant W., that he and defendant D. made the note for the accommodation of P., as his surety, to secure a debt due to the plaintiff solely from P.; that it was delivered to and accepted by the plaintiff from the defendants upon an express agreement that W. and D. should be liable only as sureties; and that the plaintiff, without W.'s consent, by deed released P. Equitable replications: (1) that the pleas each refer to the same deed; that at the time of making it P. was indebted to the plaintiff in $250 on an account stated, as well as for the amount of the note; that it was intended and agreed only to release the $250, and not the note; that for the purpose of so confining the deed the plaintiff added after his signature thereto, "$250, not any sureties on this;" and that the note was not included, or intended by defendant P. or by the plaintiff to be included, in the debts released by the deed; (2) that the release was drawn and executed by mistake, the intention of the parties thereto being to execute a consent only to a discharge of P. under the Insolvent Act of 1864, and it should have been drawn so as to operate in that way only, and not as a discharge of any sureties:—Held, that at law the first replication would be bad, for the words added formed no part of the release, and it therefore set up oral matter to qualify the deed; but that on equitable grounds it was sufficient. Held, also, that the second replication was bad. *Fowler* v. *Perrin*, 25 U. C. R. 227.

Repudiation of Release — *Retaining Consideration—Trial.*]—Action for work and materials. The cause having been entered for trial, defendant paid plaintiff $2,500, and received a release expressed in the most general terms, and the record was withdrawn. The plaintiff again gave notice of trial, alleging that the $2,500 was only part of the consideration for the settlement, and that the defendant was also to procure for him an appointment in the civil service with a salary of at least $2,000 a year. He refused, however, to repay the $2,500, though defendant

offered, if he would do so, to give up the release. The master in chambers having set aside the notice of trial and stayed all proceedings, a Judge, on appeal, rescinded this order on the 11th April, 1882, and permitted defendant to plead the release on that day; replication and joinder of issue to be filed on the two following days; and directed the issue to be tried at the next assizes, which began on the 17th. The defendant took out the order and pleaded the release, and the plaintiff entered the case at these assizes, but was allowed to withdraw it, and defendant, in Easter term following, appealed from the order of the Judge:—Held, that the order must be rescinded, for the plaintiff could not repudiate the release while retaining the money which he had received under it, and, as the additional consideration alleged was illegal, the plaintiff being particeps criminis, could not set it up to avoid the release. *Hewson* v. *Macdonald*, 32 C. P. 407.

Validity—*Fraud—Trial.*] — A settlement of a pending action, agreed to by an illiterate plaintiff without communication with her solicitor and without fair disclosure of facts, cannot stand, and its validity may be tried in the pending action if pleaded in bar. *Johnson* v. *Grand Trunk R. W. Co.*, 25 O. R. 64, 21 A. R. 408.

See, also, *Farmer* v. *Grand Trunk R. W. Co.*, 21 O. R. 299; *Haist* v. *Grand Trunk R. W. Co.*, 26 O. R. 19, 22 A. R. 504; *Rowand* v. *Tyler*, 3 O. S. 563, 630, *post* 4.

4. *Pleading.*

Plea of Release—*Replication of Fraud—Evidence.*]—In covenant, to a plea of release, the plaintiff replied that it was procured by fraud and covin, on which issue was joined. At the trial it appeared that the plaintiff had assigned his interest in the subject matter to a third person, for whose benefit this action was brought, and that the plaintiff and defendant had combined to defraud him by the release:—Held, that under the pleadings such evidence was inadmissible, and that the party interested should have applied to set the release aside. *Rowand* v. *Tyler*, 3 O. S. 563.

——— *Surplusage.*]—Declaration by executor of S. on defendant's covenant to pay S. £240. Fifth plea, that before breach of the covenant declared on, S. accepted from defendant £210 in goods in full satisfaction of said sum of £240, and of the cause of action declared on, and by deed released defendant therefrom. On demurrer to this plea, except as to the allegation of release:—Held, that the rest might be rejected as surplusage, and that it shewed a good defence. *Robison* v. *Flanigan*, 22 U. C. R. 417.

——— *Taking off Files.*]—Even after verdict the court will order a plea of release to be taken off the files if shewn to be clearly fraudulent. *Rowand* v. *Tyler*, 3 O. S. 630.

See Adams v. *Haw*, 5 U. C. R. 292, *ante* 2; *Johnson* v. *Grand Trunk R. W. Co.*, 25 O. R. 64, 21 A. R. 408, *ante* 3; *Duross* v. *Duross*, 19 U. C. R. 77, *ante* 3; *Coulson* v. *McPherson*, 23 U. C. R. 129, *ante* 3; *Fowler* v. *Perrin*, 25 U. C. R. 227, *ante* 3; *McAlpine* v. *Carling*, 8 P. R. 171, *ante* 1; *Corby* v. *Paterson*, 15 U. C. R. 575, *ante* 2; *McGiverin* v. *Turnbull*, 32 U. C. R. 407, *ante* 2.

5. *Taking Criminal Proceedings — Effect on Civil Proceedings.*

Assault.]—The purser of a steamboat had been summoned by the plaintiff before a magistrate for an assault, and a fine was imposed, which he paid. This under 32 & 33 Vict. c. 20, s. 45 (D.) (Criminal Code, s. 866), though a release to the purser, did not constitute any bar to a civil action against the company. *Emerson* v. *Niagara Navigation Co.*, 2 O. R. 528.

See Flick v. *Brisbin*, 26 O. R. 423; *Nevills* v. *Ballard*, 28 O. R. 588.

Obstructing Sheriff.] — The sheriff of Oxford, in executing a writ of replevin, was obstructed by the defendants, who rescued the goods. On complaint of the sheriff's officer, they were summarily tried before a police magistrate and fined, under 32 & 33 Vict. c. 32, by which it is declared that any person discharged or convicted in such a case shall be released from all further or other criminal proceedings for the same cause. A motion afterwards made by the plaintiff to attach the same persons for contempt, was discharged, but without costs. *Haywood* v. *Hay*, 46 U. C. R. 562.

6. *Other Cases.*

Right to Compel Legatee to Execute a Release.]—See *Kaiser* v. *Boynton*, 7 O. R. 143.

Release of Surety.]—See PRINCIPAL AND SURETY, II.

Release by Administratrix.]—See *Denham* v. *Brewster*, 28 C. P. 607.

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RENT.

Devise of Rent—*25 Geo. II. c. 6, s. 1.*]—A devise of rent to an attesting witness is void under 25 Geo. II. c. 6, s. 1. Rent issuing out of land is a tenement, it partakes of the nature of land, and is within the 5th section of the Statute of Frauds, and hence is also within 25 Geo. II. c. 6, s. 1. *Hopkins* v. *Hopkins*, 3 O. R. 223.

Rent Charge and Rent Seck.]—In debt for arrears of an annuity or rent charge, by the purchaser thereof under a fi. fa. against the grantee's land, the declaration was held insufficient:—(1) Because there was no averment that the sheriff seized before the return of the writ of fi. fa. against lands. (2) Because, it not appearing that the said rent was anything more than a rent seck, it would not be liable to seizure under a fi. fa. lands. *Dougall* v. *Turnbull*, 8 U. C. R. 622.

Debt does not lie by the grantee of a rent charge to issue out of lands, where there is no express covenant by the grantor to pay. Quære, if the grantee could bring debt, whether his assignee might do so. *S. C.*, 10 U. C. R. 121.

Under a fi. fa. against lands and tenements against the plaintiff in this suit, in favour of A., the sheriff sold to A. a rent charge, which the defendant in this suit had granted by deed to the plaintiff for her life. The deed contained a personal covenant of the defendant to the plaintiff to pay the rent charge:—Held, that A. was not entitled to sue on the covenant in the name of the plaintiff. Quære, whether the sale to A. would not have the effect of discharging defendant from his covenant. *Smith* v. *Turnbull*, 1 P. R. 38.

A landlord may assign rent, and since 4 Geo. II. c. 28, s. 5, rent charge or rent seck may be distrained for, and by one who has not the reversion, as, for instance, the assignee of the landlord. *White* v. *Hope*, 17 C. P. 52; *S. C.*, 19 C. P. 479.

See BANKRUPTCY AND INSOLVENCY, I. 6, VI. 6—COMPANY—LANDLORD AND TENANT, XXIII. — LIMITATION OF ACTIONS, VI. — SHERIFF, IX. 2.

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I. GENERALLY—WHEN MAINTAINABLE.

1. *Distress for Rent or Taxes.*

Bailiff — *Illegal Seizure — Liability of Landlord.*]—Defendant gave a warrant to a bailiff to distrain for rent on premises occupied by the plaintiff as his tenant, but the bailiff seized plaintiff's property off the premises. This was done without defendant's knowledge, and there was no evidence of his having adopted the act:—Held, that defendant was not liable, and that the plaintiff could not maintain replevin against him. *Ferrier* v. *Cole*, 15 U. C. R. 561.

Change in Person Assessed — *Assignment for Creditors — Possession of Goods — Estoppel.*]—The plaintiff, being in possession of a stock of goods, was assessed therefor in his own name, against which he appealed to the court of revision, and to the county court Judge, when an indenture of assignment of the goods to one M. upon trusts for creditors

was produced, and the plaintiff's name was erased and that of M. substituted therefor. The plaintiff alleged, however, that his name was not struck out on his application, for that his ground of appeal was that the goods were not equal to the debts due upon them, and so were exempt. Defendants having distrained upon the goods, the plaintiff replevied, and defendants avowed as for taxes due to them by the plaintiff, whose name did not appear on the collector's roll. It was contended that the plaintiff having denied his title, and his name being erased from the roll, he was debarred from replevying the goods distrained: — Held, that under the assignment he had a right of possession in the goods, which, being coupled with actual possession, entitled him to maintain replevin under our statute; that he was not estopped; and that the plaintiff not being shewn to be indebted to defendants for taxes, the avowry failed. *Sargant* v. *City of Toronto*, 12 C. P. 185.

Goods Improperly Seized — *Replevin Act.*]—Replevin is maintainable as the law was before the Replevin Act, and in a far more comprehensive manner since that Act, for goods taken as a distress which were not properly seizable; and that though goods properly seized be replevied with the others. *Miller* v. *Miller*, 17 C. P. 226.

Partly Illegal Distress—*Separation.*]—A collector, having authority to collect the rates for three specific years' taxes, distrained for them with other sums not properly collectable:—Held, that the three legal distresses were separable from the illegal ones, and until they were paid replevin would not lie. *Corbett* v. *Johnston*, 11 C. P. 317.

Right to Demise — *Stranger Questioning.*]—A stranger, whose goods have been distrained for rent on the premises of a tenant, cannot, in replevin, any more than the tenant, question the landlord's right to demise. *Smith* v. *Aubrey*, 7 U. C. R. 90.

School Rates—*Illegality—Acceptance of Security.*]—Replevin for horses. Plea, justifying the taking under a warrant for school taxes, and alleging that the horses were delivered by the collector to defendant, an innkeeper, to take care of until the sale. Replication, setting out facts to shew the rate illegal, and averring that the plaintiff, after seizure of the goods, at the request of the collector and trustees, gave his note for a sum named (not saying that it was the amount due by him), payable to bearer, which was accepted in satisfaction of the taxes; that the collector released the property seized; that the note was still outstanding and the plaintiff liable upon it; and that the seizure in the plea mentioned was made afterwards:—Held, on demurrer, replication bad; for (1) the collector, acting under a warrant legal on the face of it, would not be liable in trespass or trover, and therefore not in this action, nor the defendant for taking the horses from him to keep; and (2), even if the note had been alleged to be for a sufficient amount to pay the rate, yet the improper acceptance of it by the trustees would not prevent them from afterwards distraining. *Spry* v. *McKenzie*, 18 U. C. R. 161.

——— *Illegality—Union of Sections.*]—Under the Public Schools Act of 1874, 37 Vict. c. 28 (O.), no power is given to form a union school section out of sections in different townships. Where, therefore, such section was formed and a rate levied therein, for which the plaintiff's goods were seized:—Held, that such rate was illegal, and the plaintiff entitled to succeed in replevin. *Halpin* v. *Calder*, 26 C. P. 501.

See, also, *Askew* v. *Manning*, 38 U. C. R. 345.

——— *Notice of Action.*]—Replevin may be brought upon a distress for school rates, and notice of action is not necessary. *Appelgarth* v. *Graham*, 7 C. P. 171.

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2. *Goods in the Custody of the Law.*

[*See* R. S. O. 1877 c. 53, s. 3; R. S. O. 1897 c. 66, s. 3.]

Assignee in Insolvency.] — Where the goods of A., having been seized by the sheriff under a fi. fa. against B., had been handed over by the sheriff to an assignee, to whom B. had made a voluntary assignment in insolvency:—Held, that A. might maintain replevin against the assignee. *Burke* v. *McWhirter*, 35 U. C. R. 1.

Held, that an official assignee, appointed under the Insolvency Act of 1875, is an officer within C. S. U. C. c. 29, s. 2, and that goods in his possession as such assignee cannot be replevied. *Barclay* v. *Sutton*, 7 P. R. 14.

Division Court Attachment.] — Goods seized under an attachment from a division court may be replevied by a third party claiming them as his own. *Arnold* v. *Higgins*, 11 U. C. R. 191.

——— *Stay of Proceedings.*] — Certain goods being under an attachment from a division court were placed by the bailiff in custody of the clerk, from whom they were replevied by the plaintiff. A summons then issued from the division court, calling before the Judge there, the attaching creditors, and the plaintiff as claimant of the goods:—Held, that, under 16 Vict. c. 177, the proceedings in the replevin suit must be stayed. Held, also, that if the plaintiff had been allowed to proceed he must have failed, for neither trespass nor trover would lie against the clerk, and therefore replevin could not be maintained. Quere, as to the remedy which the defendant, the clerk of the division court, or the attaching creditors, would have in case the plaintiff in replevin should be held by the Judge to have no claim. *Caron* v. *Graham*, 18 U. C. R. 315.

Guardian in Insolvency.]—Goods are repleviable out of the hands of a guardian in insolvency, notwithstanding C. S. U. C. c. 29, s. 2. The question as to how far goods seized under an execution or attachment are protected from the remedy by replevin discussed. *Jameson* v. *Kerr, Galley* v. *Kerr*, 6 P. R. 3.

Police Magistrate — *Stay of Proceedings.*]—A gold watch having been taken on a search warrant from a person who absconded, the plaintiff claimed title to it, and brought replevin therefor against a city police magis-

trate, who applied to stay proceedings under 16 Vict. c. 180, s. 6:—Held, that replevin did not come within the Act; and the application was dismissed. *Manson* v. *Garnett*, 2 P. R. 389.

Seizure of Vessel by Revenue Authority.]—A vessel seized for breach of the revenue laws having been replevied from the collector, the writ of replevin was set aside. *Scott* v. *McRae*, 3 P. R. 16.

See also *Campbell* v. *Lepan*, 21 C. P. 363.

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3. *On Sale of Goods.*

Conditional Delivery—*Promissory Note —Jury.*]—Defendant purchased some horses and a waggon from the plaintiff, at auction, the terms being that he should give his own notes at three, six, and nine months, indorsed by one W., and on his promise to give these he was allowed to take the goods. W. refused to indorse, and the plaintiff, having waited for some time without getting the notes, replevied. It was left to the jury to say whether the delivery was absolute, with intent to pass the property, or conditional on defendant giving the notes, and they found for the plaintiff:—Held, a proper direction, and that the verdict was warranted. *Smith* v. *Hobson*, 16 U. C. R. 368.

——— *Re-taking — Injunction.*]—Several persons united in purchasing a printing press and material for the establishment of a newspaper to advocate certain views, and agreed with a printer that he should establish the newspaper, and should have a legal transfer of the property on paying to the several persons the sums they had respectively contributed. This agreement was acted on, and the printer paid some of the contributors accordingly. One of them, who asserted that he had not been paid, took possession of the press and material by writ of replevin:—Held, that the printer was entitled to relief in equity, and an injunction was granted to stay proceedings in the replevin suit on security being given. *Dewhurst* v. *McCoppin*, 17 Gr. 572.

Payment — *Set-off — Disaffirmance.*] — The plaintiff, with the intention of parting with the possession and property in certain flour, made an absolute sale of same, on apparently short terms of credit, to defendant, who withheld from plaintiff his intention to pay for the flour by setting off a claim he had acquired against the plaintiff:—Held, that this did not constitute a fraud on the defendant's part so as to entitle the plaintiff to disaffirm the contract and replevy the flour. *Baker* v. *Fisher*, 19 O. R. 650.

Promissory Notes — *Acceptance of — Disaffirmance—Innocent Purchaser—Sheriff.*] —M. by false representations induced T. to sell him a horse, buggy, and harness, and to take for them two promissory notes. T., having discovered the fraud, demanded back his goods, at the same time throwing the notes on the table. On the assurance of M., however, that on the following Tuesday he would bring the property or satisfaction, T. again took the notes and went away. M. did not appear as he had promised, and T. sued out a writ of replevin against M., but before it had been executed M. sold the property to plaintiff, an innocent purchaser, who, having been deprived of it under the replevin, brought trover against the sheriff:—Held, that the plaintiff was entitled to recover; that the contract had not been disaffirmed when the writ of replevin issued; and that the mere issue of it was no notice to M. of disaffirmance, and could not affect the plaintiff. Held, also, following Great Western R. W. Co. v. McEwan, 28 U. C. R. 528, 30 U. C. R. 559, that the defendant, as sheriff, having taken the property out of the plaintiff's possession, could not justify under the writ of replevin. *Stoeser* v. *Springer*, 7 A. R. 497.

——— *Agreement that Property Should not Pass until Notes Paid—Sale by Vendee to Defendants — Replevin not Maintainable without Demand and Refusal.*]—See *Tufts* v. *Mottashed*, 29 C. P. 539.

——— *Condition as to Payment—Sale to Third Person.*]—Plaintiff sold to one F. certain goods, taking notes in payment, a written agreement being entered into that unless the notes were promptly paid the property should not vest. F. sold the property to defendant, giving him notice of the plaintiff's claim. The notes not being paid:—Held, that the plaintiff was entitled to replevy the goods. *Weeks* v. *Lalor*, 8 C. P. 239.

Refusal of Vendor to Deliver—*Property Passing — Contradictory Evidence — Jury.*]—Where goods are sold so that the property passes, and the vendor refuses to deliver, replevin will lie. Defendant sold the plaintiff an ox at 35s. per cwt., and received 20s. as earnest. Some days afterwards the ox was weighed at 15 cwt., and the plaintiff offered $46 as the balance of purchase money, contending that by the original agreement one-third was to be taken off for offal. Defendant denied this and refused to deliver the ox, and the plaintiff thereupon brought replevin. The evidence as to the bargain was contradictory:—Held, that the jury should have been told, that if the agreement was as stated by the plaintiff he was entitled to succeed; but that if that was not clear, and defendant refused under the bonâ fide belief that there was to be no deduction, then they should find in his favour. *O'Rourke* v. *Lee*, 18 U. C. R. 609.

Sale under Execution — *Replevin by Claimant against Purchaser.*]—The Division Courts Act, s. 175, does not authorize a bailiff, when a claim is made by a third person to goods and chattels seized under execution, to sell the goods and issue an interpleader for the proceeds, and thus compel the claimant to try his right merely to such proceeds, and deprive him of his goods. The claimant having proved his right to the goods—a quantity of timber—was therefore held entitled to recover in replevin against the purchaser under the execution. *Reid* v. *McDonald*, 26 C. P. 147.

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4. *Sale of Timber.*

Possession of Land—*Mixing Logs.*]—Let al., claiming certain lands in the township of Horton under a paper title, built a barn and camp in 1875, commenced and continued logging all that winter and in subsequent years. In 1877 McD., setting up a title under certain proceedings adopted at a meeting of

the inhabitants of the township in 1847, held for the purpose of making provision for the poor, by which certain commissioners were authorized to sell vacant lands, entered upon and cut on the lands in question some 500 trees, which he put on the ice outside and inside L. et al.'s boom, mixing them with some 900 logs already in said boom, and cut by L. et al., in such a way that they could not be distinguished. McD. then claimed the whole as his own, and resisted L. et al.'s attempt to remove them. In an action of replevin brought by L. et al. for 1,400 logs cut on said lands:—Held, that L. et al.'s possession of the lands in question was sufficient to entitle them to recover in the present action against McD., who was a wrongdoer, all the logs cut on the lands in question. *McDonald* v. *Lane*, 7 S. C. R. 462.

See McGregor v. *McNeil*, 32 C. P. 538; *Bates* v. *Mackey*, 1 O. R. 34.

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5. *Other Cases.*

Administrator — *Goods Taken before Grant.*]—The title of an administrator relates back to the death, so as to enable him to replevy goods taken before the grant of administration. *Deal* v. *Potter*, 26 U. C. R. 578.

Agreement to Saw Lumber—*Refusal to Deliver.*]—A. and B. entered into an agreement to saw lumber for the plaintiff for one year at $1.87½ per thousand feet, to be delivered on the platform outside the mill, and a person to be chosen to measure it, plaintiff to furnish the logs, and A. and B., when not otherwise paid for cutting, to have, every month, one-third of the quantity cut piled for their security. Under this agreement the plaintiff seized and replevied a quantity of sawn lumber at the mills, A. and B. refusing to deliver it to him:—Held, that, although in the general accounts plaintiff was indebted to the defendant, still replevin would lie for the amount due the plaintiff under the agreement. *Bush* v. *Pimlott*, 9 C. P. 54.

Application of Municipal Act.]—The Municipal Act, 22 Vict. c. 99, s. 201, which prevents actions being brought for anything done under a by-law until it has been quashed, applies only to suits for the recovery of damages, not to replevin. *Wilson* v. *County of Middlesex*, 18 U. C. R. 348.

Books of Office—*Proof of Title.*]—Any person out of whose possession books, &c., have been taken, whether by force or fraud, or without right, may replevy under our statutes; but when the right to the custody and possession depends on the holding of an office, it should appear that the applicant does hold the office, and therefore is entitled to the books, &c. *Hammond* v. *McLay*, 10 L. J. 269.

Booms—*Proprietary Rights—Revendication—Estoppel by Conduct.*]—O'S., claiming to be the legal depositary, and T. McG., claiming to be the usufructuary, of certain booms, chains, and anchors in the Nicolet river, under 36 Vict. c. 81 (Q.), which G. B., being in possession of the same for several years under certain deeds and agreements from T. McG., had stored in a shed for the winter, brought an action en revendication to replevy the same and for $5,000 damages:—Held, that O'S. and T. McG. were not entitled to the possession as alleged, and that they were precluded by their conduct and acquiescence from disturbing G. B.'s possession. *O'Shaughnessy* v. *Ball*, 21 S. C. R. 415. See *Ball* v. *McCaffrey*, 20 S. C. R. 319.

Detention — *Taking.*]—Replevin will lie in this country, though there has been no wrongful taking, but a detention only is complained of, and this though the writ and declaration charge both, for every detention is a new taking. *Deal* v. *Potter*, 26 U. C. R. 578.

Equitable Title—*Trust — Agent.*]—Under the system of procedure in Ontario an equitable title to chattels will support an action of replevin. *Carter* v. *Long*, 26 S. C. R. 430.

Farm Bailiff—*Purchaser of Stock from.*]—A. agreed to manage B.'s farm, in consideration whereof B. agreed to give him, among other things, one-third of the increase of young stock raised. B. left the country and died, and A. sold all the stock upon the farm:—Held, that he had no right to do so, and that B.'s administratrix might replevy from the vendees. *Duffill* v. *Erwin*, 18 U. C. R. 431.

Goods in Possession of Third Person—*Notice—Demand.*]—In trespass for taking goods the defendant justified, as sheriff, under a writ of replevin at the suit of one H. against P., alleging that he entered plaintiff's freight house, where the goods were, the outer door being open, and replevied the goods to H., the same then being in the plaintiffs' possession as bailees and agents only of P., who unjustly detained them from H.:—Held, no defence; for the plea did not bring defendant within ss. 9 and 10 of the Replevin Act, C. S. U. C. c. 29; and in replevin against one person goods cannot be taken out of the peaceable possession of another without notice or demand. *Great Western R. W. Co.* v. *McEwan*, 28 U. C. R. 528.

Goods Subject to Lien—*Tender.*]—C., being indebted to defendant, assigned to him with plaintiff's consent his lien on a buggy owned by plaintiff, on which he, C., had a claim for repairs amounting to $25.25. The plaintiff subsequently demanded the buggy, but without any tender or offer to pay the lien. Upon replevin:—Held, that defendant was entitled to succeed, there being no evidence of a tender or satisfaction of the lien. *Lake* v. *Biggar*, 11 C. P. 170.

Hire of Chattel — *Conditions—Agent—Right to Sue.*]—Defendant in writing acknowledged the receipt from the plaintiff, described as assistant manager of the Howe Machine Company, of a sewing machine, on hire for nine months at $5 a month in advance. He agreed to pay $45, the value of the machine, in the event of its being injured or not returned; and in default of payment of the monthly rental, or the due fulfilment of the lease, or if the machine should be deemed by the lessor to be in jeopardy, the plaintiff or the company might resume possession of it; and defendant waived all right of action for trespass, damages, or replevin, by reason of any action taken by the plaintiff or the company in resuming such possession.

The plaintiff said he had possession of the machine before it was delivered to defendant: that he was responsible to the company, a foreign corporation; and had no property in it except as their agent:—Held, that the plaintiff under the agreement might maintain replevin in his own name for the machine, on non-fulfilment of the conditions. *Coquillard* v. *Hunter*, 36 U. C. R. 316.

Poundkeeper — *Replevin against.*]—See *Ibbottson* v. *Henry*, 8 O. R. 625.

Seizure of Property Already Replevied—*Second Writ.*] — Defendant replevied certain account books under a writ in Crawford v. Brown, and handed them to plaintiff, but before a removal could be effected, and while the parties were yet together, a writ of replevin in McLaren v. Crawford was placed in the hands of the sheriff, who thereupon again seized the books:—Held, that the taking of property under one writ of replevin does not prevent the operation of a second writ upon the same property under 14 & 15 Vict. c. 64 and 18 Vict. c. 118. *Crawford* v. *Thomas*, 7 C. P. 63.

Taking under Warrant—*Removal to Another County—Trespass—County Courts.*] —In an action of replevin brought in the county court of Haldimand for a mare taken by the defendants from the plaintiff's close in that county, removed to the county of Brant, and there detained until replevied:—Held, that the taking could not be justified under a warrant issued for the arrest of the plaintiff on a charge of stealing the mare; and, although the original taking was justified under a search warrant issued in Haldimand to search the plaintiff's premises in Haldimand for the mare, and to bring it before a justice of that county, yet the subsequent removal to the county of Brant and detention there were not, and constituted the defendant a trespasser ab initio, and therefore the county court of Haldimand had jurisdiction to replevy the goods in Brant. *Hoover* v. *Craig*, 12 A. R. 72.

Timber—*Licensees in Possession — Identity of—Logs—Trespassers.*]—The plaintiffs were in possession of certain timber limits under a license from the Crown, which expired in April, 1872, but it was the practice of the Crown lands department to recognize the right of licensees to a renewal, and a renewal was granted to the plaintiffs for 1872-73, and the ground rent paid in advance, the plaintiffs remaining in possession. In consequence, however, of some difficulty about the boundaries, the license did not issue until the 5th April, 1873, but it was stated to cover the period from the 20th June previous. During this period certain persons, under whom defendant claimed, entered upon the land and cut a quantity of sawlogs; and on the plaintiffs going to where they were lying in a creek or river on their limits for the purpose of marking them, they were forcibly prevented by defendant, who opened an artificial dam and caused the logs to be floated down the river, where they got mixed with some of defendant's logs. The plaintiffs then went to where the logs were, and selected the logs in question, being of the same size and description as their own logs, and marked them:—Held, that the plaintiffs might maintain replevin: that there was sufficient evidence of identity: and that, at all events, as defendant's own wrongful act was the cause of any difficulty, he could not object on this ground. The plaintiffs being in possession, though they might have no title as against the Crown, could maintain replevin against a wrongdoer. *Gilmour* v. *Buck*, 24 C. P. 187.

Tortious Taking — *Statute.*] — Quære, could replevin be sustained in any court before the Replevin Act, upon a mere tortious taking or detention not in the nature of a distress? *Foster* v. *Miller*, 5 U. C. R. 569.

Trespass.]—Held, that, under the circumstances of this case, the plaintiff could have maintained trespass, and consequently that he could bring replevin. *Cook* v. *Fowler*, 12 U. C. R. 568.

Trover—*Conversion.*] — Held, that there was not sufficient evidence to constitute a conversion of the goods by the defendant in this case so as to support an action of trover, and therefore that replevin would not lie. *Smalley* v. *Gallagher*, 26 C. P. 531.

See also *Lewis* v. *Teale*, 32 U. C. R. 108; *Schaffer* v. *Dumble*, 5 O. R. 716.

See SOLICITOR.

II. ACTION AND PROCEEDINGS IN.

1. *Costs.*

[*See* R. S. O. 1877 c. 53, ss. 28-29; con. rules (1897) 1079, 1130.]

Apportionment of—*Divided Success.*] —Replevin for 900,000 feet of sawn lumber: Pleas: non cepit; (2) goods not plaintiff's; (3) goods defendant's. The jury found in favour of the plaintiff for 350,000 feet of lumber, and for defendant as to the remaining 550,000:—Held, that the plaintiff was entitled to the general costs of the cause, from which defendant might deduct the proportion of costs occasioned by that part with respect to which he had succeeded. *Canniff* v. *Bogart*, 6 L. J. 59.

Scale of—*Certificate.*] — A certificate is necessary to obtain full costs in replevin as in other actions, though the affidavit and bond state the goods to be worth a sum above the jurisdiction of the inferior courts. *Ashton* v. *McMillan*, 3 P. R. 10.

Held, approving the last case, that in replevin full costs are not taxable without a certificate. At the trial in a county court, a verdict was entered for defendant, with leave reserved to move to enter it for the plaintiff, and no certificate was applied for. On appeal a verdict was directed for the plaintiff for 15s., and the clerk of the county court taxed only division court costs. The Judge refused a revision, and the court would not interfere. *In re Coleman* v. *Kerr*, 28 U. C. R. 297.

——— *Value of Goods.*]—The mere fact of the plaintiff in his declaration in replevin stating the value of the goods distrained at a higher sum than £15, does not entitle him to Queen's bench costs. He must prove at the trial that the goods are really of greater value. *Wheeler* v. *Sime*, 3 U. C. R. 265.

2. *Damages.*

Mitigation of Damages.]—The defendants were the widow of the intestate and her second husband. It was shewn that she had taken possession of and appropriated to her own use the intestate's property:—Semble, if it had been shewn that the widow had paid funeral expenses or debts of the intestate, this might have been allowed in mitigation of damages. *Deal* v. *Potter*, 26 U. C. R. 578.

Value of Goods.]—The plaintiff may recover as damages the value of any of the property in defendant's hands at the time of issuing the writ, to which the plaintiff proves his right, though not actually replevied. *Rolston* v. *Lawson*, 17 U. C. R. 494; *Frontenac Division No. 2, Sons of Temperance* v. *Rudston*, 4 L. J. 211; *Deal* v. *Potter*, 26 U. C. R. 578; *Lewis* v. *Teale*, 32 U. C. R. 108.

——— *Continued Detention.*] — The practice, generally, as to damages in actions of replevin is, that where the goods are promptly returned, only sufficient will be given to cover the expense of preparing the replevin bond, but where the party distraining acts in a manner unnecessarily harsh or oppressive, substantial damages may be recovered. And where the sheriff was unable to replevy some of the articles mentioned in the writ, by reason of their having been lost or eloigned by the defendant, the plaintiff was held entitled to recover their value as damages; the count being in the detinet as well as in the detinuit. *Graham* v. *O'Callaghan, Russell* v. *O'Callaghan*, 14 A. R. 477.

3. *Evidence.*

(a) *Under Plea of Non Tenuit.*

Alienation of Estate by Landlord.]—Under non tenuit evidence is rightly received to shew that defendant had parted with his estate to another, and was no longer plaintiff's landlord. *Lewis* v. *Brooks*, 8 U. C. R. 570.

Eviction.]—In replevin, under the plea of non tenuit to an avowry for rent in arrear, the plaintiff may shew an eviction. *Cormack* v. *Bergin*, 5 O. S. 561.

Payment before Distress — *Mortgage.*]—To an avowry setting out a mortgage and demise to the mortgagor, the entry thereunder, non-entry of mortgagee and non-exercise of power of sale, the permitting mortgagor to continue as tenant, and that while so occupying, there was a large arrear of interest, &c., plaintiffs simply pleaded non tenuit, and under it sought to give in evidence the fact of payment of the mortgage before distress, with a view to shewing that there was, consequently, no tenancy: — Held, inadmissible. *Royal Canadian Bank* v. *Kelly*, 20 C. P. 519. Reversed, 22 C. P. 279. See 14 C. L. J. 8. See, also, *S. C.*, 19 C. P. 196.

Tenancy at Time of Distress.] — The plea put in issue not merely the demise pleaded, but whether the plaintiff was tenant to the avowant at the time of the distress. *Elsworth* v. *Brice*, 18 U. C. R. 441.

Variance.]—An avowry for two and a quarter years' rent, and proof of a tenancy for only one year, although the tenant continued in possession for three years, having however paid no rent nor made any acknowledgment during the last two years:—Held, a fatal variance on the plea of non tenuit. *Thomson* v. *Forsyth*, E. T. 3 Vict.

(b) *Other Cases.*

Joint Taking—*Acts and Declarations.*]—Defendants were the widow of the intestate and her second husband. It was shewn that she had taken possession of and appropriated to her own use the intestate's property, and acts and declarations of both defendants established that they held it together after her second marriage:—Held, sufficient evidence of a joint taking. *Deal* v. *Potter*, 26 U. C. R. 578.

Onus—*Right to Begin.*] — Replevin for a horse. Plea, that the horse was the horse of the defendant, and not of the plaintiff, as alleged, and issue thereon:—Held, that the plaintiff was entitled to begin. *Neville* v. *Fox*, 28 U. C. R. 231.

Place of Taking—*Possession — Timber.*]—Defendants took timber made by the plaintiff on land of which he was in possession, and the plaintiff replevied. The declaration alleged the timber to have been taken from lot 12, and defendants pleaded non ceperunt, and that the timber was theirs. At the trial, defendants having given evidence that the timber was not cut on lot 12, but on 13, claimed a verdict without shewing any title to 13, or that they were authorized to seize the timber there; but the Judge ruled that the plaintiff, having proved possession of the timber, was entitled to recover:—Semble, that the ruling was right, for though in England the place of taking must be stated in replevin, and is material, it is different under our Replevin Act when the action is not founded on a wrongful distress. A new trial was refused, the ruling not having been objected to, or attention called to the distinction between replevin and trespass under the plea. *Fitzpatrick* v. *Casselman*, 29 U. C. R. 5.

See also *Frontenac Division No. 2, Sons of Temperance* v. *Rudston*, 4 L. J. 70.

4. *Pleadings.*

(a) *Declarations.*

[*See* R. S. O. 1877 c. 53, ss. 24, 25, effete.]

Distress Damage Feasant — *Local Description—Joinder of Counts.*] — See *Barber* v. *Armstrong*, 5 P. R. 153.

Effect of Judicature Act.]—See *Campan* v. *Lucas*, 9 P. R. 142.

Joinder of Causes of Action—*Common Law Procedure Act.*]—See *Great Western R. W. Co.* v. *Chadwick*, 3 L. J. 29.

Joinder of Counts—*Detinuit—Detinet.*]—See *Thurston* v. *Breard*, 8 P. R. 10.

Necessity for — *Non-appearance — Notice.*]—See *Zavitz* v. *Hoover*, M. T. 1 Vict., R. & J. Dig. 3308.

Place of Taking.]—See *Perrin* v. *Conley*, 14 U. C. R. 53; *Fitzpatrick* v. *Casselman*, 29 U. C. R. 5.

Venue.]—The venue in any action in replevin in a county court except for goods distrained may be changed to any other county under R. S. O. 1877 c. 50, s. 155. *O'Donnell* v. *Duchenault*, 14 O. R. 1.

See Vance v. *Wray*, 3 L. J. 69.

(b) *Defences—Avowries and Cognizances.*

Distress for Rent — *Identity of Premises.*]—In an action of replevin the first count charged the defendant with taking certain goods on premises known as the "Creemore Woollen Mills;" and the second count with taking certain goods on the premises known as the "Northern and North-Western Station at the said village of Creemore." The defendant pleaded denying the taking and the property, and then for a third plea set up, that one W. was tenant to the defendant of certain premises in the said village known as "Block B," and certain other premises known as the "Langtry Block;" that rent was in arrear, and because of such arrears of rent the defendant "well avowed the taking of the said goods on the said premises and justly, &c., as a distress for said rent which still remains due and unpaid:" — Held, on demurrer, plea bad: for if the "said premises" upon which the alleged taking was made were the premises set out in the plea, then the taking was on other premises than those named in the declaration, and there was no confession, and the plea of non cepit covered this defence; but if the premises named in the declaration were referred to, then defendant confessed the taking and justified for rent due for other premises, which amounted to a taking off the demised premises, so that enough was not shewn. *Robins* v. *Coffee*, 9 O. R. 332.

Distress under Conviction — *Warrant—Constable—Costs.*] — On demurrer to an avowry justifying under a conviction for selling spirituous liquors without a license, and a distress warrant issued thereon:—Held, as to the form of the warrant, that it was unnecessary to allege that it was under seal or that it was directed to any one, it being averred to have been duly issued and delivered for execution to defendant M., the constable. Held, also, that the avowry set out in the report sufficiently shewed that defendant M. was a constable, and that it was delivered to him for execution. Held, further, that the mention in the warrant of the $1 for costs of conveying defendants to gaol, could not vitiate, for it authorized a distress only for the penalty and costs of conviction. *Reid* v. *McWhinnie*, 27 U. C. R. 289.

Distress under Mortgage.]—Held, that the avowries set out in this case, justifying under a distress clause contained in a mortgage, were bad, as not alleging that the mortgage contained a provision that the mortgagor should be permitted to continue in possession of the mortgaged premises, nor that he did occupy, in pursuance of such permission, at the time of the distress, or at any time. *Royal Canadian Bank* v. *Kelly*, 19 C. P. 196.

Justification.]—As to the distinction between an avowry, which must shew a good title in omnibus, and a justification: see *Taylor* v. *Jermyn*, 25 U. C. R. 86.

School Rates.]—In making a cognizance under a warrant of school trustees to collect school rates, it is sufficient to state that the plaintiff was duly assessed, and that the collector (the cognizor) was duly appointed; it is not necessary to state that the rate was decided upon at a meeting as required by the statute, or how the appointment was made. *Gillies* v. *Wood*, 13 U. C. R. 357.

——— *By-law.*]—Held, that a party avowing for distress for a school rate, the by-law for sanctioning such levy requiring to be passed upon the request or with the consent of certain persons, must shew such request or consent. Held, also, that upon such avowry the avowant must set forth the conditions precedent required by law to be complied with before the passing of a by-law to levy a rate for school purposes. *Huacke* v. *Marr*, 8 C. P. 441.

(c) *Pleas to Avowries for Rent.*

Agreement for Deduction.] — See *Wheeler* v. *Sime*, 3 U. C. R. 143.

Denial of Distress.] — See *Sheeran* v. *O'Connor*, 15 U. C. R. 418

Denial of Title.] — See *Robertson* v. *Meyers*, 7 U. C. R. 415; *Hartley* v. *Jarvis*, 7 U. C. R. 545; *Smith* v. *Aubrey*, 7 U. C. R. 90.

——— *Cesser of Reversion—Time.*] — See *Lynett* v. *Parkinson*, 1 C. P. 95.

——— *Nil Habuit in Tenementis.*]—See *Brown* v. *Garden*, 19 U. C. R. 518.

Non Tenuit.]—See *O'Brien* v. *Welsh*, 28 U. C. R. 394.

Part of Goods.]—The action of replevin is divisible, and therefore a plaintiff may plead to the avowry a plea which only goes to part of the goods. *Miller* v. *Miller*, 17 C. P. 226.

Set-off.]—Set-off may be pleaded to an action for rent due under a demise, though not to an avowry for rent in replevin. *McAnnany* v. *Tickell*, 23 U. C. R. 122.

(d) *Other Pleas and Replications.*

Abatement—*Non-joinder.*]—See *Cook* v. *Fowler*, 12 U. C. R. 568.

Detinue—*Denial—Lien.*] — See *Stephens* v. *Cousins*, 16 U. C. R. 329.

Equitable Replication.]—See *Reilly* v. *Clark*, 2 L. J. 232.

Justification — *Search Warrant — Judgment—Quashing.*]—A search warrant issued under the Canada Temperance Act is good if it follows the prescribed form; and if it has been issued by competent authority and is valid on its face, it will afford justification to

the officer executing it, in either criminal or civil proceedings, notwithstanding that it may be bad in fact and may have been quashed or set aside. A judgment on certiorari quashing the warrant would not estop the defendant from justifying under it in proceedings to replevy the goods seized where he was not a party to the proceeding to set the warrant aside, and such judgment was a judgment inter partes only. *Sleeth* v. *Hurlbert*, 25 S. C. R. 620.

Non Cepit—*Notice of Action.*]—See *Folger* v. *Minton*, 10 U. C. R. 423.

——— *Seizure under Process.*]—See *Calcutt* v. *Ruttan*, 13 U. C. R. 146; *Clark* v. *Ruttan*, 6 C. P. 97.

Not Possessed — *Divisible Plea.*] — See *Henderson* v. *Sills*, 8 C. P. 68.

See also *Miller* v. *Miller*, 17 C. P. 226; *Robins* v. *Coffee*, 9 O. R. 332.

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5. Verdict and Judgment.

Bar to Future Action.]—Quere, whether a judgment in replevin could be a bar to an action for use and occupation. *Crooks* v. *Bowes*, 22 U. C. R. 219.

Demurrer.]—In replevin, where the district court found for the plaintiff on demurrer to the first cognizance, and for defendant on demurrer to his replication to one of several pleas in bar of the second cognizance, and a general judgment was given in defendant's favour, awarding damages and a return of the goods:—Held, on appeal, that such judgment was erroneous. *Rea* v. *Gilliland*, 5 O. S. 649.

Divided Verdict.]—The declaration in replevin under 14 & 15 Vict. c. 64 was for "taking and unjustly detaining" certain goods. Defendants pleaded "non ceperunt" and a special plea of lien. The evidence shewed that defendants came lawfully by the goods, but had no right to detain them. A rule for nonsuit was discharged, as the plaintiffs had succeeded on the second plea, and thereby established their right to the goods; and, semble, that although defendants had obtained a verdict on "non cepit," yet the plaintiffs were entitled to judgment generally, such issue being either immaterial, or determined in plaintiffs' favour by proof of detention. *Waters* v. *Ruddell*, 11 U. C. R. 181.

In replevin the verdict is divisible, so that the plaintiff may recover for whatever part of the goods he proves himself entitled to, and defendant for the rest. *Sills* v. *Hunt*, 16 U. C. R. 521; *Haggart* v. *Kernahan*, 17 U. C. R. 341; *Henderson* v. *Sills*, 8 C. P. 68. See *Canniff* v. *Bogart*, 6 L. J. 39.

Interlocutory Judgment — *Default.*] — The proceedings in replevin as regards appearance were regulated by the Replevin Act, C. S. U. C. c. 29, not by the C. L. P. Act; and an interlocutory judgment signed as for want of a plea, without any appearance by or for defendant, was therefore a nullity. But see R. S. O. 1877 c. 53, s. 38. *Hart* v. *Pacaud*, 28 U. C. R. 390.

Nonsuit.]—A defendant in replevin could not move for judgment as in case of a nonsuit. *Brown* v. *Simmons*, 1 U. C. R. 336.

And 14 & 15 Vict. c. 64, s. 72, does not allow it. *Arnold* v. *Higgins*, 1 P. R. 139.

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6. Writ of Replevin.

Affidavit for — *By whom Made.*]—The deponent, not being the plaintiff himself, did not describe himself as servant or agent of the plaintiff, but used the words, "now acting for the said" (the plaintiff):—Held, that this alone would have been insufficient; but the affidavit went on to state particularly the position and quantity of the timber replevied, and other facts from which the agency might be inferred; and an application to set aside the writ was therefore refused. *Arnold* v. *Hamilton*, 1 P. R. 263.

——— *Description of Property.*]—The affidavit must be sufficient to enable the sheriff by it to identify the property. Where it stated only that the plaintiff was owner of 98 trees, which, he was informed and believed, were cut on certain lots specified, and it appeared that these trees were alleged to be then in use as binders for a large raft of timber on its way to Quebec:—Held, insufficient, and the writ was set aside. *Jones* v. *Cook*, 2 P. R. 396.

Description of Goods.] — The plaintiff issued a writ of replevin directing the sheriff to replevy "two hundred and thirty sheep and lambs," unjustly detained by the defendant. On the previous day defendant had sold the property to one Gill, in whose possession it was when the seizure was made:—Held, that the above description was not sufficient, and that the articles could not be seized under the writ while they were in the possession of a person not named therein. Plaintiff was allowed to amend the description and substitute or add Gill as a defendant. *Hoorigan* v. *Driscoll*, 8 P. R. 184.

Form of.]—A writ of replevin with a justice's clause was irregular. An original writ, alias and pluries, modified in form so as to conform to the local jurisdictions, should be adopted. *Cornell* v. *Quick*, Dra. 427.

Place of Issue.]—Where the goods to be replevied have not been distrained, the writ may be sued out in any county, and it may be issued from one outer county to replevy goods in another outer county. *Buffalo and Lake Huron R. W. Co.* v. *Gordon*, 3 L. J. 28.

Return to Writ.]—Return by sheriff to a writ of replevin, that the property had not been since the delivery of the writ to him in the possession of defendant, or of any person for him. Attachment as for an insufficient return with costs. Remarks as to the propriety of such return, and the sheriff's duty under the circumstances. *Carveth* v. *Greenwood*, 3 P. R. 175.

Service of.]—Personal service of the summons was unnecessary. *Zavitz* v. *Hoover*, M. T. 1 Vict., R. & J. Dig. 3308

Setting aside—*Grounds.*]—An objection that there was in fact no taking or detention, is no ground by setting aside the writ. *Gilchrist* v. *Conger*, 11 U. C. R. 197.

To whom Directed.]—Where the sheriff is defendant, a writ of replevin, under 14 & 15 Vict. c. 64, may be directed to the coroners, though the statute does not provide for such a case. *Gilchrist* v. *Conger*, 11 U. C. R. 197.

——— *Irregularity—Waiver.*] — In a replevin action the writ was directed to a sheriff, who was the sole liquidator of the plaintiffs, and as such instituted the action:—Held, that this was at most an irregularity, and it was too late for the defendant to raise the objection after appearance. R. S. O. 1877 c. 53, s. 9, applies to the case of an application on the merits, and not for irregularity only. Quære, whether, even if the objection had been taken in time, it should have prevailed, having regard to the kind of duty the sheriff has to perform in executing a writ of replevin, and to the position of the liquidator as a mere officer under the Act. *Alpha Oil Co.* v. *Donnelly*, 12 P. R. 515.

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7. *Other Cases.*

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

Award — *Promissory Note — Inconsistency.*]—Held, that an award, in replevin for a promissory note, that declared the defendant to have detained the note illegally, and at the same time awarded that it should be delivered up upon payment of a certain sum (which amount was due thereon) was not void for inconsistency, as it effected substantial justice between the parties. *Lund* v. *Smith*, 10 C. P. 443.

Certiorari to Inferior Court.]—Where in replevin in a county court the plaintiff shewed clearly that he had reason to believe that the title to the land would be brought in question by defendant, a certiorari was granted. *Heaton* v. *Cornwall*, 4 P. R. 148.

23 Vict. c. 44 prohibits a certiorari unless the debt or damages claimed exceed $100. Quære, therefore, whether replevin is within the Act. *Meyers* v. *Baker*, 26 U. C. R. 16.

Interference by Injunction.] — This court will not interfere by injunction to restrain the plaintiff suing out a writ of replevin from taking possession of and receiving the profits derivable from the goods replevied, unless it can be shewn that complete security could not be obtained at law. By 23 Vict. c. 45, the courts of common law can impose such terms upon the plaintiff as will fully indemnify defendant in the suit from all damages he may sustain by reason of the action. *Bletcher* v. *Burns*, 9 Gr. 425.

New Trial—*Costs.*]—Where the court has set aside a verdict for defendant in replevin, upon the ground that he had no legal right of distress, and the jury have found a second time for defendant, the court will always grant a second new trial to the plaintiff, without costs. *Sanderson* v. *Kingston Marine R. W. Co.*, 4 U. C. R. 340.

Notice of Action.]—Notice of action is not necessary in replevin. *Folger* v. *Minton*, 10 U. C. R. 423; *Kennedy* v. *Hall*, 7 C. P. 218; *Applegarth* v. *Graham*, 7 C. P. 171; *Lewis* v. *Teale*, 32 U. C. R. 108.

Notice of Trial.] — In an action of replevin ten days' notice of trial must be given, instead of eight days, as under the old practice. *Wallace* v. *Cowan*, 9 P. R. 144.

Sheriff—*Refusal to Execute Writ.*]—The sheriff, being in possession under an attachment against an insolvent debtor, refused to execute a writ of replevin at the suit of the plaintiff, two instalments of whose mortgage on the goods were overdue:—Held, that the sheriff was liable for not executing the writ. *Boys* v. *Smith*, 9 C. P. 27. Affirmed on appeal, 6 L. J. 182.

Third Party—*Examination of, by Plaintiff.*]—See *Bradley* v. *Clarke*, 9 P. R. 410.

See Culham v. *Love*, *Love* v. *Culham*, 30 U. C. R. 410.

III. Replevin Bond.

1. *Action on.*

(a) *Cause of Action—Delay in Prosecuting Replevin Action.*

Denial of Delay—*Plea—Explanation of Delay—Evidence.*]—Debt on a replevin bond against J. C., principal, and his sureties. 4th plea, that J. C. commenced his suit without any delay, and prosecuted the same (not adding without delay). 5th plea, that J. C. commenced a suit without delay, and "from thence hitherto has prosecuted the said suit without delay:"—Held, 4th plea bad; 5th plea good. *Caswell* v. *Catton*, 9 U. C. R. 282.

Defendants pleaded that an action was commenced and prosecuted without delay, according to the true intent and meaning of the condition; and to this the plaintiffs replied that after the commencement of the action an unreasonably long time was allowed to elapse without taking any further step therein, adding a special traverse of the due diligence alleged:—Held, that under these pleadings defendant should have been allowed to give evidence of circumstances, shewing a reason for a delay of more than a year after the writ of replevin was sued out. *S. C., ib.* 462.

Excuse for Delay.]—Semble, that the inability of the plaintiff's attorney in replevin to communicate with his client, not knowing where he was, affords no excuse for allowing two assizes to elapse; for it is the plaintiff's delay, not that of his attorney, which is a breach of the bond. *Bletcher* v. *Burn*, 24 U. C. R. 124.

Defendant replevied a schooner in September, 1862. Issue in fact was joined in the replevin suit in March, 1863, and issues in law also raised were disposed of in September, 1863, but nothing more was done. In February, 1864, an action was brought on the replevin bond by the plaintiff, as assignee of the sheriff, to which defendant pleaded only that he had prosecuted the replevin suit without delay. As an excuse for not going to trial at the assizes, which began on the 12th October, 1863, defendant proved that he sailed in the schooner, as master, from Port Colborne,

about the 1st October, for Chicago, which he was prevented from reaching until the 25th, the usual time required for the voyage being about ten days; and that his attorneys, not knowing where he was, and getting no answer to their letters, countermanded the notice of trial:—Held, no excuse, for it could not be presumed that defendant's presence was necessary for the trial, nor that his attorneys were not properly instructed before he left, or were in ignorance of his going; and if they were, quære, whether it would have made any difference, for issue had been joined since March, and there had been ample time, therefore, to give all necessary information. The reason offered for not proceeding at the winter assizes in January, 1864, was, that on the 7th November, 1863, defendant filed a bill in chancery against the plaintiff and others, relating to the title to this vessel, and praying, among other things, to restrain proceedings on the plevin bond:—Held, also, no excuse. *S. C.*, 16. 259.

——— *Postponement of Trial.*]—The trial of an action of replevin in a county court was, by a Judge's order, on the application of the plaintiff therein, postponed to the next sittings thereof, and subsequently the action was by Judge's order transferred to another county court. In an action on the replevin bond it was held, on demurrer, that the delay being that of the plaintiff in replevin without the consent or connivance and against the opposition of the defendant therein, the sureties to the bond were not discharged. *O'Donnell* v. *Duchesnault*, 14 U. R. 1.

Stay for Want of Jurisdiction.]—A. brought replevin in the county court and obtained a verdict, which was set aside because title to land came in question. Nothing was said in the rule about a new trial, but he served another notice of trial, and the cause was made a remanet. The surety, being sued in a superior court on the replevin bond for not prosecuting the suit with effect and without delay, moved for a mandamus to compel the county court to proceed with the action, or a certiorari to remove it, and in the meantime to stay proceedings in the superior court; but the court refused to interfere. *Meyers* v. *Baker, Hargreaves* v. *Meyers*, 26 U. C. R. 16.

See Culham v. *Love, Love* v. *Culham*, 30 U. C. R. 410.

(b) *Cause of Action—Indemnity.*

Rule 1074.]—Con. rule (1897) 1074, dealing with the question of indemnity of the defendant in replevin proceedings, is the statute 48 Vict. c. 13, s. 8 (O.), imported into the rules, and does not give an independent cause of action, merely adding another condition to the replevin bond required to be taken by the sheriff. *Harper* v. *Toronto Type Foundry Co.*, 31 O. R. 422.

(c) *Cause of Action—Not Prosecuting with Effect.*

Action Undetermined — *Judgment not Entered—Damages.*]—To an action on a replevin bond given by a sheriff and two sureties to the coroners, conditioned to prosecute a replevin suit with effect and without delay, defendants pleaded that the suit was still undetermined. It was proved by the record that a verdict had been obtained against the principal obligor with points reserved, which also appeared by production of a special case to have been decided against him:—Held, sufficient, without shewing the entry of a judgment thereon, to entitle the plaintiff to a verdict for nominal damages. The verdict having, however, been entered for the penalty of the bond, £1,500, the court ordered it to be reduced to 1s.; otherwise a new trial. *Johnson* v. *Parke*, 12 C. P. 179.

Appeal Pending.] — Action by the assignee of the sheriff on a replevin bond, alleging a judgment in favour of defendants in the replevin suit, and non-return of the goods. Plea, that the plaintiffs in the suit applied for a new trial, which was refused, and thereupon an appeal was permitted, pursuant to 20 Vict. c. 5, and the security duly allowed, and that said appeal had been prosecuted with all reasonable speed, and was still pending:—Held, a good defence, and that the averment of the appeal having been allowed sufficiently implied that the necessary notice had been given. *Becker* v. *Ball*, 18 U. C. R. 192.

Judgment for Defendant on Some Pleas.]—In replevin defendant pleaded: (1) that he did not detain the goods; (2) not guilty; (3) that the goods were not the plaintiff's. Judgment was given for defendant upon the first and second issues, and for plaintiff on the third:—Held, in an action on the replevin bond, that defendant had not prosecuted his suit with effect, and that the plaintiff (defendant in replevin) was entitled to recover his costs of defence. *Mulvaney* v. *Hopkins*, 18 U. C. R. 174.

Setting aside Writ and Proceedings.]—An order of a Judge setting aside a writ of replevin "and all proceedings thereon, subsequent to the issue thereof," admitting that it extends to the replevin bond, does not of itself absolutely annul the bond, so that to an action on it such order can be pleaded as a defence. The obligor in such case may obtain relief upon application to stay proceedings on the bond, or otherwise, on shewing that he is entitled to it, but the mere setting aside the writ of replevin by the defendant in that suit can be no reason why the bond should not be sued upon, for not prosecuting the suit with effect. *Meloche* v. *Reaume*, 34 U. C. R. 606.

Stay for Want of Jurisdiction.]—To a breach of the bond in not prosecuting the suit, which was in a county court, with effect, defendants pleaded that the suit was brought to trial without delay, and a verdict given for defendants, with leave reserved to move for a nonsuit or verdict for plaintiff; that in the next term a rule nisi was obtained accordingly, on the argument of which defendants therein objected to the Judge proceeding further because title to land had come in question, whereupon the Judge determined that the jurisdiction of his court was ousted and declined giving judgment, and none had ever been given; and that the plaintiff in the cause then applied in chambers at Toronto for a certiorari, which was refused:—Held, that the plea shewed no defence; for that the suit had been brought to an unsuccessful termination, and the facts of the defendants in it having caused such result by objecting to the jurisdiction

could not prevent their recovery on the bond. *Welsh* v. *O'Brien*, 28 U. C. R. 405.

See Culham v. *Love*, *Love* v. *Culham*, 30 U. C. R. 410.

(b) *Cause of Action—Non-return of Goods.*

Plea—*Answering only one Breach.*]—Declaration, alleging that B., the plaintiff in replevin, did not prosecute his suit with effect, and did not make a return of the goods. Plea, that B. did make a return according to the condition, but that the plaintiff refused to accept the same:—Held, a bad plea, as answering only one breach. *Golding* v. *Bellnap*, 26 U. C. R. 163.

Return as to Part.]—Where the plaintiff in replevin succeeds only for part of the goods replevied, and a return is adjudged as to the rest, he is liable upon the replevin bond for not prosecuting the suit with effect as to the goods for which he failed, and for not returning them. *Patterson* v. *Fuller*, 31 U. C. R. 263.

Set-off.]—To an action on a replevin bond by the assignee of the sheriff, a set-off forms a good defence, the penalty being considered as the debt. To such an action defendants pleaded, on equitable grounds, that the cordwood for which the replevin was brought and the bond given, was claimed by M. (defendant in the replevin) and it was agreed between him and the plaintiff that M. should haul the wood from where it was cut to the river, and if M. could not prove that he was entitled to the wood, the plaintiff should pay him for hauling and bankage, which amounted to $165:—Held, that this sum might be set off against the breach for non-return of the wood. *McKelvey* v. *McLean*, 34 U. C. R. 635.

(c) *Damages.*

Condition of Bond—*Statute.*]—Quære, as to the effect of 23 Vict. c. 45, s. 5, adding a new condition to the replevin bond. Semble, that it gives no right to damages not before recoverable; and it does not bring such bond within the statute of Wm. III. *Bletcher* v. *Burn*, 24 U. C. R. 259.

Costs of Defence—*Additional Damage—Evidence—Jury.*]—Action by the assignee of a replevin bond for not prosecuting the suit with effect, the writ of replevin having been set aside; and for not paying the damages sustained by plaintiff by the issue of said writ, the costs incurred in setting aside the writ, and for damages for detention of vessel replevied. Plea, non damnificatus. At the trial it appeared that the plaintiff had also caused the vessel to be seized on certain fi. fas. placed in the sheriff's hands prior to her being replevied, which executions were withdrawn as soon as the writ of replevin was set aside. The plaintiff wished to shew that his object in seizing under the fi. fas. was to prevent defendant taking possession of her under a writ of replevin, but this evidence was rejected and the plaintiff was nonsuited:—Held, that the plaintiff's property having been seized under the writ of replevin, he had to take steps to defend the same, and was entitled to at least his costs of defence; what the other damages were, and whether they arose from the issuing of the writ of replevin, would be for the jury, if such damages could be recovered, the bond not containing the condition provided for in 23 Vict. c. 45, s. 5. Semble, that the evidence was rightly rejected. The statement by an attorney that he directed the seizure of goods under a fi. fa. because they were replevied:—Held, no evidence to enhance the damages in this suit. *Burn* v. *Blecher*, 14 C. P. 415.

——— *Solicitor and Client.*]—Where the avowant successfully defends a replevin suit, and subsequently institutes proceedings on the replevin bond, he is not entitled to recover as part of his damages the excess of solicitor and client costs of his defence, over and above his taxed party and party costs in that action. Semble, that the effect of R. S. O. 1877 c. 50, s. 352, is to make the Imperial Act 5 & 6 Vict. c. 97, s. 2, as to costs in cases of replevin on a distress for rent in arrear, applicable to our practice. *Williams* v. *Crow*, 10 A. R. 301.

Penalty—*Actual Damages.*]—A plaintiff suing on the bond is entitled to a verdict for the penalty, but the court will not allow him to recover more than the actual damages, if assessed. *Heley* v. *Cousins*, 34 U. C. R. 63.

Reduction of—*Actual Loss—Set-off—Stay of Proceedings.*]—The defendant's timber limits adjoined those of B. & C., but from uncertainty of description in their respective licenses, the division line was not defined. The defendant replevied 216 pieces of timber cut within a line run under instructions of the Crown timber agent, as the boundary of the defendant's limits, but, on account of the infirmity in his license, he failed in the action as to 175 pieces, for a return of which B. & C. were entitled to judgment. The latter procured an assignment of the replevin bond to themselves, and assigned it to the plaintiffs, who brought this action thereon. The court was of opinion that the timber in question was cut upon lands intended by the Crown to be within the limits of the defendant's license, though B. & C. had some grounds for asserting title thereto:—Held, that, there having been a breach of the condition of the bond, B. & C. became entitled to recover such damages as they had sustained by replevin proceedings; that the bond, after it was assigned by the sheriff to B. & C., was a debt and chose in action assignable pursuant to the statute; and that the plaintiff, having the beneficial interest therein by assignment, was entitled to recover; but, it being a case for the equitable interference of the court, it was directed that upon payment by the defendant of the cost incurred by B. & C. in cutting and transporting the timber up to the time it was replevied, less a set-off found for the defendant in this action (the amount to be ascertained by a reference if the defendant should so elect), further proceedings should be stayed. *Bates* v. *Mackey*, 1 O. R. 34.

Rent Distrained for — *Undertaking—Nominal Damages.*]—In an action for breach of a replevin bond for not prosecuting the replevin suit without delay, the plaintiff at the trial was awarded as damages the amount of the rent distrained for. On motion in term, on defendants undertaking to bring the replevin suit down to trial at the next assizes, the damages were reduced to a nominal sum. *Churchill* v. *Denham*, 29 C. P. 474.

Value of Goods—*Removal—Place of Replevin.*]—In an action on the bond, against principal and sureties, the breach assigned was the non-return of a portion of the timber replevied, for which defendants in replevin, the now plaintiffs, obtained judgment. It appeared that the timber when replevied was on the banks of a river some distance above the point where it was intended to be shipped, and by the direction of F., the plaintiff in replevin, it was put in the possession of one L., who was F.'s general agent for looking after his lands in that part of the country. L. authorized defendant in replevin to take it down to the shipping point, where it was again taken possession of for F. by a person appointed by L. to receive it there, and shipped for F. L. had been forbidden by F. to permit this removal to the shipping point, but the defendant in replevin was not aware of it, and such removal was to the benefit of whoever might be the owner: —Held, that the receipt of the timber at the shipping point by F. was a ratification on his part of the removal. Semble, that the plaintiff, though entitled therefore to recover against F. the value of the timber at the shipping point, could, as against the sureties, recover only its value where replevied. *Patterson* v. *Fuller*, 32 U. C. R. 240.

(f) *Pleading.*

Declaration—*Form of.*]—A declaration by the assignee of a replevin bond, in the form used in England, with an averment of a plaint made to the sheriff:—Held, bad. *Hutt* v. *Keith*, 1 U. C. R. 478.

——— *Setting up Bond—Coroner—Judicial Notice.*]—In an action on a replevin bond given by a sheriff, defendants moved in arrest of judgment, on the ground that the bond was made to and assigned by *one* coroner of the county:—Held, that the bond being properly set out in the declaration, and no issue as to its making or assignment being raised on the record, the court were not bound to take judicial notice that there were more coroners than one in the county, and the declaration was therefore sustained. *Johnson* v. *Parke*, 12 C. P. 179.

Plea—*No Rent in Arrear.*]—In debt on the bond the declaration set out that the plaintiff had distrained goods of H. S. N. and J. V. N., which were claimed by the now plaintiff, who replevied. Defendant pleaded "no rent in arrear," which was held clearly bad, as being a defence which should have been pleaded to the avowry in the original action, if at all. *Meyers* v. *Maybee*, 10 U. C. R. 200.

——— *Payment into Court—Issue—Jury.*]—The declaration claimed damages for breaches of the condition of a replevin bond, assigning as breaches the non-payment of the costs of the replevin suit, or of the writ for the return, or of the sheriff's fees, and that the goods replevied were appraised at more than the rent for which they were seized, but were depreciated before the return of the writ and sold for less. Defendant pleaded payment of money into court under an order of a Judge, and upon the authority of 23 Vict. c. 45:—Held, good. The court was also of opinion that the issue should be tried by a jury, considering the additional clause added by the late statute to the condition of the bond. *Thompson* v. *Kaye*, 13 C. P. 251.

See (a), (b), (c).

(g) *Staying Proceedings.*

Chattel Mortgage — *Payment.*] — C. mortgaged to plaintiff the goods in his shop to secure £125. The plaintiff having taken possession of all C.'s stock in the shop, the greater portion of which was not there at the execution of the mortgage, C. replevied. This action on the replevin bond had been taken down to the county court, and the trial postponed. The court, on application, ordered proceedings to be stayed on payment of the amount secured by the mortgage, with interest and costs. *Hedley* v. *Closter*, 13 U. C. R. 333.

Replevin Action Pending—*Pleading.*]—L. brought replevin for his goods, which C. had distrained for rent. While the action was pending, and before declaration, C. took an assignment of the replevin bond, and sued L. and his sureties thereon. Application was then made to stay proceedings in each case—in the suit on the bond, on the ground that until the determination of the action of replevin the rights of the parties on the bond could not be satisfactorily settled; and in the replevin suit because it had not been prosecuted according to the bond, of which defendants had obtained an assignment. The defendant in replevin moved also for leave to plead, with other pleas, that the plaintiff had not prosecuted his suit with effect and without delay, and that defendant had sued upon the replevin bond before the plaintiff had declared in replevin. The court refused to interfere in either case; for, as to the action on the bond, whether the replevin had been prosecuted without delay was a question of fact, which could be tried; and as to the replevin, the plaintiff was at liberty to go on and prosecute it with effect. The proposed plea was not allowed, as it could be no answer to the action. *Culham* v. *Love*, *Love* v. *Culham*, 30 U. C. R. 410.

Verdict for Penalty—*Payment of Value and Costs.*]—Goods seized under an execution in the hands of the debtor were replevied, under 14 & 15 Vict. c. 64, by S., claiming under an assignment from such debtor. S. failed in the replevin; and in this suit, brought by the sheriff on the replevin bond, defendant suffered judgment by default, and a verdict was rendered for the penalty. The jury having found at the trial the value of the goods, the court ordered proceedings to be stayed on payment of such value into court with the costs. Quære, as to the proper method of ascertaining the value. *Ruttan* v. *Short*, 12 U. C. R. 485.

2. *Assignment of.*

Action by Assignee.]—The assignee of a sheriff's replevin bond under 14 & 15 Vict. c. 64, may sue thereon in his own name. *Bacon* v. *Langton*, 9 C. P. 410.

Joint and Several Bond — *Action* — *Parties.*]—Action by the assignee of the sheriff on a replevin bond:—Semble, that,

though not a case of distress for rent, the bond could be assigned; and that it was no objection, the bond being joint and several, that one of the three obligors was not made defendant. *Becker* v. *Ball*, 18 U. C. R. 192.

Sureties—*Action by Assignee.*]—A replevin bond entered into by the principal and three sureties is sufficiently in accordance with 4 Wm. IV. c. 7; and the assignee of such bond may sue in his own name. *Meyers* v. *Maybee*, 10 U. C. R. 200.

Witness.]—An assignment by the sheriff of a replevin bond is valid in Ontario, attested by only one witness. Semble, that a subscribing witness is necessary to its validity. *Heley* v. *Cousins*, 34 U. C. R. 63.

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3. *Forfeiture of.*

The court will not determine summarily whether a replevin bond has been forfeited or not. *Hoover* v. *Zavitz*, T. T. 1 & 2 Vict.

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4. *Sheriff.*

Action against, for not Assigning.]—Declaration, that the defendant, as sheriff, took from H. and two sureties a bond in $1,800 conditioned for said H. prosecuting with effect and without delay an action of replevin brought by him against the plaintiff; that H. did not so prosecute the suit, nor did he make a return of the goods; and that defendant refused to assign the bond to the plaintiff, whereby the plaintiff was hindered from suing on the bond, and deprived of the means of recovering the value of the goods and the costs, &c. Plea, as to so much as alleges that the plaintiff is deprived of the means of recovering the value of the goods, that the goods were replevied by defendant by the Great Western R. W. Co., and that the plaintiff afterwards recovered from said company the full value of such goods in an action against them as common carriers, for non-delivery of said goods:—Held, on demurrer, plea bad, for it did not shew that the plaintiff was not delayed in recovering the value of the goods by defendant's refusal to assign, and it was pleaded to damages only. *Pacaud* v. *McEwan*, 30 U. C. R. 550.

Action against the sheriff for not assigning a replevin bond. It appeared that one H. originally owned the goods replevied, which were wrongfully taken from him and sent to Windsor. There they were replevied by H. from the Great Western Railway Company, who held them for one P., the defendant in the replevin suit. P. assigned the goods to F. H., who sued the railway company, in the State of Michigan, and recovered their value, which the company paid. The company then sued the sheriff for taking the goods, but failed, the verdict being that the goods when replevied belonged to H., not to P. H. did not go on with the replevin suit, and P., for the benefit of the company, claimed an assignment of the bond, which the sheriff refused to give:—Held, that only nominal damages could be recovered, for P., not being the owner of the goods, could not recover their value. *S. C.*, 31 U. C. R. 328.

Duty to Take Bond.] — In replevin a county court Judge made an order when the writ was granted, directing the sheriff to seize the goods and hold them subject to requisition by the plaintiff to replevy to him. The sheriff seized the goods, but did not take a bond as directed by R. S. O. 1877 c. 53, s. 11:—Held, that this order did not do away with the necessity of taking a bond, and the seizure was set aside, with costs to be paid by the sheriff. *Lawless* v. *Radford*, 9 P. R. 33.

Held, that it is the sheriff's duty in replevin to take a bond with two sureties, and to use due care and to exercise a reasonable discretion in inquiring into the sufficiency of the sureties, and that when he had failed to do this, and the owner of the goods replevied, and the bailiff (defendants to the replevin suit, which had resulted in their favour) brought an action against him for damages consequent thereon, they were entitled to recover all such damages as naturally flowed to them from his wrongful act, viz., the rent in arrear, the costs of distress, and of the replevin suit, and of an action against the principal and sureties on the replevin bond and incidental thereto, provided the same did not exceed the penalty named in the bond; and the defendant could not excuse himself by shewing that the plaintiff in replevin and one of the sureties was worth the amount of the penalty of the bond at the time it was taken. *Norman* v. *Hope*, 13 O. R. 556, 14 O. R. 287.

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5. *Sureties—Discharge of.*

Reference to Arbitration—*Assent of Surety.*]—Where, after proceedings have been commenced on the bond, the parties to the replevin go to arbitration without the assent of the surety, all further proceedings against the surety will be stayed. Aliter, where the reference is with his assent. *Hutt* v. *Gilleland*, *Hutt* v. *Keith*, 1 U. C. R. 540.

——— *Assent of Surety—Conduct.*]—An action of replevin, with all matters in difference between the parties, was referred to arbitration, and decided in favour of defendant, who then sued the sureties on the replevin bond. On motion to stay proceedings, on the ground that they were discharged by the reference, defendants swore that they had not consented to the reference, and the plaintiffs in answer shewed that they were aware of it and did not object, but attended at the arbitration, and that one of the defendants had asked the plaintiff's attorney for time:—Held, that, as consent, on these affidavits, could not be assumed, defendants were discharged; and the rule was made absolute. *Burke* v. *Glover*, 21 U. C. R. 294.

Release of One—*Effect of—Sheriff.*]—A release by plaintiff to one of several obligors in a replevin bond to the sheriff, after an assignment to the plaintiff, releases all; and having released the sureties, the plaintiff cannot sue the sheriff for taking insufficient sureties. *Kirkendall* v. *Thomas*, 7 U. C. R. 30.

Trial—*Postponement—Assent of Surety.*]—Where the trial of the replevin had been postponed at the instance of defendant, but without the direct assent or concurrence of the sureties:—Held, that the bail was discharged. The true question is not whether

the surety has been injured by the delay, but whether he might have been. *Canniff* v. *Bogart*, 6 C. P. 474.

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REVENUE.

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I. Courts—Jurisdiction of.

Before the A. J. Act — *Common Law Courts.*]—In debts due to the Crown, which would be cognizable in the court of exchequer in England, this court may give relief, when it appears that "in law, reason, or good conscience, the debtor ought not to be charged." *Regina* v. *Bonter*, 6 O. S. 551.

Held, that the equitable jurisdiction in matters of revenue in this Province, at the suit of a subject, resides in the superior courts of common law if at all, and not in the court of chancery. *Norwich* v. *Attorney-General*, 9 Gr. 563; *Miller* v. *Attorney-General*, 9 Gr. 558.

[By R. S. O. 1897 c. 51, s. 29, the high court of justice has the like equitable jurisdiction in matters of revenue as the court of exchequer in England possessed on the 18th March, 1865.]

Court of Chancery.] — Held, affirming the decree in 25 Gr. 233, without determining whether the A. J. Act extends to Crown cases generally, that under s. 32, and under s. 155 of 31 Vict. c. 8 (D.), the attorney-general is entitled to sue in the court of chancery for the recovery of excise duties, even if it be a purely legal debt. Held, also, that ss. 43 and 44 of 31 Vict. c. 8 (D.) do not restrict the right of the Crown to sue in respect of frauds committed upon the revenue to the period of one year, or prevent a recovery in a court of law, unless a special investigation has been held in pursuance of the Act. *Attorney-General* v. *Walker*, 3 A. R. 195.

Exchequer Court of Canada—*Penalty—Admiralty.*]—The jurisdiction conferred upon the vice-admiralty courts in Canada by s. 113 of the Inland Revenue Act, R. S. C. c. 34, in respect of actions for penalties prescribed by such Act, is not disturbed by the Colonial Courts of Admiralty Act, 1890 (Imp.) The latter Act (s. 2, s.-s. 3) vests the jurisdiction of the vice-admiralty courts in any colonial court of admiralty, and by the Admiralty Act, 1891, the parliament of Canada made the exchequer court the court of admiralty for the Dominion, and by s. 9 thereof confers upon the local Judges in admiralty all the powers of the Judge of the exchequer court with respect to the admiralty jurisdiction thereof. *The Queen* v. *The Annie Allen*, 5 Ex. C. R. 144.

——— *Penalty — Customs—Discretion.*]—The penalty enforceable under the provisions of s. 192 of the Customs Act in the exchequer court is a pecuniary one only, and the other remedies open to the Crown thereunder cannot be enforced in the exchequer court. 2. The court has no discretion as to the amount of the penalty recoverable under such enactment. *The Queen* v. *Fitzgibbon*, *The Queen* v. *Thouret*, 6 Ex. C. R. 383.

——— *Reference—Minister of Customs—Evidence.*]—Where a claim has been referred to the exchequer court under s. 182 of the Customs Act, the proceeding thereon, as regulated by the provisions of s. 183 of the Act, is not in the nature of an appeal from the decision of the minister; and the court has power to hear, consider, and determine the matter upon the evidence adduced before it, whether the same has been before the minister or not. *Tyrrell* v. *The Queen*, 6 Ex. C. R. 169.

See Julien v. *The Queen*, 5 Ex. C. R. 238, *post* II. 5.

II. Customs Duties.

1. *Generally.*

Power to Impose.]—The colonial legislature has power to impose duties of customs, to punish infringement, to enforce payment, and to resort to forfeiture if necessary. *Regina ex rel. Attorney-General* v. *Brunskill*, 8 U. C. R. 546.

2. *Exemptions from Duty.*

Jute Cloth.]—In construing a clause of a Tariff Act which governs the imposition of duty upon an article which has acquired a special and technical signification in a certain trade, reference must be had to the language, understanding, and usage of such trade. By item 673 of R. S. C. c. 33, jute cloth "as taken from the loom, neither pressed, mangled, calendered, nor in any way finished, and not less than forty inches wide, when imported by manufacturers of jute bags for use in their own factories," was made free of duty. By item 261 of such Act, it was provided that manufactures of jute cloth, not elsewhere specified, should be subject to a duty of 20 per cent. ad valorem. The claimants, who were manufacturers of jute bags, had for a number of years imported into Canada jute cloth cropped after it was taken from the loom. Item 673 was susceptible of several interpretations, one of which was that the jute cloth so cropped should be entered free of duty, and in this construction the importers and the officers of customs had concurred during such period of importation: — Held, that, inasmuch as the cloth in question had been, in good faith, entered as free of duty and manufactured into

jute bags and sold, and it would happen that, if another construction than that so adopted by the importers and customs officers was now put upon the statute, the whole burden of the duty would fall upon the importers, the doubt as to such construction should be resolved in their favour. Quære, whether the words used in s. 183 of the Customs Act (as amended by 51 Vict. c. 14, s. 34) "the court . . . shall decide according to the right of the matter," were intended by the legislature in any way or case to free the court from following the strict letter of the law, and to give it a discretion to depart therefrom if the enforcement, in a particular case, of the letter of the law, would, in the opinion of the court, work injustice? *Dominion Bag Co.* v. *The Queen*, 4 Ex. C. R. 311.

"Shaped" Lumber.] — Under item (departmental No.) 726 in schedule "C." of the Tariff Act, 1886, oak lumber sawn, but not "shaped, planed, or otherwise manufactured," may be imported into Canada free of duty. The plaintiff imported a quantity of white oak lumber from the United States, which had been sawn to certain dimensions so as to admit of it being used in the manufacture of railway cars and trucks without waste of material, but yet before being used for such purpose had to be recut and fitted:—Held, that the lumber, being merely sawn to such dimensions as would enable it to be worked up without waste, was not "shaped" within the meaning of the Tariff Act, and was not dutiable. *Magann* v. *The Queen*, 2 Ex. C. R. 64.

Steel Rails for Railways—*Temporary Purpose.*] — Steel rails weighing twenty-five pounds per lineal yard, to be temporarily used for construction purposes on a railway, and not intended to form any part of the permanent track, cannot be imported free of duty under item 173 of the Tariff Act of 1887 (50 & 51 Vict. c. 39). (2) In virtue of cl. 13 of the Customs Act (R. S. C. c. 32) the court held that such rails should pay duty at the same rate as tramway rails (under 50 & 51 Vict. c. 39, item 88), to which of all the enumerated articles in the tariff they bore the strongest similitude or resemblance. *Sinclair* v. *The Queen*, 4 Ex. C. R. 275.

Steel Rails for Street Railways.]—Although there may be in various Canadian Acts, and for other purposes, substantial distinctions between railways or railway tracks and street railways and tramways, yet, for the purpose of separating free and dutiable articles, such distinction is not maintained in 50 & 51 Vict. c. 39 (D.) and its three predecessors. According to the true construction of that Act (see s. 1, item 88, and s. 2, item 173), the question whether imported steel rails are taxed or free depends solely upon their weight, not upon the character of the railway track for which they are intended. Judgments in 4 Ex. C. R. 262 and 25 S. C. R. 24 reversed. *Toronto R. W. Co.* v. *The Queen*, [1896] A. C. 551.

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3. *Fraud, Undervaluation, and Smuggling.*

(a) *Fraudulent Entries.*

Acting on Declaration — *Subsequent Seizure.*]—Where goods subject to an ad valorem duty have been entered at a port in this Province upon the importer's own declaration of value, which the collector had accepted and acted upon, the same goods cannot afterwards be seized by the collector of another port as having been undervalued upon their entry with the first collector. *Regina* v. *Jagger*, 3 U. C. R. 255.

Goods which have passed the custom house upon importation, and been taken into the interior, are still liable to seizure if it should appear that they have been fraudulently undervalued, but not for defects of form, such as the want of a permit. *Wile* v. *Cayley*, 14 U. C. R. 285.

False Declaration — *Pleading.*] — The second count charged that the goods were not truly described in the entry for duty, in this, that the value for the duty stated in the entry was not the actual cash value in the markets in the country where the importer purchased them, without adding that such untrue description and undervalue was made with intent to evade the payment of duty:—Held, count bad, for that the mode of calculating the value for duty as required by 12 Vict. c. 1, s. 6, not being complied with, was in itself no ground, without the further allegation of design to evade the payment, of forfeiture under 10 & 11 Vict. c. 31, s. 18. *Regina ex rel. Attorney-General* v. *Brunskill*, 8 U. C. R. 546.

Information for the condemnation of goods seized. The second count set forth that the goods were entered with the proper officer of customs—that in such entry they were valued at £ s. d., and that they were in and by such entry undervalued (not pointing out whether in reference to the domestic or foreign market value), with intent to avoid payment of duty, &c.:—Held, sufficient after verdict. Regina v. Brunskill, 8 U. C. R. 546, followed. *Regina* v. *Hibbard*, 3 C. P. 451.

False Invoices.]—Defendants residing in the United States, having contracted, by letter, with McP. & Co., of Toronto, to sell them brooms, laid down in Toronto, duty free, shipped the brooms to Toronto, and sent an invoice to their agent in Toronto valuing them at or near manufacturers' prices, and much under the price at which they were sold to McP. & Co. The brooms being entered for duties at the customs house, Toronto, at such undervalue:—Held, that such goods were liable to be seized, as being entered below the actual cash value in the markets of the country from which they were exported, and that such value was not to be taken to be the manufacturers' wholesale prices, but the sale prices in the markets whence the goods were exported. *Attorney-General* v. *Thompson*, 4 C. P. 548.

Machinery—*Constituent Parts—Completed Article.*]—G., manufacturer of an "automatic sprinkler," a brass device composed of several parts, was desirous of importing the same into Canada with the intention of putting the parts together there and putting the completed articles on the market. He interviewed the appraiser of hardware at Montreal, explained to him the device and its use, and was told that it should pay duty as a manufacture of brass. He imported a number of sprinklers and paid the duty on the several parts. There was little or no labour performed on the sprinklers in Canada. The customs officials caused the sprinklers to be seized, and an information to be laid against him for

smuggling, evasion of payment of duties, undervaluation, and knowingly keeping and selling goods illegally imported, under ss. 153 and 155 of the Customs Act of 1883:—Held, that there was no importation of sprinklers as completed articles by G., and, the Act not imposing a duty on parts of an article, the information should be dismissed. Held, also, that the subsequent passage of an Act (48 & 49 Vict. c. 61, s. 12, re-enacted by 49 Vict. c. 80, s. 11), imposing a duty on such parts, was a legislative declaration that it did not previously exist. *Grinnell* v. *The Queen*, 16 S. C. R. 119.

Manufactured Cloths—*False Invoices—Forfeiture.*]—Claimants were charged with a breach of the Customs Act by reason of fraudulent undervaluation of certain manufactured cloths imported into Canada. The goods were imported in given lengths cut to order, and not by the roll or piece as they were manufactured. The invoices on which the goods were entered for duty, shewed the prices at which, in the country of production, the manufacturer sells the uncut goods to the wholesale dealer or jobber, instead of shewing the fair market value of such goods cut to order in given lengths when sold for home consumption in the principal markets of the country from which they were imported. The values shewn on the invoices were further reduced by certain alleged trade discounts for which there was no apparent justification or excuse:—Held, that the circumstances amounted to fraudulent undervaluation; and that the decision of the controller of customs declaring the goods forfeited must be confirmed. [Leave to appeal to supreme court of Canada refused.] *Schulze* v. *The Queen*, 6 Ex. C. R. 268.

Medicines—*Constituent Parts—Value.*]—Some time before the Dominion of Canada was constituted, the J. C. A. Co., manufacturers of proprietary medicines in the United States, established a branch of their business in St. John's, P.Q., and commenced to import from the United States certain articles required in the preparation of their medicines. These articles were in the form of liquid compounds, and were valued for duty under the provisions of the Act 29 & 30 Vict. (C.) c. 6, s. 11, then in force, at the aggregate of the fair market value of the several ingredients entering into the compounds so imported, with the addition of all the costs and charges of transportation. These ingredients, after arrival in Canada, were mixed, bottled, and sold under various names. The import entries were made under the rates of duty fixed by the customs authorities in virtue of the provisions of the said Act, they being fully aware of the purposes to which the articles imported were to be applied. The company continued to import such goods in this way for upwards of twenty years, except some alterations they were called upon to make in the valuation for duty of certain liquids in 1883, when, on the 22nd May, 1885, the Dominion customs authorities seized large quantities of their manufactured medicines, and caused an information to be laid against the company for smuggling, evasion of the payment of duties, undervaluation, and for knowingly keeping and selling goods illegally imported, contrary to the provisions of the Customs Act, 1883:—Held, that there was no importation of goods as compounded medicines ready for sale, and that the duty having been paid upon the fair market value, in the place of exportation, of the ingredients of which the liquid in bulk were composed, there was no foundation for the seizure. (2) Where the constituent parts or ingredients of a specific article are imported, their value for duty within the meaning of ss. 68 and 69 of the Customs Act, 1883, is not the fair market value of the completed article in the place of exportation, but is simply the fair market value there of the several ingredients. The form in which the material is imported constitutes the discriminating test of the duty. (3) Notwithstanding the interpretation clause in the Customs Act, 1883, which provides that Customs laws shall receive such liberal construction as will best insure the protection of the revenue, &c., in cases of doubtful interpretation the construction should be in favour of the importer. (4) Where an importer openly imports goods and pays all the duties imposed on them at the fair market value thereof in the place of exportation at the time the same were exported, he has not imported such goods with intent to defraud the revenue, simply because he had the mind to do something with them which, had it been done in the country from which they were exported, would have enhanced their value, and, consequently, made them liable to pay a higher rate of duty, but which, in fact, was never done before the goods came into his possession after passing the customs. *The Queen* v. *Ayer Co.*, 1 Ex. C. R. 232.

Oils—*Undervaluation—Seizure—Notice — Waiver—Deposit—Penalty—Prescription.*]—The suppliants, who were manufacturers of oils in the United States, sold some of their oils in retail lots to purchasers in Canada. The price of such oils to the consumer at Rochester was taken as a basis upon which the price per gallon to the Canadian purchaser was made up, but the goods were entered for duty at a lower value—two sets of invoices being used, one for the purchaser in Canada, and the other for the company's broker at the port of entry:—Held, that the oils were undervalued. (2) The suppliants, having established a warehouse in Montreal as the distributing point of their Canadian business, exported oils from the United States to Montreal in wholesale lots. The invoices shewed prices which were not below the fair market value of such oils when sold at wholesale for home consumption in the principal markets of the United States:—Held, that there was no undervaluation. (3) When goods are procured by purchase in the ordinary course of business, and not under any exceptional circumstances, an invoice correctly disclosing the transaction affords the best evidence of the value of such goods for duty. In such a case the cost to him who buys the goods abroad is, as a general rule, assumed to indicate the market value thereof. It is presumed that he buys at the ordinary market value. (4) It is not the value at the manufactory or place of production, but the value at the principal markets of the country, i.e., the price there paid by consumers or middlemen to dealers, that should govern. Such value for duty must be ascertained by reference to the fair market value of such or like goods, when sold in like quantity and condition for home consumption in the principal markets of the country, whence they are exported. (5) The neglect of an importer, whose goods have been seized, to make claim to such goods by notice in writing as provided by s. 198 of the Cus-

toms Act, 1883, may be waived by the act of the minister of customs in dealing with the goods in a manner inconsistent with an intention on his part to treat them as condemned for want of notice. Quære, does s. 198 apply to a case where money is deposited in lieu of goods seized? (6) The additional duty of fifty per cent. on the true duty, payable for undervaluation under s. 102 of the Customs Act, 1883, is a debt due to Her Majesty which is not barred by the three years' prescription contained in s. 207, but may be recovered at any time in a court of competent jurisdiction. Quære, is such additional duty a penalty? *Vacuum Oil Co.* v. *The Queen*, 2 Ex. C. R. 234.

(b) *Harbouring Smuggled Goods.*

Penalty—*Information—Scienter.*]—In an information for a penalty under the Customs Acts, for knowingly harbouring smuggled goods, the scienter is a proper question for the jury; and such information should specify the particular illegal act, as that the goods were imported without the payment of duty, &c., and should expressly shew that the offence charged was contrary to the statute. If a quantity of smuggled goods be purchased at one time, but seizures of them are made at different times, only one penalty for harbouring them can be recovered. *The Queen* v. *Asmond*, *The Queen* v. *Easton*, 2 U. C. R. 166.

——— *Surveyor of Customs—Witness—Information—Harbouring Party's Own Goods.*]—Under the Imperial Act 8 & 9 Vict. c. 93, s. 89, the surveyor of customs, not being the party either "seizing or informing," is not entitled to a share of the penalty, and is therefore a competent witness upon an information for a penalty for harbouring smuggled goods. *Attorney-General* v. *Warner*, 5 U. C. R. 485.

Quære, would an information lie under the 60th clause of that Act, where the party informed against was shewn not to have transported or harboured goods of another, but his own goods, smuggled by himself on his own account? *S. C.*, 7 U. C. R. 399.

(c) *Sale or Carriage of Goods Smuggled or Fraudulently Undervalued.*

Carrier—*Negligence—Defence—False Invoices.*]—It is no ground of defence to a common carrier by water for not carrying goods safely from a foreign country, or on a claim for general average, that the owner of the goods had prepared false invoices to defraud the revenue laws of this Province. *Grousette* v. *Ferrie*, M. T. 6 Vict.

Defendant Particeps Criminis—*False Invoice.*]—Where merchants residing in the United States sold goods to defendant, and combined with him in furnishing false invoices to evade the revenue laws of this Province in respect of the amount of duties to be paid on the importation of such goods:—Held, that the plaintiffs could not recover their value from defendant in this country. *Mullen* v. *Kerr*, 6 O. S. 171.

——— *Jury.*]—Where in an action upon several promissory notes defendant proved that they had been given by him for the price of tea which had been smuggled for him by the plaintiff, and the jury were directed to find for the defendant if they believed that such was the consideration given, and they found a verdict for the plaintiff for the amount of only one of the notes—the court refused to grant defendant a rule nisi for a new trial. *Beebee* v. *Armstrong*, H. T. 6 Vict.

Where in assumpsit on bills of exchange, and for goods sold, the defence was that the bills had been given for the price of goods bought from the plaintiffs in a foreign country, and which they had assisted defendant in smuggling into this country, and some evidence was given to that effect, but the jury found for the plaintiffs,—the court refused to grant a new trial. *Wallbridge* v. *Foliett*, 2 U. C. R. 280.

Knowledge of Plaintiff.]—Where, in an action for goods sold, the defence to which was that the goods were smuggled, it was doubtful (the verdict being general for plaintiff), whether the jury understood that the plaintiff knew that the goods were contraband—the court granted a new trial. *Sewell* v. *Richmond*, Tay. 423.

Presumption.]—Quære, whether a foreigner forwarding prohibited goods to a place in the United States so situated as to furnish a strong presumption that they would be smuggled, can maintain an action for the price of such goods. *Sawyer* v. *Manahan*, Tay. 315.

Set-off—*False Invoices—Defendant Particeps Criminis.*]—Plaintiffs had been in the habit of selling oil to defendants, the terms being payment on delivery free on board at St. John's, New Brunswick, and double invoices had been frequently sent to them, one giving the real selling price and the other less. It was not clear whether this was done at defendants' request or not, but they had written to the plaintiffs on one occasion, in giving an order, to "send invoices as before." In an action for the price of certain oil defendants endeavoured to set off the value of eight barrels which they had previously ordered and paid for but never received. It appeared that when shipping this lot the plaintiffs' agent wrote to defendants "recommending" them, in order to "lessen the expenses, and especially in the duty," to send the bill of lading to the plaintiffs' friends, R. and S., at Portland, with instructions to include it in the bond and entry with the other lots sent to Messrs. J. T. & Co., at Montreal, forwarding agents, to pay the duties and forward to them. Plaintiffs accordingly wrote to R. and S. to do so, and this with the other lots consigned to R. and S. were entered upon an invoice of the whole furnished by the plaintiffs under the selling price, and seized by the collector at Montreal. The jury were directed that, if the eight barrels were undervalued by the plaintiffs without defendants' privity or consent, in order to defraud the customs, the defendants might set off the price which they had paid for them, but that if defendants were concerned in the fraud they could not:—Held, that the direction was right, and the evidence warranted a verdict for plaintiffs. *New Brunswick Oil Works Co.* v. *Parsons*, 20 U. C. R. 531.

See Tyrrell v. *The Queen*, 6 Ex. C. R. 169.

(d) *Other Cases.*

Illegal Importation—*Stress of Weather.*]—Under a plea of not imported in manner and form, &c., to an information for the condemnation of goods as illegally imported, evidence may be given that they were landed through stress of weather. *Attorney-General* v. *Spafford*, Dra. 333.

Unlading before Due Entry — *Invoices.*]—Information for the condemnation of certain goods. The first count charged the unlading of goods before due entry, contrary to the statute, &c., whereby they became forfeited:—Held, that it was not necessary to aver that the unlading was to avoid the duties, nor that there was no sufferance; that the meaning of the statute is, that no goods shall be unladen without entry, nor after entry, except at some place where an officer is appointed. Held, also, that the entry of goods on invoices not the invoices of sale to the importer in the country where he purchased (which are not such as the law requires him to produce) and an entry without the oath the law requires, is not a due entry necessary to give the right to unlade. *Regina ex rel. Attorney-General* v. *Brunskill*, 8 U. C. R. 546.

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4. *Officers—Actions against.*

Acting Officer—*Notice of Action—Trespass—Forfeiture — Time.*]—A person who, acting as a revenue office, or conceiving that he has authority so to act, seizes goods, is entitled to notice, without the necessity of proving his commission or appointment. *Wadsworth* v. *Murphy*, 1 U. C. R. 190.

Where the seizure was by a person not then authorized, but whose act was subsequently adopted and sanctioned by the collector, he was held entitled to notice under the Customs Acts. Where goods are seized for what appears to be a direct violation of the revenue laws relating to the customs, by which they become forfeited, they are absolutely condemned at the end of thirty days, if no claim is properly made for them, according to the Imperial statute 4 & 5 Wm. IV. c. 89, s. 25; and after such condemnation the owner cannot bring trespass for any alleged illegality in the seizure. *S. C.*, 2 U. C. R. 120.

Appointment of Collector—*Removal from one Port to another—Effect of, on Liability of Surety.*]—See *The Queen* v. *Miller*, 20 U. C. R. 485.

Defalcations of Deputy Collector—*Liability of Collector — Bond.*]—A., having been appointed collector of customs, gave a bond to Her Majesty, conditioned for the discharge of his duties as collector, and to account for and pay over moneys which should come into his hands; and having received written instructions that all entries were to be made by him, all permits were to be granted and signed only by him, and payment of all duties to be made by him, except under certain circumstances:—Held, that, having permitted the deputy collector rightfully to assume and perform duties intrusted to him alone, he was responsible under his bond for defalcations of said deputy. *The Queen* v. *Stanton*, 2 C. P. 18.

Refusal of Permit to Land Goods—*Forfeiture.*]—If dutiable goods be brought by inland navigation to a port of entry and there entered, and the goods are afterwards landed without a permit, they are liable to seizure, but the vessel in which they were brought is not. And if the duties on dutiable goods be offered to a collector, and he refuses to grant a permit, either on the ground that the sum tendered is insufficient in amount, or for any other reason which may not be tenable, if the goods be afterwards landed without a permit they are liable to forfeiture, and the only remedy for the owner is by action against the collector for the injury which he may suffer by the refusal of the permit. *McKenzie* v. *Kirby*, 6 O. S. 416.

Seizure of Goods—*Certificate — Protection.*]—Where a claim for goods seized was brought before the commissioners of customs, under 4 Geo. IV. c. 11, and they restored the property to the claimant, without any trial or verdict passing upon the matter, but gave a certificate to the officer who had seized that there was a probable cause of seizure, such certificate however not being entered of record in any way:—Held, in trespass against the officer for the seizure, that the certificate afforded him no protection, either under the Provincial statute 4 Geo. IV. c. 11, s. 27, or the Imperial statute 3 & 4 Wm. IV. c. 59, s. 72. *Lewis* v. *Kirby*, 1 U. C. R. 486.

——— *Forfeiture — Trespass — Case.*] — Trespass cannot be maintained against a custom house officer for seizing goods as forfeited, upon grounds which, if they existed, would justify such seizure, if he was misled by false information, or acted maliciously, case is the proper remedy; but no action will lie while the legality of the seizure is still undetermined. *Wile* v. *Cayley*, 14 U. C. R. 285.

Seizure of Vessel — *Notice of Claim—Condemnation—Value.*] — On the 7th June defendant, a collector, seized the plaintiff's vessel for a breach of the revenue laws. The plaintiff petitioned the government, and on the 7th July received an answer from defendant, informing him that they had refused to interfere. On the 8th the plaintiff served a notice of claim:—Held, that the notice of claim required by s. 48 of 10 & 11 Vict. c. 31, to be given within one calendar month from the day of seizure, could not be waived by any representation of defendant to the plaintiff; (2) that no notice having been given within the time allowed, the vessel was thereby condemned; and that by the act of seizure the plaintiff was deprived of his right of property, and therefore unable to maintain trespass; (3) that in this case it was not necessary that the value of the vessel should be determined by the jury. *Dame* v. *Carberry*, 10 U. C. R. 374.

——— *Port Regulations.*]—A collector of customs at a port of entry has no power to direct that all vessels and boats coming from a foreign country by inland navigation, shall come to report at a particular place within the port; and, although it is necessary that all goods, whether dutiable or not, shall remain on board until a permit is granted to land them, yet the horses and carriages of travellers may be landed without any permit, after the arrival of the vessel in which they have been conveyed has been reported to the collector; and if the collector should seize the

vessel as forfeited, either because the master did not bring his vessel to the place he had appointed, or because the horses, &c., of travellers were landed without a permit, such seizure would be illegal; and although in such a case no claim should be entered under the Imperial statute 4 & 5 Wm. IV, c. 89, s. 25, by the owner, &c., of the vessel, the collector would not be protected in an action of trespass for the seizure. *McKenzie* v. *Kirby*, 6 O. S. 416.

5. *Seizure of Vessels.*

Cargo — *Harbour — Report — Forfeiture —Procedure.*]—Where nothing has been done by the master to shew an intent to defraud the customs, a vessel entering a port for shelter, before reaching a place of safety there, has not "arrived" at such port within the meaning of 40 Vict. c. 10, s. 12, so as to justify seizure of her cargo for not reporting to the customs authorities. (2) Where false statements are made by the master regarding the character of the cargo and port of destination of his vessel, which would subject him to a penalty under s.-s. 2 of s. 12, 40 Vict. c. 10, they cannot be relied on to support an information claiming forfeiture of the cargo for his not having made a report in writing of his arrival as required by s.-s. 1 of s. 12 of the said Act. (3) That s. 10 of 44 Vict. c. 11, amending ss. 119 and 120 of 40 Vict. c. 10, merely provides a procedure to be followed when the customs department undertakes to deal with questions of penalties and forfeitures, and does not divest the Crown of its right to sue for the same in the manner provided by ss. 100 and 101 of 40 Vict. c. 10, even where departmental proceedings have been commenced under the said provisions of 44 Vict. c. 11, s. 10. (4) That, even if ss. 100 and 101 of the said Act, 40 Vict. c. 10, had been repealed by the later statute, the Crown could proceed by information in rem at common law, and this right could not be taken away except by express words or necessary implication. *The Queen* v. *MacDonell*, 1 Ex. C. R. 99.

Controller's Decision — *Reference to Court — Petition of Right — Jurisdiction — Damages.*] — The controller of customs had made his decision in respect of the seizure and detention of the vessel under the provisions of the Customs Act, confirming such seizure. The owner of the vessel, within the thirty days mentioned in the 181st and 182nd sections of the Act, gave notice in writing to the controller that his decision would not be accepted. No reference of the matter was made by the controller to the court, as provided in s. 181, but the claimant presented a petition of right, and a fiat was granted. The Crown objected that the court had no jurisdiction to entertain the petition, and that the only procedure open to the claimant was upon a reference by the controller to the court:—Held, that the court had jurisdiction. (2) Damages cannot be recovered against the Crown for the wrongful act of a customs officer in seizing a vessel for a supposed infraction of the customs law; but the claimant is entitled to the restitution of the vessel. *Julien* v. *The Queen*, 5 Ex. C. R. 238.

Replevin.]—A vessel seized for breach of the revenue laws having been replevied from the collector, the writ of replevin was set aside. *Scotts* v. *McRae*, 3 P. R. 16.

See McKenzie v. *Kirby*, 6 O. S. 416, *ante* 4; *Dame* v. *Carberry*, 10 U. C. R. 374, *ante* 4.

6. *Value of Goods and Amount of Duty.*

High Wines—*Proof—Measurements.*] — High wines imported into this Province were liable to a duty under 18 Vict. cc. 5, 81, on each gallon according to the strength of proof by Sykes's hydrometer, and not according to the gallon by measurement. *Lane* v. *Jones*, 5 C. P. 467.

Time for Assessing Duty—*Importation, when Complete.*]—By the time construction of the Customs Tariff Act, 1894, s. 4, as amended by the Tariff Act, 1895, which in effect directs that duty be paid upon raw sugar "when such goods are imported into Canada or taken out of warehouse for consumption therein," the date at which duty both attaches thereto and becomes payable is when the goods are landed and delivered to the importer or to his order, or when they are taken out of warehouse, if instead of being delivered they have been placed in bond. Section 150 of the Customs Act, 1886, which directs that the precise time of the importation of goods shall be deemed to be the time when "they came within the limits of the port at which they ought to be reported," refers on its true construction to the port at which the goods are to be landed—that is, where the effective report is to be made. Such construction is required in order to place a consistent, rational, and probable meaning on the context and other clauses of the Act. *Canada Sugar Refining Co.* v. *The Queen*, [1898] A. C. 735. See *S. C.*, 5 Ex. C. R. 177, 27 S. C. R. 395.

Watch Cases—*Value—Misrepresentation —Costs.*]—The rule for determining the value for duty of goods imported into Canada, prescribed by ss. 58 and 59 of the Customs Act, R. S. C. c. 32, is not one that can be universally applied. When the goods imported have no market value, in the usual and ordinary commercial acceptation of the term in the country of their production or manufacture, or where they have no such value for home consumption, their value for duty may be determined by reference to the fair market value for home consumption of like goods sold under like conditions. Vacuum Oil Co. v. The Queen, 2 Ex. C. R. 234, referred to. (2) The goods in question were part of a job lot of discontinued watch cases, and at the time of their sale for export were not being bought and sold in the markets of the United States. They could be purchased for sale or use there, but only at published prices, which were greater than any one would pay for them. The claimants bought the goods for export at their fair value, being about half such published prices. They let their agent in Canada know the prices paid, but withheld from him the fact that the purchase was made on the condition that the goods were to be exported. The agent, without intending to deceive the customs appraiser, represented that the prices paid were those at which the goods could be had in the United States when purchased for home consumption. The representation

was untrue. On the question of the alleged undervaluation the Court found for the claimants, but, because of such misrepresentation, without costs. *Smith* v. *The Queen*, 2 Ex. C. R. 417.

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7. *Other Cases.*

Bond for Goods Seized—*Form of.*]—Declaration on a bond from O. M. and others to E. W., collector of customs, &c., for and on behalf of her Majesty, conditioned—after reciting the seizure of certain goods belonging to said O. M. and that said O. M. was desirous of bonding said goods until the decision of the government should be made thereon,—that if the seizure should not within thirty days be declared illegal by the governor in council, then the obligors should pay to the said E. W., collector as aforesaid, or &c., the sum of, &c.:—Held, that the bond was good on the face of it, being taken for and on behalf of the Queen, and no prescribed form of bond having been given by the statute. *Webster* v. *Macklem*, 4 C. P. 266.

Carriage of Goods—*Delay—Imposition of Duties—Damages—Evidence.*]—The declaration charged defendants, in the first count, on a contract to carry certain wool from Cobourg to Boston within a reasonable time, subject to certain conditions indorsed on a receipt given by defendants—amongst others, that defendants should not be responsible for damages occasioned by delays from storms, accidents, or unavoidable causes—and alleging as a breach the neglect to carry. In the second count the contract was stated to be to carry within a reasonable time, and that the wool should be imported into the States before the 17th March, when the reciprocity treaty would expire. Breach, that defendants did not so carry, by which the plaintiffs were disabled from importing the wool into the States, unless upon payment of duties. The wool was sent as far as Prescott, where it was to cross the St. Lawrence, but not having been sent over to Ogdensburg by the 17th, the plaintiffs gave no further instructions, and it remained at Prescott:—Held, that though, if a special contract to deliver within the United States by the 17th had been proved, the duty, if paid by the plaintiffs, might have been recovered as damages, yet it was their duty to enter the goods and pay it, and they could not hold defendants responsible for delay occasioned by their default. The witness called to prove the imposition of a duty in the United States after the 17th March, derived his knowledge only from printed circulars:—Held, insufficient. *Fraser* v. *Grand Trunk R. W. Co.*, 26 U. C. R. 488.

Condemnation of Goods Seized—*Claim—Time.*]—Where a collector had seized goods in May, 1847, and filed his information upon it in 1848:—Held, that such goods might be taken as condemned, if no claim should be made within a month after notice of the information published as directed by s. 58 of 10 & 11 Vict. c. 31. *Davidson* v. *Brethom*, 8 U. C. R. 219.

Customs Export Bonds—*Penalties—Enforcement—Law of Quebec.*]—The provisions of s. 8 of 8 & 9 Wm. III. c. 11, affecting actions upon bonds, do not apply to proceedings by the Crown for the enforcement of a penalty for breach of a customs export bond. Two customs export bonds were entered into by warehousemen at the port of Montreal, P.Q. Upon breach of the conditions of the bonds the Crown took action to recover the amount of the penalties fixed by such bonds:—Held, that the case must be determined by the law of the Province of Quebec, and that under that law (arts. 1036 and 1135, C. C. L. C.) judgment should be entered for the full amount of each bond. *The Queen* v. *Finlayson*, 6 Ex. C. R. 202.

Drawback—*Materials for Ships—Refusal of Minister — Remedy — Order in Council.*]—By the Customs Act, 1877 (40 Vict. c. 10), s. 125, cl. 11, it was enacted, inter alia, that the governor in council might make regulations for granting a drawback of the whole or part of the duty paid on materials used in Canadian manufactures. In 1881, by an amendment made by the Act 44 Vict. c. 11, s. 11, the governor in council was further empowered to make regulations for granting a certain specific sum in lieu of any such drawback. (See also the Customs Act, 1883, s. 230, cl. 12, and R. S. C. c. 32, s. 245 (*m*)). By an order of the governor-general in council, dated the 15th May, 1880, it was provided as follows: "A drawback might be granted and paid by the minister of customs on materials used in the construction of ships or vessels built and registered in Canada, and built and exported from Canada under governor's pass, for sale and registry in any other country since the 1st day of January, 1880, at the rate of 70 cents per registered ton on iron kneed ships or vessels classed for 9 years, at the rate of 65 cents per registered ton on iron kneed ships or vessels classed for 7 years, and at the rate of 55 cents per registered ton on all ships or vessels not iron kneed." By an order in council of the 15th November, 1883, an addition was made to the rates stated "of ten cents per net registered ton on said vessels when built and registered subsequent to July, 1883:"—Held, that a petition of right would not lie upon a refusal by the controller of customs to grant a drawback in any particular case. Semble, that the provision in an order in council that the drawback "may be granted" should not be construed as an imperative direction; it not being a case in which the authority given by the use of the word "may" is coupled with a legal duty to exercise such authority. *Matton* v. *The Queen*, 5 Ex. C. R. 401.

Goods in Customs Warehouse—*Assignment for Creditors.*]—As to certain goods belonging to the assignor, but lying in the customs warehouse subject to duties, no change of possession having taken place, and no compliance being shewn with the formalities required by the Customs Act, 10 & 11 Vict. c. 31:—Held, that such goods did not pass by the assignment. The statute requiring registration does not apply to such goods, as they are not capable of delivery, and they would therefore have passed if the directions of the Customs Act had been followed. *Harris* v. *Commercial Bank of Canada*, 16 U. C. R. 437.

Liability of Goods to Duty—*Teas—Transit through United States.*]—The plaintiffs made two shipments of tea from Japan to New York for transportation in bond to Canada. In one case the bills of lading were marked "in transit to Canada;" in the other

the teas appeared upon the consular invoice, made at the place of shipment, to be consigned to the plaintiffs' brokers in New York for transhipment to Canada. On the arrival of both lots at New York, and pending a sale thereof in Canada, they were allowed to be sent to a bonded warehouse as unclaimed goods for some five or six months, and were finally entered at the New York customs house for transportation to Canada, and forwarded to Montreal. There was nothing to shew that the plaintiffs at any time proposed to make any other disposition of the teas, and there was nothing in what they did that contravened the laws and regulations of the United States or of Canada with respect to the transportation of the goods in bond:—Held, affirming the judgment in 2 Ex. C. R. 126, that, as it clearly appeared that the tea was never entered for sale or consumption in the United States; that it was shipped from there within the time limited by law for goods during transit to remain in a warehouse; and that no act had been done changing its character in transit; it was therefore "tea imported into Canada from a country other than the United States but passing in bond through the United States," and under s. 10 of the Act relating to duties on customs, R. S. C. c. 33, not liable to duty as goods exported from the United States to Canada. But see 52 Vict. c. 14 (D.) *Carter, Macy, & Co.* v. *The Queen*, 18 S. C. R. 706.

Lien of Crown for Unpaid Duty—*Assignment for Creditors.*]—On the 3rd February, 1887, B., a coal merchant, made an assignment to the plaintiff for the benefit of his creditors under 48 Vict. c. 26 (O.), and there passed thereunder to the plaintiff a quantity of coal in B.'s yards. By permission of the customs department, B., on giving security therefor to the Crown, had sold, before the assignment, certain other coal, imported by him, without first paying the duty upon it:—Held, that there was nothing in the Customs Act, R. S. C. c. 32, nor in law, giving the Crown the right of lien upon the coal assigned to the plaintiff, for duty payable by B. in respect of the other coal sold by him. (2) That the issue of a writ of extent by the Crown against B. on the 19th February, 1887, for the recovery of the duty so payable in respect of such other coal would have availed the Crown nothing so far as the property assigned to the plaintiff was concerned, for it could not have been seized under such extent, having previously become vested in the plaintiff. (3) That the claim of the Crown for the duty payable by B. in respect of such other coal was not payable by the plaintiff out of the proceeds of the property assigned to him in preference to the claims of other creditors: the principle that when the right of the Crown and the subject come into competition, that of the Crown is to be preferred in any case, has now no existence in Ontario, because the effect of R. S. O. 1887 c. 94 is to do away with any distinction between debts due from the subject to the Crown and debts due from subject to subject, and to place them all upon the same footing. Such principle, although it has been applied to winding-up proceedings instituted under statutes in which the Crown is not bound, and where the property was not divested out of the Crown debtor, is not applicable to estates in bankruptcy or assigned in trust for creditors. *Clarkson* v. *Attorney-General for Canada*, 15 O. R. 632, 16 A. R. 202.

Penalty—*Rescue of Goods Seized.*]—In a qui tam action for penalties under the Imperial statute 6 Geo. IV. c. 114, for rescuing goods seized, which gives one-third of the penalty to the King, one-third to the lieutenant-governor, and one-third to the informer, the court refused to arrest judgment because the plaintiff claimed the penalty for himself and the King only, not naming the lieutenant-governor. An action of debt will lie on that statute to recover the penalty. *Jones q. t.* v. *Chace*, Dra. 322.

Sale of Dutiable Goods—*Liability for Duty—Usage of Trade.*]—Plaintiffs bought from defendant certain coal, shipped to defendant at Toronto from a foreign port, and then lying on board a vessel in the Welland Canal. A sale note was given, stating only the quantity and price, and the time by which it was to be taken out of the vessel:—Held, that defendant was not obliged to pay the import duties. Held, also, that evidence was rightly admitted to shew the usage of the trade on sales made under such circumstances. *Brown* v. *Browne*, 9 U. C. R. 312.

Tariff Act—*Retrospective Operation.*] —Section 4 of the Tariff Act, 1895 (58 & 59 Vict. c. 23), provided that "this Act shall be held to have come into force on the 3rd of May in the present year, 1895." It was not assented to until July:—Held, that the goods imported into Canada on 4th May, 1895, were subject to duty under said Act. *The Queen* v. *Canada Sugar Refining Co.*, 27 S. C. R. 395. See *S. C.*, 5 Ex. C. R. 177, [1898] A. C. 735.

III. Inland Revenue.

Brewer's License.]—A brewer licensed as such by the government of Canada, under 31 Vict. c. 8 (D.), requires no license under the Tavern and Shop License Act of Ontario, 32 Vict. c. 32, s. 1, as amended by 33 Vict. c. 28, for selling ale manufactured at his brewery. *Regina* v. *Scott*, 34 U. C. R. 20.

Duty on Spirits—*Extent of — Non-payment—Evidence.*]—On an information, under 27 & 28 Vict. c. 3, against defendant as a distiller, for the non-payment of duty on spirits manufactured by him:—Held, that defendant was liable to pay duty upon all spirits manufactured by him, not merely on such as had been measured and ascertained in the manner pointed out by the statute; for the obtaining the duty on all spirits manufactured is the main object of the Act, and the provisions for ascertaining the quantity, &c., are only auxiliary thereto. (2) It was proved by one A. that he sold, as agent for defendant at Montreal, between the days mentioned in the information, 159,608 gallons more than appeared on the credit side of defendant's stock books, and on which duties had been paid; and a number of invoices of these sales, which were produced, represented the spirits to be 50 over proof. Moreover, A. said that large quantities of spirits had been consigned to him direct, and it was to be gathered from the evidence that deliveries had been made to the purchasers direct from the conveyance by which they had been sent by defendant:—Held, that from this evidence, unanswered in any way, the jury were warranted in finding against defendant for the

duty on that quantity. Held, also, that s.-s. 2 of s. 14 of 29 Vict. c. 3, throwing the proof of payment of duty on defendant, was properly treated as applicable, though passed after the period for which duties were claimed; for it related only to matter of evidence and procedure. Held, also, that a judgment in defendant's favour, on a previous information against him for penalties for not making true entries of the spirits taken from the close receiver and brought into his distillery, and of the number of gallons disposed of by him, between the days mentioned in this information, was properly rejected as evidence for him in this cause; for there was nothing to connect the spirits on which duties were claimed here with those taken from the receiver, and making true entries of the spirits disposed of by him would not prove payment of the duties. *Attorney-General* v. *Halliday*, 26 U. C. R. 397.

Returns of Distillers—*Inquiry—Fraud—Action.*]—The Inland Revenue Act, 31 Vict. c. 8, s. 44, cl. 6, provides for inquiries being instituted for any period not more than one year before the inquiry is commenced, for the purpose of testing the truth of the returns made by distillers to the government:—Held, that this did not prevent proceedings at the instance of the attorney-general being instituted afterwards, on the discovery of frauds having been perpetrated in making such returns. *Attorney-General* v. *Walker*, 25 Gr. 233. See *S. C.*, 3 A. R. 195.

Seizure of Spirits—*Native Manufacture—Permit—Reasonable and Probable Cause.*]—Plaintiffs manufactured in Montreal some Old Tom gin, &c., which they sold and shipped to Guelph, to J. & H., no permit accompanying it. The casks were branded as if manufactured in London, England; but the invoice, received by the consignees from the plaintiffs and handed to the officers, shewed that the goods came from the plaintiffs, and described the plaintiffs as distillers, &c. The defendants, as officers of inland revenue, seized and detained the goods for want of a permit, but subsequently, upon its being shewn at Ottawa that the goods were manufactured from spirits which had paid duty, they, by instructions, offered to release the goods on payment of the costs of seizure:—Held, that Old Tom gin was spirits, within the Inland Revenue Act, 31 Vict. c. 8 (D.); for the admixture of flavouring essences, &c., did not deprive it of its character, and, whether imported or manufactured in Montreal, a permit was required. (2) That, under the circumstances set out, defendants had reasonable and probable cause for believing the goods were being unlawfully removed, and for seizing them. (3) That the seizure being so justified, and no permit obtained, the refusal to deliver up except on payment of the costs, could not make defendants liable. *Winning* v. *Gow*, 32 U. C. R. 528.

Slide and Boom Dues—*Statutes—Regulations.*] — Inasmuch as the provisions and enactments relating to tolls in 31 Vict. c. 12 are in substance and effect the same as those contained in c. 28 of the Consolidated Statutes of Canada, under which the regulations relating to timber passing through the slides were made, in virtue of the provisions of s. 71 of 31 Vict. c. 12, such regulations are in effect to be construed as having been made under the later statute. *Merchants Bank of Canada* v. *The Queen*, 1 Ex. C. R. 1. Reversed by the Supreme Court, *Cassels' Dig.* 636.

Statutory Offence — *Conviction — Appeal.*]—Held, that an appeal would lie to the quarter sessions from a summary conviction, under the Inland Revenue Act, 31 Vict. c. 8, s. 130, for possessing distilling apparatus without having made a return thereof, for that such conviction was for a crime, and therefore not within C. S. U. C. c. 114. *In re Lucas and McGlashan*, 29 U. C. R. 81.

See Regina v. *Boardman*, 30 U. C. R. 553.

——— *Conviction — Justice's Return — Penalty.*]—Section 165 of the Inland Revenue Act, 31 Vict. c. 8 (D.), prescribes that "the pecuniary penalty or forfeiture incurred for any offence against the provisions of this Act, may be sued for and recovered before any two or more justices of the peace, . . and any such penalty may, if not forthwith paid, be levied by distress, . . or the said justices may in their discretion commit the offender to the common gaol until the penalty . . be paid." The plaintiff, who was tried under the above Act for distilling spirits without a license, before the defendant and three other justices of the peace, and was ordered to pay $200, sued defendant for not making a return thereof under R. S. O. 1877 c. 76:—Held, that the defendant was liable, as the adjudication in question was a conviction within the meaning of R. S. O. 1877 c. 76, and not a mere order for the payment of money. *May q. t.* v. *Middleton*, 3 A. R. 207.

IV. Succession Duty.

Executors—*Legacies—Residue.*] — A testator devised and bequeathed all his real and personal estate to his executors and trustees for the purpose of paying a number of pecuniary legacies, some to personal legatees, and others to charitable associations, and provided that the residue of his estate should be divided pro ratâ among the legatees:—Held, that it was the duty of the executors to deduct the succession duty payable in respect of the pecuniary legacies, before paying the amounts over to the legatees, and they had no right to pay such succession duty out of the residue left after paying the legacies in full. *Kennedy* v. *Protestant Orphans' Home*, 25 O. R. 235.

Liability for — *Property in Another Province — Testator's Domicile — Surrogate Courts.*]—The Judge of a surrogate court has jurisdiction to determine whether a particular estate of which probate or administration is sought, is liable or not to pay succession duty, and the amount of such duty; his decision being subject to appeal. Where a deceased person had his domicile, prior to and at the time of his death, in another Province, and the value of his property in Ontario is under $100,000, although his whole estate, including property in the Province of his domicile, exceeds $100,000, and his whole estate in this Province is by his will devised and bequeathed to his wife and children, the property in this Province is not liable to pay succession duty. *Re Renfrew*, 29 O. R. 565.

——— *Bank Deposit Receipts — Foreign Domicile.*] — Succession duty is payable upon

deposit receipts issued by banks in this province, payable here to a person whose domicile was in a foreign country at the time of his death. *Attorney-General for Ontario* v. *Newman*, 31 O. R. 340.

Present and Future Interests — *Annuity.*] — Where a testator divides up his estate so as to create present and future estates or interests, the duty under the Succession Duty Act, 1892, 55 Vict. c. 6 (O.), is to be assessed on the whole estate at the time of his death, including both the present and future estates or interests, but duty is only payable at the death or within eighteen months thereafter on the present estates or interests; the payment of duty on the future estates being deferred until they become estates in possession or enjoyment, and the duty then payable is not the duty fixed at the time of the death, but that assessed upon the value of such estates or interests at the time the right of possession or enjoyment accrues. In computing the duty on an annuity payable on a testator's death, and of which there is present actual enjoyment, the duty thereon must be assessed on its then cash value; on a deferred annuity, duty is payable when the right to enjoy it commences. Duty is also payable on the capital producing an annuity, when it becomes distributable as legacies or as part of the final distribution of the estate. *Attorney-General* v. *Cameron*, 27 O. R. 380.

——— *Capital — Final Distribution.*] — Held, in addition to the findings reported in this case in 27 O. R. 380, that, under the Succession Duty Act, 55 Vict. c. 6 (O.), the duty payable on the capital was deferred until the final distribution thereof, which was the time when the moneys under the directions of the will reached the hands of the persons who should become entitled thereto, and that the duty then payable would be on the amount then actually distributed, whether increased by accumulations, or by the rise in value of lands or securities, or decreased by loss. *Attorney-General* v. *Cameron*, 28 O. R. 571.

Tribunal for Deciding Disputes.]— When the provincial treasurer and the parties interested do not agree as to the succession duty payable, the question must be settled by the tribunal appointed by the Act, namely, the surrogate registrar, with the right of appeal given by the Act. The high court has no jurisdiction to decide the question upon a case stated. The court of appeal refused, therefore, to entertain an appeal from the judgments in 27 O. R. 380 and 28 O. R. 571. *Attorney-General* v. *Cameron*, 26 A. R. 103. (See *Re Renfrew*, 29 O. R. 565, *ante*.)

Value of Property—*Deduction of Debts —Compromise of Claim by Executors.*]—For the purpose of arriving at the aggregate value of the property of a deceased person under s. 3, s.-s. 3, of the Succession Duty Act, R. S. O. 1897, c. 24, debts are to be deducted. The duty to be paid by the person who takes is on the value of the estate which he takes, at the time of taking. Sums bonâ fide paid by executors for the purpose of settling claims against them as such, must be considered debts for the purpose of administration and of ascertaining the amount of succession duty. Where executors, erroneously and in ignorance of the existence of claims, overvalued the estate and paid succession duty for which the estate would not have been liable had the amount of such claims been deducted therefrom, they were held entitled to recover back from the Crown the amount of the duty wrongly paid. *Ross* v. *The Queen*, 32 O. R. 143.

REVENUE OFFICER.

See NOTICE OF ACTION, I.—REVENUE, II. 4.

REVISING OFFICER.

See PARLIAMENT, I. 12 (g).

REVISION OF TAXATION.

See COSTS, VIII. 3—SOLICITOR, VI. 4(h).

REVIVAL.

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REVIVAL OF ACTIONS, JUDGMENTS, AND PROCEEDINGS.

See SCIRE FACIAS AND REVIVOR, IV., V., VI.

REVIVOR.

See MORTGAGE, VIII. 5 (g)—PARTIES, I. 5—SCIRE FACIAS AND REVIVOR.

REVOCATION.

See ARBITRATION AND AWARD, VIII. 5— LICENSE, I. 2 — PRINCIPAL AND AGENT, VII. — TRUSTS AND TRUSTEES, IV. — WILL, VIII.

REWARD.

Condition Precedent — *Conviction of Crime.*]—A reward of $100 was offered by defendants to any person giving such information as would lead to the conviction of the murderer or murderers of certain persons therein named:—Held, that the actual conviction of the party accused was a condition precedent to the recovery of the reward, and that the accused having committed suicide while in gaol awaiting his trial, it could not be recovered. *Fortier* v. *Wilson*, 11 C. P. 495.

County Corporations—*By which Payable.*] — The prisoner hired a horse in the county of York to go to Aurora and Stouffville in that county. It was not shewn whether he had been at those places, but he afterwards sold the horse in the county of Waterloo, where he was arrested for stealing it, and

convicted:—Held, that the award for his apprehension, under 36 Vict. c. 48, s. 396 (O.), was payable by the county of Waterloo; and a mandamus was ordered to the Judge of that county to sign an order upon the treasurer in favour of the applicant, who had apprehended the prisoner. Semble, that the evidence did not establish a theft in the county of York. *In re Robinson*, 7 P. R. 239.

Powers of Township Corporation.]—Township municipalities have no power to expend any portion of their funds in rewards for the apprehension of felons. Where, therefore, a township corporation offered and promised to pay a reward of $500 for the arrest and conviction of the persons guilty of a murder, it was held that such promise was not binding upon them. *Cornwall* v. *Township of West Nissouri*, 25 C. P. 9.

RIGHT TO BEGIN.

See NEW TRIAL, XI.

RIGHT OF WAY.

See WAY.

RIOT.

See CRIMINAL LAW, IX. 42 — PARLIAMENT, I. 10.

RIPARIAN OWNERS.

See CONSTITUTIONAL LAW, II. 21—WATERS AND WATERCOURSES, XVII.

RIVER.

See CONSTITUTIONAL LAW, II. 21 — WATER AND WATERCOURSES.

ROAD ALLOWANCES.

See MANDAMUS, II. 4 (f)—WAY, III., IV.

ROYALTY.

See PATENT FOR INVENTION, VI.

RULE OF THE ROAD.

See SHIP, V. 3 (g).

RULES OF COURT.

English Rules.] — All rules of English practice to date, M. T. 4 Geo. IV., are adopted in this Province. *Doe ex dem. Burger* v. ——, Tay. 363.

Heading of Rules—*Effect of.*]—Con. rule 5 provides that "the division of these rules into chapters, titles, and headings is for convenience only and is not to affect their construction:"—Held, that con. rule 1008, notwithstanding the heading "Summary Inquiries into Fraudulent Conveyances," is not limited to cases of equitable interests arising under fraudulent conveyances, but applies to a case where a judgment creditor is seeking to make available the interest of his debtor under an agreement for the purchase of land. A reference was directed to ascertain what interest the debtor had in the land in question. Wood v. Hurl, 28 Gr. 146, not followed owing to the change of law by con. rule 5. *Peters* v. *Stoness*, 13 P. R. 235.

See post STATUTES.

New Rules—*Effect on Pending Cases.*]—A declaration filed in M. T., 1842, but served after T. T., when certain new rules came into force, must be pleaded according to those new rules. *Clark* v. *White*, M. T. 7 Vict. See, also, *Strathy* v. *Crooks*, 1 U. C. R. 44.

Proceedings in Opposition to Rule—*Subsequent Amendment.*] — Proceedings cannot be sustained which are in direct opposition to the terms of a rule of court, though the terms of such rule be not in accordance with the order of the court, through a mistake of the clerk; and such proceedings cannot be supported by a subsequent amendment, the effect of which is not retrospective. *Doe d. Burnham* v. *Simmonds*, 7 U. C. R. 598.

Statutes Inconsistent with Rules—*Repeal.*]—The authority to proceed by rule or order nisi in quashing a by-law, conferred by R. S. O. 1887 c. 184, s. 332, is inconsistent with con. rule 526, and must therefore be taken to be repealed: for by 51 Vict. c. 2, s. 4 (O.), it is declared that all enactments in the revised statutes inconsistent with the con. rules are repealed. It is therefore not proper to proceed by order nisi. Re Peck and Amelianburg, 12 P. R. 664, followed. Hewison v. Pembroke, 6 O. R. 170, distinguished. *Re Colenutt and Township of Colchester North*, 13 P. R. 253.

See Regina v. *Birchall*, 19 O. R. 697.

See, also, PRACTICE—PRACTICE AT LAW BEFORE THE JUDICATURE ACT, XIII.—PRACTICE SINCE THE JUDICATURE ACT.

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VIII. MISCELLANEOUS CASES, 6243.

I. GENERALLY—WHAT CONSTITUTES A SALE.

Agreement to Manufacture — *Delivery—Acceptance—Sample.*]—Plaintiff and defendant agreed that on condition of the plaintiff delivering to defendant wheat of the same quality as the sample previously shewn to defendant, to be ground into flour, defendant would manufacture the said wheat into flour, and for every four bushels and forty pounds of wheat of the quality and according to the sample received, he would deliver one barrel of flour which should pass inspection as superfine at Montreal:—Held, not a contract for sale of the wheat, but an agreement to manufacture into flour for the plaintiff the identical wheat delivered; that it was a condition precedent, on the plaintiff's part, that the wheat delivered should be of the same quality as the sample; that an acceptance of the wheat by defendant, and his manufacturing it into flour, did not cause the rules prevailing between vendor and vendee to apply with equal force in this case as in the case of an absolute sale, to conclude the defendant from afterwards disputing the correspondence of the wheat delivered with the sample. *Stephenson* v. *Ranney*, 2 C. P. 196.

Delivery as Payment of Debt—*Oral Transfer.*]—A. makes an agreement with B. to work a mill on shares—A., who owned the mill, to have two-thirds, and B., who worked it, one-third of the toll. After some years B. is taken dangerously ill, and about an hour before his death sends for A. and tells him (having first requested those about him to leave the room) that there are about 300 bushels of toll wheat in the mill undivided, 100 of which under the agreement would be his, B.'s; that, as he, B., owed him, A., for money lent, he begged he would accept this 100 bushels, and also a promissory note which he sent for and handed him. Witnesses who overheard part of the conversation swore to the 100 bushels, and the note being given by B., not as a gift, but, as they heard B. say, in payment of a debt:—Held, in trover by B.'s administratrix to recover from A. the wheat and note, that upon these facts the question of delivery as upon a donatio mortis causâ did not arise, the transaction being nothing more than an ordinary sale, for a valuable consideration; and that, if it had, the wheat being already in A.'s own mill, no further delivery could be required. Held, also, that the agreement being personal between A. and B., and B., the intestate, having no term in the mill, his administratrix had no right of possession and could not support the action. *Ralph* v. *Link*, 5 U. C. R. 145.

Future Delivery — *Bought and Sold Notes.*]—Bought and sold notes for goods to be delivered may be treated as an actual sale, though the one party has not at the time a specific lot of the article in his possession, and actually set apart for the particular vendee. *Brunskill* v. *Chumascro*, 5 U. C. R. 474.

Receipt for Goods—*Construction.*]—The plaintiff, a farmer, on leaving wheat with defendants, who were millers, took the following receipt signed by them:—"Received from W. I. in store 296 bush., 5 lbs., No. 2 Treadwell wheat, fire accepted; price to be set on or before 1st August next." It was proved that the word "accepted" was intended for "excepted:"—that the wheat was

placed in a separate bin, and kept apart from defendants' wheat; and that nothing further occurred between the parties until the 28th August, when it, with the mill, was destroyed by fire:—Held, that the agreement did not by itself import a sale; that there was nothing in the evidence to shew that a sale was intended; and that the plaintiff, therefore, could not recover. *Isaac* v. *Andrews*, 28 C. P. 40.

Right of Repurchase—*Time for Payment.*]—Plaintiff and defendant made the following agreement: "I, S. (the defendant), give $20 to M. (the plaintiff) for the colt which I have in possession, but I promise to give back the colt to M. if he will pay the same sum, with 12 per cent. interest, on or before the 1st May, 1866. If not paid, the colt will be the property of S.; then he can do with it as he likes, or keep it for himself." The plaintiff paid defendant $15, but failed to pay the balance, and in September, 1867, defendant sold the colt; whereupon the plaintiff brought trover:—Held, that the transaction was in effect a sale with right of repurchase, not a mortgage; and that the plaintiff not having paid the money by the day, his right was gone. The defendant, therefore, was held not liable in trover; and the plaintiff was allowed to recover the $15 paid by him, as money had and received. *Moore* v. *Sibbald*, 29 U. C. R. 487.

Timber—*Agreement to Manufacture into Lumber—Possession.*]—K. B. made an agreement with T. for the purchase of the output of his sawmill during the season of 1896, a memorandum being executed between them to the effect that T. sold and K. B. purchased all the lumber that he should saw at his mill during the season, delivered at Hadlow wharf, at Levis; that the purchasers should have the right to refuse all lumber rejected by their culler; that the lumber delivered, culled, and piled on the wharf should be paid for at prices stated; that the seller should pay the purchasers $1.50 per hundred deals, Quebec standard, to meet the cost of unloading cars, classification, and piling on the wharf; that the seller should manufacture the lumber according to specifications furnished by the purchasers; that the purchasers should make payments in cash once a month for the lumber delivered, less two and a half per cent.; that the purchasers should advance money upon the sale of the lumber on condition that the seller should, at the option of the purchasers, furnish collateral security on his property, including the mill and machinery belonging to him, and obtain a promissory note from his wife for the amount of each cullage, the advance being made on the culler's certificates, shewing receipts of logs not exceeding $25 per hundred logs of fourteen inches standard; that all logs paid for by the purchasers should be stamped with their name; and that all advances should bear interest at the rate of 7 per cent. Before the river drive commenced, the logs were culled and received on behalf of the purchasers, and stamped with their usual mark, and they paid for them a total sum averaging $32.33 per hundred. Some of the logs also bore the seller's mark, and a small quantity, which were buried in snow and ice, were not stamped, but were received on behalf of the purchasers along with the others. The logs were then allowed to remain in the actual possession of the seller. During the season a writ of execution issued against the seller under which all movable property in his possession was seized, including a quantity of the logs in question, lying along the river drive and at the mill, and also a quantity of lumber into which part of the logs in question had been manufactured, at the seller's mill:—Held, that the contract so made between the parties constituted a sale of the logs, and, as a necessary consequence, of the deals and boards into which part of them had been manufactured. *King* v. *Dupuis*, 28 S. C. R. 388.

Transfer of Bill of Lading—*Pledgee—Warranty—Failure of Consideration.*]—The plaintiffs sued a bank to recover the price paid the bank for certain goods which, owing to a customs seizure and forfeiture, the plaintiffs never received. The bank were never in actual possession of the goods, but a bill of lading was indorsed to them as a security for advances, and this bill of lading was indorsed and delivered by the bank directly to the plaintiffs. The jury found that it was the bank who sold the goods to the plaintiffs; that they professed to sell with a good title; that they had not a good title; and that the plaintiffs could not by any diligence have obtained the goods:—Held, that upon these findings and the evidence, and having regard to the provisions of the Bank Act, R. S. C. c. 120, the transaction must be regarded as a sale by the bank as pledgees with the concurrence of the pledgor, and not as a mere transfer of the interest of the bank under the bill of lading; and that the plaintiffs were entitled to recover the price as upon an implied warranty of title and a failure of consideration. Morley v. Attenborough, 3 Ex. 500, commented on and distinguished. *Peuchen* v. *Imperial Bank*, 20 O. R. 325.

See Whelan v. *Couch*, *Couch* v. *Whelan*, 26 Gr. 74.

II. Contract of Sale.

1. *Conditional Sale.*

(a) *Conditions as to Payment and Property not Passing.*

Default—*Demand of Possession—Conversion by Landlord.*]—The plaintiffs sold to U. & Co. certain wheels, &c., to be used in their manufactory, under a written agreement, whereby it was stipulated that the right and property to the goods should not pass to them until the whole price thereof was paid, the right of possession merely passing; such right to be forfeited and the plaintiffs to be at liberty to resume possession in case of default in the payments being made, or in case of seizure for rent, &c., or upon any attempt by U. & Co. to sell or dispose thereof without the consent of the plaintiffs, it being expressly declared that the sale was conditional only, and punctual payment of the instalments being essential to its existence. U. & Co. placed the machinery in the flume belonging to their factory, which was held by them under a lease from H. & Co., and subsequently the sheriff having seized other chattels belonging to U. & Co., they surrendered the possession of the premises and delivered the key thereof to H. & Co. Default having been made by U. & Co., the plaintiffs demanded the wheels of H. & Co., which demand H. & Co. refused to comply with, assigning as a reason that they had not possession thereof, and in

the following month the wheels were sold under proceedings to enforce payment of the liens of certain mechanics:—Held, affirming the judgment in S. C. R. 465, that the plaintiffs were entitled to recover the value of the goods. *Joseph Hall Manufacturing Co.* v. *Hazlitt*, 11 A. R. 749.

——— *Replevin.*]—By an agreement signed by defendant he acknowledged the receipt from plaintiffs on hire at $6 per month of a piano, valued at $300, which he was to pay the plaintiffs if it were destroyed or not returned to them on demand in good order, &c. It was agreed that defendant might purchase it for this sum by two payments of $150 each on the 1st of July and November respectively, but until payment of the whole purchase money it was to remain plaintiffs' property on hire by defendant, and on default in the punctual payment of any instalment of such purchase money, or of the monthly rental, plaintiffs might resume possession, although there might have been a part payment of the purchase money or a note or notes given therefor, the agreement for sale being conditional and punctual payment being essential to it; but, if so assumed by plaintiffs and returned in good order, any sum received on account of purchase money beyond the amount due for rent and expenses incurred was to be repaid. Defendant gave two notes for $150 each, payable at the dates mentioned in the agreement, and shortly after the maturity of the first note paid $50 on account of it; and subsequently, on being pressed by the plaintiffs, he gave them a mortgage on some lands, which the plaintiffs received as collateral security for the amount then due, reserving their rights under the agreement. The piano remained with the defendant over two years, nothing being paid on the mortgage or any further sum on account of the notes or for rent. Defendant swore that he had bought the piano before he signed the agreement:—Held, that under the agreement the property in the piano remained in the plaintiffs until the payment of the amount fixed as the purchase money; that there was nothing in the evidence to shew any contrary intention; and that default having been made, the plaintiffs might replevy. *Mason* v. *Johnson*, 27 C. P. 208.

——— *Resuming Possession — Force.*]—Where machinery was sold upon the terms expressed in a hire receipt that "the title of and right to the possession of the above mentioned property, wherever it may be, shall remain vested in the said vendor and subject to his order until paid for in full:"—Held, that the vendor or his assigns had the legal right (the purchase money being in arrear and unpaid) to enter upon the premises where the property was, in order to resume actual possession of the machinery, giving notice and using all care in so doing, but that it would be illegal for him to take possession by force, and an injunction might properly issue to restrain acts of force on behalf of the vendor, but only on the terms that the assignee of the vendee be likewise enjoined from using force in resisting the vendor. Before taking possession of the machinery the vendor was ordered to give such security as is usual in replevin. *Traders Bank of Canada* v. *Brown Manufacturing Co.*, 18 O. R. 430.

———*Resuming Possession—Incorporation into Freehold.*] — See *Lainé* v. *Béland*, 26 S. C. R. 419.

——— *Seizure — Resale—Action for Deficiency.*]—After default in payment by the purchaser of a machine under an agreement whereby the property was not to pass until payment in full, with a provision that on default the whole price should fall due, and that the vendors should be at liberty to resume possession, nothing being said as to resale, the vendors seized the machine and resold it, and, after crediting the proceeds, brought this action to recover the balance of the original price:—Held, that by the resale the original agreement had been put an end to, and that the plaintiffs had no right of action. *Sawyer* v. *Pringle*, 20 O. R. 111, 18 A. R. 218.

——— *Seizure — Resale — Judgment — Claim for Deficiency.*]—The defendants purchased machinery from a company under a conditional contract of sale, in writing, providing that the property should remain in the company until payment of the price in full, with the right to resume possession and resell on non-payment, but without any provision that in such latter event the purchase money was to be applied pro tanto, and the defendants remain liable for any balance. On default, after certain payments had been made, the company obtained judgment on notes which had been given for the purchase money, and subsequently seized and sold the machinery, and, applying the proceeds, sought and were allowed to prove a claim in the master's office for the balance due on the judgment:—Held, that the whole matter was examinable in the master's office, although judgment had been recovered, and, as consideration for the judgment had disappeared by the intentional act of the company in taking possession and selling, the claim should have been disallowed. Sawyer v. Pringle, 18 A. R. 218, followed. *Arnold* v. *Playter, Waterous Engine Works Co.'s Claim*, 22 O. R. 608.

Effect of Condition—*Price—Damages.*]—On the 7th September, 1875, the plaintiff orally agreed with the defendant to sell to him a cab, horses, &c., for $1,900—$500 in cash, and the balance in four notes at three, six, nine, and twelve months; the defendant also to give a chattel mortgage on the property as security for the payment of the notes, and the plaintiff undertaking not to put another cab on the route, &c. For the $500 the defendant gave his note, which stated that it was given in part payment of the property, and was to be paid before the 11th instant. The goods were not delivered to the defendant, but remained with the plaintiff, who continued to use them as before. Defendant stated that there never was any concluded bargain between them, but that the agreement was entered into and the note given merely conditionally on the defendant being able afterwards to carry it out; but in a written notice served by defendant on plaintiff, repudiating the contract, this ground was not stated, but only that the contract had been obtained by fraud, &c. The plaintiff also stated that the intention of the parties was that the property was to pass to defendant, but to remain in plaintiff's possession until the terms of the agreement were fulfilled:—Held, that the effect of the evidence was, that the property was not to pass until the agreement was fulfilled; that the plaintiff therefore could not claim the full purchase money, nor could he recover on the note, for, being part of the executory contract, as between the parties, it fell with the contract. Held, however, that

there was a concluded bargain between the parties, and that the plaintiff was therefore entitled to the damages, $250, which had been assessed for its breach. *Gleason* v. *Knapp*, 26 C. P. 553.

Loss of Goods by Fire — *Liability.*]—The plaintiffs sold and delivered certain machinery to the defendant, receiving part of the price in cash and part in notes, and by the contract of sale it was provided that no property in the machinery should pass to the defendant until it was paid for. The machinery was destroyed by fire before the notes were paid. In an action on one of the notes:—Held, that the defendant had the possession and use of the machinery and an interest in it; that there was not a total failure of consideration for the note or a partial failure which was ascertained; and that the plaintiffs were entitled to recover. *Goldie and McCulloch Co.* v. *Harper*, 31 O. R. 284.

Manufactured Article — *Vendor's Lien —Conditional Sales Act.*]—The lien of an unpaid vendor of a manufactured article is not invalidated if, without his direction or connivance, the purchaser paints out or obliterates the name and address of the vendor, which were, pursuant to the Conditional Sales Act, 51 Vict. c. 19 (O.), properly marked on the article at the time of the conditional sale. Semble, that an instrument in the form of a promissory note with conditions thereunder written is an instrument evidencing a conditional sale within the first and sixth sections of that Act. *Wettlaufer* v. *Scott*, 20 A. R. 652.

Transfer of Rights under Hire Receipts.]—The purchaser of a piano under a hire receipt (by which the property was to pass to him only on completion of certain payments on account), before he had paid the required sum agreed with his wife that she should purchase his interest and pay the balance due the vendors. There was no bill of sale registered nor such change of possession as is required by the Bills of Sale and Chattel Mortgage Act, R. S. O. 1897 c. 148:—Held, that the transaction was invalid as against execution creditors under s. 37 of that Act, and was not within s. 41, s.-s. 4, which is intended to except only conditional sales of chattels within R. S. O. c. 149, which this was not. Held, however, that the wife was entitled to be subrogated to the rights of the vendors of the piano to the extent of the payments made by her. *Eby* v. *McTavish*, 32 O. R. 187.

Validity of Condition.]—A suspensive condition in an agreement for the sale of movables, whereby, until the whole of the price shall have been paid, the property in the thing sold is reserved to the vendor, is a valid condition. *Banque D'Hochelaga* v. *Waterous Engine Works Co.*, 27 S. C. R. 406.

Vendor's Lien—"*Interest*" *in Goods—Distress.*]—An agreement upon the sale of certain machinery and other goods contained a provision that until the balance of the purchase money should be fully paid, the vendor should have a vendor's lien on the goods for such balance, and that no actual delivery of such property should be made, nor should possession be parted with, until such balance and interest should be fully paid. After the sale the vendee took possession of the goods, and subsequently, on the 1st April, 1890, with the assent of the vendor, who surrendered a former lease, the defendants leased to the vendee the premises upon which the goods were situated. Afterwards, and while the balance of the purchase money was still unpaid, the defendants distrained for rent upon the goods in question:—Held, that the stipulation in the agreement for a vendor's lien was inappropriate and inconsistent and must be read out as mere surplusage; and, so reading the agreement, the transaction was one of conditional sale, and, under 57 Vict. c. 43 (O.), only the interest of the tenant in the goods could be distrained on. *Carroll* v. *Beard*, 27 O. R. 349.

See Mason v. *Bickle*, 2 A. R. 291; *Nordheimer* v. *Robinson*, 2 A. R. 305; *Thomas* v. *Inglis*, 7 O. R. 588; *Frye* v. *Milligan*, 10 O. R. 509; *Discher* v. *Canada Permanent L. and S. Co.*, 18 O. R. 273.

See post 5 (a).

(b) *Conditions as to Shipping.*

Arrival of Goods.]—A contract for the sale of goods "to arrive" does not constitute a conditional contract rendering the vendor liable only on the condition of the arrival of the goods, except perhaps where the goods are either in transit in a named vessel or about to be shipped at a named port in some particular manner. In the case of a sale of iron to be made in Scotland:—Held, upon the evidence, that the sale was absolute, and not subject to any condition as to the arrival of the goods. *Fleury* v. *Copeland*, 46 U. C. R. 36.

Name of Consignee—*Materiality.*]—The plaintiff purchased a quantity of lambs from the defendant, to be consigned to plaintiff's firm at Buffalo, which condition plaintiff stated he inserted in the contract "to help our business, . . . and to help build the firm up," the firm being a new one. Defendant disregarded this condition and shipped the lambs to another name, and plaintiff refused to accept delivery. In an action for the deposit paid at the time of the contract and for damages:—Held, that the term of the bargain as to the matter of consignment was a material part of it; material to the plaintiff, as the defendant knew well; and, following Bowes v. Shand, 2 App. Cas. 455, that the plaintiff must succeed. Norrington v. Wright, 115 U. S. R. 188, specially referred to. *McLean* v. *Brown*, 15 O. R. 313, 16 A. R. 106.

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2. *Description of Goods.*

Construction of Contract—*Tender.*]—The plaintiff sued defendant for two cultivators with wheels, upon the following contract, signed by defendant: "Good to B. Harpell (plaintiff) for two cultivators, and Robt. Leakey's note for $227 to him or bearer when called for. Value received:"—Held, that defendant had satisfied the obligation of his contract by tendering to plaintiff two cultivators without wheels, and that under the contract the plaintiff was not entitled to recover any other description of cultivators than that tendered. *Harpell* v. *Collard*, 6 L. J. 212.

Order for Goods — *Understanding of Technical Term.*]—The plaintiffs, who were

potters at Peterborough, sent an order to defendants at Toronto, for 89 worth "of stone spar such as potters use." Defendants answered acknowledging the receipt of the money, "which we have placed to your credit for stone." The order was entered in the order book as for stone, but defendants' manager crossed it out, and wrote ground flint, thinking that must be what was meant, though he said he might as well have sent Cornish stone. The evidence shewed that spar or feld-spar was a substance used in the United States for the same purposes for which stone or Cornwall stone is used in England. The flint was sent in a barrel, which the defendants said was marked flint, and the railway receipt to them was for "one barrel flint." The station master at Peterborough entered it from the way bill as one barrel fluid. The plaintiffs alleged that the barrel was not marked "flint;" that the railway notice described it as fluid; that they received and used it assuming it to be stone as ordered, there being nothing in the appearance to distinguish it, and they having before got stone from the defendants. Being thus used instead of stone, it destroyed the plaintiffs' ware, and for this the plaintiffs sued. The jury were directed that defendants were liable if the order sent by the plaintiffs should have been understood by defendants as an order for Cornwall stone, and if the plaintiffs were justified in believing that the article sent was, and did not know that it was not, such stone; but that, if defendants were justified in sending ground flint on the order received, they would not be liable; and they found for the plaintiffs $150:—Held, that the direction was right; and that it was not a case in which the parties' minds were not ad idem, so that no agreement had been made. *Baker* v. *Lyman*, 38 U. C. R. 498.

See Northey Manufacturing Co. v. *Saunders*, 31 O. R. 475.

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3. *"Free on Board"—Term of Contract.*

Damage to Goods while Awaiting Shipment — *Liability—Interference.*]—On the 4th June 1852, plaintiff bought from defendants, through their agent, 1,100 barrels of flour, and received a sale note as follows:—"Toronto, June 4th, 1852. Messrs. C. W. W.: I have this day sold for your account 1,100 barrels of flour at the Humber, guaranteed to inspect as No. 1 superfine in Montreal, Boston, or New York, deliverable free on board in good order and condition at 16s. 9d. per barrel." Having made the purchase, he wrote to G., with whom the flour was stored at Milton Mills, on the river Humber, subject to defendants' order, saying that he expected the steamer Marion would be at the Humber in the morning, and that he proposed shipping this flour on board of her. On the 5th June he wrote again to G., saying that the steamer would be ready to commence loading on the morning of the 7th, and desiring him to arrange accordingly. On the 7th defendants gave plaintiff their written order upon G. to deliver the flour to plaintiff or order, and the plaintiff transmitted that order to G. with directions to ship the flour on the Marion, consigned to certain persons in Boston, defendants to pay shipping charges. The flour was shipped on the 9th, but when G. received the plaintiff's notice he had immediately sent it down the river to be ready for the steamer; while waiting there in the scow there was much rain, and when the flour reached Boston it was found to be injured. The jury found that the plaintiff was entitled to £62 damages, of which £50 was occasioned by wet while in G.'s warehouse, and £12 while in the scow:—Held, upon the evidence, that the plaintiff's conduct was not such an interference as to take the flour out of the hands of defendants, or their agent, from the time of leaving defendants' mills, and to relieve them from liability for damage received while in the scow waiting for the steamer in which it was to be shipped. *Wilmot* v. *Wadsworth*, 10 U. C. R. 594.

Effect and Meaning of Words.]—See *Coleman* v. *McDermot*, 5 C. P. 303, 1 E. & A. 445.

——— *Time for Payment.*]—Case for not accepting flour. The witnesses on the trial were agreed in the opinion that the words "free on board" included the shipment and all port and harbour charges, such as canal dues, wharfage, &c.:—Held, that the defendant had a right before paying to see the flour free on board. *George* v. *Glass*, 14 U. C. R. 514.

Held, reversing the judgment in 29 U. C. R. 168, that upon a contract for the sale of 10,000 bushels of oats, "at 40 cents per 34 lbs., free on board at Kingston," the purchaser was not bound to pay or tender the price before requiring the seller to put the oats on board. *Clark* v. *Rose*, 29 U. C. R. 302.

Providing Means of Transportation —*Duty of Buyer—Usage.*]—Plaintiff, through his agent at Seaforth, early in September offered defendant 94c. a bushel for his wheat f. o. b. at Clinton, where defendant lived, a station on the same line of railway as Seaforth. This was not then accepted, and on the 9th September defendant offered to take that price, but the plaintiff did not then want the wheat. On the 11th September plaintiff telegraphed defendant: "Will take your wheat at 94 cents, f. o. b. Answer." On the same day defendant answered, "Will accept your offer 94. Send directions about shipping:"—Held, that under such a contract it was the duty of the buyer to provide the cars; that the defendant in this case not having done so within a reasonable time could not recover for the non-delivery of the wheat; and that there was no evidence of a usage or custom to the contrary, even if such usage could be received to vary the contract. Semble, that the explanation of the alleged usage was that the sellers, in providing cars at Clinton under such contracts, were acting as agents for the buyers. *Marshall* v. *Jamieson*, 42 U. C. R. 115.

Warehouse Charges while Awaiting Shipment—*Liability.*]—One E., in February, sold to defendant certain flour to be delivered in May following, f. o. b. (meaning free on board the vessels which were to take it from Hamilton.) The flour was delivered in May, but defendant had no vessels then ready, and E. stored it with plaintiff, subject to defendant's orders, paying all charges on it up to the end of May:—Held, that defendant was liable to the plaintiff for subsequent warehouse charges up to the time of shipment. *Howland* v. *Brown*, 13 U. C. R. 199.

See Butters v. *Stanley*, 21 C. P. 402.

4. *Price and Payment.*

(As to manner of payment, see PAYMENT.)

Absence of Agreement as to Price—*Time of Payment.*]—When there is no actual agreement as to price or time for payment, the law will supply the deficiency by importing into the bargain a promise by the buyer to pay a reasonable price, and by implying, in the absence of evidence to the contrary, that payment should be made on delivery. *Christie* v. *Burnett*, 10 O. R. 609.

Acknowledgment of Value Received.]—Held, upon an agreement by H. to pay to T. or bearer, pine saw-logs, &c., "for value received," &c., that the logs must be considered as paid for, and that H. could not recover from T. the value of the logs in an action of debt upon the common counts for goods sold and delivered. *Hifferman* v. *Thompson*, 6 U. C. R. 207.

Ascertainment of Price — *Reference — Evidence to Explain Writing.*]—The plaintiff bought the office and plant of a newspaper, gave a chattel mortgage thereon to W., and placed P. in charge. The defendants made advances to P. for the purpose of carrying on the business. W. sold the property by auction for the amount of the mortgage debt to the defendants, who, supposing that P. was the owner, wished to secure themselves for the advances made to him. The defendants then agreed to sell the property to the plaintiff; but a dispute arose as to the price, and this action was brought to obtain specific performance of the agreement. There was written evidence of the agreement in a document signed by the defendant Moore, part of which was as follows: "Price of this office to be what it has cost Mr. Horton (the other defendant) and myself." Specific performance was decreed by consent, and it was referred to a master to take the accounts, and to report what was the true agreement between the parties:—Held, that the defendants had the right to shew before the master what they meant by the reference to the cost of the office as fixing the price; and that, upon the evidence, the true agreement between the parties was, that the price was to be the amount paid to W. plus the advances to P. *Hughes* v. *Moore*, 11 A. R. 569.

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

——— *Weighing—Conduct.*] — The plaintiffs, carrying on business at Hamilton, sold a certain number of chests of tea, through a broker at Toronto, to the defendants, who were merchants at the latter place. Before shipping the goods, the plaintiffs ascertained the net weight of the tea, after deducting the weight of the chests, by a mode in general use in the trade, and sent an invoice charging defendants with the number of pounds so ascertained. Some days after the receipt of the goods, the defendants wrote to the plaintiffs refusing to remit their notes for the amount charged, on the ground that the taring was incorrect, and added, "if you wish, we will have more of them tared, or you can send down yourselves, when I will settle." One of the plaintiffs thereupon came down to Toronto, and the goods were re-tared at defendants' warehouse, in the presence of the broker and the defendants' agent, when it was ascertained that the defendants were chargeable with 95 pounds more than the plaintiffs had claimed. The defendants then sent their notes for the amount charged in the original invoice, and refused to pay for the additional 95 pounds:—Held, that the defendants had bound themselves by their letter and conduct to abide by the result of the re-taring at Toronto, and were liable for the additional weight so ascertained. *Brown* v. *Shaw*, 1 A. R. 293.

Cash Payment — *Amount of—Construction of Writings.*]—The declaration charged that defendants sold and plaintiff bought 14,000 bushels of barley at a certain price, to be delivered to plaintiff, when called for, on board a certain vessel, to be paid for on getting a receipt; that plaintiff then paid defendants $200 on account, and called for delivery,—assigning, as a breach, the non-delivery. The evidence of the contract consisted of a writing purporting to be a receipt, dated 29th September, 1868, signed by defendants, for $200, which was therein stated to have been paid "as part margin" on a cargo of barley sold by defendants to plaintiff, to be delivered when called for, and to be paid for on getting the receipt of the captain of the vessel; and also another writing signed by both parties at the same time, but before the receipt was signed, and of the same date, and being a memorandum of the sale of the barley in question, from which it appeared that the barley was to be delivered on the following Thursday, that the "margin" to be paid was $1,000, and that the residue ($800) was to be paid by plaintiff on the same day that the $200 was paid:—Held, that the two writings must be read as incorporated the one with the other, and that the true contract was to be deduced from reading both together; that the jury should have been so directed; and that the plaintiff, having failed to pay the $800, balance of margin, on the day named, could not recover under the above count. Held, also, that there was no substantial variance, for that, reading the two together, the words, "to be delivered when called for," as contained in the second writing, might well mean within the time that had just been fixed by the first. Quere, as to the right of the plaintiff to recover back the $200 paid. *Phippen* v. *Hyland*, 19 C. P. 416.

Credit—*Terms—Breach—Set-off.*]—By an auctioneer's conditions of sale purchasers exceeding £30 were to have "six months' credit, giving approved indorsed notes:"—Held, that a purchaser of over £30 was a purchaser unconditionally on credit, and could not be treated as a purchaser for cash upon his refusal to furnish the note; and, as he could not conse-

quently be sued for goods sold and delivered until after the expiration of the credit, that to a special action by the auctioneer against the purchaser before the credit had expired, for not giving the indorsed note when requested, a plea of set-off would be inadmissible. *Wakefield* v. *Gorrie*, 5 U. C. R. 159. See *Magrath* v. *Tinning*, 6 O. S. 484.

Delivery — *Notification.*] — Where by an agreement the plaintiff is to deliver not personally to the defendants, but on certain parts of a road, a certain quantity of timber to build certain bridges, he must notify defendants of the delivery before he can sue for the price. *Watson* v. *Gorren*, 6 U. C. R. 542.

Invoice—*Presumption.*]—If a merchant receives an invoice and retains it for a considerable time without making any objection, there is a presumption against him that the price stated in the invoice was that agreed upon. Judgment of the court below, that the evidence was sufficient to rebut the presumption, reversed. *Kearney* v. *Letellier*, 27 S. C. R. 1.

Instalments — *Default — Forfeiture.*] — The defendant on the 31st August, 1874, by writing under seal agreed to purchase certain chattels from the plaintiff at the price of $1,078, payable $350 down, $100 on the 1st October, November, and December, and $50 on the 1st January following, and $9 on the 1st of each and every month thereafter, until the full sum of $1,078, without interest, was paid, and in case of default all payments made thereunder to be forfeited to the vendor, and time was declared to be of the essence of the contract. The defendant took possession of the property and paid punctually all the instalments falling due up to and inclusive of the 1st April, 1875. The instalment due on (Saturday) the 1st May was through oversight not paid or tendered, but was tendered on the 3rd, when the plaintiff refused to accept: — Held, that under the terms of the agreement the plaintiff had a right, though a piece of very hard dealing on his part, to insist upon the default in payment of the $9, as a forfeiture of the bargain, and of the money paid; and that, notwithstanding that the defendant swore, and there was some evidence to corroborate the statement, that the real bargain was a sale of the chattels for $700, and a renting of the premises (a bowling alley) in which they were placed at $9 a month during the period, the vendor was entitled to hold the same under a lease from the owner of the fee. *Whelan* v. *Couch*, *Couch* v. *Whelan*, 26 Gr. 74.

Manner of Payment—*Appropriation of Dividends — Set-off.*] — The Albert Mining Company (respondents) brought this action to recover for coal sold and delivered to appellants during the years 1866, 1867, and 1868. S. and M. and one McG. were partners carrying on business under the name of the Albertine Oil Company, the defendant S. furnishing the capital. The contract for the coal was made by S., who was a large stockholder in the plaintiff company and entitled to yearly dividends on his stock. The agreement, as proved by plaintiffs, was that S. purchased the coal for the Albertine Oil Company, the members of which he named; that the president of the plaintiff company told S. they would look to him for payment, as the other partners were poor; that the terms of sale were cash on delivery on board the vessels; and that S. agreed that the dividends payable to him on his stock should be applied in payment for the coal; that in consequence of this arrangement the plaintiffs credited the Albertine Oil Company with the amount of S.'s dividends as they were declared from time to time down to August, 1866, leaving a balance of $912 due to S. It also appeared that the coal delivered was charged in the plaintiffs' books to the Albertine Oil Company, and that the bills of lading on the shipments of the coal were also made out in their name and that some time afterwards a notice, signed by S. and M., was given to the plaintiffs, complaining of the inferior quality of the coal, and claiming damages in consequence. In the latter part of the year 1868 S. repudiated the agreement to appropriate his dividends to the payment of coal, and refused to sign the receipts therefor in the plaintiffs' books. He had signed the receipt for the dividends of 1866. The present action was then brought (in 1873) against S. and M., the surviving partners of the Albertine Oil Company, McG. having died, to recover the value of the coal. S. shortly afterwards brought an action against the plaintiffs for the dividends; this latter claim was referred to arbitration, and an award was made in favour of S. for upwards of $15,000, which the plaintiffs paid in July, 1874. The receipt given for the payment stated that it was in full satisfaction of the judgment in the suit of S. against the Albert Mining Company, and it appeared (though evidence of this was objected to in the present action) that it included the dividends for the years 1867 and 1868:—Held, that, there being clear evidence of the appropriation of S.'s dividends in pursuance of the agreement made with him, and therefore of the plaintiffs having been paid for the coal in the manner and on the terms agreed on, the plaintiffs were properly nonsuited. *Spurr* v. *Albert Mining Co.*, 9 S. C. R. 35.

Place of Payment—*Bank — Attendance to Receive.*]—The declaration—after stating an agreement for the sale and purchase of from 1,000 to 1,500 bushels of peas, to be delivered by defendant at, &c., on or before the 15th November next ensuing the agreement, and that plaintiff should pay for said peas on the 12th November at the bank of Upper Canada in Kingston,—averred that plaintiff on the 12th November went to the bank during banking hours, and was then ready and willing to pay defendant the price of 1,500 bushels, but that neither defendant nor any person on his behalf was there at any time during the day to receive said moneys:—Held, sufficient on demurrer, for that plaintiff was not bound to pay the money into the bank or to attend after banking hours. *Platt* v. *McFaul*, 4 C. P. 293.

Right to Recover Price—*Condition Precedent—Separate Covenant.*]—An agreement for the sale of a machine provided that the inventor should personally inspect the placing and setting of it in operation. The machine was delivered, but, the inventor refusing to go, the vendors sent another competent person to set it up:—Held, that the vendors were nevertheless entitled to recover the price, on the principle that the stipulation alleged did not go to the whole root and consideration of the contract, and, therefore, was not to be considered as a condition precedent, but as a distinct covenant, the breach of which could be satisfied by damages. *Cowan* v. *Fisher*, 31 O. R. 426.

Sale to Agent—*Appropriation of Price to Vendor—Revocation.*]—In December, 1875, H. purchased a quantity of scrap iron for defendants from the plaintiff, the assignee of the J. H. Manufacturing Co.; and on the 10th plaintiff telegraphed defendants to ask if they would be responsible for H., their agent, to which they replied that they dealt direct with H., but would hold the money for plaintiff if H. so requested them. The iron was then shipped to defendants, in H.'s name, though directed by plaintiff to be shipped in his, and was received by defendants. On the 16th December H. drew on defendants, to plaintiff's order, for the amount of the iron, which defendants refused to accept; but afterwards they telegraphed to the plaintiff that when the draft was presented the iron had not been received, but that they had since received it; that H. was with them; and to telegraph amount of draft, and they would keep it out of money due, and to send back the draft. The draft was sent back, and on 27th December presented to defendants, who again refused to accept it, on the ground that the iron was not up to sample. An order of the same date from H. to the defendants, to pay the plaintiff, was proved, and a countermand thereof on the 30th. The defendants subsequently settled with H., and refused to pay the plaintiff. It appeared that previous to the commencement of this suit, a creditors' assignee had been appointed to the estate of the J. H. Manufacturing Co.:—Held, that the plaintiff was entitled to recover from defendants the price of the iron, for that there had been an appropriation of such amount for the plaintiff by the act of all parties, which could not be revoked. *Wilcox* v. *Pillow*, 28 C. P. 100.

Time of Payment—*Part Delivery.*]—Plaintiff and defendant entered into the following contract: "To G. M. B. (plaintiff)—Please deliver to me at Port Arthur five head good steers on first 'City' up, and six steers and heifers on second trip 'City' up, and four cows on same trip, also 100 good lambs in lots of fifteen or twenty, of $3 each lamb, to dress not less than ten pounds per quarter, price of cattle $3.50, weighed at Port Arthur." Nothing was said as to time of payment. The cattle were all delivered, but the plaintiff refused to complete the contract until the defendant paid for the cattle, which the defendant declined to do:—Held, that the price was not payable till the completion of the whole contract, and that the refusal of the defendant to pay for the part delivered did not justify the plaintiff in refusing to deliver the remainder. Withers v. Reynolds, 2 B. & Ad. 882, considered and distinguished. *Boyd* v. *Sullivan*, 15 O. R. 492.

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5. Property Passing or not Passing.

(a) Construction of Contract.

Delivery to Agent to be Manufactured—*Presumption.*]—M. & Co., of Guelph, bought a car load of wheat on commission for C. They paid for it themselves, and shipped it by defendants' railway, taking the railway receipt in their own name as consignees. The car was addressed to the care of C. at Waterdown, M. & Co. being aware that it was intended to be ground there for C., and the receipt was indorsed by them to the order of the Canadian Bank of Commerce. Through this bank they drew upon C. at fifteen days' sight for the price, with their commission and bank charges, and discounted the draft with the receipt attached as collateral security. At Waterdown the wheat was delivered by defendants, upon C.'s order, to his brother, who had a mill there. It was mixed by him with other wheat and ground, and fifty-five barrels of flour, the equivalent for it, were delivered by him to the defendants for C. C. became insolvent before the draft matured, and M. & Co. took it up and got the railway receipt re-indorsed to them. C.'s assignee having sued the defendants in trover and detinue for the flour, they, in privity with M. & Co., denied the plaintiff's right to it, and set up the title of M. & Co.:—Held, that, as between M. & Co. and C., the insolvent, the property in the wheat did not pass to C. until paid for, it being the reasonable presumption from all the circumstances that this was the intention of the parties; that the conversion of the wheat into flour made no difference, for, looking at the usual course of business in such matters, this flour, though not made from the identical wheat, should be regarded as the produce of it. *Mason* v. *Great Western R. W. Co.*, 31 U. C. R. 73.

Effect of Property not Passing—*Agent—Fraudulent Pledge—Replevin.*]—F., a music teacher at Beardstown, Ill., wrote to K. & Co., at Chicago, that he had a customer named J. to whom he could sell a piano, and desiring them to ship one in their own name, to be subject to their order, but F. to pay freight charges in case of no sale, and return piano to plaintiffs, he, F., simply to act as their agent. K. & Co., not having the style of piano required, handed F.'s letter to plaintiffs, piano manufacturers in Chicago, who, after communicating with F., shipped a piano to Beardstown, consigned to their own order, but to be delivered to F. on payment of the freight charges. The piano was received by F. at Beardstown, and its receipt acknowledged in a letter to plaintiffs. It was shipped by F. to Virginia City, Ill., and from there to F. at Toronto, under the assumed name of R., and was there pledged by F. under such assumed name, with defendant D., a pawnbroker, to cover an amount lent by D. to pay the charges, as well as a further advance, F. representing that he intended opening an agency for the sale of pianos. The piano was taken by D. to his own premises, where it remained until replevied:—Held, that there was no sale to F. of the piano, as it never was intended that the property should pass to him. *Bush* v. *Fry*, 15 O. R. 122.

——— *Innocent Purchaser—Estoppel.*]—The plaintiffs, makers of safes at Toronto, sold a safe to one H., of London, on a written order stipulating that he was to give his notes at four and six months for the price; that his name was to be painted on the front of the safe; and that no title to the safe was to pass to H. until full payment of the price agreed upon. The plaintiffs accordingly had H.'s name painted on the safe, and delivered it to him in August, 1876. In November of the same year defendants purchased the safe from H. after having first searched the office of the county court clerk for incumbrances against it, and believing it to belong to H.; whereupon the plaintiffs brought trover:—Held, that the plaintiffs were not estopped from proving their ownership of the safe. *Walker* v. *Hyman*, 1 A. R. 345.

——— *Innocent Purchaser—Estoppel—Action for Price.*]—The plaintiff consigned crude oil to A., who was a refiner, on the express agreement that no property in the oil should pass until he made certain payments. Before making such payments, however, A. sold the oil to the defendants, without the knowledge of the plaintiff:—Held, affirming the judgment in 29 Gr. 300, that, although the defendants were purchasers for value from A., in belief that he was the owner and entitled to sell the oil in question, the plaintiff, under his agreement with A., having retained the property in the oil, and not having done anything to estop him from maintaining his right of ownership, was entitled to recover from the purchasers the price of the oil. *Forristal* v. *McDonald*, 9 S. C. R. 12.

——— *Innocent Purchaser—Replevin.*]—T., the plaintiff, delivered certain articles to one C. under a special contract contained in four notes made by C. in the following form: "For value received, 1st November, 1877, after date, we promise to pay to the order of T. $81.67. The consideration of this and the other notes is one Artic Apparatus," &c., "which we have received of said T. Nevertheless, it is understood and agreed between us and T., that the title to the above mentioned property does not pass to us, and that until all such notes are paid the title to the aforesaid property shall remain in T., who shall have the right, in case of non-payment at maturity of either of said notes, without process of law to enter and re-take, and may re-enter and re-take immediate possession of the said property wherever it may be, and resume the same," &c. C., without payment of the notes, sold and delivered possession of the said articles to defendant, who was then unaware of the plaintiff having any claim on them, but, on subsequently discovering it, negotiated for a new bargain with the plaintiff, which was not made. There was no demand and refusal of the articles. The plaintiff brought replevin, to which defendant pleaded non cepit, and that the goods were defendant's:—Held, that the defendant was entitled to succeed on the first issue, for that the goods came lawfully into his possession, so that without a demand and refusal trespass or trover, and therefore replevin, would not lie; but that the plaintiff was entitled to succeed on the second issue, as under the terms of the notes the property in the goods continued in him. *Tuffts* v. *Mottashed*, 29 C. P. 529.

——— *Liability for Damage to Goods.*]—W., a commission merchant residing at Toledo, Ohio, purchased and shipped a cargo of corn on the order of C. et al., distillers at Belleville, and drew on them at ten days from date for the price, freight, and insurance. This draft was transferred to a bank in Toledo, and the amount of it received by W. from the bank, and the corn, having been insured by W. for his own benefit, was shipped by him under a bill of lading, which, together with the policy of insurance, was assigned by him to the same bank. The bank forwarded the draft, policy, and bill of lading to their agents at Belleville, with instructions that the corn was not to be delivered until the draft was paid. The draft was accepted by C. et al., but the cargo arriving at Belleville in a damaged and heated condition, between the dates of the acceptance and the maturity of the draft, C. et al. refused to receive it and afterwards to pay the draft at maturity. Thereupon the bank and W. sold the cargo for behalf of whom it might concern, credited C. et al. with the proceeds on account of the draft, and W. filed a bill to recover balance and interest:—Held, reversing the judgment in 5 A. R. 626, that the contract was not one of agency, and that the property in the corn remained by the act of W. in himself and his assignees, until after the arrival of the corn at Belleville and payment of the draft; and the damage to the corn having occurred while the property in it continued to be in W. and his assignees, C. et al. should not bear the loss. *Corby* v. *Williams*, 7 S. C. R. 470.

——— *Seizure under Execution.*]—By an agreement between H., of the one part, and W. and wife, of the other, the latter were to provide and furnish a store, and H. to supply stock and replenish same when necessary; W. was to devote his whole time to the business; W. and wife were to make monthly returns of sales and cash balances, quarterly returns and stock, &c., on hand, and to remit weekly proceeds of sales with certain deductions. H. had a right at any time to examine the books and have an account of the stock, &c.; the net profits were to be shared between the parties; the agreement could be determined at any time by H. or by W. and wife on a month's notice:—Held, that the goods supplied by H. under this agreement as the stock of the business were not sold to W. and wife, but remained the property of H. until sold in the ordinary course; such goods, therefore, were not liable to seizure under execution against H. at the suit of a creditor. *Ames-Holden Co.* v. *Hatfield*, 29 S. C. R. 95.

Machinery—*Default in Payment for—Annexation to Freehold—Rights of Vendors.*]—An engine, boiler, and other machinery, were shipped by plaintiffs to the defendant E. under a written order to ship same to his address as per sum agreed on, viz., $875; $225 to be allowed for E.'s portable engine and boiler, and $635 to be paid on shipment; but, if not settled for in cash and notes within twenty days, then the whole amount to become due; the order not to be countermanded, and until payment the machinery to be at E.'s risk, which he was to insure, and on demand was to assign the policy to the plaintiffs, and the title thereof was not to pass out of plaintiffs, E. agreeing not to sell or remove same without the plaintiffs' consent in writing. On default in payment the plaintiffs could enter and take and remove the machinery, and E. agreed to deliver same to plaintiffs in like good order and condition as received, save ordinary wear and tear, and to pay expenses of removal. Any notes or other security given by E. for his indebtedness to be collateral thereto. The machinery was put up in a mill on premises leased with right of purchase, by defendant D. to E.'s wife for one or five years from 11th March, 1883. E.'s wife died on the 23rd October, 1883, and by her will appointed E. sole executor, giving him power to sell or dispose of any property to which testatrix was or might be entitled. E. by deed of 27th April, 1885, demised and released to D. all the right, title, and interest in the premises as well of himself as also as executor, together with the mill built thereon, with the boiler and engine, &c., and on the same day D. leased the said premises, mill and machinery, to E. for one year. After the execution of this

lease D. mortgaged the land, mill and machinery, to the defendants the F. Loan Society. The defendant E. never paid any cash, but gave his promissory note at three months, which was renewed from time to time, but ultimately, E. having failed to pay, the plaintiffs demanded the machinery, when D. notified plaintiffs not to remove it, as also did the society:—Held, that the effect of the transaction was, that the property was in the plaintiffs, and that they were entitled thereto, and that there was an illegal detention by the defendants D. and E. amounting to a conversion; and that the F. Loan Co., by having notified plaintiffs not to remove the machinery, were proper parties to the suit to give plaintiffs full relief; and that unless defendants allowed plaintiffs to remove the machinery on demand, the plaintiffs were entitled to recover $650 with interest, being the price of the machinery, and that upon removal of the engine and boiler the sum of $60 for repairs should be paid by plaintiffs to D. to be repaid to plaintiffs by E. *Polson* v. *Degeer*, 12 O. R. 275.

Manufactured Goods — *Agreement — Necessity for Filing—Execution.*]—M. agreed to manufacture and furnish to the joint account of himself and the plaintiff a quantity of staves to be loaded in cars at a railway station by a day named. By the terms of the agreement the staves were to be considered at all times, whether marked or not, the property of the plaintiff as security for advances:—Held, that under the agreement the staves became the property of the plaintiff as soon as made, and never were the property of M.; and that the agreement did not require filing under the Chattel Mortgage Act; and that the plaintiff therefore was entitled as against an execution creditor of M. *Kelsey* v. *Rogers*, 32 C. P. 624.

——— *Oral Agreement — Execution.*] — On an interpleader to try the title to two locomotives, it appeared from the finding of the jury that in September, 1858, when they were half finished, the plaintiffs orally agreed with G., the manufacturer, to buy them from him for $16,000, payable as he might require it, for which they were to be finished by him; and on the 3rd January, 1859, by deed reciting this arrangement, G. conveyed them to the plaintiffs. Defendant claimed under an execution issued after the agreement, and when that was made there was an execution in the sheriff's hands, at the suit of a third party, which was subsequently paid:—Held, that by the oral agreement the property passed; (2) that the execution in the sheriff's hands clearly could not affect the plaintiffs' claim as against the defendant. *Burton* v. *Bellhouse*, 20 U. C. R. 60.

——— *Oral Agreement—Jury.*]—In an action to try the right to certain bricks, it appeared that they had been made by one D. for the plaintiffs, who were to find the wood to burn the kilns, and deduct it from the price, and had supplied wood to the extent of several hundred pounds. The bricks had not been delivered, and defendant claimed them under an assignment from D.:—Held, that it was properly left to the jury to say, whether by the agreement between the plaintiffs and D. the bricks were to become the plaintiffs' property as soon as they were made; and that, under the evidence given, they were justified in finding that they were. *Burnett* v. *McBean*, 16 U. C. R. 466.

——— *Vesting before Delivery.*]—One P. in January, 1860, agreed to build for a railway company 100 cars of a specified pattern, to be delivered in four months and a half from that time on their track at Toronto, free of charge; the company to pay $825 for each car, payments to be made monthly on the estimate made by a person appointed by the company on materials furnished and work done; "payments to be made to the satisfaction of the Bank of Upper Canada, who are to act as receivers." All but 16 cars were delivered, and these 16 the inspector of the company had approved of, and they were sent to the Suspension Bridge to wait for the springs, which the company were to furnish:—Held, that by the agreement the cars vested in the company before delivery. *Bank of Upper Canada* v. *Killaly*, 21 U. C. R. 9.

Simulated Sale—*Absence of Delivery—Quebec Law.*]—See *Cushing* v. *Dupuy*, 5 App. Cas. 409.

Taking without Payment—*Effect of—Replevin.*]—The plaintiff, being administratrix of the estate of her husband, had a public sale of his effects, on the 11th November, at which defendant, her son-in-law, bought among other things two mares, it being understood before the sale that he should purchase goods equal in value to the share of the estate which his wife would be entitled to. He took away the mares next day, without having made any settlement, and without express assent on the plaintiff's part. His purchases amounted to $154, and his wife's share of the estate was found to be only $100. The plaintiff, through her agent, wrote to defendant demanding payment of the balance, $54, and, not having received it, replevied one of the mares, which at the sale was sold for $51.50. The trial Judge found for the plaintiff, on the ground that defendant had no right to take away the mare until paid for. On motion for a new trial:—Held, there being evidence to sustain this view, that the verdict should not be disturbed. Semble, however, the plaintiff having demanded payment of the balance, thus recognizing the sale, that it would have been more satisfactory to have found a sale and delivery, and to have held defendant indebted for the balance. *Smith* v. *Hamilton*, 29 U. C. R. 494.

See Gleason v. *Knapp*, 26 C. P. 553; *Mason* v. *Bickle*, 2 A. R. 291; *Nordheimer* v. *Robinson*, 2 A. R. 305; *Thomas* v. *Inglis*, 7 O. R. 588; *Frye* v. *Milligan*, 10 O. R. 509; *Thames Navigation Co.* v. *Reid*, 13 A. R. 303; *Bertram* v. *Massey Manufacturing Co.*, 15 O. R. 516; *Hesselbacher* v. *Ballantyne*, 28 O. R. 182, 25 A. R. 36; *Goldie and McCulloch Co.* v. *Harper*, 31 O. R. 284; *Tufts* v. *Poness*, 32 O. R. 51.

(b) *Delivery and Acceptance.*

Ascertained Goods — *Immediate Vesting.*]—By the law of England, under a contract for sale of specific ascertained goods, the property immediately vests in the buyer, and a right to the price in the seller, unless it can be shewn that such was not the intention of the parties. If the seller is to do something to the goods sold, the property will not be changed until he has done it or waived his right to do it. There is no distinction

between the law of England and the law in force in Upper Canada in this respect. *Gilmour* v. *Supple*, 11 Moo. P. C. 551.

——— *Inspection — Rescission.*] — The plaintiffs, merchants in New York, sold to E. B. & Co., merchants in Toronto, through the intervention of a broker, one O., 50 bags of coffee, on the 4th January, 1876, at sixty days' credit. The coffee was selected by O., after full opportunity of inspection and examination, and was sent by rail to Toronto, at the risk of E. B. & Co., who paid the freight thereon, and on arrival of the goods entered and bonded them in their name. Upon examination, E. B. & Co. ascertained that, with the exception of fifteen bags, the coffee was badly stained with some chemical substance, and, on the 17th January, informed O. that it was unmerchantable, and asked him to see the sellers and let them know what to do, as they could not use it. O. replied that the plaintiffs repudiated all liability, but he suggested an experiment to get rid of the damage, and requested them to telegraph him if they could use the goods at ½ cent per pound allowance, offering to endeavour to induce the plaintiffs to make that reduction. E. B. & Co. replied that there could be no doubt that the damage was an old one, but that they would call in a coffee roaster to inspect it, and if anything could be done they would communicate without delay. On the 7th February, and before O.'s suggestion was acted upon, E. B. & Co. made an assignment in insolvency to the defendant, having in the meantime sold 23 bags of the coffee, 15 before and 8 after the objection had been made to it:—Held, reversing the judgment in 41 U. C. R. 136, that the selection of the goods by O., acting either for E. B. & Co., or for both parties, passed the property to E. B. & Co., and that they could not reject it after a full and fair opportunity of inspection by their agent. Held, also, that, even if E. B. & Co. had been at liberty to rescind the contract on ascertaining that some of the goods were unmerchantable, they had precluded themselves from so doing by the mode in which they had dealt with them. Held, also, that, even if the correspondence with O. had taken place with the plaintiffs, there was no evidence of a mutual rescission of the contract. *Wilds* v. *Smith*, 2 A. R. 8.

——— *Part Payment — Oral Agreement —Lien for Balance of Price.*]—Defendants, having a stock of lumber at Milton, agreed orally to sell it to M., to be delivered at Bronte station on the Great Western Railway, for $12 per 1,000 feet, and to be paid for as shipped from the station by him, which he was to do as fast as defendants hauled it there. M. paid on the making of the agreement $1,000 on account of the purchase money. At first M. shipped it away as fast as it was delivered at the station, and afterwards not so rapidly, but, with defendants' knowledge and without objection, he culled, measured, and piled it, marked it with his initials, and left it in charge of the station master, who on his directions from time to time shipped large quantities of it. About six weeks before M. became insolvent, one of the defendants requested payment from him for the lumber then lying at the station, when M. put him off and said, "You are all right anyway. You have the lumber there at Bronte station:"—Held, that there had been a delivery to and an acceptance and receipt by M. of the lumber, so that defendants had lost their lien, which could not be re-established by M.'s statement to defendant. M.'s assignee was held entitled, therefore, as against the defendants. *Mason* v. *Hatton*, 41 U. C. R. 610.

Change of Property—*Goods in Transit.*]—Held, that the taking possession by the Buffalo and Lake Huron R. W. Co., under 19 Vict. c. 21, of the property previously owned by the Buffalo, Brantford, and Goderich R. W. Co., operated to transfer the same to the former, so as to prevent its being seized under a fi. fa., even although the goods were in the process of transportation from England to their line of road. *Buffalo and Lake Huron R. W. Co.* v. *Corbett*, 8 C. P. 536.

Conditional Acceptance — *Municipal Corporation—Executory Contract—Seal.*]—The corporation of a town appointed a committee, consisting of the reeve and two others, to purchase 1,500 feet of hose for the use of the waterworks. They called for tenders, and the two plaintiffs, of whom the reeve was one, submitted a sample of hose, on which the other two members of the committee gave the plaintiffs the order. The hose was tested when it arrived, and was the same as the sample, but it was useless for the purpose required:—Held, that the corporation, on the evidence, had not accepted the hose absolutely, but conditionally only, to keep it if they found it to answer; that they were not liable for it as being bound by the conduct of the committee, for want of an agreement under the corporate seal; and that such contract, being executory, might also be avoided because one of the plaintiffs was a member of the committee. *Brown* v. *Town of Lindsay*, 35 U. C. R. 509.

Conditional Delivery.]—Defendant purchased horses and a waggon from the plaintiff, at auction, the terms being that he should give his own notes at three, six, and nine months, indorsed by one W., and on his promise to give these he was allowed to take the goods. W. refused to indorse, and the plaintiff, having waited for some time without getting the notes, replevied. It was left to the jury to say whether the delivery was absolute with intent to pass the property, or conditional on defendant's giving the notes, and they found for the plaintiff:—Held, a proper direction, and that the verdict was warranted. *Smith* v. *Hobson*, 16 U. C. R. 368.

Countermand of Order — *Absence of Acceptance.*]—Defendant, a cooper, used to make barrels for the plaintiffs (distillers) and receive money as required. In the course of their dealings plaintiffs instructed defendant not to sell his barrels to any body else, as they would require them all. Defendant kept all for plaintiffs, who afterwards refused to take them, and defendant having overdrawn his account, the plaintiffs brought this action for the amount:—Held, that defendant could not set off the value of the barrels kept at plaintiffs' request, as belonging to them, they never having accepted the same. *Gooderham* v. *Dash*, 9 C. P. 413.

Goods Damaged—*Dispute as to Freight —Delivery by Carriers.*] — Three cases of goods, exceeding $40 in value, were orally ordered by L. at M. from plaintiff at T., through plaintiff's traveller, and were shipped,

consigned to L., and carried by railway and then by defendants' steamer to M. Two of the cases were received by L., one of which was in a damaged condition. The third case remained on board the vessel, as the purser refused to deliver it up until the freight on these cases as well as on other goods consigned to L. was paid, but L. refused to pay until he had first an opportunity of checking over the goods. Before the dispute was settled the vessel left, and was subsequently wrecked, and this case lost. An agreement was made between plaintiff and L. whereby plaintiff allowed L. twenty-five per cent. on the value of the two cases received by L. The plaintiff then brought an action against the defendants to recover the twenty-five per cent. so allowed, and the value of the case lost:—Held, that there was an acceptance and receipt of the goods sold by L. so as to pass the property therein to him; and therefore the action should, under the Mercantile Amendment Act, R. S. O. 1877 c. 116, s. 5, s.-s. 1, have been maintained by him and not by plaintiff. *Friendly* v. *Canada Transit Co.*, 10 O. R. 756.

See also *Langdon* v. *Robertson*, 13 O. R. 497.

Goods Stored — *Insufficient Delivery.*]—Plaintiffs contracted for the manufacture of a quantity of glassware, which, though invoiced to and paid for by plaintiffs, was stored with a warehouseman as the goods of the manufacturers, who obtained warehouse receipts for them. These receipts were transferred by the manufacturers to defendants, as collateral security for advances made to them:—Held, in an interpleader to try the right to the goods, that there had not been a sufficient delivery of the goods to pass the property in them to plaintiffs, and that defendants were therefore entitled to succeed. *Gowans* v. *Consolidated Bank of Canada*, 43 U. C. R. 318.

——— *Order for Payment—Execution.*]—On an interpleader, it appeared that A. owned the wheat in question, which was stored with S. On the 8th October he sold it to the plaintiff, and on the 10th gave him an order on S. for it, which S. accepted, and on the 11th the plaintiff paid A. the purchase money. On the 10th the sheriff went to seize the wheat under an execution against A., at the suit of N., which had been in his hands since August, but S. told him that A. had no wheat there. On the 11th, however, the sheriff returned and seized, and on the 14th the execution at the suit of defendants was placed in his hands:—Held, that the plaintiff was clearly entitled under his purchase as against the defendants' execution. *Tucker* v. *Ross*, 19 U. C. R. 295.

Possession Taken — *Impugning Title of Vendor — Ratification — Ascertainment of Price.*]—On the 27th April, 1872, at a meeting of the creditors of one A. R., deceased, at which the administrator of his estate was present, the plaintiffs entered into a written agreement to purchase on behalf of one M. the estate of A. R., consisting of a stock of goods and other effects. This was signed by a number of the creditors, but not by the administrator, but the administrator at the trial swore that he considered it a sale to the plaintiffs. On the 6th May the plaintiffs sold to defendant this stock of goods, as shewn by the stock book, for $7,695.24, of which defendant paid in cash $2,782, and received a receipt therefor, on the back of which a memorandum was indorsed, that the balance was to be paid in notes at three, six, and nine months; and defendant was to go on the following morning to Ingersoll, where the goods were, and take possession. On the day of this sale the plaintiffs applied to and obtained from the administrator an order for the delivery of the key of the store in which the goods were, on the person who held it, as well as an authority on M.'s behalf to sell the goods. On the following morning defendant, with one W., who was sent by the plaintiffs to assist, went to Ingersoll, when the defendant took possession. While the goods were being packed with a view to their removal, they were destroyed by fire. M., who resided in Ingersoll, was well aware of the object with which defendant came there, and at the trial swore that the plaintiffs were authorized to make the sale, and that he had been informed by telegraph of it, and did not dissent:—Held, that the evidence clearly shewed that there was a sale by the plaintiffs to defendant so as to pass the property, for, even if the plaintiffs had not at the time power to sell, yet the subsequent ratification by the administrator and M. related back so as to make it valid. It was contended by defendant that the goods were to be checked with the stock book to ascertain the sum for which the notes were to be given. The jury found that this was no part of the bargain; but semble, that if it had been, the property might still have passed, the checking being required only to ascertain the balance of the purchase money to be paid. The declaration set out the contract and the terms of payment—namely, part cash and part by notes, at stated dates; and alleged that, though defendant had paid the sum payable in cash, he had not paid the balance by his notes or otherwise:—Held, sufficient, it not being necessary to declare specially for the non-delivery of the notes. *Lockhart* v. *Pannell*, 22 C. P. 597.

Unascertained Goods — *Agreement.*]—By an agreement, dated 17th December, 1876, plaintiff agreed to procure and have sawed for defendant at the Waverly mill, 18,000 feet of lumber at $10 per thousand, to be delivered as early in May as possible; defendant agreeing to pay therefor in the manner specified on delivery of the lumber. The lumber was not all cut until the 5th June, and defendant was not aware of its being so cut until after it had been destroyed by fire, which occurred on the 12th June, but evidence was given by plaintiff, which defendant denied, that on the 20th May defendant promised to go up in two weeks and accept the lumber; and it appeared that of the lumber so cut 9,000 feet was placed in a pile by itself for defendant, but the residue was not separated from other lumber which the plaintiff was getting sawed at the same time:—Held, that under the contract no property passed, there having been no delivery or acceptance; and that defendant could not be held liable on the ground of delay in accepting. *Pew* v. *Lawrence*, 27 C. P. 402.

See Brunskill v. *Muir*, 15 U. C. R. 213; *Scott* v. *Melady*, 27 A. R. 193, *post* V. 2.

(c) *Separation, Appropriation, and Weighing.*

Ascertainment of Weight—*Future Delivery—Intention.*]—On the 13th September, 1866, S. agreed to deliver on account of K. at a railway station, when wanted, 600 boxes of factory cheese, at a certain rate per pound, and to keep the same insured until wanted.

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The weight had not then been ascertained; in fact all had not been manufactured. Subsequently two warehouse receipts, dated respectively 21st September and 9th October, were given to K., one for 330, the other for 230 boxes, signed by S. and specifying the weight of the cheese. On the 22nd October K. mortgaged to plaintiffs 400 boxes of cheese purchased by him from S., on or about the 13th September, and then in the curing houses of S., to secure moneys advanced to him by plaintiffs upon the security of part of the cheese. This mortgage was not filed. S. became insolvent on the 19th October following, and K. became aware of it on the following day. The plaintiffs replevied 341 boxes of cheese:—Quære, whether the property in the cheese passed to K. on the 13th September; but if it did not, because the weight had not been then ascertained, that objection was removed on the 21st September, as the receipts specified the weight. Held, however, that the fact that the cheese was not to be delivered until a future time, when K. wanted it, and that S. was to keep it insured in the meantime, did not prevent the property passing; for it is the intention of the parties which is to govern. *Bank of Montreal* v. *McWhirter*, 17 C. P. 506.

Right to Possession—*Failure to Provide Means of Transport — Trover.*] — Plaintiff, through his agent, bought from A. & Co. a certain quantity of wheat, at a price named f. o. b., which was to be loaded by a day named, or as soon as bags and cars could be furnished by the plaintiff for it. Plaintiff paid part on account and furnished bags to the vendor, who filled them, but no cars were sent by plaintiff to take the wheat away. Whilst the wheat was lying ready, and after the day named, defendants, holders of a warehouse receipt, demanded of the vendors the wheat covered by it, when plaintiff's wheat, some of which, amounting to 250 bushels, had been weighed, was delivered to and received by them. There was no demand and refusal of plaintiff's wheat, nor did plaintiff notify defendants that the wheat was his:—Held, that the plaintiff was not entitled to possession of the wheat, and could not, therefore, maintain trover against defendants for it. *Butters* v. *Stanley*, 21 C. P. 402.

——— *Payment of Price.*]—The defendant agreed to get out wood for the mortgagors of the plaintiffs, whose mortgage covered certain wood then piled, as also future acquired wood brought on the premises, and to place it upon the premises at a specified price, and the mortgagors agreed to pay part of the price as the wood was got out, and the balance in cash upon and according to a measurement to be made by them. Subsequent to the date of the mortgage, wood was got out, placed on the premises, and measured in the presence of all parties, and the quantity agreed upon, and marked with the plaintiffs' mark:—Held, that the property in the wood became at once vested in the mortgagors, and through them in the plaintiffs; but such vesting did not transfer the right of possession without payment of the price; and therefore the plaintiffs could not maintain trespass or trover for wood taken away by the defendant after appropriation and before payment of the full price; but were entitled, upon amendment of the pleadings, to a declaration of their right to the property, and to possession upon payment of the amount due, and to an account of the wood not received by them. *Rogers* v. *Devitt*, 25 O. R. 84.

Sale by Weight—*Completion of Contract —Vendor's Risk — Depositary—Acceptance.*] —Held, that where goods and merchandize are sold by weight, the contract of sale is not perfect, and the property in the goods remains in the vendor and they are at his risk, until they are weighed, or until the buyer is in default to have them weighed; and this is so even when the buyer has made an examination of the goods and rejected such as were not to his satisfaction. Held, also, that where goods are sold by weight and the property remains in the possession of the vendor, the vendor becomes in law a depositary, and if the goods while in his possession are damaged through his fault and negligence, he cannot bring action for their value. *Ross* v. *Hannan*, 19 S. C. R. 227.

Setting apart—*Marking—Part Delivery.*] —Under an execution delivered to him on the 16th November, the sheriff seized goods on the 17th. The plaintiff, another creditor, was then at the debtor's shop receiving delivery of some crockery which the debtor was selling him in order to satisfy his claim. These goods were proved to have been set apart for the plaintiff, and to have been marked with his mark, and one of the articles had been delivered to him in the name of the whole. Part had been removed, and the rest was detained and secured by the sheriff. Plaintiff having replevied:—Held, that under a plea of not possessed, defendant was entitled to a verdict. *Calcutt* v. *Ruttan*, 13 U. C. R. 146.

Term of Agreement—*Performance of—Part Payment.*]—By an agreement alleged to be a memorandum of sale of a newspaper, job office, and subscription list by one C. to the plaintiff, for $2,000, $500 was to be paid on giving possession, C. to be relieved of a mortgage to one Cooper for $500 on the plant; and to receive a horse, &c., at such price as H. was willing to give for it last fall. For the balance, to be paid within one year of receipt of the $500, C. was to retain a Gordon press and such further portion of the jobbing plant as would secure him till paid, the plaintiff was to pay rent on the part retained equal to 8 per cent. on the balance unpaid. The agreement was only to take effect if C. obtained an appointment in the revenue department, when it was immediately to take effect. C. having obtained the appointment, plaintiff paid $400, and obtained time for the balance of $100, and he contended that what then took place constituted a transfer of the property in the goods to him:—Held, that, even if the payment of the $400 was a compliance with the agreement as regarded the payment of the $500, that of itself did not cause, nor did the parties intend, the property to then pass, but that it was necessary that the other terms of the agreement should be performed, namely, that C.'s mortgage should be paid off, the horse, &c., delivered at the price to be ascertained, and the portion of the plant on which C. was to have his lien ascertained, and his lien perfected. *Ross* v. *Eby*, 28 C. P. 316.

Transfer of Specific Quantity — *Setting apart of Lesser Quantity.*]—B. transferred to one S. 100 tons of coal, as security for an indorsement. He had then a certain lot of coal lying on a wharf, supposed to contain that quantity, though in reality only 78 tons, and subject to a claim for wharfage equal to

the value of ten tons, but the jury found that the transfer was not confined to this lot, but was of 100 tons, B. having more in his yard. No other coal, however, was set apart, and it had not been ascertained how much would be required to make up the difference, when B. assigned all his effects, including the coal in the yard, to the plaintiff for the benefit of creditors. Defendant afterwards removed from the yard 42 tons, being 22 to make up the deficiency in quantity, 10 for wharfage, and 10 because the quality of that in the yard was inferior to that on the wharf, but he afterwards abandoned his claim to the last 10 tons:—Held, that the plaintiff was entitled to recover, for the sale to S. did not pass the property in any of the coals in the yard. *McDougall* v. *Elliott*, 20 U. C. R. 299.

Treasury Notes—*Setting apart—Lien—Trover.*]—Held, that the facts of this case shewed that no American currency was set apart for plaintiff under the agreement set out, so as to pass to him the property in certain known treasury notes or "greenbacks," and give defendant a lien on them for the amount he was to receive; and that therefore trover and detinue would not lie for the "greenbacks;" and that the plaintiff could not recover back the deposit of $400 in "greenbacks," under the count for trover, as that had never been demanded, and there was no evidence of actual conversion of it. *Walsh* v. *Brown*, 18 C. P. 60.

Warehoused Goods—*Indorsement of Receipt.*]—T. sold to plaintiff 2,000 out of 3,000 bushels of wheat owned by him and lying in two bins in the warehouse of S., whose receipts he held for the same, and which he indorsed to the plaintiff, who paid him. The wheat remained in the warehouse for some time. T. and S. left the country, when defendants seized and converted the whole quantity to their own use. The plaintiff sued them in trover and detinue. The evidence of T., so far from shewing that he repudiated the sale, fully upheld it, and proved that he had told S. to appropriate all the wheat in one of the bins to plaintiff; and S. stated that he would not, after the notice of the sale to plaintiff, have delivered any of the wheat in the two bins to any one by plaintiff, without retaining enough to satisfy plaintiff's 2,000 bushels: — Held, sufficient evidence of an appropriation of the wheat by T. in fulfilment of his sale to plaintiff. *Coffey* v. *Quebec Bank*, 20 C. P. 110.

——— *Indorsement of Receipt—Specific Appropriation.*]—On the 29th June, 1872, C., of the firm of J. F. & Co., who had stored a quantity of coal with defendants, for which defendants were to give warehouse receipts on certain terms, applied to the plaintiff for his acceptance for the firm's accommodation of two bills of exchange, one for $1,500, and the other for $900, offering to give him defendants' warehouse receipt for 400 tons of coal as security therefor. The plaintiff agreed to accept on these terms, of which C. notified the defendants, obtained their receipt dated 27th June, 1872, and indorsed it over to the plaintiff, who then accepted the bills on the faith of this receipt. At the maturity of the bills the plaintiff retired them, by a renewal of and paying at maturity the $1,500 one, and by giving H., one of the defendants, into whose hands the one for $900 had come, his note therefor, which were not paid. On the 28th November a writ of attachment issued against J. F. & Co. On the 30th they made an assignment in insolvency, and on the same day the official assignee took possession of the coal. On the 14th December the plaintiff went to defendants and asked for the coal, but defendants stated that they could not give it to him, as the assignee had taken possession of it; and he subsequently called at different times, but received in effect the same reply. The coal, which was proved to have been worth between $5 and $6 per ton, was afterwards sold by the assignee at an average of $3.80 per ton. The plaintiff, on the 28th February, 1876, brought trover against defendants for their refusal to deliver:—Held, that there was no necessity for any specific appropriation of coal to answer the receipt; and that at all events defendant could not set up this objection. *Cockburn* v. *Sylvester*, 27 C. P. 34.

——— *Receipt—Necessity for Separation.*]—A warehouseman sold 3,500 bushels of wheat, part of a larger quantity which he had in store, and gave the purchaser a warehouseman's receipt under the statute, acknowledging that he had received from him that quantity of wheat, to be delivered pursuant to his order to be indorsed on the receipt. The 3,500 bushels were never separated from the other wheat of the seller: — Held, that the purchaser had an insurable interest. *Box* v. *Provincial Ins. Co.*, 18 Gr. 280; *S. C.*, 15 Gr. 337, 552.

——— *Receipt—Non-payment of Price.*]—The defendants had over 4,000,000 feet of lumber in a yard in Rockland, Ont., and sold 1,500,000 through an agent to L. of Montreal on six months' credit, ratifying the sale by a letter to the owners of the yard as follows: "Montreal, 12th January, 1887. Messrs. W. C. Edwards & Co., Rockland, Ont. Gentlemen,—You will please ratify Mr. Lemay's order for one million feet 3 mill culls 8-13 feet and 493,590 feet 3 mill culls 14-16 feet sold to Mr. William Little, f.o.b. of barges, with option to draw them from the piles, if he wants some during winter. Yours truly, N. Hurteau et Frère." A few days after the sale the agent gave an order on the owners of the yard for delivery of the lumber to L., which order was accepted by the owners. L. had given a six months' note for the price of the lumber, and just before it matured he asked the defendants to renew, which they refused, and on L. saying that he could not pay, the defendants replied that he must keep his lumber, whereupon he was informed by L. of his agreement with the plaintiff made about a month after the purchase from the defendants, by which he pledged to the plaintiff the warehouse receipt for the lumber as collateral security for advances to him by the plaintiff. On the trial of an interpleader issue to determine the title to this lumber it was shewn by the evidence that the quantity sold to L. had never been separated from the defendants' lot in the yard, and that the defendants had always kept it insured, considering it theirs until paid for:—Held, that the property in the lumber never passed out of the defendants. *Ross* v. *Hurteau*, 18 S. C. R. 713.

See Coleman v. *McDermott*, 1 E. & A. 445; *Scott* v. *Mclady*, 27 A. R. 193, *post* V. 2.

See, also, *ante* (a), (b).

(d) *Other Cases.*

Assent of Purchaser—*Necessity for.*]—A., being indebted to B. and C., and being insolvent, was about to leave the country, but desired to secure to B. the debt he owed him, and instructed his clerk to that effect, who after A.'s departure made an assignment of his goods to B., without B.'s knowledge or consent, and before B.'s consent was received the goods were seized by a sheriff on an attachment issued at the suit of C.:—Held, that the sale to B. was not complete until his assent was received, and that the sheriff, having seized the goods before such assent, could not be treated as a trespasser. *Barrett* v. *Rapelje*, 4 O. S. 175.

Equitable Interest in Goods—*Payment of Claim against—Possession—Execution.*]—W., an hotel keeper, contracted with Messrs. N. for the purchase of a piano for $400, payable by instalments, they retaining the property until full payment of the purchase money, with possession to W. at an agreed rental. Subsequently W. borrowed $200 from plaintiff, giving her a chattel mortgage on certain property in the hotel, not including the piano. After W. had paid $250 on the piano, he sold out the hotel and chattels therein, subject to the mortgage to M., the piano, as not yet vested in W., not being included in the sale. A further instalment coming due, the plaintiff and W. agreed, with the privity of M. and Messrs. N., that the $250 already paid on the piano should be credited on the plaintiff's mortgage, and that M. should pay the balance due on the piano, which was also to be so credited, and that plaintiff was thus to acquire the piano, which, at Messrs. N.'s desire, was to remain in M.'s possession until the whole purchase money was paid. M. then paid $100 of the amount due, but, before the balance of $50 was paid, the piano was seized under an execution by defendant against W. Messrs. N. then claimed the piano, and an interpleader order was applied for, when the plaintiff paid Messrs. N. the amount due, and was substituted as claimant, and an interpleader was directed to try whether defendant was entitled to the proceeds of the piano, which had been sold under the execution:—Held, that the plaintiff was entitled to such proceeds, for she had an interest in the piano, equitable if not legal, preferable to defendant's claim, and M. was holding for her. *Black* v. *Drouillard*, 28 C. P. 107.

Evidence of Property Vesting.]—In trover for wheat and flour, the plaintiff claimed as purchaser from H. K. & Son, the owners of a grist mill, on the 14th and 15th October, 1851; the defendants, as assignees of H. K. & Son, for the benefit of creditors, by assignment dated the 31st October. At the trial evidence was given as to the quantity of wheat in the mill on the 18th October, and of the flour delivered from the mill before the assignment to the defendants, upon which defendants contended that, from the proved course of business in the mill, none of the identical wheat there at the time of the sale to the plaintiff could have been manufactured into the flour of which defendants had taken possession under the assignment. The jury having found for the plaintiff, the court, upon the evidence, granted a new trial upon payment of costs, holding that the evidence left it doubtful whether the property in any wheat ever vested in the plaintiff; and that the weight of evidence rendered it probable that no part of the wheat in the mill at the time of the contract with the plaintiff came into defendants' possession. *Rigney* v. *Mitchell*, 2 C. P. 266.

——— *Recognition of Ownership—Transfer of Bill of Lading.*]—The declaration alleged that the plaintiff by his agents delivered to defendants 8,000 bushels of his corn, to be carried from Chicago to Stratford, &c., and to be delivered to the Bank of Montreal or their assigns; that the bank assigned the corn to the plaintiff, yet that defendants neglected for an unreasonable time to carry and deliver it, whereby the plaintiff lost a market, and was afterwards obliged to sell for a less price than he would otherwise have done. It appeared that the corn was shipped by M. & Co., "as agents and forwarders," on account of whom it might concern, to be delivered to the Bank of Montreal or their assigns, and the bill of lading was indorsed by the agent of the bank to the plaintiff, with whom defendants treated as the owner, and delivered it to him after some delay caused by a charge made and afterwards remitted by them. It was objected that the consignor or consignee only could sue upon this contract, not the plaintiff; that the bank could not assign to him; and if they could, the right of action would not pass. There was no evidence to shew what interest the bank had in the corn:—Held, there being no plea denying plaintiff's property in the corn, that he was admitted to have been the owner when it was shipped; that the bill of lading did not transfer the property to the bank, in whom no other right was shewn; that their indorsement was therefore unnecessary; and that he was entitled to maintain the action. Semble, however, that if he had first acquired his title by such indorsement, he might have sued defendants for any negligence occurring after they had recognized him as owner. A bill of lading is not conclusive proof of the change of property, like a bill of sale; it is a question of evidence whether such an operation should be given to it. *Kyle* v. *Buffalo and Lake Huron R. W. Co.*, 16 C. P. 76.

Money Advanced—*Warehouse Receipt—Lien on Proceeds.*]—The plaintiff purchased barley from R., telling him to consign it to C. and draw on C. for the purchase money. C. was to keep the barley as plaintiff's agent until the sheriff directed him to sell, the plaintiff paying him such a sum as he might require by way of margin to protect himself against a fall in price. C., to reimburse his advance on R.'s draft, obtained a discount from the bank on his own note secured by the warehouse receipt for the barley, which he transferred to the bank. While C. held the barley the plaintiff paid to him $540 as margin to hold it. The barley was shipped by plaintiff's instructions to Oswego, to the order of the bank, where it was sold; and the bank received the proceeds on the 2nd December, having previously had notice that the plaintiff owned the barley. About the 17th November C. left the country, and an attachment in insolvency having issued against him, an interpleader was directed to try whether the balance of such proceeds above the bank's advances belonged to his assignee or to the plaintiff:—Held, that the plaintiff was entitled to it, for the barley was his, and the money, the proceeds of its sale, never came into C.'s hands, or was mixed with his general assets.

C. had advanced by paying R.'s draft more than the proceeds of the barley, and it was contended therefore that there was no surplus available for the plaintiff:—Held, that the plaintiff was entitled to deduct from such advance the sum paid by way of margin. After C. had absconded the plaintiff went to his office to ask about his barley, and there saw R., the manager of C.'s business, who went with him to the bank and had a conversation with the cashier:—Held, that their evidence of what passed was clearly admissible. *Cotter* v. *Mason*, 30 U. C. R. 181.

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

See McNeil v. *Kelcher*, 15 C. P. 470.

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6. *Purchase by Sample or Inspection.*

(*See*, also, *post* 7.)

Guaranteed Inspection—*Necessity for Sample before Acceptance.*] — Defendant agreed to buy from plaintiff 1,000 barrels of flour, deliverable at a good port on Lake Ontario in May, 1856, and to be guaranteed inspection extra in Boston or New York at 89 per barrel, free on board. It appeared that on the 27th May the plaintiff told the broker at Toronto through whom the contract was made, and who was interested in half of the flour, that he was ready to deliver it at Hamilton, and gave him an order on M. & Co., of Hamilton, to deliver the flour to him on receipt of the purchase money; which the broker said would not be satisfactory to defendant. Next day plaintiff offered defendant the receipt of the Great Western Railway Company for the flour, with a delivery order indorsed in defendant's favour, which defendant refused, saying that he must first see a sample. After due notice to defendant the flour was sold by auction at a price much lower than he had agreed to give, and plaintiff sued for the difference in an action for not accepting:—Held, that he was entitled to recover. *George* v. *Glass*, 14 U. C. R. 514.

Inspector—*Acceptance of.*]—A contract for the sale of lumber was made wholly by correspondence, and the letter which completed the bargain contained the following provision: "The inspection of this lumber to be made after the same is landed here" (at Windsor) "by a competent inspector to be agreed upon between buyer and seller, and his inspection to be final:"—Held, that it was not essential for the parties to agree upon an inspector before the inspection was begun; and a person chosen by the buyer having inspected the lumber, and before his work was completed the seller having agreed to accept him as inspector, the contract was satisfied, and the inspection final and binding on the parties. *Thomson* v. *Matheson*, 30 S. C. R. 357.

Opportunity for Inspection — *Caveat Emptor.*]—The plaintiff, a fruit dealer in Ottawa, went to Montreal for the purpose of buying fruit, where he met the defendant, who had a quantity of apples for sale. The defendant, in answer to a question by one H., his agent, said they would be found to be "a good lot," and H. opened several barrels for the purpose of plaintiff examining the contents, which he did in five or six instances, when the apples "appeared to be good." The plaintiff might, had he so desired, have examined all the barrels; but, having previously bought apples packed by the defendant which proved satisfactory, and placing reliance on the reputation of the defendant for being an honest packer, he refrained from any further examination, and purchased 138 barrels, which, on his subsequently attempting to sell, proved to be so inferior in quality that some persons refused to buy, and others returned what they had bought. Thereupon the plaintiff instituted proceedings to recover compensation for the defect in value:—Held, that, as the sale was not a sale by sample, and the plaintiff had not been deterred by any acts or conduct of the defendant from making a full examination or inspection of all the barrels, the defendant was not liable on any warranty, express or implied, and that the maxim "caveat emptor" applied. *Borthwick* v. *Young*, 12 A. R. 671.

Under a contract to supply goods of a specified description which the buyer has no opportunity of inspecting, the goods must not only, in fact, answer the specific description, but must be saleable or merchantable under that description. On a sale of goods when the buyer has no opportunity of inspection, the maxim caveat emptor does not apply. *Moores* v. *Gooderham and Worts (Limited)*, 14 O. R. 451.

Place of Inspection—*Agency—Ratification.*]—Held, by the court of appeal, that in a sale by sample of goods to be "laid down" at a certain place, inspection, if desired, must be made there, and, if a proper opportunity of making inspection be afforded, and the buyer refuse to inspect, and demand that the goods be shipped to another place for inspection, the seller is justified in treating this as a breach of contract. Held, by the supreme court of Canada, affirming this decision, that where goods are sold by sample, the place of delivery is, in the absence of a special agreement to the contrary, the place for inspection by the buyer, and refusal to inspect there, when opportunity therefor is afforded, is a breach of the contract to purchase. Evidence of mercantile usage will not be allowed to add to or affect the construction of a contract for sale of goods in New York by persons domiciled there, unless the latter are shewn to have been cognizant of it, and can be presumed to have made their contract with reference to it. If persons in Canada contract to purchase goods in New York, through brokers, first by telegram and letters, and completed by exchange of bought and sold notes signed by the brokers, the latter may be regarded as agents of the purchasers in Canada: but if not, if the purchasers make no objection to the form of the contract, or to want of authority in the brokers, and after the goods arrive refuse to accept them on other grounds, they will be held to have ratified the contract. *Oelrichs* v. *Trent Valley Woollen Mfg. Co.*, 20 A. R. 673, 23 S. C. R. 682.

——— *Delivery—Refusal to Accept.*]—The defendants agreed with one W., who stated incorrectly that he was acting as broker for the plaintiff, for the purchase by sample of a quantity of cotton waste at one and one-fourth cents per pound, to be delivered at St. Catharines. In reality W. was selling for his own benefit, as he arranged to purchase the waste at one cent a pound. Instead of inspecting the goods at St. Catharines, the defendants requested W. to consign them to their house in Cincinnati, U. S., which the plaintiff did by direction of W. The plaintiff, at the request of W., made out a bill of lading in the name of the defendants and drew on them for the price at one and one-fourth cents per pound, which draft was accepted by the defendants, the plaintiff paying W. his profit in cash. On the goods reaching Cincinnati, an inspection took place, when they were found greatly inferior to the sample. The defendants rejected the goods, but refused to return them to the plaintiff at St. Catharines, although he was willing to accept them there. In an action on the bill of exchange:—Held, that the defect in quality formed no ground of defence; that the plaintiff's contract was to deliver the goods at St. Catharines, where the inspection ought primâ facie to have taken place; and that the only redress of the defendants was by cross-action. *Towers* v. *Dominion Iron and Metal Co.*, 11 A. R. 315.

——— *Shipment—Description of Goods.*]—The plaintiff contracted with the defendant, a dealer in lumber, to sell him 200,000 feet of eighteen foot plank of red or white pine two inches thick, and from six to twelve inches wide; "quality the same as he had supplied the previous year," to be paid for by acceptance at three months from date of shipment. The lumber was to be shipped f.o.b., at the plaintiff's mills, to such places as the defendant should direct. A shipment was made of some car loads, which the defendant accepted. Subsequent shipments were made, some car loads of which were received and others rejected at Hamilton, where the defendant carried on business:—Held, in an action for the price, that under the terms of the contract the inspection should have been made at the plaintiff's mills and (affirming the judgment in 9 O. R. 566), that the defendant could not reject the lumber at Hamilton unless it was shewn that the article delivered was not the article agreed to be delivered; and the evidence failed to shew that the description of the lumber mentioned in the contract was not substantially satisfied. *Dyment* v. *Thomson*, 12 A. R. 659.

Held, affirming the judgment in 12 A. R. 659, that, under the circumstances of the case, the defendant had no right to reject the lumber, his only remedy for the deficiency being to obtain a reduction of the price or damages for non-delivery according to the contract. *S. C., sub nom. Thompson* v. *Dyment*, 13 S. C. R. 303.

——— *Shipment—Waiver.*]—By telegrams and letters the defendant offered to sell the plaintiff twelve cars of barley, to be delivered free on the track in Toronto at sixty-six cents per bushel, of the quality of two cars previously shipped by the defendant to the plaintiff, subject to inspection by the plaintiff at his own expense at Lansdowne. The plaintiff telegraphed, "All right, will take the lot. Ship one car on receipt—quick." By letter of same date the plaintiff said that this might save the necessity of his sending down to inspect, as if this car was all right he need not do so. The car was sent by the defendant, who, however, wrote at once, when advising of the shipment, that the only way he would sell would be to have the barley inspected at his grain house. Defendant drew on the plaintiff for the price of the car sent, which was paid. The plaintiff did not inspect, but, after receiving this car, he wrote and telegraphed to defendant to ship the balance, but defendant refused to do so:—Held, that the contract was subject to the condition stipulated for by the defendant, that the plaintiff should inspect before shipment; and that the shipment of one car, with the letter accompanying it, was not a waiver of the condition for inspection at Lansdowne of the residue, which the defendant was therefore not bound to deliver. *Goodall* v. *Smith*, 46 U. C. R. 388.

Waiver.]—Held, in this case, that, even though inspection might be a term of the contract, this was chiefly for the plaintiff's protection, and he might waive it, as he had done, by a letter. *Ballantyne* v. *Watson*, 30 C. P. 529.

See Fisher v. *Cassady*, 14 P. R. 577; *Leggatt* v. *Clarry*, 13 O. R. 105; *Leadlay* v. *McRoberts*, 13 A. R. 378.

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7. *Quantity and Quality.*

(*See*, also, *ante* 6.)

Deficiency in Quantity—*Bill of Lading—Weighing—Notice.*]—In an action for the price of 810 tons of coal the defendants pleaded delivery of only 755 tons, and tendered the price of that quantity, which was refused. At the trial it was proved that defendants agreed to take the coal as per bill of lading without having it weighed. They caused it to be weighed, however, in their own yards, without notice to the vendors, and it was found to consist of only 755 tons, and about three weeks after receiving the bill of lading they claimed a reduction for the deficiency:—Held, that the defendants had no right to refuse payment for the cargo on the ground of deficiency in the delivery, considering that the weighing was made by them in the absence of, and without notice to, the plaintiffs, and at a time when the defendants were bound by the option they had previously exercised of taking the coal in bulk. *Hudon Cotton Co.* v. *Canada Shipping Co.*, 13 S. C. R. 401.

Difference in Quality — *Grade.*]—The defendant company agreed to purchase from the plaintiff a quantity of iron called "Depere" iron, the plaintiff to deliver the same as the defendants should require for their works. The plaintiff subsequently, without any requisition from the defendants, shipped to them nearly the whole quantity agreed for, of another brand of iron manufactured by a different company, though using the same ore and fuel and making the same grade of iron as the Depere Company. The defendants refused to accept the iron offered:—Held, affirming the judgment in 31 C. P. 475, that the defendants were not bound to accept the iron so tendered, neither could the plaintiff recover the value thereof, the iron being a different article from that contracted for. *Hedstrom* v. *Toronto Car Wheel Co.*, 8 A. R. 627.

Excessive Quantity—*Description*—"*Car Load*"—*Option.*]—The defendants agreed to buy from the plaintiff a car load of hogs at a rate per pound, live weight. The plaintiff shipped a "double-decked" car load, and the defendants refused to accept this, contending that a "single-decked" car load should have been shipped. There was conflicting evidence as to the meaning given in the trade to the term "car load of hogs," and it was shewn that hogs were shipped sometimes in the one way and sometimes in the other:—Held, that the plaintiff had the option of loading the car in any way in which a car might be ordinarily or usually loaded, and that he having elected to ship a double-decked car load, the defendants were bound to accept. *Hanley* v. *Canadian Packing Co.*, 21 A. R. 119.

——— *Waiver.*]—The defendants, with the knowledge that a consignment of goods was in excess of the quantity ordered by them, made no objection on that ground, though negotiations took place for a reduction in price, on account of delay, &c., but took into stock fifteen out of twenty-five cases sent. The other ten cases remained in bond till they were sold to pay duties:—Held, that there was evidence on which a waiver of any objection as to the excess was properly found. *Goodyear Rubber Co.* v. *Foster*, 1 O. R. 242.

See Brown v. *Shaw*, 1 A. R. 293, *ante* II. 4.

Inferiority in Quality—*Acceptance*—*Quantum Meruit.*]—The defendant purchased from the plaintiff a car load of "No. 1 green hoops," to be delivered at the railway station. On their arrival at the station they were removed by the defendant to his own place and some of the hoops used by him, but merely, as he said, for the purpose of testing them. He then wrote to the plaintiff that he was astonished at his sending dry and rotten hoops for first-class green hoops, and if he, defendant, had seen them before they were at his place he would not have touched them; that there were less in the car than the number stated by the plaintiff; that he enclosed a bill which was the amount he intended to pay, and not a cent more, because they were not worth that; and if the plaintiff would accept the amount offered to let the defendant know by return mail, and he would remit. In answer, the plaintiff, through his solicitor, threatened a suit, when the defendant replied that if plaintiff would not accept this he might go on and sue:—Held, that there was evidence to go to the jury of an acceptance of the hoops, and an agreement to pay on a quantum meruit. *McClure* v. *Kreutziger*, 6 O. R. 480.

——— *Acceptance of Bills for Price*—*Counterclaim*—*Loss.*]—The defendant ordered a quantity of boots from plaintiff at Montreal, through G., plaintiff's agent, who shewed defendant samples, some being known in the trade as "solid leather," and others as "shoddy." The defendant said he bought what was represented as solid leather, while G. said he sold by sample, and that the boots were in accordance therewith. The order was given in September, and parts delivered respectively in October and November, and the balance somewhat later. The defendant said he complained, in October, and again some three weeks later, to G. of the quality of the boots, and said that he would ship them back, when G. told him to do so. The defendant said he shewed G. a pair of the boots which had turned out badly, and G. said as he was going to Montreal he would shew them to the plaintiff. On G.'s return he told defendant that if there were any more like that to send them all back. In January the defendant went to Montreal and asked for an extension of time for payment, to see if the goods turned out all right, which the plaintiff refused to give, when defendant said if they did not turn out right he would return them. The boots were taken into stock and a large quantity sold; but a few pairs were returned. In February the defendant claimed to be entitled to return the boots as not answering the contract. There was no evidence to shew what defendant's loss was; and the whole evidence was conflicting. It was urged that the defect was a latent one, and therefore not discoverable by ordinary inspection and examination. The defendant accepted four bills of exchange in payment of the price, one of which he paid after maturity. In an action on the other three the defendant denied his liability thereon; and also counterclaimed for damages. The Judge at the trial found for the plaintiff on the bills, and dismissed the counterclaim, without prejudice to the defendant bringing a fresh action for damages:—Held, that the finding as to the bills was correct, as there was unquestionably a good consideration therefor; and defendant's remedy, if any, must be on his counterclaim; but, in the absence of any evidence of loss, there could be no judgment thereon; and also, if the Judge at the trial had decided on the conflicting evidence, the court might not be able to interfere. The right, however, conceded, of bringing a fresh action, placed the defendant in as favourable a position as he could expect. *Leggatt* v. *Clarry*, 13 O. R. 105.

——— *Culling.*]—Plaintiff agreed in writing to sell to defendant, at a rate named, 60,000 merchantable oil barrel staves, subject to the culling of one S. Plaintiff sued on this contract, alleging the delivery of the staves, duly culled by S. Defendant pleaded denying the delivery and acceptance of staves which had been culled by S., to any greater extent than 52,479, to which amount payment was pleaded; but at the trial he relied, as to the residue of the staves, solely upon the fact that these latter were not merchantable staves, although they had been approved by S.:—Held, that the culling of S. must be taken as conclusive between the parties under the contract, and that it was not competent for defendant, upon the issue joined, to raise any questions as to the quality of the staves after approval by S. *DeCew* v. *Clark*, 19 C. P. 155.

——— *Flour—Inspection.*] — Held, that, under the circumstances of this case, the plaintiff was entitled to recover, because certain flour sold to him as "Victoria Extra," had not passed inspection as "extra superfine." *Bunnel* v. *Whitlaw*, 14 U. C. R. 241.

Where flour is guaranteed to inspect of a particular grade, such as "No. 1 superfine," it must inspect sweet of that grade. *Bain* v. *Gooderham*, 15 U. C. R. 33.

——— *Particular "Brand"—Estoppel.*]—*Acceptance and User.*]—The plaintiffs agreed to deliver to the defendants a quantity of Staffordshire Crown Bar iron of the T. K. brand. A part of the iron was delivered to the defendants, of which a considerable quantity was unbranded; the defendants, however, did not treat the absence of the brand as creating a difficulty in the way of their accepting

the iron, but proceeded to test it, and, finding it unsatisfactory, declined to receive any more, or to pay for the whole or part. This action was then brought for the contract price of the whole. The jury found that the iron was merchantable, but not equal in quality to the standard T. K. Crown brand:—Held, that the duty of the plaintiffs under the contract would have been performed if they had supplied to the defendants merchantable iron bearing on its face the genuine brand contracted for: but, in the absence of that authentication, and having regard to the conduct of the defendants, the contract must be taken to be one for the sale of iron manufactured by the T. K. Co., of the quality usually indicated by the Crown brand, and so the defendants would have the right to test it, and, according to the findings of the jury, would have been justified in rejecting it all; and the fact that the portion which was branded was below the standard, did not estop the defendants from shewing that the portion which was unbranded was also below the standard. But held, that the defendants, having used in the manufacture of their machines, after the doubtful quanty of the iron had been brought to their notice, and without the consent of the plaintiffs, a considerable quantity of what had been delivered to them as part of an entire contract, had precluded themselves from objecting to the remainder of that which came into their possession. Held, also, that the property in the part of the iron which was not delivered to the defendants, must be taken to remain in the plaintiffs; for defendants had never exercised their right to test it, and had refused to receive it, and until tested the plaintiffs could not compel the defendants to accept it. The action was treated as one for the price of iron which the defendants accepted, and for damages arising from their refusal to accept the remainder, and, in accordance with the findings of the jury, which, in the opinion of this court, were sustained by the evidence, judgment was entered for the plaintiffs for the actual value of the part of the iron delivered only (the damages having been negatived by the jury), and for the defendants upon their counterclaim for damages sustained from the breach of contract, other than by reason of the inferior quality of the iron; and the plaintiffs were allowed the costs of the action, and the defendants the costs of the counterclaim. *Bertram* v. *Mersey Manufacturing Co.*, 15 O. R. 516.

——— *Particular Chattel — Representation.*] — The respondent bought at auction, through an agent, a billiard table described in the auctioneer's advertisement as "a full size 6 pocket English billiard table made by Thurston," &c., and wrote to the appellants, makers of billiard tables in Toronto, describing his table and asking terms of exchanging it for a new one of another style. On receiving the information asked, the respondent wrote that he could not accept the terms offered. The appellants wrote to the respondent asking him to make an offer for an exchange, and to give a description of the table. To this the respondent answered: "I may just say I never saw our table yet, but am informed it is a very nice one, made by "Thurston," and very little the worse of wear. The gentleman who purchased the table for us writes thus: "I got the 3 billiard balls and marker, and 19 cues, which is all that is needed for billiards. I am told the table is a great bargain, cost £200 in England, and is not much the worse for wear. The table is 6 x 12, and for particulars we would refer you to . . " M. & Co. then wrote accepting the offer, and adding, "We trust that the English table is fully as represented; and if you are satisfied, you may ship it at once, with billiard balls, markers, 19 cues, cloth, and what else there may be. In the meantime we will get up a 4¼ x 9 Eclipse Combination table in best style, and with outfits for pool, carom, and pin pool games." The table shipped by McD. on reaching Toronto was found to be an American made table with English cushions and worth only from $15 to $25. M. & Co. brought an action for the original price of the new table:—Held, that McD. agreed to deliver to M. & Co. an English built table made by Thurston as described in his letter, and having failed to deliver such a table, he was liable to pay the full price of the one obtained from M. & Co. *May* v. *McDougall*, 18 S. C. R. 700.

——— *Representations — Warranty.*] — Where a person manufacturing flour, marks it as of a particular quality, that amounts to a warranty of its being of such quality. Held, that in this case the evidence of representations made by the seller at the time of sale were sufficient to warrant the jury in finding an express warranty. *Chisholm* v. *Proudfoot*, 15 U. C. R. 203.

——— *Warranty—Delivery—Acceptance.*] —In a contract for the purchase of deals from A. by S. et al., merchants in London, it was stipulated, inter alia, as follows: "Quality —Sellers guarantee quality to be equal to the usual Etchemin Stock and to be marked with the Beaver Brand:" and the mode of delivery was f. o. b. vessels at Quebec, and payment by drafts payable in London 120 days' sight from date of shipment. The deals were shipped at Quebec on board vessels owned by P. & Bros., at the request of P. & P., intending purchasers of the deals. When the deals arrived in London they were inspected by S. et al., and found to be of inferior quality, and S. et al., after protesting, sold them at reduced rates. In an action in damages for breach of contract: —Held, that the delivery was to be at Quebec, subject to an acceptance in London, and that the purchasers were entitled to recover under the express warranty as to quality, there being abundant evidence that the deals were not of the agreed quality: arts. 1507, 1473, 1073, C. C. *Stewart* v. *Atkinson*, 22 S. C. R. 315.

See Exchange Bank v. *Stinson*, 32 C. P. 158; *Dyment* v. *Thompson*, 9 O. R. 566, 12 A. R. 659, 13 S. C. R. 303; *Bogardus* v. *Wellington*, 27 A. R. 530.

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8. *Other Cases.*

Deduction from Price—*Conflicting Evidence—Jury.*] — Defendant sold the plaintiff an ox at 25s. per cwt., and received 20s. as earnest. Some days after, the ox was weighed at 15 cwt., and the plaintiff offered $46 as the balance of purchase money, contending that by the original agreement one-third was to be taken off for offal. Defendant denied this and refused to deliver the ox, and the plaintiff thereupon brought replevin. The evidence as to the bargain was contradictory:—Held, that the jury should have been told, that if the agreement was as stated by the plaintiff he was entitled to succeed; but that if that was

not clear, and defendant refused under the bonâ fide belief that there was to be no deduction, then they should find in his favour. *O'Rourke* v. *Lee*, 18 U. C. R. 609.

Liability for Customs Duty—*Payment by Purchaser — Recovery.*] — The defendant, assignee in insolvency of L. & Co., advertised the whole estate for sale, consisting of a wholesale stock of groceries, &c., and a distillery and plant, which were specified in the advertisement in parcels, with the supposed value of each, the total being said to be about $51,000. He had an inventory prepared which professed to give the cost price, and the advertisement invited tenders "at so much in the dollar on inventory price," to be paid in three equal quarterly instalments, or five per cent. to be allowed off for cash. Most of the goods were then in bond. W. & Co., on the 12th January, 1875, tendered for the whole stock, "as per inventory, the sum of 76¼ cents on the dollar, payable in cash after having checked over the stock and found it correct." On the next day, at a meeting of creditors, the assignee was instructed to accept this offer, and he wrote to W. & Co., accepting it, repeating the offer almost in their words. Afterwards, acting under the orders of certain creditors, the assignee refused to deliver the goods to W. & Co., unless they would pay the duty as well as the 76¼ cents on the $51,000; and to obtain the goods, W. & Co. had to pay $43,000, being about $1,500 more than they would owe according to their offer, without the duty:—Held, that, looking at the advertisement, tender, and acceptance, W. & Co. were not bound to pay the duty; and that the payment by them was not a voluntary one, so as to prevent them from recovering back the excess as money had and received. W. & Co., to obtain possession of part of the distillery plant which was affixed to the distillery, had to expend money in order to remove it:—Held, recoverable as money paid. *Wilson* v. *Mason*, 38 U. C. R. 14.

——— *Usage of Trade.*]—Plaintiffs bought from defendant certain coal, shipped to defendant at Toronto from a foreign port, and then lying on board the vessel in the Welland Canal. A sale note was given, stating only the quantity and price, and the time by which it was to be taken out of the vessel:—Held, that defendant was not obliged to pay the import duties. Held, also, that evidence was rightly admitted to shew the usage of the trade on sales made under such circumstances. *Brown* v. *Browne*, 9 U. C. R. 312.

Place of Delivery—*Change of—Extra Freight.*]—The defendants agreed to sell to the plaintiff a quantity of tow, to be delivered in the United States at a "Boston point," that is, a point to which the freight charged was the same as to Boston, Mass. Both parties contemplated the route from the Suspension Bridge as that by which the tow would be sent, and Bellows' Falls, Vt., a Boston point on that railway system, was the place named by the plaintiff, but subsequently he desired to have the tow sent to Franklin, N.H., which was not a Boston point on that railway system, and he agreed to pay the arbitrary or extra freight, which he supposed was five cents per 100 pounds. The defendants accordingly consigned the goods to "Franklin, N.H.," and in the ordinary course of transport they were taken to Boston, and thence to Franklin, N.H., where they were received by the plaintiff, subject to railway charges greatly exceeding the five cents per 100 pounds. It happened that Franklin was a Boston point upon the lines of railway with which the Grand Trunk Railway connected at St. Albans, and the defendants had on one occasion shipped two car loads from stations of the Grand Trunk Railway by that route, but, in consequence of delays at the St. Albans custom house, the plaintiff wrote directing the defendants to ship by the Suspension Bridge:—Held, that by their contract the defendants were not bound to ship to Franklin, N.H., which was not a Boston point within the contract; and that under the circumstances the plaintiff, and not the defendants, was bound to pay the extra freight. *Symmers* v. *Livingstone*, 10 A. R. 355.

Possession—*Payment of Price—Execution of Conveyance.*]—The declaration stated that by agreement between the plaintiff and J. and H., two of the defendants, the plaintiff was entitled, on delivering to them certain goods, to a conveyance in fee, free from incumbrances, of two lots mentioned, which were then subject to a mortgage to one A. S.; and, in consideration that the plaintiff would accept a conveyance and deliver up the goods, defendants by an agreement in writing promised to pay the plaintiff $500 in six weeks, if in the meantime the lots should not be released from the mortgage. Averment, that the conveyance was so accepted and the goods delivered; that the mortgage had not been discharged; and that defendants had not paid the $500. The two agreements were put in. The first, under seal, dated 1st June, 1865, set out the sale of the goods by the plaintiff to the defendants J. and H., for which they agreed to pay $1,400—$200 on receiving possession, $500 by a conveyance in fee of the two lots, to be taken as cash for that sum, and the remaining $700 by instalments, as stated in the agreement: — Held, that under this agreement defendants were not entitled to possession of the goods until payment of the $200 and execution of the conveyance. *Greenham* v. *Watt*, 25 U. C. R. 365.

Return of Article.] — See *Hamilton* v. *Northey Mfg. Co.*, 31 O. R. 468.

Right of Selection — *Parol Evidence — Usage.*] — The plaintiffs in the beginning of January, 1880, had purchased through C. and G. of Montreal, a quantity of rails, and requiring 2,000 tons more, negotiations were entered into between H., the plaintiff's agent, C. and G., and the defendant, which resulted in a note being signed on the 14th January addressed to the defendant advising him that they had sold to the plaintiffs on the defendant's account 2,000 tons of rails (56 lbs. to the yard) at £8 18s. 9d. stg. per ton, payment to be made in London against documents, and credit to be there opened with approved bankers in favour of defendant's agent. The defendant, who was then in Montreal, signed a sale note in similar terms to the above. The sale was immediately communicated to the plaintiffs, who signed a confirmatory note, adding the words that the make should be either Ebbwvale or Moss Bay, and wrote across the face that the rails were to be 56 lbs. "ordinary section and specification." This confirmatory note was not communicated to the defendant until after action brought. The credit was opened by the plaintiffs in accordance with the contract. The plaintiffs and

defendant were dealers in and not manufacturers of rails. The defendant, at the time the contract was entered into, had purchased rails from a firm in England, who were also dealers and not manufacturers, and who had arranged with the manufacturers at Ebbwvale for the manufacture of rails of a section known as "Hamilton and North-Western," and which came within the term "ordinary section," by which a number of different kinds of sections were embraced; and these were the rails which the defendant intended delivering to the plaintiffs. The plaintiffs required a section called "Sandberg," which also came within the term "ordinary section," and when they discovered the defendant's rails were Hamilton and North-Western, they endeavoured to get defendant to change the section, which the defendant was unable to do. The plaintiffs allowed the rails to be shipped to them and paid for under the credit, and it was not till afterwards that they notified the defendant of their refusal to accept, contending that under the contract they had the right to name the section:—Held, that, even if the confirmatory note were embraced in the contract, it did not give the plaintiffs the right of selection; that parol evidence was not admissible to add such a term to the contract; and that the evidence failed to establish any usage giving such right, especially as the parties were dealers and not manufacturers, and in view of the plaintiff's conduct in the matter; and that the contract was therefore performed by the section delivered. *Page* v. *Proctor*, 5 O. R. 238.

Time, Essence of Contract.]—In an action for non-delivery of cheese sold by defendant to plaintiff, it was urged that time was of the essence of the contract, and that the plaintiff should have proved a readiness to accept by the time stipulated, which defendant contended was 20th September:—Held, that the evidence shewed that time was not intended to be so considered; that the contract was only for delivery within the usual time; and that if delivery by the 20th was a condition precedent, it was waived by a letter of the 18th. *Ballantyne* v. *Watson*, 30 C. P. 529.

In contracts for the sale and delivery of flour at a future day, and in like cases, time is strictly of the essence of the contract. *Coleman* v. *McDermott*, 1 E. & A. 445.

See Bush v. *Pimlott*, 9 C. P. 54 (*ante* REPLEVIN, I. 5).

III. PROCEEDINGS ON CONTRACTS.

1. *Actions for Goods Sold and Delivered and for Goods Bargained and Sold.*

(a) *When the Action will Lie.*

Agreement to Pay by Bill of Exchange.] — Where, in assumpsit for goods sold, the plaintiff produced two writings, by one of which he agreed to deliver to A. W. & Co. 100 barrels of pork at a certain price, and by the other signed by the defendant, "agent of A. W. & Co.," the defendant agreed to pay for pork by bill in favour of the plaintiff:—Held, that, although defendant was personally liable on his undertaking, yet that the plaintiff should have brought his action against him for not furnishing the bill, and not for goods sold. *Counter* v. *Roebuck*, E. T. 3 Vict.

Agreement to Return or Pay.]—"Good to ——— for the above goods, either to be returned or paid for," attached to a list of the goods:—Held, that after demand the goods might be sued for as goods sold and delivered. *Harvie* v. *Clarkson*, 6 U. C. R. 27.

Assignee Suing—*Defence—Jus Tertii.*]—In an action for goods sold and delivered by plaintiff, the assignee of the J. H. Co., it appeared that before suit a creditors' assignee had been appointed to the estate of the company:—Held, that defendants could not object to plaintiff's title on the ground of the estate being in the creditors' assignee, for such assignee had not questioned plaintiff's title, and defendants were not defending under him. *Widcox* v. *Pillow*, 28 C. P. 100.

Delivery for Manufacture — *Damages for not Manufacturing—Re-delivery.*]—Semble, that if in an action upon the case for not manufacturing 400 bushels of wheat into flour, the plaintiff recover damages equal to the value of the wheat delivered to the defendant, the latter cannot bring an action for goods sold for part of the wheat which had, in point of fact, been re-delivered to the plaintiff, and that such re-delivery should have been given in evidence in mitigation of damages; and that an action upon the common counts could not at any rate be sustained in such a case. *Andrus* v. *Burwell*, Tay. 382.

Executory Contract.]—Defendants, B. and A., being in partnership, agreed under seal to buy a quantity of tobacco from D. M., one of the two plaintiffs. B. signed the name of defendants' firm opposite to one seal. By another sealed instrument of the same date the plaintiffs agreed to deliver the tobacco to defendants, and this was also signed opposite to one seal by B., in the name of defendants' firm, and opposite the other by D. M., per B. P. Plaintiffs declared as upon a parol agreement for not accepting the tobacco. Common counts were added:—Held, that the contract under the evidence could not be treated as executed, and plaintiffs therefore could not recover upon the common counts. *Moor* v. *Boyd*, 23 U. C. R. 459.

Expiry of Credit.]—Where plaintiff sold goods to defendant, who was to give his note at three months for the price, but afterwards took away the goods without giving it:—Held, that an action for goods sold would not lie until the time of the credit had expired. *Magrath* v. *Tinning*, 6 O. S. 484.

Defendant purchased goods at auction, on the following terms: "Under £2 10s. cash down; over that amount but under £125, eleven months' credit on approved indorsed notes with interest:"—Held, approving Wakefield v. Gorrie, 5 U. C. R. 159, that an action would not lie upon the common counts until the time of credit had expired. *Silliman* v. *McLean*, 13 U. C. R. 544.

An action for goods bargained and sold, to be paid for by instalments, cannot be maintained until the full period of credit has expired. *Moore* v. *Kuntz*, 44 U. C. R. 309.

Foreign Corporation—*Right to Sue.*]—Action by a foreign corporation, incorporated in the United States, against residents of this Province, on the common counts. Plea, that defendants are subjects of this Province, and the plaintiffs are a foreign corporation, and

cannot sue in this Province. On demurrer:—Held, that, although the plaintiffs might not be able to sue for goods bargained and sold on a contract made wholly in Upper Canada, they could for goods sold and delivered; and, as in this case the plea must be taken to apply distributively to each cause of action stated in the count, that the account stated in Canada must be taken to have been of and concerning dealings which took place in a foreign country, where the right of the corporation to be a party to such proceedings could not be denied. *Union India Rubber Co.* v. *Hibbard*, 6 C. P. 77.

Payment for Land in Goods.]—Where the plaintiff had agreed orally with defendant to purchase land from him, and having been let into possession had made payments on account in money and cattle, and defendant afterwards sold the land to another, promising to repay what he had received from the plaintiff:—Held, that on his refusing to do so, the plaintiff could recover the amount from him in an action for goods sold and delivered. *Hill* v. *Stanton*, 2 U. C. R. 149.

Plaintiff orally agreed to purchase certain land of defendant, giving goods in part payment on account of the purchase money:—Held, that the absence of any written agreement would not entitle the plaintiff to sue for the price of his goods as if payable in money. *Hoskins* v. *Mitchcson*, 14 U. C. R. 551.

Price Agreed on.]—To sue for goods bargained and sold, the plaintiff must prove a certain price agreed upon; if he cannot, there should be a special count for not accepting. *Elvidge* v. *Richardson*, 3 U. C. R. 149.

Promissory Note — *Acceptance of — Fraud.*]—To an action on the common counts for goods sold, defendant pleaded that at the time of sale the plaintiff agreed to and did receive in payment therefor two promissory notes made by one M. The plaintiff replied that he was induced to receive these notes by fraud (setting out defendant's fraudulent representation respecting them.) The facts as stated in the pleadings being admitted by the plaintiff's counsel:—Held, that the plaintiff could not recover, for, there being an express contract, defendant's fraud could not create an implied one, though it would entitle the plaintiff to sue in trover for the goods, or maintain a special action for the deceit. *Sheriff* v. *McCoy*, 27 U. C. R. 597.

Defendant gave a note made by one K., to the plaintiffs, in exchange for a buggy. The note was not paid at maturity, whereupon the plaintiffs sued defendant on the common counts for the price, alleging that he had induced them to take the note by fraudulent representations:—Held, that the plaintiffs could not recover, for, there being an express contract to take the note for the buggy, no agreement to pay in money could be implied by reason of the alleged fraud. *Auger* v. *Thompson*, 3 A. R. 19.

Purchase of Goods on Credit—*Statutory Inability to Buy on Credit.*]—The plaintiff sued the officers and directors of a co-operative association, incorporated under R. S. O. 1887 c. 166, for the price of goods sold on credit, the association being by their Act of incorporation forbidden to buy in that way:—Held, that the plaintiff could not recover, as no action could be maintained upon an implied representation or warranty of authority in law to do an act; and, moreover, the plaintiff must be taken to have known of the statutory inability. Held, also, that, although the proceeds of a resale of the goods by the association were applied to relieve the defendants from a personal liability for other goods purchased by the association, they could not be said to have derived a personal benefit from the plaintiff's goods; and, therefore, the latter could not recover on this ground. *Struthers* v. *Mackenzie*, 28 O. R. 381.

Sale by Agent—"*Goods Intrusted to Agents*"—*Payment to Agent—Innocent Purchaser — Rights of Owner against.*]—See *Moshier* v. *Keenan*, 31 O. R. 658.

Shares in Boat—*Price of.*]—Where one has subscribed for shares in a steamer which another person intends to build, if the subscriber refuse to accept and pay for the shares, an action can be maintained only on the special agreement, not for the price of the shares in the boat not yet built, as if they were a vendible commodity. *Cameron* v. *Thornhill*, 1 U. C. R. 132.

Tender of Goods — *Necessity for.*] — Where defendant in this country ordered certain articles of clothing from the plaintiff in England, and on arrival here they were received by the plaintiff's agent, who did not tender them to nor leave them with defendant, but demanded payment for them, which was refused:—Held, that an action for goods sold and delivered would not lie, but that the plaintiff should have declared specially for the non-acceptance. *Lane* v. *Melville*, 3 O. S. 124.

(b) *Other Cases.*

Evidence—*Admissibility — Worthlessness of Goods.*]—C. wishing to procure a water wheel which, with the existing water power, would be sufficient to drive the machinery in his mill, A. undertook to put in a "four-foot Sampson turbine wheel," which he warranted would be sufficient for the purpose. The wheel was afterwards put in, but proved not to be fit for the purpose for which it was wanted. The time for payment of the agreed price of the article having elapsed, C. sued A. for breach of the warranty, and recovered $438 damages. A. subsequently sued C. for the price, and C. offered to give evidence in mitigation of damages that the wheel was worthless and of no value to him. Objection was taken that it was not competent to C. to give any evidence in reduction of damages by reason of the breach of warranty, or on the ground of the wheel not answering the purpose for which it was intended, and the Judge declared the evidence inadmissible:—Held, reversing the judgment of the court of appeal, 26 C. P. 338, that, as the time for payment of the agreed price of the article had elapsed when the first action was brought, and only special damages for breach of warranty had been recovered, the evidence tendered by C. in this case of the worthlessness or inferiority of the article was admissible. *Church* v. *Abell*, 1 S. C. R. 442.

Pleading.]—In debt for goods found and provided for one M. at defendant's request, not alleging by plaintiff:—Held, declaration sufficient, on motion to arrest judgment. *Kendrick* v. *Maxwell*, 7 U. C. R. 94.

——— *Warranty—Breach of.*]—In an action between vendor and purchaser for the price of a machine sold under a conditional sale, the defendant may shew that the machine was not as warranted and so reduce the claim by the difference between the value of the machine as warranted and its actual value. Tomlinson v. Morris, 12 O. R. 311, specially referred to. *Cull* v. *Roberts*, 28 O. R. 591.

2. *Actions for Non-acceptance.*

(a) *Damages Recoverable.*

Deed of Vessel—*Whole Value.*]—In an action against the vendee upon a contract to accept a deed of a vessel, and to give a mortgage upon it for the purchase money, the declaration, which shewed a delivery of the vessel by the plaintiff to the defendant under the contract, alleged as a breach the refusal of the defendant to accept such deed; and averred that by means thereof the vessel and its price had been lost to the plaintiff. The jury gave the plaintiff a verdict for the whole value of the vessel, and the court refused to disturb the verdict. *Phillips* v. *Merritt*, 2 C. P. 513.

Loss of Profit—*Difference in Price.*]—Declaration, that plaintiff agreed with defendant to deliver to him on or before the 1st August, at, &c., 500 cords of wood at 14s. per cord, to be paid for monthly, according to the quantity delivered. It then averred delivery of 125 cords before the 1st August; and that, although more than one month had elapsed after the agreement, and although plaintiff was ready and willing to deliver the residue, yet defendant would not pay for the quantity delivered, nor accept the remainder;—Held, that the measure of damages was the value of the quantity of wood delivered at the contract price, and also the difference of profit on the residue of the wood between the current selling price and the contract price. *Moore* v. *Logan*, 5 C. P. 294.

Defendant agreed to purchase from plaintiff 2,000 barrels of flour, to be delivered at a good port on Lake Ontario, in all June next, by giving the buyer one week's notice at Toronto, at 37s. 6d. per barrel, payable on delivery. Plaintiff sued for non-acceptance, averring that he was ready and willing and offered to deliver the flour at Oswego, but defendant refused to accept, and he was obliged to resell at a loss. Defendant pleaded that the plaintiff gave one week's notice of delivery to him at Oswego on the 1st June; that he was ready and willing to accept and pay there on that day, and for a reasonable time thereafter, but that the plaintiff had not the flour then, nor within a reasonable time thereafter. It appeared that the plaintiff had given notice of delivery on the 1st June, but afterwards, on the 31st May, finding that the 1st would fall upon a Sunday, he notified defendant not to attend then, but on the 11th instead; and that he had attended both on the 2nd and 11th, and was ready to deliver, but defendant was not there to accept:—Held, that the plaintiff was entitled to recover, and that the measure of damages was the difference between the contract price and what he was afterwards obliged to sell for at Oswego, not what was the price at Toronto. *Brunskill* v. *Mair*, 15 U. C. R. 213.

Defendant agreed to buy flour from plaintiff, deliverable at a good port on Lake Ontario, in May, 1856, and to be guaranteed inspection extra in Boston or New York, at $9 per barrel, free on board. It appeared that on the 27th May the plaintiff told the broker at Toronto through whom the contract was made, and who was interested in half of the flour, that he was ready to deliver it at Hamilton, and gave him an order on M. & Co., of Hamilton, to deliver the flour to him on receipt of the purchase money, which the broker said would not be satisfactory to defendant. Next day plaintiff offered defendant the receipt of the Great Western Railway Company for the flour, with a delivery order indorsed in defendant's favour, which defendant refused, saying that he must first see a sample. After due notice to defendant the flour was sold by auction at a price much lower than he had agreed to give, and plaintiff sued for the difference in an action for not accepting:—Held, that he was entitled to recover. *George* v. *Glass*, 14 U. C. R. 514.

On the 7th May, 1874, the appellant sold to the respondent 500 tons of hay. The writing, which was signed by the appellant alone, was in the following terms: "Sold to G. A. C. 500 tons of timothy hay of best quality, at the price of $21 per ton f. o. b. propellers in canal, Montreal, at such times and in such quantities as the said G. A. C. shall order. The said hay to be perfectly sound and dry when delivered on board, and weight tested if required. The same to be paid for on delivery of each lot by order or draft on self, at the Bank of Montreal, the same to be consigned to order of Dominion Bank, Toronto." In execution of this contract, the appellant delivered 147 tons and 33 pounds of hay, after which the respondent refused to receive any more. The appellant, having several times notified the respondent, both orally and in writing, by formal protest on the 28th July, 1874, requested him to take delivery of the remaining 354 tons of hay. On the 11th November following the appellant brought an action of damages for breach of contract, by which he claimed $3,417.77, to wit, $2,471 difference between the actual value of the hay at the date of the protest and the contract price, and $943.77 for extra expenses which the appellant incurred owing to the refusal of the respondent to fulfil his contract:—Held, that such a contract was to be executed within a reasonable time, and that, from the evidence of the usage of trade, the delivery, under the circumstances, was to be made before the new crop of hay, and that the respondent, being in default to receive the hay when required, was bound to pay the damages which the appellant had sustained, to wit, the difference at the place of delivery between the value when the acceptance was refused and the contract price, and other necessary expenses, the amount of which, being a matter of evidence, was properly within the province of the court below to determine. *Chapman* v. *Larin*, 4 S. C. R. 349.

Price of Goods—*Property not Passing—Possession—Tender—Waiver.*]—On the 30th May, 1899, the plaintiff and defendant agreed in writing for the sale by the former to the latter of certain goods for $175, payable $30 on receipt of bill of lading for or tender of the goods, and the balance to be paid in instalments, for which promissory notes were to be given; the property to remain in the

plaintiff until payment of the notes, but the goods to be shipped as soon as possible, freight and charges to be paid by the defendant. On the 6th June the plaintiff sent the defendant an invoice of the goods, and on the 14th of that month the defendant wrote to the plaintiff refusing to proceed with the contract upon the ground that the invoice price was not that agreed upon. On the 15th June the plaintiff advised the defendant that the goods had been shipped and drafts and notes forwarded. Some correspondence ensued, but the defendant adhered to his refusal to take the goods. The goods arrived at the town where the defendant lived on the 10th July, and the defendant on the 20th July again wrote to the plaintiff that he had supposed that the plaintiff had concluded not to ship the goods, and again refused to take them, giving as a ground that the season for use of them had passed, and saying that they were now at the station at the plaintiff's risk:—Held, that the defendant having refused to perform his contract on the 15th June, at which date he did not contend that there had been default on the plaintiff's part, and his refusal remaining unretracted down to the time of the arrival of the goods in July, his right to require tender at the date fixed for the performance was waived. Held, also, that the plaintiff was entitled to recover the full price of the goods as damages for breach of the contract, upon the ground that the right to the possession of the goods having been transferred by the plaintiff to the defendant, the plaintiff had done all that he was required by the contract to do to entitle himself to payment of the price. The stipulation by which the property in the goods was to remain in the plaintiff during the term of credit, notwithstanding the delivery of possession to the defendant, and the fact that the plaintiff had given up possession to the defendant, as far as he could, took the case out of the general rule which prevents a vendor from recovering the price where he has not parted with the property in the goods. *Tufts* v. *Poness*, 32 O. R. 51.

Retention of Deposit as Compensation for Non-acceptance—*Action for.*]—On the 9th July, 1885, the plaintiff, a cattle dealer, bought from defendant forty-two head of cattle for $2,772, and paid $200 on account, the defendant to retain the animals on his pasture until in a condition fit for the English market, for which they were, to the knowledge of the defendant, purchased by the plaintiff. The defendant, insisting that he was bound to retain the cattle until the 20th August only, on the 18th September wrote to the plaintiff requiring him to "settle for the cattle and take them away before the 27th instant, or I will sell the cattle again to get my money out of them." The plaintiff, not having acted upon this notice, the defendant on the 5th October sold forty of the cattle at a loss, and refused to refund the deposit. In an action brought by the plaintiff, the evidence, as to the exact terms of the contract, was contradictory, but the jury found in favour of the plaintiff's version, and gave a verdict for the full amount of deposit, which the court below refused to disturb. The court of appeal, being of opinion that the plaintiff could waive the breach of contract, and simply sue for recovery of the money paid, affirmed the judgment. *Murray* v. *Hutchinson*, 14 A. R. 489.

See McClure v. *Kreutziger*, 6 O. R. 480; *Dymcut* v. *Thomson*, 9 O. R. 566, 12 A. R. 659, 13 S. C. R. 303; *Bertram* v. *Massey Manufacturing Co.*, 15 O. R. 516.

(b) *Other Cases.*

Acceptance by Conduct after Notice—*Verdict for Price.*]—Plaintiff on the 7th March, 1864, agreed to sell to the defendant all the lumber which the new saw logs at plaintiff's mill would produce, to be cut in the manner specified, and delivered during the year at the railway station, at a named price per thousand feet, defendant to accept the same, and pay as delivered. About the 21st June defendant inspected and measured 21,072 feet at the mill. On the 29th he went with the plaintiff to the station, and the plaintiff told him there was then 75,000 feet there. On the 21st July this was accidentally burned. By the 17th August an additional quantity had been delivered, making in all 119,000 feet, of which defendant was notified by the 20th. The plaintiff having sued defendant on special counts for not accepting, and for goods sold and delivered, the jury were told that an acceptance might be proved either expressly or by permitting a reasonable time to elapse without objection after notice of delivery; and they found for the value of the whole quantity on the last count:—Held, that the verdict was right: that the plaintiff could sue on the common count, though all the lumber contracted for had not been manufactured, for defendant was bound to pay "as delivered," i. e., after he had received proper notice of delivery and had not objected; that the seller had done all that was requisite, either on his own behalf or the buyer's, by sawing, measuring, delivering, and giving notice, and was therefore entitled to recover. *Cox* v. *Jones*, 24 U. C. R. 81.

See Midland R. W. Co. v. *Ontario Rolling Mills Co.*, 2 O. R. 1, 10 A. R. 677; *Tufts* v. *Poness*, 32 O. R. 51, *ante* (a).

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3. *Actions for Non-delivery.*

(a) *Damages.*

Indirect Damages.]—Action on a contract to make and deliver two pair of burr mill stones. Breach, their insufficiency and bad quality. The jury, in addition to the cost of new stones, allowed certain sums expended in attempting to repair the broken stones, for dressing them, and for injury caused by their breaking to the machinery of the mill; damages being specially claimed in the declaration on these accounts:—Held, that the verdict was sustainable as to the last two items, but not as to the first. *Colton* v. *Good*, 11 U. C. R. 153.

——— *Excessive Damages.*]—Under a general allegation in the declaration, that the plaintiff had incurred expense in replacing, altering, and repairing certain lock castings, which the defendant did not make or finish in the manner contracted for:—Held, that plaintiff could properly claim certain travelling expenses to which he had been put in connection therewith. The contract price for the castings in question, to be paid to the defendant, was $52; whilst the jury gave the the plaintiff $397.50, damages, which were

proved to be the expenses to which he had been put by reason of defendants' failure to carry out the contract:—Held, not excessive. *Lalor* v. *Burrows*, 18 C. P. 321.

Measure of Damages.]—Plaintiff having contracted with S. & Co. to furnish railway ties, of which defendants had notice, defendants agreed to furnish plaintiff with a certain quantity of ties at 11d. per tie. In an action for breach of such sub-contract:—Held, that the measure of damages was the difference in value upon each tie between what plaintiff was to pay defendants and to receive from S. & Co. *Watrous* v. *Bates*, 5 C. P. 367.

Action on a contract to deliver cordwood, required for the purpose of burning brick. The plaintiff proposed to prove that, during the delay occasioned by defendant's neglect to deliver, the price of bricks fell considerably, and he claimed to recover for this loss:—Held, that such evidence was rightly rejected; and that the measure of damages was only the difference between the price specified in the contract and that actually paid for the wood procured by the plaintiff elsewhere, together with compensation for his trouble. *Feehan* v. *Hallinan*, 13 U. C. R. 440.

(b) *Pleading.*

Counterclaim to Action for Price.]—Held, that to an action by an assignee of an account for the price of lumber and staves delivered by the assignor to the defendant under two certain contracts therefor, the defendant under R. S. O. 1877 c. 116, ss. 7, 10, and the Judicature Act, 1881, ss. 12, 16, and rule 127, can set up as a defence a claim for damage for the non-delivery by the assignor to the defendant of certain other timber and staves specified in the contracts, and for the inferior quality of those delivered. In this case the trial Judge having refused to entertain the former defence, a new trial was ordered. *Exchange Bank* v. *Stinson*, 32 C. P. 158.

Declaration — *Willing to Accept — Request.*]—Upon an agreement to deliver wheat for the plaintiff at A.'s mill, the plaintiff averred in his declaration "that he was always willing to accept the wheat at the place aforesaid, and to have paid defendant for the same at the rate in that behalf aforesaid, whereof the defendant had notice:"—Held, on motion to arrest judgment, declaration good. Held, also, that plaintiff need not prove, under this agreement, a request on his part to defendant to deliver, or that he was at the mill to accept delivery. *Wright* v. *Weed*, 6 U. C. R. 140.

Defence—*Denial — Notice—Offer.*]—Declaration, that the plaintiff had contracted with one R. to deliver to him 200 firkins of butter, of which defendant had notice; and that defendant promised to use due diligence in endeavouring to procure the same; but that, although defendant procured seven firkins for the plaintiff, yet he did not use due diligence in procuring the rest, but made default, whereby the plaintiff was unable to keep the contract with R., and lost great profit which he would otherwise have made. Defendant pleaded: (1) that the plaintiff did not contract with R., nor had defendant notice thereof, as alleged. (2) That he offered to deliver to plaintiff the said seven firkins so procured for him as alleged, but the plaintiff refused to accept the same:—Held, on demurrer, that neither plea offered any defence. *Robertson* v. *Hoyes*, 15 U. C. R. 263

——— *Extension of Time.*]—Declaration, that the defendant agreed to sell and deliver to the plaintiff within one week certain wheat, and the plaintiff advanced $600 on account, yet defendant failed to deliver. Plea, that before breach it was agreed that the plaintiff should waive the delivery within one week, and the plaintiff did then waive the same, and extended the time for delivery:—Held, plea bad, for no subsequent delivery was alleged, nor was it alleged that the extended time had not elapsed. *Molson* v. *Bradburn*, 25 U. C. R. 457.

——— *Readiness to Deliver—Request.*]—Debt on bond, conditioned that defendant should "pay to the plaintiff £43 15s. in building stone, at 15s. per cord, to be delivered for that sum in the town of Hamilton, at such times and in such places as should be required by the plaintiff: twenty cords to be delivered by the 20th of September then next, and the remainder in one year." Defendant pleaded that from the making of the bond until the expiration of one year, he had always been ready and willing to deliver the said stone at such times and places as should be required by the plaintiff, &c.; yet that the plaintiff did not, within one year from the date of the bond, require him to deliver the said stone or any part thereof:—Held, on demurrer, a good defence. *Stinson* v. *Brunigan*, 10 U. C. R. 210.

——— *Readiness to Deliver—Time.*]—In assumpsit for non-delivery of a quantity of hams, which were to be delivered at the opening of the navigation in the spring, defendant pleaded that he was ready and willing to deliver the hams at such opening, but the plaintiff refused to accept or pay for them: on which issue was joined. There was no proof of any offer or readiness to accept them at the opening of navigation, although some evidence was given of readiness at a subsequent period:—Held, that the jury properly found for defendant. *Hancock* v. *Gibson*, 3 U. C. R. 41.

(c) *Other Cases.*

Agreement—*Notice — Request — Plea — Readiness to Deliver—Demand.*]—Defendant agreed as follows:—"Within three years, and when desired by him, I promise to pay M. C. N.," (the plaintiff) "or bearer, £50 currency, in such stone and marble work as he may want, at cash price, delivered at Port Dover, value received, with interest:"—Held, that the plaintiff must prove notice to defendant of the kind of stone or marble work required, and when it was to be delivered, and that until such request there could be no default. Quære, whether a plea, that after the making of the agreement, and within three years from the date thereof, the defendant was, and still is, ready and willing to perform the agreement, would raise a material issue. Semble, that the defendant, on a proper demand, would have been bound to carry out the agreement, even after the three years. *Nickerson* v. *Gardner*, 12 U. C. R. 219.

Delivery of Wrong Goods.] — On motion for a new trial, in an action for non-delivery of oats sold:—Held, that, although defendant might not have contracted to deliver the best quality of oats, yet that, inasmuch as the grain delivered was a mixture of oats and wheat, he had not fulfilled his contract to deliver oats; and, the jury having found for defendant, a new trial was granted, but only on payment of costs, as the amount of damages to which plaintiff appeared entitled was only about $100. *Twohy* v. *Armstrong*, 15 C. P. 273.

Demand—*Set-off.*] — Though a demand may be necessary where A. is suing B. for not delivering goods, &c.: yet where B. is suing A. and A. is setting off his breach against B.'s claim, it does not follow that the same demand must then be proved. *Russell* v. *Rowe*, 7 U. C. R. 484.

Destruction of Goods before Acceptance—*New Trial—Costs.*]—A. agreed to sell and deliver "F. O. B." 4,000 barrels of flour by a day named. Of this quantity 3,000 had been delivered, but the remaining 1,000 were not in the possession of the party contracting, to be delivered, until after the day appointed. Some days afterwards the vendor sent to the broker who had negotiated the sale the order of another person for the required quantity, which, after taking some days to correspond with their vendees, the purchasers agreed to accept, and paid the price agreed upon to the broker, who remitted the money to the vendor, and a vessel was without delay despatched by the purchasers to receive the flour on board. Before reaching the port where the flour was to be shipped, a fire had taken place in the warehouse and destroyed the flour stored therein. In the absence of any evidence shewing a setting apart of the 1,000 barrels, or any acceptance by the purchasers thereof, the court, in an action for non-delivery, while expressing a clear opinion that, under such circumstances, the loss must fall upon the vendors, dismissed an appeal from the decision of the court below granting a new trial on the application of the vendors, such new trial having been ordered upon the view taken of the evidence. They reserved for future consideration the costs of the appeal, thus leaving the new trial to proceed on the terms on which it was ordered. *Coleman* v. *Wetbermott*, 1 E. & A. 445; *S. C.*, 5 C. P. 393.

Recovery of Cash Deposit—*Non-completion of Contract.*] — The plaintiff, having negotiated with defendant for the purchase of a pair of horses and harness from defendant for $400, paid $154 in cash, and, after some correspondence as to the time and mode of paying the balance, defendant sold the property, whereupon the plaintiff sued, declaring on a special count for not delivering the horses sold to him, and on the common counts. A verdict on the common counts for the sum paid was sustained, on the ground that, upon the evidence, it was not clear that any agreement was ever arrived at as to the terms and time of payment. Quære, as to the plaintiff's rights, if there had been a contract. Semble, that, on tender to him of the price after the conversion by resale, the defendant on non-delivery of the goods would be liable in trover, such non-delivery being a refusal which would vest the right of action by relation; but that, at all events, the plaintiff could in some form of action recover, though perhaps not the full amount paid by him. *Heffernan* v. *Berry*, 32 U. C. R. 518.

See Cole v. *Sumner*, 30 S. C. R. 379.

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4. *Parties Liable.*

Partners.]—Quære, where there are partners employed in making engines, &c., and the plaintiff makes an express contract with one for an engine, can he, notwithstanding such contract, sue them all? *Loomis* v. *Ballard*, 7 U. C. R. 366.

Person Obtaining Goods — *Vacating Judgment—Fraud.*] — A manufacturing company transferred to a syndicate, which had lent it money, its works, plant, and material, and in effect its whole business, which the syndicate proceeded to carry on, on the company's premises, for its own benefit, and at its own risk. The managing director of the company, who had become the manager of the syndicate, after the above transfer, but pursuant to a correspondence commenced a few days before it, ordered, as in his former capacity, certain goods from the plaintiff, who, subsequent to the transfer, supplied the goods ordered, which were used by the syndicate, and he afterwards took a note of the company for their price, on which, when dishonoured, he sued and obtained judgment against the company, being, however, all the time, ignorant of the circumstances above mentioned. About a week prior to the judgment a winding-up order was obtained against the company, hearing of which, the plaintiff at once commenced this action against the syndicate for the price of the goods, and afterwards, before trial, he obtained ex parte an order vacating the judgment against the company:—Held, that the plaintiff was entitled to recover from the syndicate the price of the goods. *Keating* v. *Graham*, 26 O. R. 361.

Person to whom Credit Given—*Undisclosed Principal.*] — A., doing business under the name of J. A. & Sons, assigned all his property and effects to H. for benefit of creditors. H., by power of attorney, authorized A. to collect all moneys due his estate, &c., and to carry on the business if expedient. A. continued the business as before, and in the course of it purchased goods from F., to whom, on some occasions, he gave notes signed "J. A. & Sons, H. trustee, per A." All the goods so purchased from F. were charged in the books to J. A. & Sons, and the dealings between them after the assignment continued for five years. Finally, A. being unable to pay what was due to F., the latter brought an action against H. on notes signed as above, and for the price of goods so sold to A.:—Held, that the evidence at the trial of the action clearly shewed that the credit for the goods sold was given to A. and not to H.; that A. did not carry on the business after the assignment at the instance or as the agent of H., nor for the benefit of his estate; that A. was not authorized to sign H.'s name to notes as he did; and that H. was not liable either as the person to whom credit was given or as an undisclosed principal. Held, further, that if H. was guilty of a breach of trust in allowing A. full control over the estate, that would not make him liable to F. in this action. *Hechler* v. *Forsyth*, 22 S. C. R. 489.

Third Person—*Privity.*]—An action for goods bargained and sold will lie against a person who has become responsible for the payment of goods delivered to a third party. *McKenzie* v. *McBean*, 4 O. S. 137.

H. signed a writing in the following words:—"Toronto, 16th December, 1858. Mr. Dixon—Please let the bearer, B., have what goods he may require, and charge yours, M. Hutchinson." Held, not a guarantee for goods furnished to B. on the authority of it, but a direction to furnish the goods on defendant's credit as principal. *Grasett* v. *Hutchinson*, 10 C. P. 265.

Defendant purchased goods from the plaintiffs, with instructions to charge and send them to one F., which they did, and, after receiving from him a portion of the purchase money, brought this action against defendant, alleging that he was liable as purchaser. Several letters were put in by defendant, written by the plaintiff to F., in one of which was the following passage: "It is now so long since your account was due, that there is no other recourse left except to follow up Mr. M. (defendant), who is guarantor." And in another: "We shall place the matter in the hands of G., with instructions to proceed immediately against you and Mr. M. for the amount." The plaintiffs also proved that defendant had ordered goods in the same manner from merchants in Montreal, and in some instances paid, and in others given his own notes, for them, and that when asked to pay this demand, he said it would be all right. The jury having found for the plaintiffs, the court refused to disturb the verdict. Semble, that the evidence as to defendant ordering goods from others was properly received. *Ogilvie* v. *McLeod*, 11 C. P. 348.

——— *Privity—New Trial.*]—In an action for 74,000 bricks sold and delivered, the plaintiff's evidence went to shew that he sent the bricks to the town hall in Yorkville, which was in defendants' possession, and that they were used there in the erection of a stable for defendants, which one E. with others was superintending. Plaintiff received $100 on account from E., and afterwards $100 more from defendants' office, but under what circumstances or from whom did not appear. A written agreement was produced, by which the plaintiff agreed to sell and deliver to E., at the town hall yard, 90,000 bricks, to be paid for by the defendants' note, indorsed by E., with defendants' bonds as collateral security. A verdict having been found for the plaintiff, defendants objecting that E. only was liable:—Held, that it should have been left to the jury to say whether the bricks sued for were delivered under the agreement with E. or independent of it, and it not being clear that the case had been so left, a new trial was ordered. *Severn* v. *Toronto Street R. W. Co.*, 23 U. C. R. 489.

——— *Want of Privity.*]—Plaintiff brought ejectment against D., and hearing that D. was about to remove a barn upon the lot in dispute to other land which he had leased from defendant, he went to defendant and told him that it was his. D. afterwards took the barn there, though defendant forbade him; and the plaintiff then sued defendant for it as for goods sold and delivered:—Held, that, even assuming the barn to be a chattel, he could not recover, for there was no contract or privity between them. *Best* v. *Boice*, 22 U. C. R. 439.

——— *Joint Liability—Agency.*]—Taking the facts most favourably for plaintiff, it appeared that McA., being authorized by defendants, purchased the goods in question for them, together with certain lands, from plaintiff, agreeing to give land in payment, and that the goods, about sixteen months after, were in possession of one of the defendants, on a portion of the land which had been conveyed by the plaintiff to this defendant alone:—Held, that the plaintiff could not recover for goods sold, for if McA. was authorized, the contract was to pay in land; and if not, the fact of the goods being found with one defendant could not prove a joint liability. The bill or invoice of the goods, signed by the plaintiff, was made out, stating the sale to be to McA. Semble, however, that this would not have been a conclusive objection, if the sale were shewn to have been really made to defendants. *Thayer* v. *Street*, 23 U. C. R. 189.

——— *Vessel Owners—Supplies.*]—Where one brought an action against the registered owners of a certain vessel for the value of goods supplied before they became such owners, not on the order of the defendants, but on the order of one G. C., between whom and the defendants no relation of agency was proved:—Held, that the plaintiff could not recover. Held, also, that it was open to the defendants to shew that their real interest was that of mortgagees, though ostensibly registered owners. The fact that the vessel got the benefit of the supplies and necessaries did not make the registered owner liable. *Nelson* v. *Wigle*, 8 O. R. 82.

Undisclosed Principal.]—Where undisclosed principals, carrying on a wholesale business, employ an agent to carry on a retail business in his own name but for their benefit, to sell their goods at invoice prices, they are not liable for the price of goods of the same kind purchased by the agent for himself from other persons without the knowledge or authority of his employers. Watteau v. Fenwick, [1893] 1 Q. B. 346, considered. *Becherer* v. *Asher*, 23 A. R. 202.

Vendee—*Loss of Goods.*] — Where goods, the subject of an executory contract of sale, have passed into the possession of the vendee, without payment therefor being made, and have while in such possession been lost or destroyed, through no fault of the vendor, the vendee is liable for the price, notwithstanding that the property in the goods had not, by the terms of the contract, passed to the vendee, and notwithstanding that no negligence on his part is shewn. *Hesselbacher* v. *Ballantyne*, 28 O. R. 182. Affirmed, the court holding, on the evidence, that the plaintiff had accepted and taken possession of the goods in question. *S. C.*, 25 A. R. 36. See *Goldie and McCulloch Co.* v. *Harper*, 31 O. R. 284.

IV. Rescinding Contract.

After Shipment — *Execution against Buyer—Seizure in Transit.*]—A. & Co. purchased goods in England from B., which were shipped to them per Grand Trunk Railway, to be delivered at L. While the goods were

being transported, A. & Co., becoming insolvent, determined not to receive them, and so advised B., who immediately assented, and sent out a power of attorney to two persons to act for him. In the meantime, and while the goods were in charge of the railway company, defendants in these suits placed executions against the goods of A. & Co. in the hands of the sheriff, and seized the goods at Cornwall, some 300 or 400 miles from the place of delivery:—Held, that the declining to receive the goods by A. & Co. in the course of delivery, communicated to B., and B.'s assent to and acting upon it as soon as advised, vested the goods in B., who was, as against the executions, entitled. The right of stoppage in transitu did not arise. *Don* v. *Law*, *Don* v. *Ogilvie*, 12 C. P. 460.

Conduct Shewing Mutual Abandonment.]—In March, 1872, the plaintiff, a merchant at Orillia, gave to D., the travelling agent of defendants, who were merchants at Montreal, an order for certain goods, amongst which were 500 kegs of nails, at $3.80 per ton, which D. accepted, the goods to be delivered monthly during the season, or sooner if required by the plaintiff, at six months' credit. In May following, after all the goods except the nails had been delivered, the plaintiff was burned out, in consequence of which he became insolvent, and so notified his creditors, giving them a statement of his assets and liabilities, and offering them a composition of 60 cts. in the $, which they accepted; and a deed of composition and discharge was executed, the composition being paid by instalments at certain stated periods, the plaintiff to give his creditors his promissory notes for the said instalments, and to assign to a trustee certain policies of insurance and other securities for the due payment of the instalments, but on the payment of the instalments at the times specified the creditors were to release the plaintiff from all their claims. Neither at the meeting of defendants' creditors, nor at the time the deed was executed, was any mention made of the plaintiff's intention to require the performance of the contract as to the nails, nor did he include it as one of his assets, either in his statement delivered to his creditors, or in the schedule attached to the deed. There was contradictory evidence as to a rescission of the contract in fact, but the jury found there had been none. The plaintiff having subsequently sued defendants for non-delivery of the nails:—Held, that the evidence shewed a rescission in law of the contract, the conduct of the plaintiff having been such as to justify the defendants in the belief that he intended to abandon it upon his insolvency, and there being evidence that the defendants, in such belief, likewise abandoned it. *Bingham* v. *Mulholland*, 25 C. P. 210.

Notice of Disaffirmance — *Replevin —Innocent Purchaser.*] — M. by false representations induced T. to sell him a horse, buggy, and harness, and to take for them two promissory notes. T., having discovered the fraud, went and demanded back his goods, at the same time throwing the notes on the table. On the assurance of M., however, that on the following Tuesday he would bring the property or satisfaction, T. again took the notes and went away. M. did not appear as he had promised, and T. sued out a writ of replevin against M., but, before it had been executed, M. sold the property to the plaintiff, an innocent purchaser, who, having been deprived of it under the replevin, brought trover against the sheriff:—Held, that the plaintiff was entitled to recover; that the contract had not been disaffirmed when the writ of replevin issued; and that the mere issue of it was no notice to M. of disaffirmance, and could not affect the plaintiff. *Stoeser* v. *Springer*, 7 A. R. 497.

Refusal to Accept — *Acquiescence—Revesting.*]—H., doing business at Halifax, N. S., was accustomed to sell hides to J. L. of Pictou. Their usual course of business was for H. to ship a lot of goods consigned to J. L., and send a note for the price according to his own estimate of weight, &c., which was subject to a future rebate if there was found to be any deficiency. On 14th July, 1884, a shipment was made by H. in the usual course and a note was given by J. L., which H. caused to be discounted. The goods came from Pictou Landing, and remained there until 5th August, when J. L. sent his lighterman for some other goods, and he, finding the goods shipped by H., brought them up in his lighter. The next day J. L. was informed of their arrival, and he caused them to be stored in the warehouse of D. L., where he had other goods, with instructions to keep them for the persons who had sent them. The same day he sent a telegram to H. as follows: "In trouble. Have stored hides. Appoint some one to take care of them." H. immediately came to Pictou, and, having learned what was done, expressed himself satisfied. He asked if he would take them away, but was assured by J. L. that they were all right, and left them in the warehouse. On 6th August a levy was made, under an execution of the Pictou Bank against J. L., on all his property that the sheriff could find, but the goods in question were not included in the levy. On 12th August J. L. gave to the bank a bill of sale of all his hides in the warehouse of D. L., and the bank indemnified D. L. and took possession under such bill of sale of the hides so shipped by H. and stored in said warehouse:—Held, that the contract of sale between J. L. and H. was rescinded by the action of J. L. in refusing to take possession of the goods when they arrived at his place of business and handing them over to D. L. with direction to hold them for the consignor, and in notifying the consignor, who acquiesced and adopted the act of J. L., whereby the property in and possession of the goods became revested in H.; and there was, consequently, no title to the goods in J. L. on the 12th August, when the bill of sale was made to the bank. *Pictou Bank* v. *Harvey*, 14 S. C. R. 617.

——— *Repudiation—Release.*] — The defendants contracted to purchase a quantity of old iron rails from the plaintiff company, to be paid for as each 100 tons were delivered. The plaintiffs consigned 1,150 tons out of 1,300 tons stipulated for, and drew for the amount thereof at the agreed price, which draft the defendants refused to accept, under the erroneous belief that a portion of the iron charged for had not been received by them, and informed the plaintiff company of the ground of their refusal to accept the draft:—Held, affirming the judgment in 2 O. R. 1, that this refusal to accept was not, under the circumstances, such an act as to warrant the plaintiffs in treating it as a repudiation of the contract, or such as would release the plaintiffs from a further performance of it. What would amount to such a repudiation considered. *Midland R. W. Co.* v. *Ontario Rolling Mills Co.*, 10 A. R. 677.

Retention of Goods after Rescission —*New Contract.*] — Defendant bought from plaintiff a quantity of oil at four months' credit. Plaintiff delivered the oil, but defendant refused to accept a four months' draft for the price, alleging that it was not according to sample. Plaintiff assented, and requested defendant to return the oil, which defendant promised, but failed to do within a reasonable time. Before the four months had expired plaintiff sued for goods sold and delivered:—Held, that the original contract had been rescinded, and that the plaintiff might sue upon a new contract arising out of the retention of the oil by defendant. *Thompson* v. *Smith*, 21 C. P. 1.

Right to Disaffirm—*Fraud—Set-off.*]—The plaintiff, with the intention of parting with the possession and property in certain flour, made an absolute sale of the same on apparently short terms of credit to the defendant, who withheld from plaintiff his intention to pay for the flour by setting off a claim he had acquired against the plaintiff:—Held, that this did not constitute a fraud on the defendant's part so as to entitle the plaintiff to disaffirm the contract and replevy the flour. *Baker* v. *Fisher*, 19 O. R. 650.

See Brassert v. *McEwen*, 10 O. R. 179; *Mason* v. *Redpath*, 39 U. C. R. 157; *Davis* v. *McWhirter*, 40 U. C. R. 598, *post* VI.

V. Statute of Frauds.

1. *Generally—What within Statute.*

Crops.]—Quære, is the sale by a sheriff of a crop of wheat ready for the harvest the sale of a mere chattel, not requiring a writing under s. 4 of the statute? *Haydon* v. *Crawford*, 3 O. S. 583.

Foreign Contract—*Valid where Made.*]—A contract for the sale of goods to the plaintiffs at a certain price, payable in Toronto, was made by defendant at Chicago, through his agent there, the goods to be shipped by the Grand Trunk Railway from Toronto. No sold note was signed by the broker until after action brought for the non-delivery; but it was proved that s. 17 of the Statute of Frauds was not in force in Illinois:—Held, that the contract, being valid where it was made, could be enforced here, though not in writing. *Green* v. *Lewis*, 26 U. C. R. 618.

Machinery Affixed to Freehold—*Detachment by Buyer—Execution.*] — Trespass against the sheriff for seizing under a fi. fa. The goods in question, an engine and boiler, had been in a saw mill, which was burnt down, and remained there, set in brick, and bolted to timbers let into the ground. The sheriff offered them for sale while in this state, but there were no buyers. On the return day of the writ the execution debtor sold them orally to the plaintiffs, who detached them from the mill, and removed them to another place, where the sheriff followed and sold under a ven. ex.:—Held, that the first attempt at sale was clearly illegal, as the goods were then fixed to the freehold, and could not be taken as chattels. Quære, whether the oral sale was effectual, or whether the Statute of Frauds would apply. Semble, that it would not; but that the sale would in effect amount only to a license to the vendee to enter on the land and detach the goods; and quære, whether on being so severed the fi. fa. would not attach upon them. *Walton* v. *Jarvis*, 13 U. C. R. 616. See *S. C.*, 14 U. C. R. 640.

Manufacture of Ordered Goods—*Sale of Chattel.*] — One W., during her lifetime, orally ordered from the plaintiffs a tombstone, to be put up by them at the grave of her late husband. It was begun before and completed by them after her death, and they sued the administrator of her estate for the price:—Held, that the plaintiffs' claim was for the sale of a chattel, not one for work and labour; and there being no contract within the statute, the plaintiffs could not recover. Lee v. Griffin, 1 B. & S. 272, followed. *Wolfenden* v. *Wilson*, 33 U. C. R. 442.

Trade Fixtures and Term of Years—*Sheriff.*]—Where a sheriff had sold an unexpired term and certain trade fixtures under an execution at common law, but before any deed was executed by him a settlement was effected by the debtor with the execution creditor, who thereupon desired the sheriff to refrain from completing the sale, and the sheriff accordingly refused to convey the property to the purchaser, who thereupon filed a bill against the sheriff for specific performance of the alleged contract, but it appeared that no memorandum had been made or signed by the sheriff:—Held, that the contract must be in writing under the statute. *Witham* v. *Smith*, 5 Gr. 203.

Warehoused Goods — *Estoppel—Certificate.*]—A. by artifice obtained an order from B., directed to his agent, to deliver wheat to A., which order A. presented, not to the agent, but to defendant, a wharfinger, in whose warehouse B. had wheat. Defendant thereupon gave him his certificate or bon for the wheat, deliverable on demand. Defendant shortly after learned how the order had been obtained, and, B. being disatisfied with him for having given such a certificate, defendant notified A. that he would not deliver the wheat to him; whereupon A., it was alleged, transferred his right to the wheat to the plaintiffs, though there was no indorsement or transfer of defendant's certificate to plaintiffs. The wheat was subsequently demanded of defendant, who refused to deliver it, but it did not appear that the person who demanded it shewed any authority from the plaintiffs, or that defendant ever knew of the plaintiffs having any interest whatever in the wheat. Plaintiffs having brought trover:—Held, that the alleged sale to them was void under the statute; and that defendant was not estopped by his certificate from denying plaintiffs' title. Semble, that A. had no power to sell the wheat to plaintiffs, he not having an undisputed control over it himself. *Davis* v. *Browne*, 9 U. C. R. 193.

Warranty of Machine — *Delivery for Test.*]—By an agreement between the parties, the plaintiff agreed to purchase a certain hay press from defendant for $500, if it should be capable of pressing into bales ten tons of hay per day, which the defendant warranted it to be capable of doing; and on the faith of such warranty the plaintiff received it, and incurred heavy expenses in paying freight and making a trial of it, when it proved to be insufficient; and defendant then, instead of allowing plaintiff to return it, urged further trials and delay,

which lasted for some weeks, when the plaintiff returned it:—Held, that, even if there was no absolute sale, but the machine was only sent on trial, with the warranty, the plaintiff was entitled to maintain an action for the breach of the warranty, and to recover such damages as legitimately flowed from the breach, as to which $250, the amount found in this case, was held not to be excessive. Held, also, that the warranty need not be in writing, for the machine having been sent to the plaintiff, and received and tested for weeks, the Statute of Frauds could not apply. *Northwood* v. *Rennie*, 28 C. P. 202, 3 A. R. 37.

See O'Brien v. *Credit Valley R. W. Co.*, 25 C. P. 275.

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2. *Acceptance and Receipt.*

Effect of as to Agreement for Resale —*Entire Contract.*] — Defendant sold the plaintiffs some tea, and orally agreed that he would take back, at an advance of ten cents a pound, such part thereof as the plaintiffs should have in stock unsold at a certain date:—Held, affirming the decision in 46 U. C. R. 1, that there was but one entire conditional contract—not one contract to sell the tea to the plaintiffs, and another to buy it back—and therefore the delivery of the tea by the defendant satisfied the Statute of Frauds, and the plaintiffs were entitled to recover for the defendant's refusal to take back the unsold tea. Williams v. Burgess, 10 A. & E. 499, considered and followed. *Lumsden* v. *Davies*, 11 A. R. 585.

Effect of as to Other Objection.] — There may be an acceptance of goods, so as to take the case out of the statute, and let in proof of the parol bargain, leaving the persons still able to object that the goods do not answer the contract. *McMaster* v. *Gordon*, 20 C. P. 16.

Equivalent of — *Dealing with Goods—Customs—Invoices.*]—The plaintiff, who lived in New York, agreed at Orillia, in this Province, through his agent, to sell to defendants there certain goods, to be forwarded from New York by express. This agent had on the same day sold goods to W. T., another person in Orillia, and it was agreed between W. T., the agent, and the defendants, that the defendants' goods also should be directed to W. T. The goods for defendants and for W. T. were sent, as agreed upon, to W. T. in one case, and invoices were sent to W. T. and the defendants of their respective purchases. W. T. was notified of the arrival of the goods in Toronto, and about the middle of July sent down the invoices to pass them through the customs, but they were passed and duties paid upon W. T.'s invoice only, and the customs department, believing that there was an attempt at fraud, seized the goods and sold them in September as forfeited. Neither defendants nor W. T. had made any special inquiries after receiving the invoices, and they never informed the plaintiff of the facts:—Held, that this was a dealing with the goods by defendants through W. T., for whom they were responsible, which was evidence of an assumption of ownership, and of a receipt and acceptance sufficient within the statute; and that defendants therefore were liable in an action for goods sold. *Tower* v. *Tudhope*, 37 U. C. 200.

——— *Direction to Seller.*]—Where A. purchased of B. plate worth £70, and desired him to have his crest engraved on it, and afterwards to forward it to his residence, but paid nothing, and B., having obeyed his orders, sued him for the price:—Held, that A.'s directions as to the engraving of the crest and forwarding to his residence, constituted a sufficient acceptance and delivery. *Walker* v. *Boulton*, 3 O. S. 252.

——— *Offer to Resell.*]—An offer by a purchaser at an auction to sell to another person the goods purchased by him, does not constitute an acceptance of them, to take the case out of the statute. *Clarkson* v. *Noble*, 2 U. C. R. 361.

Proof of — *Acknowledgment.*]—The purchaser of a steam engine at a sheriff's sale, after the sale wrote to the deputy sheriff speaking of the engine as being on his lot, and having been bid in for him by T., the agent who had purchased at the sale, and saying that he had heard that the sheriff's fees had not been paid, and that the sheriff intended to sell again:—Held, not evidence of a delivery to satisfy the statute, which the other evidence tended strongly to disprove. *Flintoft* v. *Elmore*, 18 C. P. 274.

——— *Delivery of Part.*]—The defendant, a manufacturer of woollen goods, in company with W., his manager, went to the warehouse of the plaintiffs for the purpose of purchasing wool, where he was shewn a quantity consisting of about 200 sacks of white wool, which plaintiffs offered to sell at twenty-four cents a pound for the lot. The defendant, after examining as much of the wool as he desired, ordered ten sacks thereof to be shipped to him immediately with a view of trying it, that is, to see if it would produce the quality of goods he dealt in. On the following morning the defendant saw the plaintiff L. personally, and informed him that he would take the lot; and the plaintiffs agreed to carry it for him on certain terms, and on that day the ten sacks were shipped to the defendant. At the same time an invoice was sent containing this memorandum, "Terms, interest at seven per cent., from 1st February," being the terms offered to defendant if he would take the lot. The ten sacks were subsequently received at the defendant's mill and were worked up there:—Held, that the agreement to take the lot made before the performance of the first bargain was a variation of or substitution for the first bargain, and that the delivery of the sacks was a delivery and such an actual receipt and acceptance of part of the goods purchased as satisfied the requirements of s. 17 of the Statute of Frauds, and that the plaintiffs were entitled to recover the price of the remaining 190 sacks, together with interest from the date mentioned. *Leadlay* v. *McRoberts*, 13 A. R. 378.

——— *Delivery of Part — Necessity for Measuring.*] — Plaintiff sold to defendant a quantity of wood, cut and lying on his premises, supposed to be about 100 cords, agreeing to remove it from his (the plaintiff's) land to the bank of a canal adjacent thereto, and there deliver it from time to time for defendant. Forty-one cords were so delivered, and taken away by defendant, and subsequently twenty-five cords more were delivered. After this the price of wood rose, whereupon plaintiff forbade defendant removing the twenty-five cords, which, however, defendant did. The

plaintiff having brought replevin:—Held, that the jury having found the above facts, it was not necessary for defendant to measure the wood so delivered in order to acquire property therein; that the mere delivery of the twenty-five cords by plaintiff, in part performance of his contract, passed the property therein to defendant, which could not be divested by any subsequent act of the plaintiff; and such delivery of the 41 and 25 cords in part performance of the contract, took it out of the statute. *McNeil* v. *Ketcher*, 15 C. P. 470.

——— *Necessity for.*]—Quære, if the sale by a sheriff of a crop of wheat ready for harvest, be not the sale of an interest in lands—still, to satisfy the statute, should there not be proof of the delivery of the wheat, or payment of the price? *Haydon* v. *Crawford*, 3 O. S. 583.

——— *Oral Evidence.*]—Held, that in an action in the Province of Quebec upon an unwritten commercial contract for the sale of goods exceeding the sum of $50, oral evidence of acceptance or receipt of the whole or any part of the goods, is admissible, under art. 1235, C. C. *Munn* v. *Berger*, 10 S. C. R. 512.

——— *Resale of Part—Condition.*]—Defendants, wholesale merchants, in December orally ordered certain cloth goods from the plaintiff, a manufacturer, by sample, at a stipulated price per yard, to be delivered by the 1st April next. Three cases were received at different times, before the 10th March, and on that day they wrote to plaintiff that they would not keep them except at a less price, because he had disregarded an alleged condition of the bargain, not to sell to retail merchants. The plaintiff in reply denied this condition, and refused to lower the price, and on the 12th defendants again wrote, that the goods were in their hands subject to the plaintiff's order. On the 26th, having received the last case, defendants wrote declining to take it in stock, "for other reasons as well as those already mentioned," and stating that the goods were stored at the plaintiff's risk. Defendants sold part of the first two cases, whether before or after the 26th March was not clear, and soon after, as they alleged, discovered defects in quality, and did not open the other case till the end of October, about ten days before the trial. The objections as to selling to retail dealers, and as to quality, having been left to the jury, they found for the plaintiff:—Held, that there was an acceptance and receipt of the goods by defendants, within the statute. *Robinson* v. *Gordon*, 23 U. C. R. 143.

——— *Sufficiency.*]—Action for the price of a carriage which the plaintiff had agreed to make for defendant:—Held, that upon the evidence there was clearly no sufficient acceptance within the Statute of Frauds, and 13 & 14 Vict. c. 61. *Wegg* v. *Drake*, 16 U. C. R. 252.

——— *Sufficiency—Statute not Pleaded.*]—The plaintiff agreed to sell the defendant a piano for $400, to be paid by notes at one and two years with interest, with a rebate for cash. The piano was delivered at defendant's residence, but he, after using it for some time, objected to retain it, and refused to give the notes or pay the stipulated price. The plaintiff thereupon sued the defendant in a county court, claiming the $400 and interest. At the trial leave was given to strike out the words "with interest:"—Held, that the amount was ascertained by the act of the parties, and that defendant having neglected to pay either by notes or cash, the plaintiff was entitled to recover in an action for goods sold and delivered. The Statute of Frauds not having been pleaded nor any objection properly taken to the sufficiency of the delivery of goods either at the trial or in the order nisi, the court, without deciding that there had been a sufficient delivery, held that the objection was not open to the defendant, and refused to permit an amendment. *Greenizen* v. *Burns*, 13 A. R. 481.

Shipment — *Samples — Inspection—Property Passing.*]—The defendants agreed orally to buy from the plaintiff ten thousand bushels of No. 2 red wheat, at $1.12 per bushel, to be delivered f.o.b., a vessel to be provided by the defendants, who were to pay freight and insurance, and delivery was to be made to them on payment of a sight draft for the price. The captain of the vessel gave the plaintiff a bill of lading, describing him as the consignor, and in it, under the heading "consignees," was written "Order of Bank of Montreal, advise Melady & McNairn (defendants)." A draft for the price, drawn by the plaintiff upon the defendants, was attached to the bill of lading and discounted, but the defendants refused to accept this draft:—Held, that there was, upon these facts, no final appropriation of the wheat or delivery thereof to the defendants, and that the property therein would not pass to them until acceptance of the draft, or payment or tender of the price. Held, also, that neither the shipment in the vessel provided by the defendants, nor the taking by the defendants of samples of the cargo for inspection, constituted an acceptance within the statute. *Scott* v. *Melady*, 27 A. R. 193.

See Grover v. *Cameron*, 6 O. S. 196.

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3. *Note or Memorandum.*

Acknowledgment of Bid in Book—*Sheriff's Sale.*]—Where the purchaser at a sheriff's sale merely signed a memorandum in a book, acknowledging the amount of his bid for goods sold by defendant, and no memorandum was signed by the sheriff, it was held insufficient to entitle the plaintiff to sue the sheriff for refusing to complete the sale. *Mingaye* v. *Corbett*, 14 C. P. 557.

Bought and Sold Notes—*Variance.*]—In an action upon a contract for the sale and purchase of wheat by bought and sold notes, it appeared that the sold note made the wheat deliverable at Montreal afloat, "on arrival during the first half of August next," vessel to be named (meaning by the seller); while the bought note made it deliverable "during the first half of August next, at seller's option:"—Held, a material variance, which avoided the contract. The seller having named one vessel:—Semble, that he could not alter it and substitute another, though under certain circumstances this might be done. *Butters* v. *Glass*, 31 U. C. R. 379. See *Brunskill* v. *Chumascro*, 5 U. C. R. 474.

Formal Writing — *Definiteness — Parol Evidence.*]—The contract was expressed to sell

"Limits Nos. 1 and 2 for $15,000: also all the plant used in connection with the shanty now in operation on limit No. 1, included in the list made out last summer, and the material then not included which had been in use for the winter's operations of 1880 and 1881," at the price of $3,000:—Held, sufficiently definite to satisfy the Statute of Frauds, since the plant referred to therein could easily be identified by parol evidence as being that specifically described in a certain writing, which accompanied the above contract, and which was signed in the firm's name and by the purchaser, as also could the terms of credit to be allowed as to the payment of the $15,500, and such parol evidence was admissible, though the contract imported primâ facie a down payment of $15,500. *Reid* v. *Smith*, 2 O. R. 69.

Letter—*Absence of Assent—Terms—Consideration.*]—The plaintiff in England sold certain goods to M. & Co., at Toronto. After the arrival of the goods at Toronto, the plaintiff discovered that M. & Co. were insolvent, and he notified his agent to stop the goods; but it appeared that M. & Co. had paid the freight and duty and removed the goods into their warehouse. After negotiations between plaintiff's agent and M. & Co., the latter orally agreed to hold the goods subject to plaintiff's order, and on the following day wrote plaintiff's agent to the same effect, but no written assent was made thereto. M. & Co. subsequently made an assignment for the benefit of their creditors to defendant, who took possession of the goods, and on demand refused to deliver them up to plaintiff, whereupon trover was brought:—Held, that the goods having become the property of M. & Co., and being of greater value than $40, in order to retransfer them to the plaintiff, it was necessary that there should be a memorandum in writing, shewing the terms of the transfer, or some other act sufficient to take the case out of the Statute of Frauds; but semble, if any consideration had been stated between the plaintiff's agent and M. & Co., for the latter assuming the position of bailees of the goods, and holding them for the plaintiff's benefit, the transaction might have been supported as not coming within the statute. *Brassert* v. *McEwen*, 10 O. R. 179.

Letters—*Parol Evidence.*]—Held, that the letters of the defendant, read together in the light of the parol evidence, constituted a sufficient note or memorandum in writing within s. 17 of the Statute of Frauds, and that parol evidence was also admissible to shew what the words "work" and "rig" used therein referred to. *Christie* v. *Burnett*, 10 O. R. 609.

——— *Sufficiency.*]—K. entered the sale of certain groceries in a book which was not produced, but the plaintiff produced a list of the things ordered, and their prices; and K. afterwards sent the order in a letter signed by him to the defendants, who thereupon wrote the plaintiffs, "K. reports a sale that we cannot approve in full, but will accept for," enumerating certain articles. Upon the plaintiffs insisting on the completion of the order in full, the defendants cancelled it altogether:—Held, that the letters were a sufficient memorandum within s. 17 of the Statute of Frauds. *Ockley* v. *Masson*, 6 A. R. 108.

Lost Memorandum of Auction Sale—*Tender.*]—In trover for a buggy bought by M. at auction, an application to set aside a nonsuit was refused, the note or memorandum taken at the time of the sale having been lost, and there being no proof of its contents, and the proof of tender of the price being insufficient, as the person to whom it was offered did not appear to be authorized to receive the same. *Ryan* v. *Salt*, 3 C. P. 83.

Receipt—*Terms of—Absolute Sale.*]—A contract to sell wheat and deliver it at the buyer's mill within a reasonable time, the seller to receive whatever may be the highest market price at the time when he shall demand payment, is valid, for it may be ascertained at any time by the method agreed upon. The plaintiff agreed orally with defendant as above stated, and on delivery received a receipt, signed by defendant's miller, as follows: —"Received in store from J. McB. for Mr. do. do., 51 bushels fall wheat, at £ s. d.," &c.:—Held, that the receipt expressing the wheat to have been received "in store," did not preclude the plaintiff from proving an absolute sale on the terms above set forth. *McBride* v. *Silverthorne*, 11 U. C. R. 545.

Undefined Terms of Agreement—*Enforcing.*]—The position of a defendant resisting a claim, is more favourably considered than that of a plaintiff endeavouring to enforce an agreement, the terms of which may not have been defined so as to clearly satisfy the requirements of the statute. *Lawrence* v. *Errington*, 21 Gr. 261.

Written Offer—*Person to whom Addressed — Parol Evidence — Acceptance in Writing.*]—Where an offer, signed by the defendant to exchange a stock of goods for land, did not in any way designate the person to whom it was supposed to be made or for whom it was intended, and such person could not be ascertained without extrinsic parol evidence adding to the memorandum: — Held, not to be an agreement in writing within the statute so as to entitle the plaintiff to specific performance. Held, also, that an acceptance of an offer beneath the defendant's signature, signed by the plaintiff's assignor, did not cure the defect. *White* v. *Tomalin*, 19 O. R. 513.

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4. *Part Payment.*

Terms of Contract—*Right to Resell.*]—At an auction, defendant purchased goods on condition of furnishing indorsed notes for the amount, with the option of a discount of ten per cent. for cash, and on default the goods were to be resold at the risk of the purchaser. After the sale defendant paid £15 on account, but performed no other part of the conditions, and the plaintiff resold the goods at a loss:—Held, that the part payment took the case out of the statute, and that it did not deprive the plaintiff of the right to resell and make defendant responsible for the loss. *Furniss* v. *Sawers*, 3 U. C. R. 77.

Third Person.]—Plaintiff agreed with defendant to sell him 500 cords at 3s. 9d. a cord. M. had agreed to cut this wood for plaintiff at 2s. 6d. a cord, and defendant was to pay M. the 2s. 6d. and the plaintiff 1s. 3d. as owner of the trees:—Held, that a payment on

account by defendant to M. took the agreement sued upon out of the statute, being a payment on the contract as much as if made to the plaintiff. *Brady* v. *Harrahy*, 21 U. C. R. 340.

See Phippen v. *Hyland*, 19 C. P. 416.

VI. STOPPAGE IN TRANSITU.

Effect of—*Lien.*]—Stoppage in transitu does not rescind a contract on the sale of goods, but merely gives the vendor a lien on the goods for their price. *Brassert* v. *McEwen*, 10 O. R. 179.

——— *Trover.*]—The plaintiffs, at Montreal, having sold goods on credit to H. & Co., living at Meaford, on Lake Huron, shipped them by the Grand Trunk Railway to Toronto, and thence by defendants' railway to Collingwood. While they were at Collingwood defendants received notice of stoppage in transitu, but they delivered the goods to H. & Co., who were found by the jury to have been insolvent at the time of the notice; and the plaintiffs thereupon brought trover:—Held, that the action would not lie, for the goods by the sale and delivery to the carriers were at the purchasers' risk, and the stoppage in transitu did not give the plaintiffs the right of property and possession necessary to maintain trover. *Childs* v. *Northern R. W. Co.*, 25 U. C. R. 165.

Notice of—*Sufficiency—Agent of Railway Company.*]—H., of Souris, P. E. I., carried on the business of lobster packing, sending his goods to M., of Halifax, N. S., who supplied him with tin plates, &c. They had dealt in this way for several years, when, in 1882, H. shipped 180 cases of beef, viâ Pictou and I. C. R., addressed to M. The bill of lading for this shipment was sent to M., and provided that the goods were to be delivered at Pictou to the freight agent of the I. C. R. or his assigns, the freight to be payable in Halifax. M., the consignee, being on the verge of insolvency, indorsed the bill of lading to McM. to secure accommodation acceptances. H. drew on M. for the value of the consignment, but the draft was not accepted, and H. then directed the agent of the I. C. R. not to deliver the goods. The goods had been forwarded from Pictou, and the agent there telegraphed to the agent at Halifax to hold them. McM. applied to the agent at Halifax for the goods, and tendered the freight, but delivery was refused. In a replevin suit against the Halifax agent:—Held, that the goods were sent to the agent at Pictou to be forwarded, and that he had no other interest in them, or right or duty connected with them, than to forward them to their destination, and could not authorize the agent at Halifax to retain them. Held, also, that, whether or not a legal title to the goods passed to McM., the position of the agent in retaining the goods was simply that of a wrongdoer, and McM. had such an equitable interest in such goods, and right to the possession thereof, as would prevent the agent from withholding them. *McDonald* v. *McPherson*, 12 S. C. R. 416.

———*Sufficiency — Bill of Lading — Indorsement.*] — W. B. P. purchased goods from the plaintiffs in England, which were shipped at Liverpool, in fifteen packages, in the name of M. & Co., the plaintiffs' shipping agents, as consignors, consigned to W. B. P. & Co., at Hamilton. These goods arrived in three different lots at Hamilton, between the 29th November and 4th December. On the 23rd November W. B. P. & Co. indorsed the bill of lading to McP. & Co., as security for a debt, and between the 6th and 10th December the goods were delivered to them by defendants. The plaintiffs had a branch house at St. John, N. B., and their agent there, having heard of W. B. P. & Co.'s insolvency, telegraphed to defendants at Hamilton, on the 5th December: "Do not deliver earthenware from our English house to W. B. P. & Co. Hold to our order." Signed "C. & Co." (the plaintiffs). W. B. P. & Co. had then about 400 pieces of goods in defendants' warehouse at Hamilton, and the plaintiffs' names were not on any of the papers in defendants' possession, nor were the packages so marked that they could be identified:—Held, that the notice was insufficient. The bill of lading, headed "Montreal Ocean Steamship Company, Allan line, and Grand Trunk Railway of Canada," stated that the goods were to be delivered at Portland, "unto the Grand Trunk R. W. Co., and by them to be forwarded thence by railway to the station nearest to Hamilton," &c.:—Held, that the bill of lading, not having been superseded by any of the documents, was in force up to the time of its indorsement to McP. & Co.; and, semble, that such indorsement, though for an antecedent debt, would defeat the right of stoppage in transitu. *Clementson* v. *Grand Trunk R. W. Co.*, 42 U. C. R. 263.

——— *Sufficiency — Customs Officer.*]—Goods which came from Montreal in bond were deposited in the customs warehouse at the Grand Trunk Railway station at Toronto. The consignees became insolvent, and the consignors gave notice of stoppage in transitu to the railway company, after which the agent of the company gave an order for delivery on payment of charges to another person, who made the entry and received them from the customs:—Held, that the notice to the company was sufficient, though in such cases it is advisable to give notice also to the customs officer; and that an action would lie against the company for such delivery. *Ascher* v. *Grand Trunk R. W. Co.*, 36 U. C. R. 999.

Right of Stoppage—*End of Transitus—Delay of Agent.*] — The defendants, unpaid vendors of goods, shipped them over the Grand Trunk Railway to the vendee at W. When the goods arrived, the railway company's agent at W. sent an advice notice to the vendee, who refused to take it. After this the vendee assigned to the plaintiff for the benefit of his creditors, and the plaintiff, as soon as the assignment was delivered to him, produced it to the railway company's agent and claimed the goods, offering to pay the freight, but producing no advice notice. The agent did not refuse to deliver the goods, but stated that, according to the rules of the company, when the person claiming the goods was an assignee for the benefit of creditors, his duty was to telegraph to the company's solicitor for instructions; he did so telegraph, but before he received an answer and on the same day the defendants notified him not to deliver the goods to the vendee or his assignee, assuming a right to stop them in transitu:—Held, that the action of the railway company's agent in delaying till he received instructions was not

wrongful; that the transitus was not at an end when the defendants intervened; and the right of stoppage was well exercised. *Anderson* v. *Fish*, 16 O. R. 476, 17 A. R. 28.

——— *End of Transitus—Estoppel—Proof of Claim in Insolvency.*]—The plaintiffs, merchants in Boston, sold and consigned goods to J. C. & Son, in Toronto. While the goods were held by the railway company in T., J. C. & Son assigned to the defendant as trustee for the benefit of creditors. The defendant, immediately after the assignment, passed and entered the goods, and paid the duty thereon, and the railway company removed the goods from the customs warehouse to their freight sheds, where they remained, and delivery was refused to the defendant for non-production by him of a bill of lading, and the freight was not paid or tendered. The plaintiffs having stopped the goods:—Held, that the transitus was not at an end, for that the railway company continued to hold the goods as carriers, and not as agents for the defendant. The plaintiffs had, before they stopped the goods in transitu, proved their claim for the goods on the estate of J. C. & Son:—Held, that this did not deprive them of their rights as lien holders, or affect their right to stop the goods in transitu. *Morgan Envelope Co.* v. *Boustead*, 7 O. R. 697.

——— *End of Transitus—Fraud.*]—P., carrying on business at Woodstock, on the 28th August ordered eight half chests of tea from the plaintiff, who lived at Bowmanville, at five months' credit, through H., the plaintiff's traveller, who called upon him to solicit orders. The order was given on the 28th August, 1876, and the tea arrived at Woodstock by rail, on the 4th September. The railway company addressed the usual notice of arrival to P. as consignee, which notice came on the 5th into the hands of defendant, an attachment in insolvency against P. having on that day been received by defendant as official assignee. Defendant on the same day demanded the goods from the freight agent of the company, tendering the freight, but the agent refused to deliver them. The plaintiff's agent telegraphed to him on the 6th to hold the tea; and, on the company's application, an interpleader was granted. Semble, that the transitus was at an end, on the authority of Bird v. Brown, 4 Ex. 797. P. had previously purchased tea from the plaintiff, giving his note at five months, which matured on the 4th September, though the usual credit was five months. H. said that he remarked to P., when making the sale in question, that there were extra hands behind the counter, for which P. accounted by the alleged increase of his business; and he added that he was not in immediate need of these teas, but wanted to get them. H. said he thought P. was doing well and intended to pay, but he made no inquiries as to his standing, or as to probable payment of the note then maturing. On or shortly before the 5th September P. absconded, owing over $3,000, and leaving assets to pay only about five cents in the dollar. None of his employees was examined at the trial:—Held, that the fair inference from all the circumstances was that P. ordered the goods fraudulently, with a preconceived design of not paying for them; and that on this ground the plaintiff was entitled to recover. *Davis* v. *McWhirter*, 40 U. C. R. 598.

——— *End of Transitus—Goods in Bond.*] A. living in Kingston, bought six cases of goods in New York, and saw them packed and leave the vendor's shop on their way to the shipping warehouse; on their arrival at Kingston they were received by the officers of the customs, and placed in the custom house store. A. entered and paid duty upon and took away two of the cases; he also paid the freight and charges upon all from New York:—Held, that the vendor had not lost the right of stoppage in transitu over the remaining four cases. *Burr* v. *Wilson*, 13 U. C. R. 478.

A. having purchased goods from the defendant in New York, they were shipped in bond to him and landed at a wharf in B., whence they were carted by him and placed in a bonded warehouse on his own premises, to which there were two different locks and keys, one in the control of A., the other of the custom house. While the goods were thus placed A. became insolvent, and the plaintiff gave notice of ownership and stoppage in transitu to the custom house officer:—Held, that the goods were not, under the facts stated, in possession of A., and therefore the right of stoppage in transitu still remained in the plaintiff. *Howell* v. *Alport*, 12 C. P. 375.

The goods in question were purchased by M. in Hamilton, from the agent there of the plaintiffs, who lived in Montreal, at four months' credit. They were delivered by the plaintiffs in bond at the railway station in Montreal consigned to M., and arrived in Hamilton on the 16th February, 1874, where they were placed in the customs warehouse at the railway company's freight shed. M. was advised on the following day of their arrival there, but allowed them to remain, and no entry was made or duties paid before the 23rd May, when the plaintiffs gave notice of stoppage in transitu. M. having become insolvent. M. had accepted the plaintiffs' draft for the price, due on the 14th June, which they had discounted at the bank, but they took it up at maturity, and produced it at the trial:—Held, that the transitus was not at an end; that the right to stop existed; and that the plaintiffs therefore were entitled to the goods as against M.'s assignee. *Lewis* v. *Mason*, 36 U. C. R. 590.

The plaintiffs at Philadelphia sold to E. B. & Co. at Toronto 92 bags of coffee on credit, and consigned the same to them in bond. On arrival at Toronto they were entered and bonded in the consignees' names and placed in one of the customs bonded warehouses, subject to the payment of duties. Subsequently E. B. & Co. paid the duties and took out of bond 54 of the bags, but 38 bags still remained in bond, subject to duty, and while they so remained E. B. & Co. became insolvent:—Held, that the right of stoppage in transitu still existed in the plaintiff, though the goods were bonded in the names of the consignees, for until the duties were paid the goods could not be deemed either actually or constructively to have come into the possession of the consignees so as to put an end to the transitus. *Graham* v. *Smith*, 27 C. P. 1.

The plaintiffs, merchants in New York, sold to E. B. & Co. at Toronto, 250 barrels of currants on credit, and consigned the same to them in bond. A bill of lading thereof was duly received by E. B. & Co., who paid the freight thereon, and gave their acceptance for the price of the said goods, as well as for the cartage and American bonding charges. The

goods, on arrival, were entered and bonded in the consignees' name, and placed in one of the customs bonded warehouses subject to the payment of the duties. E. B. & Co. sold and delivered 150 barrels, and the remaining 100 barrels were bonded under 31 Vict. c. 6 (D.), in a portion of E. B. & Co.'s warehouse partitioned off and used by the customs authorities. Before the acceptance matured, and while the goods remained in bond, E. B. & Co. became insolvent:—Held, reversing the judgment of the Queen's bench, which followed Graham v. Smith, 27 C. P. 1, that the transitus was at an end, and that the plaintiffs had lost the right to stop the goods. The previous decisions on the right of stoppage of such goods in bond, Burr v. Wilson, 13 U. C. R. 478, Howell v. Alport, 12 C. P. 375, Lewis v. Mason, 36 U. C. R. 590, Wilds v. Smith, 41 U. C. R. 136, reviewed. *Wiley* v. *Smith*, 1 A. R. 179.

Held, affirming the judgment in 1 A. R. 179, that the transitus was at an end, and that the appellants had lost the right to stop the goods remaining in bond. Howell v. Alport, 12 C. P. 375, and Graham v. Smith, 27 C. P. 1, overruled. *Wiley* v. *Smith*, 2 S. C. R. 1.

See, also, *Wilds* v. *Smith*, 2 A. R. 8, reversing judgment in 41 U. C. R. 136.

——— *Facts Giving Right.*]—Semble, that on the facts the defendant had not put it in the plaintiff's power to exercise any right of stoppage in transitu. *Sword* v. *Carruthers*, 7 U. C. R. 313.

——— *Insolvency—Fraudulent Preference—Rescission.*]—R. & Co., sugar refiners in Montreal, in September sold 145 barrels of sugar to L. at Hamilton, on sixty days' credit. On the 27th November L. wrote to R. that he was unable to meet his acceptances, and on the 28th R. telegraphed to L. to know if he had received the sugar, and was answered that part had been received on the day before. Twenty barrels were received at L.'s warehouse on the 27th, and forty on the 28th, from the railway company. On the 30th, Monday, R.'s agent called on L. and asked him to transfer the sugar to S. & Co., of Hamilton, and one load was sent to them, when L. forbade the sending more, but about an hour afterwards he ordered the rest to be delivered, and fifty-nine barrels were sent, one barrel having been sold to a customer of L. On the 30th an agreement, prepared by L.'s solicitor, was signed by R.'s agent, reciting that the fifty-nine barrels had been delivered to L., which R. wished to resell to others; and that it had been agreed, to avoid any question as to L.'s right to deliver to R. said fifty-nine barrels, the others having been stopped in transitu, that R. should indemnify L. and his assignee, if any appointed, against all consequences of such delivery, in case a return thereof should be adjudged; and the agreement was to indemnify L. accordingly, and make good to him or his assignee the value of said sugar so to be delivered, if a return should be adjudged by a competent court. L. made an assignment on the 5th December, 1874, and on the 3rd February, 1875, the plaintiff, the assignee, conveyed to Lamb & Co. all the estate. L., being examined, swore that he had no intention of receiving the sugar into stock; that it was sent to his warehouse by the railway company without his knowledge or instructions; that he had previously instructed his manager not to receive any goods; that when he became aware that it had been sent, he gave orders that it should not be taken into stock; and that the agreement signed was an afterthought, subsequent to his agreement with R.'s agent to take away the sugar, and after part of it had been removed. This was substantially corroborated by the agent. In an action by the assignee of L. against R., claiming to avoid the giving up of the sugar as an unjust preference, and in trover:—Held, that the plaintiff could not recover; that whether there was, strictly speaking, a right of stoppage in transitu or not, the evidence warranted a finding that before the assignment in insolvency the contract of sale had been rescinded by both parties, which it was competent for them to do, the goods not having been actually accepted; and the goods therefore never passed to the plaintiff. Semble, that the count as upon a fraudulent preference could not have been sustained; and quære as to the plaintiff's right to recover, he having before action assigned the property to Lamb & Co. *Mason* v. *Redpath*, 39 U. C. R. 157.

——— *Insolvency—Retention.*] — A., the purchaser of saw logs to be delivered at certain specified times, assigned the contract, and the vendor delivered one year's supply of the logs to the assignee. Afterwards A., becoming insolvent, absconded, and the vendor refused to complete the contract, asserting a right to stop the goods in transitu, or to retain them in consequence of A.'s insolvency. The assignee thereupon commenced an action at law in A.'s name against the vendor, in which he recovered judgment; and a bill by the vendor to restrain proceedings at law was dismissed with costs. *Wait* v. *Scott*, 6 Gr. 154.

——— *Seizure under Execution.*] — The plaintiff sold to G. a quantity of leather, which was to be sent to the purchaser at P. by railway. The shipping bill contained, amongst others, the following conditions: "In all cases . . . the delivery of goods will be considered complete and the responsibilities of the company shall terminate when the goods are placed in the company's shed or warehouse, . . . when they shall have arrived at the place to be reached upon the railway of the company. The warehousing of them will be at the owner's risk," who was to be liable for any charges for storing them otherwise than in the warehouse of the company. "Storage will be charged on all freight remaining in the depots over forty-eight hours after its arrival." While the leather remained in the warehouse of the railway company at P., the purchaser requested the station agent to have it kept for him by the company until he could find time to remove it, and asked him not to charge storage, but the agent made no promise; and subsequently the sheriff paid the charges thereon, seized the leather under a writ of attachment sued out by the defendants, and removed the same from the stores of the railway company to the shop of G.:—Held, that this did not deprive the vendor of his right to stop the goods in transitu. *McLean* v. *Breithaupt*, 12 A. R. 383.

See Don v. *Lawe*, 12 C. P. 460.

VII. Vendor's Title.

Caveat Emptor.]—Plaintiff (a merchant) having delivered cloth, &c., to be made up into

coats, to a tailor, who made up cloth, &c., for plaintiff and others, and also exhibited for sale and sold clothes on his own account, and he having sold the coats made of plaintiff's cloth to defendant:—Held, that plaintiff was entitled to recover them from defendant, and that the maxim of caveat emptor applied. *Thompson* v. *Nelles*, 4 C. P. 399.

——— *Estoppel.*]—A. agreed to sell to B. a lot of land, and to give him a deed upon payment of a certain price by instalments. B. went into possession of the lot, but made default in the payments, whereupon A. conveyed the same lot by deed to C.; B. being still in possession, after default and after the conveyance to C., cut timber on the lot, and sold the logs to D., who had no notice of C.'s title. C. brought ejectment against D., laying the demise at a period antecedent to the cutting of the timber, and recovered. He then gave notice to D. not to pay any more money to B. on account of the logs, but to pay the balance due to him. C. B. sued D. in assumpsit for the price of the logs, and D. set up, as a defence, the notice and the paramount title of C.:—Held, defence good, the rule of caveat emptor and of estoppel not applying strictly in this case. *McMahon* v. *Grover*, 3 C. P. 65.

United States Postage Stamps Taken by Confederate Ship during Civil War —*Notice of Defective Title—Stamps Ordered to be Delivered up to United States Government.*]—See *United States of North America* v. *Boyd*, 15 Gr. 138.

Want of Title — *Damages.*]—The purchaser of a chattel is entitled to recover from the vendor upon failure of title, the value of the chattel, and not merely the amount paid by him to the vendor. *Confederation Life Association* v. *Labatt*, 27 A. R. 321.

See Stoeser v. *Springer*, 7 A. R. 497; *Forristal* v. *McDonald*, 9 S. C. R. 12.

VIII. MISCELLANEOUS CASES.

Cash Deposit—*Right to Recover back, on Sale Falling through.*]—See *Phippen* v. *Hyland*, 19 C. P. 416.

Conspiracy to Defeat Contract.]—An action on the case in the nature of a conspiracy does not lie against a person supplanting another in the purchase of goods which had first been contracted for by the latter party. *Davis* v. *Minor*, 2 U. C. R. 464.

Co-operative Association—*Cash Transaction—Pleading.*] — The plaintiffs supplied goods to a co-operative association, formed under 29 Vict. c. 22, on the order of their manager. The terms of purchase were said to be cash, but it appeared that, according to the course of dealing between the parties, before payment the invoices were laid before a board meeting, and if found correct the treasurer was ordered to pay. These goods were ordered in January, and not paid for, and in July the plaintiffs sued:—Held, not a cash transaction, within s. 14 of the Act, and that the plaintiffs could not recover. Semble, that the defence should have been specially pleaded, and the plea was allowed to be added. *Fitzgerald* v. *London Co-operative Association*, 27 U. C. R. 605.

——— *Inability to Buy on Credit—Acceptance—Implied Representation of Authority.*] —The plaintiff sued the officers and directors of a co-operative association, incorporated under R. S. O. 1887 c. 166, for the price of goods sold to it on credit, which, by the statute incorporating it, the association was forbidden to buy in that way:—Held, that he could not recover, as no action could be maintained upon an implied representation or warranty of authority in law to do an act; and, moreover, the plaintiff must be taken to have known of the statutory inability. Held, also, that, although the proceeds of a resale of the goods by the association were applied to relieve the defendants from a personal liability for other goods purchased by the association, they could not be said to have derived a personal benefit from the plaintiff's goods, and, therefore, the latter could not recover on this ground. Held, lastly, that, although one of the defendants accepted, on behalf of the association, the plaintiff's drafts drawn on it for the goods, he was not liable upon an implied representation or warranty of authority in law of the association so to accept. *Struthers* v. *Mackenzie*, 28 O. R. 381.

Covenant against Incumbrances on Sale of Vessel—*Action thereon—Effect of Notice to Vendee of Incumbrance Complained of—Equitable Defence—Payment of Purchase Money.*]—See *McDonell* v. *Thompson*, 16 U. C. R. 154.

Lien on Goods Sold — *Quebec Law.*]—Where a consignment of goods has been sold and they remain no longer in specie, the only recourse by a person who claims an interest therein is by an ordinary action for debt, and he cannot claim any lien upon the goods themselves nor on the price received for them. *Dingwall* v. *McBean*, 30 S. C. R. 441.

Warehoused Goods—*Receipt.*] — A receipt by A. for flour as in store for B., given and accepted, is not conclusive upon the party accepting it from B. *Mair* v. *Holton*, 4 U. C. R. 505.

See BILLS OF SALE—COSTS, VI. 2—DISTRESS, III. 6—EXECUTION, VIII. 2—PRINCIPAL AND AGENT, VI. 5 — SHERIFF, IV. 1—WARRANTY.

SALE OF LAND.

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SCHOOLS, COLLEGES, AND UNIVERSITIES.

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I. COLLEGES AND UNIVERSITIES.

1. *Huron College.*

Power to Take and Assign Mortgage of Lands.]—By its Act of incorporation, 26 Vict. c. 31, Huron College is authorized to take, hold, and convey lands sold, given, or

granted to it, provided that such land so held shall be only such as may be required for the purposes of college buildings, &c., and provided, also, that it may acquire any other real estate, by gift, devise, or bequest, and hold the same for seven years, to revert to the person from whom it was acquired, if not disposed of within that time. The plaintiff in ejectment claimed as assignee of a mortgage executed to the college in 1864, and assigned by it to him in the same year; and it was objected that the college had no power either to take or assign such mortgage:—Held, that under the first part of the clause the college could take the lands; and, if prevented from holding by the first proviso, the Crown only could take advantage of the disability, and the college could convey its defeasible title. Quære, whether it could not also acquire this land under the second proviso, the word "gift" being often confounded with "grant." If so, the assignment to the plaintiff being within seven years, he was entitled to recover. *Becher* v. *Woods*, 16 C. P. 29.

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2. *King's College.*

Covenant—*Statutory Assignment of—Upper Canada College.*]—The plaintiffs, by the name of the Upper Canada College and Royal Grammar School, declared in covenant on an indenture made between the chancellor, president, and scholars of King's College, and the defendant:—Held, that the effect of 12 Vict. c. 82 and 13 & 14 Vict. c. 49, was to transfer the covenant from the University of King's College to the plaintiffs: and consequently gave them the right of property in the indenture declared on, and entitled them to recover thereon in the name used; and that proof that the covenant was made on behalf and for the benefit of the plaintiffs, would not be contradicting the deed or covenant. *Principal of Upper Canada College and Royal Grammar School* v. *Boulton*, 2 C. P. 326.

Tuition Fees—*Upper Canada College.*]—Right of King's College to recover for tuition given in Upper Canada College before and after the passing of 7 Wm. IV. c. 16. It is no objection to the right of King's College to sue for tuition given after the passing of 7 Wm. IV. c. 16, in Upper Canada College, that professors in King's College had not, during the time sued for, been appointed. *King's College* v. *Denison*, 5 U. C. R. 203.

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3. *Queen's College.*

Bequest—*Mortmain.*]—A bequest issuing out of realty to Queen's College for the founding of a bursary, is a charitable bequest within the Mortmain Acts, and therefore void. *Ferguson* v. *Gibson*, 22 Gr. 36.

Removal of Professor — *Injunction — Restoration—Jurisdiction.*] — By letters patent under the great seal, issued on the 16th October, 1842, certain persons were created a body corporate by the name of "Queen's College, at Kingston," with the style and privilege of a university, with power to appoint professors and other officers, and in case of complaint made to the trustees to institute inquiry, and in the event of any impropriety of conduct being duly proved, to admonish, reprove, suspend, or remove the person offending:—Held, that the professorships were offices of freehold, held ad vitam aut culpam; that the trustees could not at their descretion, without such inquiry, remove the professors; and that the court would by injunction prevent the trustees from improperly interfering with the professors. *Weir* v. *Mathieson*, 11 Gr. 383.

But on appeal the decision was reversed, and it was held, that there was no jurisdiction in equity to interfere for the restoration of a professor removed, and that, under the charter, a sufficient number of trustees might remove in their discretion. *S. C.*, 3 E. & A. 123.

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4. *Victoria University.*

Senate—*Place of Meeting.*] — Held, that under the Acts incorporating Victoria University, and the statutes thereof, the chancellor had no power to call a meeting of the senate elsewhere than at Cobourg, the seat of the University. *Town of Cobourg* v. *Victoria University*, 18 O. R. 165.

II. Grammar Schools.

Board of Trustees — *Union with Common School Trustees — Illegality of.*]—The united board of grammar and common school trustees of the village of Trenton applied for a mandamus to the corporation of Trenton to levy a sum of money required by them for grammar school purposes, as mentioned in the estimate, supporting the application by an affidavit of their secretary, who stated that the trustees of the village of Trenton county grammar school had united with the board of school trustees of the village of Trenton, and the same became and had ever since been the united board of grammar and common school trustees of the village: — Held, that such union of the two boards of trustees was not authorized by C. S. U. C. c. 63, s. 25, s.-s. 7, and c. 64, s. 79, s.-s. 9; and the application was therefore refused. *Re Trenton School Trustees and Village of Trenton*, 26 U. C. R. 353.

——— *Union with Common School Trustees — Illegality—Treasurer of County—Liability for School Moneys.*]—There being in a village a joint board of grammer and common school trustees, on 7th July the chairman of the board of grammar school trustees received a circular from the education office, advising him of the payment of $202 for that school. This money had been paid into the Toronto office of the Bank of Upper Canada (prior to its suspension) as agent for defendant, the treasurer of the county, and the bank sent him an order on their Hamilton branch, which was not presented before the bank stopped payment in September. It was not asked for until 25th September, when the treasurer of the joint board called for it. On 26th defendant wrote to the treasurer of the joint board enclosing this draft, saying that it had been received by him for the grammar school, and had been lying in his office for their demand as usual since the 11th July. The plaintiffs having refused to accept the draft:—Held, that an action for this money would lie against defendant as treasurer, it having been paid to his agents at Toronto, and he having admitted its receipt for the special purpose. (2) That, as the board of grammar

school trustees, notwithstanding the union, still existed as a separate corporation, the action should have been by them, not by the joint board. If the action had been rightly brought, defendant would have been liable for the loss on the draft, for the payment was made to his agents at Toronto in money. *Caledonia Grammar and Common School Trustees* v. *Farrell*, 27 U. C. R. 321.

County Council — *Raising Money—Statute.*] — Held, that a county council is not bound under C. S. U. C. c. 23, to raise a sum of money upon the application of grammar school trustees for purposes connected with the grammar school; but that the statute is permissive, not obligatory. *In re Weston Grammar School Trustees and Counties of York and Peel*, 13 C. P. 423.

III. High Schools.

1. *Applications to Municipal Councils for Funds.*

Applicants — *Description of — Demand—Estimates— Maintenance.*] — On an application for a mandamus to compel a municipal corporation to provide $286.74 for a board of school trustees, they were described in the proceedings as "The trustees of the Port Rowan high school;" and it appeared that on the 1st July, 1872, a demand was made on the township corporation, headed, "School Section No. 12, Walsingham, Port Rowan, July 1st, 1872," and stating that the amount required was "for expenses of conducting high school;" and was signed "Wm. Ross, secretary and treasurer of Port Rowan high school board." Subsequently to this, on the 19th August, 1872, the secretary of the board sent a letter to the clerk of the township corporation, headed, "Office of high school board, sec. No. 12, Port Rowan, 19th August, 1872," stating that in making up the estimates for the "current expenses of high school," an error had been made, and that the amount actually required was $286.74, which amount he was required to make immediate demand for from the council, &c. In reply the township clerk sent a letter addressed, "To — Ross, secretary, P. Rowan high school board," enclosing a copy of a resolution passed by the township council, stating that they declined to pay "the demand of the Port Rowan high school trustees," &c.:—Held, that the description of the trustees was sufficient; for that, although "The trustees of the Port Rowan county high school," would appear to be more correct, yet 34 Vict. c. 33 (O.) did not in express terms give any corporate designation, and the township corporation by their action had shewn that they fully understood the body with whom they were dealing. (2) That the demand was sufficient, being signed by the secretary and treasurer, the officer and organ of the board, and having been recognized by the resolution of the township council as the demand of the board. (3) That it was not necessary to give the estimates on which the sums required were based, there being a difference in this respect between the Grammar School and Common School Act. (4) That the purposes for which the money was stated to be required, viz., "for expenses of conducting high school," and "current expenses of high school," fell within the meaning of the words "maintenance and school accommodation," used in the statute. *In re Port Rowan High School Trustees and Township of Walsingham*, 23 C. P. 11.

——— *Joint Board—Maintenance—Buildings—Mandamus— Demand.*] — A mandamus nisi was ordered, on the application of the joint board of education of the town of Perth, commanding the corporation of the town to provide $16,000, as required by said board, for the maintenance and accommodation of the high school, to pay for a school site and building of a school house and premises connected therewith, as shewn by the estimates prepared and submitted by said board to the corporation:—Held, that the joint board of education were the proper applicants, and not the trustees of the high school board. The sections of the High School and Public School Acts, 37 Vict. cc. 27, 28 (O.), which confer on the joint board the powers of each board, mean the powers possessed by each board for the purpose for which such board was created, before the creation of the joint board. Semble, that the demand here was not in form sufficient; but, the council having resisted the application on other grounds, effect was not given to the objection. *Re Perth Board of Education and Town of Perth*, 39 U. C. R. 34.

——— *Joint Board—Buildings—Statute.*] —On the 29th April, 1878, the board of education of the incorporated village of Morrisburgh, which was formed by the union of the high school board of high school district No. 4 of the united counties of Stormont, Dundas, and Glengarry, and the public school board of the incorporated village of Morrisburgh, in which village the high school was situated, resolved that the sum of $7,000 should be levied on high school district No. 4, to cover the expense of building, furnishing, &c., for purposes of the high school:—Held, that the joint board, and not the high school board, was the proper body to make the requisition for the money, under 37 Vict. c. 27, s. 63 (O.), adopting the construction put upon that section in Re Perth Board of Education and Town of Perth, 39 U. C. R. 34, which had been confirmed by implication by 42 Vict. c. 34 (O.) *Re Morrisburg Board of Education and Township of Winchester*, 8 A. R. 169.

Erection of School House — *Contributing Township.*]—Held, affirming the judgment in 39 U. C. R. 362, that under 37 Vict. c. 27 (O.), the high school board for a district composed of two municipalities, a town and a township, can compel one of the municipalities, the township, to contribute towards the erection of a school house in the other municipality, and not merely towards its maintenance. *In re Niagara High School Board and Township of Niagara*, 1 A. R. 288.

Maintenance—*Requisities of Application — By-law.*] — Held, that the words "maintenance, accommodation, and other necessary expenses" in s.-s. 6 of s. 25, R. S. O. 1887 c. 226, include the purposes mentioned in s. 35 (1), and consequently that an application under s. 35 (1) must be made before the 1st day of August. Held, also, that an application under s. 35 (1) must be the corporate act of the school board, not merely the oral request (however unanimous) of the individuals composing it, and must specify the purposes for which the money is required. Held, also, that, to come within the provisions of s. 35, an application must be an independent application for purposes mentioned

in that section, and that an application combining other purposes with these purposes, may be rejected by a simple majority vote. Held, also, that an application under s. 35 may be rejected by the council, although no formal by-law relating to the purposes of the application is before the council, and the meeting at which the rejection takes place has not been called for the special purpose of considering such a by-law. Decision in 15 O. R. 686 reversed. *In re Oakwood High School Board and Township of Mariposa*, 16 A. R. 87.

——— *Proportion of Liability — Mandamus.*] — By 60 Vict. c. 14, s. 73 (O.), it is enacted that "the municipal council . . shall pay for the maintenance of pupils . . ." —Held, that the municipal corporation and not the individual members of the council are liable. Judgment below, ordering the defendants to pay to the plaintiffs a proportion of the cost of maintenance of the high school in respect of pupils residing in the town attending the high school, affirmed, but that part thereof directing a mandamus to the mayor and councillors of the town to pass a resolution authorizing the treasurer to pay the amount, struck out as unnecessary. *Port Arthur High School Board* v. *Town of Fort William*, 25 A. R. 522. See *Dawson* v. *Town of Sault Ste. Marie*, 18 O. R. 556, *post* 2.

Non-Existent School.]—A county council is not authorized under 37 Vict. c. 27, s. 47 (O.), to raise money by by-law for a high school not in existence, but in contemplation only. *Sharp* v. *County of Peel*, 40 U. C. R. 71.

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2. *Appointment of High School Boards and Trustees.*

Authority of Corporation — *By-law — Erection of School House.*] — On motion to continue an injunction to restrain the corporation of a town in a judicial district from paying over to the high school board of said town, and the said board from receiving, the sum of $15,000 raised by by-law of said town, for acquiring a site and erecting a high school thereon:—Held, that under the provisions of ss. 4 and 10 of R. S. O. 1887 c. 226, taken in connection with s. 1 of 50 Vict. c. 64 (O.), incorporating the said town, the corporation were authorized to appoint a high school board therefor, and to pass a by-law for the erection of said school; and that the consent of the lieutenant-governor, provided for by s. 8, was not required, as this was not an additional high school. Held, also, that the appointment of the board must be by by-law; but a by-law therefor passed after the motion was made, but before the hearing thereof, was sufficient. The court refused to entertain an objection that the board were about to build the school on land not acquired by them, for it could not be assumed that the money would be spent until the title to the land had been acquired; and also it was not necessary to shew that specific portions of the $15,000 had been appropriated to the purchase of the land and the erection of the building. *Dawson* v. *Town of Sault Ste. Marie*, 18 O. R. 556.

——— *By-law — Resolution.*] — Under its Act of incorporation, 47 Vict. c. 57 (O.), the town of Port Arthur has the same rights and powers in regard to the organization and maintenance of high schools as other incorporated towns. A board of trustees of a high school may be appointed by resolution of the municipal council having jurisdiction; a by-law is not necessary. The opinion bearing on this point expressed in Township of Pembroke v. Canada Central R. W. Co., 3 O. R. 503, at p. 508, preferred to that in Dawson v. Town of Sault Ste. Marie, 18 O. R. 556, *Port Arthur High School Board* v. *Town of Fort William*, 25 A. R. 522.

Trustee—*Appointment to Fill Vacancy.*] —In a high school board of a high school district constituted under s. 11 of 54 Vict. c. 57 (O.), a vacancy occurred by reason of the expiration of the term of office of one of the trustees appointed by a town, whereupon the town council passed a by-law appointing the plaintiff to fill the vacancy. At a subsequent meeting, in the absence of any of the causes provided for by the Act, namely, death, resignation, or removal from the district, &c., the council passed a by-law amending their previous by-law by substituting the name of the defendant for that of the plaintiff:—Held, that the plaintiff was duly appointed to fill the vacancy, and that he was entitled to the seat, and the subsequent appointment of defendant was illegal. *Regina ex rel. Moore* v. *Nagle*, 26 O. R. 249.

Trustee—*Proceeding to Remove — Quo Warranto.*]—See QUO WARRANTO.

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3. *Districts.*

County Council—*Aid to Districts—Assessment.*]—The three united counties of Stormont, Dundas, and Glengarry were formed into five high school districts:—Held, that under 36 Vict. c. 48, s. 383, s.-s. 6, and 37 Vict. c. 27, s. 45 (O.), the aid granted by the corporation to the high schools to supplement the government grant must be by an equal rate upon the assessable property of the united counties, not upon each high school district for the sum apportioned to its schools. *Re Chamberlain and Counties of Stormont, Dundas, and Glengarry*, 42 U. C. R. 279.

——— *Alteration of Districts—Consent.*] —Under s. 6 of the High Schools Act, 54 Vict. c. 57 (O.), as amended by 57 Vict. c. 58, s. 1 (O.), a county council has power to detach a township from a high school district without the consent of that township or of the other townships included in the high school district in question. *In re Wilson and County of Elgin*, 21 A. R. 585, 24 S. C. R. 706.

——— *Alteration of Districts—Repetition of.*]—Under 44 Vict. c. 33 (O.), the county council has impliedly the power to change the limits of a high school district from time to time, and not merely once, or when an additional school is established. *Re Tyrell and County of York*, 35 U. C. R. 247.

——— *By-law—Repeal.*]—After the repeal of 37 Vict. c. 27, s. 38 (O.), by 40 Vict. c. 16, s. 18, s.-s. 2 (O.), a county council, having no power to determine the limits of high school districts, passed a by-law determining the same. By another law they repealed it and established new limits:—Held, that such last mentioned by-law was valid so far as it repealed the first by-law, which was

invalid, but the rest of it must be quashed. *Re Chamberlain and Counties of Stormont, Dundas, and Glengarry*, 45 U. C. R. 26.

——— *By-laws—Repeal—Demand — Mandamus—Costs.*]—The county council of the united counties, acting under 37 Vict. c. 27, s. 38 (O.), which gave power to every county council from time to time to determine the limits of a high school district for each high school existing in the county and within its municipal jurisdiction, had, on 23rd June, 1876, by by-law No. 516, declared that district No. 4 should consist of the village of Morrisburgh and the townships of Williamsburgh and Winchester. Section 38 was repealed by 40 Vict. c. 16, s. 18 (O.), which, however, declared that all high school districts which existed at the time of its passing (viz., 2nd March, 1877), should continue until the county council should think fit to discontinue them. On 12th October, 1877, the county council passed by-law No. 551, which, after reciting, inter alia, that it was expedient to consolidate all Acts and by-laws of those counties which in any way related to high school districts, proceeded in direct terms to repeal several by-laws, including No. 516, and then went on to enact that the united counties should be divided into five districts for high school purposes. No. 4 and No. 5 being in the county of Dundas, and No. 4 embracing Williamsburgh, Winchester, and Morrisburgh:—Held, that, although the reconstruction of the districts was ultra vires and void, because the power to determine the districts had ceased at the passing of 40 Vict. c. 16 (O.), yet the repeal of by-law 516, being within the power to discontinue the districts which that statute preserved, was valid, and the township of Winchester had therefore ceased to be part of district No. 4 before the resolution of April, 1878, was passed. The board of education, acting under the resolution of April, 1878, had on 19th July, 1878, made a demand upon the township of Winchester for its proportion of the money required. Before that demand was made, another by-law, No. 590, had been passed on 22nd June, 1878, by the county council, repealing that portion of by-law No. 551 which related to high school districts for high school purposes in the county of Dundas, and enacting, inter alia, that district No. 4 should embrace the village of Morrisburgh only. This by-law was passed after a majority of the reeves and deputy reeves of the county of Dundas had, under the power given by 41 Vict. c. 15 (O.), requested the county council to abolish the districts Nos. 4 and 5, and to constitute the corporation of the village of Morrisburgh high school district No. 4:—Held, that this by-law was effectual to abolish district No. 4, if that district had continued to exist after the passage of by-law No. 551. When the demand was made in July, 1878, by-law 590 was in force. It was moved against in the court of Queen's bench in November, 1878, and was quashed so far as it assumed to determine the limits of districts, but not so far as it repealed by-law No. 551: Re Chamberlain and Counties of Stormont, Dundas, and Glengarry, 45 U. C. R. 26. In 27th June, 1879, the county council passed another by-law, No. 617, simply abolishing the existing high school districts in the county of Dundas. At this time no part of the money demanded had been levied. This by-law was passed after the rule nisi for a mandamus in the matter had been granted, but before it was argued:—Held, reversing the judgment in 45 U. C. R. 460, that if the demand had been originally valid, it could not be enforced after the passage of by-law No. 617, and nothing would have remained in question but the costs of the application. *Re Morrisburg Board of Education and Township of Winchester*, 8 A. R. 169.

Township and Village Councils—*By-laws—Repeal—Petition.*]—In 1879 the township of Grimsby passed a by-law attaching a certain portion of the township to the village of Grimsby for high school purposes. In 1881 the same council similarly annexed another portion. Corresponding by-laws were passed by the village of Grimsby. By 45 Vict. c. 33 (O.), the township was divided into two townships of North and South Grimsby. In 1882 the council of the township passed a by-law, on the petition of less than two-thirds of the ratepayers, repealing the two former by-laws:—Held, that the two township by-laws, with the corresponding village by-laws, formed an agreement, pursuant to R. S. O. 1877 c. 205, s. 30, as amended by 42 Vict. c. 34, s. 32 (O.), which could not be rescinded by one of the municipalities without the concurrence of the other; and therefore that the repealing by-law should be passed only upon the petition of two-thirds of the ratepayers. *Re Wolverton and Townships of South and North Grimsby*, 3 O. R. 293.

IV. Public Schools.

1. *Officers of School Corporations.*

Secretary-Treasurer — *Appointment — Presumption—Acts of — Action—Parties.*] — One T., who acted in the capacity of secretary-treasurer of the plaintiffs, who had not been appointed in writing, and had not given security as required by the statute in that behalf, absconded with certain moneys which had been received by him, as such secretary-treasurer, from the defendants. The plaintiffs had recognized T. as their secretary-treasurer by intrusting him with the custody of their books and papers, by allowing him to receive moneys for them, by auditing his accounts, and receiving and approving of the auditor's reports:—Held, that R. S. O. 1877 c. 204, s. 99, which provides that, in the case of a rural school section corporation, the resolution, action, or proceeding of at least two of the trustees shall be necessary in order lawfully to bind such corporation, does not apply to acts of duty of the secretary-treasurer; and that payment by the municipality of school moneys to T. was binding on the trustees. Held, also, that if a person acts notoriously as the officer of a corporation, and is recognized by it as such officer, a regular appointment will be presumed, and his acts will bind the corporation, although no written proof is, or can be, adduced of his appointment. To a bill by a rural school section corporation to compel the municipality to make good money paid by the municipality to a person alleged not to be the duly appointed officer of the corporation, the treasurer of the municipality is not a proper party. *Hamilton School Trustees v. Neil*, 28 Gr. 408.

——— *Sureties.*]—A secretary-treasurer of a public school board was appointed for a year on giving the necessary security, which he did by bond with sureties, without any limit as to time or any reference to the period of his appointment. He was reappointed

each year for several years in the same way and on the same condition, but without fresh security being taken, and subsequently became a defaulter in respect of moneys received by him during his last year's appointment:—Held, that the sureties were not liable for his defalcation. *Waterford School Trustees* v. *Clarkson*, 23 A. R. 213.

See Paris Board of Education v. *Citizens Insurance and Investment Co.*, 30 C. P. 132; *Township of Oakland* v. *Proper*, 1 O. R. 330; *Stephen School Trustees* v. *Mitchell*, 29 U. C. R. 582; *Keith* v. *Fenelon Falls Union School Section*, 3 O. R. 194.

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2. *Pupils.*

Exclusion—*Colour — Separate School.*]—Residents of a section in which a separate school has been established for the class to which they belong—as in this case, for coloured people—are not entitled to send their children to the general common school of such section. *In re Hill and Camden and Zone School Trustees*, 11 U. C. R. 573.

Held, upon the facts, that either no separate school extending to the appellant had been established for coloured persons within the statute, or it had been discontinued, and that he was therefore entitled to a mandamus to the trustees to admit his daughter to the common school. The erection of a separate school suspends but does not annul the rights of those for whom it was established, as regards the common schools. When it is no longer kept up, these rights revive. *In re Stewart and Sandwich East School Trustees*, 23 U. C. R. 634.

In answer to an application for a mandamus to the school trustees of a town to admit the applicant's son, a coloured boy, to the public school in his ward, it was sworn that since 1886 a school had been set apart for the coloured inhabitants, and that the school to which admission was desired was overcrowded, and had no room for any additional children. There was, however, no separate school legally established for coloured people, the Act authorizing such schools being passed after the setting apart of the school above mentioned:—Held, that on the ground only of want of accommodation the writ must be refused; but, as admission had been refused on account of the boy's colour, the trustees were ordered to pay the costs of the application. *In re Hutchison and St. Catharines School Trustees*, 31 U. C. R. 274.

——— *Residence of Parent.*]—Held, that in this case it was sufficiently shewn that the plaintiff was a resident of the school section from the school of which his son had been excluded, for which this action was brought. *Washington* v. *Charlotteville School Trustees*, 11 U. C. R. 569.

Expulsion or Suspension—*Trustees — Teacher—Apology — Malice — Remedy—Notice.*]—On the 3rd December, 1884, a school teacher dismissed the plaintiff, a boy thirteen years of age, for disobedience, speaking impudently when questioned about it, and refusing to be punished for misconduct. The matter was brought before the trustees, and on the 6th January they held a meeting and passed a resolution that the boy could return to school on his expressing regret for his misconduct. After the receipt of a solicitor's letter on behalf of the father, the trustees, on the 10th February, held another meeting and passed a resolution that the boy could return to school after one day's suspension. On the 11th February another meeting of the trustees was held and a resolution passed reinstating the resolution of the 6th January. The father was not notified nor was he present at the meetings of the 6th January and 11th February; but he was notified of, and was present at, the meeting of the 10th February. The boy returned to school, but, relying on the resolution of the 10th February, made no apology, and remained there for several days, but was not interfered with by the teacher, who, however, would give him no instruction. In an action in a division court against the teacher and trustees for an alleged wrongful dismissal:—Held, that the action must be dismissed against the trustees; that it was not their act, but that of the teacher, that caused the boy's removal; that the passing of the resolution as to apologising was not an expulsion; that the teacher in not instructing the boy was not acting under the trustees' direction; and that they were not liable for not compelling her to give the instruction. Quære, whether in such a case as this malice must not be shewn, unless followed by some act amounting to assault or trespass; and whether a mandamus, and not an action, was not the proper remedy. The action of the trustees in proceeding in the absence and without notice to the parties interested, and also the unreasonable conduct of the father, commented on. *McIntyre* v. *Blanchard School Trustees*, 11 O. R. 439.

——— *Trustees—Teacher — Discretion — Mandamus — Delay.*]—A pupil at a public school having injured the top of a school desk by cutting it, he was ordered by the schoolmaster to replace the top with his own hands, and was suspended till he should do so. The suspension was on the 20th February, 1888, and on the 7th May, 1889, notice of motion was served by the father of the pupil for a mandamus to compel the trustees to readmit the son. In the meantime appeals had been made by the father to three of the trustees, to the public school board, and to the annual school meeting, on all of which applications the action of the teacher was sustained. During this time the pupil attended another public school:—Held, that the discretion exercised by the master and trustees should not be interfered with, especially after the delay and change in the position of affairs. *Re McCallum and Brant School Trustees*, 17 O. R. 451.

Right of Admission—*Insufficient Accommodation—Application.*]—A mandamus to compel the admission of a child to a public school will not be granted where it is shewn that there is not accommodation for her, for this is a valid answer to such an application, especially where it appears, as here, that there is sufficient accommodation at another public school in the same town; nor where it is shewn that the application for admission was not made in the regular and proper way, under the public school regulations, as was the case here, inasmuch as, although the child in question was a registered pupil at the other public school in the same town during the preceding term, she had not attended there at the commencement of the present one, nor had application been made to the inspector to have her admitted to the school to which

admission was now sought. *Dunn* v. *Windsor Board of Education*, 6 O. R. 125.

——— *Guardian — "Boarding-out Agreement".*]—The custodian of a child under a "boarding-out agreement" to clothe, maintain, and educate him, is not his "guardian" within the meaning of s.-s. 3 of s. 40 of the Public Schools Act of 1891, 54 Vict. c. 55 (O.), and the trustees of the school section within which the custodian resides need not provide school accommodation for the child. Judgment in 28 O. R. 127 affirmed. *Hall* v. *Stisted School Trustees*, 24 A. R. 476.

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3. *School Houses and Sites.*

(a) *Acquisition of Site.*

Conveyance — *Mistake in Description—Title—Parties to Suit.*]—A school site had been granted to certain persons in 1831, and a school house erected thereon, but by mistake the wrong site was conveyed. The grantor subsequently made a mortgage on his estate, but exempted the portion reserved for a school site. He died shortly afterwards, leaving his son and heir-at-law a minor. The defendant, during the minority of the heir, obtained a lease of the premises, excepting the site in question; but on the coming of age of the heir obtained a deed from the said heir, without any reservation of the school site. About the same time, or a little before, he also obtained an assignment of the mortgage so as to perfect his title. He then claimed the land on which the school house was erected, on the ground that in consequence of the mistake no title was vested in the trustees, whereupon the trustees of the school section filed a bill against him:—Held, that he had express notice of the trustees' title; and that, even if the trustees were volunteers as to this piece of land, the defendant was also a volunteer, and being prior to him they had a right to the aid of equity to have his title to said piece of land cancelled, or a conveyance thereof from said defendant. Held, also, that the township council was a necessary party to the suit. *West Gwillimbury School Trustees* v. *Farrell*, 5 L. J. 230.

Conveyance to County—*Subsequent Incorporation into City—Effect of Statute.*]—On the 26th September, 1844, one LeB. conveyed certain land to the municipal council of the district of Dalhousie, on condition of their erecting within a year a school house thereon. The deed did not state that it was to be a model school house, but that was the only school they could then establish, and the council had on the 16th May previous, acting under 7 Vict. c. 29, which authorized the establishment of model schools, passed a resolution and by-law reciting the statute, and directing the establishment of a model school, which, within the time limited, was erected on this land. The land formed part of what was afterwards incorporated as the town of Bytown, and subsequently the city of Ottawa, while the district of Dalhousie became the county of Carleton. The evidence shewed that up to 1851 the school was used as a model school, and that the plaintiffs had always asserted their right thereto, and had ejected one S., who got into possession as a private and afterwards as a common school teacher; and up to 1868 the defendants had admitted the plaintiffs' right to it. 37 Vict. c. 28 (O.) empowered the public school board of any city to take possession of all public school property, and to hold, as a corporation, all such property acquired or given at any time for public school purposes in the city by any title whatsoever. Defendants took possession, claiming the land as being vested in them under this Act, and the plaintiffs then brought ejectment:—Held, that plaintiffs were entitled to recover, for that under DeB.'s conveyance the property vested in them, and the subsequent School Act had not had the effect of divesting it. Held, also, that there was no objection to the county owning land so acquired, and subsequently included in the city. *County of Carleton* v. *Ottawa Public School Board*, 25 C. P. 137.

Expropriation — *Interest of Lessee — Orchard.*]—In proceeding to select a site for a public school house, no notice of the proceeding to arbitrate upon the question of compensation was given to a lessee in possession of the property selected, and in consequence he did not name an arbitrator, neither did he attend before or take any notice of the arbitration; and the arbitrators in fact did not take into consideration the value of his interest, neither did they find that such interest was not of any value. The court, at the instance of the lessee, declared that his interest had not been affected by the arbitration, and directed an inquiry as to damages sustained by him, and ordered the trustees to pay him his costs of suit. The principal objection to land being taken for a school site was, that it was an orchard, but the facts shewed that the owner had only, after the selection was first spoken of, planted some trees, which, on the movement to take the land being stopped, were suffered to die out; and these were renewed again on a subsequent movement of the trustees to take possession:—Held, that this was not such an orchard as should prevent the trustees from appropriating the land for school purposes. *Johnson* v. *Howard School Trustees*, 26 Gr. 204.

Purchase — *Application to Municipal Council for Funds.*]—A municipal council has no discretion in accepting or rejecting the requisition of school trustees for funds for a school site, except by a two-thirds vote. An adverse vote by a smaller majority is a virtual acceptance, and the requisition must therefore be complied with. *Re Napanee Board of Education and Town of Napanee*, 29 Gr. 395. See *Re Morrisburg Board of Education and Township of Winchester*, 8 A. R. 169, *ante* III. 3.

——— *Concurrence of Freeholders.*]—A board of school trustees cannot, under 14 & 15 Vict. c. 48, and 16 Vict. c. 185, without any reference to the freeholders, select and purchase the site for the school house, and impose a rate therefor. *Orr* v. *Ranney*, 12 U. C. R. 377.

Quære, whether, under C. S. U. C. c. 64, s. 27, s.-s. 10, and s. 34, the concurrence of the freeholders and householders required to enable the trustees to call upon the council to levy money for the purchase of a school site, &c., can be expressed at the annual school meeting, without notice that the question will then be brought up. *In re Taber and Township of Scarborough*, 20 U. C. R. 549.

——— *Concurrence of Freeholders—Meeting—Difference of Opinion—Arbitration and*

Award.]—Replevin. Two defendants avowed; the third pleaded the convening of a special meeting of the freeholders and householders of a certain school section to procure a school site, when it was agreed to procure a certain piece of ground and erect a school house thereon, which was done; that the plaintiff was a resident freeholder then and when his goods were seized, and was assessed $80 for building said school house, &c. The plaintiff pleaded that the meeting above set forth was null and void, because before the said meeting another meeting had been convened according to law, when a difference of opinion existed between a majority of the freeholders and householders as to choosing a school site, and arbitrators were appointed, who decided upon a certain site, which decision remains in force; and the defendants in contravention thereof wrongfully purchased the site mentioned in their plea, and wrongfully distrained, &c. Upon demurrer:—Held, that the second meeting pleaded by defendants was a violation of the statute, and that the plaintiff was entitled to judgment. The arbitrators to whom a reference in this cause was made under the School Act executed an award, the description of the lot not being fully inserted, but a blank being left therefor, which was afterwards filled in and the word "lot" altered into "gore:"—Held, that the award was insufficient. *Ryland* v. *King*, 12 C. P. 198.

Replevin against two school trustees and one K., a bailiff, for a horse. Defendants pleaded, (1) that they did not take; and (2) an avowry, setting out in substance that on the 30th October, 1858, a special meeting of the freeholders and householders of the section had been duly called to procure a school site and erect a school house thereon, at which it was agreed to procure a certain site named; that this was procured and the school house built; that the plaintiff was duly assessed for a sum specified; that the trustees by their warrant commanded K. to collect it; and that, after demand and default made, he seized the horse. The plaintiff pleaded to the avowry, (1) de injuriâ; and (2), as to the justification by the trustees, that the meeting was void, because before it took place a special meeting of the freeholders was duly held to procure a school site, at which a majority of the trustees differed from a majority of those present with regard to the site, in consequence of which the freeholders and householders, the trustees, and the local superintendent, each appointed an arbitrator to decide the question; that the arbitrators determined upon a site specified, different from that mentioned in the avowry, which award remained in force; and that the trustees, contrary to this decision, wrongfully purchased the site mentioned in the avowry. The defendants replied that there was no such award. With regard to the second and third issues, raised by the plea of de injuriâ to the avowry and replication denying the award, the evidence shewed that in 1857 the inhabitants were divided as to the choice of a school site, and an award was made but not acted upon; that in 1858 the same differences existed, and one of the trustees also differed from his co-trustees; that in March the two trustees, defendants, obtained a conveyance of half an acre, part of lot 15, and in May a meeting was held at which arbitrators were named and an award made; but, the inhabitants being still dissatisfied, another meeting was held in July, when the arbitrators mentioned in the plea to the avowry were chosen. In the meantime the building was commenced upon the land conveyed. On the 4th September an award was drawn up, which, as produced at the trial, directed that the site should be "*a part of the gore lying between 16 and* 17, now in the tenure of John Landon, situated on the south-west of the road, and in the westerly limit of the said gore;" but it appeared that the words in italics were not in the award when signed, but added by two of the arbitrators in May, 1859; and that the word "gore" stood originally "lot," and so remained until the other words were filled in. On the 30th October, 1858, a meeting was held, having been regularly called by the two trustees to settle the question finally, and a resolution passed adopting the land conveyed. In April, 1859, the two trustees, defendants, met, the third being absent from the country, and resolved upon the rate, which was inserted by the clerk in the roll, and the warrant was issued to K., who seized the plaintiff's horse. The plaintiff after that procured the award to be filled up by two of the arbitrators, who stated that it had been left blank because they did not know the precise description of Landon's land:—Held, that upon the second issue defendants were entitled to succeed, for the evidence sustained the avowry; and that upon the third issue they were also entitled to the verdict, for there was in fact no award made, and even as it was altered after execution the description was too uncertain. Ryland v. King, 12 C. P. 198, commented upon. Held, that, under the circumstances proved, that reference did not make the subsequent meeting illegal. Held, also, upon demurrer, that the avowry was good, the omission of any averment essential to the validity of the rate being cured by the second plea to it, which relied wholly upon the award; that the second plea was bad, for not shewing that before the award the trustees and inhabitants had not duly selected the site built upon, as they might do notwithstanding the reference; and that the replication to it denying the award was a good answer. *Vance* v. *King*, 21 U. C. R. 187.

——— *Concurrence of Freeholders—Money By-law.*]—It appeared from the affidavit of the secretary and treasurer of a school section, that at two regularly called meetings of the duly qualified electors of the school section, at which a chairman was appointed, proposals to purchase a site, build a school house, and borrow money therefor, were put by way of motion and carried, upon which a by-law was passed, authorizing the issue of debentures to raise money for the above purposes:—Held, that under 42 Vict. c. 34, s. 29, s-s. 3 (O.), this was a sufficient submission to and approval of the proposal by the duly qualified school electors of the section; and a rule to quash the by-law was discharged. *In re McCormick and Township of Colchester South*, 46 U. C. R. 65.

——— *Dissent of Trustees.*]—A dissent by school trustees from a decision of the ratepayers as to a site for the school, should be intimated promptly, and if not announced till after the expiration of the current year, it is too late. *Coupland* v. *Nottawasaga School Trustees*, 15 Gr. 339.

Reservation—*Plan—Improvements.*] —A reservation for school purposes is of such a character as to be the subject of dedication. The owners of land in 1856 caused the same to be surveyed and laid off into village lots,

and on the plan thereof, which was duly registered, marked a portion as "reserve for school ground." An auction sale of lots took place during the same month with reference to the lots not fronting on the reserve, when lots to the value of $20,000 were sold; and after the auction lots were sold privately, according to the plan. The school trustees did not take possession of the school reserve. Subsequently conveyances were executed to S. of all the undisposed of portion of the town as surveyed. S. in January, 1863, caused a new plan to be prepared and registered, in which the school reserve was laid out into village lots, some of which had meanwhile been bought by the defendant from an intermediate owner with notice of the original plan and the reservation for school purposes:—Held, on a bill filed in 1876, that the original plan was binding; that the conveyance to S. did not give him the ownership of the soil of the streets or reserves for public purposes; and that the defendant was not entitled under 36 Vict. c. 22 (O.) to be paid for any improvements he had made upon the lots forming part of the school reserve. *Corporation of Wyoming* v. *Bell*, 24 Gr. 564.

See In re Oakwood High School Board and Township of Mariposa, 16 A. R. 87.

(b) *Change of Site.*

Concurrence of Ratepayers—*Meeting—Arbitration.*]—The trustees called a meeting in January, 1857, for the selection of a new site, which they considered desirable. This meeting decided against a change, and the trustees called a second meeting to reconsider the question, at which the same decision was come to. Arbitrators were then appointed, and their award was to the same effect. The trustees then called a third meeting to reconsider the question, and the change being thereat approved of, the trustees acted upon this decision by obtaining a new site and issuing their warrant to raise money for building the school house there:—Held, that the proceedings were invalid, and that a seizure under the warrant could not be sustained, for that the award was final, at all events for that year, and the third meeting had no power to act. Semble, that the second meeting was irregular, as the arbitrators should have been appointed at the first. *Williams* v. *Plympton School Trustees*, 7 C. P. 559.

——— *Meeting—Arbitration—Joint Board of Education—Grammar School.*]—Where a board of school trustees passed a resolution professing to adopt a permanent site for the school, and the resolution was confirmed at a special meeting of the ratepayers duly called, these proceedings were held not to prevent a change of site in a subsequent year. Where school trustees selected a new site for the school house, and at a special meeting of the ratepayers, duly called, those present rejected the site so selected and chose another, but neither party named an arbitrator:—Held, that an arbitrator might be appointed by the ratepayers at a subsequent meeting. The power of a county council to change the site of a grammar school is not lost by the union of the grammar school with a common school; though if the new site is not also adopted by the means provided by law for the case of a common school, the change may render necessary the separation of the schools. Where the joint board of a grammar and common school, after the site for the grammar school had been changed by the county council, wrongfully expended school money granted for a grammar school building; and a bill was filed against the trustees to restrain further expenditure, and to make them refund what had been expended, the defendants were ordered to pay the costs, but were allowed time to ascertain if all parties concerned would, under the special circumstances, adopt again the old site. It is contrary to the rule of the court, in dealing with persons who have not acted properly, to punish them more severely than justice to others renders necessary; and therefore, where school trustees wrongfully expended money in building on a site which had been changed by competent authority, relief was only granted to a ratepayer who complained of the act, subject to equitable terms and conditions. *Malcolm* v. *Malcolm*, 15 Gr. 13.

——— *Meeting — Difference of Opinion—Arbitration.*]—Two of the trustees of a school section, wishing to change the school site, called a meeting of the freeholders and householders, who rejected the proposal. The two trustees thereupon chose an arbitrator, assuming to act under s. 30 of C. S. U. C. c. 64, but none was chosen by the freeholders and householders, and under the advice of the deputy superintendent the trustees called another meeting, at which a motion to appoint such arbitrator was rejected. The trustees' arbitrator and the local superintendent thereupon made an award changing the site. A special meeting was then called to consider how the money should be raised to carry out the change, at which the conduct of the trustees and the change were strongly disapproved of. The two trustees thereupon petitioned the township council, stating that the ratepayers were desirous of purchasing a new site, and asking for a loan of $400, which was granted:—Semble, per Richards, C.J., that, under s. 30, the difference of opinion as to the change of site authorized a reference to arbitration; but that the refusal of the freeholders and householders to name an arbitrator, did not enable the other two arbitrators to proceed, the proper course being to compel the appointment by mandamus. Per A. Wilson, J., that the difference of opinion must be as to the position of the new site, after a change has been agreed to by the ratepayers, not as to whether there shall be a change; and the arbitration therefore was unauthorized. *Township of Toronto* v. *McBride*, 29 U. C. R. 13.

——— *Meeting—Majority.*]—A new rural school section being formed, it became necessary for the then trustees to provide a school site, &c. A public meeting of the ratepayers was called pursuant to 48 Vict. c. 49, s. 64 (O.), which nearly all the ratepayers attended, when the T. site was chosen by a majority vote of both the ratepayers and trustees as against the J. C. site. A complaint against this result was lodged with the school inspector under s. 32 of the statute, which led to his making attempts to have an amicable adjustment of the difficulty, the outcome of which was that two of the trustees gave notice of a subsequent meeting for the purpose of changing and selecting a school site, at which meeting a unanimous vote was had in favour of a third site, called the C. site. In an action by the other trustee and some ratepayers to have it declared that the last meeting was illegal, and to restrain building on the

C. site, in which it appeared that fifty out of the sixty-seven ratepayers approved of the latter site:—Held, that the necessary prerequisite, under s. 64 of the statute, of taking the opinion of the ratepayers, had been complied with, and the selection made was the T. site; that no change of a school site should be made without the consent of the majority of ratepayers present at a special meeting called for that purpose, and that under the circumstances of this case the school site had been ascertained and fixed by the first meeting, but it was competent for the second meeting to change the site with the consent of the necessary majority. *Wallace* v. *Lobo School Trustees*, 11 O. R. 648.

——— *Meeting—Resolution.*] — Where it appeared that at a meeting of ratepayers, called, pursuant to s. 64 of R. S. O. 1887 c. 225, to provide for a change of the school site, a resolution for that purpose, and also an amendment thereto, were submitted, both of which, in addition to the main question as to change of site, embraced matters collateral thereto, the former of which was carried:—Held, that the resolution was invalid, and that certain deeds of conveyance, executed pursuant thereto, must be set aside. It is essential that the vital matter voted on should be so laid before the meeting that a fair vote thereon can be given, unequivocally indicating the mind of the majority on the particular point. Held, however, that, as the plaintiffs were present at the meeting, and it was their business to have then objected to the way in which the question was being submitted, and complained to the inspector under s. 32 of the said Act, they should not have their costs of action. *McGuigan* v. *Southwold School Trustees*, 17 O. R. 428.

Necessity for By-law—*Specific Performance.*]—Held, affirming the decree in 26 Gr. 590, that the board of education formed by the union of high school and public school trustees, had power to change the site for a school, and purchase another without a by-law or resolution of the county council, or the approval of the lieutenant-governor in council, and that the plaintiff was entitled to specific performance of an agreement by the board to purchase land for such purpose. *Moffatt* v. *Carleton Place Board of Education*, 5 A. R. 197.

See Picton School Trustees v. *Cameron*, 2 S. C. R. 690, *post* 8 (b).

(c) *Other Cases.*

By-law—*Creating Debt.*]—The by-law in this case passed to raise money for a school house, was held bad, for omitting to comply with the requisites, under 14 & 15 Vict. c. 109, s. 4, of all by-laws creating a debt or contracting a loan. *Re Hart and Townships of Vespra and Sunnidale*, 16 U. C. R. 32.

Contract for Erection of School House—*Seal.*]—The trustees of a school section, being a corporation under 13 & 14 Vict. c. 58:—Held, not liable to pay for a school house erected for and accepted by them, not having contracted under seal. *Marshall* v. *Kitley School Trustees*, 4 C. P. 373.

——— *Ultra Vires.*]—The school board of a city, town, or incorporated village has no authority to contract for the building of a school house, until the necessary funds have been provided, under 54 Vict. c. 55, s. 116 (O.), or for one involving the expenditure of any greater sum than has been so provided. The plaintiff, a freeholder, ratepayer, and elector of the town of Fort William, and a supporter of the public schools therein, suing on behalf of himself and all other ratepayers, was held entitled to an injunction to restrain the proceeding with the erection of a school house, in a case where the contract price exceeded the amount provided under s. 116, and to an order compelling the repayment to the school corporation of certain sums paid by individual members of the school board to the contractors for a portion of the work already performed. *Smith* v. *Fort William School Board*, 24 O. R. 366.

Sale of Site under Execution.]—Held, that land conveyed to school trustees for a school could not be sold under execution against them for money due for building the school house. *Scott* v. *Burgess and Bathurst School Trustees*, 19 U. C. R. 28.

See Attorney-General for Nova Scotia v. *Axford*, 13 S. C. R. 294.

4. *School Rates.*

(a) *Collection of.*

Action by Collector.]—A township collector may sue for the amount of an assessment for common schools, under 4 & 5 Vict. c. 18, in a division court. *McGregor* v. *White*, 1 U. C. R. 15.

Action by Trustees.]—The trustees proceeded to collect the rate by action instead of by warrant, as provided by 13 & 14 Vict. c. 48, s. 12, s.-ss. 2, 7, 8:—Semble, that an appeal from a nonsuit in such action might have been dismissed on this ground, but the objection was waived. *In re Moore School Trustees* v. *McRae*, 12 U. C. R. 525.

Action on Collector's Bond—*Municipal Treasurer.*]—Held, that all moneys collected for the erection of school houses under any by-law of the district municipal council were payable, not to the superintendent, but to the district treasurer, who alone was authorized to take security from collectors for the payment of moneys collected for public purposes; and that the plaintiff, as treasurer, was entitled to recover on the bond given by the collector and his sureties. *Brown* v. *Styles*, 2 C. P. 346.

Distress—*Avowry in Replevin—By-law.*]—Held, that a party avowing for distress in the levying of a school rate, the by-law for sanctioning such levy requiring to be passed upon the request or with the consent of certain persons, must shew such request to have been made, or such concurrence or consent obtained. Held, also, that upon such avowry the avowant must set forth the conditions precedent required by law to be complied with before the passing of a by-law to levy a rate for school purposes. *Haacke* v. *Marr*, 8 C. P. 441.

See, also, *Free* v. *McHugh*, 24 C. P. 13.

——— *Collector—Time.*]—The time for levying a school tax in the city of Kingston,

imposed by by-law in December, 1855, was extended by resolutions of the city council, under 18 Vict. c. 21, s. 3, until the 1st August, 1856, and again on the 22nd December, 1856, to the 1st March, 1857:—Held, that the collector, who was the same person for both years, might distrain between the 1st August and the 22nd December, 1856, although no resolution extending the time was then in force. *Newberry* v. *Stephens*, 16 U. C. R. 65. Followed in *McBride* v. *Gardham*, 8 C. P. 296.

——— *Previous Years' Taxes.*]—Held, that a collector of school taxes might in 1861 collect by distress the taxes for 1859 and 1860, not having made his final return of such taxes as in arrear, and being still collector; and semble, that in this case the plaintiff, who complained of the seizure, having led to it by his own conduct, the proceeding should in the division court have been upheld at all events. *In re McLean* v. *Farrell*, 21 U. C. R. 441.

——— *Promissory Note—Satisfaction—Re-seizure.*]—Replevin for horses. Plea, justifying the taking under a warrant for school taxes, and alleging that the horses were delivered by the collector to defendant, an innkeeper, to take care of until the sale. Replication, setting out facts to shew the rate illegal, and averring that the plaintiff after seizure of the goods, at the request of the collector and trustees, gave his note for a sum named (not saying that it was the amount due by him), payable to bearer, which was accepted in satisfaction of the taxes; that the collector released the property seized, and said note is still outstanding, and the plaintiff liable upon it, and that the seizure in the plea mentioned was made afterwards:—Held, on demurrer, replication bad, for (1) the collector, acting under a warrant legal on the face of it, would not be liable in trespass or trover, and therefore not in this action, nor the defendant for taking the horses from him to keep; and (2), even if the note had been alleged to be for a sufficient amount to pay the rate, yet the improper acceptance of it by the trustees would not prevent them from afterwards distraining. *Spry* v. *McKenzie*, 18 U. C. R. 161. See the comments on this case in *Coleman* v. *Kerr*, 27 U. C. R. 5, and in *Harling* v. *Mayville*, 21 C. P. 499.

——— *Property of Non-Resident.*]—School trustees, and collectors under their warrants, have no power, either under C. S. U. C. c. 64, or 23 Vict. c. 49, to levy on the property of a non-resident of the school section for rates assessed in respect of property within that section. *In re Chapman* v. *Thrasher*, 20 C. P. 259.

——— *Replevin—Notice of Action—Roll—Demand.*]—Replevin may be brought upon a distress for school rates, and notice of action is not necessary. Where several devisees and executors were rated to a school rate in respect of the property of their testator, as "John Applegarth and brothers," which entry appeared to have been made at the instance of some of the plaintiffs, but two of them only had slept on the premises occasionally, although such was not their usual place of residence, and they had received the usual notice of assessment in that form without appealing, and the same two had paid taxes on an assessment on the township roll in their individual names:—Held, (1) that the facts afforded sufficient evidence to shew that the plaintiffs were "inhabitants" for the purposes of the rate. (2) That the parties were sufficiently named on the roll to render the rate lawful. (3) That a demand made by the collector on the plaintiff "John A." named in the roll, was sufficient to bind all the plaintiffs. *Applegarth* v. *Graham*, 7 C. P. 171.

——— *Warrant—Collector.*]—Under 13 & 14 Vict. c. 48, school trustees can only give a warrant to collect school rates within the limits of the section for which they are appointed. Semble, that such warrant is sufficient if signed by two of the trustees, and that it need not be under their corporate seal. In making cognizance under such a warrant, it is sufficient to state that the plaintiff was duly assessed, and that the collector (the cognizor) was duly appointed; it is not necessary to state that the rate was decided upon at a meeting, as required by the statute, or how the appointment was made. *Gillies* v. *Wood*, 13 U. C. R. 357.

Excessive Amount Collected—*Right to.*]—In each of the years 1881 to 1886, inclusive, the defendants levied a rate to raise the sums required by the plaintiffs for school purposes. The rate was imposed in good faith as being the nearest which could be struck in order to insure the collection of the sum demanded with the necessary expenses, but in each year a small surplus was produced by it, which the council refused to pay over to the trustees, contending that they were entitled to retain and apply it towards payment of any sum which might be demanded by the trustees in a future year, as in the case of an excess collected on account of a special municipal tax for a local object under s. 365 of the Municipal Act:—Held, that this section did not apply, and that the money having been collected for school purposes, the council was required by the statute to pay it over to the trustees in each year. It was not intended by the Consolidated Public Schools Act of 1885, 48 Vict. c. 46, R. S. O. 1887 c. 225, to alter the law in this respect. *Nottawasaga School Trustees* v. *Township of Nottawasaga*, 15 A. R. 310.

See Healey v. *Carey*, 13 C. L. J. 91.

(b) *Imposition of—For what Purposes.*

Building School House.]—Under 13 & 14 Vict. c. 48, school trustees are authorized to levy a rate for the erection of a school house in their section. *In re Kelly* v. *Hedges*, 12 U. C. R. 531.

——— *Concurrence of Ratepayers—Acquiescence—By-law.*]—The township council, by resolution, agreed to lend to the school trustees, out of the clergy reserve fund, a sufficient sum to build a school house, taking as security their debentures. This arrangement was made by the trustees without any reference to the ratepayers, but at the next annual school meeting, at which the applicant was present, the matter was discussed, and the contract and plans for the building examined. The council subsequently, on the requisition of the trustees, passed a by-law to raise a sum for school purposes, which was required to pay the interest of these debentures and redeem one of them. The applicant

moved to quash this by-law, objecting that the loan effected by the trustees without the consent of the ratepayers, was illegal; but it appeared that the school house had been finished and occupied, many of the ratepayers swore that they were satisfied with what had been done, and the affidavits were contradictory as to how far the applicant had acquiesced in the proceedings. The by-law not being illegal on the face of it, the court, under these circumstances, refused to interfere. *In re Taber and Township of Scarborough*, 20 U. C. R. 549.

Costs—*Separate School Supporters.*]—A rate may be levied to reimburse school trustees for the cost of defending a groundless action brought against them. When such charge was incurred before the establishment of a separate Roman Catholic school:—Held, that the supporters of that school were not exempt from the rate. *In re Tiernan and Township of Nepean*, 15 U. C. R. 87. See, also, *In re Johnson and Harwich School Trustees*, 30 U. C. R. 264; *Scott* v. *Burgess and Bathurst School Trustees*, 21 C. P. 398.

——— *Travelling Expenses.*]—School trustees cannot impose a rate to reimburse themselves for costs incurred in defending unsuccessfully a suit brought against them for levying an unauthorized rate, or for travelling expenses incurred in order to consult with the superintendent. *Stark* v. *Montague*, 14 U. C. R. 473.

Salary of Teacher.]—No rate can legally be imposed for the salary of an unqualified teacher. *Stark* v. *Montague*, 14 U. C. R. 473.

The board of school trustees of a town may levy and collect a rate for the payment of school teachers' salaries and expenses. *Munson* v. *Town of Collingwood*, 9 C. P. 497.

See Re Doherty and City of Toronto, 25 U. C. R. 409.

(c) *Imposition of—How Effected.*

By-law—*Appropriation of General Funds—Ultra Vires.*]—A township council passed two by-laws, one in 1855, enacting that for the purpose of remedying the unequal taxation for the support of common schools, there should annually be appropriated out of the general funds of the township so much as to the municipality should seem reasonable, within a specified sum; and that the treasurer should apportion such money, and payment should be made to each section as directed. The other by-law was passed in 1858, in accordance with a previous resolution of the same year, that £250 should be apportioned from the township funds that year, "in accordance with the by-law provided in such case," and it enacted that certain sums should be assessed and collected, among which was "vote in aid of education, $1,000:"—Held, that both by-laws were bad, the first, as substituting a different system for the support of common schools from that laid down by the School Acts, which the municipality had no power to do; and the second as carrying out that system. *In re Dunlop and Township of Douro*, 18 U. C. R. 227.

——— *Certainty—Property of Non-residents.*]—Where the municipality of a township, intending to act under 13 & 14 Vict. c. 48, for common school purposes, declared a rate upon the resident inhabitants only of a school section:—Held, that, under that Act as well as the Upper Canada Assessment and Municipal Acts, the by-law was invalid, because the rate should be levied on the taxable property within the section, whether of residents or non-residents. Held, also, that in such case the court has no discretion, but must quash the by-law with costs. Quære, whether in the present case the rate and assessment to be levied were stated in the by-law with sufficient certainty. *In re De La Haye* v. *Township of Gore of Toronto*, 2 C. P. 317.

——— *Discretion — School Meeting—Assessed Values—List of Persons Assessed—Property Assessed — Proviso.*] — A by-law passed by a township, authorizing the levy of a rate to realize £100 for school purposes, having been quashed, the municipality then, without a second meeting having been called, passed another by-law for the same purpose, which was also moved against on several grounds:—Held, (1) that the discretion to appropriate the sum required rested as much with the council as with the school meeting or trustees. (2) That the rate was not declared on the property assessed in 1852 (the preceding financial year,) but only determined by reference to the assessed value of the taxable property in that year. (3) That the rate not being complained of as excessive, its being calculated to realize more than the precise sum of £100 did not render the by-law void. (4) That the meeting was not indispensable. (5) That the duty imposed upon the clerk of the municipality to furnish a list to the secretary of the school trustees of the persons assessed in the school section was not unreasonable, or inconsistent with the statutes. (6) That the rate was properly assessed upon the whole ratable property of the school section. (7) That the proviso of the by-law sanctioning the receipts pro tanto from those who had paid under the invalid by-law did not render the second by-law void. *In re De La Haye and Township of Gore of Toronto*, 3 C. P. 23.

——— *Inequality—Debentures.*]—By-laws were passed by a township council granting to the trustees of school sections authority to issue debentures for the erection of a school house, and creating a rate not payable within the year, but without settling an equal special rate in each year, &c., as required by s. 243 of the Municipal Act of 1873:—Held, invalid. The by-laws authorized the trustees of the school section, instead of the reeve of the township, to sign the debentures:—Held, a fatal objection, notwithstanding that in fact the debentures had been executed by the reeve. *In re McIntyre and Township of Elderslie*, 27 C. P. 58.

——— *Repayment of Loan—Levy of Portion.*]—A township corporation passed a by-law, reciting that by s. 35 of C. S. U. C. c. 64, they might collect by special rate in school sections that had become indebted to them by loan, and that a certain section had borrowed of the municipality $400, due at different days; and enacting that there should be levied in the section by the collector of the municipality $262, to meet a certain portion of said loan. The by-law was quashed, for, among other objections, the statute referred to gave no such authority, and, if it did, it required

provision to be made for levying the whole sum borrowed. The money was said to have been lent out of the clergy reserve funds of the township, and 27 Vict. c. 19 was referred to as authorizing it, but that statute was passed after the loan. *In re Doherty and Township of Toronto*, 25 U. C. R. 409.

Deficiency — *Appropriation of General Funds.*]—The local municipality must make up and supply out of their general fund any deficiency in the school rate of any township, upon notice given them at the end of the current year by the collector of school rates; and such notice need not be under the seal of the trustees. *Arthur School Trustees* v. *Townships of Arthur and Luther*, 9 C. P. 532.

Existing Assessment Roll.] — School trustees may at any time impose and levy a rate for school purposes; they are not bound to wait until a copy of the revised assessment roll for the particular year has been transmitted to the clerk of the municipality, but may and can only use the existing revised assessment roll. *In re Hogg* v. *Rogers*, 15 C. P. 417.

Inequality — *City Wards.*]—An assessment for school purposes cannot be levied by an unequal rate in different wards in a city. *In re Scott and City of Ottawa*, 13 U. C. R. 346.

——— *Taxable Property.*]—In replevin for plaintiff's goods, defendant made cognizance, justifying as bailiff of a collector of school rates under a warrant from him. Plaintiff pleaded that the rate was bad, as not being levied according to the valuation of the whole taxable property in the school section as expressed in the assessor's and collector's roll, pursuant to the statute, but that it was levied wrongfully upon only three-fourth parts of such taxable property:—Held, plea good, for primâ facie the trustees could levy a rate only on the whole taxable property. *Harling* v. *Mayville*, 21 C. P. 499.

Land in Different Municipalities.]—The proviso in 16 Vict. c. 185, s. 16, as to assessing property in two or more sections, applies only to the case of an undivided property extending into more than one section of the same municipality, not where the land lies in different municipalities. *In re Hallowell and Storm School Trustees*, 14 U. C. R. 541.

Resolution of Trustees — *Seal.*] — A board of school trustees in a town passed a resolution stating the sum required for school purposes, of which their treasurer gave notice to the town clerk, orally or in writing, but not under the corporate seal. The corporation, however, made no objection, and acted upon it as an estimate:—Held, that, though it would have been insufficient on application to compel the town to levy the money, yet an individual ratepayer could not object to the rate on that ground. *Coleman* v. *Kerr*, 27 U. C. R. 5.

Resolution—*School Meeting—Trustees—Property of Non-residents—Executor.*]—A resolution of the freeholders and householders of a school section, passed at their annual meeting, that the trustees tax the property in such section to pay the teacher's salary, followed by a resolution of the trustees of such section, directing a rate to be levied on the ratable property in said section to raise the sum required, and the preparation of rate-bills, &c., is sufficient to render a non-resident having real estate within such section liable for the sum rated by the trustees, according to the assessed value of his real property. And being so liable, defendant, as his executor, and representing his estate, was held liable as the testator would have been. *Dunwich School Trustees* v. *McBaeth*, 4 C. P. 228.

Voluntary Subscription.] — The freeholders and householders of a school section cannot substitute a voluntary subscription among themselves for the expenses of the school, instead of the provisions made by law; and a resolution to have such subscription, and that the trustees neglected to collect it, is therefore no answer to an avowry for a rate levied by them in the usual way. *McMillan* v. *Rankin*, 19 U. C. R. 356.

——— *Parents of Pupils.*] — A general school meeting having passed a resolution, "that the expenses of the school section be paid by voluntary subscription, and the balance to be raised from a tax to be levied upon the parents and guardians of those sending children to the school," the school trustees, after the failure of the voluntary subscription, levied a general rate, upon which this replevin arose—the plaintiff contending that he was not liable, as not being a parent or guardian of a child attending the school:—Held, that the trustees had no authority to tax the parents or guardians of those sending children, or to alter or annul the resolution, and that C. S. U. C. c. 64, s. 27, s.-s. 10, authorized the levy as made. *Craig* v. *Rankin*, 10 C. P. 186.

See In re Tiernan and Township of Nepean, 15 U. C. R. 87 *ante* (b); *In re Chapman* v. *Thrasher*, 20 C. P. 259, *ante* (a); *Free* v. *McHugh*, 24 C. P. 13.

(d) *Mandamus to Municipal Corporations to Levy.*

Contract—*Part Payment—Default of Officer.*]—K. was employed in 1848 by the trustees of school section 4 in the township of Sandwich, acting under a by-law of the district council, to furnish materials for and to erect a school house in that section. Part of the money was paid to him on account, and for the balance he recovered judgment against the trustees. Finding no property on which to levy, he applied in 1850 to the municipal council, who passed a by-law imposing a rate to satisfy his judgment; but this by-law was repealed before the money had been collected. It appeared that, under the original by-law of the district council, the rate for erecting the school house had been levied, and the part not paid over to K. had been handed to the secretary-treasurer of the trustees, who absconded, and that K. was in possession of the school house, and retained it for the money due him:—Held, that the township council were not liable; and a mandamus to them to pass a by-law for raising money to satisfy the claim, was refused. Semble, also, that if the applicant were entitled to recover, an action would lie against the council, and therefore no mandamus should go. *Kennedy* v. *Township of Sandwich*, 9 U. C. R. 326.

County Rates — *Contribution from Towns.*]—Held, that the town of Dartmouth

is not liable to contribute to the assessment for the support of schools in the municipality of the county of Halifax. Held, also, that, if so liable, a writ of mandamus could not issue to enforce the payment of such contribution, as the amount would be uncertain and difficult to be ascertained. Held, also, that the ratepayers of 1886 could not be assessed for school rates leviable in previous years. *Dartmouth* v. *The Queen*, 14 S. C. R. 45. See *S. C.*, 9 S. C. R. 509.

Demand — *Insufficient Particulars — Absence of Date—Costs.*] — The trustees of a township school section sent to one of the councillors a notice signed by them, addressed to the reeve and councillors of the township, as follows: "Gentlemen,—You will please levy the sum of $460 on the ratable property of school section No. 6, South Fredericksburgh, for the school purposes of said school section." This notice had no date. It was handed to one of the councillors, and the affidavits were contradictory as to its having been formally presented to the council, but the trustees were informed that the council would not act upon it, as it had no date:—Held, that such an application should be made through the township clerk; that the demand for a lump sum, simply for the school purposes of the section, is insufficient, for the corporation have a right to know particularly the purposes for which the money is required. Semble, that the absence of a date would alone have been a fatal objection. A mandamus to compel the corporation to levy the amount was therefore refused, but, as the affidavits filed on shewing cause were unnecessarily long, the corporation were allowed only one-half their costs. *In re South Fredericksburgh School Trustees and Township of South Fredericksburgh*, 37 U. C. R. 534.

——— *Powers of Trustees.*] — Mandamus refused, because the demand and refusal of a certain sum was not sufficiently shewn. Quære, however, whether a mandamus would lie, the trustees having power themselves to raise the money. *In re Collingwood School Trustees and Town of Collingwood*, 17 U. C. R. 133.

——— *Resolution of Trustees.*]—The communication by a board of trustees to the town council of a resolution of the board, that the chairman do authorize the secretary of the board to notify the town council to furnish the board with a sum of money immediately to purchase a site and erect a school house, a copy of which resolution was sent to the town council, is not such a compliance with 13 & 14 Vict. c. 48, as to render the council liable to be compelled to pay the amount by mandamus. *Port Hope School Trustees* v. *Town of Port Hope*, 4 C. P. 418.

Estimate — *Part Payment—Estoppel.*]—Where an estimate of the sum required for school purposes for a certain year was sent to the town council by the trustees, and the council recognized such estimate by paying a portion, and submitted to the court their reasons for refusing to pay the balance:—Held, that they were precluded from objecting that the estimate was not laid before them as by law required. *Brockville School Trustees* v. *Town of Brockville*, 9 U. C. R. 302.

——— *Resolution of Trustees — Insufficiency—By-law.*]—The school trustees of a town applied for a mandamus to the corporation to pay over all moneys collected for the erection of school buildings under a by-law of the 21st August, and to collect the sum remaining; or to provide for the trustees $1,000. It appeared that the trustees had passed a resolution to apply to the corporation for $3,000 for the erection of school buildings, upon which a by-law was passed to raise that sum. This by-law was repealed and another passed to raise the necessary sum, but it was defective:—Held, that, though the resolution of the trustees was not a sufficient estimate, the objection was cured by the corporation having passed a by-law in pursuance of it; but that, as that by-law was invalid, the court could not enforce any thing arising under it by mandamus. Held, also, that the estimate being insufficient a mandamus could not be granted to provide the sum mentioned in it, as asked by the second alternative of the application. *Re Sandwich School Trustees and Town of Sandwich*, 23 U. C. R. 639.

——— *Resolution of Trustees — Insufficiency—Demand.*]—On application for a mandamus to compel a municipal corporation to provide $3,500 for a board of school trustees, it appeared that on the 15th March the trustees wrote to the corporation, informing them that they had passed a resolution on the 12th instant, directing their chairman and secretary "to wait on the council at its next meeting, and submit an estimate for $3,500, for the purpose of building a brick school house, the same to be procured by the 10th April," and requesting the council to provide said amount in accordance with the estimate. On the same day, after receiving the letter, the corporation notified the trustees that they were unable to comply with the demand; and on the 13th April an order upon the treasurer of the council by the chairman of the board of school trustees for $3,500 was presented, and payment refused:—Held, that the statute, which requires the trustees to prepare and lay before the council an estimate, had not been complied with; and that the demand for payment within three weeks, without shewing that the corporation had funds in hand available for the purpose, was not reasonable. The mandamus therefore was refused. *In re Mount Forest School Trustees and Village of Mount Forest*, 29 U. C. R. 422.

——— *Year's Expenses.*] — A mandamus was granted to compel a city council to levy the sum required for school purposes for the year, according to the estimate furnished to them by the school trustees. *Toronto School Trustees* v. *City of Toronto*, 20 U. C. R. 302.

Manner of Providing Money—*Mandamus Nisi—Estimate.*]—C. S. U. C. c. 64, s. 79, s.-s. 11, which requires municipal corporations to provide the sums required by school trustees "in the manner desired" by them, authorizes the trustees to direct at what times the money shall be paid, but not how it is to be procured. The court, therefore, refused a mandamus to levy a rate, but granted it to provide the money as desired. Where it appeared on affidavit that steps had been taken to provide the sum required, a mandamus nisi was nevertheless granted. The court declined, on the motion for the writ, to consider objections to certain items in the trustees' estimate, as these could form no reason for withholding the whole. *In re Toronto School Trustees and City of Toronto*, 23 U. C. R. 203.

Other Remedy — *Action.*]—Upon an application by school trustees for a mandamus to a corporation, the affidavits being contradictory, and this court having decided in Arthur School Trustees v. Corporation of Arthur, 9 C. P. 532, that an action for a balance due in such a case would lie, the mandamus was refused. *Elzevir School Trustees* v. *Township of Elzevir*, 12 C. P. 548.

Purchase of Site—*Application for Funds—Order on Treasurer.*]—The trustees of a school section in an incorporated village applied to the village municipality to levy a sum required for a school site which they had contracted to purchase. The municipality refused. It did not appear that the trustees had appointed a secretary-treasurer, if empowered to do so by 16 Vict. c. 185, ss. 1, 6: —Held, that the trustees should first have given an order to the person from whom they had agreed to purchase, upon the treasurer of the municipality, and on this ground a mandamus was refused. Quære, however, whether a mandamus would have gone, independently of this objection. *In re Galt School Trustees and Village of Galt*, 13 U. C. R. 511.

(e) *Mandamus to School Trustees to Levy.*

Judgment against Trustees—*Disobedience to Writ—Attachment—Practice.*]—A mandamus nisi having been issued to school trustees to levy the amount of a judgment obtained against them, no return was made, and a rule nisi for an attachment issued. In answer to this rule one trustee swore that he had always been and still was desirous to obey the writ, and had repeatedly asked the others to join him in levying the rate, but that they had refused. Another swore that owing to ill-health, with the consent of his co-trustees and the local superintendent, he had resigned his office before the writ was granted. The court, under these circumstances, discharged the rule nisi as against these two, on payment of costs of the application, and granted an attachment against the other trustee, who had taken no notice either of the mandamus or rule. *Regina* v. *Tyendinaga School Trustees*, 20 U. C. R. 528.

No attachment will lie for not making a return to a peremptory mandamus; it should be for not obeying the writ. The rule nisi called upon the trustees of school section 27 in the township of Tyendinaga to shew cause why an attachment should not issue against them. On an affidavit of service of this rule on A., B., and C., stating them to be trustees of that section, a rule absolute was granted, following it in form, and thereupon an attachment issued against A., B., and C.:—Held, bad, as not warranted by the rule. *S. C.*, 3 P. R. 43.

——— *Inquiry into — Debt of Previous Year.*]—In 1862 the trustees of a school section issued their warrant to J. to levy a rate. One S., who was upon the roll, claimed exemption as a supporter of a Roman Catholic separate school, and in 1863 recovered against J., in replevin for his goods which J. had seized. J., in 1866, sued the trustees of that year for indemnity, and recovered judgment, the action being defended. The trustees issued their warrant to levy a rate, including this judgment, and about $100 was levied and paid over to J., but many of the ratepayers refused to pay the proportion imposed for J.'s claim. J. then, in 1869, having had a fi. fa. on his judgment returned "no goods," applied for a mandamus to the trustees to levy the balance due to him, none of these trustees having been trustees in 1866. The application was refused, on the ground that the court might inquire into the grounds of the judgment; and that the applicant was bound but had failed to shew clearly that it was recovered in a justifiable litigation. Quære, however, whether apart from this the application could be granted, for the effect would be to levy a rate on a different body to pay the debt of a previous year. *In re Johnson and Harwich School Trustees*, 30 U. C. R. 264.

——— *Merits—Alterations in Section.*]—The plaintiff recovered a judgment in March, 1858, against the school trustees for building a school house for the section, and made several unsuccessful attempts to obtain payment of it from the trustees and their successors. The trustees always refused to levy a rate, or to pay the judgment. To an application for a mandamus to compel the trustees to levy a rate for payment of the judgment:—Held, no answer that since the judgment two alterations had been made in the limits of the section, and that many changes had taken place among the ratepayers originally liable; or that the merits of the claim upon which the judgment was founded were capable of being impeached. The last case distinguished. *Scott* v. *Burgess and Bathurst School Trustees*, 21 C. P. 398.

Teacher's Salary.]—The court refused a rule nisi for a mandamus to the trustees to levy a rate to pay the applicant the balance of his salary as teacher, for which he had recovered judgment in a division court against former trustees, it not appearing when, for how long, and by whom the said teacher was employed. *O'Donahoe* v. *Thorah School Trustees*, 5 C. P. 297.

The court refused a mandamus to compel school trustees to pay a sum awarded to a teacher for arrears of salary observing that there were other remedies open. Upon the facts, also, the legality of the award appeared doubtful. *Re O'Leary and Blandford School Trustees*, 19 U. C. R. 556.

The board of school trustees of a town may be compelled by mandamus to raise the money for teachers' salaries. *Munson* v. *Town of Collingwood*, 9 C. P. 497.

(f) *Other Cases.*

By-law—*Appropriation of School Funds.*]—A township by-law enacted that the interest arising on the invested funds for schools in a township should be apportioned on and according to the numbers of days the schools had been open or taught in each half year. It was objected that the by-law was one made under 37 Vict. c. 28, s. 48, s.-s. 4 (O.), which did not authorize this method of apportionment. The court refused to quash the by-law, as the effect of so doing would be to place the apportionment as provided by earlier by-laws and resolution, and in effect produce no change; and, moreover, the municipality, under s. 153, could by another mode do what

the by-law purported to do. Quære, whether the money in question, having been specially appropriated by by-laws under 20 Vict. c. 71, was within s. 48, s.-s. 4, above referred to. The question raised being doubtful, the rule was discharged without costs. *In re Storms and Township of Ernestown*, 39 U. C. R. 353.

See In re Gill and Jackson, 14 U. C. R. 119.

——— *Requisites.*]—By-law issued to raise money for a school house, held bad, for non-compliance with the requisites under 14 & 15 Vict. c. 109, s. 4, of all by-laws creating a debt or contracting a loan. *Hart* v. *Townships of Vespra and Sunnidale*, 16 U. C. R. 32. See also *Re McIntyre and Township of Elderslie*, 27 C. P. 58.

Common School Fund—*Share of Separate School—Mandamus to Pay over.*]—See *Belleville Roman Catholic School Trustees* v. *Belleville School Trustees*, 10 U. C. R. 469.

Exemption from Payment of Rates—*Separate School Supporters.*]—See *In re Roman Catholic Separate Schools*, 18 O. R. 606.

Limitation of Annual Rate — *Debentures for School House.*]—The annual amount required to pay for debentures issued under a by-law passed for the purchase of a school site and the erection of a school house thereon, comes within the term "school rates," and is excluded from the two cents to which, by s. 357 of the Consolidated Municipal Act, 1892, 55 Vict. c. 42 (O.), the annual rate permitted to be levied by municipalities is limited. *Foster* v. *Village of Hintonburg*, 28 O. R. 221.

Payment to Wrong School Section—*Finality of Roll.*]—Plaintiffs complained that for the years 1883 and 1887 certain lots which formed part of their section had not been so assessed, but had been assessed as part of school section 23, and the taxes thereon levied and paid over to section 23, and that plaintiffs were entitled to be paid their taxes either by the township or by section 23. In each of these years, so far as regards this matter, the rolls were finally passed by the court of revision and certified by the clerk, &c.:—Held, that the plaintiffs could not now maintain such claim, for they were bound by s. 57 of R. S. O. 1877 c. 180, under which the rolls as finally passed by the court of revision, &c., were valid and binding on "all parties concerned," the plaintiffs coming within the designation, but apparently they were not entitled to the notice provided for by s. 41 of that Act. *Burford School Trustees* v. *Township of Burford*, 18 O. R. 546.

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5. *School Sections — Formation and Alteration of.*

(a) *Union School Sections.*

Appeal against By-law Uniting.]—By 34 Vict. c. 33, s. 16, "the majority of the trustees, or any five ratepayers of a school section, shall have the right of appeal or complaint to their county council against any by-law or resolution which has been passed by their township council for the formation or alteration of their school section," &c. In 1858 two school sections in a township were united by by-law, pursuant to 13 & 14 Vict. c. 48, s. 18, and remained so, the old separate school houses having been sold and a new one built, &c., until January, 1873, when a petition was presented, under 34 Vict. c. 33, to the county council for the disallowance of said by-law, and the matter was referred to a committee, as directed by that statute, which disallowed the by-law of 1858. The township council thereupon passed a by-law, among other things, to raise $270 by a rate on one of the original sections for public school purposes in said section:—Held, that such petition and subsequent proceedings were not authorized by 34 Vict. c. 33, s. 16, and that the by-law, being based upon their validity, must be quashed. Semble, that the section could not be held to be so far retrospective as to authorize the appeal from and disallowance of the by-law uniting the sections, after it had been so many years passed and acted upon. Quære, whether the words in the section, "for the formation or alteration of their school section," include a by-law for the union of school sections. Held, that the right of appeal was given by the section only to persons who were trustees or ratepayers of the section, when or in the year after the statute came into force. Semble, also, that there could be no right of appeal here, for the petition admitted that the union complained of was desirable when formed in 1858, but alleged that it had ceased to be so, owing to a change of circumstances. *Re Proper and Township of Oakland*, 34 U. C. R. 266.

Different Townships—*Union of Sections in.*] —Held, that under the Public Schools Act of 1874, 37 Vict. c. 28 (O.), no power is given for the formation of a union section out of sections in different townships. Where, therefore, such section was formed and a rate levied therein, for which the plaintiff's goods were seized:—Held, that such rate was illegal, and the plaintiff entitled to succeed in replevin. *Halpin* v. *Calder*, 26 C. P. 501.

——— *Union of Sections in—Alteration.*] —A municipality under 13 & 14 Vict. c. 48, s. 18, s.-s. 4, have no power to alter the boundaries of a union school section consisting of parts of different townships. *In re Ley and Township of Clarke*, 13 U. C. R. 433.

——— *Union of Sections in—Alteration—Notice.*] — The municipality of Vespra and Sunnidale, before 16 Vict. c. 185, passed a by-law remodelling the school sections of those townships, which transferred to union school section No. 3, created by the by-law, a part of Vespra, which had formerly belonged to union school section No. 4 of Vespra, Flos, Oro, and Medonte:—Held, that this was beyond the power of the municipality, and that the by-law was bad. It appeared also that no notice had been given of the intended alteration, and on this ground as well the by-law was illegal. Held, also, that, as section No. 3 was illegally constituted, a by-law passed to raise money for a school house erected there, was also bad. *Re Hart and Townships of Vespra and Sunnidale*, 16 U. C. R. 32.

——— *Union of Sections in — Validating Statute.*]—In September, 1874, the reeves of East Nissouri and North Oxford, with the county superintendent, proceeded to form a union school section of sections 1 in North Oxford and 5 in East Nissouri. In January, 1875, and since, trustees were elected for such union section, as also for section No. 1, and during the same period the union section maintained a school house in East Nissouri,

which had been selected as the union school, at which some of the North Oxford children attended. From April, 1875, to 31st December, 1876, the school in No. 1 had been closed, but since then it had been kept open. The government grant for the year 1875-6 was paid to the union section, under objection from section No. 1; and in 1875 the union section levied a rate for that year, but none was levied by section No. 1. In June, 1876, Halpin v. Calder, 26 C. P. 501, was decided, declaring the union section illegally formed, and immediately thereafter section No. 1 bought additional land and erected a new school house, levied a rate for that year, and issued debentures for school purposes, which were still outstanding. On 2nd March, 1877, 40 Vict. c. 16, s. 11, s.-s. 4 (O.), was passed:—Held, that the union section existed as a fact at the passing of the Act and was legalized by it, and that section No. 1 was absorbed and ceased to exist. *In re Petition of Minister of Education*, 28 C. P. 325.

On the 1st November, 1874, a union school section was formed by adding to section 6 in the township of Verulam, several lots in the township of Harvey. The village of B., which became incorporated on the 1st January, 1877, was all in Verulam, and before such alteration formed part of said section 6. In 1874, before the alteration, section 6 had raised by loan $5,000 to build a school house, and in 1876 the plaintiff was assessed for the union section so formed in respect of the lots thus added, part of his assessment being for said loan:—Held, that the union section existed in fact on the 2nd March, 1877, when 40 Vict. c. 16, s. 11, s.-s. 4, was passed; that its existence was not altered by the incorporation of the village; but under that statute, though illegally formed, it must be deemed to have been legally formed; and that the rate thereupon was legal. *Boyd* v. *Bobcaygeon Public School Board*, 43 U. C. R. 35.

——— *Union of Sections in—Validity of Formation—Right to Question in Action.*]—Replevin. Plea justifying under a distress for school rate for a union school section No. 2, Raleigh and Tilbury East, alleged to have been duly formed by the reeves of said townships and the local superintendent, of which section defendants were trustees, and averring that the rate was imposed by defendants to raise the necessary sum to purchase a school site, and that the plaintiff was rated in respect thereof. Replications, (1) that the said section was not formed as alleged; (2) that the alleged union school section was on or about 24th December, 1873, pretended to be formed by the reeves of the said townships and the superintendent by uniting s. 6 of Tilbury with parts of sections in Raleigh; that the plaintiff resided and was a ratepayer within one of the sections affected by the proposed formation of said section; that no notice was given to him and others intended to be affected by such formation, or of any alteration in the sections in said townships; and that the inspector of the county has not transmitted to the clerks of said townships any copy of the resolution to form said section, nor have the reeves of the said townships, with the inspector or otherwise, equalized the assessment within said section:—Held, on demurrer, replications bad, for that it was not open to the plaintiff in this suit to contest the validity of the formation of the school section on the grounds taken, his proper course being by information in the nature of quo warranto to determine the defendants' right to the office of trustee. The plaintiff replied also that the defendants were not on the 24th December, 1873, a corporation duly formed as alleged. Upon the trial it appeared that the union section for which the defendants assumed to be trustees had been formed by adding to a section in one township parts of two sections in another township:—Held, that a union school section can be formed only of two sections, not of parts of sections; and that the objection therefore being not to the regular exercise, but to the existence, of the power to form such sections, and the facts being undisputed, the validity of the formation might be questioned in this action. *Askew* v. *Manning*, 38 U. C. R. 345.

Dissolution — *Petition for—By-law—Motion to Quash—Laches.*]—On application to quash a by-law dissolving a union school section:—Held, that the council were not bound to go behind the assessment roll to ascertain whether the petition for such dissolution was signed by a majority of the assessed freeholders and householders, as required by s. 140 of the Public Schools Act, R. S. O. 1877 c. 204. The petition was, that the section might be dissolved, "when," it was added, "a new section may be formed, and a few lots from sections 2, 7, and 8, might be annexed to equalize the area with other sections:"—Held, that this addition, being a mere suggestion, formed no objection. The by-law provided that the dissolution should take effect "from and after," instead of on, "the 1st January, 1880:"—Held, no objection. The by-law was passed on the 7th April, and this motion was not made until December following:—Semble, that this delay, unexplained, would have been an answer to the application, which may be too late, although within the year fixed by the Act as the extreme limit. *In re McAlpine and Township of Euphemia*, 45 U. C. R. 199.

——— *Power of Arbitrators.*]—Arbitrators appointed by a county council under s. 44 of the Public Schools Act, 1896, 59 Vict. c. 70 (O.), awarded that a certain union school section, which comprised a rural section and an incorporated village, should be dissolved, and that all the lands included in the rural section "be attached to and form the same for school purposes," and that all the lands included in the village "shall remain attached to and form the urban section" of the said village for such purposes:—Held, that, though the language was in part insensible, the effect of it was to dissolve the union, recognizing the village as a corporation subject to the provisions of ss. 53 and 54 of the Act, and the rural section as a non-union school section subject to the provisions of ss. 9 and 13 of the Act, and that the award was valid as an exercise of power under s.-s. 5 or 6 of s. 43. Semble, the arbitrators would not have been justified in taking a portion of the territory outside the village and attaching it to the village. *In re Chesterville Public School Board*, 29 O. R. 321.

District Council—*Power of Alteration.*]—Under 7 Vict. c. 29, ss. 14, 24, the township council and not the district council had authority to sanction any alteration made in school districts. A proposed alteration being submitted by the superintendent of schools to the district council:—Held, not to legalize the alteration thereby proposed. *McFee* v. *Dundar*, 10 C. P. 94.

Existence De Facto — "*Municipality Concerned*"—*Trustees.*]—There was no proof of the formation of the union school section in question, but it was shewn that for many years a lot in one township had been marked in the assessment roll as in a school section of the adjacent township, to which the taxes received in respect of that lot were paid; that in various reports and returns made by the school inspector the owner of the lot was treated as a ratepayer in respect of the school section of the adjacent township; that his children went to the school established there; and that in the township school map, prepared by the township clerk under the provisions of s.-s. 4 of s. 1 of the Public Schools Act, R. S. O. 1897 c. 292, the lot was marked as in the school section of the adjacent township; —Held, that the evidence was sufficient to shew that the union school section existed in fact and that s. 42 of the Act applied to it, so that it must be deemed to have been legally formed. History and object of that legislation discussed. Proper corporate description of the trustees of a union school section pointed out. A municipality in which there is any territory forming part of the union school section in question is "concerned," within the meaning of s. 43 of the Act, in any proceedings for the alteration of the section, and these proceedings must be based upon a petition of five ratepayers of this municipality, though not necessarily of ratepayers in the territory itself. *Nichol School Trustees* v. *Maitland*, 26 A. R. 506.

Meeting—*Request.*]—A school section in a township cannot be altered by the municipality without the request of the majority of freeholders and householders in each section affected, expressed at a meeting called by the trustees for that purpose; and the want of such meeting and request is a sufficient ground for quashing the by-law. *In re Morrison and Township of Arthur*, 13 U. C. R. 279. (Overruled by the next case.)

Notice — *Necessity for* — *Ratepayers Interested*—*Recital in By-law.*]—Held, that the request of the freeholders and householders mentioned in 13 & 14 Vict. c. 48, s. 18, s.-s. 4, applies only to the union of two or more sections into one; and that the municipality of a township may pass a by-law to bring back exclusively within their own jurisdiction any part which has been united with a school section in another township, and may alter and arrange the sections within their own township; provided only that all parties affected by such intended alteration shall appear to have been duly notified. By a resolution of the district council in 1849, a union school section was formed, consisting of part of what had formerly been section 10 in Saltfleet and part of section 3 in Barton. In 1854 a by-law was passed by the municipality of Saltfleet, which defined the limits of section 10 and brought it entirely within Saltfleet, excluding that part of Barton which had belonged to it:—Held, that a ratepayer of Barton could not object that no notice had been given to those affected in Saltfleet; and semble, that no notice was required to those in Barton. It is not necessary to recite in such by-law that the requisite notice, &c., have been given. In re Morrison and Township of Arthur, 13 U. C. R. 279, overruled. *In re Ness and Township of Saltfleet*, 13 U. C. R. 408.

Time Limit for Alteration of Boundaries.]—In 1897 a township council passed a by-law altering the boundaries of an existing school section, and this was affirmed by the county council on appeal. In 1898 the county council, on appeal from the refusal of the township council to do so, appointed arbitrators to consider the advisability of forming a union school section from parts of the section in question and of another section, and an award was made setting apart the new union school section, and thereby making material alterations in the boundaries of the existing section:—Held, that, although the by-law of 1898 was passed under ss. 43 and 44 of the Public Schools Act, R. S. O. 1897 c. 292, it came within the prohibition of s. 38, s.-s. 3, which required that the by-law of 1897 should remain in force for five years; and therefore the by-law of 1898 was quashed and the award set aside. *Re Amaranth School Trustees and County of Dufferin*, 30 O. R. 43.

——— *Award.*]—An award of arbitrators under ss. 87 and 88 of the Public Schools Act, 1891, as to readjustment of union school sections, is conclusive for five years, though the award be that no change be made in the boundaries. *In re East and West Wawanosh Union School Section*, 26 O. R. 463.

——— *Award — Petition.*]—The petition for the formation, alteration, or dissolution of a union school section under 54 Vict. c. 55, s. 87, s.-s. 1 (O.), must be, in all cases, the joint petition of five ratepayers from each of the municipalities concerned, otherwise the award based upon it will be void ab initio, and s. 96, validating defective awards where there has been no notice to quash given within the time prescribed, has no application. When the award in such case is that no action be taken, the restriction in s.-s. 11 of s. 87 against new proceedings for a period of five years does not apply. Semble, no appeal lies from such an award as last referred to. In re East and West Wawanosh Union School Section, 26 O. R. 463, not followed. *East and West Wawanosh Union School Section* v. *Lockhart*, 26 O. R. 662.

The "joint petition" of five ratepayers from each of the municipalities concerned, required under 54 Vict. c. 55, s. 87, s.-s. 1 (O.), for the formation, alteration, or dissolution of a union school section, means that each set of five ratepayers shall join in a petition to the municipal council of the municipality, of which they are ratepayers, and not that five ratepayers from each municipality concerned must join in each petition to each municipality. Judgment in 26 O. R. 662, following York School Trustees v. Corporation of York, 26 O. R. 664 n., reversed. Where the award in such case was that no action should be taken on the petition, the prohibition in s.-s. 11 of s. 87 against any new proceedings for a further period of five years, was held not to apply. Judgment in 26 O. R. 662 affirmed on this point. *East and West Wawanosh Union School Section* v. *Lockhart*, 27 O. R. 345.

See Re Tuckersmith Public School Board, 16 O. R. 604.

(b) *Other Sections.*

Abolition of Sections—*By-law*—*Validity*—*Petition*—*Detachment of Village.*]—On the 1st January, 1875, Bracebridge, hitherto

forming part of the township of Macaulay, was incorporated as a village. At the time of incorporation Bracebridge and a portion of the township, being the territory in dispute, formed school section No. 1, Macaulay, which on incorporation became the Bracebridge section, the school house being in Bracebridge. In October, 1875, the township of Macaulay, on petition of two-thirds majority of the township sections, not counting the territory in dispute, passed a by-law, under s. 48 of 37 Vict. c. 28 (O.), abolishing the division of the township into sections, and forming a public school board for the township for the management of all the schools therein; and promptly after the passing thereof the school board erected a school house in the disputed territory, which had ever since been open and attended. The by-law thus passed was acted upon for nearly three years, and no motion made to quash it. In November, 1876, at a meeting of the county inspector and the reeves of Bracebridge and Macaulay, with a representative from each school board, to alter the boundaries of the Bracebridge section, a portion of the disputed territory was set off to Macaulay, and the other portion retained by Bracebridge:—Held, that the by-law was not invalid on its face, nor beyond the jurisdiction of the council. Held, also, that after the passing of the by-law the disputed territory became detached from Bracebridge, and came under the control of the township school board, and continued thereunder notwithstanding the action of November, 1876; and that at all events under s. 6, s.-s. 7, of 40 Vict. c. 16, it became so detached on the 1st January, 1878. Held, also, that under 40 Vict. c. 16, s. 6, s.-s. 1, it was not necessary to consider the territory in dispute in ascertaining the two-thirds majority, and that it did not appear to be necessary even under s. 48 of 37 Vict. c. 28 (O.) *In re Macaulay and Bracebridge School Boards*, 29 C. P. 122.

Appeal from Township By-law—"*Divide*"—*Appeal.*]—Under R. S. O. 1897 c. 292, s. 39, there is no longer any appeal to the county council from the refusal of a township council to "divide" a school section. *In re Hamilton School Section*, 29 O. R. 390.

——— *Appointment of Arbitrators.*]—The provisions of s.-s. 3 of s. 39 of the Public Schools Act, R. S. O. 1897 c. 292, whereby a county council may appoint arbitrators to hear an appeal against a by-law of a township council altering the boundaries of a school section, are permissive, not imperative. *Re Woolwer and County of Kent*, 31 O. R. 606.

By-law—*Petition — Award — Appeal — Time—Waiver.*]—In the absence of satisfactory evidence of waiver of the objection by all persons interested, a county council has no jurisdiction under s.-s. 3 of s. 82 of the Public Schools Act, 54 Vict. c. 55 (O.), to appoint arbitrators to hear an appeal from the action or refusal to act of a township council and to determine or alter the boundaries of school sections, unless a notice of appeal has been duly given within the time mentioned in s.-s. 1. Where a by-law of the county council appointing arbitrators was passed pursuant to a notice of appeal, in the form of a petition, filed with the county clerk after such time had expired, and there was no waiver:—Held, that the authority of the arbitrators to enter upon the inquiry being affected by the want of jurisdiction of the council to pass the by-law, their award could not be confirmed by s. 96 of the Public Schools Act; and the by-law was quashed. The application to quash was made by a ratepayer of the school section whose boundaries were in question, acting at the request of the trustees of the section, and the solicitors acting for him were also retained by the trustees, whose secretary-treasurer appeared before the committee of the county council, prior to the passing of the by-law, and before the arbitrators, and did not make objections to the jurisdiction of either body:—Held, that, in the absence of proof of the authority of the secretary-treasurer to represent the trustees, it could not be said that they had waived their right to object to the proceedings, nor that the rights of the applicant were entirely gone and merged in those of the trustees. *Re Martin and County of Simcoe*, 25 O. R. 411.

——— *Repeal—County Council—Appeal.*]—It is ultra vires a township council which has regularly passed a by-law under the provisions of s. 38 of the Public Schools Act, creating a new rural school section from parts of existing school sections, to repeal or alter such by-law until the expiration of five years as provided in the Act, although the repealing by-law is passed before that creating the new section is to take effect. The only remedy is an appeal to the county council against the by-law, under s. 39 of the Act. *Re Powers and Township of Chatham*, 29 O. R. 571, 26 A. R. 483.

——— *Seal—Signature—Injunction—Parties.*]—A by-law of a township corporation for the purpose of dividing a school section is invalid unless under the corporate seal, and signed by the head and by the clerk of the corporation. The township corporation and the individual members of the proposed new school board are proper parties to an action to have an invalid by-law for such a purpose set aside. *Holt* v. *Township of Medonte*, 22 O. R. 302.

——— *Time for Passing.*]—Sub-section 3 of s. 81 of the Public Schools Act, 54 Vict. c. 55 (O.), provides that by-laws passed under the said section for altering, &c., school sections, shall not be passed later than 1st May in the year, and shall not take effect before the 25th December next thereafter:—Held, that the word "year" as used therein means the calendar year commencing 1st January and ending 31st December, and that a by-law altering certain school sections passed on the 25th September was invalid. *In re Asphodel School Trustees and Humphries*, 24 O. R. 682.

Description of Boundaries—*Indefiniteness.*]—A by-law recited that certain coloured inhabitants had petitioned for an alteration of school section No. 9, and for the establishing of two separate schools for coloured people in the township, and that it was expedient to grant their request, by defining the boundaries of said sections so as to include the coloured inhabitants of the township; and it set out the limits of each section to be established, the last boundary of No. 1 being "thence to include all and singular each and every lot or parcel of land occupied, or which shall or may be occupied, by any coloured person or persons in the front part of the said township of Chatham;" and the last boundary

of No. 2, "thence to include all and singular, each and every lot or parcel of land occupied, or which shall or may be occupied, by any coloured person or persons in that part of the said township not included in the section No. 1, as described in the first section of this by-law:"—Held, that these boundaries were indefinite and fluctuating, and that the by-law was therefore bad. *In re Simmons and Township of Chatham*, 21 U. C. R. 75.

——— *Sufficiency—Map—Evidence.*]—The question being whether the plaintiff's lot 23 in the 8th concession of Thurlow was within school section 16, a by-law defining the limits of sections in the township was proved, which declared the section to be composed, among other lots, of "50 acres of the east side of lot No. 16, all of No. 17, s. ½ of No. 18, all of 19, 20, 21, 22, 23, and 24 (not giving the concession), excepting such portion of last mentioned lots as included in sections 18 and 19." Section 18, by the same by-law, was made to comprise parts of lots 16, 18, 20, 21, and 22, in the 8th concession; and section 19, the N. ½ of 24 in the same concession:—Held, that the whole by-law taken together sufficiently shewed the plaintiff's lot to be in section 16. Held, also, that the map prepared by the township clerk, under s. 49 of the School Act, C. S. U. C. c. 64, shewing the division of the township into sections, was admissible as evidence. *In re Shorey* v. *Thrasher*, 30 U. C. R. 504.

——— *Uncertainty.*]—The by-law in this case was held bad, for not describing or defining with sufficient certainty the limits of the school sections intended to be established by it. *Haacke* v. *Township of Markham*, 17 U. C. R. 562.

Division of District—*Quebec Law.*]—See *Tremblay* v. *Valentin*, 12 S. C. R. 546; *Hus* v. *School Commissioners for Parish of Ste. Victoire*, 19 S. C. R. 477.

Evidence of Formation—*Map.*]—As evidence of the formation of school sections in a township by the municipal council thereof, a rough sketch or map designated "school section map township of B.," but without signature, seal, or date, having the appearance of being very old, and there being no other map to be found, was produced from the proper custody. In 1888, before this action was commenced, but after the beginning of the agitation which gave rise thereto, the municipal council passed a by-law "to make alterations in school section map," and authorized the clerk to correct the map, &c.; and when any difficulty arose as to boundaries of school sections recourse was had, at least in some instances, to this map:—Held, that the map must be assumed to be drawn in pursuance of s. 11 of the Public Schools Act, and therefore afforded evidence of the original division of the township into school sections by the township council. *Burford School Trustees* v. *Township of Burford*, 18 O. R. 546.

Limits of School Sections.]—See *In re Hayes and Toronto School Trustees*, 3 C. P. 478.

Notice—*Necessity for.*]—Before any alteration can be made in the limits of a school section, notice must be given to the parties interested in the proposed alteration. *Griffiths* v. *Township of Grantham*, 6 C. P. 274.

——— *Necessity for—Repealing By-law.*]—On the 19th December, 1857, a township council passed a by-law creating a new school section, called No. 9, out of sections 13 and 8, and defining what should thereafter constitute section 13. Notice was given of the intention to pass this by-law, but it was not done at the request of the freeholders and householders expressed at a public meeting; on the contrary, the change made appeared to be opposed to the wishes of a majority of the inhabitants. On the 8th May, 1858, a by-law repealing it was passed, of which no notice had been given to the parties interested, thus restoring the sections to their former position; and on the 10th September, 1859, another by-law was passed assessing the section 13 as it originally stood, for the expenses of building a school house, &c.:—Held, that the by-law of May, 1858, must be quashed, for the previous by-law was legal, and a by-law repealing it, which would in effect make an alteration of school sections, could not be passed without notice to those interested; and that the by-law levying a rate on section 13, as it stood before 1857, must necessarily be quashed also, for that would include part of what was section 9. *Re Shaw and Township of Manvers*, 19 U. C. R. 288.

——— *Proof of—Denial — Laches.*]—Application to quash a by-law passed on the 14th August to divide a school section, on the ground that it was not under the seal of the corporation, and that it did not appear that all parties to be affected had been duly notified of the intended step or alteration. Upon the affidavits on both sides, the court was satisfied that the seal had been duly affixed. The applicant swore that he had received no notice of the intention to divide the section or pass the by-law, and believed the corporation gave none, and this was confirmed by the local superintendent. On the other hand, it was sworn that the council in February received petitions, numerously signed, for the division, which they directed to stand over until their next meeting, on the 14th August, and instructed the clerk to give the necessary notices that such petitions would then be considered; and that such notices had been seen in an hotel, in the post-office, and in the school house. In reply the clerk denied receiving such instructions, and a person who had lived at the hotel, and the postmaster, swore that they had never seen the notices. The court refused to quash the by-law, for the affidavits only denied notice of intention to divide the section or pass the by-law, not of the application; the council had acted upon reasonable assurance that all persons had notice of such application, which no inhabitant of the section had denied knowledge of; and the objections being technical should have been taken promptly, without allowing a term to elapse. *Re Taylor and Township of West Williams*, 30 U. C. R. 337.

——— *Sufficiency—"Parties Affected"—Trustees — By-law — Quashing — Time.*]—Section 40 of the Common School Act, C. S. U. C. c. 64, enacts that a township council may alter the boundaries of a school section, in case it clearly appears that all parties to be affected by the proposed alteration have been duly notified of the intended step or application. In this case the only notice given was by the trustees of the section from which certain lots were taken by the alteration, to the trustees of the section to which such lots were added—that being the notice which it

was alleged had been customary in the township in similar cases:—Held, insufficient; and the by-law making the alteration was quashed. The by-law was passed in February, 1870, but the clerk of the corporation did not notify the trustees of it until August:—Held, that a motion to quash in M. T. 1870 was in time. *Re Patterson and Township of Hope*, 30 U. C. R. 484.

Request—*Notice.*]—Under 13 & 14 Vict. c. 48, s. 18, s.-s. 4, the municipality may alter the boundaries of sections within their township, by taking from one and adding to another, without any previous request of the freeholders and householders, and notwithstanding their disapprobation of the change, provided that those affected by the alteration have notice of the intention to make it. *In re Ley and Township of Clarke*, 13 U. C. R. 433.

Resolution of Council—*By-law Confirming—Motion to Quash—Laches.*]—The corporation on the 7th December, 1867, passed a resolution, that a petition asking for a separation from school section 9, and to form a separate section consisting of certain lots, be granted, and a meeting be called to elect trustees. On the 3rd October, 1868, they passed a by-law enacting that this resolution should "remain confirmed, whole, and entirely without abatement whatsoever, with the force and effect of a by-law of this corporation." The applicant in Michaelmas term, 1868, moved to quash the by-law and resolution. It appeared that both had been passed after due notice, and after opposition by the applicant and others before the council, and that a school had been opened, and school taxes collected and expended in the section as separated:—Held, as to the resolution, that the delay in moving was a sufficient reason for refusing to interfere; and as to the by-law (the merits being against the application, on the affidavits), that though informal it was not substantially defective, and was not open to objection as being retroactive. The rule was therefore discharged, but without costs. *Re Leddingham and Township of Bentinck*, 29 U. C. R. 206.

Time of Taking Effect.] — On a motion to quash a by-law passed on the 1st October, 1859, by defendants, doing away with school section No. 7 in the township of Darlington, and attaching a portion thereof to school section No. 6, and another part to No. 8:—Held, that it is unnecessary that a by-law should state on its face that the alteration shall not go into effect till the 25th December following the passing thereof: 13 & 14 Vict. c. 48, s. 18, s.-s. 4. *Cotter* v. *Township of Darlington*, 11 C. P. 265.

——— *Appeal — By-law.*] — A township council in April, 1874, under 37 Vict. c. 28, s. 48 (O.), passed a by-law altering certain school sections in the township, and on its being petitioned against to the county council, they, in June, 1874, appointed a committee, under s. 61, to settle the matter. In November, 1874, the committee established the sections, and reported to the county council, which, under s. 57, would not take effect until the 25th December following; but, in consequence of the report embracing union sections over which the committee had no control, it was inoperative. In June, 1875, the township council passed another by-law, repealing their former by-law, and defining the limits of the sections. This also on petition was referred by the county council to a committee to settle and report on, which they did in December. Previously, however, to their report being so made, the township council, on the 11th September, 1875, passed the by-law in question, levying a rate for school purposes on the sections as they existed prior to December, 1874:—Held, that the by-law was valid, for that until the result of the appeal was reported to the county council the sections as established before December, 1874, continued to exist. *In re McIntyre and Township of Elderslie*, 27 C. P. 58.

——— *By-law — Repeal — Quashing.*] — While an application to quash a by-law, No. 250, altering the boundaries of school sections 15 and 16, was pending, the corporation passed a by-law, No. 268, to remove doubts in regard to the former by-law and to confirm it, but so worded as to leave it doubtful whether it was not in effect an independent by-law, defining the limits of these sections. The first by-law was quashed, and an application was then made to quash this last by-law. It appeared, on shewing cause, that it had been repealed. The court, under the circumstances, quashed the by-law, notwithstanding its repeal; for the repealing by-law being, in effect, a by-law making an alteration in school sections, it could not take effect until the 25th December following, and it was stated that the trustees of section 15 intended to act under this by-law to be repealed. *Re Patterson and Township of Hope*, 31 U. C. R. 360.

——— *Notice.*]—Held, approving In re Ness and Township of Saltfleet, 13 U. C. R. 408, that to alter the boundaries of a school section within a township, not being a union section, it is only necessary that the alteration shall not go into effect before the 25th December following; and that it appear to the municipality that all parties affected have had due notice, which here was sufficiently shewn. *In re Isaac and Township of Euphrasia*, 17 U. C. R. 265.

See, also, *Re Chamberlain and Counties of Stormont, Dundas, and Glengarry*, 45 U. C. R. 26.

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6. *Superintendents.*

Contract—*Approval.*]—A county superintendent signing, together with trustees, a contract with a teacher, will be considered to have signed only as approving of the appointment, and in pursuance of the statute, not as contracting with the teacher. *Campbell* v. *Elliott*, 3 U. C. R. 241.

Moneys Received by Township—*Action for.*]—A township superintendent appointed under 7 Vict. c. 29, since repealed by 9 Vict. c. 20, s. 45, cannot sue the collector of the township for moneys received by him, not in the nature of penalties. *Shirley* v. *Hope*, 4 U. C. R. 240.

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7. *Teachers.*

See ante 2, 4 (e), and *post* 8.

(a) *Contracts with.*

Allowance Appropriated.]—Under 7 Vict. c. 29, the trustees of any school district

might agree with the teacher to give him the whole allowance appropriated for such school district for the year when that Act came into force, if the teacher served for three months. *Darby* v. *Earl*, 3 U. C. R. 6.

Board and Lodging.]—Semble, that the school trustees have no power to make an agreement for providing the teacher with board and lodging. *Quin* v. *Seymour School Trustees*, 7 U. C. R. 130.

Seal and Signature—*Meeting.*]—In an action by a school teacher to recover damages as for a wrongful dismissal, it was shewn that the agreement to employ the plaintiff was made in writing, under seal and signed by two of the three school trustees, but not at the same time or at any meeting of the trustees called for the purpose of transacting school business:—Held, that the agreement was void under s. 97 of the Public Schools Act, which provides that "no act or proceeding of a school corporation which is not adopted at a regular or special meeting of the trustees shall be valid or binding on any party affected thereby." *Lambiere* v. *South Cayuga School Trustees*, 7 A. R. 506.

(b) *Dismissal.*

Right of Trustees.]—The right of public school trustees to dismiss for good cause a teacher engaged by them, necessarily exists from the relation of the parties. 49 Vict. c. 49, ss. 165, 168 (O.), provides a proceeding by which the status or qualification of the teacher may be determined; and the result of such proceeding may be in effect the same as dismissal; but such enactment does not deprive the employer of the inherent right to dismiss. *Raymond* v. *Cardinal School Trustees*, 14 A. R. 562.

(c) *Proceedings to Recover Salary.*

Action against Municipality—*Refusal to Levy Rate.*]—Held, that a teacher could not maintain an action against the municipal corporation for refusing to levy a rate for his salary upon an estimate furnished to them for that purpose by the trustees. *Smith* v. *Village of Collingwood*, 19 U. C. R. 259.

——— *Treasurer's Acceptance.*] — Held, that an action would not lie against a municipal corporation by a school teacher, upon an order made upon and accepted by the treasurer in the plaintiff's favour for his salary, the treasurer having no power to bind the corporation by such acceptance. *Smith* v. *Village of Collingwood*, 19 U. C. R. 259.

The Municipal Act does not authorize the acceptance by the treasurer of orders for a school teacher's salary, although permitted to pay such orders on presentation, nor can the treasurer bind the corporation by his acceptance of orders. *Munson* v. *Village of Collingwood*, 9 C. P. 497.

Action against Trustees—*Mandamus—Special Action.*]—A school teacher sued the trustees in a division court for his salary, upon an agreement under defendants' corporate seal, by which they bound themselves to employ the powers legally vested in them to collect and pay him; and upon the common count for work and labour. It appeared that he was not a legally qualified teacher, but that he had taught the school during the time claimed for:—Held, that he could not recover: (1) because by C. S. U. C. c. 64, s. 27, s.-s. 9, as amended by 34 Vict. c. 33, s. 30, defendants were prohibited from giving an order in his favour on the local superintendent, and the latter, by s. 91, s.-s. 2, from giving him a cheque upon the treasurer; (2) because, if entitled to payment, his remedy would be by mandamus, or a special action, not by an action for the money, which was not in defendants' hands. See also as to this point, Quin v. Seymour School Trustees, 7 U. C. R. 130. Quære, as to the meaning of 34 Vict. c. 33, s. 27 (O.) *Wright* v. *Stephen School Trustees*, 32 U. C. R. 541.

Action on Special Agreement—*Fuel—Request — Parties.*] — Plaintiff, a teacher, sued upon a special agreement stated to have been made by defendants as trustees, to furnish him with fuel when required, under 9 Vict. c. 20. Defendants demurred: (1) because no request with time and place had been alleged to furnish fuel; (2) because the defendants were charged as individuals:—Held, declaration bad on both grounds. *Anderson* v. *VanSittart*, 5 U. C. R. 335.

——— *Seal.*] — In assumpsit by a teacher against the school trustees appointed by 9 Vict. c. 20, setting out a special agreement to retain the plaintiff in the employment of a teacher for one year at a certain salary; and also with a count, founded upon a parol agreement, for wrongfully turning the plaintiff away: — Held, both counts bad, in not averring the agreement to have been made with defendants by their corporate seal. *Quin* v. *Seymour School Trustees*, 7 U. C. R. 130.

Action—*Reference—Award — Appeal.*] — Where an action in a division court by a teacher against the trustees was referred by order of the Judge, with consent of the parties:—Held, that the award could not be appealed from under 16 Vict. c. 185, s. 24. Remarks as to defendants' remedy by prohibition. *In re Milne and Sylvester*, 18 U. C. R. 538.

Arbitration—*Action.*] — No action could be sustained under 13 & 14 Vict. c. 48, s. 17, and 16 Vict. c. 185, s. 15, by a school teacher for his salary; arbitration was the only remedy. *Tiernan* v. *Nepean School Trustees*, 14 U. C. R. 15.

——— *Agreement—Validity.*]—There is no right to arbitrate under C. S. U. C. c. 64, unless the contract of service is entered into by the trustees in their corporate capacity, made under their corporate seal; and without this the person discharging the duties of teacher has no legal status as such. *Birmingham* v. *Hungerford*, 19 C. P. 411.

See post 8.

Mandamus — *Refusal to Pay Order — Action.*]—Declaration by a teacher against defendant, as sub-treasurer of school moneys, setting out an order signed by the local superintendent of schools in favour of plaintiff upon defendant, as such sub-treasurer, directing him to pay plaintiff $27.80, and charge to account of county assessment for 1866, and alleging a refusal to pay such order, with a

claim for a mandamus: — Held, declaration bad, as not shewing that the cheque or order was drawn on the order of the school trustees, and in setting out a cheque void on its face, because drawn upon a fund over which the local superintendent had no control, and in not shewing that defendant had money in his hands belonging to the school section, or that the county council had made provision to enable him to pay the amount. *Welsh* v. *Leahey*, 18 C. P. 48.

——— *Refusal to Sign Order—Action.*]— If the school trustees, appointed under 9 Vict. c. 20, decline to sign the order upon the superintendent for the payment of the teacher's money, as provided for by the Act, they may be proceeded against by mandamus, or perhaps they may be sued in a special action for not making the order; but they cannot be sued in an action for the money as that is not in their hands. *Quin* v. *Seymour School Trustees*, 7 U. C. R. 130.

Master and Servant Act.]—The Master and Servant Act, 10 & 11 Vict. c. 23, does not apply to the case of school trustees and school teacher. *In re Joice*, 19 U. C. R. 197.

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8. *Trustees.*

(a) *Actions against.*

Contract—*Hiring of Teacher—Seal.*] — In an action of assumpsit brought by a teacher against the school trustees appointed by the Act 9 Vict. c. 20, setting out a special agreement to retain the plaintiff in the employment of a teacher for one year from, &c., at a certain salary, &c.; and also in a special action on the case, founded upon a parol agreement, brought by the teacher under the same statute, for wrongfully, and without cause, turning the plaintiff away, and preventing him thereby from earning his salary: —Held, that the declaration in both cases was bad, in not averring the agreement to have been made with the defendants by their corporate seal. *Quin* v. *Seymour School Trustees*, 7 U. C. R. 130.

——— *Joint Board—Liability.*] — A joint board of grammar and common school trustees are a corporate body, capable of contracting and being sued, though the separate corporate existence of each continues; and they were held liable, therefore, for the work done upon a contract made by them with the plaintiff for an addition to the school house. Caledonia School Trustees v. Farrell, 27 U. C. R. 321, commented upon. *Oliver* v. *Ingersoll School Trustees*, 29 U. C. R. 409.

——— *Purchase of Land—Remedy of Purchaser.*]—A school trustee, by desire of the board, attended an auction and bought for the board a piece of property for a school site, and he signed the contract with his own name only. The board afterwards, by several resolutions, during three years, unanimously recognized the purchase as their own, and paid three instalments of the purchase money. In an estimate under the corporate seal, the board applied to the town council for money to pay "for school premises for a central school, contracted for and agreed to be paid, $1,570; for building a central school house on said purchased premises, $7,870." It was shewn that there was no other property or contract to which this language could refer than the property or contract mentioned. The town council did not comply with the requisition, and ultimately trustees were elected, a majority of whom determined to repudiate the purchase: —Held, in a suit against the board, by the purchaser, for indemnification in respect of the remainder of the purchase money, that the plaintiff was entitled to relief. *Smith* v. *Belleville School Trustees*, 16 Gr. 130.

——— *Sufficiency of — Parties.*] — The agreement sued on was headed "Specification of a school house in school section No. 4, Tilbury East." Then followed in detail the size of the building, and the work and material to be employed, and it concluded, "The whole to be of good material, and to be finished in a good workmanlike manner, and to be finished on the 1st July, 1873. In consideration the parties of the first part agree to pay the party of the second part the sum of $708, one-half on the 15th May, and the other half when the said school house is completed." Then followed the signatures of the three school trustees, with their corporate seal, and the signature of the plaintiff. It bore no date, but was proved to have been executed by the parties about the 1st March, 1873. It referred to no plan, but the trustees furnished the plaintiff with a plan to work by, and they paid to him $400 on account. They refused to pay the balance, or to accept the building, alleging that it was not properly constructed; but the trial Judge found for the plaintiff for the balance of the $708: — Held, that it was sufficiently clear from the instrument itself, and the acts of the parties, that defendants were the parties covenanting with the plaintiff, and that the instrument was intended so to operate; and the verdict was upheld. *Coghlan* v. *Tilbury East School Trustees*, 35 U. C. R. 575.

Costs of Defence.]—A rate may be levied to reimburse school trustees for the costs of defending a groundless action against them. *In re Tiernan and Township of Nepean*, 15 U. C. R. 87.

Equitable Relief — *Ratepayer — Conditions.*] — It is contrary to the rule of the court, in dealing with persons who have not acted properly, to punish them more severely than justice to others renders necessary; and therefore, where school trustees wrongfully expended money in building on a site which had been changed by competent authority, relief was granted to a ratepayer who complained of the act, but subject to equitable terms and conditions. *Malcolm* v. *Malcolm*, 15 Gr. 13.

Execution—*Sale under.*]—Held, that land conveyed to school trustees for a school could not be sold under execution against them for the money due for building the school house. *Scott* v. *Burgess and Bathurst School Trustees*, 19 U. C. R. 28.

Injunction—*Ratepayer — Constitution of Suit—Consent.*]—A bill was filed by a ratepayer seeking to restrain school trustees from allowing the school house to be used for religious services, but the bill did not allege that it was filed on behalf of the plaintiff and all other ratepayers. Two of the three school trustees consented to the injunction being granted as asked. The court refused the application, on the grounds, first, that the suit was not properly constituted; and second, if it had been, it appearing that a majority of the trus-

tees were in favour of the views of the plaintiff, they had themselves the power to do that which they consented to the court doing. Quære, if the bill had been by the plaintiff on behalf of himself and all other ratepayers, whether then the suit would have been properly constituted. *Rabian* v. *Thurlow School Trustees*, 12 Gr. 115.

Notice of Action—*Limitation of Actions —Warrant.*]—Held, that a school trustee sued for any act done in his corporate capacity is entitled to notice of action, and that the action must be brought within six months. And that a school trustee, acting in the discharge of his duty as such, is entitled to the protection of, and comes within, 16 Vict. c. 180, notwithstanding that he had signed a warrant individually instead of in his corporate capacity. *Spry* v. *Mumby*, 11 C. P. 285.

(b) *Actions by.*

Money Collected — *Municipal Corporation.*]—Held, that a demand or order from a majority of the school trustees of a school section is necessary to sustain an action against a municipal corporation for money collected under a by-law, passed under the authority of s. 34 of C. S. U. C. c. 64. *Caledon School Trustees* v. *Township of Caledon*, 12 C. P. 301.

Money Received — *Secretary-treasurer.*] —Held, that a board of school trustees could maintain an action for money had and received against their secretary-treasurer, to recover a balance of money in his hands not expended or accounted for. *Stephen School Trustees* v. *Mitchell*, 29 U. C. R. 382.

Recovery of Seal and Papers.] — A court of equity has jurisdiction to order persons wrongfully claiming to be school trustees, to deliver up the corporate seal and papers to the legal trustees. *Belleville Roman Catholic Separate School Trustees* v. *Grainger*, 25 Gr. 570.

School Rates — *Parties—Amendment.*]— The plaintiff, who was the collector of the Roman Catholic separate school tax for the township of Kitley, having sued the defendant for the amount of the tax:—Held, that the action should have been brought in the name of the trustees as a corporation; and an amendment was allowed. *Healy* v. *Carey*, 13 C. L. J. 91.

Trespass to School House.] — Under 7 Vict. c. 29, s. 44, the trustees of the school (and not the school master) should sue for a trespass to the school house, unless, at least, it can be shewn that the trustees have given the school master a particular interest in the building beyond the mere liberty of occupying it during the day for the purpose of teaching. *Monaghan* v. *Ferguson*, 3 U. C. R. 484.

——— *Parties—Corporation.*]—J. C. and J. A. C., while trustees of a school section in Nova Scotia, and their servant, N. C., entered upon the school plot, removed the school house from its foundation, and destroyed a portion of the wall. In trespass by the trustees against these three persons, they pleaded that the acts were legally done by them in their capacity of trustees. By s.-s. 4 of s. 30 of R. S. N. S., 4th ser., c. 23, the sites for school houses shall be defined by the trustees, subject to the sanction of the three nearest commissioners residing out of the section. This sanction was not obtained:—Held, that under the sub-section referred to the defendants were not authorized to remove the school house. (2) That the plaintiffs, as a corporate body identical with the corporation which existed at the time of the trespass, could maintain trespass for the injury to the corporate property. (3) That if the action were brought in the name of the corporation, without due authority, the defendants' remedy was to apply summarily to stay proceedings. *Pictou School Trustees* v. *Cameron*, 2 S. C. R. 690.

See Nichol School Trustees v. *Maitland*, 26 A. R. 506.

(c) *Disqualification of.*

Contract with Board of Trustees — *Shareholder in Company — Intention to Declare Seat Vacant—Remedy.*]—Held, on a special case, that the fact of the public school board of the city of Toronto entering into an agreement with and purchasing their stationery and school supplies from a publishing company, and having obtained gas from a gas company, and insured their property in certain insurance companies, of which said companies the plaintiff was a shareholder, did not disqualify him from acting as a trustee of the school board, or render his seat vacant, under 44 Vict. c. 30, s. 10 (O.) Quære, whether the special case could properly be entertained, no fact being disclosed by which jurisdiction could be exercised under the Act relating to mandamus and injunction, R. S. O. 1877 c. 52, s. 30, no wrongful act having been actually done by the school board, but merely an injury to the plaintiff's rights threatened, it being alleged that the board intended to declare the seat vacant. *Lee* v. *Toronto Public School Board*, 32 C. P. 78.

——— *Medical Practitioner.*] — Where a school trustee, who was a medical practitioner, acted in his professional capacity under engagement by the board for examining the pupils attending the school as to the prevalence of an infectious disease, and made a charge of $15 therefor, which the board ordered to be paid, but he afterwards declined to accept payment:—Held, that this disqualified him as trustee, and rendered his seat vacant, under 44 Vict. c. 30, s. 13 (O.) *Regina ex rel. Stewart* v. *Standish*, 6 O. R. 408.

——— *Necessity for Declaration that Seats Vacant — Remedy — Injunction — Quo Warranto.*]—In an action brought by a ratepayer against a school board, three of the persons elected as trustees, and one G., the statement of claim alleged that the three defendant trustees had, by reason of their being interested in certain contracts with the board, ipso facto vacated their seats, by virtue of s. 247 of the Public Schools Act, R. S. O. 1887 c. 225; that they nevertheless continued to sit and vote, and had voted in favour of certain resolutions which were passed, whereby the principal of the school was dismissed and the defendant G. appointed in his place; and that but for the votes of the three defendant trustees the result would have been different. The prayer was that the seats of the three should be declared vacant, and the votes and resolution declared void, and for an injunction re-

straining the defendants the trustees from further acting as members of the board:—Held, upon demurrer, following Hardwick v. Brown, L. R. 8 C. P. 406, that the seat of a trustee does not under s. 247 actually become vacant until the other members of the board have declared it to have become vacant; and in this case, no action having been taken by the remaining members of the board, that the seats of the three defendant trustees were full; and being full, that the court would not interfere by injunction to restrain the occupants of them from acting as trustees. (2) That quo warranto proceedings were the only means by which the seats could be declared vacant by the court; that the duty of declaring them vacant, if the facts charged were established, devolved upon the remaining individual members of the board, who were not parties to the action and were not made parties by the fact that the school corporation was a party defendant. Regina v. Mayor of Hereford, 2 Salk. 701, Rex v. Smith, 2 M. & S. 583, referred to. (3) That the defendant G. was an unnecessary and improper party to the action. Injunction, since the Judicature Act, seems to be the appropriate, or at all events the alternative, remedy in cases of disputed claims of this nature, in which mandamus would have been formerly required. In Smith v. Petersville, 28 Gr. 599, Mearns v. Petrolia, 28 Gr. 98, Aslatt v. Corporation of Southampton, 16 Ch. D. 143, injunctions were granted at the suit of the holders of seats at council boards, to restrain other persons claiming the seats from preventing their exercising their rights as such actual holders, because before the Judicature Act mandamus was the remedy provided for enforcing the rights of the occupants of offices against persons preventing their enjoyment of them. But, on the other hand, where the actual holder of the office is charged with holding it improperly, quo warranto proceedings on behalf of the Queen remain the only means by which it can be declared vacant (see Regina ex rel. Stewart v. Standish, 6 O. R. 403); and so long as it is full, a general injunction against acting in it cannot be granted. *Chaplin* v. *Woodstock Public School Board*, 16 O. R. 728.

Residence.]—The defendant, a life tenant of a farm in the township of Albion, lived on it from 1888 until 1894, when he rented it to his son and went to live with his wife and family on a farm owned by his wife, in the township of Caledon, where he continued to live until 1898, when the son having given up possession of the Albion farm, he took possession of it, to enable him to work it, sleeping in the house, and occasionally visiting his wife and family, who remained in Caledon, and staying there over night, while the wife occasionally visited him, staying a couple of weeks:—Held, that the defendant's place of residence was where his wife and family lived, and he was therefore not a resident within the township of Albion so as to qualify him for the office of a trustee of a school section within that township to which he had been elected: but, as the granting of the order for a quo warranto was in the discretion of the court, and the term of the defendant's office would expire before the issue could be tried, the motion was dismissed without costs. Sub-section 8 of s. 14 of R. S. O. 1897 c. 292, providing for an investigation as to the election by the inspector, would not of itself prevent the granting of such order. *Regina ex rel. Horan* v. *Evans*, 31 O. R. 448.

(d) *Election of.*

Alteration in Sections—*New Election.*]—An alteration of the boundaries of a section under 13 & 14 Vict. c. 48, s. 18, s.-s. 4, does not make it necessary to call a school section meeting and appoint new trustees. *In re Moore School Trustees* v. *McRae*, 12 U. C. R. 525.

In 1853, on application of the resident inhabitants of Oneida, the municipality resolved to divide section No. 7, by taking away a part to constitute a new section, but no by-law was passed until 1855, when one was adopted confirming this resolution. A meeting was called for the 16th January, 1854, to elect three new trustees for section 7. In the meantime, on the 10th January, the ordinary annual meeting was held, and a dispute arose as to whether trustees should not then be elected for the ensuing year; some thought not, and left the meeting, while others remained and proceeded with the election. The local superintendent, being appealed to, declared the election illegal, considering that No. 7 had become a new section, and appointed a new election to take place at the meeting called for the 16th, when the defendants were appointed the three trustees for No. 7 as a new section. In January, 1855, the dispute was renewed; the defendants appointed a new trustee in the usual way, but another meeting was held, at which a new trustee was elected to succeed the retiring one of those first chosen in 1854, so that there were two sets of trustees claiming the office. The first elected trustees in 1854 abstained from acting for that year, and defendants imposed a rate, which the plaintiff resisted:—Held, approving the last case, that the alteration did not constitute No. 7 a new section, but that the rate was legal, being imposed by the trustees de facto, who had not been removed. Quære, whether such alteration could be made by resolution only. Quære, also, whether the decision of the local superintendent can be thus incidentally reviewed in an action to recover back the rate. *In re Gill and Jackson*, 14 U. C. R. 119.

In replevin, defendant made cognizance as collector of school section No. 1. It appeared that prior to February, 1854, school section No. 1 consisted of the town of Chatham and a part of the township of Harwich; there was also a school section in operation, known as section No. 2½. In February, 1854, the township council of Harwich passed a resolution dividing the township into sixteen school sections. No. 1 of these new sections was formed of that part of the township of Harwich which, together with the town of Chatham, had previously been No. 1, added to the whole of 2½ as it existed previously. In January, 1855, an election for section No. 1, as created by the resolution of February, 1854, was held, at which one trustee only was elected, and the two other trustees elected the previous year for the then section gave defendant the warrant under which he acted:—Held, that there should have been three trustees elected for section No. 1, at the election in January, and that a warrant signed by the other two was inoperative. *McGregor* v. *Pratt*, 6 C. P. 173.

Electors — *Statute Labour.*] — Persons rated only for statute labour, and not householders, are not "taxable inhabitants" within 13 & 14 Vict. c. 48, s. 22, and cannot

therefore vote at the election of school trustees. Quære, whether ss. 5 and 7 of that Act apply to the electors of school trustees for towns, or only for townships. Semble, that s. 7 at least applies to both. *Regina ex rel. McNamara* v. *Christie*, 9 U. C. R. 682.

Validity of Election—*Decision of Board—Acquiescence—New Election.*]—Where certain persons were elected school trustees, and, at a meeting of the board held subsequently to the election, were declared duly elected, but, proceedings having been meanwhile commenced to question the validity of the election, at a subsequent meeting of the board they acquiesced in the conclusion of the board to hold a new election, and became candidates again, and canvassed as such, until the twenty days allowed for disputing the first election had elapsed (the proceedings formerly commenced for that purpose having been meanwhile dropped), and were not elected at the second election:—Held, that they could not afterwards maintain a suit to have it declared that they were the duly elected trustees. *Foster* v. *Stokes*, 2 O. R. 590.

(e) *Personal Liability.*

On Contract.]—The plaintiff, a teacher, sued upon a special agreement, stated to have been made by defendants as trustees, to furnish him with fuel when required, under 9 Vict. c. 20. Defendants demurred, because the defendants, having made the agreement in their corporate capacity, were charged as individuals:—Held, declaration bad. *Anderson* v. *VanSittart*, 5 U. C. R. 335.

See, also, *Sheriff* v. *Patterson*, 5 U. C. R. 620.

——— *Promissory Notes.*]—Two school trustees petitioned the council, stating that the ratepayers were desirous of purchasing a new site, and asking for a loan of $400, "for which the trustees will bind themselves to pay the interest annually and the principal when due." This was granted and secured by two instruments, as follows: "We, the undersigned, trustees of school section No. 11, do hereby promise to pay the treasurer of the corporation of Toronto township, on," &c. This was signed by the defendants in their own names followed by the word "trustees," and the corporate seal was affixed. The money was expended for the purpose mentioned. The township corporation having sued the two trustees individually, on these notes and on the common counts:—Held, that the defendants were not personally liable on the notes. Held, also, that the defendants were not liable on the common counts either, for the intention of all parties plainly was, that the trustees as a corporation should be bound, not the defendants personally, and, there being no fraud or concealment on their part, the fact that they as a corporation had no authority to borrow nor the plaintiffs to lend, would not, under the circumstances, make them personally liable. *Township of Toronto* v. *McBride*, 25 U. C. R. 13.

[By R. S. O. 1877 c. 204, s. 238, (R. S. O. 1897 c. 292, s. 104) any trustee or trustees of any public school wilfully neglecting or refusing to exercise all the corporate powers vested in them by this Act for the fulfilment of any contract or agreement made by them, shall be held to be personally responsible for the fulfilment of such contract or agreement.]

Refusing to Exercise Corporate Powers.]—Formerly any difference between trustees and a teacher in regard to his salary or any other matter, must have been submitted to arbitration, as provided by the statutes. See C. S. U. C. c. 64, ss. 84-87. And by 23 Vict. c. 49, s. 9, trustees wilfully neglecting or refusing to give effect to the award, were held personally responsible for the amount awarded, which might be enforced against them by warrant of the arbitrators. But these provisions were repealed by 34 Vict. c. 33, s. 27 (O.), which directed all such differences to be decided in the division court. This enactment is contained in R. S. O. 1877 c. 204, s. 165. For decisions under the arbitration clauses as between the trustees and a teacher, see *Kennedy* v. *Hall*, 7 C. P. 218; *Weaver* v. *Bull*, 10 C. P. 369; *Kennedy* v. *Burness*, 15 U. C. R. 473; *S. C.*, 7 C. P. 227; *Hughes* v. *Pake*, 25 U. C. R. 95; *Birmingham* v. *Hungerford*, 19 C. P. 411.

Where school trustees become personally responsible under 13 & 14 Vict. c. 48, s. 2, s.-s. 16, for refusing to exercise their corporate powers, before such liability can be enforced by the warrant of arbitrators under s. 15 of 16 Vict. c. 185, it is necessary to shew that there has been some adjudication of the fact of wilful refusal, to justify such warrant. *Ranney* v. *Macklem*, 9 C. P. 192.

A plea setting up an award between the school trustees, of whom plaintiff was one, and the teacher, and a warrant by the arbitrators, under which plaintiff's goods were sold:—Held, bad on demurrer, for (1) the arbitrators had no power to award costs; (2) nor that the sum should be paid within thirty days; (3) nor to resume consideration of the matter after having once made their award; (4) nor to decide that the trustees were personally liable. Trustees can be held liable only where they wilfully neglect to do their duty, not where they decline in good faith to exercise their corporate powers on account of any doubt or legal difficulty which they suppose to exist. *VanBuren* v. *Bull*, 19 U. C. R. 633.

School trustees cannot be held liable under 23 Vict. c. 49, s. 9, for wilfully neglecting or refusing to comply with an award, without being first afforded an opportunity of explaining or justifying such non-compliance. Where, therefore, the defendant in replevin justified seizing the plaintiff's goods under a warrant of the arbitrators issued against the plaintiff and the other trustees for non-compliance with an award, but did not shew that the plaintiff was notified or called upon to shew cause before such warrant issued:—Held, that the plea was bad. Remarks as to the informality of the warrant. *Graham* v. *Hungerford*, 29 U. C. R. 239.

Validity of Award—*Jurisdiction of Arbitrators.*]—Held, following Kennedy v. Burness, 15 U. C. R. 487, that arbitrators between school trustees and a teacher, under the Common School Act, acting within their jurisdiction, are entitled to protection under C. S. U. C. c. 126, as persons fulfilling a public duty; and therefore that trespass would not lie against them and their bailiff for seizing goods to enforce their award under s. 86. It was contended that the arbitrators had no jurisdiction, as no contract under the corporate seal, required by 23 Vict. c. 49, s. 12, was proved to have been produced before

them; but the plaintiff's witness said an agreement was produced which he thought had the seal, and the plaintiff, as a trustee, had named an arbitrator and submitted the matters in dispute:—Held, that under these circumstances it might be assumed that the arbitrators had before them all that was necessary to give jurisdiction. Held, also, that the award set out in the case was sufficient; and that 23 Vict. c. 49, s. 9, which directs that no want of form shall invalidate such awards, should receive a liberal construction. *Hughes* v. *Pake*, 25 U. C. R. 95.

Warrant—*Liability for Seizure.*]—Where it appeared that a horse was seized by K. under a warrant signed by two trustees, commencing, "We, the undersigned trustees of school section," &c., and sealed with the corporate seal:—Held, that the trustees were liable personally, not in their corporate capacity only. *Vance* v. *King*, 21 U. C. R. 187. But see *Ryland* v. *King*, 12 C. P. 198.

Withholding Books and Money—*Award—County Judge — Misdemeanour.*]—Held, that an award made by arbitrators appointed under s. 29 of C. S. U. C. c. 64, against one of the trustees (the secretary-treasurer), in his individual capacity as said trustee, for wrongfully withholding books, moneys, &c., is binding. (2) That the citing of a trustee to appear before the Judge of the county court, under s. 130 et seq. of the School Act, is not necessarily a bar to proceeding by arbitration under s. 29. (3) That under s. 130 the Judge of the county court has no jurisdiction, except when a secretary-treasurer "has in his possession, books, moneys, &c., which came into his possession as secretary-treasurer, and which he wrongfully holds and refuses to deliver up," &c., and such secretary-treasurer must be guilty of misdemeanour, contemplated by s. 130, before the Judge can interfere. *Ferris* v. *Chesterfield*, 10 C. P. 272, 6 L. J. 163.

(f) *Powers of.*

Contract with Board.]—A school trustee cannot, even by the consent of his co-trustees, be a contractor for the building of a school house. *Lamont* v. *Aldborough School Trustees*, 5 L. J. 93.

Distribution of School Fund—*Discretion—Injunction—Parties.*]—By the patent or grant of a township made in 1761, four hundred acres of land were declared to be "for the school." By a subsequent grant from the Crown in 1790, the said four hundred acres were declared to be vested in the rector and wardens of a church in the township, "in special trust, to and for the use of one or more school or schools, as may be deemed necessary by the said trustees, for the convenience and benefit of all the inhabitants of the said township, and in trust that all schools in said township furnished or supplied with masters qualified agreeably to the laws of this Province, and contracted with for a term not less than one whole year, shall be entitled to an equal share or proportion of the rents and profits arising from said school lands, provided the masters or teachers thereof shall receive and instruct, free of expense, such poor children as may be sent them by the said trustees." The grantees took possession of the land, and they and their successors in office had remained in possession of it, and until the year 1873 the rents and profits were distributed among the schools of the township, and poor children sent by the trustees to, and educated in, said schools according to the terms of the trust. In 1873, however, the then trustees discontinued such distribution and allowed the funds realized to accumulate, the reason alleged being that the schools of the township had become so numerous that the sum appropriated to each would be too small to be of use, and also, that under the free school system all the poor children of the township were educated free of expense, and the object for which such funds had previously been supplied no longer existed. The present defendants were invested with the trust in 1879, when the revenue had accumulated until it amounted to over $1,200. Shortly after they became such trustees, it was determined to build a school house in a certain district in the township with the money. A meeting of the vestry of the church was held and a resolution passed authorizing such school house to be built on land leased from the church; the school was to be non-sectarian, but after school hours any of the children who wished could receive instruction in the doctrines of the church of England:—Held, that the trustees had no discretion as to the application of the trust funds, but were bound to distribute them among all the schools of the township, which would be entitled to participate under the terms of the trust, however wanting in utility such a disposition of said funds might be. Held, also, that the attorney-general for the Province was the proper person to bring this suit. *Attorney-General for Nova Scotia* v. *Axford*, 13 S. C. R. 294.

Majority Acting.]—Two of the trustees of a section are not competent to act in all cases without consulting the third. *Orr* v. *Ranney*, 12 U. C. R. 377. (See R. S. O. 1877 c. 204, s. 99.)

Majority Signing Contract.]—A contract for building a school house made by two trustees under the corporate seal is sufficient; and a plea that it was signed by the two without the consent or approbation of the third:—Held, bad. In an action upon such a contract, under a plea of non est factum, the plaintiff was held entitled to succeed. *Forbes* v. *Plympton School Trustees*, 8 C. P. 74.

Number of Schools.]—The trustees of towns (though not of townships) under 13 & 14 Vict. c. 48, s. 24, have unlimited discretion as to the number of schools to be kept up. *Brockville School Trustees* v. *Town of Brockville*, 9 U. C. R. 302.

Payment of Solicitor's Bill—*Right of Ratepayer to Taxation.*]—See *McGugan* v. *McGugan*, 21 O. R. 289, 19 A. R. 56, 21 S. C. R. 267.

Special Meeting.]—Held, that power is given, under 13 & 14 Vict. c. 185, to school trustees to assemble a special meeting of the freeholders and householders of any school section for the purpose of maintaining a common school within their section. Held, also, that any resolution passed at the general annual meeting may be rescinded by a special meeting properly convened for that purpose. *Wilson* v. *Thompson*, 9 C. P. 364.

See Oliver v. *Ingersoll School Trustees*, 29 U. C. R. 409.

See, also, *ante* 4 (b).

9. *Other Cases.*

Common School Fund—*Inter provincial Rights—Adjustment.*]—The arbitrators appointed in 1879, under s. 142 of the B. N. A. Act, were authorized to "divide" and "adjust" the accounts in dispute between the Dominion of Canada and the Provinces of Ontario and Quebec, respecting the former Province of Canada. In dealing with the common school fund established under 12 Vict. c. 200 (C.), they directed the principal of the fund to be retained by the Dominion, and the income therefrom to be paid to the Provinces:—Held, that, even if there was no ultimate "division and adjustment," such as the statute required, yet the ascertainment of the amount was a necessary preliminary to such "division and adjustment," and therefore intra vires of the arbitrators. Held, further, that there was a division of the beneficial interest in the fund and a fair adjustment of the rights of the Provinces in it, which was a proper exercise of the authority of the arbitrators under the statute. By 12 Vict. c. 200, s. 3 (C.), one million acres of the public lands of the Province of Canada were to be set apart to be sold and the proceeds applied to the creation of the "common school fund," provided for in s. 1. The lands so set apart were all in the present Province of Ontario:—Held, that the trust in these lands created by the Act for the common schools of Canada did not cease to exist at Confederation, so that the unsold lands and proceeds of sales should revert to Ontario, but such trust continued in favour of the common schools of the new Provinces of Ontario and Quebec. In the agreement of reference to the arbitrators appointed under Acts passed in 1891 to adjust the said accounts, questions respecting the Upper Canada improvement fund were excluded, but the arbitrators had to determine and award upon the accounts as rendered by the Dominion to the two Provinces up to January, 1889:—Held, that the arbitrators could pass upon the right of Ontario to deduct a proportion of the school lands the amount of which was one of the items in the accounts so rendered. *Provinces of Ontario and Quebec* v. *Dominion of Canada, In re Common School Fund and Lands*, 28 S. C. R. 609.

Dissolution of Township Boards—*Time for.*]—Upon a case submitted by the minister of education under s. 237 of the Public Schools Act:—Held, that the plain meaning of s. 63 of the Public Schools Act, R. S. O. 1887 c. 225, is that, after the township public school board has existed for five years at least, the submission of a by-law for the repeal of the by-law under which that board was established, may be required at any time upon the presentation of a properly signed petition therefor. The by-law establishing the township board may be attacked with a view to its repeal again and again, so long as the agitation against it subsists. *Re Tuckersmith Public School Board*, 16 O. R. 604.

School Acts—*Amendments—Powers of School Sections.*]—The whole tendency of recent amendments of the Education Acts has been to give the rural school sections greater powers of self-regulation and self-government, and the courts should not be astute to interfere unless there has been a plain violation of the statute, or a manifest usurpation of jurisdiction, or a reckless disregard of individual rights. An action by a trustee and several ratepayers to have it declared that a certain meeting was illegal, and to restrain the board of a rural school section from building on a site unanimously adopted by the meeting, was dismissed, but without costs, as the point was new, and the statute was not plainly expressed. *Wallace* v. *Lobo School Trustees*, 11 O. R. 648.

School Moneys—*Bond.*]—Moneys appropriated for educational purposes are not protected by a township treasurer's bond. *Township of Oakland* v. *Proper*, 1 O. R. 330.

V. Separate Schools.

1. *Generally.*

Powers of Provincial Legislature.]—Under the British North America Act, provincial legislatures may legislate in regard to separate schools, provided that the legislation is not such as prejudicially affects the rights or privileges theretofore possessed by such schools. *Belleville Roman Catholic Separate School Trustees* v. *Grainger*, 25 Gr. 570.

School Rates—*Power to Levy.*]—The difference between the powers of public school trustees and of the Roman Catholic separate school trustees to levy school rates by their own authority observed upon. *Nottawasaga School Trustees* v. *Township of Nottawasaga*, 15 A. R. 310.

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2. *Coloured Separate Schools.*

See In re Hill and Camden and Zone School Trustees, 11 U. C. R. 573; *In re Stewart and Sandwich East School Trustees*, 23 U. C. R. 634; *In re Hutchison and St. Catharines School Trustees*, 31 U. C. R. 274, *ante* IV. 2; *Harling* v. *Mayville*, 21 C. P. 499, *post* 3.

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3. *Protestant Separate Schools.*

By-law Establishing—*Time of Taking Effect — Teacher — Rate — Return—School House.*]—Held, under C. S. U. C. c. 65, s. 3, and c. 64, s. 40, that the by-law of a township council authorizing the establishment of a Protestant separate school, on the ground that the teacher of the public school is a Roman Catholic, does not come into effect or the school into existence until the 25th December following. Held, also, that the appointment of a Protestant teacher to the public school before that day enabled the municipality to repeal the by-law, but did not, of itself, put an end to the separate school. No return was made by the local superintendent, under s. 13 of c. 65, of the supporters of the separate school for the preceding six months, to the public school trustees, and they, acting under the assessment roll for the year, where all the ratepayers of the section were entered, including the separate school supporters, of whom the plaintiff was one, levied a rate on all in the section for teacher's salary and other ordinary expenses of the public school, and also the amount payable within the year of the cost of a new schoolhouse, the construction of which was undertaken, before the 25th December, and issued a warrant for its collection to defendant,

their collector. The plaintiff brought detinue for his property seized under this warrant. The facts being stated in a special case without pleadings:—Held, that the public school trustees were not bound to exclude the names of the separate school supporters from their rate, as they had not notice of any exemptions, either by a return from the local superintendent or the assessment roll. Held, also, that under c. 65, s. 8, the supporters of the separate school were liable for the public school rates for the new school house, as it was undertaken before the separate school was established; but that this portion of the levy being correct would not make valid the whole levy, which was for one sum or rate, including several items. Held, also, that the fact of the separate school having received a share of the legislative school grant could not affect the case. Held, also, though there were no formal pleadings, that the defendant was not protected, as having acted under a warrant apparently lawful, but that he must be considered an actor, and must shew a title also to the property. Semble, that separate Protestant school trustees have no power to build school houses or impose rates therefor. Quære, as to the meaning of "school-rolls," in s. 14 of c. 65. *Free* v. *McHugh*, 24 C. P. 13.

School Rates—*Inequality—Pleading.*]—In replevin for plaintiff's goods, defendant made cognizance, justifying as bailiff of a collector of school rates under a warrant from him. Plaintiff pleaded: (1) that the rate was bad, as not being levied according to the valuation of the whole taxable property in the school section, as expressed in the assessor's and collector's roll, pursuant to the statute, but that it was levied wrongfully upon only three-fourth parts of such taxable property; (2) that, at the time said rate was imposed, there was a Protestant separate school, which had been long before established, and that plaintiff for a long time before the imposition of the rate had been and at the time of its imposition was sending his children to the said separate school. To the first plea defendant replied that the rate was duly imposed, because at the time of its imposition, and long before then, there was a union separate school of the townships of, &c., for coloured people, the limits of which took in the whole of the section in which plaintiff resided, and the trustees of said section properly omitted the names of the coloured people in said section from said rate-bill:—Held, that the first plea was good, for primâ facie the trustees could levy a rate only on the whole taxable property; but that the second plea was bad; and that the replication to the first plea was bad. *Harling* v. *Mayville*, 21 C. P. 499.

School Section—*Extension of Boundaries.*]—The boundary of a Protestant separate school section cannot be extended into or over an adjoining public school section, where the teacher in the latter is not a Roman Catholic. *Banks* v. *Township of Anderdon*, 20 O. R. 296.

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4. *Roman Catholic Separate Schools.*

Elections — *Appeal.*] — The election of school trustees, as well for the common schools as the Roman Catholic separate schools, must be held by the same returning officers, and at the same time and place as municipal elections. In election matters separate school boards have the same right of appeal to a county Judge as public school boards have. *Belleville Roman Catholic Separate School Trustees* v. *Grainger*, 25 Gr. 570.

Establishment—*Power to Define Limits.*]—Application for a mandamus to the board of school trustees of the city of Toronto, to authorize the establishment of a separate Roman Catholic school in section 9, in St. James's ward in said city:—Held, that the board, and not the applicants, should prescribe the limits of separate schools; and that the application should therefore be for one or more such schools, in general terms, leaving it to the board of trustees to define the same. *In re Hayes and Toronto School Trustees*, 3 C. P. 478.

Incorporation — *Formalities—Validity.*]—Six persons, Roman Catholics, some of whom were supporters of an existing Roman Catholic separate school, No. 6, and others, public school supporters in several adjoining public school sections, convened a meeting for the purpose of establishing a Roman Catholic separate school, which they thereupon assumed to do; but only three of them were residents of the same school section, and also heads of families:—Held, that the requirements of 49 Vict. c. 46 (O.), ss. 22, 24, were not complied with, and consequently there was no valid incorporation of the trustees elected at such meeting. Held, also, that a question as to the valid incorporation of trustees of a Roman Catholic separate school does not come within the purview of 49 Vict. c. 46, s. 68 (O.), R. S. O. 1887 c. 225, s. 67, which presupposes incorporation. *Arthur Roman Catholic Separate School Trustees* v. *Township of Arthur*, 21 O. R. 60.

School Moneys—*Grant—Assessment—Apportionment.*]—Semble, that what a separate school, established under s. 19 of 13 & 14 Vict. c. 48, is entitled to share in, is the sum apportioned by the chief superintendent out of the government grant, and the sum, at least equal in amount, raised by local assessment for the payment of teachers. *Belleville Roman Catholic School Trustees* v. *Belleville School Trustees*, 10 U. C. R. 469.

——— *Mandamus.*]—The court refused a mandamus, on the application of the Roman Catholic school trustees of Belleville, to compel the school trustees of the town to pay over to them a certain sum claimed as their share of the common school fund: (1) because it could not be said to be clear and without question what sum the applicants were entitled to, or in what fund they had a right to share under the Act. 2. Because the applicants, before coming to the court, should at least have been able to shew that they had submitted their complaint to the local or chief superintendent, and that he had refused to entertain it; and quære, whether the decision of the chief superintendent upon such a complaint would not be final. (3) Because the application should not have been made on behalf of the trustees, but on that of the teacher of the separate school, as being the person entitled to the money. *Belleville Roman Catholic School Trustees* v. *Belleville School Trustees*, 10 U. C. R. 469.

Supporters—*Duty of Assessor—Assessment Roll—Court of Revision.*]—Held, that

if the assessor is satisfied with the primâ facie evidence of the statements made by or on behalf of any ratepayer, that he is a Roman Catholic, pursuant to R. S. O. 1887 c. 225, s. 120, s.-s. 2, and thereupon (asking and having no other information) places such person upon the assessment roll as a separate school supporter, this ratepayer, though he may not, by himself or his agent, give notice in writing pursuant to R. S. O. 1877 c. 227, s. 40, may be entitled to exemption from the payment of rates for public school purposes, he being in the case supposed assessed as a supporter of Roman Catholic separate schools. The court of revision has jurisdiction, under R. S. O. 1887 c. 225, s. 120, s.-s. 3, on application of the person assessed, or of any municipal elector (or ratepayer, as under R. S. O. 1887 c. 227, s. 48, s.-s. 3), to hear and determine complaints, (a) in regard to the religion of the person placed on the roll as Protestant or Roman Catholic, and (b) as to whether such person is or is not a supporter of public or separate schools within the meaning of the provisions of the law in that behalf, and (c), which appears to be involved in (b), where such person has been placed in the wrong column of the assessment roll for the purposes of the school tax. It is competent for the court of revision to determine whether the name of any person wrongfully omitted from the proper column of the assessment roll should be inserted therein, upon the complaint of the person himself, or of any elector or ratepayer. The assessor is not bound to accept the statements of, or made on behalf of, any ratepayer under R. S. O. 1887 c. 225, s. 120, s.-s. 2, in case he is made aware, or ascertains before completing his roll, that such ratepayer is not a Roman Catholic, or has not given the notice required by s. 40 of R. S. O. 1887 c. 227, or is for any reason not entitled to exemption from public school rates. A ratepayer, not a Roman Catholic, being wrongfully assessed as a Roman Catholic and supporter of separate schools, who through inadvertence or other cause does not appeal therefrom, is not estopped (nor are other ratepayers) from asserting, with reference to the assessment of the following or future years, that he is not a Roman Catholic. A ratepayer, being a Roman Catholic, and appearing in the assessment roll as such and as a supporter of separate schools, who has not given the notice required by R. S. O. 1887 c. 227, s. 40, is not (nor are other ratepayers) estopped from demanding, in the following or future year, that he should not be classified as a supporter of separate schools with reference to the assessment of such year, although he has not given the notice of withdrawal mentioned in R. S. O. 1887 c. 227, s. 47. *In re Roman Catholic Separate Schools*, 18 O. R. 606.

——— *Exemption.*]—A rate may be levied to reimburse school trustees for the costs of defending a groundless action against them. Where such charge was incurred before the establishment of a separate Roman Catholic school:—Held, that the supporters of that school were not exempt from the rate. *In re Tiernan and Township of Nepean*, 15 U. C. R. 87.

——— *Exemption — Clerk—Correction of Roll.*]—A rate having been imposed to build a new school house in the town of Amherstburg, certain persons who were Protestants signed a notice to the clerk, he himself being one of them, that as subscribers to the Roman Catholic separate school they claimed to be exempted from all rates for common schools for 1861; and the clerk, thereupon, in making up the collector's roll, omitted this rate opposite to their names:—Held, that the clerk, who had been notified before making up the roll that it would be illegal to exempt these persons, had done wrong, and might be punished under C. S. U. C. c. 55, ss. 171, 173; but that the court could not, in the following year, interfere by mandamus to compel him to correct the roll. *In re Ridsdale and Brush*, 22 U. C. R. 122.

——— *Landlord or Tenant—Action for Tax—Parties — Amendment.*]—The plaintiff, who was collector of the Roman Catholic separate school tax for the township of Kitley, having sued defendant therefor, the latter admitted that he was a separate school supporter, but contended that he had leased his real estate to his son, who was a supporter of public schools, and who, as between defendant and himself, was to pay all taxes, and had paid the public school tax:—Held, (1) that defendant was liable. (2) That the action should have been brought in the name of the trustees as a corporation; and an amendment was allowed. *Healy* v. *Carey*, 13 C. L. J. 91.

SCIRE FACIAS AND REVIVOR.

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I. Bonds to the Crown.

Co-sureties—*Relief inter se—Judgment.*]—A. and B. entered as co-sureties into separate bonds to the Crown for C., as paymaster of militia. C. became a defaulter. The Crown proceeded by sci. fa. on each bond, and obtained a separate judgment against each surety. A. satisfied the judgment against himself. B. moved to be allowed, on paying the judgment against himself in full, to stand in

the place of the Crown, and to have the benefit of the Crown process against his co-surety for a moiety of the judgment:—Held, that the court would not thus relieve B.; that they might have allowed him to proceed in the name of the Crown to enforce the judgment which had been obtained on sci. fa. against A.; but this they could not now do, as it appeared the Crown had already enforced that judgment. *The Queen* v. *Land*, 3 U. C. R. 277.

Relief of Surety—*Notice of Default.*]—The court stayed proceedings on a sci. fa. on a bond to the Queen against a surety for the due performance of the duties of the post office by a deputy postmaster, where it appeared that when default was made by the deputy postmaster he was in good circumstances, and the deputy postmaster-general had taken security from him for the amount of his default, the surety having had no notice of the default until three years after it occurred, when the deputy postmaster had become insolvent. In debts due to the Crown which would be cognizable in the exchequer in England, the court of Queen's bench may give relief when it appears that "in law, reason, or good conscience the debtor should not be charged." *The Queen* v. *Bonter*, 6 O. S. 551.

Remedy—*Post Office Act—Joint and Several Obligors.*]—The defendant entered into a joint and several bond to the Queen, with D. and S., for the faithful discharge of S. of the duties of deputy postmaster at O. On sci. fa. against defendant on the bond, he appeared, and, upon its being set out on oyer, demurred to it, on the ground that a bond of this nature should, since the passing of the Post Office Act, C. S. C. c. 36, have been proceeded on by suit in the name of the postmaster-general, and not by sci. fa. or at the instance of the attorney-general:—Held, that, though the statute may authorize the postmaster-general in such cases to sue in his official name, the words "or otherwise," contained therein, do not deprive the Crown of the right to sci. fa. on a bond taken expressly in the name of the Queen. Held, that the Crown may have sci fa. against one or against all of the joint and several obligors of a bond, but that the proceeding must be against all or each one. *The Queen* v. *McPherson*, 15 C. P. 17.

II. JUDGMENTS AGAINST COMPANIES—SCI. FA. AGAINST SHAREHOLDERS.

Act of Incorporation—*Action—Remedy.*]—27 & 28 Vict. c. 23, s. 27, incorporating the defendants, enacts that every shareholder, until his stock has been paid up, shall be liable to the creditors of the company to the amount unpaid thereon; "but shall not be liable in an action therefor by any creditor" until an execution against the company has been returned unsatisfied, &c.:—Held, that sci. fa. would lie by a judgment creditor of the company against a shareholder, though the general practice here is to proceed by action, for a sci. fa. is in fact an action. *Gwatkin* v. *Harrison*, 36 U. C. R. 478.

Demurrer — *Remedy—Practice.*]—Where to a declaration against a shareholder of a joint stock company for the recovery against him, to the amount of his unpaid stock, of an unsatisfied judgment against the company, he demurred on the ground that an action on the case, and not a sci. fa., was the proper remedy:—Held, that the point was one of practice, and not of pleading, and was not, therefore, open on demurrer. *Page* v. *Austin*, 26 C. P. 110.

Fraud in Obtaining Judgment.]—The court refused to set aside a judgment obtained against a company for a valid claim, at the instance of a shareholder against whom a sci. fa. upon it had been issued, there being no proof of fraud or collusion between the plaintiff and the company in the obtaining such judgment. *English* v. *Rent Guarantee Co.*, 7 P. R. 108.

Winding-up Act—*Effect of.*]—There is nothing in the Winding-up Act, R. S. C. c. 129, which makes it a bar, either expressly or by implication, to an action of scire facias, brought by a creditor of the company without the leave of the court against a contributory. Difference between the Imperial Companies Act, 1862, and the Winding-up Act of Canada pointed out. *Shaver* v. *Cotton*, 27 O. R. 131.

III. REPEAL OF LETTERS PATENT.

Declaration—*Particulars.*]—The effect of C. S. C. c. 34, s. 20, s.-s. 2, enacting that the proceedings on a writ of sci. fa. to repeal a patent shall be "according to the law and practice of the court of Queen's bench in England," is to introduce the Imperial Act 15 & 16 Vict. c. 83:—Held, therefore, that leave to deliver particulars of the breaches, which should have been delivered with the declaration, could only be granted as if the declaration were delivered de novo; and that, as the jury had been sworn, and this, therefore, could not be done, a verdict was properly directed for defendant. The court, however, upon affidavit, allowed the plaintiff to deliver particulars, on terms. *The Queen* v. *Hall*, 27 U. C. R. 146.

Fiat—*Attorney-General.*]—A sci. fa. to set aside a patent was issued at the instance of a private relator, without the fiat of either the attorney-general for the Dominion or Ontario having been first obtained:—Held, (1) that a fiat was necessary. (2) That the attorney-general for Ontario was the proper authority to grant it. *The Queen* v. *Pattee*, 5 P. R. 292.

Right to—*Mistake—Concealment—Quebec Law—Crown Dues—Tender.*]—A sale of land subject to the right of redemption, (vente à rémeré) transfers the title in the lands to the purchaser in the same manner as a simple contract of sale. Salvas v. Vassal, 27 S. C. R. 68, followed. The locatee of certain Crown lands sold his rights therein to B., reserving the right to redeem the same within nine years, and subsequently sold the same rights to M., subject to the first deed. These deeds were both registered in their proper order in the registry office for the division and in the Crown lands office at Quebec. M. paid the balance of Crown dues remaining unpaid upon the land, and made an application for letters patent of grant thereof, in which no mention was made of the former sale by the original locatee. In an action by scire facias for the annulment of the letters patent granted to M.:—Held, that the failure to mention the vente

à réméré in the application for the letters patent was a misrepresentation and concealment which entitled the Crown to have the grant declared void and the letters patent annulled as having been issued by mistake and in ignorance of a material fact, notwithstanding the registration of the first deed in the Crown land office. Fonseca v. Attorney-General for Canada, 17 S. C. R. 612, referred to. Held, further, that it is not necessary that such an action should be preceded or accompanied by tender or deposit of the dues paid to the Crown in order to obtain the issue of the letters patent. *The Queen* v. *Montming*, 29 S. C. R. 484.

——— *Repeal of Ferry License—Grant of Rights Interfering with.*]—See *Brigham* v. *The Queen*, 6 Ex. C. R. 414, 30 S. C. R. 620.

Trial—*Right to Begin.*]—Under the general order of the exchequer court of Canada, bearing date the 5th December, 1892, and the provisions of s. 41 of 15 & 16 Vict. c. 83 (Imp.), the defendant in an action of scire facias to repeal a patent for invention is entitled to begin and give evidence in support of his patent, and, if the plaintiff produces evidence to impeach the same, the defendant is entitled to reply. *The Queen* v. *La Force*, 4 Ex. C. R. 14.

IV. Revival of Judgments and of Actions after Judgment.

1. *Death of Parties after Judgment.*

Defendant—*Execution.*]—The death of a defendant, after the placing of an execution in the sheriff's hands, does not make it necessary to revive the judgment against his executors and administrators, to make valid the seizure, under the writ, of goods which were owned by defendant at the time of his death. *Turner* v. *Patterson*, 13 C. P. 412.

Plaintiff—*Appeal.*]—The court will not allow the revival of a judgment by an administrator pending an appeal to the court of the governor in council or the King and privy council, although it be suggested and proved by affidavit that the administrator has been informed and believes the plaintiff in the court below, in whose favour the judgment was given, died after the judgment and before the allowance of appeal. *Washburn* v. *Powell*, 2 O. S. 463.

——— *Motion to Set aside Execution—Irregularity.*]—After judgment pronounced by the court upon default of defence the plaintiff died, and the defendant, desiring to have the judgment set aside and be let in to defend, issued a præcipe order under rule 622 reviving the action in the name of the executor of the plaintiff's will. Upon motion to set this order aside:—Held, that rule 622 should be read as applicable to a case in which final judgment has been entered; and, as it was necessary that the defendant should be allowed to carry on the proceedings, the order should be sustained. Arnison v. Smith, 40 Ch. D. 567, distinguished. Curtis v. Sheffield, 20 Ch. D. 398, and Twycross v. Grant, 4 C. P. D. 40, followed. After the death of the plaintiff, and before the order of revivor, the solicitor who had acted for her issued a writ of hab. fac. poss. upon the judgment without the leave required by rule 886:—Held, that the writ was irregular; and it was competent for the party affected by it to apply to set it aside without first reviving the action. *Chambers* v. *Kitchen*, 16 P. R. 219. Affirmed, 17 P. R. 3.

See Murray v. *Wurtele*, 19 P. R. 288, *post* V. 1.

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2. *Executors—Sci. Fa. against.*

Form of Sci. Fa.—*Payment—Judgment.*]—Sci. fa. on a judgment alleged to have been recovered against defendant, executrix, &c., (not as executrix) for £250. Plea, payment. Defendant proved payment to about £130. An account was produced by the plaintiff, shewing due at testator's death £76 7s. 4d. This was carried forward, and the account continued for some time against defendant, leaving a balance due altogether of £196 12s. 1d. Defendant contended that, as the payments proved exceeded the amount due by testator at his death, she was entitled to a verdict:—Held, that the statement in the sci. fa. did not amount to an allegation that defendant was sued in her representative character, the word executrix being mere description; and that the plaintiff was therefore entitled to a verdict on the issue, only half the amount of the judgment having been proved to be paid. Semble, that on such issue the plaintiff should have taken a verdict merely that the judgment was unsatisfied, not for any specific sum; and that a verdict so taken would not prevent defendant from obtaining relief if the execution on the judgment should be indorsed for more than the sum due. *Caughill* v. *Teal*, 12 U. C. R. 619.

Judgment of Assets Quando—*Lands.*]—A sci. fa. upon a judgment of assets quando acciderint must not pray execution of assets generally, but only of such assets as have come to the executor's or administrator's hands since the recovery of the judgment. A sci. fa. on a judgment against defendant as executrix under the will of C., deceased, alleged that lands as well as goods and chattels had come to the defendant's hands as such executrix to be administered, and prayed execution thereon:—Held, that the lands of which the testator died seised did not become assets in the hands of the executrix to be administered; and, there being no evidence of any goods and chattels having so come to the defendant's hands as such executrix, a verdict was entered for the defendant. The court intimated that the plaintiffs could obtain execution against the lands in the ordinary way. *Consolidated Bank of Canada* v. *Cameron*, 29 C. P. 71.

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3. *Necessity and Possibility of Revivor—Life of Judgment.*

Lapse of One Year—*Execution.*]—The court refused to set aside upon motion a ca. sa. issued upon a judgment more than a year old without sci. fa. to revive it. The ca. sa. was clearly irregular, yet not void, but voidable, and the proper remedy would seem to be a writ of error. *McNally* v. *Stephens*, Tay. 263.

It is irregular to issue a ca. sa. upon a judgment more than a year old, even though a fi. fa. has been issued within the year, but not returned, without a sci. fa. *Sewell* v. *Thompson*, E. T. 3 Vict.; *Wilson* v. *Jamieson*, 6 O. S. 481.

Upon the old law (before 29 Vict. c. 57, s. 10), it was sufficient to issue a writ of execution within a year from the entry of judgment, and it was unnecessary to return and file it within that time. *Hall* v. *Boulton*, 9 L. J. 213.

Lapse of Six Years — *Execution.*]—A writ of execution may be sued out at any time within six years from judgment without a revivor, and if during the six years it is sued out, returned, and filed, the same consequences follow as if, under the old practice, a writ had been sued out within a year and a day and returned and filed—that is, such writ will support a subsequent writ issued after that period without a sci. fa. or revivor. *Jenkins* v. *Kerby*, 2 C. L. J. 164.

Where the writ was issued within one year after entry of judgment, an alias writ issued more than six years thereafter, is regular without reviving the judgment. *Johnson* v. *McKenna*, 3 P. R. 229.

Lapse of Ten Years—*Lien on Land.*]—A writ of revivor or suggestion entered upon the roll is a "proceeding," and a judgment is to be considered as "charged upon or payable out of land" within 38 Vict. c. 16, s. 11 (O.), so that it cannot be revived by writ or suggestion after ten years. In this case the defendant did not set up the limitation upon hearing of the rule to revive, and relief was on this ground refused to him. *Casper* v. *Keachie*, 41 U. C. R. 599.

Held, reversing the judgment in 28 C. P. 506, that s. 11 of 38 Vict. c. 16 (O.) does not apply to judgments, and an action may still be brought thereon within twenty years under C. S. U. C. c. 78, s. 7. *Boice* v. *O'Loane*, 3 A. R. 167.

The plaintiff recovered judgment against the defendants on the 3rd November, 1863, and the last execution issued thereon was returned in September, 1865. More than twenty years afterwards the plaintiff moved for leave to issue execution against the surviving defendant, but no evidence was given of any part payment on account of the judgment or acknowledgment of liability thereon within that period:—Held, that, if the motion was necessary, it had been rightly refused. Quære, whether it was necessary to obtain leave to issue execution upon or to revive the judgment, execution having been in fact issued and returned within six years from its recovery. Allan v. McTavish, 2 A. R. 278, and Boice v. O'Loane, 3 A. R. 167, commented on. *McMahon* v. *Spencer*, 13 A. R. 430.

Judgment was recovered in 1856. On the 23rd October, 1869, an order was made by a Judge in chambers to revive by entering a suggestion on the roll under the C. L. P. Act, and the suggestion was entered on the 22nd January, 1870, but no execution issued after that date. On the 6th December, 1884, an order was made under rule 356, O. J. Act, for leave to the plaintiff to issue execution:—Held, that the entry of a suggestion under the C. L. P. Act was a judgment of the court and gave a new starting point for the Statute of Limitations to run from, and that the period of limitation in the case of judgments in personal actions is twenty years under R. S. O. 1877 c. 61, and not ten years under R. S. O. 1877 c. 128, which relates to judgments as liens on land. Allan v. McTavish, 2 A. R. 278, and Boice v. O'Loane, 3 A. R. 167, commented on and followed. *McCullough* v. *Sykes*, 11 P. R. 337.

See Allan v. *McTavish*, 2 A. R. 278; *Chard* v. *Rae*, 18 O. R. 371; *Allison* v. *Breen*, 19 P. R. 119, 143.

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4. *Other Cases.*

Assignee.]—Since the passing of 35 Vict. c. 12, s. 1 (O.) (R. S. O. 1877 c. 116) the assignee of a judgment is entitled to revive the same in his own name by entering a suggestion on the roll. *Philips* v. *Fox*, 8 P. R. 51.

Decree for Sale of Land — *Registered Judgment.*]—Where under a decree for sale founded on a registered judgment certain lands were sold, and several years afterwards other lands affected by the judgment having been discovered, were ordered to be sold:—Held, that it was not necessary under such circumstances to revive the suit. *Dickey* v. *Heron*, 2 Ch. Ch. 490.

Heir—*Sci. Fa. against.*]—A sci. fa. will not issue against an heir under 5 Geo. II., although an execution may have issued against the goods and chattels in the hands of the administrator and been returned nulla bona. *Paterson* v. *McKay*, Tay. 43.

——— *Judgment against—Sale—Title.*]—A judgment on sci. fa. against B., the heir of the deceased owner of the land, and a fi. fa. thereon, awarding the sale of lands of which the deceased was seised on a specified day, previous to which he had died, will not sustain a purchase and a sheriff's deed under such judgment, and the fi. fa. gives no title. *Varey* v. *Muirhead*, Dra. 486.

Husband and Wife—*Judgment against Woman before Marriage—Procedure.*]—The plaintiff proceeded by writ of revivor to obtain execution against husband and wife on a judgment recovered against the latter before marriage. The declaration set out the writ, in which the judgment was stated, and prayed execution against both defendants upon it; and defendants demurred, on the ground that no legal right of action was shewn against them, and that the proceeding by writ of revivor was not applicable:—Held, that under the C. L. P. Act, s. 143, the proceeding was proper, and that the right of action need not be shewn, but only a right primâ facie to have execution on the judgment. Section 18 of C. S. U. C. c. 73 applies only to cases where judgment has not been obtained against the woman before marriage. *Aylesworth* v. *Patterson*, 21 U. C. R. 269.

Joint Judgment—*Proceeding on.*]—In an action against the executors of W. on a judgment obtained against F. as sheriff, and A. and W. as sureties for the sheriff:—Held, that the judgment obtained against two or more was joint; that a judgment recovered against two or more defendants does not render them joint contractors within C. S. U. C. c. 78, s. 6; and that the action could not be maintained against the sureties as survivors, the plaintiff's remedy being by revivor or suggestion under C. S. U. C. c. 22, s. 312. *Gilchrist* v. *Weller*, 14 C. P. 404.

Writ of Revivor—*Irregularity.*]—Where a writ of revivor did not comply with the C. L. P. Act, 1856, s. 205, in stating by way of recital the reason why the writ had become necessary, the writ was set aside. *Gallusia* v. *Butler*, 3 L. J. 108.

V. REVIVAL OF PENDING ACTIONS.

1. *Assignment or Change of Interest.*

Assignment of Cause of Action.]—An order of revivor was obtained in this cause on the ground that the sole plaintiff had assigned all his interest, &c., to one Close. The plaintiff applied to the court by petition to set aside the order, disputing the assignment on the allegation of which the order was obtained. The order of revivor was discharged with costs. *Fisken* v. *Ince*, 8 P. R. 147.

Ejectment—*Conveyance Pendente Lite—Lapse of Time—Agreement of Solicitors.*]—In 1867 an action of ejectment was brought by L., and notice of trial given and the case entered for trial for 15th October following. The trial was postponed, and on 21st October L. conveyed the lands to I. On 8th January, 1871, L. died, and on 14th May, 1886, I. conveyed to the plaintiff. In February, 1892, an ex parte order under rule 620 was obtained by the plaintiff from the local registrar, reviving the action in the plaintiff's name. It appeared that in January, 1872, the then plaintiff's solicitors had notified the defendant's solicitors of the plaintiff's intention of reviving the action, and they gave notice of trial for the ensuing assizes, whereupon it was agreed between the solicitors that on the then plaintiff's solicitors refraining from reviving and proceeding to trial, the defendant's solicitors would abide by the result of another named suit, and if that result should be in favour of the plaintiff, an order of revivor might then issue and judgment be entered for the plaintiff:—Held, that the original action was governed by C. S. U. C. c. 27, s. 22, and terminated on the 21st October, 1867, when the plaintiff conveyed to I.; that after such a lapse of time, the plaintiff's rights being barred by the Statute of Limitations, no order of revivor should have issued; and that the court would give no effect to the agreement made by the solicitor, for to do so would be an injustice to the client:—Held, by the court of appeal, affirming the judgment discharging the order of revivor, that the action was governed by C. S. U. C. c. 27, and that it came to an end as soon as the conveyance to the present plaintiff's predecessor in title was made, except perhaps as to costs, for which the original plaintiff might probably have proceeded. *Lemesurier* v. *Macaulay*, 22 O. R. 316, 20 A. R. 421.

——— *Conveyance Pendente Lite.*]—Rules 383, 384, and 385, Ontario Judicature Act, 1881, which relate to the transmission of interest pendente lite, and permit the continuance of an action by or against the person to or upon whom the estate or title has come or devolved, are applicable to an action of ejectment begun before the Act, when the conveyance of the land by the original plaintiff did not take place until after its passing. *Irvine* v. *Macaulay*, 16 P. R. 181.

Promissory Note — *Transfer Pendente Lite — Substituting Plaintiff — Stay of Proceedings.*] — It may, in rare cases, such as Chambers v. Kitchen, 16 P. R. 219, be "necessary and desirable" under rule 396 to add or substitute a person as plaintiff, without the consent required by rule 206 (3), upon the application of the opposite party; but where it becomes necessary to substitute a person as plaintiff without his consent, to prevent injustice, he should not be exposed, without some further action on his part or adoption by him of the position into which he is forced, to any liability for damages or costs. Under the circumstances of this case, the fact that F. had become pendente lite, the transferee of the promissory note sued on, did not entitle the defendants to an order substituting him as plaintiff and making him liable for the costs of the action. But the original plaintiff could not be allowed to prosecute the action further, because he had no longer any interest in it, and F. could not be allowed to do so because he had not caused himself to be substituted as a plaintiff, nor obtained leave to proceed in his own name upon the judgment pronounced in favour of the plaintiff, which had not been entered, but from which the defendants sought to appeal; and all further proceedings in the action should, therefore, be stayed, but without costs. *Murray* v. *Wurtele*, 19 P. R. 288.

See Merchants Bank v. *Monteith*, 10 P. R. 407.

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2. *Death of Parties.*

(a) *Of Defendant.*

Carrier—*Survival of Cause of Action.*]—Plaintiff sued defendant, owner of a steamer carrying passengers for hire, charging that plaintiff was received by defendant as a passenger from T. to N., for safe carriage, for reward, but defendant did not safely carry plaintiff, who was in consequence seriously injured, &c. There was a second count charging it to have been defendant's duty to stop at the wharf at N., and to provide safe and proper gangways, but that defendant refused to stop to enable plaintiff to land in safety, and neglected to provide a safe gangway or other means and a reasonable opportunity for plaintiff to land, in consequence of which plaintiff, in landing at said wharf, was thrown down and injured, &c. After the commencement of the action defendant died, and plaintiff entered a suggestion on the record:—Held, that the action died with defendant, and could not be revived against his executor. *Cameron* v. *Milloy*, 22 C. P. 331.

Continuation against Executor de son Tort.]—An action commenced against an intestate may, under the C. L. P. Act, s. 134, be revived and continued against his executors de son tort. This question cannot be raised under a plea of ne unques executor. *Keena* v. *O'Hara*, 16 C. P. 435.

Dower—*Devisee—Procedure.*]—A plaintiff in an action for dower recovered judgment, but before the execution of the writ of assignment of dower, and after its issue, the tenant of the freehold died, having devised the land in question to the present defendant:—Held, that the plaintiff must proceed against the devisee by scire facias, and not by suggestion or revivor. *Davis* v. *Dennison*, 8 P. R. 7.

Order of Revivor—*Notice of Trial.*]—The original defendant dying pendente lite, the

plaintiffs issued an order of revivor on the 22nd April, and served it on the defendants by order on the same day, and along with it a notice of trial for the 5th May, at Cornwall. The defendant moved to set aside the notice of trial as irregular:—Held, that the order of revivor was in force from its service, and as it would be confirmed by the lapse of twelve days upon the 4th May, the notice of trial for the 5th May was regular. *New York Piano Co.* v. *Stevenson*, 10 P. R. 270.

See Ross v. *Pomeroy*, 28 Gr. 435; *Lince* v. *Faircloth*, 11 C. L. T. Occ. N. 49.

(b) *Of Garnishee.*

Execution.] — There is no power in the court or a Judge to order or permit a suggestion to be entered of the death of a garnishee, so as to legalize execution against his executors or administrators. *Ward* v. *Vance*, 3 P. R. 323.

(c) *Of Plaintiff.*

Between Award and Judgment.] — When a plaintiff, in whose favour an award is, dies after the award, but before judgment, the suit does not abate, but judgment may be entered under 17 Car. II. c. 8. No execution, however, can issue in the name of the plaintiff's executor without reviving the judgment. *Proctor* v. *Jarvis*, 15 U. C. R. 187.

Between Verdict and Judgment—*Assignment of Verdict — Assignee — Tort—Appeal.*]—In an action for malicious prosecution the jury found a general verdict for the plaintiff with damages. The defendant moved to set aside the verdict, &c., and his motion being dismissed, gave security for the purpose of an appeal, after which the plaintiff assigned "the verdict or judgment" to his daughter, and died about three months later. No judgment had been entered, nor was there any order or direction of the Judge for the entry of judgment. By an ex parte order, made on the application of the next friend of the plaintiff's daughter, after his death, the assignment to her was recited, and it was ordered that the action should stand revived in her name:—Held, that the action could not be revived or continued by or against the daughter, she not being the assignee of a judgment, and the cause of action not being one capable of being assigned to her so as to sue for it in her own name; and the defendant's appeal could not be heard in the absence of the legal personal representative of the plaintiff. Semble, the assignee of a judgment debt may obtain an order to enter a suggestion reviving the action for the purpose of issuing execution in his own name. Philips v. Fox, 8 P. R. 51, referred to. Where a verdict only is taken at the trial, and the Judge does not pronounce judgment or direct findings of fact to be entered, a motion for judgment is necessary. Wellbanks v. Conger, 12 P. R. 354, referred to. *Blair* v. *Asselstine*, 15 P. R. 211.

Practice — *Delay in Prosecution of Action.*]—A statute passed in 1889 gave persons making certain claims a right to bring an action within a year. The plaintiffs brought such an action within the year, but did not proceed with it, and no proceeding was taken by either party, after the delivery of the defence in June, 1890, until, one of the plaintiffs having died in January, 1895, the action was revived in February, 1896, by a præcipe order. In the meantime changes had taken place in the interests of the parties:—Held, that the order should not be interfered with. The old practice had been superseded, and the defendants, not having moved to dismiss, were not entitled to complain of the action being revived. *Ardagh* v. *County of York*, 17 P. R. 184.

——— *Suggestion—Motion.*]—Leave to enter a suggestion of the death of plaintiff and proceed under s. 210 of the C. L. P. Act, 1856, will be granted upon an ex parte application, upon an affidavit shewing the nature and state of the action, and that the party applying is plaintiff's legal representative. *Reischmuller* v. *Uberhorst*, 3 L. J. 48.

Survival of Cause of Action — *Covenant.*]—S. P. brought an action for damages sustained and to be sustained by reason of breaches of covenants for title in a conveyance of certain lands to him, and before the trial died intestate, whereupon his administratrix took out an order of revivor, which order was now sought to be set aside on the ground that the right of action did not survive to her:—Held, that for damages which accrued during the lifetime of S. P., his administratrix was entitled to sue; but that this was not so as to damages which might have accrued since his death, for which, semble, the heir, or devisee, might bring an action. In the case of such covenants running with the land, where only a formal breach takes place in the life of the ancestor, the remedy for damages accruing after his death passes to the heir or devisee; but where not only the breach took place, but damages accrued in the lifetime of the ancestor, the remedy for these damages passes to the personal representative. *Platt* v. *Grand Trunk R. W. Co.*, 11 O. R. 246

See White v. *Parker*, 16 S. C. R. 699.

——— *Tort—Appeal.*]—An action for injury to the person now survives to the executor of the plaintiff, who can, in case of his death pendente lite, on entering a suggestion of the death and obtaining an order of revivor, continue the action. *Mason* v. *Town of Peterborough*, 20 A. R. 683.

(d) *Of Plaintiff's Lessor.*

Ejectment.]—In ejectment under the old form, where the lessor of the plaintiff died before the trial:—Held, that no sci. fa. was necessary, but that judgment might be entered, and a writ of possession obtained. *Doe d. Hay* v. *Hunt*, 12 U. C. R. 625.

VI. Revival of Pending Proceedings in Equity.

(*See* also *ante* V.)

Acquisition of Interest—*Application to Amend.*]—An application to amend after decree, under order 438, by adding a party interested in the equity of redemption, need not be on petition, but is properly made on motion. Where such a motion was opposed on

the ground of irregularity, as not being by petition, the costs of opposing it were refused. *Harrison* v. *Grier*, 2 Ch. Ch. 440.

Acquisition of Interest before Suit.]—Persons who acquired an interest in the subject of the suit before the suit was commenced, cannot be made parties by an order of revivor. *McKenzie* v. *McDonnel*, 15 Gr. 442.

Assignment.]—An order of revivor is the appropriate proceeding in all cases of assignment pendente lite. *Matthews* v. *Mears*, 21 Gr. 99.

Where an order to revive is obtained to add a party who is an assignee of the defendant, it is not necessary to describe him in the order as assignee. *Brigham* v. *Smith*, 2 Ch. Ch. 257.

Death—*Amendment.*]—When any of the parties to a suit dies, and it is necessary to bring the representatives of such deceased party before the court, an order to amend the bill for that purpose will be granted. *Smith* v. *Meredith*, 2 Gr. 691.

Death of Defendant—*Amendment—Notice of Motion.*]—When a defendant died, and the plaintiff desired to amend by way of revivor, pursuant to s. 15 of the 9th general order, the court intimated that the proper mode of proceeding was to serve notice of motion to amend upon the person intended to be brought before the court by the amendment. *Goodeve* v. *Manners*, 4 Gr. 101.

——— *Amendment — Infants—Guardian.*]—When it becomes necessary to revive by way of amendment against infant defendants, the proper course is to amend simply in the first instance by making the infants parties. After that has been done, if the infants fail to have a guardian appointed, the plaintiff may apply under order 13 to have a solicitor appointed guardian, and in either case the plaintiff will be in a position to move that the suit do stand revived. *Kirkpatrick* v. *Fouquette*, 4 Gr. 549.

——— *Before Service of Bill.*]—If a sole defendant die before the bill is served upon him, there is no suit in court; the plaintiff, therefore, cannot revive, and if he take out an order to revive under such circumstances, it will be discharged with costs. *Watson* v. *Ham*, 1 Ch. Ch. 295.

——— *Decree—Confirmation.*]—A decree having been obtained after the decease of the original defendant, and before revivor, leave was obtained to serve an order of revivor by publication; and leave was afterwards obtained to serve by publication a notice of motion to confirm the decree or substitute a new decree. *McTaggart* v. *Merrill*, 7 P. R. 405.

——— *Demurrer—Amendment—Notice.*]—A plaintiff submitted to a demurrer and obtained an order to amend, by which he was required to make the amendments within fourteen days. This he failed to do, but took out ex parte and served an order of revivor, the demurring defendant having died after the expiration of the fourteen days:—Held, that by his failure to amend within the time limited, the plaintiff's right to amend was gone, unless by a special application he obtained an order enlarging the time. Held, also, that the plaintiff was not warranted without notice to the defendant in taking any further steps in the cause before making the amendments for which in the first place the bill was preserved, and he could not, therefore, issue an ex parte order of revivor. *Carr* v. *Moffat*, 9 C. L. J. 52.

——— *Infants—Defence.*]—Where infants have been made parties by revivor, they cannot set up a defence which their ancestor had not set up, except when such ancestor has been prevented by fraud or mistake from pleading such defence; and all the more particularly where the deceased defendant has been guilty of gross laches. *Burke* v. *Pyne*, 2 Ch. Ch. 193.

——— *Joint Executor—Abatement.*]—During the progress of an administration suit, and after the master had made his report charging the executors jointly with receipt of assets of the estate, one of them died, and the plaintiff by way of revivor made his personal representative a party. A motion to discharge the order of revivor on the ground that no abatement had taken place, was refused with costs. *Clousten* v. *McLean*, 14 Gr. 261.

——— *Joint Executor—Motion to Compel Revivor.*]—Bill against two executors and others. One of the executors died. A motion by the surviving defendants, including the co-executrix of the deceased defendants, to compel plaintiff to revive, or in default dismissal, was refused:—Held, that the proper parties to move were the representatives of deceased defendant, and that the surviving defendants might move to dismiss for want of prosecution in the usual way. *Watson* v. *Watson*, 6 P. R. 229.

——— *Widow—Motion to Discharge Order of Revivor.*]—Where, after a defendant's lands were seized under a writ of sequestration, the defendant died intestate, it was held that his widow was not a proper party to the order to revive. A motion to discharge an order to revive cannot, without leave of the court, be made after fourteen days from the service of the order; and mere service of notice within the fourteen days is not a sufficient compliance with G. O. 339. The notice of motion in such a case need not set forth the previous proceedings. *Harris* v. *Meyers*, 16 Gr. 117.

Death of Plaintiff—*Decree—Alimony.*]—After a decree, which had the effect of creating an interest in the lands of the defendant in favour of the plaintiff as also of their infant children, had been pronounced in an alimony suit, the plaintiff died, whereupon the suit was revived in the name of the infants, and subsequently the defendant died:—Held, under these circumstances, that the executor of defendant had no right to object to the solicitor of the plaintiff reviving in his own name against the estate of defendant, making the infants defendants instead of plaintiffs, in order to recover his costs. *Elvert* v. *Elvert*, 26 Gr. 448.

——— *Decree — Infants — Guardian.*]—Where the plaintiff in a redemption suit died before the decree pronounced had been drawn up, leaving infants his real representatives:—Held, that before an application to revive could be made, the decree must be drawn up, and a guardian ad litem appointed. *Beamish* v. *Pomeroy*, 1 Ch. Ch. 32.

Improper Order of Revivor—*Delay in Moving against.*]—The defendants, though aware that A. had no interest in the matters in question, made him a party plaintiff, by order of revivor obtained on præcipe. A. was then and for some time afterwards under the belief that he had been made a party properly; and even after he found out that he had been made a party improperly, he did not petition to have the order of revivor set aside as against him, till he found that he was prejudiced by it. The court granted the application, on his paying the costs of the petition and any costs incurred by his having been made a party. *Smith* v. *Gunn*, 2 Ch. Ch. 230.

Insolvency of Defendant — *Assignee — Service.*]—Where a defendant becomes insolvent after the service of the bill upon him, but before the time for answering expires, and the suit is thereupon revived against the assignee, it is necessary to serve the assignee with the bill as well as with the order to revive, or an order pro confesso cannot be obtained. *Smith* v. *Lines*, 1 Ch. Ch. 398.

Motion to Discharge Order of Revivor.]—An application to set aside an order to revive for irregularity is properly intituled in the abated suit, but if it be made upon any other ground the style of the cause as revived should be used. An application to set aside an order of revivor should be made to the court and not in chambers. Nicholson v. Peile, 2 Beav. 497, not followed. *Carr* v. *Moffat*, 9 C. L. J. 52.

Motion before a Judge to set aside an order to revive was held to be too late after fourteen days. But under the circumstances the court granted an enlargement of the time. *McIlroy* v. *Hawke*, 3 Ch. Ch. 66.

See Grasett v. *Carter*, 6 O. R. 584.

See PATENT FOR INVENTION, IX.

SCRUTINY.

See PARLIAMENT, I. 8.

SEAWORTHINESS.

See INSURANCE, VI. 3.

SEAL.

See COMPANY, V. 3 (b)—DEED, V. 4—ESTOPPEL, I. — MUNICIPAL CORPORATIONS, VIII. 8, IX. 1—PRINCIPAL AND AGENT, I. 2.

SEAL FISHERIES.

See FISHERIES, II.—SHIP, VII. 1.

SEARCH WARRANT.

Direction and Execution.]—Held, that the direction of a search warrant to the constable of Thorold, not naming him, to execute the warrant in the township of Louth, was good. *Jones* v. *Ross*, 3 U. C. R. 328.

Malicious Issue of—*Action for.*]—See *Lucy* v. *Smith*, 8 U. C. R. 518; *McNellis* v. *Gartshore*, 2 C. P. 464.

An action for malicious prosecution will lie for issuing a search warrant without reasonable and probable cause. *Young* v. *Nichol*, 9 O. R. 347.

See Hoover v. *Craig*, 12 A. R. 72.

See INTOXICATING LIQUORS, II. 3 (c)—JUSTICE OF THE PEACE.

SECONDARY EVIDENCE.

See EVIDENCE, I. 8.

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SECURITY FOR COSTS.

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SEDUCTION.

[*See* R. S. O. 1897 c. 69.]

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- 1. *Costs*, 6318.
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II. MISCELLANEOUS CASES ,6332.

I. ACTION FOR.

1. *Costs.*

Demurrer — *Small Verdict.*]—A declaration contained one count for seduction of

plaintiff's daughter, and another for necessaries supplied for the child. Plea, not guilty to first count; demurrer to second. The issue in fact was first tried and verdict for the plaintiff for 5s. Judgment was afterwards given for plaintiff on the demurrer, whereupon the plaintiff remitted on the roll all damages, without excepting costs, under the second count, and signed judgment for the 5s. and full costs taxed. On a summons for revision:—Held, that the plaintiff was entitled to the costs of demurrer to the second count, although it would have been more correct to have excepted the costs in the remittitur. An action of seduction may, under some circumstances, be brought "to try a right," or the grievance complained of may be "wilful and malicious;" and therefore, on a verdict under 88, without a certificate, the plaintiff was held not entitled, under the C. L. P. Act, s. 324, to any costs whatever; but, as the statute is confined to a verdict or assessment, he was entitled to full costs of demurrer. *Townsend* v. *Sterling*, 4 P. R. 125.

Successful Party Deprived of Costs— *Good Cause.*]—In an action for seduction it appeared that the wrong complained of was partly attributable to the culpable conduct of the girl's parents, and the jury gave a verdict for the defendant, but declared that they desired him not to get the costs, whereupon judgment was directed to be entered for him without costs:—Held, that good cause was shewn why costs should not be given to the defendant within rule 428, which declares that where an action is tried by a jury the costs shall follow the event, unless upon application made at the trial, for good cause shewn, the Judge or court shall otherwise order. *Wamsley* v. *Mitchell*, 5 O. R. 427.

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2. *Damages.*

Assessment of, by Judge without Jury.]—See *Adair* v. *Wade*, 9 O. R. 15.

See Palmby v. *McCleary*, 12 O. R. 192, *post* 3; *Lince* v. *Faircloth*, 11 C. L. T. Occ. N. 49, *post* 7.

See post 4.

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3. *Evidence.*

Admissions of Defendant — *Death of Plaintiff's Daughter.*]—In an action of seduction the only evidence was that of the plaintiff, the father of the seduced girl, and the defendant, the girl having died shortly after the birth of the child. The plaintiff stated that the defendant had admitted that he had seduced the girl, and asked what the case could be settled for. The defendant denied that he was the father of the child, or that he had made any such admission; and said that he had heard L. spoken of as the father of the child. He admitted having asked what the case could be settled for, but that he did so because he heard the plaintiff was asking $1,000, and he wished to know what it could be settled for; that he did not do so with a view to any one but merely out of curiosity. The jury found for the plaintiff with $750:—Held, that there was sufficient evidence to go to the jury in support of the plaintiff's case; and that the damages, under the circumstances, were not excessive. *Palmby* v. *McCleary*, 12 O. R. 192.

Affidavit.]—In an action by a father for the seduction of his daughter while she was living with a third person, it is not necessary to prove that an affidavit of the seduction was made and filed according to 7 Wm. IV. c. 8, s. 4. *Gill* v. *Brown*, 6 O. S. 142.

Disclosing Felony — *Rape.*] — Case for seduction will lie to recover damages arising from subsequent connexion, though the evidence strongly tend to shew that defendant had in the first instance committed a rape on the girl. *Hayle* v. *Hayle*, 3 O. S. 295.

An action for seduction will not lie, where the defendant has had connexion with the seduced against her will. *Vincent* v. *Sprague*, 3 U. C. R. 283.

Whenever, in an action for seduction, it turns out upon the trial that the act complained of was a felony, the Judge must direct an acquittal. Held, however, that in this case, the evidence being considered unsatisfactory, the Judge was justified in not directing a verdict for defendant. *Brown* v. *Dalby*, 7 U. C. R. 160.

Held, following the last case, that defendant cannot move against a verdict for plaintiff, as contrary to law and evidence, on the ground that the evidence shewed a rape. In such case, if the plaintiff refuses to be nonsuited, the Judge should discharge the jury until the criminal defence has been disposed of. *Walsh* v. *Nattrass*, 19 C. P. 453.

Held, following the last case, that where in an action of seduction, the evidence of the witness shews that a rape was committed upon her, it is the duty of the Judge, in the interest of public justice, to stop the case, and not leave it to the jury, with a direction to find for defendant if in their opinion it was rape; and this even where the Judge himself is not clear that a rape has been committed; but that defendant cannot set aside the verdict for misdirection in this respect, as this will only be done in the interests of public justice. *Williams* v. *Robinson*, 20 C. P. 255. *See Cole* v. *Hubble*, 26 O. R. 279, *post* 11.

Discovery— *Particulars — Examination.*] —The plaintiff in an action of seduction was examined for discovery by the defendant, but was able to give very little information:—Held, nevertheless, that the defendant was not entitled to examine the plaintiff's daughter. The defendant having made an affidavit denying the seduction and all knowledge of it, an order was made for particulars of specific acts, with regard to which the plaintiff proposed to give evidence. Turner v. Kyle, 2 C. L. T. 598, 18 C. L. J. 402, explained. *Hollister* v. *Annable*, 14 P. R. 11.

——— *Particulars.*]—Where the defendant in an action of seduction denies the seduction on oath, the plaintiff will be required to furnish particulars of the times and places at which it is charged that the alleged seduction took place. Hollister v. Annable, 14 P. R. 11, approved. *Mason* v. *VanCamp*, 14 P. R. 296.

Incompetent Witness—*Deficiency of Intellect.*]—In an action of seduction the plaintiff obtained a verdict, and judgment was directed to be entered in his favour. At the next sittings of a divisional court an order nisi was obtained to set aside the verdict and judgment, and to enter judgment for the

defendant, on the ground of the improper admission of the evidence of the seduced girl by reason of her incompetency to give evidence. The order was set down, and on its coming on for argument, it appeared that after the order had been served the plaintiff had died:—Semble, that under O. J. Act, rule 383, the action abated by reason of the plaintiff's death. Held, that the girl's evidence was improperly received, as it clearly appeared that she was not capable of understanding or appreciating the nature of an oath or the obligation she assumed in swearing to tell the truth, and was therefore incompetent to give evidence; and without her evidence the verdict could not be supported. An order was granted staying further proceedings in the action. *Udy* v. *Stewart*, 10 O. R. 591.

Means of Defendant.]—Held, following Hodsoll v. Taylor, L. R. 9 Q. B. 79, that in an action for seduction evidence as to defendant's means is inadmissible; and that, evidence of the kind having been received, defendant was not to be prejudiced in his application for a new trial because his counsel had, after having done his best to exclude the evidence, examined defendant on the same subject with a view to disproving the estimate placed on his means. *Ferguson* v. *Veitch*, 45 U. C. R. 160.

Paternity of Child.]—The plaintiff must prove the defendant to have been the father of the child; mere proof of seduction by him will not be sufficient. *Kimball* v. *Smith*, 5 U. C. R. 32.

——— *Birth in Wedlock—Presumption—Loss of Service.*]—In an action for the seduction of plaintiff's daughter, it appeared by her evidence that defendant had had intercourse with her in January, and up to June, 1860, but that she married one C. in October, 1860, and that the child was born on the 11th February, 1861. The plaintiff having obtained a verdict:—Held, that the child having been born in lawful wedlock, the mother's evidence was inadmissible to prove it illegitimate; and a new trial was granted. *Ryan* v. *Miller*, 21 U. C. R. 202.

At a second trial the fact that defendant was the father of the child was attempted to be proved by his admissions, and the jury again found for the plaintiff:—Held, that the verdict was not supported by the admissions stated in the case; and semble, that no evidence could be received to rebut the presumption of legitimacy. Quære, whether, if a clear loss of service before the marriage had been shewn, the plaintiff could recover for it. *S. C.*, 22 U. C. R. 87.

Where an unmarried woman is seduced and pregnancy follows, or sickness which weakens or renders her less able to work or serve, the father's cause of action is complete, and cannot be divested by the subsequent marriage of his daughter before the birth of a child. The facts of seduction, pregnancy, and illness might be proved by the daughter, but she might refuse to answer as to who was the cause of her pregnancy if she asserted that the child she bore was born in wedlock. Where the daughter was married during her pregnancy consequent upon her seduction by the defendant, and her child was born in wedlock, and the action was brought at the instigation of the husband, he and his wife being the only witnesses, and no proof of sickness or inability to serve was given:—Held, that a nonsuit was properly entered. *Evans* v. *Watt*, 2 O. R. 166.

——— *Seduction of Married Woman.*]—In an action for the seduction of a married woman the non-access of her husband, and her seduction by the defendant, may be proved by her own evidence. Evans v. Watt, 2 O. R. 166, considered. *Mulligan* v. *Thompson*, 23 O. R. 54.

Pecuniary Loss.] — The statute 7 Wm. IV. c. 8, C. S. U. C. c. 77, does not dispense with evidence of a pecuniary loss or damage, such as was required before the Act. *Westacott* v. *Powell*, 2 E. & A. 525.

Previous Want of Chastity.]—Where the female seduced has denied on her examination that she had intercourse with others besides the defendant, the defendant can only shew in answer that to the knowledge of his witnesses that statement was not true; he cannot be permitted to ask them whether they themselves had connexion with her. *McMahon* v. *Skinner*, 2 U. C. R. 272.

In an action for seduction witnesses called for the defence testified to having had connexion with the girl. The jury were told that these witnesses had a right to refuse to answer such questions:—Held, a misdirection. Held, also, that evidence of the girl's general bad character for chastity was improperly rejected. The defendant, being called, wholly denied the charge, and the jury having found for the plaintiff, though the verdict was not large, a new trial was granted without costs, on the ground that the defendant might have been prejudiced by the misdirection and rejection of evidence. *McCreary* v. *Grundy*, 39 U. C. R. 316.

Proof of Service.]—When the seduction took place, the girl seduced was living with her mother at the house of the plaintiff, her step-father, and he was working at a distance from home, having separated from his wife, by whom he had children, but sending money to assist in supporting the family. Semble, that if the case had depended on the fact of service, it might have been presumed from this evidence. *McIntosh* v. *Tyhurst*, 23 U. C. R. 565. See also *post* 5.

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4. *New Trial.*

Affidavit—*Intercourse—Denial.*] — New trial refused, defendant's affidavit not denying intercourse. Remarks upon the action generally. *Snure* v. *Gilchrist*, 23 U. C. R. 81.

Affidavits.]—New trial granted to defendant in an action of seduction, on affidavits. *McIlroy* v. *Hall*, 25 U. C. R. 303.

Conflicting Testimony — *Damages* — *Costs.*]—New trial refused in an action for seduction, where there was much conflicting testimony, and the verdict was for £100; though the Judge who tried the cause was unfavourable to such verdict; but the rule for a new trial was discharged without costs, as the plaintiff had improperly written letters to the court on the subject of the suit. *Thorpe* v. *Grier*, 1 U. C. R. 528.

Connivance — *Neglect* — *Excessive Damages.*]—Where evidence had been given of connivance on the part of the plaintiff, the

mother, and great negligence on the part of the father, and the jury gave £200 damages, the court granted a new trial. *Beadstead* v. *Wyllie*, Tay. 60.

Excessive Damages.]—The court refused a new trial for excessive damages, the verdict being for £200. *Ross* v. *Merritt*, 3 U. C. R. 60.

——— *Action by Master.*] — None of the special grounds for compensation which may be considered in the case of a parent apply in the case of a master or employer, but he is not restricted to his actual pecuniary loss; the damages recoverable must depend very much on the position in his household of the person seduced, &c.; and in this case, the verdict being for $500, the court refused to interfere for excessive damages. *Ford* v. *Gourlay*, 42 U. C. R. 552.

——— *Contradictory Evidence.*] — In this case the evidence was directly contradictory. The plaintiff, a married man, was an engine driver, and the girl his servant. There were circumstances which, if the defendant was guilty, would tend to inflame the minds of the jury, and there was no particular evidence of defendant's circumstances. The jury found a verdict of $2,000. The court refused to set aside the verdict as excessive. *Fitzhenry* v. *Murphy*, 14 C. L. J. 22.

——— *Perverse Findings.*] — In an action for the seduction of plaintiff's daughter, the daughter proved her seduction under a promise of marriage, her removal from her father's house, and concealment for a long period from her father. Certain letters to defendant were put in, which she at first admitted to be hers, but upon some indelicate portions being read she at once denied that she wrote them. These letters contained an admission of intercourse with defendant's brother, exonerated defendant from blame, and denied any promise of marriage. It appeared that some of the letters had been sent by the daughter under cover to defendant's brother in the States, and by him remailed to defendant, but the brother was not called, though in court during part of the trial. Defendant in his evidence denied any promise of marriage, but admitted the seduction. The persons were all respectable and belonged to the farming class. The jury having given $1,600 damages, defendant moved for a new trial on the ground of excessive damages, and on the ground that the finding of the jury that there was a promise of marriage, and that the letters were not genuine, was against law and evidence. No affidavit was filed, or new evidence suggested, and defendant declined to pay $1,000 into Court to abide the event of a new trial. Under these circumstances the court refused to interfere. *Hope* v. *Davidson*, 33 U. C. R. 550.

Gross Neglect.] — Gross neglect on the part of the parents, is held to be a good ground for a new trial for seduction. *Hogle* v. *Ham*, Tay. 248.

Misdirection—*Indirect Damages.*] — In an action (both parents being dead) brought by the brother of the girl seduced, who was living with him at the time of the seduction, under an agreement to remunerate her for her services, the court refused to set aside a verdict for the plaintiff, on the ground of misdirection in telling the jury that plaintiff was legally entitled to damages for distress of mind, injury to the feelings and reputation, and disgrace brought upon him, as standing in loco parentis. *Paterson* v. *Wilcox*, 20 C. P. 385.

Prior False Charge — *Contradiction — Damages.*]—New trial granted on payment of costs, where the person seduced in giving her evidence declared that another person whom she had formerly charged with being the father of the child, had been so charged falsely by her, and that defendant was the father, and her evidence had been contradicted and shaken in many particulars; the amount of the verdict being considerable. *Cane* v. *Reid*, 2 C. P. 342.

Surprise — *Character Evidence.*] — The court refused a new trial where the jury had found for defendant on evidence clearly impeaching the character of the seduced, although affidavits were produced that the plaintiff could rebut such evidence, and would have been prepared to do so at the former trial had he had notice. *Monk* v. *Casselman*, 4 O. S. 336.

See Morrison v. *Shaw*, 40 U. C. R. 403 (HUSBAND AND WIFE, II.)

See ante 3.

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5. *Persons Entitled to Sue and Right of Action.*

(a) *Masters.*

Time for Bringing Action.]—The statute 7 Wm. IV. c. 8 restrains the master of an unmarried female from suing for her seduction until six months have elapsed from the birth of the child, and it be first seen whether her father or mother within that time (not having abandoned her before her seduction) intend bringing the action. *Whitfield* v. *Todd*, 1 U. C. R. 223.

——— *Abatement of Parent's Action.*] — Where the mother of the girl seduced sued within six months from the birth of the child: —Held, that by the statute the master's right of action was taken away, notwithstanding that the suit brought by the mother had abated owing to her death after verdict in her favour had been set aside, and before a new trial granted had taken place. *Cross* v. *Goodman*, 20 U. C. R. 242.

See post (c).

See Ford v. *Gourlay*, 42 U. C. R. 552, *post* 6 (a).

(b) *Parents.*

Abandonment of Daughter.] — To an action by the mother, alleging that the seduction took place after the father's death, defendant pleaded that the daughter was not the plaintiff's servant, and that for ten years before and five years since the cause of action arose the plaintiff had continually abandoned and refused to provide for and to entertain the daughter as an inmate:—Held, plea bad, for the mere abandonment would not of itself divest the right of action, though it should affect the damages; and there was no allegation of the cause of action being vested in

any other person. *James* v. *Hawkins*, 25 C. P. 346.

Bastard—*Father of.*]—The father of an illegitimate daughter cannot, under 7 Wm. IV. c. 8, bring the action merely on the ground of being her father. *Biggs* v. *Burnham*, 1 U. C. R. 106.

——— *Mother of.*] — The mother of an illegitimate daughter can maintain an action for her seduction only on the principles of the common law, but she is so far in loco parentis that damages may be given beyond the mere loss of service. *Muckleroy* v. *Burnham*, 1 U. C. R. 351.

But she cannot, under C. S. U. C. c. 77, maintain the action, if the daughter while seduced was living with the defendant. Remarks as to the effect of the statute in attaining its object. *Hicks* v. *Ross*, 25 U. C. R. 50.

Before Birth of Child.]—Under 7 Wm. IV. c. 8, seduction followed by pregnancy entitles the parent, even before the birth of the child, and to the exclusion of any other person, to maintain an action, although the daughter had from tender years been living in the family of a stranger, and continued to reside there up to the time of bringing the action. *L'Esperance* v. *Duchene*, 7 U. C. R. 146.

An action for the seduction of the plaintiff's daughter, may be maintained before the birth of the child. *Westacott* v. *Powell*, 2 E. & A. 525.

Death of Father after Seduction.]—The plaintiff, a widow, sued the defendant for the seduction of A., her daughter. The seduction took place in October, 1861, during the lifetime of the plaintiff's husband, father of A., the daughter. On the 15th June, 1862, the father died, and on the 16th July, 1862, a child was borne by the daughter:—Held, that the action was not maintainable without proof of actual service, and, as the plaintiff, neither at the time of the seduction, nor subsequently when by her daughter being pregnant the right of action became complete, was entitled to her services, she could not be said to have lost those services by the misconduct of defendant. A nonsuit was therefore entered. *Smart* v. *Hay*, 12 C. P. 528.

In an action, after the death of the father, by the mother for the seduction of her daughter in the lifetime of the father, who was an invalid supported by the mother and daughter, no evidence of the actual relationship of mistress and servant was given:—Held, that the action was not maintainable. *Entner* v. *Bennewcis*, 24 O. R. 407.

Presumption of Service — *Absence of Daughter—Loss of Service.*] — The plaintiff's unmarried daughter was seduced by the defendant while at service in his family. There was no pregnancy, and only very slight physical disturbance: — Held, that under the Seduction Act, R. S. O. 1887 c. 58, an action lies by the parent, although the daughter may not have been living with him at the time of the seduction or subsequent illness. (2) That while mere illicit intercourse affords no ground of action, proof of illness or physical disturbance sufficient to have caused loss of service to the parent, if the girl had been living with the parent, is all that is necessary. Kimball v. Smith, 5 U. C. R. 32, L'Esperance v. Duchene, 7 U. C. R. 146, Westacott v. Powell, 2 E. & A. 525, and Cole v. Hubble, 26 O. R. 279, considered. Judgment in 28 O. R. 140 affirmed. *Harrison* v. *Prentice*, 24 A. R. 677.

Proof of Service.]—The proof of service was held insufficient to support the father's action. *Anderson* v. *Rannie*, 12 C. P. 536.

Residence of Father abroad—*Action by Mother.*]—Held, on demurrer to a statement of claim in an action of seduction, that the mother of the girl seduced, suing as her mistress, had a sufficient common law right to bring the action, in the absence from the Province of the girl's father. Held, also, that R. S. O. 1887 c. 58, "An Act respecting the Action of Seduction," is only an enabling Act, enlarging the right to maintain the action, under circumstances which would not be sufficient at common law. *Gould* v. *Erskine*, 20 O. R. 347.

——— *Master — "Not Guilty."*] — The parent may sue for the seduction of his daughter, though he was resident abroad at the birth of the child, and a cause of action at common law has vested in a master, whom she served. Held, also, that the question may be raised under a plea of not guilty. *Cromie* v. *Skene*, 19 C. P. 328.

Step-father and Mother.]—Declaration by husband and wife, for seducing the daughter of the wife by a former marriage, alleging her to be the servant of the plaintiffs, whereby the plaintiffs lost her services: — Held, bad: for if the cause of action accrued before the intermarriage of plaintiffs the girl was not then the servant of the husband, and if after she was his servant alone, so that in either case she could not be the plaintiffs' servant, as alleged. *Smith* v. *Crooker*, 23 U. C. R. 84; *Green* v. *Wright*, 24 U. C. R. 245.

Quære, whether s. 1 of the Seduction Act, C. S. U. C. c. 77, applies, except where the female seduced "was at the time of her seduction serving or residing with another person." Semble, that s. 3, postponing the right of the master for six months to that of the father or mother, refers only to the new right of action given to the latter by s. 1; and if so, quære, whether the ground upon which the plaintiff's verdict in McIntosh v. Tyhurst, 23 U. C. R. 565, was set aside, can be maintained. *Green* v. *Wright*, 24 U. C. R. 245.

A widow having an unmarried daughter married the plaintiff, and took the daughter to her new home. While living there and performing acts of service the daughter was seduced:—Held, that the step-father might maintain an action as at common law, though six months had not expired from the birth of the child, for it could not be said that the daughter was at the time of her seduction not living with her mother, but with "another person," within s. 1, of the Seduction Act, and s. 3 therefore did not apply. Remarks as to the object and proper construction of the statute. *McIntosh* v. *Tyhurst*, 24 U. C. R. 443.

See McIntosh v. *Tyhurst*, 23 U. C. R. 565, which is in effect overruled by the above decision; and *Green* v. *Wright*, *ante*.

Declaration by H. W. and M. W., husband and wife, that defendant, after C. S. U. C. c. 77, and the death of E. R.'s father, who

was the former husband of M. W., and during the intermarriage of the plaintiffs, and while E. R. resided with H. W., seduced said E. R., being the daughter and servant of M. W., whereby M. W. lost her services; and this action is brought by M. W. as her mother, under the statute, and H. W. is joined for conformity:—Held, following the last case, that the declaration was bad, for under the circumstances the statute did not apply, and the step-father should have sued as at common law. *Waters* v. *Powers*, 29 U. C. R. 336.

——— *Absence of Daughter.*]—In an action for seduction brought by the mother and step-father of the daughter, it appeared that at the time of the seduction the daughter was not living at home with the plaintiffs, but was out at service:—Held, that the plaintiffs had the right to maintain the action. Quære, as to the mother's right to sue alone. *Meyer* v. *Bell*, 13 O. R. 35.

Widow—*Father of.*]—A "widow" is not an "unmarried female," within 7 Wm. IV. c. 8, and her father cannot sue for her seduction when she was not living in his service, but in that of her seducer. *Kirk* v. *Long*, 7 C. P. 363; *Anderson* v. *Rannie*, 12 C. P. 536.

See Hogan v. *Aikman*, 30 U. C. R. 14, *post* 6 (a).

(c) *Persons in Loco Parentis.*

Proof of Service.]—Where an action is brought by the brother of the girl, not by the parents, the statute does not apply, and proof of service must be given. *McKay* v. *Burley*, 18 U. C. R. 251.

Recovery of Damages—*Mental Distress.*]—*See Paterson* v. *Wilcox*, 20 C. P. 385.

Right of Action—*Loss of Service—Damages.*]—In an action by the plaintiff, the husband of the seduced girl's aunt, it appeared that the girl had been intrusted when ten years of age to the aunt by her mother, who died in 1867, her father being resident in the United States. The girl then lived with the aunt, and on the aunt's marriage with the plaintiff in 1871, she still continued to live with the aunt and her husband, rendering, but without any contract of hiring, the services usually rendered by a farmer's daughter or servant, until September, 1873, when she left and went to live with one W. at Guelph, but without being in any way bound to him, to learn the millinery business by what was called the season, lasting from September to January, and from April to July, and at the close of each season returning to the plaintiff and living with him and the aunt as before. In February, 1875, while residing with the plaintiff and her aunt, on her return, she was seduced by the defendant. In March she again left the plaintiff and returned as before to W.'s, but before the expiration of the season she left him and went into a millinery establishment in Toronto, on the same terms as at W.'s, returning in September to the plaintiff, and living as before with him and her aunt; and while so living with them, a child was born:—Held, that there was sufficient evidence of the plaintiff being in loco parentis, and of loss of service to him, to entitle him to maintain the action, and to recover damages beyond the mere loss of service. A nonsuit was therefore set aside, and a verdict entered for $400, which the jury had assessed as the damages. *Abernethy* v. *McPherson*, 26 C. P. 516.

——— *Mother Living—Loss of Service.*]—Declaration for the seduction of one C. T., alleging that at the time of the seduction she was the sister and servant of the plaintiff, whereby, &c. Plea, that at the time of the child's birth C. T.'s father was dead, and her mother was then and still is alive and a British subject, and at the commencement of the action was and still is a resident of the Province; and that C. T. is her legitimate daughter:—Held, declaration good, and plea bad; for the declaration shewed a common law right in the plaintiff to maintain the action, and the plea did not shew enough to divest it under the statute in favour of the mother. *Tweedlie* v. *Bogie*, 27 C. P. 561.

——— *Loss of Service—Master.*]—In an action for seduction of the grandniece of the plaintiff, it appeared that on her father's and mother's death, when she was about twelve years old, she went to live with the plaintiff, and from his house went out to service to various persons, and at the time of the seduction, and for three years previously, was in the service of one C., retaining her wages for her own use. She was seduced by the defendant in the month of April, being then about nineteen years old. In June following she went to Detroit for a couple of weeks, and thence to the plaintiff's, where she resided until she was sick, when she went to the hospital, where she was confined. While at the plaintiff's she worked, and did whatever was required of her, the plaintiff treating her as if she were at home, as her guardian:—Held, that the plaintiff could not recover, for that the right of action for the alleged wrong was not vested in the plaintiff, but in the person who was master of the girl at the time of her seduction. *McKersie* v. *McLean*, 6 O. R. 428.

In an action for seduction it appeared that the plaintiff was the brother of the girl seduced; and that the girl, though in the service of another person, yet (by agreement with her mistress, entered into at the time of her engagement) was at liberty to perform, and did perform, certain services at home for the plaintiff, under contract with him for which she received compensation:—Held, that the plaintiff was entitled to maintain the action. Rist v. Faux, 4 B. & S. 409, specially referred to. Thompson v. Ross, 5 H. & N. 16, distinguished. *Straughan* v. *Smith*, 19 O. R. 558.

(d) *Plaintiff's Death—Continuation of Action.*

After Verdict—*New Trial.*]—Where the plaintiff, a widow, recovered a verdict for $2,000, for the seduction of her daughter, and a new trial was granted on payment of costs, and plaintiff subsequently died before the costs were paid, an order was made to enter a suggestion of plaintiff's death, and to proceed with the action in the name of the personal representative. *Chisholm* v. *Goodman*, 6 L. J. 88.

Survival of Cause of Action.]—The right of action does not survive to the administrator of the original plaintiff, the mother of the deceased, and damages occasioned to

the estate in the nursing and attending of the daughter, do not entitle the administrator to continue the action. *Ball* v. *Goodman*, 10 C. P. 174.

——— *Loss of Service.*]—The plaintiff sued for the seduction of her daughter, claiming the right to continue the action upon a writ issued by the father in his lifetime, and declared for loss of service as between mistress and servant. The seduction, it was proved, took place and a child was born while the daughter resided with her parents, and during her father's lifetime:—Held, that the right of action did not survive to the mother. (2) That it was necessary (the case not coming within the statute) to allege and prove the relation of master and servant, and the loss of service occasioned thereby. *Healey* v. *Crummer*, 11 C. P. 527.

See Cross v. *Goodman*, 20 U. C. R. 242, *ante* (a); *Udy* v. *Stewart*, 10 O. R. 591, *ante* 3.

6. *Pleading.*

(a) *Declaration—Necessary Averments.*

Loss of Service—*Adopted Daughter—Residence of Parents.*]—The plaintiff sued for the seduction of his adopted daughter, bringing his action within six months from the birth of the child, and averring loss of service, which he proved, and obtained a verdict. Defendant pleaded only not guilty:—Held, that it was unnecessary to allege in the declaration, or to prove, that neither the father nor the mother of the girl was resident in Upper Canada at the birth of the child, or if resident had brought no action within six months; for, as the plaintiff had at common law a right of action on the facts stated, any defence under the statute depriving him of it must be pleaded. Held, also, that if such proof was essential to the action it should after verdict be presumed. In this case there was some evidence of the death of both parents, which might be supposed to have satisfied the jury. *Nickells* v. *Goulding*, 21 U. C. R. 366.

——— *Death of Father.*]—A declaration by a woman that defendant seduced her daughter and servant, whereby she lost her services:—Held, good, either at common law or under the statute, without alleging the father's death. *Kelly* v. *Bull*, 23 U. C. R. 278.

A declaration for seduction not containing an averment of loss by the plaintiffs (the mother of the seduced and her second husband) of the services of the seduced, nor that the seduced was the servant of the plaintiffs, is bad. Such declaration by the mother for the seduction of her daughter, is bad for not alleging the death of the father. *Lake* v. *Bemiss*, 4 C. P. 430.

——— *Death of Parents—Action by Master.*]—The plaintiff sued for the seduction of E. L., his servant, who had been in his employment for several years, and while there was seduced by defendant, who had been received as a suitor for her. Her brother had been dead many years, and her father, of whom she knew nothing, had left the country fifteen years before, having married again. The action was brought within six months from the birth of the child, which was not born in the plaintiff's house. Defendant pleaded only not guilty, and that E. L. was not the plaintiff's servant. The jury found for the plaintiff and $500 damages:—Held, that it was unnecessary to aver in the declaration the death of the parents, or shew such facts as enabled the plaintiff to sue as master within the six months, but that it was sufficient to shew a common law cause of action, leaving defendant to plead any such defence, which was not admissible under the pleas here. The last case dissented from. *Ford* v. *Gourlay*, 42 U. C. R. 552.

Statute.]—In an action by a father for the seduction of his daughter, who was not living with him at the time of the seduction, it is not necessary to aver in the declaration that the action is brought under the statute. *McLean* v. *Ainslie*, 5 O. S. 456.

Time of Seduction.]—Declaration by husband and wife, that the defendant, after the death of the father of K., seduced said K., then being the daughter and servant of the wife, while the said K. was unmarried, and residing with the defendant, and not with her said mother, whereby the mother lost her services, &c.:—Held, that the declaration was good; that the action would lie; and that it was unnecessary to state that the seduction took place before the mother's second marriage, for if essential to the action the plaintiff under the declaration must prove it. *Hogan* v. *Aikman*, 30 U. C. R. 14.

(b) *Pleas.*

Accord and Satisfaction.]—Declaration in seduction, by the father. Plea, in effect, that after the seduction it was agreed between plaintiff and defendant that if defendant would agree to take, maintain, and support the child at his own costs, &c., from the date of such agreement, plaintiff would accept the same in full satisfaction and discharge; and that defendant, in pursuance thereof, did agree so to do, and plaintiff accepted said agreement in full satisfaction, &c. Replication, that before said agreement was made, the mother of the child made the usual statutory affidavit, and filed it within the required time, and before the alleged accord, in the office of the clerk of the peace; and that defendant, before and at the time of the making of such alleged agreement and accord, was liable in law to maintain and support the child:—Held, on demurrer, plea good, as setting out an agreement on defendant's part, for which a sufficient consideration appeared in his undertaking a liability which he was not bound to assume, and that defendant was not obliged to shew that he had actually performed his agreement, as this was unnecessary to support the accord set up by the plea. Held, also, that the replication was bad, and did not displace the plea. *McHugh* v. *Grear*, 18 C. P. 488.

To an action for the seduction of plaintiff's daughter, the defendant pleaded, on equitable grounds, that the plaintiff and his daughter had entered into an agreement under seal with defendant for the settlement of the suit and other matters (setting it out), by which the amount to be paid by defendant was fixed at $120, which the defendant agreed to pay by instalments of $15 at the times specified; and it

was stipulated that if the defendant should not make these payments punctually the agreement should be void. The plea then set out that defendant paid three instalments, but by accident omitted to pay the fourth, which he was ready and willing to pay; and he submitted that the proviso to avoid the agreement on non-payment was, on the true construction of the agreement, a penalty only, against which he should be relieved, and if not that it differed from the intention of both parties, and should be reformed. The attorney who drew the agreement said that he put in this proviso of his own accord, without instructions to do so, but that it was read over to the parties, and executed in duplicate, each party taking one:—Held, that there was no ground for saying that the proviso was introduced by mistake; that it was not a penalty against which defendant should be relieved, being a reservation only of an existing legal right; and that it formed no defence therefore to this action. *Boland* v. *McCarroll*, 38 U. C. R. 487.

Leave and License.]—The plaintiff declared in trespass in the first count, complaining of breaking and entering his close and debauching of his daughter only, and the defendant pleaded to each count, as to all but the force and arms, &c., the leave and license of the daughter. The plea was held bad on demurrer. *Ross* v. *Merritt*, 2 U. C. R. 421.

Marriage of Seduced.] — Defendant pleaded, among other pleas, as to the alleged loss of service, and trouble in nursing, &c., that at the time of the delivery the daughter was not an unmarried female:—Held, on demurrer, no defence. *Ryan* v. *Miller*, 21 U. C. R. 202.

Not Guilty.]—The plea of not guilty does not deny the allegation that the seduced was the servant of the plaintiff. *Alteman* v. *Smith*, 4 C. P. 500.

Traversing Service.]—A plea traversing the service:—Held, bad, for traversing an inference of law; and that the court could not intend that the seduced was a married woman in order to support it. *McLeod* v. *McLeod*, 9 U. C. R. 331; *Lake* v. *Bemiss*, 1 P. R. 359.

See Ford v. *Gourlay*, 42 U. C. R. 552, *ante* (a); *Daley* v. *Byrne*, 15 P. R. 4 (PLEADING —PLEADING SINCE THE JUDICATURE ACT, XI. 4).

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7. *Other Cases.*

Arrest under Ca. Re.]—See *Wheatly* v. *Sharp*, 8 P. R. 189.

Death of Defendant—*Survival of Action.*]—After an action of seduction was commenced, but before the trial, the defendant died, and the action was continued against his administrator:—Held, that s. 10 of R. S. O. 1887 c. 110, altered the common law to the extent necessary to entitle the plaintiff to maintain the action against the representative of the person who committed the wrong—the damages in actions of seduction, so far as they exceed the value of the loss of service, the cost of nursing, and doctors' bills, being given to the plaintiff for the loss of the comfort and society of his daughter and the loss of reputation which he sustains; the plaintiff's reputation and feelings are a part of his person, and an injury to them is an injury "in respect of his person." *Lince* v. *Faircloth*, 11 C. L. T. Occ. N. 49.

Examination of Defendant.]—An order to examine defendant granted in an action of seduction, when interlocutory judgment had been signed for want of a plea. *Cerriby* v. *Wells*, 14 C. L. J. 170.

Form of Action.]—Action on the case lies, as well as trespass, for seduction. *Cavan* v. *Welsh*, Dra. 246.

Infant Defendant—*Guardian.*]—In an action of seduction brought against an infant, the defendant was served personally, and entered an appearance in person:—Held, that the common law practice referred to in con. rule 261 means the practice by which a real guardian and not a fictitious one was appointed; and an order was made requiring the defendant to appear by guardian within six days, and in default that the plaintiff should be at liberty to appoint a guardian for him, the consent of such guardian being shewn, as also that he had no interest adverse to the defendant. *Hyne* v. *Brown*, 13 P. R. 17.

It appeared that the defendant was not quite of age, and that no guardian had ever been appointed, but that the fact of infancy was well known to the defendant's parents and to the solicitor and counsel who appeared for him at the trial, and no objection on this ground was taken till this motion before the divisional court:—Held, that under con. rules 261, 313, the appointment of a guardian was not imperative; the court had a discretion; and in this case the judgment obtained against the defendant at the trial should not be interfered with. Furnival v. Brooke, 49 L. T. N. S. 134, followed. *Straughan* v. *Smith*, 19 O. R. 558.

Parties — *Addition of Mother—Amendment.*]—Plaintiff caused defendant to be arrested for the alleged seduction of his stepdaughter, she at the time of her alleged seduction not being in his service. Afterwards he applied to amend his declaration by joining his wife, striking out the allegation that the girl seduced was the daughter of the plaintiff, and substituting the statement that she was the daughter of the wife. The application was refused. *Lawson* v. *McDermitt*, 9 L. J. 45.

Statute of Limitations.]—The Statute of Limitations begins to run from the time of the seduction, not from the birth of the child. *McKay* v. *Burley*, 18 U. C. R. 251.

II. MISCELLANEOUS CASES.

Affidavit before Magistrate—*Alteration in.*]—It was stated, in an affidavit in support of the rule for a new trial in an action of seduction, that the plaintiff had sworn before a magistrate that defendant never had criminal connexion with her. The magistrate, in an affidavit used on shewing cause, stated that the defendant's brother S., with the girl said to have been seduced, and her mother, came to him together, saying that the girl was going to clear his brother, that his mother was very ill, and the rumor was affecting her very much; that he, the magistrate, wishing to do something to let the old lady die easy, and at

the same time to let the girl have a chance to swear the child on defendant, inserted in the affidavit taken before him the words "criminal connexion," instead of "carnal connexion." Such conduct very strongly censured. *McIlroy* v. *Hall*, 25 U. C. R. 303.

Carnal Connexion by Force—*Previous Acquittal for Rape—Amendment.*]—In an action for enticing away and having carnal knowledge of the plaintiff's daughter, the plaintiff was allowed at the close of the case to amend by setting up, as an alternative cause of action, the enticing away of the daughter and having connexion with her by force and against her will, and consequent loss of service. No application was made by the defendants to put in further evidence, nor was any suggestion made that they were in any way prejudiced by the amendment:—Held, that the amendment was properly allowed. Held, also, that the fact of the defendants having been previously acquitted on an indictment for rape on the plaintiff's daughter was not a bar to the action. *Cole* v. *Hubble*, 26 O. R. 279.

Indictment for.]—See *Regina* v. *Smith*, 19 O. R. 714.

Insolvency.]—An insolvent debtor charged in execution in case for seduction is entitled to relief under 5 Wm. IV. c. 3. *Perkins* v. *O'Connolly*, H. T. 6 Wm. IV.

Held, affirming the judgment in 9 P. R. 206, that under the Insolvent Act, 1864, s. 9, s-s. 5, a discharge in insolvency would form no answer to proceedings upon a judgment against defendant for seduction. *Beninger* v. *Thrasher*, 1 O. R. 313.

Malicious Arrest—*Reasonable and Probable Cause.*]—Plaintiff sued defendant in the first count for malicious arrest, by a false affidavit that defendant had a cause of action against him for the seduction of his daughter; and in the second count for effecting the same object by falsely, &c., representing that he was about to quit Canada, with intent, &c. The plaintiff established a primâ facie case on both counts, in answer to which defendant proved that he was present when his daughter made an affidavit before a justice of the peace that she was pregnant by the plaintiff; that he had been informed of statements made by the plaintiff affording a very strong inference of improper intercourse; that he was told the plaintiff had said he had "signed away" his place; and that he, defendant, had received a letter from plaintiff's cousin, condemning the plaintiff for not marrying defendant's daughter, and telling defendant that it was his duty to look after him, as he was going to sell his place, and wanted to sell it to the writer:—Held, that these facts sufficiently shewed reasonable and probable cause; that, as they were uncontradicted, there was no question for the jury; and that a nonsuit therefore was proper. *Riddell* v. *Brown*, 24 U. C. R. 90.

See HUSBAND AND WIFE, II.—NEW TRIAL, IX. 7—PUBLIC MORALS AND CONVENIENCE, III.

SEISIN.

Letters patent, suo vigore, constitute seisin in fact. *Weaver* v. *Burgess*, 22 C. P. 104.

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I. Generally—Authority and Jurisdiction.

Application of District Funds.]—Justices in sessions cannot apply the funds of a district towards building a gaol and court house without express authority by statute. *Rex* v. *Justices of Newcastle*, Dra. 204.

Assault — *Attempt to Murder.*]—At the quarter sessions the prisoner was found guilty on an indictment charging that she, on, &c., in and upon one B., in the peace of God and of our lady the Queen then being, unlawfully did make an assault, and him, the said B., did beat and illtreat, with intent him, the said B., feloniously, wilfully, and of her malice aforethought, to kill and murder, and other wrongs to the said B. then did, to the great damage of the said B., against the form of the statute in such case made and provided, and against the peace, &c. A count was added for common assault. The evidence shewed an attempt to murder, but it was moved in arrest of judgment that the court had not jurisdiction, for that it was a capital crime, under C. S. C. c. 91, s. 5:—Held, that the indictment did not charge a capital offence under that section, nor an offence against any statute, but that the conviction might be sustained as for an assault at common law. *Regina* v. *McEvoy*, 20 U. C. R. 344.

——— *Sentence — Warrant — Costs—Imprisonment.*]—Held, that the court of quarter sessions is a court of record, and has power, in the case of an assault, to pronounce a sentence of fine and costs of prosecution, and imprisonment in default of payment; and that a warrant of commitment under the seal of the court, or signature of the chairman, is not necessary. Quære, as to the propriety or impropriety of such court directing imprisonment to be continued until costs as well as fines are paid. *Ovens* v. *Taylor*, 19 C. P. 49.

Bench Warrant—*Seal.*]—A bench warrant issued at the quarter sessions, tested in open sessions, and signed by the clerk of the peace:—Held, not invalid for want of a seal. *Fraser* v. *Dickson*, 5 U. C. R. 231.

Constitution of Court—*Judge—Conviction.*]—It is no objection to a conviction at the quarter sessions that neither the Judge of the district court nor any barrister was present when a conviction was made. *Regina* v. *Crabbe*, 11 U. C. R. 447.

——— *Judge of Neighbouring County — Provincial Statute.*]—Held, that the county Judge of the county of Lanark had no power to preside at the sessions in the county of Renfrew, the Provincial statute authorizing him to do so being ultra vires. *Gibson* v. *McDonald*, 7 O. R. 401.

Costs—*Power to Award.*]—See *Regina* v. *McIntosh*, 28 O. R. 603.

Forgery.]—The quarter sessions has no jurisdiction to try the offence of forgery. *Regina* v. *McDonald*, 31 U. C. R. 337. See *Regina* v. *Dunlop*, 15 U. C. R. 118.

Kidnapping.]—See *Cornwall* v. *Regina*, 33 U. C. R. 106.

New Trial — *Assault.*] — Defendant was convicted of an assault at the quarter sessions and fined, but during the same sessions he obtained a new trial on his own affidavit, and was acquitted at the following sessions:—Held, that the quarter sessions had authority to grant such new trial, and that the court of Queen's bench could not interfere. *Regina* v. *Fitzgerald*, 20 U. C. R. 546. See *Re Yearke and Bingleman*, 28 U. C. R. 551, *post* II. 11.

Nuisance — *Abatement — Order—Certiorari—Costs.*]—The defendant was convicted at the general sessions on an indictment for a nuisance in obstructing the highway by the erection of a wall thereon, and directed to abate the nuisance, which not having been done the sessions made an order directing the sheriff to abate the same at the defendant's costs and charges, and to pay the county Crown attorney, forthwith after taxation, the costs of the application and order, and the sheriff's fees and costs and incidental expenses arising out of the execution of the order:—Held, that the sessions had no authority to make the order to the sheriff, the proper mode in such case being by a writ de nocumento amovendo; that the order, being a judicial act, was properly removed by certiorari, and must be quashed, but without costs. Remarks as to the jurisdiction of the sessions as to costs. *Regina* v. *Grover*, 23 O. R. 92.

Order—*Sittings of Court.*]—Semble, that the chairman of the quarter sessions cannot make any order of the court except during the sessions, either regular or adjourned. *In re Coleman*, 23 U. C. R. 615.

Perjury.]—Held, that a recognizance to appear for trial on a charge of perjury at the sessions was wrong, as the court had no jurisdiction in perjury; but a certiorari to remove it was refused, as the time for the appearance of the party had gone by. *Regina* v. *Currie*, 31 U. C. R. 582.

II. Appeals to Sessions.

1. *Generally—Right of Appeal.*

Conviction under Inland Revenue Act.]—Held, that no appeal would lie to the quarter sessions from a summary conviction under the Inland Revenue Act, 31 Vict. c. 8, s. 130, for possessing distilling apparatus without having made a return thereof; for that such conviction was for a crime, and therefore not within C. S. U. C. c. 114. *In re Lucas and McGlashan*, 29 U. C. R. 81.

Conviction under Liquor License Act.]—F., a shop-keeper licensed to sell in-

toxicating liquors in quantities not less than a quart, was convicted before the police magistrate under 32 Vict. c. 32, for selling half a pint of whisky, contrary to the provisions of the Act, "without the license therefor by law required." His appeal to the general sessions of the peace was dismissed on the ground that, by s. 25, the conviction was final and without appeal:—Held, that s. 25 only applied to persons who sold without any license; that F. came under s. 26; and that by s. 36 he had a right of appeal. *Regina* v. *Firmin*, 33 U. C. R. 523.

Conviction under Public Health Act.]—Where there is a conviction for an offence under the by-law set out in the schedule to the Public Health Act, R. S. O. 1887 c. 205, as distinguished from any of the provisions in the Act itself, an appeal will lie from such conviction to the sessions, notwithstanding s. 112, which has no application. *Regina* v. *Coursey*, 26 O. R. 685. Reversed on different grounds, 27 O. R. 181.

Dismissal of Complaint.] — Where a charge of assault was preferred before two magistrates, under 4 & 5 Vict. c. 27, who dismissed the complaint, ordering the complainant to pay the costs, the court refused a mandamus to the sessions to hear an appeal, for the statute contemplates an appeal only in cases of conviction. *In re Justices of Brock District*, M. T. 6 Vict.

Held, that the prosecutor of a complaint cannot appeal from the order of a magistrate dismissing the complaint: as by R. S. O. 1877 c. 74, s. 4, the practice of appealing in such a case is assimilated to that under 33 Vict. c. 47 (D.), which confines the right of appeal to the defendant. A prohibition was therefore ordered, but without costs, as the objection to the jurisdiction had not been taken in the court below. *In re Murphy and Cornish*, 8 P. R. 420.

——— *Offence under By-law.*]—There is no appeal to the court of general sessions of the peace from an order of dismissal of a complaint for an offence against a city by-law passed under the authority of s. 554 of the Municipal Act, R. S. O. 1897 c. 223. The "order" referred to in s. 7 of R. S. O. 1897 c. 90, the Ontario Summary Convictions Act, means an order against the party against whom the information and complaint is laid, and does not include an order of dismissal. *Regina* v. *Toronto Public School Board*, 31 O. R. 457.

Order under Prevention of Cruelty to Children Act.]—There is no appeal to the general sessions from an order for the custody and care of children under s. 13 and subsequent sections of 56 Vict. c. 45 (O.), "An Act for the Prevention of Cruelty to and better Protection of Children," made by two justices of the peace sitting under s. 2 of 58 Vict. c. 52 (O.), amending the former Act. *In re Granger and Children's Aid Society of Kingston*, 28 O. R. 555.

Temporary Judicial District—*Nearest County.*] — Two justices, appointed in 1880 for the temporary judicial district of Nipissing, made a conviction in the said district of one M. for an assault committed there:—Held, that no appeal would lie under 9 Vict. c. 41 (C. S. C. c. 101, s. 4), to the general sessions of the county of Renfrew, being the nearest to the place of conviction, for the justices were not appointed under the Act, but under R. S. O. 1877 c. 71, and the place of conviction was not within any part of Canada defined and declared by proclamation under that Act. *Gibson* v. *McDonald*, 7 O. R. 401.

See Regina v. *Ramsay*, 11 O. R. 210; *Regina* v. *Robert Simpson Co.*, 28 O. R. 231.

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2. *Adjournment.*

Power of.]—Under C. S. U. C. c. 114, an appeal from a conviction must be heard at the court of quarter sessions appealed to. There is no power of adjournment. *In re McCumber and Doyle*, 26 U. C. R. 516.

——— *Costs.*]—Nor is there power to adjourn the question of costs. *Regina* v. *Murray*, 27 U. C. R. 134.

Statute—*Directory—Indorsement on Conviction.*]—An appeal from a conviction for malicious injury to property came on for hearing at the general sessions. No order of adjournment was indorsed on the conviction, the clerk merely entering a minute of the order in his book. At the following sessions the appeal was heard and the conviction quashed:—Held, that the provision in s. 77 of R. S. C. c. 178, as to indorsing the order of adjournment on the conviction, was not imperative, but directory merely, and therefore the omission to make the indorsement did not affect the validity of the order to quash. *Regina* v. *Read*, 17 O. R. 185.

See In re Ryer and Plows, 46 U. C. R. 206.

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3. *Amendment.*

By Magistrate—*Return of Amended Conviction—Judgment.*]—A conviction may be returned and proved at any time during the hearing of an appeal therefrom to the general sessions, or, in the discretion of the chairman, even during an adjournment for judgment. A minute of conviction signed by the justice, but not sealed, was returned to the sessions, upon the entering of an appeal therefrom by the defendant. The jury found the defendant guilty of the offence of which he had been convicted, but on motion for judgment he objected that the conviction was not sealed. The chairman reserved judgment until a day named, and during the adjournment the justices returned and filed a conviction under seal. The chairman then refused to receive it, or to give judgment, holding that there was no conviction upon which to found the appeal, which had been heard:—Held, that the prosecutor was not entitled to a mandamus to compel him to deliver judgment; for the reception of the conviction in evidence at that period was in the chairman's discretion, which could not be reviewed. *In re Ryer and Plows*, 46 U. C. R. 206.

——— *Return of Amended Conviction—Notice of Appeal.*]—The appellant was convicted before the police magistrate of a city for keeping a house of ill-fame, "contrary to a certain by-law of the corporation." She appealed to the sessions, in May following, where it was held that under 32 & 33 Vict. c. 32 (D.), the decision of the magistrate was final.

The appellant, on the 2nd June, applied for a mandamus to the sessions to hear the appeal, and the police magistrate on the same day filed with the clerk of the peace another conviction, stating the offence to be "contrary to the statute in such case made and provided," 32 Vict. c. 32, under which there is no appeal:—Held, that the appeal should have been heard; and that, after notice of appeal given and the time of hearing the appeal had arrived, no amendment could be made to the conviction. The mandamus was therefore ordered. *Regina* v. *Smith*, 35 U. C. R. 518.

By Sessions—*Amendment of Sentence.*]—Where an appeal was brought from a conviction imposing imprisonment with hard labour, which the magistrate had no power to award, and the sessions amended the record by striking out "hard labour:"—Held, that their assuming so to amend the conviction was not a quashing of the conviction, and therefore trespass would not lie against the justices. Semble, that the general sessions of the peace have no power under 32 & 33 Vict. c. 31 (D.) to amend the sentence in a conviction as by striking out the part imposing hard labour, but can hear and determine an appeal on the adjudication of guilt only. *McLellan* v. *McKinnon*, 1 O. R. 219.

——— *Duty to Amend.*]—On appeal to the quarter sessions from a justice's conviction, apparently intended to be under C. S. U. C. c. 105, as amended by 25 Vict. c. 22, for having unlawfully entered defendant's premises (describing them) and cut down and destroyed certain trees thereon, &c., without stating that the premises were wholly enclosed, it appeared in evidence that the premises were in fact wholly enclosed, and the chairman directed the jury that the case, if any, was one arising under C. S. U. C. c. 93, s. 25. The jury found the appellant guilty, but the chairman, notwithstanding, made an order quashing the conviction, as there was no averment or evidence that the damage done amounted to 20 cents, and he refused to amend under 29 & 30 Vict. c. 50:—Held, that the conviction was one under C. S. U. C. c. 105, as amended by 25 Vict. c. 22, and that the quarter sessions could not convert the charge into one under C. S. U. C. c. 93, s. 25; but that, the appeal having been submitted to the jury, though with an erroneous charge, their verdict should have been treated as a determination of the appeal, and the chairman should have amended the conviction, in accordance with 29 & 30 Vict. c. 50, by the insertion of the words "wholly enclosed," and have affirmed and enforced the same. A mandamus was therefore ordered to set aside the order of the quarter sessions as in excess of jurisdiction, and to amend and affirm the conviction. *McKenna* v. *Powell*, 20 C. P. 394.

See Regina v. *Washington*, 46 U. C. R. 221, *post* 5.

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4. *Costs.*

Certificate of Non-payment.] — The court having granted a prohibition against proceeding further with an appeal from a conviction, refused a mandamus to the clerk of the peace to certify the non-payment of costs of the appeal, under C. S. C. c. 103, s. 67. *In re Coleman*, 23 U. C. R. 615.

Order for—*Payce.*]—Quære, whether an order of the sessions, simply ordering costs of an appeal to be paid, without directing to whom they are to be paid, &c., under s. 74 of 32 & 33 Vict. c. 31 (D.), is regular. *In re Delaney* v. *MacNabb*, 21 C. P. 563.

——— *Payce—Amendment.*]—Under 32 & 33 Vict. c. 31, ss. 65, 74 (D.), the court of quarter sessions, at which an appeal is heard, must determine, on quashing a conviction, whether any and what costs are to be paid, and when. Where, therefore, the only order made was, "conviction quashed with costs:"—Held, that no subsequent session of the court could interfere by way of amendment of the order or otherwise, and a rule for a mandamus to the chairman and clerk of the sessions to issue the said order, with a provision for payment by the respondents to the appellant of the costs of the appeal forthwith after taxation, was discharged, but under the circumstances without costs. *In re Rush and Village of Bobcaygeon*, 44 U. C. R. 199.

Respondent — *Abandoned Appeal.*]—Appeal against a summary conviction for breach of a by-law of the corporation of St. Thomas, for selling spirituous liquors without license. The appellant gave notice of appeal in due time, but entered into no recognizance to prosecute his appeal with effect; nor did he afterwards give notice, before the sittings of the sessions, of the abandonment of his appeal, under s. 4 of C. S. U. C. c. 114:—Held, respondent entitled to costs. *In re Neil and Sells*, 9 L. J. 217.

——— *Want of Proper Notice.*]—Under 32 & 33 Vict. c. 31, s. 65, and 33 Vict. c. 27 (D.), the court of quarter sessions has no power to award costs on discharging an appeal for want of proper notice of appeal, for the words "shall hear and determine the matter of appeal" mean, decide it upon the merits. *In re Madden*, 31 U. C. R. 333.

——— *Want of Proper Notice — Certiorari.*]—Where an appeal to the sessions is dismissed without being heard and determined on the merits, there is no power to impose costs. Re Madden, 31 U. C. R. 333, followed. When a notice of appeal is given for the wrong sessions, and the appeal is not heard on the merits, the right to certiorari is not taken away by s. 84, R. S. C. c. 178. *Regina* v. *Becker*, 20 O. R. 676.

Successful Appellant.] — The court of quarter sessions has no authority to order a person acquitted on appeal to pay any part of the costs of such appeal, or to convict him of an offence for disobeying such order. *Regina* v. *Orr*, 12 U. C. R. 57.

Taxation—*Jurisdiction—Formal Order—Criminal Code.*]—Where the chairman of the general sessions of the peace made a minute of dismissal of an appeal from the conviction of a police magistrate, with costs to be taxed by the clerk of the peace, but no formal order was drawn up in pursuance of such minute:—Held, that a certificate of the clerk as to the amount of such costs and a subsequent order of the court of general sessions directing a distress warrant to issue in respect of the same, were irregular and must be quashed. If such formal order had issued, the certificate might have been upheld, although the appellant was bound by recognizance conditioned to pay

the costs. Freeman v. Read, 9 C. B. N. S. 301, specially referred to. Held, also, that in view of s. 880(e), (f), of the criminal code, 55 & 56 Vict. c. 29 (D.), the formal order might have been drawn up at any future sittings of the court of general sessions, and the costs included therein nunc pro tunc, if necessary, the power to determine the amount of such costs not being, as it is in England, confined to the justices at the same general sessions at which the appeal is heard. *Re Bothwell and Burnside*, 31 O. R. 695.

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5. *Evidence.*

Improper Admission—*Reversal of Verdict.*]—Where a person had been convicted before justices and fined, and on an appeal to the quarter sessions the justices there admitted more evidence than had been heard on the conviction, and the accused party was acquitted; but, on receiving the opinion of the attorney-general that the additional evidence should not have been admitted, the justices in sessions confirmed the conviction, and ordered it to be recorded, but took no notice of the acquittal—the court made absolute a rule for a mandamus, commanding them to enter an acquittal. *Rex* v. *Justices of Bathurst*, 4 O. S. 340.

New Evidence on Appeal.]—On an appeal to the quarter sessions under 4 Wm. IV. c. 4, evidence differing from or additional to that produced before the convicting justices may be received and go to the jury. *Rex* v. *Justices of Bathurst*, 5 O. S. 74.

On the appeal the appellant tendered evidence and witnesses not heard on the trial before the magistrate which the chairman rejected, relying on 32 & 33 Vict. c. 31, s. 66 (D.), which, however, had been repealed by 42 Vict. c. 44, s. 10 (D.) The conviction was amended and affirmed, as and for a breach of a municipal by-law:—Held, that the appellant had the right under either the Dominion Act, or R. S. O. 1877 c. 74, s. 4, which governed the case, to have such witnesses examined, and having been deprived of this right, the order of sessions should be quashed. *Regina* v. *Washington*, 46 U. C. R. 221.

See the next case.

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6. *Jury.*

Conviction under Liquor License Act —*Prohibition.*]—Held, (1) that after a conviction by a magistrate for selling liquor after 7 o'clock on Saturday evening under 32 Vict. c. 32, s. 23 (O.), has been confirmed, on appeal to the sessions, a prohibition to the sessions will not be granted. (2) That under the above section it is irregular for the Judge who tries the case to call a jury or to receive depositions of witnesses as evidence; but this is not ground for a prohibition. *In re Brown and Wallace*, 6 P. R. 1.

Conviction under Lord's Day Act.]—Defendant was convicted under 8 Vict. c. 45, "for that he, J. H., of the village of Preston, did on Sunday the 26th day of July last past, at the township of Waterloo, work at his ordinary calling, inasmuch as he and his men did make and haul hay on said day." He appealed to the quarter sessions, where the question was tried before a jury, and the conviction affirmed. The proceedings having been removed by certiorari to this court:—Held, that 13 & 14 Vict. c. 45 extended to this case, and authorized the trial by jury, though in 8 Vict. c. 45 there is a provision for appeal to the sessions, but not such trial. *Hespeler* v. *Shaw*, 16 U. C. R. 104.

Conviction under Municipal By-law.] —On an appeal to the sessions from a conviction by a magistrate for breach of a municipal by-law, it is in the discretion of the chairman to grant or refuse a request for a jury, under 36 Vict. c. 58, s. 2 (D.), which is declaratory of the meaning of s. 66 of 32 & 33 Vict. c. 31 (D.), and is not confined to cases under the Acts mentioned in the preamble and title, which relate only to the desertion of seamen. *Regina* v. *Washington*, 46 U. C. R. 221.

See Regina v. *Bradshaw*, 38 U. C. R. 564.

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7. *Notice.*

Signature.]—It is not essential that the notice of appeal under 33 Vict. c. 27 (D.), from a summary conviction, should be signed by the party appealing. A notice, therefore, "that we, the undersigned D. N. and C. N." of, &c., following the form given by the Act in other respects, but not signed, was held sufficient. *Regina* v. *Nichol*, 40 U. C. R. 76.

Sufficiency of — *Objections.*]—Held, that a notice of appeal, stating "that the formal conviction drawn up and returned to the sessions is not sufficient to support the conviction," &c., is sufficiently particular to allow all objections to be raised which are apparent on the face of the conviction or order. *Re Helps and Eno*, 9 L. J. 302.

Time for Giving — *Certiorari.*]—A conviction having been made within twelve days of the next sessions, notice of appeal was given to such sessions, instead of to the second sessions after the conviction, contrary to 33 Vict. c. 27, s. 1 (D.), and the appeal was not heard:—Held, that such notice being inoperative, there had, in effect, been no appeal, and the right of certiorari was therefore not taken away by s. 2. *Regina* v. *Caswell*, 33 U. C. R. 303.

See In re Hunter v. *Griffiths*, 7 P. R. 86, *post* 9; *Regina* v. *McGauley*, 12 P. R. 259, *post* 9; *Regina* v. *Smith*, 35 U. C. R. 518, *ante*; *In re Madden*, 31 U. C. R. 333, *ante* 4; *Regina* v. *Essery*, 7 P. R. 290, *post* 8.

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8. *Recognizance.*

Filing — *Enrolment* — *Condition*—*Sufficiency.*]—Upon an appeal from a conviction to the general sessions of the peace, the notice of appeal and the recognizance were produced by the clerk of the court from its files, exhibited to the court, and placed in its custody, and evidence was given of the service of the notice of appeal. The recognizance purported to be executed by the convicting justice, and appeared to have been in the custody of the clerk of the peace from its date:—Held, sufficient proof to found the jurisdiction of the court to

try the appeal, in the absence of evidence shewing the recognizance to be false; and that enrolment of the recognizance was unnecessary. The recognizance was filed by the appellant, instead of being sent to the clerk of the peace by the justice who took it; and the condition therein was to appeal to the "general quarter or general sessions," and not to the "court of general sessions of the peace:"—Held, a sufficient compliance with the statute. *Regina* v. *Essery*, 7 P. R. 290.

Form—*Condition.*]—The form of recognizance to try an appeal, given in the schedule to C. S. C. c. 103, is sufficient, though the condition differs in form from that provided by c. 99, s. 117. *In re Wilson and Sessions of Huron and Bruce*, 23 U. C. R. 301.

——— *Variance from Statute — Time for Filing.*]—The person appealing from a summary conviction by a magistrate must comply with all the conditions imposed upon him by the statute under which he appeals. Where in the recognizance the appellant, instead of being bound to appear and try the appeal, &c., as required by the Act, was bound to appear at the sessions to answer to any charge that might be made against him, the appeal was dismissed. An application to take the appellant's recognizance in court was refused, on the ground that, although the recognizance need not be entered into within four days, it must be entered into and filed before the sittings of the court of quarter sessions to which the appeal is made. *Kent* v. *Olds*, 7 L. J. 21.

Non-resident Sureties.]—Persons non-resident within the jurisdiction of the general sessions of the peace to which an appeal is given, are not competent sureties in a recognizance to prosecute an appeal from a summary conviction of a justice of the peace. *Regina* v. *Lyon*, 9 C. L. T. Occ. N. 6.

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9. *Time for Appealing.*

"Appeal Brought" — *Notice — Indian Act.*]—Under 39 Vict. c. 18, s. 84 (D.), the Indian Act, 1876, an appeal must be brought before the appellate Judge within thirty days from the conviction. Giving notice of appeal to the next session, and entering into a recognizance within that time, is not sufficient. *In re Hunter* v. *Griffiths*, 7 P. R. 86.

The words "appeal brought" in s. 108 of the Indian Act, R. S. C. c. 43, are satisfied by the giving of notice and of the security provided for by the Summary Convictions Act; and it is not necessary for an appellant to bring his appeal to a hearing within the time limited by s. 108. In re Hunter v. Griffiths, 7 P. R. 86, not followed. Semble, merely giving notice of appeal within the thirty days would have satisfied the words of the statute. *Regina* v. *McGauley*, 12 P. R. 259.

Extension of Time by Justices' Delay —*Certiorari.*]—S. on the 9th February, 1875, was convicted before justices of an offence against the Act for the sale of spirituous liquors, 37 Vict. c. 32 (O.) On the 27th he obtained a certiorari to the justices to return the conviction into the Queen's bench, which was not served until the 9th July. In the meantime, on the 3rd March, he procured a summons from the county Judge by way of appeal from the conviction under 38 Vict. c. 11 (O.), alleging as a ground for obtaining it so late, that the delay arose wholly from the default of the justices. He persisted in the appeal, notwithstanding the certiorari; but the Judge refused to adjudicate on the merits, holding that it had not been made to appear to him that the delay arose wholly from the default of the convicting justices, and, therefore, that he had no jurisdiction. On the 13th September the justices returned to the certiorari that before its delivery to them they had, at the request of S., transmitted the conviction and papers to the county Judge upon the appeal under 38 Vict. c. 11 (O.) In November S., having procured the papers to be returned by the county court clerk at Barrie to the magistrates' clerk at Orillia, moved to quash the return to the certiorari, and for another writ, or for an attachment for not having returned the conviction, in obedience to it, or for an order to return the conviction forthwith, or to amend the return by including the conviction therein. In support of this motion it was urged that the magistrates wrongfully put it out of their power to return the writ by transmitting the papers to the clerk of the county court, when they must have known that the appeal was too late. The application was refused, for S., having procured the transmission of the papers for his own appeal, could not insist that it was wrong; it was apparent that he abandoned the certiorari in order to carry on his appeal; and when he served the writ he knew that the justices had not the papers to return. Quære, as to the propriety of the county court clerk returning the papers to the justices' clerk. Semble, that the justices could not properly have refused to transmit the papers on the ground that the appeal was not made in time; but that the recognizance being furnished, they should transmit the papers at least within the month, leaving it to the county Judge to decide as to the cause of delay. *Regina* v. *Slaven*, 38 U. C. R. 557.

See Regina v. *Caswell*, 33 U. C. R. 303, *ante* 7.

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10. *Waiver.*

(a) *Of Appeal.*

Payment of Fine — *Mandamus.*]—One M., having been on the 27th August, 1862, convicted "for allowing card-playing at his inn, and other disorderly conduct during this year," was fined $20 and costs, which he paid, but said he "would see further about it." On the 30th notice of appeal was given, and on the 11th September the appeal came on at the quarter sessions, when the court decided that the right to appeal was waived by plaintiff having paid. On application for a mandamus the rule nisi called upon the court of quarter sessions, instead of the justices, to shew cause:—Held, (1) that under the circumstances there was no waiver of the right to appeal. (2) That the rule nisi having been enlarged by the justices at their request, from the previous term, objections could not now be taken to its form. Semble, that on any doubtful ground a party should not be deprived of his right to appeal against a summary conviction. *In re Justices of United Counties of York and Peel Ex parte Mason*, 13 C. P. 159.

(b) *Of Objection to Appeal.*

Application to Postpone.]—The appellant, having been convicted of an assault under C. S. C. c. 91, s. 37, appealed to the quarter sessions. On the first day of the court, after he had proved his notice of appeal, at the respondent's request the case was postponed until next day; and the respondent then objected to the jurisdiction, as it was not shewn that the appellant had either remained in custody or entered into recognizance, as required by s. 117 of C. S. C. c. 99. The court held that this objection had been waived by the application to postpone, and they quashed the conviction. On motion for a prohibition to the quarter sessions from further proceeding in the matter:—Held, that this was an appeal under s. 117 above mentioned, not under C. S. U. C. 114, s. 1: that it was clearly incumbent upon the appellant to shew his right to appeal by proving compliance with that section; and that the necessity for such proof was not waived by the respondent's application for delay. The prohibition was therefore granted. *In re Meyers and Wonnacott*, 23 U. C. R. 611.

Recognizance not Proved—*Proceeding on Merits.*]—The complainant applied to quash an order of the general sessions made on appeal, quashing a conviction, on the ground that it was not shewn at the court that defendant had entered into the necessary recognizance. It was not denied that notice of appeal had been duly given or that the recognizance had been duly entered into and filed with the clerk of the peace; but the objection was that it had not been proved at the trial of the appeal:—Held, under the circumstances of the case, that the respondent's counsel, by his conduct, must be assumed to have waived any objection to the recognizance. *Regina* v. *Crouch*, 35 U. C. R. 433.

Semble, that where objection has been taken to the jurisdiction of the court, and the party objecting thereto has afterwards proceeded to a trial upon the merits, he should be held to have waived proof of those preliminary conditions which give the court jurisdiction, if it shall appear subsequently upon his moving against the verdict, that those conditions had in truth been complied with. *Regina* v. *Essery*, 7 P. R. 290.

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11. *Other Cases.*

Duty of Justices—*Return.*]—Held, that a conviction of two or more justices of the peace being appealed from did not relieve them from the penalty attached to the duty of making immediate return under 4 & 5 Vict. c. 12, s. 1. *Murphy q. t.* v. *Harvey*, 9 C. P. 528.

New Trial.]—Where a conviction has been affirmed by a jury on appeal to the quarter sessions, that court cannot grant a new trial. Quære, whether when the verdict was against the express direction of the chairman, that court would be bound, or should be compelled by mandamus, to enforce the conviction so affirmed. *Re Yearke and Bingleman*, 28 U. C. R. 551.

Order—*Revocation of.*]—On the first day of the session, the appellant's counsel called on and proved his case. The respondent did not appear. It was not known that he had employed counsel, and the conviction was quashed. On the second day counsel applied to have the order of the court discharged and for a hearing:—Held, that the court had power to revoke the order to quash. *McLean* v. *McLean*, 9 L. J. 217.

Reinstatement of Appeal—*Alteration of Judgment.*]—Held, (1) that an appeal dismissed for want of prosecution may, at the instance of the appellant satisfactorily accounting for his non-appearance, be reinstated. (2) That the justices in session may, if they see fit, alter their judgment in a matter of appeal, at any time during the continuance of the sessions. *In re Smith and Stokes*, 10 L. J. 20.

Warrant of Commitment—*Discharge of Defendant pending Appeal—Affirmation of Conviction.*]—On the conviction of the prisoner herein she was committed to custody under a warrant issued by the convicting magistrate. She gave bail, and was discharged from custody under 33 Vict. c. 27, s. 1. On the appeal being heard, the prisoner was found guilty and the conviction affirmed, and the prisoner directed to be punished according to the conviction. No process was issued by the sessions for enforcing the judgment of the court, but a new warrant was issued by the convicting magistrate, under which the prisoner was retaken. Writs of habeas corpus and certiorari were issued, and on the return thereof a motion was made for the discharge of the prisoner. In the margin of the writ of habeas corpus, it was marked "per" 33 Car. II., which was signed by the Judge issuing it:—Held, that the prisoner was not in custody or confined under the judgment of the sessions, but under the warrant of the convicting magistrate; and semble, under the circumstances, the convicting magistrate was functus officio, and therefore could not issue the warrant in question, which should have been issued by the sessions; and possibly they could have directed punishment for the unexpired term; but that if no bail had been given, and the prisoner had remained in custody, no further order of commitment would have been necessary, or if no warrant of commitment had been issued prior to appeal, the magistrate could have issued one thereafter. Held, also, that under a certiorari the conviction might be quashed; and, as the judgment of the sessions confirmed the conviction, it would probably fall with it. *Regina* v. *Arscott*, 9 O. R. 541. See *Arscott* v. *Lilley*, 11 O. R. 153, 14 A. R. 283.

See Regina v. *Dunning*, 14 O. R. 52.

III. Proceedings in Review of Sessions.

1. *Appeal to Superior Court.*

Right of.]—Quære, whether a party having appealed to the quarter sessions under 13 & 14 Vict. c. 54, from a conviction by a justice of the peace, has any right of appeal from the decision of that court. *Victoria Plank Road Co.* v. *Simmons*, 15 U. C. R. 303.

——— *Municipal By-law—Certiorari.*]—The defendant was convicted before the mayor of breaking a town by-law, and appealed to the quarter sessions, where the conviction was upheld. A motion was then made in the common pleas court against the indictment, which

was brought up by certiorari, and the conviction was again upheld. Quære, as to the right of appeal from the quarter sessions. *Regina* v. *Watson*, 7 C. P. 495.

——— *Petty Trespass Act.*]—Where a person convicted under the Petty Trespass Act, has appealed to the quarter sessions, where the conviction is confirmed, no appeal lies thence to the Queen's bench. *Regina* v. *Impey*, H. T. 4 Vict.; *Regina* v. *Hussey*, 2 P. R. 194.

See Regina v. *Boulthee*, 23 U. C. R. 457, *post* 2.

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2. *Case Reserved.*

Effect of Stating Case—*Removal from Sessions.*]—Defendant having been convicted at the quarter sessions in June, 1864, judgment was reserved, and a special case stated for the opinion of the court of common pleas. The questions thus reserved not having been heard or disposed of, the case, having been duly adjourned from time to time, was again brought up at the sessions in March, 1864, and a rule nisi granted for a new trial, which was afterwards discharged. The defendant appealed from that decision:—Held, that, as the case remained with the common pleas, the quarter sessions was not legally in possession of it, so as to grant the rule nisi; and that the Queen's bench therefore could not be called upon to review the decision. *Regina* v. *Boulthee*, 23 U. C. R. 457.

Observance of Statutory Requirements.]—The court will not hear a case from the quarter sessions unless the statute and rules of court prescribing the preliminary steps have been strictly complied with. *Regina* v. *Hatch*, 15 C. P. 461.

Power to Reserve Case — *Misdemeanour.*] — The appellant, having been convicted before justices of having pretended to be a physician, contrary to 29 Vict. c. 34, appealed to the quarter sessions, and was found guilty:—Held, that the sessions had no power to reserve a case under C. S. U. C. c. 112, the appellant not being a person "convicted of treason, felony, or misdemeanour." Semble, that if 29 Vict. had in terms declared the act charged unlawful, it would have been an indictable misdemeanour. *Pomeroy* v. *Wilson*, 26 U. C. R. 45.

See Regina v. *McEvoy*, 20 U. C. R. 344, *ante* I.

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3. *Certiorari.*

Relief upon—*Award of Restitution.*] — Defendant, having been convicted at the quarter sessions on an indictment for forcible entry, was fined, but that court refused to order a writ of restitution, and the case was removed into the Queen's bench by certiorari:—Held, that it was in the discretion of the court either to grant or refuse the writ; and under the circumstances it was refused. *Regina* v. *Wightman*, 29 U. C. R. 211.

——— *Review on Merits.*]—On the 8th November, 1875, an information was laid against B. before the police magistrate of St. Thomas, by one N., under 32 & 33 Vict. c. 22 (D.), for having unlawfully and maliciously broken and injured the fence around the land of N. The defence set up was, that the fence encroached on B.'s land, but there was evidence which, if believed, went to shew that B. did not commit the injury under a bonâ fide exercise or belief of a right; and the magistrate convicted and fined him. B. appealed to the general sessions of the peace, where neither side asked for a jury; the court urged them to have one, but the respondent, N., refused, and the court, having heard the evidence, decided that B. acted, though mistakenly, under a bonâ fide belief that he had a right to remove the fence, and without malice; and they ordered the conviction to be quashed with costs. N. then applied to quash this order, upon the ground, amongst others, that the case could not be tried without a jury:—Held, that 32 & 33 Vict. c. 31, s. 66 (D.), which authorizes the court to try without a jury, is within the powers of the Dominion parliament, and that the case having been properly before sessions, the court above could not review the decision upon the merits. Section 66 of 32 & 33 Vict. c. 22, does not dispense with proof of malice in such cases, but, read in connection with s. 29, merely means that the malice need not be conceived against the owner of the property injured. *Regina* v. *Bradshaw*, 38 U. C. R. 564.

To whom Directed.]—It is improper to call on the court of general sessions to shew cause to a rule for a certiorari. *Re Nash and McCracken*, 33 U. C. R. 181.

When Taken Away.]—In the case of a conviction for an offence not being a crime, affirmed on appeal to the sessions, the writ of certiorari is not taken away by 38 Vict. c. 4 (O.) *In re Bates*, 40 U. C. R. 284.

The statute 32 & 33 Vict. c. 31, s. 71 (D.), preventing applications touching the decision of a Judge at quarter sessions, in appeal, not only refers to cases where an adjudication has taken place therein, but even where the appeal has gone off on a preliminary objection to the right of entering it. *Regina* v. *Firman*, 6 P. R. 67.

See Regina v. *Watson*, 7 C. P. 495; *Regina* v. *Powell*, 21 U. C. R. 215, *post* 7; *Regina* v. *Grover*, 23 O. R. 92, *ante* I.; *Regina* v. *Currie*, 31 U. C. R. 582, *ante* I.; *Regina* v. *Becker*, 20 O. R. 676, *ante* II. 4; *Regina* v. *Washington*, 46 U. C. R. 221, *ante* II. 5; *Hespeler* v. *Shaw*, 16 U. C. R. 104, *ante* II. 6; *Regina* v. *Caswell*, 33 U. C. R. 303, *ante* II. 7; *Regina* v. *Slaven*, 38 U. C. R. 557, *ante* II. 9.

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4. *Habeas Corpus and Certiorari.*

See Regina v. *Arscott*, 9 O. R. 541, *ante* II. 11.

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5. *Mandamus.*

See Regina v. *Smith*, 35 U. C. R. 518; *In re Ryer and Plows*, 46 U. C. R. 206; *McKenna* v. *Powell*, 20 C. P. 394, *ante* II. 3; *In re Coleman*, 23 U. C. R. 615, *ante* II. 4; *Rex* v. *Justices of Bathurst*, 5 O. S. 74, *ante* II. 5; *In re Justices of United Counties of York and Peel, Ex parte Mason*, 13 C. P. 159, *ante* II. 10 (a); *Re Yearke and Bingleman*, 28 U. C. R. 551, *ante* II. 11.

6. *Prohibition.*

See Regina v. *Coursey*, 26 O. R. 685, 27 O. R. 181, *ante* II. 1; *In re Murphy and Cornish*, 8 P. R. 420, *ante* II. 1; *In re Granger and Children's Aid Society of Kingston*, 28 O. R. 555, *ante* II. 1; *In re Coleman*, 23 U. C. R. 615, *ante* II. 4; *In re Brown and Wallace*, 6 P. R. 1, *ante* II. 6; *In re Meyers and Wonnacott*, 23 U. C. R. 611, *ante* II. 10 (b).

7. *Writ of Error.*

The proper proceeding to reverse a judgment of the quarter sessions is by writ of error, not by certiorari and habeas corpus. *Regina* v. *Powell*, 21 U. C. R. 215. But see Criminal Code, s. 743.

See CERTIORARI, II. 1—MANDAMUS, II. 7—WAY, III. 2.

SET-OFF.

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I. BY AND AGAINST WHOM.

1. *Agents and Auctioneers.*

Against Agent.]—Held, that the defendant, upon the facts stated in the report, had no right to a set-off against the plaintiff upon the common counts, neither could he support a plea of payment, or accord and satisfaction; but that, if he had any remedy at all against the plaintiff (and the court thought none existed), he should have brought a special action for negligence of the plaintiff as agent, in not fulfilling his instructions. *Sword* v. *Carruthers*, 7 U. C. R. 313.

——— *Action by Principal.*]—The plaintiffs sued for the price of goods sold and delivered. The defendant pleaded that the goods were sold to him by one A., whom the defendant believed to be the principal, and that before the defendant knew that the plaintiffs were the principals, the said A. became indebted to the defendant in a sum of $400, which he, the defendant, was willing to set off against the plaintiffs' claim. The jury found a verdict for the defendant on this plea:—Held, that the defendant, having purchased the goods without notice of A.'s being an agent (A. having sold them in his own name), could set off the debt due to him from A. personally, in the same way as if A. had been the principal; and that the verdict should be sustained. *Bowmanville Machine Co.* v. *Dempster*, 2 S. C. R. 21.

Against Auctioneer.]—By an auctioneer's conditions of sale, purchasers to an amount exceeding £30 were to have "six months' credit, giving approved indorsed notes:"—Held, that a purchaser over £30 could not be treated as a purchaser for cash upon his refusal to furnish the indorsed note; and, as he could not consequently be sued on the common count for goods sold and delivered until after the expiration of the credit, that to a special action brought by the auctioneer against the purchaser, before the credit had expired, for not giving the indorsed note when requested, a plea of set-off would be inadmissible. *Wakefield* v. *Gorrie*, 5 U. C. R. 159.

To an action by an auctioneer against a purchaser for goods sold, the purchaser pleaded that A. delivered the goods to the auctioneer to sell; that A. was the agent of B., to whom the goods belonged; and that he (the purchaser) had a set-off against B., which he pleaded:—Quære, could the purchaser plead the set-off against B., without further alleging that the auctioneer sold these goods to him as the auctioneer of B. *S. C.*, *ib.* 160.

By Agent.]—An agent, if sued by his principal for money received, cannot deduct in the first instance from such money the amount of a claim for money lent, or for any independent transaction between himself and his principal—treating the balance as the only sum held for the use of the plaintiff; but he must plead his demand by way of set-off against his gross receipts. *Hamilton* v. *Street*, 8 U. C. R. 124.

See Brunskill v. *Rigney*, 6 C. P. 509, *ante* (PRINCIPAL AND AGENT.)

2. *Assignee for Creditors.*

Purchase of Debt before Assignment —*Knowledge of Insolvency.*]—Before an as-

signment for the benefit of his creditors, a person indebted to the assignor, who was aware of his insolvency, purchased from a creditor of the insolvent a debt due to the former by the latter, which the purchaser (in an action by creditors and the assignee of the insolvent) claimed to set off against his debt to the insolvent:—Held, that under R. S. O. 1887 c. 124, s. 23, in connection with the general law of set-off, he was entitled to do so. *Thibaudeau* v. *Garland*, 27 O. R. 391.

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3. *Companies and Shareholders.*

Creditor of Vessel—*Owner—Action for Debt—Unpaid Stock.*]—The defendant and one H., in order to utilize an engine in which they were interested, arranged to have a steam vessel built, which was to be the property of a company to be formed under the Ontario Joint Stock Act of 1874, with a capital of $30,000, in shares of $100 each. The vessel was built and registered in defendant's name, and several mortgages given by him upon her. In March, 1876, the plaintiffs, at the solicitation of the defendant and H., and upon their agreement to use the plaintiffs' wharf at a wharfage of $300 for the season, agreed to take stock in the projected company, executed a document prepared for intending stockholders, and gave two notes for $250 each, the first of which the plaintiffs paid, but not the latter. Some $900 stock was subscribed, and a meeting of intending stockholders held, at which resolutions were passed as to the formation of the company, and appointing trustees to receive a conveyance of the vessel in trust for the company until formed. The company was never formed, and it was admitted that the Ontario Act did not authorize its formation, nor was there ever a conveyance to the trustees. The plaintiffs, not having been paid the $300, the wharfage for 1876, which was charged against the vessel, sued defendant as the legal owner:—Held, that they were entitled to recover; that their subscription for stock did not constitute them joint owners or co-partners in the vessel, nor could defendant set off the amount of the unpaid stock note, for not only had the consideration therefor wholly failed, but it could only be a matter between the plaintiffs and the company, if formed. *Sylvester* v. *McCuaig*, 28 C. P. 443.

Judgment Creditor of Company—*Action against Shareholder — Execution.*]—Action against defendant as a shareholder in a company incorporated under 27 & 28 Vict. c. 28, by the plaintiff, a creditor of the company, alleging a judgment recovered and fi. fa. returned nulla bona. Plea, on equitable grounds, a set-off due to defendant by the company, on the common counts, and on a judgment recovered by the defendant against the company, on which a fi. fa. had been returned nulla bona:—Held, that the plea formed no defence; for the plaintiff was not claiming in right of the company, but by virtue of a specific statutory remedy; and the decision in Macbeth v. Smart, 14 Gr. 298, was in principle applicable, notwithstanding the fact of defendant having a judgment and execution. *Bonner* v. *Currie*, 36 U. C. R. 411.

Officer of Company—*Action for Salary—Unpaid Stock — Excess of Set-off.*]—The defendants were an incorporated company, the capital of which was $30,000, in 100 shares of $300 each, 90 of which had been subscribed for, and paid up in full by duly made calls thereon. Subsequently the defendants employed the plaintiff to take charge of their business, and he was appointed president, at a salary of $1,200. He subscribed for seven shares of the unallotted stock, debited himself with the amount thereof, $2,100, in the company's books, and afterwards paid for it. Afterwards, desiring to obtain control of the company, he arranged with four of the stockholders for the transfer to him of their stock; but one of them, M., to enable him to remain as a director, was to and did subscribe for the three remaining shares unallotted. Subsequently the plaintiff wished to withdraw from this arrangement, and the parties agreed to cancel it; but M. was to be relieved of the three shares, and M.'s name was accordingly erased, and the plaintiff's inserted, as subscriber for these shares, the substitution being made either by plaintiff himself or by the book-keeper by his direction. It was also arranged between the plaintiff and the other directors that this stock should be entered in the stock book as paid up in full, but the plaintiff was to be debited with the $900, to be paid out of his salary as president. Accordingly the plaintiff, with his knowledge and assent, was so debited, and from time to time, as his salary became payable, it was set off against it, and a balance afterwards struck in the books on this basis. There was no by-law regulating calls or transfers of stock, and no calls were made on the plaintiff for either amounts subscribed by him, and no transfer from M. to plaintiff, except in the manner stated:—Held, that no transfer was necessary, as the plaintiff's subscription must be held as an original one, nor were any calls required, for the plaintiff by his conduct had impliedly agreed that none need be made, and both he and the company were estopped from denying his ownership of the shares. The plaintiff having sued defendants for his salary:—Held, that defendants were entitled to set off the amount due on this stock. Held, also, that they were entitled to have judgment in their favour for the excess of the set-off over the plaintiff's claim, and that for such purpose no special prayer or conclusion in their plea of set-off was necessary. *Smart* v. *Bowmanville Machine and Implement Co.*, 25 C. P. 503.

——— *Action for Salary—Unpaid Stock—Winding-up.*]—To an action by the plaintiff for salary against a company incorporated under the Imperial Joint Stock Companies Acts, defendants pleaded a set-off. It appeared that the plaintiff and one H. held shares which had been issued as paid up, but that that fact not having been registered as required by the statute, they had been placed on the list of contributories under the Winding-up Acts in England, as liable for the debts of the company to the extent of their shares. The plaintiff also held similar shares in his own name:—Held, that under a special equitable plea the defendants might set off the alleged unpaid shares held by the plaintiff, but not those held by the plaintiff and H.; and that their proper remedy, therefore, was to apply to stay the action under the equity of the Imperial Acts, which application might be made to this court. Semble, that the action should be stayed, and all matters concerning the company left to be dealt

with under the Winding-up Acts in England. *Howell* v. *Dominion of Canada Oils Refinery Co.*, 37 U. C. R. 484.

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4. *Division Court Clerks.*

Official Fees—*Private Debt—Sureties.*]—An action against the sureties of a division court clerk, for moneys received by him for the plaintiff, having been referred, the arbitrator submitted a special case, stating that in 1858 the plaintiff sued the clerk for goods sold to him; that the clerk then produced a memorandum of settlement between them, signed by the plaintiff, relating to suits in the division court, which shewed a sum of £30 0s. 8d. due to the clerk; that the Judge thereupon, against the clerk's wish, and without any particulars of set-off having been given, treated this as a set-off, and deducted it from the plaintiff's claim. The sureties, defendants in this suit referred, contended that the plaintiff's demand then sued for being a private account against the clerk, that sum was improperly set off, and they claimed to have it credited to them in this action against moneys since received for the plaintiff:—Held, that what had been done in the former suit could not be thus reviewed, and that, as the clerk could not take credit a second time for this sum as against the plaintiff, neither could his sureties. *Franklin* v. *Gream*, 20 U. C. R. 84.

See Moffatt v. *Foley*, 26 U. C. R. 509, *post* 5.

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5. *Executors.*

Executor de Son Tort—*Creditor.*]—In an action by a creditor against an executrix de son tort, she cannot set off a debt due from the plaintiff to her testator. *Cameron* v. *Cameron*, 23 C. P. 289.

Parent and Child—*Advancement — Administration.*]—A father, before his daughter's marriage (in 1857), wrote a letter to her intended husband, saying he would give her £2,500 when she came of age, and one-fourth of his residuary estate at his death. In 1858, and before she came of age, the father advanced money to the husband, for which he took his note; but which he charged in his ledger to the joint account of the husband and wife, and intended, if the same was not repaid, to set off the amount against his daughter's share of his estate:—Held, in a suit by the wife in the husband's lifetime for the administration of the estate, that the executors had a right to set off the advance against the wife's share. *Torrance* v. *Chewett*, 12 Gr. 407.

Promissory Note—*Ranking on Insolvent Estate—Bank Deposit.*]—A testator, having a deposit to his credit in a bank at the time of his death, was indebted to the bank on a note under discount, which had not then matured. The deposit remained with the bank until after the maturity of the note, when the bank brought an action on it against the executors of his insolvent estate, who claimed that the bank should rank on the estate for the full amount of the note and give credit upon the dividend for the amount of the deposit:—Held, that the deposit not having been withdrawn or demanded before the maturity of the note, the bank was entitled to set off the debt on the note against the deposit, and to rank for the balance. *Ontario Bank* v. *Routhier*, 32 O. R. 67.

Representative Capacity—*Debt of Estate—Surety.*] — A testator who owed debts exceeding his personal estate, devised his land to one of his sons, whom he also appointed an executor. The devisee paid debts exceeding the personal estate, and left but one debt unpaid. For the creditor to whom that debt was due the devisee became surety for an amount exceeding the debt so due by the testator; and the devisee subsequently gave a mortgage on the land devised to secure the amount he was surety for:—Held, that the debt due by testator was to be applied towards the discharge of the sum for which the devisee had become surety. *Goldsmith* v. *Goldsmith*, 17 Gr. 213.

——— *Debt to Estate—Sureties.*]—Declaration against the executrix of F., a division court clerk, on the covenant entered into by him and his sureties, for non-payment of money collected by him. Plea, on equitable grounds, set-off for money due to defendant as executrix, on a judgment recovered by her as such executrix against the plaintiff, for goods sold, money lent, &c., by testator to plaintiff:—Held, a good defence. *Moffatt* v. *Foley*, 26 U. C. R. 509.

——— *Individual Debt.*]—Action on the common counts against an executor on his testator's promise. Plea, a set-off for goods sold and money paid by defendant as executor to the plaintiff:—Held, bad, as attempting to set off an individual debt against a demand due from defendant in his capacity of executor. *Gracey* v. *Wilson*, 1 U. C. R. 237.

——— *Individual Debt — Execution.*]—In an action by an executrix against a sheriff for money received to her use as executrix on a fi. fa. against one D., which when produced recited a recovery by the plaintiff executrix against D., for not performing certain promises and undertakings made to the plaintiff, and for her costs, &c.:—Held, that a set-off by defendant against the plaintiff in her own right was inadmissible, the plaintiff claiming in her representative character, although the fi. fa. was informally worded. *Devlin* v. *Jarvis*, E. T. 3 Vict.

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6. *Sheriffs.*

Bond of Indemnity—*Proceeds of Sale under Attachment.*]—C., one of the obligors in a bond of indemnity, given to the sheriff under a writ of attachment against the goods of an absconding debtor, filed his petition for protection from process, and afterwards obtained a final order thereon. Judgment was obtained in an action against the sheriff subsequently to the filing of the petition and the bond, but was not referred to in C.'s schedule thereto:—Held, that the sum recoverable by the sheriff upon such bond was not a "debt contracted payable on a contingency," or a "liability," under 19 & 20 Vict. c. 93, from which C. was discharged by such final order. Held, also, that the obligors in such bond were not entitled to set off against the sheriff's claim money which the sheriff had applied

out of the proceeds of the sale under the attachment to pay certain executions placed in his hands prior to such attachment. *Moody* v. *Bull*, 7 C. P. 15.

Money Made—*Claim against Plaintiff—Attorney's Lien.*]—A sheriff cannot retain money made on an execution, on the ground that he has himself a claim for the amount retained against the plaintiff, who has absconded, where the plaintiff's attorney is entitled to receive it on account of advances made to the plaintiff. *Burnham* v. *Manners*, 2 U. C. R. 94.

Sale under Execution—*Claim for Purchase Money—Individual Debt.*] — A sheriff, having at a sale under execution sold goods to the defendants, sued them for the purchase money; they pleaded set-off, and judgment recovered by them against the sheriff; to which the plaintiff replied, equitably, that the money due on the sale and purchase of the goods by the bank was due and payable to the plaintiff as sheriff, and that the claims mentioned in the plea were claims against the plaintiff individually:—Held, that the demand the sheriff had against the defendants as purchasers not being a mere personal demand, but he being in a measure the agent of the plaintiff in the suit in which the execution issued, the defendants were not entitled to set off his personal debt against the claim against them by the sheriff in his official or ministerial capacity. *Kingsmill* v. *Bank of Upper Canada*, 13 C. P. 600.

See Devlin v. *Jarvis*, E. T. 3 Vict., *ante* 5.

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7. *Vendor and Purchaser.*

Covenant by Purchaser to Pay off Mortgage—*Action by Vendor to Enforce—Debt Due by Vendor.*]—The declaration stated that one W. G. mortgaged to the plaintiff and two others, as trustees of S., his unexpired term in certain lands, to secure £400 and interest, which he thereby covenanted to pay them at certain times specified; that W. G. also mortgaged said term to the plaintiff, to secure £226 7s. 6d.; that under a power of sale in said last mentioned mortgage, the plaintiff duly sold the mortgaged premises to defendant at the following price—that is to say, that defendant should pay the mortgage to said trustees, and £150 to the plaintiff; that the plaintiff thereupon assigned said premises to defendant, and defendant by the assignment covenanted with the plaintiff to perform the covenants in the mortgage to said trustees. And the plaintiff alleged that defendant had not paid the price so to be paid by him for his purchase, and had not paid the last instalment of the mortgage to trustees. Defendant pleaded: (4) As to said price, a set-off for moneys due by plaintiff to defendant. (5) As to the plaintiff's claim in respect of the mortgage from W. G. to the trustees, a similar set-off:—Held, on demurrer, pleas bad, for they were pleaded to a cause of action not advanced, as the declaration was for the non-payment of money to the trustees, not to the plaintiff; and as to the fifth plea, the claim under the covenant to pay the trustees was not one to which a set-off could be pleaded, the debts not being mutual. *Martin* v. *Clark*, 20 U. C. R. 419.

II. Effect of Set-off or Claim of Set-off.

Agreement after Action — *Damages — Costs.*]—Plaintiff agreed with defendant after action brought that if defendant would take a note which plaintiff had given to a third person, it should be allowed for and on account of this action. Defendant did so, and, by such payment and other items of set-off accruing before action brought, overbalanced plaintiff's demand:—Held, that plaintiff was still entitled to a verdict with damages which would carry full costs. *Sherwood* v. *Campbell*, 5 O. S. 2.

Failure to Prove—*Subsequent Action.*] —Where two masons brought an action for work and labour against their employer, and recovered a verdict for £60, it was held that the employer could not afterwards bring an action against them for money he had paid them on account and which he had attempted to prove in the former action. *Hunt* v. *McCarthy*, 6 O. S. 434.

Verdict in Former Action—*Estoppel.*] —Where A. is sued by B., and is seeking to set off a demand for which he has already sued A., and has had a verdict:—Held, that he is estopped by such verdict from bringing the same demand a second time before the jury by way of set-off. *Russell* v. *Rowe*, 7 U. C. R. 484.

III. In Equity.

Agreement—*Evidence of.*]—In the view of equity the setting off one demand against another between the same parties is extremely just; and where there is any technical difficulty in the way of its being done without an agreement, the court accepts slighter evidence of such an agreement than is usually required in order to establish disputed facts. *Lundy* v. *McCulla*, 11 Gr. 368.

Alimony—*Costs.*]—In May, 1875, a deed of separation was executed between defendant and plaintiff, husband and wife, by which defendant was to pay the plaintiff $100 a year quarterly as maintenance. Afterwards in September, 1875, the plaintiff, objecting to the security offered, filed a bill for alimony, and defendant served a notice agreeing to allow her $100 a year quarterly for interim alimony. The plaintiff accepted the notice, and defendant paid his alimony until May, 1876, when a decree was made for specific performance of the agreement, but the plaintiff was ordered to pay defendant's costs:—Held, that the plaintiff must give credit for the sums paid as interim alimony; and executions issued for the whole sum payable under the agreement were set aside; the costs payable by plaintiff were also ordered to be set off against the allowance, though such set-off was not asked for in the notice of motion. *Maxwell* v. *Maxwell*, 7 P. R. 63.

Bank—*Bill of Exchange—Dealing with Collateral Security—Set-off at Law.*]—Where C. shipped flour to the order of a bank for account of L., and at the same time drew on L., discounted the bill at the bank, indorsed and delivered to the bank the carrier's receipt, and signed a memorandum stating that the receipt had been indorsed as collateral security for the payment of the draft, the bank to sell the flour, applying the proceeds

to pay the draft, and to place the property in charge of any respectable broker or warehouseman, without prejudice to the bank's claim upon any party to the draft:—Held, that the bank, though bound to retain the flour until the bill was accepted, might then, if they chose, deliver the flour to L., the fair construction of the agreement being that the retaining of possession until payment was optional with the bank. Quære, whether, if the bank were responsible for the flour under circumstances which prevented a set-off at law, that relief could be had in equity. *Clark* v. *Bank of Montreal*, 13 Gr. 211.

Costs—*Separate Actions.*]—Where there is a different cause of action in different courts between the same parties, the costs will not be ordered to be set off. *Cuthbert* v. *Commercial Travellers Association*, 7 P. R. 255.

Costs at Law and in Equity—*Lien of Attorney.*]—A bill had been filed for an injunction to stay an action of ejectment, which action the plaintiff successfully defended before any injunction could be obtained. He proceeded no further with his suit in equity, and the bill was dismissed with costs. It was contended that the costs at law should be set off as against these costs, but the referee considered that costs at law could not be set off against costs in equity, that being the rule in England. The order of the referee was affirmed as to the first point, and, without expressing any opinion as to whether costs at law could be set off against costs in equity in a proper case, on this point also, on the ground that the lien of the attorney attached, and was paramount to any right to set off. *Webb* v. *McArthur*, 4 Ch. Ch. 63.

Insurance Moneys—*Premium.*]—An insurance company accepted a note for the premium, and the policy contained the following clause: "In case of loss, such loss is to be paid in thirty days after proof of loss; the amount of the note given for the premium, if unpaid, being first deducted." A partial loss having occurred:—Held, that the assured had a right in equity to set off the amount against the note. *Berry* v. *Columbian Ins. Co.*, 12 Gr. 418.

Moneys in Administrator's Hands—*Costs.*]—On the dismissal of a bill, costs were taxed to defendants, and execution issued against the plaintiff, which was returned nulla bona. Two of the defendants, as administrators, held moneys, part of which would, on distribution, belong to the plaintiff, and which they now applied for leave to set off against the taxed costs. The motion was refused. *Black* v. *Black*, 11 Gr. 270.

Mortgage—*Rents—Improvements.*]—An assignment of an equity of redemption was made, which the court held to be void against the creditors of the mortgagor; but, it appearing that the sons of the assignee had paid off the mortgage for her benefit, the court gave relief only on the terms of the amount being paid to the assignee; and held, that the creditors were not entitled to set off the rents the assignee had received. Held, also, that in such a case the assignee was not entitled to be allowed for improvements made upon the mortgaged premises; but that, if the same were properly allowable, the rents and profits accrued should be set off against the value of such improvements. *Buchanan* v. *McMullen*, 25 Gr. 193.

Neglect to Set off at Law.]—A party who fails to take advantage of an opportunity to set off his debt at law, cannot in general come to equity for that purpose. Held, also, that the finding of a jury on a plea of payment cannot negative the existence of a cross-demand. *Smith* v. *Muirhead*, 3 Gr. 610.

——— *Reference.*]—Where a plaintiff at law filed a bill to enforce his judgment, the court, under the circumstances, directed a reference to the master to take an account between the parties, defendant claiming to have had a set-off to a greater amount than the judgment, although the general rule is, that a party neglecting to set off his claim at law, cannot afterwards apply to the court of chancery to have the benefit of it. *Cameron* v. *McDonald*, 7 Gr. 402.

Partnership Claim—*Separate Debt.*]—T. purchased a quantity of bricks manufactured by the plaintiffs jointly, against one of whom (G.) he held a demand which he desired to set off against the price of the bricks; one of the plaintiffs being in fact assignee of a former partner of G.:—Held, that, even if the effect of this was to constitute the plaintiffs tenants in common, it afforded no ground for setting off a separate against a joint debt. *Graham* v. *Toms*, 25 Gr. 184.

Partnership Debt—*Costs.*]—In a partnership suit the partnership was found indebted to defendant, and, on the other hand, defendant was liable to certain costs. Defendant having become insolvent: — Held, that the plaintiff was entitled, notwithstanding the insolvency, to set off the costs against the debt. *Brigham* v. *Smith*, 17 Gr. 512.

Promissory Note—*Failure of Consideration—Cross-Claim for Damages—Timber.*]—Declaration by payees against makers of a note for $1,000, payable at three months. Plea, on equitable grounds, that the plaintiffs falsely and fraudulently represented to the defendants that they had the right to cut hardwood timber under a crown license on certain lands, of which they gave defendants a list; that defendants, wishing to purchase such right, had all the lots examined, and thereupon, relying upon and believing plaintiffs' said representations, and being induced thereby, as plaintiffs well knew, defendants agreed with the plaintiffs to purchase the right for $2,800, of which $1,800 was paid down, and this note given for the balance; that defendants relying, &c., cut and made timber on the lots; that the plaintiffs had no such right in respect of a large quantity of said lands, by reason whereof defendants' rights acquired under said agreement were worth less by more than $1,000 that the plaintiffs represented they were possessed of and pretended to sell; that defendants first became aware of the fraud after they had paid the money and given the note, and expended a large sum, and they are likely to lose the money expended by them in manufacturing a large quantity of the timber cut by them. And defendants prayed that it might be declared they were not liable to pay the note; and that the plaintiffs might be required to pay them a fair compensation for their loss by reason of such representations:—Held, on demurrer, plea bad; that it shewed only a partial failure of consideration,

and not of any definite sum; that it was not a case of either legal or equitable set-off; and that the defendants could not prevent the plaintiffs' recovery until defendants' right to damages or compensation and the amount of it had been ascertained; and, semble, that it should have shewn a tender of or readiness to pay the value of, or an offer to give up to plaintiffs, the timber cut by them on the lots to which the plaintiffs had no right; and, perhaps, that since discovering the fraud they had cut no timber on such lots. *Georgian Bay Lumber Co.* v. *Thompson*, 35 U. C. R. 64.

——— *Price of Land—Claim for Compensation.*]—On a sale of lands the purchaser gave his note for the balance of purchase money, and received a conveyance containing the usual covenants. There was a mortgage on the property at the time for a sum less than the note, and the purchaser claimed to set off against the note damages he had sustained by being unable to resell the land in consequence of the mortgage: — Held, not allowable. *Stevenson* v. *Hodder*, 15 Gr. 570.

Purchase Money of Land—*Lien for—Partnership Account — Mortgage.*] — A purchase of lands had been made by plaintiffs and one C. jointly, each to pay one-half the purchase money. The plaintiffs paid more than their share, and had a lien on C.'s interest for the excess; they also had lumber dealings together, the accounts of which were unsettled, and the balance thereon was claimed by each to be in his favour. In accounts of these lumber dealings the plaintiffs had charged C. with his share of the purchase money. They afterwards filed a bill alleging that the land account and the lumber account were unconnected; and praying that they should be paid their advances for C. on the land, and that in default his mortgagees and assignee should be foreclosed:—Held, that, as against the lien of the plaintiffs on the land, these mortgagees were entitled to set off the amount, if any, due by the plaintiffs on the lumber dealings. *Cook* v. *Mason*, 24 Gr. 112.

Reciprocal Payments — *Decree — Motion.*]—Where a decree directs sums of money to be paid reciprocally by the parties, but is silent as to setting off one sum against another, that object cannot afterwards be attained upon motion to do so: the cause must be reheard. *Robertson* v. *Meyers* 2 Gr. 431. See *Brown* v. *Nelson*, 11 P. R. 121.

Specific Performance—*Purchase Money—Costs.*]—In decrees for specific performance of a contract for purchase, a time for payment of the purchase money should be limited, or, in default, the bill dismissed. In such cases also the decree should direct a set-off between the unpaid money and the costs. *McDonald* v. *Elder*, 3 Gr. 244.

Unconnected Cross-demands.]—Where there are unconnected cross-demands, equity does not in general interfere to set off one against the other, in the absence of any special circumstance or agreement, express or implied. *Smith* v. *Muirhead*, 3 Gr. 610.

See Egleson v. *Howe*, 3 A. R. 566; *Williams* v. *Reynolds*, 25 Gr. 49.

IV. In Particular Actions.

County Court—*Jurisdiction.*] — A plaintiff cannot, by giving credit for a set-off, compel defendant to set it up, or give the county court jurisdiction. *Furnival* v. *Saunders*, 26 U. C. R. 119. See, however, *S. C.*, 2 C. L. J. 245.

See Russell v. *Conway*, 5 U. C. R. 256; *Fleming* v. *Livingstone*, 6 P. R. 63.

Replevin — *Avowry for Rent.*] — Set-off may be pleaded to an action for rent due under a demise, but not to an avowry for rent in replevin. *McAnnany* v. *Tickell*, 23 U. C. R. 122.

Replevin Bond.] — To an action on a replevin bond, by the assignee of the sheriff, a set-off forms a good legal defence, the penalty being considered as the debt. To such an action defendants pleaded, on equitable grounds, that the cordwood for which the replevin was brought and the bond given, was claimed by M. (defendant in the replevin), and it was agreed between him and the plaintiff that M. should haul the wood from where it was cut to the river, and if M. could not prove that he was entitled to the wood the plaintiff should pay him for hauling and bankage of the same, which amounted to $165: — Held, that this sum might be set off against the breach for non-return of the wood. *McKelvey* v. *McLean*, 34 U. C. R. 635.

Special Action—*Common Counts—Sufficiency of.*]—A plaintiff cannot, by declaring specially, where he could recover on the money counts alone, deprive defendant of his right of set-off. *Miller* v. *Munro*, M. T. 3 Vict.

V. Pleading and Evidence.

Admission of Liability.]—In an action for wages earned as a lumberman, the dispute being whether the person hiring the plaintiff was defendant's agent, the defendant pleaded a set-off, and at the trial attempted to prove under it that the plaintiff had received goods from the store at the shanty:—Held, that no inference could be drawn from this as an admission by defendant of his liability for plaintiff's wages. *Stewart* v. *Scott*, 27 U. C. R. 27.

Amount of Set-off—*Particulars.*]—The declaration contained eleven counts, with damages alleged at £200. Defendant pleaded to the whole declaration that the intestate was indebted to defendant in £250 on a judgment obtained for £138 5s. 7d.:—Held, plea defective, in not shewing how the £250 was due on the judgment. *Blackstone* v. *Chapman*, 3 C. P. 221.

Excess over Claim — *Judgment for Defendant.*] — A defendant is entitled to have judgment in his favour for the excess of his set-off over the plaintiff's claim, and for such purpose no special prayer or conclusion in the plea of set-off is necessary. *Smart* v. *Bowmanville Machine and Implement Co.*, 25 C. P. 503.

See, also, *Parsons* v. *Crabb*, 31 U. C. R. 435, *post*, VI.; *Sinclair* v. *Town of Galt*, 17 U. C. R. 259, *post* VII.

Nolle Prosequi as to one Defendant.] —Action on a note made by M. and indorsed by C. Pleas by M., general issue and set-off; and by C., general issue, set-off, and release. The plaintiffs took issue on M.'s pleas, and entered a nolle prosequi as to C.:—Held, by

Robinson, C.J., and Macaulay, J., that, inasmuch as the plaintiff's confessed by their nolle prosequi that C. had a set-off sufficient to meet the note they could not recover the amount against the other defendant; and by Jones and Hagerman, JJ., that they were not precluded from doing so. *Robertson* v. *Moore*, 6 O. S. 646.

Offer to Deduct.]—Plea of set-off to a less amount than plaintiff's claim:—Held, bad on special demurrer, for not offering to deduct the set-off instead of pleading it in bar. *Jarvis* v. *Dickson*, T. T. 3 & 4 Vict.

Particulars of Demand—*Admission of Items—Statute of Limitations.*]—Where there is no plea of set-off on the record, the defendant cannot have the advantage of any mere items of set-off, not being payments on account, which the plaintiff has admitted in his particulars of demand; and where part of the plaintiff's own demands, stated in his particulars, are barred by the Statute of Limitations, he has a right to place against these the items of set-off appearing in his particulars to be beyond the six years. *Ford* v. *Spafford*, 8 U. C. R. 17.

Proof of Demand.]—Though it may be necessary to prove a demand where A. is suing B. as for a breach of contract in not delivering certain goods, &c.; yet where B. is suing A., and A. is setting off his breach against B.'s claim, it does not follow that the same demand must then be proved. *Russell* v. *Rowe*, 7 U. C. R. 484.

VI. PRACTICE.

Affidavit—*Merits.*]—An affidavit disclosing a set-off merely is not an affidavit of merits. *Anderton* v. *Johnston*, 8 L. J. 46.

Attachment.]—Quære, as to the effect of an attaching order on the right to set-off. *McNaughton* v. *Webster*, 6 L. J. 17.

Judgment on Set-off — *Nonsuit.*] — Semble, that a defendant, though the plaintiff be nonsuited or have a verdict against him on the other issues, may have his set-off found and a verdict entered for it, for he has an independent right to judgment for his claim, which the plaintiff cannot defeat by a nonsuit. *Parsons* v. *Crabb*, 31 U. C. R. 435.

See Smart v. *Bowmanville Machine and Implement Co.*, 25 C. P. 503, *ante* V.; *Sinclair* v. *Town of Galt*, 17 U. C. R. 259, *post* VII.

Notice of Set-off.] — A notice of set-off could not be given before the plea of the general issue was filed. *Bickerstaff* v. *Merchant*, H. T. 2 Vict.

VII. SUBJECT MATTER OF SET-OFF.

1. *Claims Accruing after Action.*

Effect of — *Damages—Costs.*] — Plaintiff agreed with defendant, after action brought, that if defendant would take a note which the plaintiff had given to a third person, it should be allowed for and on account of this action. Defendant did so, and by such payment and other items of set-off accruing before action brought, overbalanced the plaintiff's demand:—Held, that plaintiff was still entitled to a verdict with nominal damages, which would carry full costs. *Sherwood* v. *Campbell*, 5 O. S. 2.

——— *Promissory Note.*] — A promissory note made by the plaintiff to defendant, falling due after the service of the plaintiff's writ, but before declaration filed, may be set off in the action. *Thorne* v. *Haight*, H. T. 6 Vict.

Pleading—*Cheque — Bill of Exchange — Dishonour.*]—To an action on a cheque by the bearer against the maker, defendant pleaded that the cheque was given to one B., who had always been the lawful holder thereof, and that the plaintiffs held the same as his agents; that it was given for bills of exchange drawn by B. on H. & Co., and since overdue and dishonoured, whereof B. had notice; that the cheque was held by plaintiffs as B.'s agents, and B. was liable to pay defendant, as drawer of said bills, the amount of said cheque; and defendant offered to set off the same:—Held, plea bad, for not alleging that the bills were dishonoured before the commencement of this suit. *Wood* v. *Stevenson*, 16 U. C. R. 527.

Procuring Assignment of Judgment —*Notice.*]—After plaintiff had commenced an action against the defendant to recover from him in respect of his unpaid stock in a joint stock company the sum of $442.29, being the amount of an unsatisfied judgment recovered by the plaintiff against the company, one B. recovered a judgment against the company, for $4,333.08, and assigned it to one G., who assigned part of the money recovered to the extent of $500, the amount of the defendant's unpaid stock, to the defendant. The object of the assignment to the defendant was to give him priority over the plaintiff's claim:—Held, that the procuring of such assignment by defendant being for such purpose, and being a voluntary act on defendant's part, and with notice of plaintiff's claim, did not constitute a defence to it; but semble, if the set-off had accrued to the defendant in his own right, although after action brought, it would have been otherwise. *Field* v. *Galloway*, 5 O. R. 502.

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2. *Claims by and against Assignees in Insolvency and in Winding-up Proceedings.*

Bank—*Winding-up—Cheque— Subsequent Liabilities—Discretion.*]—On 15th November, 1887, the day before the suspension of the Central Bank, one D., having sufficient funds to his credit, drew a cheque upon it payable to C., who deposited the same in the Dominion Bank, and obtained an advance upon it, and the Dominion Bank claimed upon it in the winding-up proceedings having presented it for payment on 17th November, when, however, the Central Bank had suspended payment. On 23rd November, 1887, the Central Bank marked the cheque good, debiting D.'s account and crediting the Dominion Bank with the amount thereof. Afterwards, however, the liquidators claiming the right to set off certain subsequently accruing liabilities of D. against the cheque, the Dominion Bank withdrew their claim upon it, and the master in ordinary disallowed it. Subsequently, and

after the first dividend had been paid, C. heard of this, and filed a claim on the cheque, on 13th September, 1888. The master, however, held that the time for filing claims having elapsed, he had a discretion as to allowing the claim, and allowed it only subject to the said set-off:—Held, that there was no right to set off as claimed, and that the allowance of the claim was ex debito justitiæ, and not discretionary. The fact of the Central Bank having accepted the cheque, and credited the amount to the Dominion Bank, and charged the amount to D., shewed conclusively that at that time the Central Bank was not a creditor of D.: nor did the case come within the meaning of any of the clauses in the Winding-up Act relating to fraudulent preferences. *Re Central Bank of Canada, Cayley's Case*, 17 O. R. 122.

——— *Winding-up—Contributory—Retroactivity of Statute.*]—J. L., the appellant, gave to one Q. his note for $6,000, which was indorsed to the Bank of P. E. I.: the Union Bank at the time held a cheque or draft, made by the Bank of P. E. I., for nearly the same amount, and this draft the appellant purchased for something more than $200 less than its face value; being sued on the note, he set off the amount of such cheque or draft, and paid the difference. On the trial he admitted he had purchased it for the purpose of using it as an off-set to the claim on his note, which he had made non-negotiable, and he also admitted that if he could succeed in his set-off and another party could succeed in a similar transaction, the Union Bank would get their claim against the Bank of P. E. I., which had become insolvent, paid in full. The Judge at the trial charged that if the draft was indorsed to the defendant to enable him to use it as a set-off he could not do so, because he was a contributory within the meaning of the 76th section of the Canada Winding-up Act, and that the Act, which came into force on the 12th May, 1882, was retrospective as regards the indorsements made before it was passed, but within thirty days before the commencement of the proceedings to wind up the affairs of the bank. The jury, under direction, found a general verdict for the plaintiff for the amount of the note and interest: — Held, that the appellant having purchased the draft in question for value and in good faith prior to 26th May, 1882, the Winding-up Act, 45 Vict. c. 23 (D.), was not applicable, and therefore the appellant was entitled to the benefit of his set-off, and that the Winding-up Act was not retrospective as to this indorsement. *Ings* v. *Bank of Prince Edward Island*, 11 S. C. R. 265.

——— *Winding-up — Contributory—Security—Deposit Receipt.*]—Y., in making a deposit on a government contract, gave a marked cheque on the Central Bank, in which he was a shareholder, which cheque was subsequently cancelled, and a deposit receipt issued by the bank substituted therefor. Y. gave his note to the bank to cover the amount of the receipt. The bank went into liquidation on the 3rd December, 1887, and on 20th January, 1888, Y., having been required by the government to take up the deposit receipt and replace it with other security, took an assignment of the receipt, and notified the bank. On being threatened with a suit on the note, he filed a petition asking for leave to set up the deposit receipt against the note as a set-off:—Held, following Ings v. Bank of Prince Edward Island, 11 S. C. R. 265, that Y. as maker of the note to the bank was a mere debtor and not a contributory, and that, although also a shareholder, and so liable as a contributory, he was not a contributory quoad the debt which arose out of an independent transaction, and for that reason s. 73 of R. S. C. c. 129 did not apply. Held, also, that the prohibition in the Act against acquiring debts for the purpose of set-off is limited to the case of contributories; as to debtors the law of set-off as administered by the courts is as applicable as if the company were a going concern; and, following Re Moseley, &c., Coke Co., Barrett's Case, 4 De G. J. & S. 756, that the right of set-off virtually arose not by reason of dealings subsequent to the winding-up order, but of dealings prior thereto, because the engagement was to give security to the satisfaction of the government, and in taking up the deposit receipt and supplying better security Y. was only fulfilling that which he was obliged to do by a prior bonâ fide engagement. *In re Central Bank of Canada, Yorke's Case*, 15 O. R. 625.

Officer of Company—*Breach of Trust.*]—L. having improperly withdrawn from the moneys of the company a certain sum, on the assumption that he was entitled to it in payment of his services:—Held, that this was a breach of trust on L.'s part, and the amount thus withdrawn formed a debt based on a breach of trust, recoverable by the liquidator, under the special provisions of R. S. C. c. 129, as to which no set-off was permissible against any debt or dividend due from the company to L. *Re Bolt and Iron Co., Livingstone's Case*, 14 O. R. 211, 16 A. R. 397.

Preference—*Appropriation of Payments—Unsecured Debt—Redemption.*]—A trader carrying on business in two establishments mortgaged both stocks in trade to B. as security for indorsements on a composition with his creditors and for advances in cash and goods to a fixed amount. The composition notes were made and indorsed by B., who made advances to an amount considerably over that stated in the mortgage. A few months afterwards the mortgagor was in default for the advances and a portion of overdue notes, and there were some notes not matured, and B. consented to the sale of one of the mortgaged stocks, taking the purchaser's notes in payment, applying the amount generally in payment of his overdue debt, part of which was unsecured. A few days afterwards B. seized the other stock of goods covered by his mortgage, and about the same time the sheriff seized them under execution, and shortly afterwards the mortgagor assigned for benefit of creditors. An interpleader issue between B. and the execution creditor resulted in favour of B., who received, out of the proceeds of the sale of the goods, under an order of the court, the balance remaining due on his mortgage: Horsfall v. Boisseau, 21 A. R. 663. The assignee of the mortgagor then brought an action against B. to recover the amount representing the unsecured part of his debt, which was paid by the purchase of the first stock, which payment was alleged to be a preference to B. over the other creditors:—Held, affirming the decision below, that there was no preference to B. within R. S. O. 1887 c. 124, s. 2; that his position was the same as if his whole debt secured and unsecured had been overdue, and there had been one sale of both stocks of goods, realizing an amount equal to such debt,

in which case he could have appropriated a portion of the proceeds to payment of his secured debt, and would have had the benefit of the law of set-off as to the unsecured debt under s. 23 of the Act; and that the only remedy of the mortgagor or his assignee was by redemption before the sale, which would have deprived B. of the benefit of such set-off. *Stephens* v. *Boisseau*, 26 S. C. R. 437.

Right Passing to Official Assignee.]—A mortgagor and mortgagee dealt together for some years without having had any settlement of accounts, and the former became insolvent. At the date of the insolvency there existed a right of set-off in favour of the mortgagor for the balance due him on their general dealings:—Held, that such right of set-off passed to the official assignee of the mortgagor and that a transferee of the security took it subject to the equity. *Court* v. *Holland*, 29 Gr. 19.

See Mason v. *Macdonald*, 45 U. C. R. 113; *Thibaudeau* v. *Garland*, 27 O. R. 391, *ante* I. 2; *Ontario Bank* v. *Routhier*, 32 O. R. 67, *ante* I. 5.

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3. *Cross-Actions and Counterclaims.*

Costs of Prior Litigation—*Covenant to Pay.*]—Declaration on common counts. Equitable plea, that defendant, under a power of sale in a mortgage, of which he was the assignee, on the 1st October, 1859, sold to plaintiff the premises therein comprised for £400, £50 to be paid down at time of sale (which sum was paid, and is the money sought to be recovered in this action); and, at the same time, by agreement under seal between the parties, the plaintiff covenanted to pay any costs that defendant might be put to, by reason of any chancery or other proceeding arising out of the sale; and subsequently the mortgagor filed his bill in chancery to set aside the sale, making both the plaintiff and defendant parties; that by decree the sale was set aside, and defendant ordered to pay his own costs, which he did pay, and the same amounted to more than the plaintiff's cause of action, which he asks to have set off, and plaintiff to pay the difference. On demurrer:—Held, bad as a plea of set-off, and on other grounds, as the matter set up was only the subject of a cross-action. *Turley* v. *Evans*, 13 C. P. 214.

Money Paid under Agreement—*Improper Retention.*]—In assumpsit for work and labour, &c., defendant at the trial attempted to prove by way of set-off money received from him by plaintiff, in pursuance of an agreement to which they were mutually bound, and which was to be paid by plaintiff into a bank, being tolls received by defendant as keeper of a gate rented by him, and for which the plaintiff had become security for him:—Held, clearly not the subject of set-off, but that, if plaintiff had retained money improperly, defendant had his remedy on the agreement. *Denison* v. *Donnelly*, 2 U. C. R. 391.

Pleading Set-off as Counterclaim—*Effect of.*]—The plaintiff in his statement of claim alleged certain transactions between him and the defendant, in the whole comprehending over $1,000, and claimed a balance of $169.72 and interest from the 1st January, 1888. The defendant by his statement of defence denied that he was indebted to the plaintiff in any sum, and alleged that the plaintiff was indebted to him for goods supplied and on certain promissory notes in the sum of $1,325.75, for which he counterclaimed:—Held, that the matter of the counterclaim was really a set-off, and, even if it were not improper to call it a counterclaim, having regard to con. rule 373, this could not change its real character. Cutler v. Morse, 12 P. R. 594, referred to. *Bennett* v. *White*, 13 P. R. 149.

See Cutler v. *Morse*, 12 P. R. 594; *Sanderson* v. *Ashfield*, 13 P. R. 230; *Girardot* v. *Welton*, 19 P. R. 162, 201.

Rent—*Damages for Distress.*]—The defendant having distrained for rent in arrear, the plaintiff alleged that the defendant was indebted to him in damages for breach of the covenants in the lease to repair, and to lease to plaintiff an adjoining piece of land, and obtained ex parte an interim injunction restraining proceedings under the distress, which was dissolved on the ground of concealment of facts:—Held, that the damages claimed by the plaintiff were not a "debt" within s. 3 of 50 Vict. c. 23 (O.), so as to constitute a set-off against the rent; and, although under the O. J. Act they might be the subject of counterclaim, they would not justify an injunction as against a distress levied as here. *Walton* v. *Henry*, 18 O. R. 620.

——— *Damages for Wrongful Entry—Solicitor's Lien.*]—In an action by a tenant against his landlord for wrongful entry the tenant counterclaimed for rent, and a verdict was given for the same amount against the landlord for damages as was given against the tenant for rent. The trial Judge held that he had power to direct a set-off, although to the prejudice of the plaintiff's solicitor's lien for costs. *Flett* v. *Way*, 11 C. L. T. Occ. N. 130.

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4. *Debts in Different Rights or between Different Parties.*

Assignment of Debt—*Damages against Assignee.*]—By an agreement for the dissolution of a firm, it was provided that all claims and demands, notes, bills, and book accounts belonging to the firm were to be collected by the plaintiffs, who were to be the owners thereof, and by virtue of this the plaintiffs sued defendant for a balance alleged to be due for goods sold and delivered by the firm to defendant, who set up a claim for damages for non-delivery of goods by the firm which arose before the dissolution of the partnership:—Held, a valid assignment of a debt due by defendant to the plaintiffs; and that the defendants could set off the claim for damages arising by reason of a breach of the agreement under which the debt arose. The difference between the Imperial and Ontario Choses in Action Act referred to. *Seyfang* v. *Mann*, 27 O. R. 631. Varied 25 A. R. 179.

Joint Claim—*Individual Debt.*]—To entitle a party to set off one debt against another, it must be shewn that the debts are due from and to the same parties respectively. Where, therefore, a debt was due from A. to B., and costs were due from B. and his

solicitor to A., the court refused an application by B. and his solicitor to set off the one amount against the other. *Wilson* v. *Switzer*, 1 Ch. Ch. 160.

Nominal Plaintiff—*Assignment of Claim—Estoppel.*]—Defendant having pleaded a set-off to an action upon a covenant for the payment of money, the plaintiff replied on equitable grounds, in substance, that the deed declared on and the moneys sued for were, before this action, and before the alleged set-off had accrued, duly assigned for value by the plaintiff to D., and by D. to B.; that defendant had notice of and assented to both assignments; and that this action was brought for B.'s benefit, the plaintiff being a nominal plaintiff only; that, after the said assignments and notice thereof, B. sued defendant in the plaintiff's name on the same covenant for another breach, to which defendant pleaded non est factum, and a verdict and judgment were recovered against him, which he paid; and it was inequitable that he should now set up the defence pleaded:—Held, replication good. *Dennison* v. *Knox*, 24 U. C. R. 119.

——— *Claim against Real Actor.*]—A defendant cannot set up by way of compensation to a claim due to the plaintiff a judgment purchased subsequent to the date of the action, against one who is not a party thereto, and for whom the plaintiff is alleged to be a prête-nom. *Bury* v. *Murray*, 24 S. C. R. 77.

Partnership Claim — *Individual Debt.*]—Evidence of a debt due by one of a firm (plaintiffs) in his individual capacity, will not support a plea of set-off to an action by the firm for a partnership claim. *Pegg* v. *Plank*, 3 C. P. 396.

T. purchased a quantity of bricks manufactured by the plaintiffs jointly, against one of whom (G.) he held a demand, which he desired to set off against the price of the bricks; one of the plaintiffs being in fact assignee of a former partner of G.:—Held, that, even if the effect of this was to constitute the plaintiffs tenants in common, it afforded no ground for setting off a separate against a joint debt. *Graham* v. *Toms*, 25 Gr. 184.

Personal Covenant — *Cross-claim as Trustee.*]—Held, that a married woman, though married before 4th May, 1859, was not bound by a covenant of her husband, entered into by him for himself, his heirs and assigns, as a lessor of certain lands, to pay at the expiration of the lease for a certain malthouse which the lessee was to have liberty to erect on the demised premises, though the reversion had been assigned to her husband and another as trustees for her, in such a way that she had the entire beneficial interest, and though the covenant ran with the land:—Held, also, affirming the decision in 2 O. R. 459, that a claim on behalf of the said trustees for rent in arrear, and for damages for non-repair, was not a matter of set-off against damages recovered against W. F. for breach of said covenant, though he was one of the trustees, they not being matters arising in the same right. *Ambrose* v. *Fraser*, 14 O. R. 551.

See Field v. *Galloway*, 5 O. R. 502, *ante* 1; *Bowmanville Machine Co.* v. *Dempster*, 2 S. C. R. 21.

5. *Deduction from Contract Price.*

Building Contract—*Damages for Delay.*]—Plaintiff, by deed, agreed to build a house for defendant for $1,150, by a day named, and that for each day that should elapse after that day until completion, defendant might deduct $5 from the contract price:—Held, that the sum of $5 per day was liquidated damages, not a penalty, and that it might be deducted from the contract price, without pleading it specially by way of set-off. *Scott* v. *Dent*, 38 U. C. R. 30.

See, also, *Worthington* v. *Municipal Council of Haldimand*, 10 U. C. R. 217; *Brown* v. *Taggart*, 10 U. C. R. 183; *Truax* v. *Dixon*, 17 O. R. 366.

See also, *ante* 3.

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6. *Judgments.*

Acknowledgment of Satisfaction — *Stay.*]—A., being in execution at the suit of B., recovered against B. a verdict for a smaller sum:—Held, that proceedings in A.'s action against B. should be stayed on B.'s acknowledging satisfaction on his judgment for the amount of A.'s verdict against him. *Bethune* v. *Brown*, 5 O. S. 332.

Assignment.] — Under the circumstances of this case the set-off of cross-judgments was refused, the plaintiff's judgment having been assigned. *In re Smart* v. *Miller*, 3 P. R. 385.

——— *Bona Fides—Notice.*]—A rule to set off a judgment recovered by defendant against the plaintiff against the judgment in this cause, was discharged with costs, because the plaintiff had assigned this judgment bonâ fide to a third party, and the defendant had notice thereof. *Miller* v. *Thompson*, 1 P. R. 245.

——— *Notice—Surety—Equities—Injunction.*]—T. and M. having cross-judgments at law applied to the court of chancery to set off the one against the other, which was refused on the ground that the judgment against T. had been assigned to a third person without notice; but, it appearing that M.'s liability to T. arose in consequence of T. being surety for M., the court granted an injunction against the assignee, to prevent his enforcing the judgment recovered by M.; as a person purchasing a chose in action does so subject to all the equities to which it is liable in the hands of the assignor. *Thompson* v. *Miller*, 4 Gr. 481.

Assignment of Verdict before Judgment.]—The plaintiff had obtained a verdict against defendant for malicious prosecution. Defendant, in moving for a nonsuit or new trial on the evidence, asked also to set off a judgment which he had against the plaintiff against that to be entered on this verdict, consenting in that event to waive his motion against the verdict. The court granted this, notwithstanding an assignment of such verdict, which was alleged to have been made between the trial and term by the plaintiff to a third party in satisfaction of a debt. *Orr* v. *Spooner*, 19 U. C. R. 601.

——— *Device.*]—The plaintiff had recovered a verdict for $600 against defendant for malicious prosecution, but judgment had not been signed thereon. At the same assizes the defendant recovered a verdict against the plaintiff for $380 on promissory notes, and signed judgment. The plaintiff almost immediately after its recovery assigned his verdict to his brother, but the court held this to be a device to prevent a set-off:—Held, that the defendant was entitled to have the plaintiff's verdict set off pro tanto by entering satisfaction upon his judgment to the extent of the verdict, and paying the costs of suit; and it made no difference that the judgment had not been entered by the plaintiff. *Grant* v. *McAlpine*, 46 U. C. R. 284.

Division Court.]—A judgment in a division court may be set off against the judgment of a superior court of record. *Robinson* v. *Shields*, 2 C. L. J. 45.

Preservation of Attorney's Lien.]—Under the circumstances stated in this case, the plaintiff was allowed to set off a judgment obtained by defendant against him in a former action against this judgment, for which the present defendant was in custody, saving the attorney's lien on the first judgment. *Reed* v. *Smith*, 1 P. R. 321.

——— *Undertaking.*]—Held, that a judgment purchased by defendant from a third party cannot be set off against the costs of the day, given to the plaintiff upon an application to postpone the trial, secured by the personal undertaking of the defendant's attorney to pay these costs, and upon which the plaintiff's attorney has a lien. *Bennett* v. *Tregent*, 6 P. R. 171.

Preservation of Special Lien.]—Held, that a special lien, given upon the proceeds of a judgment pending an appeal from such judgment, must prevail against an application to set off judgments. *Ross* v. *McLay*, 7 P. R. 97.

Principal and Surety.]—A surety cannot claim to have a judgment obtained by his principal against the plaintiff, set off against a judgment obtained by the plaintiff against him as surety. *Gray* v. *Smith*, 6 O. S. 62.

Proof of Judgment in Insolvency.]—Defendant, in September, 1848, recovered judgment against the plaintiff for a large debt, on which he afterwards took out a commission of bankruptcy, and proved for his claim. Plaintiff afterwards obtained a judgment against defendant for £50, on which he issued execution. Nothing had been done under the commission beyond the appointment of an assignee:—Held, that defendant could not set off his claim against the plaintiff's judgment. *Merrill* v. *Beaty*, 15 U. C. R. 446.

Purchase of Judgment—*Return of Execution.*]—The court will not set off a judgment purchased by defendant against a plaintiff after the return of an execution against him. *Elliott* v. *Crocker*, 1 P. R. 13.

Several Defendants—*Judgment against One.*]—Two plaintiffs recovered judgment against the defendants, one of whom was afterwards arrested under a ca. sa., issued on an affidavit made by one of the plaintiffs. This defendant then sued that plaintiff and his attorney, and obtained a verdict against them. An application by the attorney for himself and his co-defendant to set off this verdict against the judgment was refused; for the attorney, having no interest in the judgment, could not claim to have the verdict against himself paid out of it. *Pentland* v. *Bell*, 13 U. C. R. 455.

——— *Payment by One.*]—A judgment was recovered by the Bank of Upper Canada v. A. Chichester, C. Chichester, and Lacourse, also a judgment of A. Chichester v. Gordon, Lacourse, and Gallon. An application by Lacourse, who had paid the former judgment, to set it off against the latter, was granted. *Chichester* v. *Gordon*, 4 P. R. 92.

——— *Set-off as to One—Lien of Attorney.*]—One of several defendants in a judgment was allowed to set off against it the amount of a judgment which he had recovered against the plaintiff, saving to the attorney his lien for costs. *Fortune* v. *Hickson*, 1 U. C. R. 408.

——— *Set-off as to One—Principal and Surety—Insolvency.*]—On a motion to set aside an award or refer back, it was alleged that $122 had been twice charged against the plaintiff, being identical with a judgment also allowed against him, and the arbitrator certified that in his opinion the matter should be re-opened, as he was not sure this was not the case. It was objected also that the judgment was improperly allowed, having been recovered against the plaintiff and another, and therefore not admissible as a set-off. In answer the mistake was denied, and it was shewn that the identity of the two sums had been expressly in dispute before the arbitrator, and that the judgment had been recovered on a note made by the plaintiff, and indorsed for his accommodation by another, a defendant in a suit upon it. It was sworn also that the plaintiff was insolvent. The application was refused. Quære, whether under the circumstances the judgment was not properly allowed as a set-off. *Latta* v. *Wallbridge*, 3 P. R. 157.

Stay of Proceedings—*Judgment not yet Recovered.*] — This action was tried on the 15th April, before a Judge, who gave his verdict for the plaintiff on the 16th May, on which judgment was entered against defendant on the 10th June, 1879. On the 29th May all proceedings were stayed by order until the determination of an action, arising out of the same transaction, which had been begun in a county court by defendant against plaintiff on the 1st January. This action was tried on the 8th July, when the defendant (plaintiff therein) obtained a verdict, and on the 27th August, judgment having been entered thereon, an order was made setting off the judgments:—Held, that the proceedings should not have been stayed, and the order was rescinded. *Booth* v. *Walton*, 44 U. C. R. 497.

——— *Judgment not yet Recovered — Attorneys—Negligence.*]—Defendants, as attorneys, delayed to register a mortgage to B., their client, by which the security was defeated. They then obtained another mortgage from the same mortgagor to B., on different land, subject to two prior incumbrances, and B. authorized their proceeding to foreclose this mortgage, expressly without prejudice to his

rights as against them. B. having died pending a suit against defendants for negligence, his administrators obtained a verdict in it and issued execution. Defendants then applied to stay proceedings until they could obtain judgment for the costs taxed in the foreclosure suit, in order to set it off, B.'s estate being insolvent. In answer it was urged that the second mortgage and foreclosure (which turned out of no benefit) as well as the insolvency, resulted from defendants' negligence, and that the judgment against them was the only asset to which the plaintiffs had to look for the expenses of administration, &c., for which they were personally liable. The application was refused. *Lynch* v. *Wilson*, 3 P. R. 169.

See ante 3.

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7. *Liquidated or Unliquidated Claims.*

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

Work and Labour—*Ascertainment.*]—A set-off for money due for cutting wood, upon a special agreement under seal, to give defendant so much per cord for cutting:—Held, a liquidated demand, and the subject of set-off. *Geddes* v. *McCracken*, 5 U. C. R. 573.

See Scott v. *Dent*, 38 U. C. R. 30, *ante* 5.

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8. *Payment or Set-off.*

Credit — *Contract* — *Account.*]—A land owner had an old account for bread against the contractor for the erection of certain stores supplied, which account, with interest, he charged against the sums due to the contractor under the contract:—Held, upon the evidence, that the account and interest should be treated, not as a matter of set-off, but as a payment of so much of the contract price. *Truax* v. *Dixon*, 17 O. R. 366.

——— *Third Party* — *Account.*] — The plaintiff wrote to defendant, who had a demand against one C., saying that C. had asked him to settle the claim with defendant, and requested him, therefore, to charge it to his, the plaintiff's, account. It was not proved that any account had been rendered by defendant in which he took credit to himself for this as a payment on any particular account:—Held, that this must be considered merely as an item of set-off, and not as a payment. *Notman* v. *Crooks*, 10 U. C. R. 105.

Orders—*Third Parties.*]—Payments made by a defendant for plaintiff of orders in favour of third parties, may be proved under a set-off, and need not be pleaded as payments on account. *McLellan* v. *McManus*, 1 U. C. R 271.

Overpayments—*Recovery of Excess.*] — In an action on a building agreement, defendants pleaded a set-off equal to the plaintiff's claim, for money had and received, &c., and it appeared that they had in fact overpaid the plaintiffs for the work. The jury found a verdict in defendants' favour for the excess, contrary to the Judge's charge. The court refused to amend the plea, so as to claim the sum given, (1) because such an amendment could not properly be granted, at least without a new trial; and, (2) because the amount overpaid would not form the subject of a set-off. *Sinclair* v. *Town of Galt*, 17 U. C. R. 259.

See Hamilton v. *Street*, 8 U. C. R. 124.

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9. *Other Cases.*

Against Crown.]—See *The Queen* v. *Whitehead*, 1 Ex. C. R. 134.

Costs Payable to Married Woman.]—Judgment for debt and costs having been recovered by the plaintiffs against the defendant, a married woman, to be levied out of her separate estate, there was an appeal by the plaintiffs with regard to the form of the judgment, which was dismissed with costs. An application to vary the order made upon the appeal by directing that the costs thereof should be set off pro tanto against the amount of the judgment was refused; but the court intimated that the taxing officer, upon taxing the costs of the appeal, would have power under rule 1164 to set them off pro tanto against the costs awarded by the judgment to be levied out of the defendant's separate property. Pelton v. Harrison (No. 2), [1892] 1 Q. B. 118, followed. *Hammond* v. *Keachie*, 17 P. R. 565.

Debt of Deceased—*Deficiency of Assets* —*Administration.*]—In an action of trespass for entering the warehouse of a deceased person (of whose estate the plaintiff was the administrator) after his death and taking and converting the goods therein, the defendant set off a debt due by deceased to him. An administration order had been made, of which the defendant had notice before defence. The set-off was held bad under R. S. O. 1877 c. 107, s. 30 (R. S. O. 1897 c. 129, s. 34), there being a deficiency of assets, and also because of the administration order. *Monteith* v. *Walsh*, 10 P. R. 162.

Distress for Rent — *Notice* — *Double Value.*]—The service by the tenant, after distress but before sale of a notice of set-off, pursuant to R. S. O. 1887 c. 143, s. 29, of an amount in excess of the rent, to which the tenant is entitled, does not make the distress illegal, and the landlord is not liable for "double value" for selling, under 2 W. & M., sess. 1, c. 5, s. 5, which requires both seizure and sale to be unlawful. *Brillinger* v. *Ambler*, 28 O. R. 368.

Improvements — *Mortgage* — *Interest*— *Rents and Profits.*]—A purchaser of land made lasting improvements thereon under the belief that he had acquired the fee and then made a mortgage in favour of a person who took in good faith under the same mistake as to title. Subsequently it was decided that the purchaser had acquired only the title of a life tenant. The mortgagee was never in possession:—Held, that the mortgagee was an "assign" of the person making the improvements within the meaning of s. 30 of R. S. O. 1887 c. 100, and had a lien to the extent of his mortgage which he was entitled to actively

enforce. Held, also, that the value of the improvements should be ascertained as at the date of the death of the tenant for life, and that there should be as against the mortgagee a set-off of rents and profits or a charge of occupation rent only from that date till the date of the mortgage. Held, also, that interest should be allowed on the enhanced value from the date of the death of the tenant for life. *McKibbon* v. *Williams*, 24 A. R. 122.

Solicitor's Costs.] — A solicitor's costs will be allowed as a set-off and as a debt, though no bill has been delivered. *Macpherson* v. *Tisdale*, 11 P. R. 261.

Statute-barred Debts.]—Where part of plaintiff's own demands stated in his particulars are barred by the statute, he has a right to place against these the items of set-off appearing in his particulars to be beyond six years. *Ford* v. *Spafford*, 8 U. C. R. 17.

P. owed B. two debts, one secured by mortgage, and one unsecured; and P. had a counterclaim against B. P. executed a subsequent mortgage in favour of R., who filed a bill to redeem B.'s mortgage. Up to the time of filing the bill there had been no act appropriating the counterclaim to either the secured or unsecured debt, and both the counterclaim and the unsecured debt had become barred by the statute:—Held, that the plaintiff was not entitled to set off the counterclaim against the mortgage debt. *Ross* v. *Perrault*, 13 Gr. 206.

See New Brunswick Oil Works Co. v. *Parsons*, 20 U. C. R. 531, *ante* REVENUE; *Teer* v. *Smith*, 21 U. C. R. 417, *ante* PARTNERSHIP.

See BILLS OF EXCHANGE, VII. 8—COMPANY. X. 6 (f)—COSTS, V. 2—DISTRESS, III. 8—JUDGMENT, VII.—LANDLORD AND TENANT, XXIII. 1—PLEADING—PLEADING SINCE THE JUDICATURE ACT, V. — PRINCIPAL AND SURETY, VI. 2 (c)—RAILWAY, XXIV. 1 (b) — SOLICITOR, VIII. 5—VENDOR AND PURCHASER, I. 7.

SETTING ASIDE PROCEEDINGS.

See PRACTICE—PRACTICE AT LAW BEFORE THE JUDICATURE ACT, XVI.

SETTLED ESTATES ACT.

Exchange of Infant's Lands—*Depreciation.*] — The Settled Estates Act does not authorize the court to sanction an exchange of the lands of an infant cestui que trust; but when in such a case it can be shewn that a part of the property of the infant is exposed to depreciation if the proposed exchange be not effected, the court may order the same to be carried out under the provisions of C. S. U. C. c. 12, s. 50. *Re Bishoprick*, 21 Gr. 589.

Married Woman—*Examination.*]—Upon a petition under the Settled Estates Act, an order was made dispensing with the examination required by the Act of a married woman interested who lived out of the jurisdiction, but not of one who lived within the jurisdiction. The Married Woman's Property Act, 1884 (O.), does not apply to cases under the Settled Estates Act, where the woman has acquired the property before the passing of the former Act. *Re English*, 11 P. R. 198.

Power to Grant Renewable Building Leases—"*Usual Custom.*"] — In applying the English Settled Estates Act of 1856, 19 & 20 Vict. c. 120, to this Province, the words "usual custom" in s. 2 must be satisfied with something less than the immemorial custom of England. It is satisfied by proof of a well recognized method or usage of framing building leases in a given locality. Under that statute and 53 Vict. c. 14 (O.), the power to lease with extended right of renewal may be granted up to 999 years. *Re Watson's Trusts*, 21 O. R. 528.

Sale of Vacant Land—*Life Tenant—Income—Taxes—Infant—Maintenance.*] — The Settled Estates Act was intended to enable the court to authorize such powers to be exercised as were ordinarily inserted in a well drawn settlement, and ought accordingly to receive a liberal construction. Where the widow of the settlor was entitled to the whole income of the estate for her life, not charged with the support and maintenance of the children, who were the remaindermen, an order was made, upon the petition of the widow and adult children and with the approval of the official guardian, authorizing the sale, in the widow's lifetime, of vacant and unproductive land forming part of the estate, notwithstanding that the effect would be to relieve the widow of the annual charge upon such land for taxes, to add to her income the profit to be derived from the investment of the proceeds of the sale, and to deprive the remaindermen of the benefit of any increase in the value of the land; the price offered being the best obtainable at the time or likely to be obtained in the near future; the court deeming the sale in the best interests of all parties; and the widow agreeing to charge her income from the settled estates with the obligation of maintaining the infant remainderman. *Re Hooper*, 28 O. R. 179.

See Deedes v. *Graham*, 16 Gr. 167; *Re Smith's Trusts*, 4 O. R. 518, 18 O. R. 327.

SETTLEMENT.

Conveyance by Husband for Use of Wife and Children—*Rights of Children.*] —A husband conveyed lands to trustees to receive the rents, and, after payment of a mortgage, to pay the balance into the hands of his wife during her life, for her use and that of her children, to be at her separate disposal:—Held, that the plaintiff, the sole surviving child, was entitled to half the yearly income. *Turner* v. *Drew*, 28 O. R. 448.

Life Policy—*Voluntary Settlement.*]—A benefit certificate in a mutual insurance society was expressed to be payable to the insurer's mother, and by contract between him and the society it was agreed that it should not be payable nor could it be transferred to any one else than his mother, wife, children, dependents, father, sister, or brother; and that if he died without having made any further

direction as to payment the money should be paid to the beneficiaries in the above order, if living. The insurer died intestate, unmarried, his father and mother predeceasing him, but two sisters survived, who were supported by him, and claimed the policy moneys in the character of "dependents" as well as "sisters." His estate was insolvent, and his administrator claimed the money as assets for the creditors:—Held, that the insurance amounted in effect to a voluntary settlement on the sisters of the insured, who, though not within the protection of R. S. O. 1887 c. 136, were beneficiaries named in the policy, and, as it was not shewn that the insured was not in a position to make a voluntary settlement at the time he effected the insurance, or at any time, they were entitled to the money. *In re Roddick*, 27 O. R. 537.

Marriage Settlement — "*Children*"—*Vested Remainder.*]—By a marriage settlement certain land was conveyed to trustees in trust to sell and convey, as the husband and wife might appoint, and to invest the money and pay the interest to the wife during life, and in case the husband survived the wife, and there was a child or children then surviving, to pay the interest to the husband during life, and after the decease of both to divide the money equally among the children, and if there was only one child to pay the whole to such child, and in case of the death of the wife without issue to pay the money to the husband, and in case the husband and wife did not make any appointment, then in trust to support the contingent remainders thereinafter limited, and to pay the rents on the same trusts as the money. Two children were born; the husband died; one of the children attained twenty-one, married, and died before his mother, leaving his sister and a daughter surviving. On the death of the mother:—Held, that the deceased son took a vested interest, although he died before the period for conveying, and that his daughter was entitled to her father's share. *Lazier* v. *Robertson*, 30 O. R. 517, 27 A. R. 114.

Mortgage—*Exoneration — Will — Direction to Sell—Discretion—Legacy.*]—Certain land, subject with other lands to an overdue mortgage made by the settlor, was conveyed by him to trustees for his daughter by way of settlement to take effect on his death or her marriage. The conveyance to the trustees contained no covenants by the settlor and no reference to the mortgage, which remained unpaid at the time of the settlor's death:—Held, that the mortgage should be paid out of the settlor's general estate. A testator devised all his estate, real and personal, to trustees upon trust so soon after his death as might be expedient to convert into cash so much of his estate as might not then consist of money or first-class mortgage securities, and to invest the proceeds and apply the corpus and income in a specified manner. A later part of the will contained the following provision: "In the sale of my real estate or any portion thereof I also give my said trustees full discretionary power as to the mode, time, terms, and conditions of sale, the amount of purchase money to be paid down, the security to be taken for the balance, and the rate of interest to be charged thereon, with full power to withdraw said property from sale and to offer the same for resale from time to time as they may deem best:"—Held, that the latter clause merely gave a discretion as to the details and conditions of the sale, and did not qualify or override the specific direction to sell as soon after the testator's death as might be expedient. The testator gave certain shares of his estate to his two sons, the provision for payment being as follows: —"To each of my sons as they arrive at the age of twenty-three years or as soon thereafter as my said trustees shall deem it prudent or advisable so to do, they shall pay over one moiety of his share of the corpus of said estate and the accumulated income on said moiety, if any, and the remaining moiety upon his attaining the age of twenty-seven years, or so soon thereafter as they shall deem it advisable so to do:"—Held, that this direction did not give the trustees an absolute discretion as to the time of payment, but that the general rule, that every person of full age to whom a legacy is given is entitled to payment the moment it becomes vested, applied. *Lewis* v. *Moore*, 24 A. R. 393.

See FRAUD AND MISREPRESENTATION, III.—HUSBAND AND WIFE, X.

SETTLEMENT OF ACTION.

See COSTS, V. 3—PRACTICE—PRACTICE SINCE THE JUDICATURE ACT, XIV.—SOLICITOR, VIII. 6.

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SHERIFF.

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I. Actions and Proceedings by Sheriff.

(*See* Interpleader.)

1. *Against Deputy-Sheriff or Bailiff for Escape.*

Bond—*Breach—Pleading.*]—Where in an action on a bond by a sheriff against his deputy, the breach assigned was, that the order of a Judge was delivered to the deputy for the committal to close custody of a debtor admitted to the limits, and that the deputy had arrested, but suffered him to escape; the breach was held bad, because it was not alleged either that the debtor was on the limits when the order was delivered to the deputy, or that he was arrested on the limits by the deputy under it. *Commercial Bank* v. *Jarvis*, E. T. 5 Vict.

Negligence—*Special Contract — Damages —Costs.*]—Under a plea of not guilty to an action for escape by the sheriff, a bailiff can only disprove the negligence. He cannot prove any special contract of service. An action on the case lies by the sheriff against a bailiff

for negligence in allowing an escape, in consequence of which the sheriff had a verdict against him for nominal damages; and semble, that in such an action the sheriff may recover both the costs of the action against himself and his own costs, although no notice of that action had been given to the bailiff by the sheriff, the bailiff not being concluded by the former verdict, if he had no opportunity of defending in the sheriff's name. *Rutlan* v. *Shea*, 5 U. C. R. 210.

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2. *For False Representation.*

As to Goods Seized—*Instructions of Execution Creditor.*]—A sheriff cannot maintain an action on the case as for a fraudulent representation, when, having seized goods on an execution of a third party, he is afterwards instructed by defendant to seize the same goods on his execution, although, on an adverse claim being set up, the plaintiff in the first writ withdraws his execution, and the defendant refuses to withdraw his or to indemnify the sheriff, and the adverse claimant afterwards prosecutes the sheriff, and recovers for the illegal seizure and detention. *Jarvis* v. *Commercial Bank*, 6 O. S. 337.

——— *Instructions of Attorney—Damages.*] — Declaration, that one A. having a judgment against B. and B., his attorney (defendant) delivered a fi. fa. to the plaintiff as sheriff, and falsely represented that certain goods in the possession of one Burns, were the goods of B. and B., and directed the plaintiff to levy them; that the plaintiff, believing said representation to be true, levied and sold the said goods, and that he, the plaintiff, afterwards suffered damage in an action brought by Burns, the owner of the goods:—Held, it being expressly stated that there was a false representation and that defendant directed the plaintiff to levy, that under the authority of Humphrey v. Pratt, 5 Bligh N. R. 154, the declaration was good. Second plea, that defendant honestly believed the goods belonged to B. and B., and made such representation only to assist the plaintiff in the execution of the writ. Held, bad, as an answer merely to the false representation, but not to the direction to levy, which was the substance of the complaint. Held, also, that the action could not be sustained without shewing that the plaintiff had actually himself suffered damage; and that damage sustained by W., the plaintiff's bailiff, and E., his assistant, this action being brought for E.'s benefit, would not suffice. *Moodie* v. *Dougall*, 12 C. P. 555.

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3. *For Purchase Money on Sales.*

Sale of Goods under Fi. Fa.—*Conditions of Sale—Payment—Offer of Notes.*]—Declaration by a sheriff, that under fi. fas. against one M. he offered for sale his stock of goods upon certain conditions, viz., the whole to be offered in one lot, the bidding to be so much in the pound on the cost as ascertained by the stock book, which should be examined by a disinterested party and all errors corrected, but no change to be made in the prices stated there—the purchaser to have a credit of 3, 6, 9, 12, and 15 months, on furnishing notes indorsed to the satisfaction of H. and V.; and if any purchaser should fail to comply with the terms the goods should be resold, and he should be liable for any deficiency in price and the expenses of such resale. Averment, that defendant purchased subject to such conditions, and did not comply with them, whereupon the goods were resold at a loss upon the first sale. Breach, non-payment of such deficiency, or the expenses of such resale. The defendant pleaded that he offered notes with good indorsers, which ought to have satisfied said H. and V., but that they unreasonably refused to approve of them; and that no notice of the second sale was given to him:—Held, both pleas bad; but that the sheriff could not lawfully make such sale as set out in the declaration, and therefore the action was not maintainable. *Smith* v. *Bacon*, 14 U. C. R. 38.

——— *Payment — Appropriation.*]—Upon the evidence set out in this case, being an action by a sheriff for the price of goods sold under execution, the question was, whether the sheriff had not appropriated the money in defendants' hands to an attachment, without reference to the decision of the court, and, the jury having found for the plaintiff, the verdict was sustained. *Carrall* v. *Montreal Bank*, 21 U. C. R. 18.

——— *Purchase by Execution Creditor—Guarantee—Condition.*]—The sheriff held several executions against one P., on which no seizure was made until after he had absconded and several writs of attachment had issued. After the attachments an execution came in at defendant's suit, and the sheriff then seized P.'s goods under all the writs, and defendant at the sale purchased a large quantity of lumber. The sheriff would not allow him to take it away without paying; but defendant contended that under his execution he was himself entitled to the money. An application was then pending by one of the attaching creditors against defendant's judgment, which it was thought would determine the question of priority, and the sheriff agreed to let defendant take the lumber on receiving a guarantee from the Bank of British North America that they would be responsible for the payment when and if it should be decided that defendant was not entitled. Afterwards, the sheriff returned defendants' writ nulla bona, for which the defendant recovered a verdict against him for more that the amount payable for the lumber:—Held, that the sheriff was entitled to recover from defendant the purchase money for the lumber, without waiting until the question of priority between his writ and the attachment had been decided, for that condition applied only to the liability of the bank under their guarantee. *Carrall* v. *Potter*, 19 U. C. R. 346.

——— *Set-off.*] — The demand which the sheriff has against defendants as purchasers of goods sold under execution, not being a mere personal demand, but he being in a measure the agent of the plaintiff, defendants are not entitled to set off his personal debt due to them against the claim against them by the sheriff in his official capacity. *Kingsmill* v. *Bank of Upper Canada*, 13 C. P. 600.

Tax Sale—*Promise to Pay—Pleading.*]—The sheriff, as well as the treasurer, may maintain assumpsit for the price of land sold for taxes; but in such an action it should be expressly averred that defendant promised to pay for the land and accept a certificate within a reasonable time. Semble, that the sheriff

may recover in assumpsit for the price of goods or lands sold by him under execution in ordinary cases. As regards a purchaser of land sold for taxes, it is to be assumed in the first instance that the sale was authorized and regular, and if any thing was in fact done which could invalidate it or defeat the title, it is for him to shew it by plea. Held, that the defendant sufficiently appeared to be the highest bidder by an allegation that he bid and offered to take the smallest quantity of the respective lots for the taxes, interest, and expenses due thereon. *Jarvis* v. *Cayley*, 11 U. C. R. 282.

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4. *On Bonds and Undertakings for Return of Goods.*

Bond—*Condition—Breach.*]—A bond by a party whose goods are seized under a fi. fa., to deliver them to the sheriff on request, means merely that they shall be forthcoming when demanded, and the sheriff cannot insist on the party removing them to any particular place within the district. And where, in such a case, the obligor has once delivered up the goods to the sheriff, the condition is performed; and his refusing to give them up on a subsequent occasion is no breach of the condition. *Malloch* v. *Patterson*, 1 U. C. R. 261.

——— *Condition — Breach — Plea—Distress for Rent.*]—A plea that after the making of the bond, and before suit, and before defendants had been called upon to return the goods, the landlord of the execution debtor seized them on a distress for rent, and took them out of defendants' control, wherefore they were unable to return them:—Held, no defence. *Rapelje* v. *Finch*, 14 U. C. R. 249.

The sheriff seized goods under execution, but forebore to remove them, on receiving a bond from defendants to deliver them up to him when requested. When his bailiff went afterwards to sell, he found that the household furniture, worth more than the execution, had been distrained by the debtor's landlord for rent, and on referring to defendants he was told that he might go and take it at his peril:—Held, that the condition of the bond was broken, and the sheriff entitled to recover the amount of the execution, though there were other goods on which he might have levied. *S. C., ib.* 468.

——— *Damages—New Trial.*] — Plaintiff, a sheriff, sued defendants on a bond to redeliver to him goods seized in execution, on a certain day, at a certain inn. The jury were told the plaintiff ought to have a verdict for 6s., the sum remaining unpaid upon the execution, but they found for defendants. Notwithstanding the smallness of the verdict the court granted a new trial without costs. *Moodie* v. *Bradshaw*, 4 U. C. R. 199.

——— *Several Obligors—Demand.*]—In an action against one of two obligors on a joint and several bond, reciting that the plaintiff, as sheriff, had seized goods under a fi. fa. at the suit of G. against C., the other obligor, and S., and conditioned to be void if the obligors should deliver the same to the sheriff, at such time and place as he should appoint:—Held, not necessary to shew a demand on both obligors. *Fortune* v. *Cockburn*, 22 U. C. R. 359.

Possession of Sheriff — *Distress for Rent.*]—A sheriff seized goods under execution, but left them in the possession of the execution debtor upon receiving a receipt for the same, with an undertaking to deliver them to the sheriff when requested:—Held, that the sheriff had not such a possession of the goods as precluded the landlord from distraining. *McIntyre* v. *Stata*, 4 C. P. 248.

II. Arrest—Duty and Liability as to.

Absconding Debtor—*Return—Notice—Search.*]—Where the sheriff goes to the known residence of a debtor and bonâ fide searches for him to make an arrest, without success, because the debtor has absconded, he has done all that is required, and he is not liable for not arresting after the debtor's return unless it be shewn that he had notice of such return. *Rigney* v. *Ruttan*, 5 O. S. 707.

Attachment for Contempt—*Bond.*]—The sheriff may, under s. 302 of C. L. P. Act, 1856, take a bond from a prisoner in close custody under an attachment for contempt in non-payment of money pursuant to an award; and a Judge of a county court may, if such bond be taken, allow it pursuant to ss. 25 and 26, C. L. P. Act, 1857. *In re T. D.* v. *A. H.*, 4 L. J. 285.

Conditional Order to Commit—*Justification—Pleading.*]—The deputy sheriff joined with the attorney for the defendant in a plea justifying under a conditional order for committal made upon the examination of a judgment debtor:—Held, that the plea, being bad as to the attorney, was bad as to both. *Chichester* v. *Gordon*, 25 U. C. R. 527.

Conditional Surrender — *Escape—Second Surrender.*] — Where a debtor on the limits on a writ of capias ad satisfaciendum from a district court, was brought by his bail for surrender to the sheriff, who refused to receive him except at the gaol, but gave a certificate, which was taken away by the bail, that the gaoler might receive him; and the bail did not then surrender him, but some time after (the debtor in the meantime having gone off the limits) gave him up to the sheriff, who kept him in close custody until he was discharged by an order of the Judge of the district court:—Held, that an action for false imprisonment would not lie against the sheriff for taking the debtor on the second surrender, the first having been conditional, and the condition not complied with, and the escape having been negligent and not voluntary. *Thompson* v. *Leonard*, 3 O. S. 151.

Diligence — *Bailable Ca. Sa.—Nominal Damages.*]—Where a bailable ca. sa. is delivered to the sheriff, he is bound to proceed with due diligence in the arrest. If the jury, upon being charged not to find for the plaintiff unless satisfied that there has been neglect by the sheriff from which plaintiff has suffered some damage, return a nominal verdict for the plaintiff, the court will not set it aside on the ground that to sustain a verdict for even nominal damages clear proof of an injury received from defendant's neglect should have been given. *O'Connor* v. *Hamilton*, 4 U. C. R. 243.

Discharge of Debtor—*Promissory Note—Bond.*]—A person arrested for debt, while

in custody of the sheriff's officer, delivered to him his promissory note, with an accommodation indorser, at the same time executing a bond with a surety for his appearance in the action, whereupon he was discharged from custody:—Held, that the transaction was in violation of the provisions of 23 Hen. VI., c. 9, and that the transfer of the note to the bailiff was illegal and void. *Richardson* v. *Hamilton*, 7 Gr. 281.

Escape—*Rule to Return—Waiver.*]—The sheriff arrested defendant on an order to hold to bail, and returned the writ cepi corpus. Defendant afterwards escaped, but the plaintiff, notwithstanding, served the declaration on the sheriff, and, a plea having been put in, recovered a verdict:—Held, that he could not, after this, rule the sheriff to return the body, and attach him for default. *Regina* v. *Sheriff of Perth*, 2 P. R. 298.

Failure to Arrest—*Absence—Negligence—Sureties.*]—Where to an action against a sheriff and his sureties, for not serving a capias, defendants pleaded that the person to be served was not to be found in the county, the mere fact that he was seen there by some third party during the currency of the writ does not necessarily rebut the plea. It should be shewn that the sheriff, without gross negligence, must have known of his being there; and it depends upon the evidence whether the sheriff alone is liable for such omission to serve, or his sureties also. *Nelson* v. *Baby*, 14 U. C. R. 235.

——— *Action Proceeded with.*]—Semble, that the plaintiff, though the defendant will not put in bail, may go on with his action against him, and pursue his remedy against the sheriff at the same time for not arresting defendant. *Regina* v. *Sheriff of Hastings*, 1 C. L. Ch. 230.

——— *Attachment for Contempt—Delivery of Documents.*] — Held, that an action lies against a sheriff for not arresting an attorney against whom an attachment has issued for not handing over, pursuant to order, all deeds, books, papers, &c., in his custody belonging to plaintiff; and that a plea which stated that on delivery of the attachment to defendant, the attorney delivered to him all deeds, &c., in his custody or power, to be by defendant delivered to plaintiff, in pursuance of the order for contempt of which the attachment issued, and that long before the return day defendant tendered them to plaintiff's attorney, who refused to accept them, and that defendant was at all times ready to deliver them to plaintiff, was bad: for that—besides being hardly an answer to one of the counts of the declaration, which was for falsely returning that the attorney could not be found—a statement that the attorney delivered to defendant all deeds, &c., in his custody, might be true as to those then in his hands, and yet not all within the scope of the order and attachment: but that the plaintiff was entitled to have the body in court, and to get discovery of all deeds, &c. *Burnham* v. *Hall*, 44 U. C. R. 297.

——— *Certificate of Filing Recognizance of Bail, not Given—10 & 11 Vict. c. 15, s. 5—16 Vict. c. 175, ss. 7, 8—Action against Sheriff—Relief, how Obtained.*] — See *Wheeler* v. *Munro*, 2 L. J. 66.

Second Arrest without Leave—*Nullity of Previous Arrest—Estoppel.*] — A ca. re. having issued to the sheriff to arrest one T., a warrant was made to one G., a sheriff's officer, to execute it. G., being unwell, gave it to another bailiff, whose name was not in the warrant, and who told T. that he had a warrant to arrest him. T. promised to go to the sheriff's office and give bail, which he did. Subsequently T.'s attorney discovered that the name of the second bailiff was not in the warrant, and applied to the Judge of the county court to set aside the arrest, which he did. Plaintiff's attorney then suggested to the officer that he should have a proper warrant made out and arrest T. while the process was still current. The warrant was made out and T. arrested. Thereupon T.'s attorney applied to the Judge of the county court to set aside this arrest as vexatious and a second arrest made without leave, and T. was discharged, and left the Province. The plaintiff having brought covenant against the sheriff and his sureties:—Held, that when the first arrest was set aside as a nullity the sheriff might still arrest while the process was current. Semble, that the first arrest was unnecessarily set aside. Held, also, that the sheriff and his sureties were not concluded by the decision in another suit in the county court with regard to the fact of the arrest being made, no estoppel being pleaded, nor could such decision act as an estoppel, being in a cause which was res inter alios acta. Held, also, that the evidence shewed that what was complained of as wilful misconduct on the part of the sheriff was done at the plaintiff's own suggestion. *McIntosh* v. *Jarvis*, 8 U. C. R. 535. See *S. C.*, *ib.* 530.

Trespass for Arrest—*Order of Sessions—Fine and Costs—Tender—Pleading.*]—Trespass will not lie against a sheriff for executing the mandate of the court of quarter sessions, by committing and detaining until the fine and the costs are paid, even though the latter may be unascertained at the time they are directed to be paid, and though that fact may, on certiorari and habeas corpus, entitle a prisoner to his discharge. The second count set out that the plaintiff, at the quarter sessions, was convicted of two common assaults and sentenced to pay a fine of $1 and the costs, and to remain in gaol till paid; and that defendant, being sheriff, without sufficient warrant, unlawfully arrested plaintiff and kept him in gaol six hours, and plaintiff, being desirous of procuring his discharge, tendered to defendant $20 for said fine and costs respectively, which plaintiff believed to be sufficient, and then demanded his discharge, but defendant would not accept the same or release the plaintiff, or inform plaintiff, although requested, what sum defendant required to entitle plaintiff to his discharge, whereby plaintiff was prevented paying the proper amount although willing, and to procure his discharge, and after said tender, &c., defendant unlawfully detained plaintiff, &c.:—Held, on demurrer, a count in trespass and false imprisonment, and as such bad, for the sheriff detained the plaintiff in obedience to the sentence of the court. Quære, whether, if the count had directly charged it as a duty incumbent on the sheriff to give the information requested, and alleged a neglect or refusal on his part to give the same, it would have disclosed a good cause of action in case. *Ovens* v. *Taylor*, 19 C. P. 49.

——— *Joinder of Defendants.*]—Where the plaintiff (defendant in a capias) sues the sheriff and the plaintiff in the writ for his arrest,

as joint trespassers, he must take care that his record of the pleadings does not shew him to be proceeding against the sheriff for one act of trespass and against the plaintiff in the writ for another act of trespass. Where the record shewed this, the court set aside a verdict obtained by the plaintiff against both defendants on the issues raised. *Eccles* v. *Moodie*, 4 U. C. R. 250.

Warrant—*Directed to Gaoler.*]—Semble, that a sheriff is not liable in trespass on insufficient commitments by magistrates directed to the gaoler, unless he has become a party to the imprisonment. *Fergusson* v. *Adams*, 5 U. C. R. 194.

——— *Justification—Pleading.*]—The sheriff sued for arrest under a warrant issued by the justices sitting at quarter sessions may give this justification in evidence under the general issue by 21 Jac. I. c. 12. *Fraser* v. *Dickson*, 5 U. C. R. 231.

What Amounts to an Arrest.] — See *Perrin* v. *Joice*, 6 O. S. 300; *McIntosh* v. *Demeray*, 5 U. C. R. 343; *Morse* v. *Teetzel*, 1 P. R. 369; *Wilson* v. *Brecker*, 11 C. P. 268.

III. Assignments for Benefit of Creditors to Sheriff.

Death — *Successor — Disclaimer—Action by Judgment Creditors.*]—An assignment for the benefit of creditors made to a sheriff under R. S. O. 1887 c. 124, is made to him as a public functionary, and on his death the care and administration of the estate assigned devolves upon his deputy, and thereafter upon his successor in office. It is not competent to the sheriff to disclaim or decline to act as such assignee. Where an assignment under the statute had been made to a sheriff, who died shortly after, and proceedings were subsequently taken in their own names by judgment creditors of the assignor to set aside a transfer of property as fraudulent: — Held, that the plaintiffs, suing alone, had no locus standi to maintain the action. *Brown* v. *Grove*, 18 O. R. 311.

Sale of Land — *Statute of Frauds.*]—A sheriff, selling lands as assignee for creditors, under R. S. O. 1887 c. 124, cannot, as when selling under an execution, sign a memorandum which will bind a purchaser under the Statute of Frauds, for he is not, as in the latter case, agent for both vendor and purchaser. *McIntyre* v. *Faubert*, 26 O. R. 427.

IV. Change of Sheriff.

1. *Sale of Goods.*

Resignation — *Interval before Appointment—False Return by Deputy.*]—A fi. fa. was delivered to a sheriff on the 21st November, 1847, returnable in H. T., 1848. On the 9th December, 1847, the sheriff tendered to the government his resignation. On the 14th he was notified of its acceptance, but his successor had not been appointed till after the return of the writ, which was made in the interval. The deputy, who remained in the office to wind up the old business, made his return to the writ. In an action against the sheriff for a false return: — Held, that the sheriff must be considered in office at the return of the writ, and liable upon the return made. *Ross* v. *McMartin*, 7 U. C. R. 179.

Sale under Previous Writ—*Nullity—Return—Priorities.*]—Action against the sheriff for false return to a fi. fa., the questions being whether the writs before the plaintiff's were in defendant's hands to be executed, and whether one of them was not fraudulent. The plaintiff's writ was delivered to defendant on the 19th May, 1864. The previous sheriff had been superseded on the 9th March, and defendant appointed on the 11th. There had been two previous writs, at the suits of B. and J. respectively, in the hands of the late sheriff, and received by defendant before the plaintiff's writ. The bailiff, who held a warrant from the late sheriff to execute B.'s writ, sold some of the goods to B. at a valuation, on the 8th April, for about the amount of his execution, without any auction, or any notice, or bill of sale; and B., being advised that this sale was ineffectual, purchased the same and other goods at the sale made by defendant on the 17th June, under his own and J.'s writ, which absorbed all the proceeds. The deputy of the late sheriff swore that this bailiff's warrant had been countermanded on the 12th March, and it did not appear that the execution of the writ had been commenced before defendant's appointment:—Held, that the plaintiff could not recover, for the sale by the bailiff of the late sheriff to B. was, under the circumstances, a nullity, and the writs of B. and J. were in defendant's hands to be executed before that of the plaintiff. *Snarr* v. *Waddell*, 24 U. C. R. 165.

Ven. Ex. — *Sale under—Attachment—Priorities.*] — On the 16th December, 1858, defendants issued a fi. fa. to K., the then sheriff of Lincoln, to which he returned goods on hand for want of buyers, having taken a bond from the execution debtor to produce them, and on the 26th April, 1860, a ven. ex. was delivered to him. On the 28th April, 1862, a new sheriff was appointed, who took possession of all the writs found in K.'s hands, but K. made no transfer to him by indenture of the writs or bond, nor did he deliver over to him the goods. In December, 1865, the new sheriff sold under the ven. ex., having previously received an attachment at the plaintiff's suit:—Held, that the sale could not be upheld, and that the attachment therefore must prevail. *Riley* v. *Niagara District Bank*, 26 U. C. R. 21.

See McKee v. *Woodruff*, 13 C. P. 583, *post* IX. 1 (a).

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2. *Sale of Land.*

Death — *Execution of Deed—Deputy.*]—A deed, executed by a deputy sheriff, of lands sold under an execution after the death of the sheriff to whom the writ was directed, and after the appointment of a new sheriff, is void. *Doe d. Campbell* v. *Hamilton*, 6 O. S. 88.

Inception of Execution before Change.]—Semble, that to support a sale by an ex-sheriff out of office, it must appear that while in office he acted upon the writ to an extent amounting in law and fact to an incipient step in the execution of it, and duly fol-

lowed up such step after leaving the office. *Doe d. Miller* v. *Tiffany*, 5 U. C. R. 79.

As to what is an inception of execution—See EXECUTION, IX. 2 (a).

Quære, under what circumstances the old sheriff or his late deputy may proceed to sell lands advertised under a fi. fa. before the new sheriff came into office. *Campbell* v. *Clench*, 1 U. C. R. 267.

——— *Tax Sale.*]—In ejectment defendant claimed through a sale for taxes under 6 Geo. IV. c. 7. The warrant relied on issued in 1837 to the then sheriff, M., who ceased to hold office in 1838; return stated the sale to have been made in 1840; and M. executed the deed in 1841:—Held, clearly insufficient; for the sale and deed being made by a person out of office were primâ facie unauthorized, and defendant proved no proceedings taken by M. which could be regarded as an inception of execution. If there had been such proof, quære, whether the law as to inception of execution or process applies equally to tax sale and to sales of land on judgments. *McMillan* v. *McDonald*, 26 U. C. R. 454.

Sale after Change — *Acquiescence.*]—Held, that the conduct of the execution debtor shewed an acquiescence on his part in the ex-sheriff's right to proceed with the sale of the lands as he did under the writ. *Doe d. Tiffany* v. *Miller*, 5 U. C. R. 426.

Sale before Change—*Deed.*]—Held, that the deed of lands sold under execution, having been executed by the sheriff out of office, but in completion of the sale made by him whilst in office, was valid under s. 269 of C. S. U. C. c. 22. *Miller* v. *Stitt*, 17 C. P. 559.

Semble, that a deed by the successor of the sheriff who made the sale for taxes, is good under 27 & 28 Vict c. 28, s. 43. *Bell* v. *McLean*, 18 C. P. 416.

——— *Registry—Certificate.*]—The sheriff, under the facts stated in this case, who had sold the land for taxes and made the deed, was a competent person to give a certificate for registry, though out of office; and the registrar having acted upon it, though he might perhaps have refused to do so owing to his informality, the registration was good. *Jones* v. *Cowden*, 34 U. C. R. 345.

See, also, *Burgess* v. *Bank of Montreal*, 3 A. R. 66.

3. *Other Cases.*

Death—*Deputy—Debtors on Limits—Assignment.*]—On the death of a sheriff, his deputy is charged with the execution of his office until a new sheriff is appointed, and he must assign over by indenture as well the debtors on the limits as those in custody; and a new sheriff is not liable for the escape of a debtor on the limits at the time of his appointment, without such assignment. *McPherson* v. *Hamilton*, 5 O. S. 490.

——— *Debtor on Limits—Departure—Action—Pleading.*] — The plaintiff declared, as assignee of G., the sheriff of Middlesex, on a bond to the limits given to H., the late sheriff, alleging that after the making of the bond H. died, and that defendant on several occasions departed from the limits; but it was not stated whether the departure was before or after the death of H., or the appointment of G., or whether the bond had been allowed:—Held, declaration bad, as for all that appeared the departure might have been at such a time as to render the late sheriff liable, and if so his successor could not assign the bond. *Osborne* v. *Cornish*, 20 U. C. R. 47.

——— *Enforcement of Judgment—Personal Representative.*]—Held, that upon the death of a sheriff who had recovered judgment in an action on notes seized under a fi. fa., his personal representative, and not his successor in office, is entitled to execution. *Dickenson* v. *Harvey*, 6 P. R. 170.

Fees Earned by Deputy while Office Vacant—*Right to.*]—See *McKellar* v. *Henderson*, 27 Gr. 181.

See Brown v. *Grove*, 18 O. R. 311, *ante* III.

V. CREDITORS' RELIEF ACT.

Assignment for Benefit of Creditors—*Executions—Priorities.*] — An assignment by an insolvent for the general benefit of his creditors does not oust a prior attachment by a creditor of the insolvent of a debt due to him. Wood v. Joselin, 18 A. R. 59, followed. Section 37, s.-s. 3, of the Creditors' Relief Act, R. S. O. 1887 c. 65, must be construed to refer only to a case where the facts would entitle a sheriff, if there had been no attaching order issued by a creditor, to obtain one at his own instance, under s.-s. (1) of s. 37; and, to entitle him to such order, there must be in his hands several executions and claims, and not sufficient lands or goods to pay all and his own fees, and a debt owing to the execution debtor by a person resident in the bailiwick. And where a debtor, who was entitled to certain insurance moneys, assigned them to his wife, who subsequently assigned them to her husband's assignee for the benefit of creditors, and such moneys were also attached by a creditor of the husband between the dates of the assignment to his wife and his assignment for creditors; and some months after these transactions, when the moneys were in court awaiting the result of litigation between the assignee and the attaching creditor, two executions against the debtor came into the hands of the sheriff of the county in which the insurance company in whose hands the moneys were when attached had its head office:—Held, that the moneys had ceased to be the property of the debtor, and, even if there had been no attaching order, the sheriff could not have obtained the moneys for the purpose of satisfying the executions. Semble, also, that the provisions of s.-s. (3) of s. 37 should be read as confined to creditors having executions and claims in the sheriff's hands at the time of the attaching of the debt. *Re Thompson*, 17 P. R. 109.

Fund in Court—*Execution Creditors—Distribution.*]—Where the surplus proceeds of a mortgage sale were paid into court by the mortgagees, and claimed by execution creditors of the mortgagor, whose executions were in the hands of the sheriff at the time of the

sale:—Held, following Dawson v. Moffatt, 11 O. R. 484, and having regard to the provisions of s. 24 of the Creditors' Relief Act, R. S. O. 1887 c. 65, that the fund in court should be paid to the sheriff for distribution in accordance with the provisions of that Act. *Re Bokstal*, 17 P. R. 201.

VI. Deputy Sheriff.

1. *Liability of Sheriff for.*

Action against—*Money Paid to Sheriff.*]—No action lies against the deputy sheriff for money received by him and paid over to the sheriff; the action must be brought against the sheriff himself. *Bird* v. *Hopkins*, H. T. 5 Vict.

Authority—*Reputation.*]—To charge a sheriff with the acts of his deputy done colore officii, it is enough to prove the authority of such deputy by general reputation. *Holt* v. *Jarvis*, Dra. 190.

Warranty.]—Semble, that the deputy sheriff cannot, in any sale of property in execution, bind the sheriff, by giving, of his own accord, a warranty that the goods belonged to the debtor in the fi. fa. The deputy sheriff would be liable himself on such a warranty. *Mink* v. *Jarvis*, 8 U. C. R. 397.

On appeal from the above decision it was held by four members of the court of error and appeal that the sheriff was not liable, and by the same number that he was. *S. C.*, 13 U. C. R. 84.

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2. *Other Cases.*

Execution against Coroner—*Amendment.*]—An execution against goods of a deputy sheriff may be directed to the sheriff of the county in which the deputy resides, and ought not to be directed to a coroner of that county. In such a case, the plaintiff was allowed to withdraw his writ of execution and amend by directing it to the sheriff, and not the coroner. *Gordon* v. *Bonter*, 6 L. J. 112.

Fees—*Bargain as to.*]—A bond to secure a sheriff a fixed salary, or otherwise, by his deputy, is void. *Foott* v. *Bullock*, 4 U. C. R. 480.

——— *Share — Agreement.*] — Held, that upon the agreement in this case, the plaintiff (the deputy sheriff) was entitled only to his share of the fees actually received by the sheriff, or in his office, except with regard to such fees as might not have been collected owing to some act or omission of the sheriff. *Fraser* v. *Fraser*, 11 U. C. R. 109.

——— *Share — Agreement — Account — Discovery.*]—The bill in this case alleged that under a yearly engagement the plaintiff agreed to discharge the duties of deputy sheriff for the defendant, for which he was to be compensated by a proportion of the fees payable on certain services performed by the sheriff; that shortly before the expiration of the second year the defendant discharged the plaintiff, and, as alleged, refused to account to the plaintiff for his portion of the fees—whereupon the plaintiff filed his bill, claiming that he was entitled to share in the fees for three years, that the items upon which he was entitled to a share of the fees numbered over one thousand, and that he had no means of shewing the amount due him except by a discovery from the defendant, and praying an account and relief consequent thereon. A demurrer thereto for want of equity was overruled; although, had the plaintiff seen fit to institute proceedings at law to enforce payment of his demand, the court of chancery would not have withdrawn it from that jurisdiction by granting an injunction to stay proceedings. *Falls* v. *Powell*, 20 Gr. 454.

Garnishment.]—Where the garnishee (a deputy sheriff) after ten months applied to set aside an order to pay, upon the ground that when the garnishing order was made there was no such debt, and that he, the garnishee, was ignorant of the nature and effect of the proceedings taken against him, the application was refused. *Gordon* v. *Bonter*, 6 L. J. 112.

Selector of Jurors.]—It was held that a deputy reeve might act as one of the selectors of jurors, under s. 49 of 22 Vict. c. 100, but not the deputy sheriff. *Regina* v. *F. J. L.*, 5 L. J. 19.

Witness.]—The deputy sheriff is, under 4 Anne c. 16, s. 20, a credible witness to the execution by the sheriff of an assignment of a bond to the limits. *Whittier* v. *Hands*, 19 U. C. R. 172.

VII. Escape.

1. *Action against Sheriff for.*

(a) *Generally—Liability.*

Arrest under Void Writ.]—Where a sheriff arrested under mesne process from a district court in an action of trespass, and afterwards suffered the debtor to escape:—Held, that he was not liable, the writ being void. *Smith* v. *Jarvis*, H. T. 3 Vict.

Arrest without Warrant.]—A sheriff is not liable for an escape where a bailiff arrests without a warrant, although he has the writ in his possession; nor on a count for not arresting under such circumstances. *Rigney* v. *Ruttan*, 5 O. S. 707; *Falconridge* v. *Hamilton*, E. T. 2 Vict.

Attachment for Contempt.]—A sheriff is liable for the escape of a party attached for contempt in not performing an award, and the party need not be brought up and formally committed. *Huntley* v. *Smith*, 4 U. C. R. 181.

Attachment to Enforce Payment.]—When the sheriff, upon an attachment to enforce payment of money, has the party in custody at the return of the writ, he must keep him safely in custody after the return of the writ, and until he is legally discharged. *Savage* v. *Jarvis*, 8 U. C. R. 331.

Discharge — *Authority—Attorney.*]—An attorney, merely as such, cannot discharge a defendant in execution—certainly not without receiving the debt; and the sheriff so acting on his authority will be liable as for an escape. *Brock* v. *McLean*, Tay. 310.

A sheriff releasing from custody under a ca. sa. on the oral consent merely of the attorney, is liable for an escape. *Davis* v. *Cunningham*, 5 L. J. 254.

But the attorney may discharge the debtor upon receiving the debt and costs. *Stocking* v. *Cameron*, 6 O. S. 475.

Failure to Produce Certificate—*Terms of Arrest—Stay.*]—Held, under the facts stated, that the suing the sheriff for an escape because the certificate under 16 Vict c. 175 was not produced to the plaintiff within a month, was wholly inconsistent with the terms imposed by the Judge in chambers, and that proceedings must be stayed, but on payment of costs, as defendant had applied late. *Calcutt* v. *Rutlan*, 14 U. C. R. 33.

See, also, *S. C.*, 13 U. C. R. 220.

Failure to Produce Prisoner—*Limits.*]—Where a sheriff refuses to produce a prisoner in his custody, twenty-four hours after notice, it is an escape. And where, in debt for an escape on a ca. sa., the sheriff pleaded that he gave the prisoner the benefit of the limits, and that he never left them, &c., and the plaintiff replied that he did leave them:—Held, that the plaintiff shewed an escape under this issue, by proving that after the prisoner was admitted to the limits she was remanded back to custody, that the order remanding her was delivered to the sheriff, and that he received due notice to produce her body, but failed in doing so. *Wragg* v. *Jarvis*, 4 O. S. 317.

Irregularities — *Jury — Costs—Judgment—Consideration.*]—The court refused to set aside a verdict against a sheriff for an escape, upon the ground that the coroner's jury who tried the cause was the same as that returned by the sheriff; that the plaintiff had produced the original ca. sa. instead of the copy; or that the judgment against the party escaping had been obtained without consideration. *Payne* v. *McLean*, Tay. 325.

Non-allowance of Bond—*Insufficiency of Sureties — Assignment—Waiver.*]—Plaintiffs sued the sheriff for the voluntary escape of M., taken under a ca. sa. at their suit; and, in a second count, charged that defendant took from M. a bond in a penalty not double the amount for which he was confined, and the sureties not being sufficient, as defendant well knew; and that the defendant fraudulently, wilfully, and corruptly released M. from custody on receiving such bond. The penalty was in double the amount of debt, costs, and costs of executions, but not including interest to the date of the bond or sheriff's fees; and there was no affidavit of execution or justification of the sureties with the bond. It appeared, however, that fourteen months after M. had been released by defendant, the plaintiffs took an assignment of the bond, which had not been allowed, and recovered judgment on it in their own names against the sureties. The jury having negatived the scienter and fraud:—Held, that the plaintiffs had waived the objections to the sufficiency of the sureties, and to the bond, for they must have been aware of the objections to the bond when they took the assignment, and that it had not been allowed. Semble, that the omission to include interest, if essential, is a matter to be considered by the county court Judge on the application for allowance, on which his decision is final. The omission of sheriff's fees was immaterial, for if he was liable for an escape the plaintiffs could not recover them unless they had paid them, which was not pretended here. *Kerr v. McEwan*, 27 U. C. R. 170. See *S. C.*, 12 C. P. 241.

——— *Limits.*]—Held, that the fact of the bond not having been allowed within thirty days (20 Vict. c. 57) would not make the sheriff liable for an escape, when the debtor remained on the limits. *Dougall* v. *Moodie*, 19 U. C. R. 568.

Taking Bond—*Bailiff—Rescue.*]—An action for an escape will not lie when a valid bail bond has been taken. Such action must be brought against the sheriff, and not against the bailiff, unless the act complained of amounts in effect to a rescue. *Wilson* v. *McCullough*, 5 O. S. 680.

See McPherson v. *Hamilton*, 5 O. S. 490; *Harkin* v. *Robidon*, 1 Ch. Ch. 133, *post* (b).

See, also, BAIL, I. 5.

(b) *Damages.*

[By R. S. O. 1877 c. 16, s. 30 (R. S. O. 1897 c. 17, s. 38) the sheriff is liable only to an action on the case "for damages sustained."]

Measure of Damages under the Old Law.]—See *Savage* v. *Jarvis*, 8 U. C. R. 331; *Brown* v. *Paxton*, 19 U. C. R. 426; *Kingan* v. *Hall*, 24 U. C. R. 248; *Kinloch* v. *Hall*, 25 U. C. R. 141.

Measure of Damages.] — Where the capias under which the sheriff arrested was indorsed to take bail for $150, but the plaintiff in the suit obtained final judgment for $270:—Held, that the measure of damages was only the sum sworn to ($150) and costs, up to the time of the escape, not the amount recovered in the suit. Jonas v. Tepper, 28 L. J. Q. B. 85, followed on this point, in opposition to earlier cases. *Taylor* v. *McEwan*, 27 U. C. R. 126.

——— *Waiver.*]—Costs were ordered to be paid, and in default an attachment issued (prior to 22 Vict. c. 33), under which the sheriff arrested defendant, and accepted bail to the limits, from which he escaped:—Held, that the sheriff was personally liable for the damage occasioned thereby, to be measured by the value of the custody. Held, also, that issuing a fi. fa. for these costs had not waived the plaintiff's right against the sheriff. *Harkin* v. *Rabidon*, 1 Ch. Ch. 133.

(c) *Evidence.*

Proof of Indebtedness of Prisoner.]—In an action for escape of A., arrested on a ca. re. at plaintiff's suit, the declaration averred "that he was indebted to the plaintiff in a large sum of money, to wit, &c., upon and in respect of certain causes of action before then accrued to the plaintiff against the said A.," &c. The defendant pleaded, denying that A. was indebted in manner and form, &c.:—Held, that the plaintiff would be entitled to recover if he shewed that any debt accrued to

him against A. before he sued out the writ. *O'Reilly* v. *Moodie*, 4 U. C. R. 266.

——— *Judgment.*]—In an action for a voluntary escape of M., arrested on a capias indorsed to take bail for $150, it appeared that defendant had permitted M. to go, on his depositing $175, and that the plaintiff had afterwards entered final judgment in the suit for his damages, assessed on judgment by default, and costs, about $270:—Held, that such judgment was evidence as against the sheriff of the debt due by M. to the plaintiff. Semble, that the plaintiff, under the C. L. P. Act, could proceed in the original suit to judgment after M. had escaped; but, if not, quære, whether the sheriff could raise the objection; and held, that while unreversed the judgment was at least primâ facie evidence against him. *Taylor* v. *McEwan*, 27 U. C. R. 126.

Variance from Declaration.] — See *Wood* v. *Sherwood*, 4 O. S. 128.

See Wragg v. *Jarvis*, 4 O. S. 317, *ante* (a).

(d) *Pleading.*

Declarations.]—See *O'Reilly* v. *Moodie*, 4 U. C. R. 266; *Wragg* v. *Jarvis*, 5 O. S. 113; *Munson* v. *Hamilton*, 5 O. S. 118; *Donaghy* v. *Moodie*, 2 U. C. R. 133; *Huntley* v. *Smith*, 4 U. C. R. 181; *Lane* v. *Kingsmill*, 6 U. C. R. 579; *Shouldice* v. *Fraser*, 7 U. C. R. 60; *Osborne* v. *Cornish*, 20 U. C. R. 47; *Wood* v. *Sherwood*, 4 O. S. 128.

Pleas.]—See *Brock* v. *McLean*, Tay. 310; *Munson* v. *Hamilton*, 5 O. S. 118; *Stocking* v. *Cameron*, 6 O. S. 475; *Graham* v. *Kingsmill*, 6 O. S. 584; *Rowan* v. *McDonell*, H. T. 3 *Vict.*, R. & J. Dig. 3516; *Andruss* v. *McDonell*, M. T. 4 Vict., R. & J. Dig. 3516; *Huntley* v. *Smith*, 4 U. C. R. 181; *O'Reilly* v. *Moodie*, 4 U. C. R. 266; *Lane* v. *Kingsmill*, 6 U. C. R. 479; *Shouldice* v. *Fraser*, 7 U. C. R. 60; *Glick* v. *Davidson* 15 U. C. R. 591; *Wilson* v. *Munro*, 20 U. C. R. 18; *Kerr* v. *McEwan*, 12 C. P. 241; *Corkery* v. *Graham*, 1 U. C. R. 315.

2. *Other Cases.*

Absence of Warrant — *Voluntary Escape.*]—The court refused to discharge a prisoner from custody upon the ground that the gaoler, having taken him before a magistrate without warrant, had suffered a voluntary escape. *Robinson* v. *Hall*, Tay. 453.

Action by Sheriff against Debtor—*Jury—Bar.*]—Where a sheriff suffers a voluntary escape, he cannot afterwards sue the debtor for the amount which he has had to pay for his escape; but where in such an action the justice of the case was clearly with the sheriff, and the Judge charged the jury in favour of defendant, but they found a verdict for plaintiff, the court refused a new trial:—Held, that a submission by the sheriff to arbitration in an action against him for an escape could not bar his recovery from the debtor, and that it was not necessary for that purpose that he should have allowed the action against him to have proceeded to verdict and judgment. *Ruttan* v. *Ashford*, 6 O. S. 280.

Neglect of Sheriff to Commit Defendant on Limits to Close Custody—*Notice of Special Bail—Time—Action as for an Escape—Stay of Proceedings.*]—See *Craig* v. *Ruttan*, 2 L. J. 67.

Voluntary Escape—*Proceeding in Action—Ca. Sa.*]—After a voluntary escape from the sheriff of a prisoner held under mesne process, plaintiff may proceed with his action, and, semble, may issue a ca. sa. without affidavit, if he has had a capias pending action, or an alias ca. sa., if the ca. sa. to fix bail had been returned non est inventus, and take the defendant thereunder; and, at all events, plaintiff may have a ca. sa. issued on a new affidavit and re-arrest defendant. Quære, whether, after voluntary return of escaped prisoner, a plaintiff cannot accept such return and lawfully charge his debtor in execution, by merely delivering a ca. sa. to the sheriff. *Hesketh* v. *Ward*, 17 C. P. 667.

VIII. Execution, Writs of—Duty and Liability on.

1. *False Return.*

(a) *Liability.*

Abandonment of Executions.] — See Execution, I.

Bankruptcy before Seizure—*Return of Nulla Bona.*]—Where before any actual seizure by the sheriff under the fi. fa., and before the return day, the goods of the debtor are seized under a commission of bankruptcy, and nulla bona returned to the writ, the sheriff is liable on such return to an action by the execution creditor. *Decatur* v. *Jarvis*, 3 U. C. R. 133.

Bill of Sale to Prior Execution Plaintiff—*Bona Fides.*]—On the 18th May the sheriff received A.'s plu. fi. fa. against B.'s goods, returnable on the 11th June (E. T.), upon which the goods were seized. On the 1st June following B. made a bill of sale to A., leaving out, however, a few small articles, of which no notice had been given to the sheriff. On the 27th July C.'s fi. fa. against B.'s goods was received by the sheriff:—Held, that upon these facts, supposing the bill of sale to be bonâ fide, C. had no right of action against the sheriff for not seizing B.'s goods under his writ. Held, also, that the direction of the Judge to the jury to inquire if the bill of sale was made for valuable consideration and bonâ fide intended to pass the property, or whether it was merely colourable—of which secrecy and the absence of change of visible possession and ownership afforded indications—and that if they sustained the bill of sale as valid, it operated as a satisfaction and discharge of A.'s fi. fa. from the day of its execution, and that then the plaintiff (C.) must fail on his first count, alleging the seizure of A.'s goods under C.'s writ, and that the only question would be on the second count, for not seizing the articles omitted from the bill of sale, as to which they were told that, in the absence of any direct notice to or knowledge in the sheriff of such goods, they must say whether he had as to them been guilty of any want of reasonable diligence in the ex-

ecution of the plaintiff's (C.'s) writ—was correct; and that the finding of the jury in the sheriff's favour could not be disturbed. *Darling* v. *Corbett*, 8 U. C. R. 72.

Compromise—*Estoppel.*]—Where a fi. fa. goods was placed in a sheriff's hands and a levy made, but the plaintiff afterwards compromised with defendant, receiving payment by instalments, but giving no directions to the sheriff to discharge the defendant's property:—Held, that on a return of nulla bona several months afterwards, when defendant had absconded without satisfying the balance of the debt, the plaintiff could not sue for a false return, as he was precluded by his arrangement with defendant. *Everarghim* v. *Leonard*, 3 O. S. 121.

——— *Subsequent Return of Nulla Bona —Transfer by Debtor.*]—Where, in an action against a sheriff for a false return to a writ against goods, a letter was put in from the sheriff to the plaintiff's attorney saying that he levied under the execution on goods claimed by others, and that he had in consequence compromised and agreed to secure the amount of the execution in two instalments at early dates, but the sheriff afterwards returned "no goods," and on the trial the execution debtor and her son-in-law proved that the property had been transferred to the son-in-law but remained in the possession of the debtor, and the jury found a verdict for the plaintiffs, the court refused a new trial. *Mead* v. *Hamilton*, 2 U. C. R. 135.

Money Made—*Return of Nulla Bona—Illegal Sale.*]—A sheriff having sold shares in a steamboat company under an execution, and received the money, cannot return nulla bona on the ground that they were not properly saleable under the writ. *Hewitt* v. *Corbett*, 15 U. C. R. 3?.

Notice as to Lands—*Inquiry.*]—The plaintiff in an execution against lands is expected to point out to the sheriff the property of the debtor, but his not doing so does not relieve the sheriff, if by reasonable inquiries he could have ascertained the fact. Where the deputy sheriff had notice of the debtor owning lands, it was held notice to the sheriff, although the latter had no personal knowledge on the subject; and he was held liable in an action for a false return. *Hutchings* v. *Ruttan*, 6 C. P. 452.

Notice to Sheriff of Property to be Seized.]—A notice by the plaintiff's attorney to a sheriff's clerk that A. and B. are jointly interested in certain goods, and pointing to a deed in his possession, which he says shews the joint interest of the parties, is not necessarily a notice which will bind the sheriff in executing the writ. If the plaintiff's attorney give at different times two wholly inconsistent notices to the sheriff:—Semble, that the sheriff is not bound to obey either. *O'Neill* v. *Hamilton*, 4 U. C. R. 294.

Obtaining Return of Nulla Bona—*Estoppel.*]—A fi. fa. at the suit of one G. v. R. was placed in the sheriff's hands, with instructions not to enforce it until further orders, unless other executions should come in. No further instructions were received, and the plaintiff subsequently put in an execution with directions to proceed at once. The sheriff levied on both writs, and paid over the money to G., who had indemnified him. The plaintiff then obtained a return to his writ of nulla bona, which the sheriff said was the only return he would make, and sued out a ca. sa., on which R. was arrested:—Held, that the plaintiff, by taking such return, had not precluded himself from proceeding against the sheriff, and that he could maintain an action for a false return. *Aitkin* v. *Moody*, 13 U. C. R. 469.

Priority of Executions.]—See EXECUTION, VI.

Seizure under Prior Execution — *Change of Sheriff.*]—One K., a sheriff, on the 11th January, 1862, received for execution a fi. fa. against the goods of R. and M., at the suit of the plaintiff. An execution against the goods of R., at the suit of S., and another at the suit of O., had been previously placed in his hands, and while they were in force a seizure was supposed to be made on O.'s writ, and a return of goods on hand to the value of £200, and nulla bona as to residue was made thereon, and upon this return a ven. ex. and fi. fa. residue was sued out by O., and delivered to the sheriff for execution, on the 1st February, 1862. K. then ceased to be sheriff, and defendant was appointed, and the writs in K.'s hands were transferred by indenture to the defendant for execution. Upon an action for neglecting to seize the goods of R., the writs of S. and O., and the return to the latter, were pleaded in answer, and that defendant R. had no more goods and chattels whereof the amount could be made. On the trial it appeared that defendant took the office of sheriff on the 12th April, 1862, and that no goods of R. or M. were delivered to him to be sold as goods on hand. It appeared, also, that S.'s writ was delivered on the 29th October, 1861, O.'s first writ on the 25th November, 1861, and his ven. ex. and fi. fa. on 1st February, 1862. It further appeared that the return of £200 on hand on O.'s writ was false, there having, in fact, been no seizure:—Held, that the return upon O.'s writ being false, and the goods not being under seizure on that execution, it was defendant's duty to have seized them on the plaintiff's writ, which was delivered to the sheriff before O.'s alias writ; and therefore a verdict for the plaintiff was upheld. *McKee* v. *Woodruff*, 13 C. P. 583.

Ven. Ex. — *Return Day* — "*Unable to Sell.*"]—The sheriff may sell the goods under a ven. ex. after return day. Semble, that where a sheriff returns to a writ of ven. ex. "that he is unable to sell," he may be liable to an action for false return, but he cannot be attached. *Bank of Upper Canada* v. *McFarlane*, 4 U. C. R. 396.

See Hobbs v. *Hall*, 14 C. P. 479, *post* 7.

(b) *Pleading.*

Declaration.]—See *Strange* v. *Jarvis*, 6 O. S. 160.

Pleas.]—See *Watson* v. *Hamilton*, 6 O. S. 114; *Commercial Bank* v. *Jarvis*, M. T. 6 Vict., R. & J. Dig. 3528; *Upper* v. *Hamilton*, 1 U. C. R. 467; *Grantham* v. *Jarvis*, 6 U. C. R. 511; *Jones* v. *Ruttan*, 12 U. C. R. 202; *Upper* v. *Hamilton*, 1 U. C. R. 467;

Tyson v. *Jarvis*, 10 U. C. R. 378; *Müller* v. *Thomas*, 11 U. C. R. 302; *Taylor* v. *Jarvis*, 13 U. C. R. 373; *Potter* v. *Carroll*, 9 C. P. 442, 1 E. & A. 341, 7 L. J. 42; *Carrall* v. *Potter*, 19 U. C. R. 346; *Patterson* v. *Thomas*, 11 C. P. 530.

(c) *Other Cases.*

Distress for Rent—*Parol Evidence of Demise.*]—Upon an action against a sheriff for a false return upon a fi. fa. goods, his defence was a chattel mortgage on part of the goods, and a distress for rent to cover the remainder:—Held, that parol evidence was admissible to prove a demise by the landlord, so as to sustain a distress, although a memorandum had been drawn up as to the terms of the lease, but signed only by the tenant. *Valentine* v. *Smith*, 9 C. P. 59.

District Courts.]—The district courts, under 8 Vict. c. 13, s. 5, have no jurisdiction in an action on the case for a false return. *Bell* v. *Jarvis*, 6 U. C. R. 423.

New Trial—*Surprise.*]—In an action against a sheriff for a false return the judgment debtor testified to facts which defendant afterwards said took him by surprise. On motion for a new trial:—Held, that defendant should have gone to trial prepared to shew all transactions with the judgment debtor in relation to the suit, and not having done so, or sworn on this motion to what he could prove, a new trial was refused. *Young* v. *Moderwell*, 14 C. P. 143.

Sale of Lands under Execution — *Equity of Redemption—New Trial.*]—In an action against the sheriff for a false return to a fi. fa. lands, it appeared that defendant, after the receipt of the plaintiff's writ, received another writ, at the suit of one S., and under this seized land owned by the debtor, upon which S. had a mortgage for rent, S.'s judgment being for arrears of rent secured by such mortgage. S. bought the land for the amount of his judgment, and paid the sheriff's fees. At the trial, however, it did not appear whether defendant sold only the equity of redemption, or the debtor's interest in the land, exclusive of the mortgage. The court set aside a verdict for defendant, and granted a new trial with costs to abide the event. *Young* v. *Baby*, 4 C. P. 537.

2. *Landlord's Claim for Rent.*

(a) *Notice.*

Effect of—*Goods of Third Person—Removal.*]—Goods having been seized by the sheriff under execution, and claims having been made thereto by third persons, namely, chattel mortgagees, an interpleader summons was obtained by the sheriff. Notice was then given to the sheriff by the landlord of rent due, but no distress was issued or anything further done on his behalf. An interpleader order was made, and the claimants having failed to give the security required thereby, the goods were sold pursuant to the terms of the order, the landlord becoming the purchaser. They were never removed from the demised premises. The claimants were successful:—Held, that the statute 8 Anne c. 14, s. 1, only applies to the goods of the execution debtor, and not to those of third persons, against whom there must be a distress, notice to the sheriff not being sufficient; and that the sheriff selling incurred no liability, as he was secured under the interpleader order. Held, also, that the sheriff is not liable when the goods have not been removed from the demised premises. The proceeds of the sale were therefore ordered to be paid out of court to the claimants. *Clarke* v. *Farrell*, 31 C. P. 584.

——— *Mistake of Landlord.*]—The sheriff, having seized goods, received a written notice from the plaintiff that there was then due to him "one half-year's rent," not stating when the rent fell due, nor for what period it was claimed. The plaintiff afterwards went to the sheriff, and, being asked when the rent fell due, said that he thought it would be on the following Monday or Tuesday. The sheriff thereupon ordered the goods to be removed and sold:—Held, that he was justified in so doing, as he was acting on reliance on the plaintiff's own declaration, and that he was not liable for any damages, although it appeared that the rent was in fact payable quarterly, and that one quarter was due at the time of the seizure. *Tomlinson* v. *Jarvis*, 11 U. C. R. 60.

——— *Sale.*]—Held, that a sheriff was not justified, having notice that rent was due, in paying over the proceeds of a sale under a fi. fa. goods against a tenant without satisfying the landlord's claim for rent. *Galbraith* v. *Fortune*, 9 C. P. 211.

Necessity for—*Removal of Goods.*]—Held, that a sheriff is not liable under 8 Anne c. 14 for the removal of goods off the premises in respect of which rent is due, unless at the time of removal he either had notice or otherwise received knowledge of the rent being due, and afterwards removed the goods without paying the rent. *City of Kingston* v. *Shaw*, 6 L. J. 280.

——— *Sale of Goods—Pleading.*]—It is sufficient in the declaration to allege that defendant had notice of the plaintiff's claim for rent before sale, though after the removal. It is a bad plea, therefore, that defendant had no notice before the removal. A plea that after the removal of the goods by defendant there remained sufficient to satisfy the rent in arrear:—Held, clearly bad. *City of Kingston* v. *Shaw*, 20 U. C. R. 223.

——— *Seizure.*]—Formal notice by the landlord that rent is due him is not necessary; but the landlord having made an illegal seizure for rent, notice of such seizure to the sheriff was held sufficient to render the sheriff liable. *Sharpe* v. *Fortune*, 9 C. P. 523.

Oral Notice.] — An oral notice from the landlord to the sheriff will be sufficient to save the year's rent; and if the sheriff knew of the rent being due, a formal notice would not be necessary. *Brown* v. *Ruttan*, 7 U. C. R. 97.

See Locke v. *McConkey*, 26 C. P. 475, *post* (b).

(b) *Other Cases.*

Acceleration of Rent — *Execution — Custodia Legis.*]—Action against a sheriff for seizing and selling goods of a tenant when

rent was due, and without satisfying the same after notice. The lease contained a proviso that if at any time within the said term the tenant should remove, or attempt to remove, his goods and chattels from off the said premises, without leaving thereon sufficient to answer the then current year's rent, or if by any writ of execution against him there should not be sufficient goods to answer the said writ, and pay the then current year's rent, the then current year's rent should immediately become due and the said term be forfeited, and this agreement is an express condition of this demise. It was contended there was a seizure of the goods in September, and that the rent did not accrue due until the 1st October, so that the goods were in custodiâ legis when the rent was due:—Held, that it was properly left to the jury to say whether there were sufficient goods to satisfy the current year's rent and execution when the execution was attempted to be enforced, and that under the evidence they were warranted in finding that there was: that the bailiff having merely made an inventory of the goods seized on the 9th September, leaving no one in possession, they were not in custodiâ legis when the rent accrued due, and therefore could not be held against the landlord's claim for rent. *Hart* v. *Reynolds*, 13 C. P. 501.

——— *Leaving Premises.*]—Premises were let for a year at a rent of £75, to be paid on the 1st May; and it was agreed that if the tenant should leave before the 1st May, then the rent was to become payable immediately. The tenant did leave on the Saturday before the 1st May, and on Monday the goods were seized under execution:—Held, that the landlord was entitled to his rent. *Vance* v. *Ruttan*, 12 U. C. R. 632.

Evidence—*Payment of Rent.*]—In an action against a sheriff for the sale of goods, without paying rent:—Held, that the statement of the tenant in possession, made before the distress, that the first year's rent had been paid, was not evidence in the cause. *Galbraith* v. *Fortune*, 10 C. P. 109.

Failure to Seize—*Notice of Claim for Rent.*]—Where at the time of placing an execution against goods in the sheriff's hands there is a claim for unpaid rent, the sheriff cannot delay the seizure until the execution creditor first pays the rent. He must seize, but he need not sell the goods until the rent is paid, and if the execution creditor will not pay it he may withdraw from possession. In this case the sheriff abstained from seizing on receiving notice of the rent being due, of which the execution creditor was aware when he issued the fi. fa., and, before he seized, certain crops were removed, which would have sufficed to pay the plaintiff's claim:—Held, that the sheriff was liable. *Locke* v. *McConkey*, 26 C. P. 475.

Interpleader Issue — *Relinquishment pending Attachment of Sheriff.*] — Under an execution in Maclean v. Anthony, the sheriff, on the 19th April, 1883, having seized the defendant's goods, sold them to one Ferguson, there being at the time rent overdue to the landlord. Ferguson did not remove the goods from the premises. By agreement between the landlord, the sheriff, and Ferguson, the latter retained sufficient of the purchase money to pay the claim for rent. Subsequently Ferguson sold the goods to one English, when it was arranged that English should pay the old claim for rent, and a further instalment which had meanwhile fallen due. The defendant then surrendered his term, and English became tenant. On the 23rd April an execution in Slater v. Anthony was placed in the sheriff's hands, and he seized the same goods some time between the 21st May and 23rd June. English having claimed the goods, the sheriff interpleaded, and an issue was directed, which resulted in favour of Slater. Pending the interpleader issue the sheriff allowed the landlord's bailiff, who also claimed the goods for arrears of taxes, to sell them and pay the rent and taxes in arrear. At the conclusion of the interpleader issue it appeared that the sheriff had taken no security for the goods, and that English, the claimant, was worthless:—Held, that there being no claim either for rent or taxes which the sheriff was justified in acknowledging, he was liable to an attachment, on motion of the execution creditor, for disobedience of the interpleader order. *Maclean* v. *Anthony, Slater* v. *Anthony*, 6 O. R. 330.

Payment by Execution Creditor — *Levy by Sheriff—Liability.*]—Where an execution creditor has, under the statute of Anne, paid rent demanded by a landlord upon an execution against the tenant upon the premises of the former, and the sheriff levies as well for the rent as the execution debt, the sheriff becomes the debtor of the execution creditor for both sums, and liable to him in an action for money had and received; and so does a bailiff under the Division Courts Act. *Lockart* v. *Gray*, 2 C. L. J. 163.

Prejudicing Claim — *Conduct—Estoppel.*]—The fact of a landlord having joined in a bond that the goods distrained should be forthcoming to be sold upon fi. fa., will not prejudice his claim for rent; nor will his having distrained as landlord, and afterwards having abandoned the distress, nor even his bidding at the sale of the goods. *Brown* v. *Ruttan*, 7 U. C. R. 97.

Prior Seizure by Landlord—*Custodiâ Legis—Interpleader.*]—When goods are under seizure for rent, they are in custodiâ legis, and the sheriff has no right to seize them under an execution. On an application by a sheriff for an interpleader order under such circumstances, the landlord's claim being taken to be bonâ fide, the legality of the seizure under the distress cannot be inquired into in chambers, and the sheriff's application for relief by interpleader was therefore refused. *Craig* v. *Craig*, 13 C. L. J. 326.

Rent Accruing Subsequent to Seizure—*Goods Left on Premises.*]—Writs of execution had been placed in the hands of the sheriff of Hastings, under which he made a levy on goods in Belleville and Madoc, leaving them on the premises in which he found them. After the seizure, which was on the 12th February, and while the goods were on the debtor's premises, two instalments of rent fell due, on the 1st March and June, which were paid by the sheriff:—Held, that this payment should not be allowed, because the goods might have been removed by him before the rent fell due, and being under seizure, they were not liable to distress, and there was nothing in the debtor's lease to accelerate payment of rent on seizure of his goods. *Grant* v. *Grant*, 10 P. R. 40.

Sheriff Acting in Interests of Execution Creditor—*Interpleader Order—Delay.*]—A sheriff, having in his hands a writ of fi. fa. against the defendant's goods, on the 23rd June, 1898, went into the hotel of which the defendant was the tenant, with the execution, and informed the defendant that he seized his furniture and effects. He then made a pencil memorandum of a number of articles stated to be in the house, first notifying the judgment debtor that everything was under seizure, and accepting his oral undertaking to hold it for him. This course was pursued in accordance with instructions from the solicitor for the execution creditor, in order to endeavour to get the defendant to make payments on account of the execution. On the 8th August the landlords of the defendant put in a bailiff to seize the same furniture and effects for rent due on the 6th August. The bailiff spoke to the sheriff, who said that he would not undertake to sell the goods and pay the rent. Nothing further was done until the 6th October, 1898, when the landlords put another distress warrant into the bailiff's hands for rent since accrued. The sheriff was notified of this in writing on the 29th October, and on the 7th November, 1898, he swore to an affidavit upon which he applied for an interpleader order, and in which he stated that he had remained in possession from the 23rd June until the time of application. Being cross-examined, he said that he was holding on till the landlords put him out of the place:—Held, upon the evidence, that the sheriff had been acting throughout in the interest of the execution creditor as against the interest of the claimants, and for this reason, as well as for his delay, was not entitled to an interpleader order. *Flynn* v. *Cooney*, 18 P. R. 321.

Subsequent Seizure by Landlord.]—A seizure by a landlord of goods already seized on a fi. fa.:—Held, illegal, and consequently invalid. *Sharpe* v. *Fortune*, 9 C. P. 523.

——— *Buying in—Leaving on Premises—Sale by Sheriff.*]—A sheriff, having seized goods of a tenant upon a farm under a fi. fa., left them in possession of the tenant, taking a receipt from him and an adjoining farmer. The landlord distrained and sold the goods, and buying them in, left them on the premises under charge of his former tenant as a hired servant, his lease having expired. The sheriff, without any subsequent seizure, proceeded as if the goods were the original tenant's and sold them under the original fi. fa.:—Held, that he was liable to the landlord for the rent due at the time of seizure, of which he had notice, and for damages to the value of the goods over the rent due. *Robertson* v. *Fortune*, 9 C. P. 427.

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3. *Money Levied.*

Accounting for Moneys Paid—*Promissory Notes—Fees.*]—H., a sheriff, seized and sold under execution goods to the amount of £3,823 12s. 2d. The terms were cash, but it was agreed that the purchaser might make such arrangements as he could with the execution creditors, all of whom required cash except the last ten, who agreed to give time, and take notes. In the settlement £2,762 was paid to the sheriff, and notes were given for £1,146, making in all £86 1s. more than the amount of the purchase. Upon an action brought against the sheriff for that amount, he proved that he had paid upon the executions all moneys received except £165 7s. 10d. and he claimed £442 2s. for fees and poundage:—Held, that he was not liable, not being shewn to have received more than he should have. *Kennedy* v. *Moodie*, 8 C. P. 544.

Assumpsit — *Statute of Limitations — Pleading.*]—To a plea of the Statute of Limitations in assumpsit, a replication that defendant was a sheriff, and that the amount claimed was an overplus remaining in his hands of money levied under a fi. fa.:—Held, bad on general demurrer, although the plaintiff might have evaded the statute had she declared in case, setting out the circumstances specially. *Ruggles* v. *Beikie*, 2 O. S. 370.

Attachment under Absconding Debtors Act.] — It is a good cause to shew to an attachment against a sheriff for not paying over money, that the money has been attached in the hands of the party not paying over, under the Absconding Debtors Act. *Powers* v. *Scott*, H. T. 3 Vict.

Claim against Plaintiff—*Lien of Attorney.*]—A sheriff will not be allowed to retain money made on an execution, on the ground that he has himself a claim against the plaintiff, who has absconded, when the plaintiff's attorney is the person entitled to it in consequence of advances made to the plaintiff. *Burnham* v. *Meyers*, 2 U. C. R. 94.

Costs of Rule to Return—*Expenses of Demand—Interest.*]—Held, that the costs of a rule to return the writ could not be recovered in this action against the sheriff for not paying over moneys levied, nor the expense of a messenger sent to demand the money returned as on hand. The court, acting as a jury, allowed interest to the plaintiffs on money levied and improperly withheld. *Michie* v. *Reynolds*, 24 U. C. R. 303.

Credit to Plaintiff's Attorney.] — Where in an action against a sheriff's sureties for money received by the sheriff on an execution at the suit of the plaintiff, it appeared that the amount had been credited to plaintiff's attorney in an award between him and the sheriff, and that the attorney had accepted the award:—Held, that a verdict for defendants was right. *Hall* v. *Hamilton*, H. T. 4 Vict.

Surplus after Sale — *Heir-at-law—Demand.*]—The heir-at-law is entitled to recover from a sheriff the surplus of moneys arising from a sale of his ancestor's lands, on a fi. fa. against those lands in the hands of the executor. *Ruggles* v. *Beikie*, 3 O. S. 276, 347.

In an action against a sheriff for the overplus of money levied under an execution, the plaintiff must prove a demand of the money before action brought. *S. C., ib.* 276.

Surplus after Satisfying Writ—*Debtor—Demand.*]—In an action against the sheriff by an execution debtor for the surplus of money in his hands after satisfying a fi. fa., no demand before action is necessary. The last case distinguished. *Ainslie* v. *Rapelje*, 3 U. C. R. 275.

4. Negligence or Delay in Executing.

Absence of Prejudice.]—Where, in an action for delay in selling lands, the jury found for defendant, saying that there had been unnecessary delay, but that the plaintiff had not been prejudiced by it, the court refused to interfere. *Markle* v. *Thomas*, 13 U. C. R. 321.

Attempts to Execute—*Due Diligence—Jury.*]—The court upheld a verdict for a sheriff sued for a false return to a fi. fa., holding that he could not be said, either in law or in fact, to have been guilty of culpable negligence in not executing the writ; he had tried several times before the return day to execute it, but could not gain admittance to the house. And the chief justice said he could not hold that a sheriff was bound to keep sentinel day and night at a defendant's house, for several days or weeks in succession; he was bound to exercise due diligence, and it was a question for the jury. *Finnigan* v. *Jarvis*, 8 U. C. R. 210.

Destruction of Goods—*Pleading.*]—Declaration, alleging that there were goods out of which defendant could have made or levied the money indorsed on a fi. fa., but that he did not levy the same. Plea, that before he could by due diligence have levied the moneys, the goods were destroyed by fire:—Held, plea bad, for levying includes seizure and sale, and consistently with the plea the goods might have been destroyed in defendant's custody after seizure, in which case he would be liable. *Ross* v. *Grange*, 25 U. C. R. 396.

Effect of Delay — *Priority of Chattel Mortgage — Damages.*] — On the 23rd July, 1868, M. recovered judgment against J. for $2,023.51, and issued fi. fa. goods, the execution of which was delayed until the end of the following month by an application to amend. On the 3rd October, 1868, J. gave plaintiff a chattel mortgage, which was registered on the 6th October, payable a year after date. J., with plaintiff's consent, continued his business, and had sold a large part of the chattels, when plaintiff (in January, 1869,) came to take possession. Thereupon the sheriff, whose previous action under the fi. fa., if any, did not appear, but who had no authority for the delay, seized and sold the remaining goods, when the plaintiff brought trover against him, the plaintiff and defendant in the execution, and another who had joined in indemnifying the sheriff, contending that the delay in executing the fi. fa. gave his chattel mortgage priority. The jury gave a verdict for $1,510 against the sheriff and in favour of all the other defendants. This verdict, being inconsistent with any view of the facts and exorbitant in amount, was set aside; costs to abide the event. *McGivern* v. *McCausland*, 19 C. P. 469.

Measure of Damages in Action for Delay.]—See *Nerlich* v. *Malloy*, 4 A. R. 430.

Security for Costs — *Public Duty.*]—A sheriff executing a writ of fi. fa. is not an officer or person fulfilling a public duty within the meaning of R. S. O. 1897 c. 89, s. 1, and is not, therefore, entitled to security for costs of an action brought against him for negligence in not making a seizure under the writ. McWhirter v. Corbett, 4 C. P. 203 (as to notice of action), followed. *Creighton* v. *Sweetland*, 18 P. R. 180.

See Jones v. *Paxton*, 27 C. L. J. 596.

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5. Payment into Court.

Effect of — *Discharge.*] — A sheriff who levies money under a fi. fa. must pay it over to the party entitled; he cannot return the writ to the Crown office and pay the money to the clerk of the Crown, and thereby discharge himself from liability to the plaintiff in the original suit. *Shuter* v. *Leonard*, 3 O. S. 314.

Improper Payment in—*Costs—Payment over—Application—Forum.*]—When the sheriff has improperly paid money into court, a Judge will not order him to pay the costs of such payment into court, but the proper application is for the sheriff to pay over the money returned by him as made, without reference to the payment into court. Quære, should an application for an order on the sheriff to pay over money be made to the full court, or to a Judge in chambers. *Crombie* v. *McVaughton*, *Warnock* v. *McVaughton*, 5 L. J. 161.

Right of Sheriff.]—Held, that a sheriff has no legal right to pay into court money made upon a writ in his office. *Gladstone* v. *French*, 9 C. P. 30.

Taking out Money Paid in—*Waiver.*]—Where a plaintiff obtained an order to take out of court money paid in by the sheriff, on condition that he should pay the master's charges, and was given to understand that he might either take it on these terms or sue the sheriff for it:—Held, that, having availed himself of this order, he could not afterwards recover from the sheriff the fees paid to the master on the ground that the money had been improperly paid into court. *Crombie* v. *Davidson*, 19 U. C. R. 369.

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6. Place of Sale.

Defendant's Premises — *Trespass—License.*]—A sheriff having seized goods cannot lawfully sell them on defendant's premises without his permission, and any person going on the premises to purchase may be treated as a trespasser. *McMaster* v. *McPherson*, 6 O. S. 16.

A sheriff is a trespasser, if, after the seizure of defendant's personal property under an execution, he enters upon the premises and sells the property there. *McMartin* v. *Powell*, E. T. 3 Vict.

A sheriff under a writ of ven. ex. has no right to enter upon a person's land and sell his goods there by public auction; and a purchaser who enters at the same time as the sheriff is a trespasser as well as the sheriff. *McMartin* v. *McPherson*, H. T. 3 Vict.

Where a sheriff has seized goods under a fi. fa. and allowed them to remain on defendant's premises, on the understanding that they should be sold there on a future day if the money were not paid before, the license thus

given to enter on the premises and sell the goods accordingly, cannot be revoked by defendant. *McGillis* v. *McMartin*, 1 U. C. R. 145.

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7. *Selling under Value or without Proper Notice.*

Action for — *Declaration — Necessary Averments.*]—In an action against a sheriff for not giving notice of the sale of effects taken in execution, at the most public place in the township:—Held, not necessary to set out the name of such place. Statements that defendant sold the goods without legal notice and for less than their real value, were not considered as distinct and independent grounds of action. *Malcolm* v. *Rapelje*, Tay. 361.

In case against a sheriff, for selling goods upon plaintiff's fi. fa. under their value, the judgment in the original action must be set out. Quære, also, whether the sheriff must not first be ruled to return the writ, and the action brought on the return. *Billings* v. *Hamilton*, 6 O. S. 113.

——— *Plea—Price Obtained.*]—Where, in an action against a sheriff for not selling lands in execution for the best price that he could get for the same, but wrongfully and injuriously much below their real value, the defendant pleaded that he sold the lands for the best price that he could get for them:—Held, plea good. *Watson* v. *McDonell*, 6 O. S. 450.

Evidence of Value — *Agent for Sale—Misconduct.*]—Action against a sheriff for not levying, although the debtor had a sufficiency of goods. Plea, not guilty; also, that debtor had not more goods than defendant had sold and returned. At the trial a verdict was found for the plaintiff for much less than he claimed. On motion for a new trial, which was granted:—Held, that defendant's statement to the insurance agent, that the goods, when seized, were worth $6,000, and his declarations to the different creditors that their claims were small as compared with the value of the debtor's goods, were evidence of value against the defendant; that his placing a stranger as his agent in possession of the goods, with authority to sell them in the shop as theretofore, who gave no satisfactory evidence of such sales, and who lost or mislaid or neglected to preserve the books of account which would have explained all these transactions, made him responsible for the consequences of his agent's misconduct; and that defendant was entitled to no advantage or consideration because the books could not be or were not produced. *Hobbs* v. *Hall*, 14 C. P. 479.

Sale of Equity of Redemption in Vessel.]—The plaintiff owning a steamer mortgaged her to one Cotton, who assigned the mortgage to J. H. C. and others. She was afterwards purchased from the plaintiff's agent in his absence by a company, to run in opposition to a boat then owned by one G., in the bay of Quinte, but no legal transfer was made. £2,000 of the price was paid and the balance secured by notes of the company, which the plaintiff's agent assigned to J. H. C., to secure the sum due on the mortgage held by him. G. afterwards purchased the notes and mortgage, and sued out a writ of replevin to obtain possession of the boat, but before it was executed he procured D. & Co., who held a judgment against the plaintiff for about £50, to issue execution, and at his instance the sheriff sold the boat under it, G. saying that he thought the plaintiff had no title, but that he wished to unite whatever it might be with his own right under the mortgage. This sale was not advertised, except by two notices, put up on the door of the court house, and in the sheriff's office; there were only three or four persons present, including G., and the boat was sold for £10 to one of them, who a few days afterwards transferred to G. G. then got possession under the writ of replevin, and laid up the boat, thus removing the opposition to his own steamer, which he admitted had been his object throughout. The attorney of D. & Co. complaining that his clients had realized so little from their execution, G. afterwards paid their claim, and took an assignment of their judgment. The mortgage which he held had been paid in full by payment of the notes. In an action against the sheriff, for fraudulently and illegally selling the boat and furniture together instead of separately, and in the absence of a reasonable number of bidders, and for a sum grossly under value, the jury having found for defendant:—Held, that the verdict must stand; because, whether the plaintiff's equity of redemption was saleable under the execution or not, the sale, made and published as it was, was not a sale in obedience to the writ, and therefore could pass nothing, so that the plaintiff sustained no legal damage by it; and because at any rate the plaintiff should fail on the plea denying his property in the vessel, for he owned only the equity of redemption; or because the equity of redemption was not saleable under the writ, and the sale therefore could not affect the plaintiff. *Bethune* v. *Corbett*, 18 U. C. R. 498.

See Smith v. *Bacon*, 14 U. C. R. 38; *Snarr* v. *Waddell*, 24 U. C. R. 165.

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8. *Wrongful Seizure of Goods—Action for.*

(a) *Evidence.*

Interference by Execution Creditors —*Facts Shewing.*]—In an action against the sheriff and six others for seizing goods, the evidence as to four of them was that they were creditors of the execution debtor, and joined in the indemnity bond to the sheriff, and that they told the bailiff to sell, and afterwards attended and bid at the sale:—Held, clearly sufficient to charge them. *Gray* v. *Fortune*, 18 U. C. R. 253.

Production of Warrant.] — It is not enough to call the bailiff who made the seizure, and prove by him that he had a warrant, without producing it or satisfactorily excusing its non-production. *Lowes* v. *Jarvis*, 5 O. S. 134.

——— *Proof of Execution—Bailiff—Adoption of Sale.*]—In trespass against the sheriff and A. and B., plaintiffs claiming the goods under a bill of sale, it was proved that the sheriff's bailiff, under a fi. fa. at the suit of another creditor, seized the goods and sold them; and after paying the amount of that execution paid the balance to A. and B. on account of their execution:—Held, after verdict for plaintiff, that the execution creditors, A.

and B., could not be made trespassers by relation or adoption of the sale under such prior execution; and there being no proof that the sheriff himself did any thing, and the writs not being produced, nor any warrant to the bailiff, that the verdict was not sustained by proof, and that there should be a new trial without costs. *Tilt* v. *Jarvis*, 5 C. P. 486. See *S. C.*, 7 C. P. 145.

Proof of Debt — *Attaching Creditor—Fraudulent Sale.*]—In trespass against a sheriff for seizing plaintiff's goods under an attachment issued under the Absconding Debtors Act against the goods of a third party, by whom they had been sold to the plaintiff before the attachment:—Held, that, to support a defence that the sale was fraudulent and void against creditors, under 13 Eliz. c. 5, the sheriff must prove that a debt had been due from the absconding debtor to the attaching creditor. *Grant* v. *McLean*, 3 O. S. 443.

Proof of Execution — *Non Cepit—Replevin.*]—In replevin against the sheriff for a seizure under execution made by his deputy:—Held, that, as plaintiff was obliged to shew that the seizure was made under process in order to connect defendant with the act, it was not necessary to plead specially, but that under non cepit defendant might avail himself of 18 Vict. c. 118, which enacts that replevin shall not lie under such circumstances. *Calcatt* v. *Ruttan*, 13 U. C. R. 146; *Clark* v. *Ruttan*, 6 C. P. 97.

Proof of Execution and Judgment.]—In an action against a sheriff for seizing goods it is sufficient to prove that they were seized colore officii, without proving a writ of execution. *Holt* v. *Jarvis*, Dra. 190.

In trespass against a sheriff for seizing plaintiff's goods, the defence was that they were the goods of A., and had been seized under an attachment against him as an absconding debtor, but had been delivered up at the time of seizure, on the plaintiffs entering into a bond for their production when required, and had been afterwards sold at the suit of the attaching creditor on a fi. fa., the plaintiffs having given them up according to the terms of their bond, and the plaintiffs now claimed them as their own property under an assignment from A. prior to the attachment, which defendant contended was fraudulent and void as against creditors. Defendant proved no debt due to the attaching creditor, nor did he shew the judgment or execution, relying on the bond as estopping the plaintiffs from disputing those facts; and the jury, under the direction of the Judge, found for the plaintiffs. The court agreed in the direction that the judgment and execution should have been shewn; but a new trial was granted. *Powers* v. *Ruttan*, 4 O. S. 58.

When a sheriff under a fi. fa. seizes goods in the possession of the debtor, and a third party claims them as his under a bill of sale, which is impeached as being merely pretended and colourable—the sheriff, when sued in trespass, may, upon a plea that the goods are not the plaintiff's, contest his right on the ground of fraud, without proving the judgment. *Keeser* v. *McMartin*, 3 U. C. R. 327.

But where part of the goods were claimed by a title independent of the assignor (the execution debtor), and the goods were not taken from the assignee's possession:—Held, that it was incorrect to hold the plaintiff bound to prove the fi. fa. and judgment. *Culbert* v. *Conger*, 7 U. C. R. 395.

Semble, following White v. Morris, 11 C. B. 1015, that the mere production of the fi. fa. will not enable the sheriff to shew that a deed which is good against all but creditors is void against the latter, but he must prove the judgment. *King* v. *Macdonald*, 15 C. P. 397.

Under a plea denying plaintiff's property, when the goods were not taken out of his possession, the sheriff may shew that an assignment under which the plaintiff claims is fraudulent; but he must prove the execution under which he seized, unless his warrant is produced reciting it. *Roblin* v. *Moodie*, 15 U. C. R. 185.

Proof of Judgment—*Justification under Execution—Husband and Wife.*]—In an action by A., a married woman, against a sheriff for taking, under an execution against her husband, goods which she claimed as her separate property under the Married Woman's Property Act, R. S. N. S., 5th ser., c. 94, the sheriff justified under the execution without proving the judgment on which it was issued. The execution was against Donald A., and it was alleged that the husband's name was Daniel. The jury found that he was well known by both names, and that A.'s right to the goods seized was acquired from her husband after marriage, which would not make it her separate property under the Act:—Held, that the action could not be maintained; that a sheriff sued in trespass or trover for taking goods seized under execution can justify under the execution without shewing the judgment. McLean v. Hannon, 3 S. C. R. 706, followed. Held, also, that under the findings of the jury, which were amply supported by the evidence, the goods seized must be considered to belong to the husband, which was a complete answer to the action. *Crowe* v. *Adams*, 21 S. C. R. 342.

Protection by Interpleader Order—*Evidence of Seizure under Different Writ.*]—Declaration, against the sheriff, for seizing goods under a false claim that they were liable to seizure to satisfy a claim of one S. against E. Plea, that the goods were seized under a fi. fa. at the suit of one B. against E., and being claimed by the plaintiff, an interpleader order was made, by which defendant was protected against any action for such seizure. New assignment—that the action was brought not for the cause admitted in the plea, but for seizing as in the declaration alleged under colour of the writ at suit of S.; on which the plaintiff took issue. The evidence shewed that both fi. fas. were sued out by the same attorney, and received by the sheriff at the same time, and that the bailiff, receiving the warrants together, seized under both on the 29th September, and remained in possession forty days. The interpleader summons in S.'s suit was discharged with costs against the sheriff, and the execution plaintiff protected from action:—Held, that the jury were warranted in finding that the goods were seized under S.'s writ, whether seized under B.'s or not, and a verdict for the plaintiff was upheld. *Johnson* v. *McDonald*, 23 U. C. R. 183.

Seizure beyond Bailiwick — *Title.*]—A sheriff who has wrongfully seized goods in

execution out of his district, cannot question the right of the person from whose possession the property was taken, as that it was received under an assignment fraudulent as against creditors. *Cook* v. *Jarvis*, 4 O. S. 250.

True Ownership — *Letter of Debtor.*]— In trespass for seizing plaintiff's goods, under an execution against the goods of A.:—Held, that a letter written by A. before any third party had an interest in questioning the right to the goods, was evidence to shew the footing on which the plaintiff and A. then stood with respect to the goods. *Robinson* v. *Rapelje*, 4 U. C. R. 289.

——— *Presumption.*] — There is no presumption that goods sold in one year continue the property of the vendee when afterwards found in the possession of a third party as owner; and the sheriff may shew that they belonged to such third party. *Kissock* v. *Jarvis*, 9 C. P. 156.

(b) *Pleading.*

Declaration — *Surplus Moneys—Division Court.*] — See *King* v. *Macdonald*, 15 C. P. 397.

Plea — *Admission—Property.*]—See *Anderson* v. *McEwan*, 8 C. P. 532.

——— *Bar—Interpleader after Action.*]— See *Roblin* v. *Moodie*, 2 P. R. 216.

——— *Justification.*] — See *Stull* v. *McLeod*, M. T. 4 Vict., R. & J. Dig. 3531; *Adams* v. *Kingsmill*, 1 U. C. R. 355; *Dougall* v. *Moodie*, 1 U. C. R. 374; *Lee* v. *Rapelje*, 2 U. C. R. 368; *Evans* v. *Kingsmill*, 3 U. C. R. 118; *Pollock* v. *Fraser*, 4 U. C. R. 352; *Outwater* v. *Dafoe*, 6 U. C. R. 256; *Spaulding* v. *Jarvis*, 11 U. C. R. 596; *McPherson* v. *Reynolds*, 6 C. P. 440.

——— *Non Cepit.*]—See *Calcutt* v. *Rattan*, 13 U. C. R. 146; *Clark* v. *Rattan*, 6 C. P. 97.

——— *Not Possessed—Jus Tertii.*] — See *Barragan* v. *Sherwood*, 11 C. P. 119.

Replication — *New Assignment.*] — See *Bain* v. *McDonald*, 32 U. C. R. 190.

——— *New Assignment — Traversing Colour.*]—See *Smith* v. *Jarvis*, E. T. 3 Vict., R. & J. Dig. 3531.

(c) *Where Goods Subject to Mortgage.*

Disobedience of Instructions — *Countermand—Parties.*]—The plaintiffs' attorney had directed the sheriff not to sell the goods of L., but to levy upon another defendant in the suit. That defendant having remonstrated and urged him to sell, he telegraphed to the attorney to know if he should do so, and in answer was told that he must act as he thought fit, according to his own judgment. He thereupon sold L.'s goods:—Held, that this answer was an abandonment of the first direction. Quære, however, whether the plaintiffs, claiming under a chattel mortgage from L., could have sued the sheriff for disobeying such instructions, they not being parties to the suit. *Boulton* v. *Smith*, 17 U. C. R. 400.

Possession.]—Trespass will not lie against a sheriff for seizing goods subject to a chattel mortgage, but of which the mortgagors had possession. *Street* v. *Hamilton*, 5 O. S. 658.

B. mortgaged to plaintiff certain goods, with a covenant that in case of default in payment, or of B.'s attempting to dispose of the goods, the plaintiff might take possession and sell or retain them for his own use, but there was no clause authorizing B. to remain in possession until default:—Held, that the plaintiff had a sufficient right to possession to maintain trespass against the sheriff seizing under a fi. fa. against B., the jury having found the mortgage to be bonâ fide. *Porter* v. *Flintoft*, 6 C. P. 335.

——— *Improper Removal.*]—If the sheriff under an execution against a mortgagor improperly removes the goods out of the possession of the mortgagee, his (the mortgagee's) remedy is against the sheriff, and not by application to a Judge in chambers. *Swift* v. *Cobourg and Peterborough R. W. Co.*, 5 L. J. 253.

——— *Right of Sheriff to Attack Mortgage —Attachment—Damages.*]—A mortgagee, under a mortgage by a firm, having taken possession of goods, they were seized by the sheriff, under an attachment against one of the partners as an absconding debtor, and afterwards delivered by the sheriff to the assignee in insolvency of such partner:—Quære, whether the sheriff was entitled to question the mortgage on behalf of creditors, without proof of the debt on which the attachment was founded. In this case no such debt existed, for the note given for the debt was not due when the attachment issued. Semble, also, that the sheriff had no right to object that the notes secured by the mortgage were not properly stamped. Held, also, that the sheriff had no right, either as representing the attaching creditor or the assignee in insolvency of one of the partners, to take the goods out of the possession of the mortgagee; that he was liable for the full amount of the plaintiff's interest in them; and that his having handed them over to the assignee could form no ground for reducing the damages. But, a verdict having been rendered for that sum, it was made a condition on refusing a new trial, that the plaintiff should assign to the sheriff his interest in the mortgage, so that the sheriff might, if possible, recoup himself. *Paterson* v. *Maughan*, 39 U. C. R. 371.

Property — *After-acquired Goods.*]—The plaintiff, owning a stock of goods and some furniture and shop fixtures, sold out to one S., taking a mortgage in security, which was duly filed. S. continued to carry on business, bringing in other goods, till he became involved and absconded, when the sheriff under an attachment seized all the property in the store:—Held, the property being distinguishable, that the sheriff was liable for trespass. *Boys* v. *Smith*, 8 C. P. 248.

Satisfaction of Mortgage — *Action by Mortgagor—Damages—Estoppel.*] — Action against the sheriff for seizing and selling goods. Pleas, not guilty, and not possessed. It appeared that the plaintiff had mortgaged the property to one M., and executions came into the sheriff's hands both against the plaintiff, who was in possession of the goods, and the mortgagee. The plaintiff told the sheriff

that the goods were not his, but were under mortgage to M., and the sheriff seized and sold under the execution against M. The sale produced £312 5s., of which the sheriff applied £200 on the executions against M., being the amount due to him by the plaintiff on the mortgage, which fell due two days after, and the balance he applied on the writs against the plaintiff. Most of the property had been bought in by the plaintiff's brother-in-law, who gave his note for the purchase money, and left the goods in possession of the plaintiff, who afterwards paid the note. The jury found that the value of all the goods sold was £500, and of that portion which the plaintiff did not get back £200; and it was left to the court, drawing such inferences as a jury might from the evidence, to say whether the plaintiff's action could be maintained, and if so whether he was entitled to the one sum or the other:—Held, that the plaintiff was entitled to a verdict, for his goods could not be sold, as they were, to satisfy the mortgagee's debt, and no justification was pleaded; but that he was not entitled to the £200, for that amount was applied by the sheriff on account of M., thus paying off M.'s claim on the goods, and relieving the plaintiff from his mortgage; nor to the remaining sum of £300, for the goods were bought in and never left his possession, and the purchase money was paid by himself, and applied on executions against him. The court, therefore, ordered a verdict to be entered for nominal damages only. Held, also, that the plaintiff was clearly not estopped from recovering, by having told the sheriff that the goods were not his, but mortgaged to M. *Henderson* v. *Fortune*, 18 U. C. R. 520. This judgment was subsequently appealed from and a new trial ordered.

(d) *Other Cases.*

Assignment to Third Person—*Completion—Assent.*]—Where A., being indebted to B. and C., and being insolvent, was about to leave the country, but desired to secure B., and so instructed his clerk, who after A.'s departure made an assignment of his goods to B. without B.'s knowledge or consent, and, before B.'s consent was received, the goods were seized by a sheriff on an attachment issued at the suit of C.:—Held, that the sale to B. was not complete until his assent was received, and that the sheriff therefore was not a trespasser. *Barrett* v. *Rapelje*, 4 O. S. 175.

Division Court Attachment.]—Goods in the hands of a division court clerk under an attachment, are not protected against an execution issuing from a superior court before the attaching creditor has obtained his judgment. The sheriff therefore is justified in seizing such goods; but quære, if the seizure were illegal, whether an action on the case would lie at the suit of the attaching creditor against the sheriff and the plaintiff in the execution. *Francis* v. *Brown*, 11 U. C. R. 558.

Division Court Execution.]—A seizure of goods under a division court execution being entitled, under s. 266, C. S. U. C. c. 22, to priority over a seizure subsequently made by the sheriff, trespass will not lie against the latter for the seizure made by him, the goods being under the division court writ already in the custody of the law. *King* v. *Macdonald*, 15 C. P. 397.

Injury to Reversionary Interest.]—A. having a reversionary interest in goods leased to B., the sheriff seized the goods under an execution against B., but did not sell or remove them. A. sued the sheriff for an alleged injury to his reversionary interest:—Held, that if any trespass was committed by the seizure B. should sue and not A. *Henderson* v. *Moodie*, 3 U. C. R. 348.

Interpleader Order — *Restraining Action.*]—Held, on the authority of Carpenter v. Pierce, 27 L. J. Ex. 143, that a Judge has authority by interpleader order to restrain an action against the execution creditor as well as against the sheriff. *Buffalo and Lake Huron R. W. Co.* v. *Hemmingway*, 22 U. C. R. 562.

Jus Tertii—*Not Possessed—Replevin.*]—In trespass for taking goods it appeared that the goods came to the plaintiffs' warehouse at Windsor, consigned to one P., and were seized there by defendant under a writ of replevin sued out against P. by one H. P. asserted that he had bought the goods from H., which H. denied, and the trial Judge found that the goods belonged to H.:—Held, that defendant, not being a mere wrongdoer, was at liberty to dispute the plaintiff's title, and set up the title of H., under a plea of not possessed, and that he was therefore entitled to a verdict on the finding. *Great Western R. W. Co.* v. *McEwan*, 30 U. C. R. 550.

Perverse Verdict — *Damages.*]—Where, in trespass against the sheriff for taking goods, the jury gave the full value of all seized, although the plaintiff had expressly claimed only a portion, declaring that the rest were not his, a new trial was granted. *Roblin* v. *Moodie*, 15 U. C. R. 185.

Trespass by Ratification.] — When a sheriff, acting under a valid writ, as a servant of the court, seizes the wrong person's goods, a subsequent ratification by a party who, until such ratification, was a stranger to the taking, cannot make such party a trespasser by relation. *Tilt* v. *Jarvis*, 7 C. P. 145, 5 C. P. 486.

See McLeod v. *Fortune*, 19 U. C. R. 98.

Trespass by Retaking—*Bond.*]—Where a sheriff's officer, acting under a warrant of a sheriff grounded on a fi. fa. goods in the sheriff's hands, levied on the goods of a debtor in possession of defendant, accepted a bond to have the goods forthcoming when required, withdrew from possession, and afterwards, the sheriff having received a ven. ex., proceeded to sell the goods, and in doing so was obstructed by the defendant, who closed the door on the bailiff:—Held, that under the facts the sheriff could not at pleasure retake the goods, but if not procured should have had recourse to the bond, and that the sheriff and his officers were, under the circumstances, trespassers; and defendant, if guilty of no excess, justified in closing his door against them. *Regina* v. *F. J. L.*, 5 L. J. 19.

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9. *Other Liabilities—Actions and Proceedings against Sheriff.*

Assignee in Bankruptcy—*Right to Dispute Cognovit of Debtor.*]—Where a cognovit has been given by a bankrupt in fraud of the

bankrupt law, and is therefore with all steps taken under it void, the assignees of the bankrupt in bringing an action against the sheriff must be looked upon as contending for the interests of the creditors, and not merely as representing the person or estate of the bankrupt; they therefore will not be estopped, as the bankrupt might, from disputing the validity of the cognovit and subsequent proceedings on the ground of fraud. *Ponton* v. *Moodie*, 7 U. C. R. 301.

Authority to Sheriff to Bid at Sale.]—The plaintiff before the sale gave the sheriff a memorandum authorizing him to bid on his account to the amount of the debt and costs in the suit. Under this the sheriff, instead of bidding gradually, bid at once the full amount, and bought in the land:—Held, that the plaintiff had clearly no ground of action against him for so doing; and quære, whether the writing could be construed as more than an authority, and whether, if the defendant had disregarded it altogether, any action could have been maintained. *Markle* v. *Thomas*, 13 U. C. R. 321.

Certificate as to Executions—*Obtaining by False Representations.*]—Declaration against a sheriff for falsely certifying that there were no executions against the lands of one H. Plea, on equitable grounds, in substance, that the plaintiffs' agent duly authorized in that behalf, late in the day, and after defendant's office was closed, applied to defendant's clerk for the certificate on the street; that the clerk having declined to return to the office to make the requisite search, the plaintiffs' agent then represented to him that the plaintiffs were aware of their own knowledge that there were no executions, and would take the risk of there being any, and would not hold defendant responsible if such certificate should prove untrue, of which the agent said there was no danger whatever, and the clerk thereupon signed the certificate at the agent's request, in reliance solely upon such representations, and without searching as his duty required, and under the belief induced by such representations that there were no executions, and upon the understanding aforesaid that no responsibility should attach to defendant:—Held, on demurrer, a good defence, for it shewed that the certificate was obtained by the false representation of the plaintiffs' agent made by him at the time, for which the plaintiffs were responsible. *Colonial Securities Co.* v. *Taylor*, 29 U. C. R. 376.

Conveyance of Land Sold—*Bill to Compel.*]—Semble, that the court will entertain a bill for the purpose of compelling a sheriff to convey property sold under an execution; but to such a bill the execution debtor whose property has been sold must be made a party. *Witham* v. *Smith*, 5 Gr. 203.

Interpleader Order—*Sale by Sheriff after—Default of Security—Neglect to Appraise—Estoppel.*]—In trover for the value of a piano, sold by the defendant, as sheriff, under an execution, it appeared that an interpleader had been directed as to the piano, the plaintiff to give the usual security within twenty days for its value, to be appraised by defendant. The defendant, though applied to, neglected to appraise the piano until it was impossible for the plaintiff to give security within the required time. Security was, however, afterwards given, but the defendant nevertheless sold the piano, contending that he was justified in so doing, as the plaintiff had not complied with the terms of the order:—Held, that the plaintiff having been prevented by the defendant's neglect from complying with the order, defendant was estopped from saying that plaintiff's non-compliance therewith justified him in selling. Held, also, that the effect of the defendant's neglect was either to deprive him of the protection of the order or to operate as a waiver of the time thereby limited for giving security; that if the former, he was not justified by the order in selling; if the latter, he was not justified, after the bond was allowed and filed, of which he had notice; but whether he had or had not notice of the allowance and filing of the bond, his duty, under the circumstances, was to have ascertained whether the payment had been made or security given before selling, and, if so, to have withdrawn from possession. *Black* v. *Reynolds*, 43 U. C. R. 398.

Payment of Taxes without Distress.]—A sheriff returned to a ven. ex. and fi. fa. residue against goods, that he had made $50, out of which he had paid a collector of taxes $48.39 claimed by the collector as taxes due by defendant at the time of the seizure under the writ on land upon which the goods were, and of which the sheriff had notice prior to the sale, and that he had retained the balance towards his fees, &c. No distress had been made by the collector:—Held, that the sheriff must account to the execution creditor for the $50, because a distress by the collector is a necessary antecedent to obtaining the benefit of the statute. *Adshead* v. *Grant*, 4 P. R. 121.

Purchase by Sheriff.]—A sheriff cannot in any manner become the purchaser of property sold under an execution. *Doe d. Thompson* v. *McKenzie*, M. T. 2 Vict.

Sale for Costs—*Lien—Insolvency.*]—The lien of a plaintiff for costs by virtue of s. 9 of R. S. O. 1887 c. 124, under an execution in the sheriff's hands, against an insolvent, at the time of an assignment by him for the benefit of creditors under that statute, is not superseded by such assignment, and the sheriff is entitled to proceed and sell for the amount of such costs. If he does not do so, and the plaintiff loses his lien:—Held, that he is not entitled to rank on the insolvent's estate as a preferential creditor; or, if so entitled, it could only be on the net funds available after payment of the proper charges incurred in the management of the estate. *Gillard* v. *Milligan*, 28 O. R. 645.

IX. Fees.

1. *Administration of Justice in Districts and Counties.*

Audit—*Prerequisite to Recovery.*]—To an action for the recovery of fees for services connected with the administration of justice within defendant's county, rendered by the plaintiff as sheriff, alleging that such fees had been duly audited by the county board of auditors under the statute, whereby the plaintiff became entitled to receive payment of the same, the defendant pleaded on equitable grounds, setting up that the right to such fees had been disputed and submitted to the court of Queen's bench, by a

special case, and that the alleged audit was made under a misconception of the judgment, which the auditors erroneously understood to decide that the plaintiff was entitled to such fees, whereas the decision was to the contrary:—Held, plea good, for that the facts stated therein would constitute a good defence to the action, because it appeared that the fees had not been duly audited, and this was a prerequisite to the plaintiff's right to recover. *Reynolds* v. *County of Ontario*, 30 C. P. 14.

——— *Sessions.*]—The fees of the sheriffs of the different districts payable by the districts for services rendered in the administration of justice, were to be audited and paid by the order of the justices of the several districts in sessions, and not under the direction of the district councils. *In re Hamilton and Justices of London District*, T. T. 5 & 6 Vict.

Payment—*Mandamus.*]—A mandamus to the treasurer of a district to pay the sheriff's account, audited by the justices in quarter sessions, was refused, and the sheriff was left to his remedy against the treasurer by indictment, for breach of duty. *In re Hamilton* v. *Harris*, 1 U. C. R. 513.

——— *Mandamus—Chairman of Sessions.*]—On an application for a mandamus to the chairman of the quarter sessions to sign an order on the treasurer for payment of the sheriff's account, which had been audited and passed:—Semble, that it could not properly be granted, for (1) it is not essential that an order of the quarter sessions should be signed by the chairman; and (2) he has no right to draw orders on the treasurer except when presiding in court, and then it is an order of the court, not of the presiding justice. The introduction in the affidavits of both sheriff and chairman of remarks impugning each other's motives and conduct, strongly disapproved of. *In re Davidson and Miller*, 24 U. C. R. 66.

——— *Time for.*] — A sheriff's account against a county is payable as soon as audited by the county board of audit, and the county treasurer is not justified in withholding payment until the account had been allowed and paid by the government to the county. *In re Sheriff of Lincoln and County of Lincoln*, 34 U. C. R. 1.

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2. *Bargaining of Fees by Sheriff.*

Bond—*Salary.*]—A bond given to secure a sheriff a certain fixed salary or otherwise, to be paid by his deputy, is void. *Foott* v. *Bullock*, 4 U. C. R. 480.

Sale of Office—*Forfeiture.*]—The defendant, a sheriff, agreed, as the jury found, with one O., to give him all the fees of his office, except for certain services specified, in consideration of which O. was to pay him £300 a year, quarterly in advance, not out of the fees, but absolutely, and without reference to their amount:—Held, clearly an agreement prohibited by 5 & 6 Edw. VI. c. 16, and 49 Geo. III. c. 126, and that the effect of it was to forfeit the office upon conviction under a proceeding by scire facias. Held, also, that the evidence stated in the case warranted the jury in finding that the agreement was in the terms above mentioned. *Regina* v. *Moodie*, 20 U. C. R. 389.

See Fraser v. *Fraser*, 11 U. C. R. 109, and *Falls* v. *Powell*, 20 Gr. 454, *ante* VI. 2.

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3. *During Vacancy in Office.*

Right of Deputy Sheriff.] — The fees earned by a deputy sheriff while the office is vacant by reason of the death, resignation, or removal of the sheriff, of right belong to the deputy himself, and neither the representatives of the late nor the newly appointed sheriff have any right or claim thereto. In such a case where fees had been received by the deputy, which the bill alleged he had in error paid over to the executors of the late sheriff, and the deputy subsequently voluntarily assigned all his right and claim to such fees to the newly appointed sheriff, who filed a bill to compel repayment of the amounts to him, the court allowed a demurrer for want of equity. *McKellar* v. *Henderson*, 27 Gr. 181.

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4. *Poundage.*

(a) *Action against Execution Debtor for.*

The sheriff cannot maintain an action against the execution debtor for his poundage. *Thomas* v. *Great Western R. W. Co.*, 24 U. C. R. 326.

(b) *On Ca. Sa.*

Arrest—*Amount of Execution.*]—A sheriff upon arresting a judgment debtor upon a ca. sa. thereby becomes at once entitled as against the execution creditor to full poundage on the amount of the execution. *McNab* v. *Oppenheimer*, 11 P. R. 348.

Custody.]—When the sheriff has the party in custody on a ca. sa., he can claim poundage under rule of H. T. 10 Vict. *Corbett* v. *McKenzie*, 6 U. C. R. 605.

Surrender.]—Where a ca. sa. was delivered with instructions to return it "non est inventus" after four days, and the bail in the meantime surrendered the defendant:—Held, entitled to poundage. *Gillespie* v. *Nickerson*, 1 P. R. 305.

(c) *On Fi. Fa. Goods—Right to Poundage.*

Before Sale—*Statute—Retroactivity.*]—Where a sheriff, before 7 Wm. IV. c. 3, s. 32, levied on a defendant's goods, he was entitled to poundage, although there was no sale, that Act not being retrospective. *Commercial Bank* v. *VanNorman*, T. T. 3 & 4 Vict.

——— *Writ Set aside.*]—Where a levy had been made under a fi. fa., but before sale the writ and all proceedings thereon were set aside: — Held, not entitled to poundage. *Walker* v. *Fairfield*, 8 C. P. 95.

Money not Directly made by Sheriff.]—On executions against person or goods, there must be a taking to entitle to poundage. If the money be paid before, this defeats the

right to poundage, but if the money be forced by the act of the sheriff, then, though it does not pass through his hands, his right to poundage accrues. *Morris* v. *Boulton*, 2 C. L. Ch. 60.

Quære, the right of the sheriff to poundage where money is apparently made by pressure of executions in his hands, but not made by or through him. *Gillespie* v. *Shaw*, 10 L. J. 100.

Under C. S. U. C. c. 22, s. 271, a sheriff is not entitled to poundage unless he actually levies the money due under the writ in his hands; even though by the pressure exerted by seizure defendant has paid or otherwise settled the debt. *Buchanan* v. *Frank*, 15 C. P. 196.

——— *Account.*]—A sheriff is only entitled to poundage on the moneys actually passing through his hands. Where therefore the parties to a suit arranged outside the sheriff's office for the payment of $3,000 on account of an execution in his hands, and the plaintiffs in the cause paid his poundage on that amount as well as on the moneys actually paid to the sheriff, the court refused to allow them to charge the amount against the defendants. *Hamilton and Port Dover R. W. Co.* v. *Gore Bank*, 20 Gr. 191.

——— *Allowance.*] — The poundage of a sheriff cannot be taken to cover more than the risk and responsibility cast upon him when he seizes, retains, and sells goods and from this levy returns the money. If the sheriff's action be intercepted, so that he does not make this money, it is for the court to say what allowance shall be made to him in lieu of poundage. *Wadsworth* v. *Bell*, 8 P. R. 478.

——— *Compensation — Disbursements — Municipal Corporation.*]—Held, that a sheriff is not entitled to poundage on writs against municipal corporations, unless he actually makes the money. Where a settlement is obtained by means of his pressure, he is entitled to reasonable compensation for services performed, although no special fee be assigned for such service in any statute or table of costs. In this case he was entitled to all his disbursements, all fees fixed by the tariff of costs, and half what would have been the amount of his poundage had the money been made, less the disbursements. Semble, a sheriff is entitled to poundage when he makes the money on a fi. fa. against a corporation, though he may, under the Municipal Institutions Act, have levied a rate to collect the amount. *Grant* v. *City of Hamilton*, 2 C. L. J. 262.

Money not Made by Sheriff — *Withdrawal.*]—Where, after seizure by a sheriff under an execution for $1,100, the execution was settled between the parties by the taking of promissory notes from defendant, and the sheriff was ordered to deliver up possession, but the writ was not withdrawn:—Held, that the execution was satisfied so as to entitle the sheriff to something for poundage under 27 & 28 Vict. c. 28, and $10 was allowed. *McRoberts* v. *Hamilton*, 7 P. R. 95.

——— *Writ Set aside.*] — Held, under the facts, that this case came within the provisions of R. S. O. 1877 c. 66, s. 45, and that therefore the sheriff was entitled to poundage. *Morrison* v. *Taylor*, 9 P. R. 390.

Money Paid to Sheriff by Debtor.]—The receipt of money by a sheriff under a fi. fa. is a virtual execution of the writ, although there has been no seizure or sale, and entitles the sheriff to his poundage and fees. The defendant requested the sheriff never to make a seizure upon receiving a writ of fi. fa. against him, promising that he would pay his fees as if a formal seizure had been made. Subsequently the sheriff notified the defendant of the receipt of a writ against him and issued his warrant, but did not levy, and the defendant paid:—Held, that the sheriff was entitled to the poundage and fees. *Consolidated Bank* v. *Bickford*, 7 P. R. 172.

Money Restored to Defendant — *Recovery from Plaintiff — Compensation.*] — Semble, that under the facts set out in this case the sheriffs were not strictly entitled to poundage. Where money levied has to be restored to defendant, in consequence of something for which the plaintiff is answerable, the sheriff may recover his poundage from the plaintiff. Quære, whether the same principle applies when the sheriff is entitled only to compensation for his services under 9 Vict. c. 56, or whether defendant must pay in all cases. *Henry* v. *Commercial Bank*, 17 U. C. R. 104.

Sale of Goods of Claimant — *Allowance.*]—Where goods seized by a sheriff under execution, and sold under an interpleader order, were afterwards found to be the goods of the claimant therein and not of the execution defendant:—Held, that the sheriff was not entitled under rule 1233 to an allowance in lieu of poundage in respect of the goods seized. *Turner* v. *Crozier*, 14 P. R. 272.

Stay of Execution after Seizure.] — The plaintiff had obtained a decree in this cause against the defendants, by which money was ordered to be paid, and on which the plaintiff issued execution and lodged it in the hands of a sheriff. After seizure under the writ, but before the money was levied, the defendants moved for and obtained leave to rehear the cause (see 1 Ch. Ch. 214) and a stay of the execution on the terms of paying the money into court, which was done:—Held, that the sheriff, not having actually levied the money under the execution, was entitled only to fees for services actually rendered. *Winters* v. *Kingston Permanent Building Society*, 1 Ch. Ch. 276.

Withdrawal from Possession.]—Where the sheriff under a fi. fa. seized goods sufficient to cover the claim, and afterwards withdrew from possession, in obedience to a Judge's order founded upon an undertaking of defendant to credit the amount of the levy on an execution which he held against the plaintiff:—Held, entitled to poundage. *Thomas* v. *Cotton*, 12 U. C. R. 148.

——— *Several Sheriffs.*]—Where writs of fi. fa. are issued in two counties, and both sheriffs seize goods sufficient to satisfy the execution, and plaintiff and defendant afterwards settle, and the sheriffs are ordered to withdraw, both are not entitled to poundage. *Brown* v. *Johnson*, 5 L. J. 17.

Writ Superseded—*Withdrawal—Allowance.*]—A sheriff made a seizure under a fi. fa. against the goods of the defendants, but, learning that they were about to appeal, of

his own motion, and for the purpose of saving expense to the parties, withdrew his officer in possession, and, the appeal having been subsequently brought, the execution was superseded. The appeal was dismissed, and the judgment debt and costs were afterwards settled by arrangement between the parties:—Held, that the sheriff had not so withdrawn from the seizure as to disentitle him to poundage or an allowance in lieu thereof, and that, notwithstanding the superseding of the execution, he was entitled under rule 1233 to such allowance — the words "from some other cause" in that rule being wide enough to cover the case. Brockville and Ottawa R. W. Co. v. Canada Central R. W. Co., 7 P. R. 372, and Morrison v. Taylor, 9 P. R. 390, approved and followed. The court will not interfere with the discretion exercised by the master in fixing the amount of the allowance. *Weegar* v. *Grand Trunk R. W. Co.*, 16 P. R. 371.

(d) *On Fi. Fa. Goods—Other Cases.*

Amount of—*Account—Costs.*]—A sheriff had moneys properly applicable to certain executions in his office but the debtor, having otherwise arranged with the plaintiffs in the writs, obtained from them orders on the sheriff for payment of their amounts respectively, but the sheriff refused to pay unless the debtor would consent to pay his full poundage as on a sale, which he was not entitled to claim, and defended an action for the amount, in which he defeated the plaintiff. This court, on a bill filed against the sheriff, granted a decree for an account and ordered him to pay the costs up to the hearing. *Davies* v. *Davidson*, 14 Gr. 296.

——— *Computation.*]—The usual mode of computing sheriff's poundage is correct, namely, to allow six per cent. on the first $1,000, and in addition thereto three per cent. on the amount over $1,000, and under $4,000; and in addition thereto one and a half per cent. on the amount over $4,000. *Fleming* v. *Hall*, 9 P. R. 310.

——— *Several Writs.*] — Held, that the sheriff was entitled to charge poundage upon each of several writs though all were issued by the same solicitor and were placed in his hands at the same time. *Grant* v. *Grant*, 10 P. R. 40.

——— *Sum Retained.*]—The sheriff is entitled to poundage only on the sum paid over by him, not on what he retains for himself. *Michie* v. *Reynolds*, 24 U. C. R. 303.

Apportionment—*Costs.*]—Where an interpleader issue, ordered upon the application of a sheriff who had seized certain goods under the direction of the execution creditors, was determined as to part of the goods in favour of the claimant and as to the remainder in favour of the execution creditors, and no costs of the issue were given to either party to it:—Held, that the execution creditors should pay the sheriff his fees and poundage on the value of the part of the goods they were found entitled to, and his costs of the interpleader application and of a subsequent application to dispose of the costs, &c.; and that the execution creditors should have an order over against the claimant for one half of such costs. *Ontario Silver Co.* v. *Tasker*, 15 P. R. 180.

Order Fixing Allowance — *Finality—Rate of Remuneration.*]—A Judge's order under C. L. P. Act, s. 271, fixing the allowance to be made to the sheriff where there has been a seizure, but no money levied, is final. In this case the sheriff rendered his bill, and the plaintiff obtained a summons to reduce it or determine who would be reasonable:—Semble, that the sheriff should have applied in order to authorize charges not sanctioned by the tariff. Semble, also, the Judge's duty is not to tax the sheriff's account, but to fix a rate for services rendered, leaving to the master to determine the amount in case of dispute. *Gwynne* v. *Grand Trunk R. W. Co.*, 24 U. C. R. 482.

(e) *On Fi. Fa. Lands.*

Right to—*Sale.*]—Quære, if a sheriff is entitled to poundage on a compromise after advertisement, but before sale. *Gates* v. *Crooks*, 3 O. S. 286.

He is not, on a compromise after delivery of a writ to him, but before any thing done on it. *Leeming* v. *Hagerman*, 5 O. S. 38.

The right to poundage only begins with the sale, and the words "and made," used in the tariff, have reference to this act. *Morris* v. *Boulton*, 2 C. L. Ch. 60.

A sheriff has no right to poundage upon an execution against lands, unless there has been an actual sale. *Merchants Bank* v. *Campbell*, 32 C. P. 170.

A sheriff is not entitled to poundage under a writ of fi. fa. lands until there has been a sale under the writ. Merchants Bank v. Campbell, 32 C. P. 170, followed. *French* v. *Lake Superior Mineral Co.*, 14 P. R. 541.

(f) *On Other Writs.*

Attachment—*Coroner.*]—A coroner is not entitled to poundage on an attachment against a sheriff. *In re Duggan*, 2 U. C. R. 118.

Estreated Recognizance.]—Where, on a levy on an estreated recognizance, the Crown discharges the estreat on payment of the sheriff's fees, he is entitled to poundage. *Regina* v. *Vinning*, H. T. 3 Vict.

Writ of Extent.]—Poundage is recoverable from defendant on a writ of extent; and other expenses also, on application to the court or a Judge. *Regina* v. *Patton*, 9 U. C. R. 307.

5. *Summoning Jurors.*

Certificate of Attendance — *Mileage—Audit—Mandamus—Copies of Panels.*] — Under C. S. U. C. c. 31, ss. 105, 161, s.-s. 4, the sheriff is entitled to charge only for such certificates of attendance as are demanded by the jurors. He cannot prepare them beforehand and charge, whether they are asked for or not. The court can compel the quarter sessions to audit the sheriff's accounts; but, semble, such audit being a judicial duty, that it cannot review a discretion exercised upon a question of fact. The court refused therefore to interfere where the quarter sessions,

after examining the bailiff vivâ voce, had disallowed certain mileage for serving jurors, sworn to in his affidavit. The sheriff is entitled, under ss. 84 and 161, s.-s. 2, to charge for four copies of panels for the court of assizes, $4, i.e., two copies of the panel of grand and petit jurors, respectively, one to be sent to each of the superior courts at Toronto; and $6 for copies of panels for the quarter sessions and county court, i.e., for two copies of the panel of grand and petit jurors respectively for quarter sessions, and of petit jurors for the county court. *In re Davidson and County of Waterloo*, 22 U. C. R. 405.

Double Panel — *Mileage.*] — The sheriff of Haldimand, for many years, since 1853, had charged for the panel of jurors for both the county court and sessions, and mileage for summoning each juror according to the distance from the court house to his residence, without reference to the distance actually travelled to serve all:—Held, that the sheriff was entitled to charge for both panels, but only to mileage for the distance actually travelled to summon all the jurors. *County of Haldimand* v. *Martin*, 19 U. C. R. 178. See this case also as to the right of the county to recover back such fees.

Where the sheriff travels to summon grand and petit jurors at the same time, he is entitled, under C. S. U. C. c. 31, to charge only for the number of miles actually travelled in order to serve all the jurors. He is entitled, under s. 161, s.-s. 3, besides his mileage, to $12 for summoning the 48 petit jurors for the county court, and the same sum for the quarter sessions, though the same jurors are summoned for both courts, and served at the same time with both summonses. *In re Davidson and Miller*, 24 U. C. R. 66.

See also *ante* 1.

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6. *Taxation.*

Excessive Amount—*Taxation Ordered.*] —The court expressed surprise at finding that on a sale of goods, producing in gross $846, the expenses amounted to $106, believing that such a charge would not be found justified by the tariff and the proper practice under it. The bill was referred to the master to tax what in his discretion was necessarily incurred in the care and removal of the goods. *Michie* v. *Reynolds*, 24 U. C. R. 303.

Observations on the exorbitant charge for fees and possession money made by the sheriff. *Black* v. *Reynolds*, 43 U. C. R. 398.

Items—*Stock-Taking.*] — The sheriff paid persons at Belleville and at Madoc for "taking stock" after the levy:—Held, that these payments should be disallowed, as they do not appear in the tariff, and the local master was precluded by R. S. O. 1877 c. 66, s. 51, from allowing anything to the sheriff which was not correct and legal. *Grant* v. *Grant*, 10 P. R. 40. See *Morrison* v. *Taylor*, 9 P. R. 390, *post*.

Place of Taxation—*Notice.*]—Held, that a sheriff's bill of fees may be taxed on notice under s. 48 of the Execution Act, R. S. O. 1877 c. 66, either at Toronto or in the sheriff's own county, as the party taxing may elect. *Dominion Type Founding Co.* v. *Nagle*, 8 P. R. 174.

Possession Money.] — It appeared that the deputy sheriff kept the keys of the store in Belleville, and went himself twice a day to see that the goods were safe:—Held, that the payment to him of $2 per day as possession money should have been allowed only if the master were satisfied that it was necessarily and actually paid, and the item was referred back for reconsideration, it being alleged that the only possession was locking up the store and keeping the key. *Grant* v. *Grant*, 10 P. R. 40.

Revision.]—Where a sheriff's fees have been taxed before a deputy clerk of the Crown under R. S. O. 1877 c. 66, s. 48, a revision of such taxation cannot take place before the principal clerk of the Crown, but the court may refer the bill back to the same deputy clerk for a revision of the taxation, where it appears that items have been improperly allowed. *Hay* v. *Drake*, 8 P. R. 120.

——— *Appeal.*] — Where a sheriff's fees and poundage had been taxed by a deputy clerk of the Crown at the instance of the plaintiffs, and it appeared that the amount allowed was not unreasonable, a revision of the taxation was refused. Semble, that, even if the allowance had been too liberal, an appeal would not be allowed to the plaintiff, who should have applied in the first instance to a Judge to fix the amount. *Brockville and Ottawa R. W. Co.* v. *Canada Central R. W. Co.*, 7 P. R. 372.

——— *Forum.*] — Held, that the plaintiff properly applied to a Judge in chambers to review the taxation pursuant to R. S. O. 1877 c. 66, s. 52, as rule 447 applied only to the Toronto taxing officers appointed under rule 438, O. J. Act. *Grant* v. *Grant*, 10 P. R. 40.

Right to Taxation—*Execution Set aside —Items—Stock-taking.*] — An execution and the judgment under which it issued were set aside on the ground of irregularity in obtaining the judgment:—Held, that the plaintiff was not entitled to have the sheriff's bill against him taxed under R. S. O. 1877 c. 66, s. 48, as the setting aside of the execution was not a "settlement by payment, levy, or otherwise," within the meaning of the Act, or under s. 47, as the plaintiff was not a "person liable on any execution:"—Held, however, that a sheriff, as an officer of the court claiming fees by virtue of its process, is so far within its jurisdiction that his bill may be taxed under rule 447, O. J. Act. The item of $6 for taking stock was improperly allowed, not being incurred in the care and removal of the property within the tariff. *Morrison* v. *Taylor*, 9 P. R. 390.

See Gwynne v. *Grand Trunk R. W. Co.*, 24 U. C. R. 482, *ante* 4 (d).

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7. *Other Cases.*

Application to Fix Fees—*Costs.*]—If, after a seizure, the parties settle, the plaintiff may apply to the court to fix the sheriff's fees, but he will not get the costs of the rule, though no cause be shewn. *In re Home*, 1 U. C. R. 412.

Appropriation of Money Made—*Interest—New Writ.*]—The master, in order to

ascertain what, if any, money remained due upon a judgment against defendants, calculated the judgment and interest from its entry, on the 26th June, 1841; and thus, with the sums due for the execution issued, made the plaintiff's claim £185 12s. 3d., to which he added the sheriff's fees, and interest thereon, £25 11s. 4d., making the total amount chargeable against defendants, £211 3s. 7d. He then gave defendants credit for various sums on account, and sums levied by the sheriff on different writs, calculating interest on each sum from the date of its payment or being got by the sheriff, amounting in the whole to £250 16s. 3d.; so that, by this mode of computation, the plaintiff appeared to have been overpaid the sum of £39 12s. 8d.:—Held, that the sheriff's fees, poundage, &c., should have been deducted from the gross amount made by him on each writ, and the balance only be brought into account between the plaintiff and defendant; that the course taken by the master was not the correct one; that where the sheriff receives a writ indorsed to levy a named sum as that recovered, and interest from the time of entering the judgment, he must make the money generally, and pay over what he makes —fees and expenses deducted—on the writ generally; if insufficient to satisfy the execution, he returns nulla bona as to the residue, and the plaintiff is then entitled to a new execution; that on indorsing the new execution he is entitled to consider the interest up to the date of the levy as paid, and the principal as reduced by the balance of what he has received from the sheriff; and having so reduced the principal, to indorse his subsequent writ for such reduced principal, and interest thereon from the time of the former levy and payment. *Cummings* v. *Usher*, 1 P. R. 15.

Expenses.]—Held, that where a sheriff, acting in good faith for all concerned, agreed to pay for having grain threshed for the purpose of its better sale, the expenses of such threshing should be allowed him. *Galbraith* v. *Fortune*, 10 C. P. 109.

Lien for Fees—*Assignment—Priorities.*]—Judgment creditors, having executions in the sheriff's hands, under which a seizure had been made, signed an agreement giving defendant an extension of time for payment on certain conditions therein mentioned. Upwards of thirty days afterwards defendant assigned under the Insolvent Acts. The conditions of the agreement having been so far performed:—Held, that the writs were not in the sheriff's hands for execution, and that the assignment took priority; and that the sheriff had no lien or claim on the goods seized for the payment of his fees. *In re Ross*, 3 P. R. 394.

Mileage.]—A sheriff is entitled to mileage only on going to make a levy, not on going to sell also. *Burwell* v. *Tomlinson*, H. T. 2 Vict.

X. Indemnity Bonds to Sheriff.

Action on Bond—*Plea—Neglect to Appeal in Action against Sheriff.*]—Action upon a bond of indemnity given by defendant for not selling goods, alleging a verdict and judgment against the sheriff in a county court, which he had been obliged to pay. Defendant pleaded that he had defended the action for the plaintiff, and moved for a new trial, which was refused; that he then gave a bond to appeal, according to the statute, and applied to the Judge to certify the proceedings, but the plaintiff (defendant in that action), without notice to defendant, and against his will, paid the money, by means whereof defendant was prevented from prosecuting the appeal, &c. It appeared that no bond had been given until the fifth day after the judgment was entered, and that the Judge of the county court had on that ground refused to interfere:—Held, that the plea was not proved, for the appeal was not prevented by the plaintiff's payment, as alleged, but by the entry of judgment. Quære, whether it formed a good defence. *Kingsmill* v. *Weller*, 16 U. C. R. 479.

——— *Proof of Damage—Judgment.*]—A sheriff, before he can recover upon a bond indemnifying him against all actions, suits, judgments, &c., must shew a judgment entered in proper form against him. *Ruttan* v. *Conger*, 9 C. P. 16.

——— *Proof of Damage—Pleading.*]—Where to a plea of non damnificatus to an action brought by the executrix of a sheriff on an indemnity bond given by defendant to the sheriff, for seizing and selling goods as the property of A. on an execution of defendant against A., the plaintiff replied a judgment and execution against A. at the suit of the defendant; that the testator was about to return the writ "nulla bona," and that defendant gave the bond to the testator to seize certain goods as goods of A.; that the testator did accordingly seize and sell, and that he paid the money arising from the sale to defendant; that an action of trespass for seizing and selling the goods had been brought against the testator by their owner, and a judgment for £26 12s. 4d. recovered against him in the district court; and so he was damnified—the replication was held good on general demurrer, the court holding that the allegations were sufficiently certain; that the seizure had been made by testator on defendant's writ and before the return day; and that the district court must be presumed not to have exceeded its jurisdiction, without any averment to that effect. *Hamilton* v. *McFarland*, E. T. 3 Vict.

——— *Protection from—Order of Court—Set-off.*]—C., one of the obligors in a bond of indemnity to the sheriff under a writ of attachment against an absconding debtor, obtained a final order for protection from process. Judgment was obtained in an action against the sheriff subsequently to the filing of the petition and the bond, but was not referred to in C.'s schedule thereto:—Held, that, under 19 & 20 Vict. c. 93, C. was not discharged by such final order. Held, also, that the obligors were not entitled to set off against the sheriff's claim money which the sheriff had applied out of the proceeds of the sale under the attachment to pay certain executions in his hands prior to such attachment. *Moody* v. *Bull*, 7 C. P. 15.

——— *Sheriff's own Wrong.*]—Where an indemnity bond was given to the sheriff by an execution creditor for the sale of the debtor's goods, and the creditor afterwards directed the sheriff not to sell, but, notwithstanding, he went on and sold:—Held, in an action by the sheriff on the bond for damages recovered against him in consequence of the sale, that defendant was entitled to a verdict on an issue that the sheriff was damnified of

his own wrong; and the jury having found for the sheriff, the court granted a new trial. *McMahon* v. *Ingersoll*, H. T. 5 Vict.

——— *Sheriff's own Wrong — Validity of Claim—Costs of Postponement.*]—Held, that under a plea that the plaintiff was damnified of his own wrong, the defendant could not shew that the sheriff incurred the damages complained of irrespective of the execution of the writ indemnified against. It is no defence to an action by the sheriff on an indemnity bond to shew that the sheriff, instead of paying the claim of the party indemnified against after he paid the execution creditor (the obligee in the bond to the sheriff), chose to pay the surplus proceeds of the sale to the assignee of the execution debtor, since a bankrupt, and so was damnified of his own wrong; the sheriff cannot be called upon to treat as valid, with respect to these parties, the very claim against which he has been indemnified. The sheriff is entitled to recover from the obligor in the indemnity bond the costs incurred in respect of putting off the trial of the cause against himself, on account of the absence of a material witness. *Corbett* v. *Wilson*, 8 U. C. R. 22.

Effect of—*Trespass.*]—A person who indemnifies a sheriff for seizing goods, does not by that act become liable as a trespasser. *McLeod* v. *Fortune*, 19 U. C. R. 98.

Execution Debtor's Bond—*Validity—Sale—Estoppel.*] — A sheriff, holding executions against defendant, took from him a bond reciting that the sheriff had seized the defendant's goods, and indemnifying the sheriff "against any loss, damage, or liability, which may be incurred by reason of the execution, wrongful execution, or non-execution of the said writ." The sheriff afterwards sold the goods contrary to defendant's wish, who informed him that they belonged to one G. G. brought trover against the sheriff and recovered the value of the goods. The sheriff then sued defendant on his bond:—Held, that defendant was not estopped by the recital from denying his property in the goods; and that the defendant, having expressly objected to the sale, would not be liable. And semble, that such a bond would at all events be void at common law, as being an indemnity to the sheriff for disobeying the command of the writ. *Corbett* v. *Hopkirk*, 9 U. C. R. 479.

Obligors—*Defence of Action—Notice.*]—The obligors must save the sheriff harmless, by assuming the defence of any action against him; and judgment against the sheriff is conclusive against the obligors. Notice to the obligors by the sheriff of his being sued is not necessary to give him a right of action against them. *Thomas* v. *Johnston*, 4 U. C. R. 110.

Revocation of Covenant — *Conditional Liability.*]—A sheriff, having two executions against the same person, accepted a covenant from the execution creditors on one of the writs, indemnifying him against any seizure and sale by him. Before anything was done on either writ, defendants countermanded and revoked their covenant, with the assent of the sheriff, who afterwards, however, went on, sold, and was damnified:—Held, that these facts formed a good equitable defence to an action on the covenant, for the agreement to indemnify merely created a conditional liability, from which defendants were at liberty to withdraw before any act done or damage sustained, especially where the withdrawal was with the sheriff's assent. *Grange* v. *Mills*, 19 C. P. 398.

Right to Take Bond.]—A sheriff, whenever there is an adverse claim to goods as between the execution debtor and a third party, may take an indemnity bond from either one or the other, or both the parties. *Thomas* v. *Johnston*, 4 U. C. R. 110.

Undertaking to Indemnify—*Attorney—Procuring Bond — Conduct of Sheriff.*] — Upon the following paper having been given by A. and B. to the sheriff: "Q. B.—Wilson et al. v. Hastings. The plaintiff will indemnify the sheriff on selling goods of H. under ven. ex. A. and B., attorneys for plaintiff. Kingston, Feb. 24, 1847:" the court ordered, upon the application of the sheriff, that A. and B. should enter into by a day named, or procure two sufficient persons to enter into, a bond of indemnity to the sheriff, to be approved of by the master; otherwise that A. and B. should pay to the sheriff the damages, &c., he had sustained by reason of selling H.'s goods under the ven. ex. The court also held that the conduct of the sheriff affecting his right to recover either in whole or in part on the bond, could not be urged as a reason for refusing his application for the bond, but must be left as a matter of defence to or mitigation of damages in a suit to be brought by the sheriff on the bond. *Corbett* v. *Smith*, 7 U. C. R. 13.

——— *Attorney—Writing.*] — Sheriffs recommended to take precise written engagements from attorneys when they mean to hold them liable, in cases they have nothing to do with except professionally, though where the attorney has orally agreed to indemnify, the court, if the agreement is admitted, will enforce it. *In re Corbett* v. *O'Reilly, Macdonell* v. *Grainger*, 8 U. C. R. 130.

——— *Attorney — Ratification.*] — Held, affirming the judgment in 25 N. B. Rep. 196, that a promise of indemnity to the sheriff by an attorney is binding on his client, where the attorney had the conduct of the suit in the course of which such promise was made, and the subsequent acts of the client shewed that he had adopted the attorney's proceedings. *Muirhead* v. *Shirreff*, 14 S. C. R. 735.

XI. Return of Writs.

[*See* R. S. O. 1877 c. 16, s. 31; R. S. O. 1897 c. 17, s. 39.]

1. *Amendment.*

Arrest—*Escape—Privilege.*]—After an action for an escape in execution, the sheriff will not be allowed to amend his return to the writ by shewing that the debtor was privileged from arrest, so as to oblige the plaintiff to have recourse to the original defendant; but the court will direct that the plaintiff shall assign the original judgment to the sheriff, so that he may proceed in the plaintiff's name, first indemnifying him against damages and costs in consequence of the assignment. *Hervey* v. *Sherwood*, T. T. 3 & 4 Vict.

Fi. Fa.—"*Goods on Hand*"—*No Seizure.*]—A sheriff returned "goods on hand" to a fi. fa., having made no seizure, and the plaintiff issued a ven. ex., but, discovering that there had been no seizure, issued another fi. fa., without a return to the ven. ex. The second fi. fa. was set aside with costs, which the sheriff was ordered to pay, and to amend his return to the first writ. *Lemoine* v. *Raymond*, 2 U. C. R. 379.

——— *Mistake.*]—The sheriff had returned to a fi. fa., that the money had been levied upon another writ, having reasons so to believe, but it appeared that part had not been made. The court allowed him to amend. *Lee* v. *Neilson*, 14 U. C. R. 606.

Where a sheriff returned a fi. fa. goods nulla bona, his deputy thinking that a water power held by lease required to be sold under a fi. fa. lands, the court allowed an amendment on terms. *Bull* v. *King*, *Boomer* v. *King*, 8 C. P. 474.

A sheriff, in his advertisement of sale of lands seized under a fi. fa., had described them as the lands of defendant, when they were the plaintiff's. The return was allowed to be amended. *McCann* v. *Eastwood*, 2 Ch. Ch. 182.

——— *Sale — Discontinuance — Interpleader.*]—After seizure under a fi. fa. the sale was delayed until an interpleader issue was tried. The jury having found that part of the goods seized were defendant's, the sheriff on the 1st October proceeded to sell, but by plaintiff's consent discontinued the sale and returned a sale to the amount of £4, and goods in hand to £15. On the 26th, and after this return, an extent, at the suit of the Crown, against defendant's goods, and on the 15th November a ven. ex. in this suit were handed to the sheriff. The sheriff applied to amend his return by returning nulla bona in whole or in part, or by making a special return:—Held, that the rule must be discharged; and that the sheriff should convert the property seized into money, when an application might be made, either by the plaintiff or on behalf of the Crown, to direct him to pay it over. *Ford* v. *Story*, 1 P. R. 18.

——— *Ven. Ex.—Lapse of Time.*]—Held, that the returns to writs of fi. fa. and ven. ex. lands could be amended so as to correspond with the facts (but upon terms), although a sale had been made under them, and after a lapse of over ten years. *Scott* v. *Burgess and Bathurst School Trustees*, 5 P. R. 228.

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2. *Attachment.*

(a) *Application for—Forum.*

Judge in Chambers.] — An attachment against a sheriff for not obeying the rule to bring in the body cannot be granted by a Judge in chambers. *Regina* v. *Sheriff of Niagara*, Dra. 331.

Quære, can a Judge in chambers pass judgment upon a sheriff for contempt, under 7 Vict. c. 33, after the object of the statute has been attained by the return of the fi. fa. *Regina* v. *Jarvis*, 6 U. C. R. 558.

(b) *Non-return or Insufficient Return.*

Ca. Re.—*Cepi Corpus—Escape—Waiver.*]—The sheriff arrested defendant on an order to hold to bail, and returned the writ cepi corpus. Defendant afterwards escaped, but the plaintiff, notwithstanding, served the declaration on the sheriff, and, a plea having been put in, recovered a verdict:—Held, that he could not, after this, rule the sheriff to return the body, and attach him for default. *Regina* v. *Sheriff of Perth*, 2 P. R. 298.

Ca. Sa. — *Cepi Corpus — Admission to Limits.*]—Where a sheriff returned cepi corpus to a ca. sa., and did not comply with the terms of a rule to bring in the body, and plaintiff then obtained a rule for an attachment:—Held, a good answer to shew that the defendant was arrested under a ca. sa. and placed in close custody, and was afterwards admitted to the limits by virtue of a certificate from the clerk of the Crown, and had not since been committed to close custody. *White* v. *Petch*, 7 U. C. R. 1.

Costs of Rule to Return.] — A sheriff cannot be attached for non-payment of the costs of a rule to return under 3 Wm. IV. c. 9, unless there has been a rule specially calling on him so to do. *Marcey* v. *Butler*, H. T. 2 Vict.; *Doe d. McGregor* v. *Grant*, T. T. 2 & 3 Vict.

Delay in Moving.] — Where the rule to return a writ of fi. fa. had been taken out and served in June, 1833, the court, in M. T. 5 Wm. IV., refused an attachment on the ground of delay. *Loucks* v. *Farrard*, 4 O. S. 5.

Indemnity—*Refusal of — Several Executions.*]—Where a sheriff had three executions against goods of a defendant, and having seized and sold had partly satisfied the first and third, when a stranger claimed the property, and the plaintiff in the second writ refused to give the sheriff an indemnity, and the sheriff did not return his writ, an attachment was granted against him for not returning it. *Land* v. *Burn*, T. T. 3 & 4 Vict.

Informality.]—Where there was an informal return, the Court refused an attachment in the first instance. *Bayman* v. *Struther*, Tay. 39.

Insufficiency.]—An insufficient return is no return, and the course is to move for an attachment, not to quash the return. *Eastwood* v. *McKenzie*, 5 O. S. 708; *Regina* v. *McLeod*, M. T. 3 Vict.; *Smith* v. *Bellows*, 2 P. R. 183.

——— *Garnishment — Withdrawal.*] — A sheriff's return to a writ of fi. fa. goods set forth that he was notified that the amount of the judgment to be executed had been attached by a judgment creditor of the execution creditor, and that the execution debtor (the garnishee) had thereupon satisfied the claim of the garnishor. In fact there was only an order to attach and a summons to pay over, but no order absolute:—Held, that the return was insufficient in substance, because it shewed that the writ remained unexecuted without legal excuse; a garnishee order absolute would have operated as a stay of execution, but not so the attaching order and summons; the duty of the garnishee was to pay the sheriff, ad-

vising him at the same time of the existence of the attaching order, and this would have been equivalent to a payment into court. Where purchasers are not in question, the issue of a writ of execution gives a specific claim to the goods of a judgment debtor, which remains till satisfaction of the debt; and, therefore, the withdrawal of the sheriff did not preclude further action upon the writ. *Genge* v. *Freeman*, 14 P. R. 330.

Late Return—*Costs.*] — Where a sheriff enclosed the return to the clerk of the Crown three or four days after the rule expired, so that it was not found on search, but was produced in open court by the clerk, the court refused an attachment in order to make him pay the costs. *Andrews* v. *Robertson*, 3 O. S. 304.

Member of Parliament.] — An attachment was granted against a sheriff who was a member of Parliament, for not returning a writ pursuant to a rule of court. *Bell* v. *Buchanan*, M. T. 1 Vict.

Place of Return—*Affidavit.*]—A sheriff had been ruled to return a fi. fa., without stating to what office, and it appeared that the writ had been issued from the office of the deputy clerk of the Crown, and that the sheriff might have returned it to that office:—Held, that an attachment could not be granted against him on an affidavit stating that he had not returned the writ to the Crown office, Toronto. *Scott* v. *Benson*, 1 P. R. 32.

Premature Rule.] — An attachment will not be granted for not obeying the rule to return it, issued on the same day as the writ was returnable. *Regina* v. *Hamilton*, E. T. 2 Vict. See *Regina* v. *Jarvis*, 3 U. C. R. 125, *post* (d).

Retired Sheriff — *Account of Sales.*]—The court will not attach a sheriff more than six months out of office before the rule issued against him, for not giving an account of sales made and moneys received from a defendant on writs against his lands, although the rule directing the sheriff to render such an account had before been granted. *Ladd* v. *Burwell*, E. T. 3 Vict.; *Mott* v. *Gray*, 1 U. C. R. 392, 2 P. R. 183.

Rule—*Stay of Proceedings.*]—A party who has ruled a sheriff to return a writ, and afterwards stayed proceedings for a certain time, cannot after that time proceed by attachment under the rule. *Bergin* v. *Hamilton*, M. T. 2 Vict.

Second Attachment—*Costs.*]—A second attachment against a sheriff for not bringing in the body after a rule on a return of cepi corpus, was refused, until the costs of setting aside a former one for irregularity were paid. *Rex* v. *Ruttan*, 5 O. S. 154.

Where an attachment against a sheriff had been set aside for irregularity with costs, the court delayed issuing another attachment to give time for the payment of these costs. *Ib.*

Title to Goods Questioned.]—It is no sufficient ground against the attachment that there is a question pending before the court respecting the title to the goods. The sheriff should apply to have the time extended for his return. *Stull* v. *McLeod*, 1 U. C. R. 402.

Ven. Ex.]—An attachment may issue for returning "goods on hand" to a ven. ex. *Harper* v. *Powell*, E. T. 2 Vict.

(c) *Relief from.*

Delay—*Trial—Terms—Costs.*]—A rule to return a ca. re. was issued in Trinity Term. In July following the writ appeared to have been in the hands of the plaintiff's agent, and in August the attachment issued. The court discharged it on paying costs up to the time it was returned, although a trial had been lost. *Rex* v. *Sherwood*, 3 O. S. 305.

Offer of Terms—*Payment of Debt and Costs.*] — The plaintiff obtained an order to hold defendant to bail in an action for seduction for £50. Defendant did not put in special bail, and the sheriff was ruled to bring in the body, and an attachment issued against him. The sheriff applied on affidavit to be relieved on payment of the £50 and costs, but the application was refused. Semble, that the plaintiff, though the defendant will not put in bail, may go on with his action against him, and pursue his remedy against the sheriff at the same time. *Regina* v. *Sheriff of Hastings*, 1 C. L. Ch. 230.

Special Circumstances — *Terms — Costs.*]—The court relieved a sheriff on payment of costs, bail being perfected, where he was in contempt for not bringing in the body, although a trial had been lost, it appearing that the sheriff was not in default for the loss of such trial, and it being sworn that the application was made solely on his behalf. *Ward* v. *Skinner*, 3 O. S. 235.

Stage of Proceedings.]—The court will sometimes relieve a sheriff by allowing a return even after motion to bring in his body, on the coroner's return of cepi corpus to the attachment against the sheriff for not returning the writ. *Regina* v. *Jarvis*, 1 U. C. R. 415.

Terms—*Late Compliance.*]—Semble, that when a sheriff returns a writ before the attachment, but not within the time limited by the rule, he can only be relieved upon payment of costs. *Bank of Upper Canada* v. *McFarlane*, 4 U. C. R. 396.

(d) *Setting aside.*

Irregular Return — *Costs.*] — Where a sheriff, on being ruled to return an execution, returned it by post to the Crown office, where it was not filed because the postage was unpaid, and the plaintiff, with notice of these facts, obtained a rule for an attachment on the usual affidavit of search, the Court set the attachment aside, but only on payment of costs, as the sheriff was bound to have paid the postage, to make his return effectual. *Regina* v. *Moodie*, 1 U. C. R. 410.

Premature Rule to Return.] — The sheriff cannot be ruled to return a writ until the return day is past. Where an attachment has been issued on such rule, he should move to set aside the attachment, and not the irregular rule. *Regina* v. *Jarvis*, 3 U. C. R. 123.

See Regina v. *Hamilton*, E. T. 2 Vict., *ante* (*b*).

Second Attachment — *Irregularity.*] — Where a sheriff returned cepi corpus, and the attachment for not bringing in the body was set aside for irregularity, and while it was in existence defendant in the action had been discharged by supersedeas, bail having been put in, but the rule of allowance was not served: —Held, that a second attachment against the sheriff on a second rule to bring in the body, issued eight months after the setting aside of the first attachment and the debtor's discharge, was irregular; and it also was set aside. *Rex* v. *Sheriff of Niagara*, 2 O. S. 126.

Settlement—*Costs.*]—An attachment obtained for not returning a writ after a settlement of the plaintiff's claim before the rule was issued, was set aside, but without costs, as the sheriff should have come in and applied to set aside the rule. *Pelton* v. *Wells*, 5 O. S. 485.

——— *Attempt.*] — Where, after the delivery of a writ against lands to a sheriff, the plaintiff and defendant agreed to compromise, and after more than two years the compromise was not effected, the court set aside a rule for an attachment for not returning the writ. *Crooks* v. *O'Grady*, 1 U. C. R. 400.

(e) *Other Cases.*

Bail Perfected.] — Bail being perfected, the court would not order an attachment for not bringing in the body to stand as a security. *Ward* v. *Skinner*, 3 O. S. 235.

Summons for Attachment — *Service—Name of Sheriff—Original Rule.*]—Semble, that a personal service on the sheriff of the copy of a summons for an attachment, without shewing him the original, is sufficient. The summons should, strictly, name the sheriff who is in default, and not merely call upon the officer, for he may be changed. In order to attach the sheriff for contempt in not obeying the rule, it must appear that the original rule was shewn to him. *Hilton* v. *Macdonell*, 1 C. L. Ch. 207.

3. *Rule to Return Writ.*

Place of Issue.]—A rule to return a fi. fa. cannot issue out of the office of the deputy-clerk of the Crown in an outer district. *Anon.*, Dra. 224.

Tender of Money Made—*Costs.*] — A sheriff sent his clerk to plaintiff's attorney before action brought, saying that certain moneys collected on an execution in favour of plaintiff were ready to be paid: the clerk had not the money with him, nor did he offer to go for it; but the attorney said he would not receive it unless the costs of a rule on the sheriff to return the writ were also paid:— Held, in an action for the sum so levied, that these facts would not sustain a plea of tender. *Thomson* v. *Hamilton*, 5 O. S. 111.

Time of Issue—*Vacation — Costs.*] — A rule to return a writ may issue in vacation; and if the sheriff do not return the writ within the time limited by the rule, the court will impose the costs of the rule upon him, unless under very peculiar circumstances. *McGowan* v. *Gilchrist*, H. T. 7 Vict.

Time for Return.]—The rule to return a writ of fi. fa. should be a six-day rule. *Hilton* v. *Macdonell*, 1 C. L. Ch. 207.

Quære, can rules to return writs, since C. S. U. C. c. 22, s. 276, with a view to proceedings to bring the sheriff into contempt, be properly made four-day rules, as intended by the statute, or six-day rules, as required by rule No. 101, T. T. 1856? Semble, a four-day rule is perfectly regular. Sed quære, the effect of the decision of the court of Queen's bench, in this case, in refusing a rule nisi for an attachment on the sheriff. *Clark* v. *Galbraith*, 10 L. J. 296.

4. *Other Cases.*

Collusive Return to Fi. Fa. Goods—*Heir of Deceased Debtor.*] — Quære, whether the heir, devisee, or other claimant under a deceased debtor, or any person to be prejudiced thereby, may not justly complain if a wrongful or collusive return of nulla bona be made, while there is a sufficiency of goods, and the debtor's lands be seized to satisfy the debt. *Ontario Bank* v. *Kerby*, 16 C. P. 35.

Deputy Sheriff — *Validity of Return.*]— The sheriff is bound by the return to a fi. fa. made by a person who, though deputy sheriff when he signed the sheriff's name to the return, was not deputy until after the writ was returnable. *Baby* v. *Foott*, 4 U. C. R. 349.

Execution against Company—*Sheriff a Director.*]—A writ of fi. fa. against a railway company which was directed to a sheriff before he became a director in the company, was properly directed and returnable by him, and his becoming a director before the return of the writ did not invalidate it. *Smith* v. *Spencer*, 12 C. P 277.

——— *Sheriff the President.*] — A sheriff, being president of a railway company, returned a fi. fa. against the company nulla bona. Upon an action brought against a stockholder founded upon that return: — Held, that the writ and return were not of themselves a nullity on account of the sheriff (being president) executing them, and no application having been made to set the writ or return aside, the objection failed. *Ray* v. *Blair*, 12 C. P. 257.

Extension of Time.]—Where an interpleader order is pending, the court will in its discretion enlarge the time for returning writs in the sheriff's hands. *Walker* v. *Niles*, 3 Ch. Ch. 59.

Fi. Fa.—*Delay—Penalty.*]—The court will not fix a sheriff with the debt merely because he has not returned a fi. fa. until after he has been ruled to do so. *Regina* v. *Jarvis*, 6 U. C. R. 558.

Form of Return—*Surplusage.*]—It is not improper to return to a fi. fa. that the sheriff has made the money *and paid it over to the plaintiff's attorney*, the words in italics being mere surplusage. *Doyle* v. *Bergin*, 5 O. S. 524.

Impertinent Matter.] — Impertinent matter in return to a writ is considered as a contempt. *Jones* v. *Schofield*, Tay. 610.

Incorrect Return.]—As a general rule, the sheriff is bound by his return to a fi. fa., but not after a verdict against him shewing it incorrect. *Houlditch* v. *Corbett*, 6 U. C. R. 549.

Negligence—*Nullity of Judgment.*] — A sheriff sued for negligence in making a return to an execution from the county court can set up as a defence the nullity of the judgment. *Jones* v. *Paxton*, 27 C. L. J. 596.

Nulla Bona—*Irregularity.*]—A return of nulla bona, where there are goods, is only an irregularity to be excepted to by defendant, if the plaintiff is abusing the process of the court by proceeding against the lands before having exhausted the goods. *Ontario Bank* v. *Kerby*, 16 C. P. 35.

Sale of Shares — *Nulla Bona.*] — The sheriff, having sold shares in a steamboat company under execution and received the money, could not return nulla bona on the ground that they were not properly saleable under the writ. *Hewitt* v. *Corbett*, 15 U. C. R. 39.

Statute.]—Remarks upon the embarrassment resulting from the operation of 29 & 30 Vict. c. 42, s. 6. *Gleason* v. *Gleason*, 4 P. R. 117. [The section is repealed by 31 Vict. c. 25 (O.). See R. S. O. 1877 c. 66, s. 14 et seq.; (1897) con. rules 844, 877.]

XII. Service of Papers.

Ca. Re.—*Deputy Sheriff.*]—A writ of ca. re. not bailable must be served by the sheriff or his officer, though the deputy sheriff be a party to the suit. *Ruttan* v. *Ashford*, 3 O. S. 302.

Process Generally.]—The process of the court can only be served by the sheriff or his officers. *Whitehead* v. *Fothergill*, Dra. 200.

Return—*Notice of Motion — Papers not Process.*]—In moving for an order upon a sheriff to return papers sent to him for service, the proper mode is to give notice of motion; but quære, whether a sheriff can be compelled to serve any paper other than process issuing from the courts. *Porter* v. *Gardner*, 1 Ch. Ch. 15.

Subpoenas.] — Semble, that, subpœnas being mesne process under C. L. P. Act, c. 277, no fees can be allowed for mileage or service, if not made by the sheriff. *McLean* v. *Evans*, 3 P. R. 154.

Held, that service of the subpœnas made by one of the defendants could not be allowed unless such defendant held a warrant or written authority from the sheriff to act as his bailiff on the occasion. *Ham* v. *Lasher*, 24 U. C. R. 357.

XIII. Summoning Juries.

Sheriff a Party.]—The court refused to set aside a verdict against a sheriff, upon the ground that the coroner's jury who tried the cause was the same as that returned by the sheriff. *Payne* v. *McLean*, Tay. 325.

It is no objection on the part of the sheriff, in an action against him, that a jury have been summoned by himself and not by the coroner. *Ainslie* v. *Rapelje*, 3 U. C. R. 275.

Sheriff of Toronto.] — Held, that since the Act separating the city of Toronto from York and Peel (24 Vict. c. 53), the sheriff of the county of the city of Toronto, not the high bailiff, is entitled to be selector of, and to ballot for and summon, the jurors for courts held in the city. *In re Sheriff of City of Toronto and Recorder of City of Toronto*, 26 U. C. R. 346.

See ante IX. 5.

XIV. Sureties of Sheriff—Actions against.

1. *Misconduct of Sheriff.*

[*See* R. S. O. 1877 c. 16, ss. 3-25; R. S. O. 1897 c. 17, ss. 11-33.]

Acceptance of Bail—*Irregular Arrest—Estoppel.*] — The declaration was in covenant against the sheriff and his sureties, under 3 Wm. IV. c. 8. The second breach stated, in substance, that, the sheriff having received a ca. re. to arrest one T., a person without any authority from the sheriff arrested T.; that T. went to the sheriff and gave him a bail bond for his appearance, which the sheriff, not knowing but that the warrant authorized the arrest, took. The second plea to this breach stated that the plaintiff having knowledge of this insisted, while the process was current, on the sheriff's making an effectual arrest:—Held, on general demurrer, that this plea was no answer. But held, that this breach did not shew such wilful misconduct by the sheriff as to sustain an action against him and his sureties under 3 Wm. IV. c. 8. Quære, whether under the circumstances the court would not hold the bail precluded from denying an arrest. *McIntosh* v. *Jarvis*, 8 U. C. R. 530.

What is done at the plaintiff's own suggestion cannot be complained of as wilful misconduct. *S. C., ib.* 535.

Error in Judgment—*Priority of Executions.*]—The sureties of a sheriff are not liable under their covenant, given in accordance with 3 Wm. IV. c. 8, as for wilful misconduct by the sheriff, where it consists in a mere error in judgment in deciding bonâ fide upon the priority of executions in his hands. *Bradbury* v. *Adams*, 1 U. C. R. 538.

False Return of Nulla Bona—*Arrest.*] —Where a plaintiff declared, that on a fi. fa. against his goods a sheriff levied and made the debt, but falsely returned nulla bona; by reason of which a ca. sa. was issued and he was arrested and again compelled to pay the money:—Held, that a sufficient damage was shewn to make the sheriff's sureties liable as for the wilful misconduct of the sheriff. *Hexon* v. *Hamilton*, 6 O. S. 115.

——— *Sale—Security.*]—Held, that the return of nulla bona by the sheriff to the plaintiff's writ, under the circumstances, was such wilful misconduct as gave a right of action

under the covenant. *Clandinan* v. *Dickson*, 8 U. C. R. 281.

The sheriff having obtained an interpleader order, it was directed by the court that in the meantime the sheriff should sell the goods claimed, taking satisfactory security for the payment. The sheriff did sell, and took as security an undertaking from persons not resident within the jurisdiction, which he subsequently offered to assign to the now plaintiff, in whose favour the issue had been found, but it was declined. Being pressed by plaintiff to give him the benefit of his writ, he returned nulla bona:—Held, such wilful misconduct as rendered the sheriff and his sureties liable. *S. C.*, 9 U. C. R. 266.

Mistake in Bail Bond.] — A sheriff's sureties are not liable for an accidental slip of himself or his clerk, in reciting in a bail bond that the action is in the county court, when it is in the common pleas. *Nelson* v. *Baby*, 14 U. C. R. 235.

Neglect to Return Writ.] — Neglecting to return a writ is misconduct for which the sureties are responsible. *Nelson* v. *Baby*, 14 U. C. R. 235.

Wrongful Sale.]—It is a good breach of the surety's covenant to shew that the sheriff sold the defendant's property for more than sufficient to satisfy the debt, and afterwards wrongfully sold it at a reduced price, causing a loss to defendant of the difference. *Sanderson* v. *Hamilton*, 1 U. C. R. 460.

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2. *Not Paying over Money.*

Credit Given — *Claim against Sheriff.*]—Semble, that if a sheriff, having an execution against a person to whom he is indebted, agrees with that person to assume the execution and pay it to the plaintiff, and receives from the debtor credit for so much on the debt due from himself, but does not pay over the money to the plaintiff in the writ, this is such conduct as the sureties will be answerable for. *McMartin* v. *Graham*, 2 U. C. R. 365.

De Facto Sheriff—*Receipt Colore Officii.*]—Defendant M., as sheriff, gave a bond, with the other two defendants as sureties, covenanting that M. should pay over all moneys received by virtue of his office as sheriff. On the 19th February, 1859, judgment was given for the Crown against M., on a sci. fa. brought to cancel his appointment, but no writ of discharge ever issued, and his successor was not appointed until the 3rd October, 1859. On the 13th March, 1859, a fi. fa. was placed in M.'s hands, at the suit of the now plaintiff against one K., and on the 29th June, 1859, the said M. received the amount indorsed on the said writ, but never paid it to the plaintiff:—Held, that M.'s sureties were liable, for M. when he received the money was de facto in possession of the office, and the money was received by him colore officii. *Kent* v. *Mercer*, 12 C. P. 30.

Deposit in Lieu of Bail Bond—*Insolvency.*]—Held, that the statutory liability of a sheriff and his sureties under s. 20 of 27 & 28 Vict. c. 28, for not paying over moneys received by the sheriff, only applies to moneys acquired by the sheriff by virtue of his office, for the purpose of being paid over to a party to some legal proceeding. Where, therefore, M. having been arrested on a capias, the plaintiff, in lieu of a bail bond, deposited $850 with the sheriff, and obtained M.'s release, but, the plaintiff having subsequently rendered M. to the sheriff, he was again put in gaol, where he remained until, becoming insolvent, he was discharged by an order in insolvency:—Held, that the plaintiff could not sue the sheriff and his sureties on their statutory covenant for the omission or default of the sheriff in not paying over the above amount to the plaintiff. Quære, as to the effect of the insolvency proceedings on the plaintiff's right to the money. *Kero* v. *Powell*, 25 C. P. 448.

Judgment in Action for False Return—*Bar.*]—Where the plaintiff had recovered judgment against a sheriff for falsely returning nulla bona after he had made the money:—Held, following Sloan v. Creasor, 22 U. C. R. 127, that he could not afterwards sue the sheriff and his sureties on their covenant, for not paying over such money. *Miller* v. *Corbett*, 26 U. C. R. 478.

Occasion of Receipt—*Declaration.*]—In an action on a sheriff's covenant, it is a good breach to state that he was indebted in a named sum for money had and received, without specifying how or on what occasion the money was received. *Commercial Bank* v. *Jarvis*, 6 O. S. 474.

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3. *Pleading and Evidence.*

(a) *Declaration and Proof.*

Covenant — *Profert.*] — In a declaration against the sureties of a sheriff it is not necessary to make any profert of the covenant. *McCrae* v. *Hamilton*, 6 O. S. 159.

Default—*Continuance of Liability.*]—It must be shewn that the default sued for took place during the term for which the sureties were liable under the covenant. *McMartin* v. *Graham*, 2 U. C. R. 365.

False Return—*Proof of Damage.*]—A declaration against a sheriff's surety set out a judgment and execution against the plaintiff in a former suit, and that the sheriff had levied the debt, but falsely returned nulla bona, by means of which return the plaintiff was obliged to pay the debt again:—Held, bad, on general demurrer, in not shewing how the plaintiff was compelled to pay twice, the first payment having discharged the debt. *Davis* v. *Hamilton*, 6 O. S. 111.

Misconduct in Executing Writ—*Judgment.*]—In an action by a defendant in an execution against the sureties of a sheriff on their covenant under the statute, for misconduct of the sheriff in execution of the writ, the declaration need not set forth the judgment in the suit against himself. *Sanderson* v. *Hamilton*, 1 U. C. R. 460.

Non-payment of Money—*Assignment of Breach.*]—It is a sufficient breach of the covenant that the sheriff would pay over moneys received by him, "that he had by virtue of his office received certain moneys which the plaintiffs are entitled to, according to the true intent and meaning of the covenant, to wit, £50, within the four years mentioned thereby, but that he neglected and refused to pay them to

the plaintiffs, although often requested so to do." *Shuter* v. *Graham*, 2 U. C. R. 164.

——— *Continuance of Liability.*]—In covenant against a sheriff's surety, it is sufficient to allege that money was received by the sheriff, as sheriff, without stating "by virtue of his office," but, if the plaintiff omit to aver that the receipt of the money by the sheriff was after the execution of the covenant by the surety, the declaration will be bad on general demurrer. *Davis* v. *Hamilton*. H. T. 4 Vict.; *Summers* v. *Hamilton*, 6 O. S. 113.

——— *Continuance of Liability — Judgment.*]—The declaration set forth the statutory covenant of sheriff and sureties, and alleged that the plaintiff caused a writ of hab. fac. and fi. fa. to be placed in the sheriff's hands, under which he had levied $151, which he had not paid over:—Held, bad, in not alleging any judgment to warrant the fi. fa., but that it was unnecessary to allege that the money was received while the covenant was in force. There being nothing to shew that the covenant sued on was qualified as to time, in the absence of such an allegation, the presumption was in favour of the continuance of liability. *Robertson* v. *Fortune*, 14 C. P. 444.

Non-Return of Fi. Fa.—*Judgment.*]—In an action against a sheriff and his sureties, on their covenant, for not returning a fi. fa. and the money made thereon, it is necessary to set out the judgment. *Bidwell* v. *McLean*, 5 O. S. 690.

See Commercial Bank v. *Jarvis*, 6 O. S. 474, *ante* 2; *Gilchrist* v. *Weller*, 14 C. P. 404, *post* 5.

(b) *Pleas and Proof.*

Abatement.]—In an action against a sheriff and his sureties on their covenant, under 3 Wm. IV. c. 8, it is a good plea in abatement that another action for the same cause is pending against the sheriff alone. *Commercial Bank* v. *Jarvis*, 6 O. S. 257.

Denial of Negligence — *Escape.*]—In covenant against a sheriff's sureties, the breach assigned was, that the sheriff arrested a debtor and afterwards allowed him to escape. Defendants pleaded that the gaol was accidentally destroyed by fire and so the debtor escaped:—Held, bad, for not denying that the fire occurred through the negligence or default of the sheriff, or his deputy. *Corkery* v. *Graham*, 1 U. C. R. 315.

Money not Made — *Return—Conclusiveness.*]—The sureties cannot be relieved after the sheriff's return to a fi. fa. by shewing that the money was not in fact made, even although an issue be raised upon the pleadings whether the money was actually made or not. *Phelp* v. *McDonnell*, 6 O. S. 258.

Prior Execution — *Return—Conclusiveness.*] — The sureties are concluded by the sheriff's return to a writ of fi. fa. of money made, and cannot shew that there was a prior execution which ought to have been first satisfied, and was not. *Shuter* v. *Graham*, 2 U. C. R. 164.

Prior Payment on Covenant—*Amendment.*]—The court refused to relieve a sheriff's surety, after damages had been assessed against him, by allowing him to plead that he had already paid the amount of his covenant under the statute. *Scott* v. *McDonald*, 6 O. S. 238.

(c) *Replication.*

Variance.]—Where, in covenant against a sheriff's surety, the plaintiff set out a judgment on "a promise and undertaking," and a fi. fa. issued thereon, to which the sheriff had made a false return; and the defendant pleaded no fi. fa. on the judgment, to which the plaintiff replied setting out a fi. fa. thereon, which, however, recited a recovery on "promises and undertakings," and defendant demurred specially for the variance:—Held, that the replication was sufficient in this action; and that, as the sheriff could not have made the variance a defence after having acted upon the writ, his surety could not. *Roy* v. *Hamilton*, 6 O. S. 110.

4. *Staying Proceedings.*

[*See* R. S. O. 1877 c. 16, s. 24; R. S. O. 1897 c. 17, s. 32.]

Default Judgment—*Prior Payment on Covenant—Costs.*]—The court will not stay proceedings against a sheriff's surety, who has suffered judgment by default, on the ground that he has already paid the full amount of his liability, unless such payment were after plea pleaded; and the costs of actions brought against the sureties cannot be included in making up the amount for which he is liable under his covenant. *Hixon* v. *Hamilton*, 6 O. S. 155.

Death of Sheriff—*Recovery against Representatives.*]—After the decease of a sheriff, the court will not stay an action against his sureties on their covenant for a default by the sheriff until a recovery shall be had against the sheriff's representatives, nor will they direct that the execution on the judgment against the sureties be indorsed to levy first of the property of the sheriff. *Morris* v. *Graham*, 1 U. C. R. 521.

Executions in Excess of Liability—*Payment.*]—Where several executions had been obtained against the sheriff's sureties, exceeding the amount of their bond, which was in £125 each, they were directed in chambers to pay the amount of their respective liabilities to the sheriff to whom the executions were directed, with the costs, and then, upon application to the court, proceedings against them were stayed. *Sinclair* v. *Baby*, 2 P. R. 117.

Judgment by Mistake—*Substitution of Surety.*]—Where the sheriff had substituted one surety for another under s. 6 of 3 Wm. IV. c. 8, after the notice had been given under 14 & 15 Vict. c. 80, but through negligence a judgment had been entered against the old sureties for subsequent defaults, relief was granted. *Hutchinson* v. *Baby*, 2 P. R. 126.

See, also, *Craig* v. *Ruttan*, 2 L. J. 67.

5. *Other Cases.*

Death of Sheriff—*Deputy's Sureties.*]—Where a sheriff dies, and after his death his deputy makes a false return to a writ, the remedy is against the sureties given by the deputy to the sheriff, and not against the sureties given by the sheriff himself. *McLeod* v. *Boulton*, 2 U. C. R. 44.

——— *Joinder of Representatives.*]—After a sheriff's death his personal representatives cannot be joined with his sureties, in an action on the covenant under 3 Wm. IV. c. 8, for a default by the sheriff in his lifetime. *Boulton* v. *Hamilton*, H. T. 3 Vict.

Executors of Surety—*Action on Judgment—Revivor.*]—Action against executors of W. on a judgment obtained against F. as sheriff, and A. and W. as his sureties. Plea, that no fi. fa. was issued, indorsed to levy of the goods of the sheriff, in the first place, and in default to levy of goods of A. and W., as required by C. S. U. C. c. 38, s. 9. On demurrer:—Held, that the indorsement, if not in accordance with the Act, might be set aside, but the proceedings taken thereunder would not be void; and that there was nothing in the statute preventing an action being brought on the judgment sued on. Quære, whether the plaintiff on a judgment recovered herein would not be bound to indorse his writ to levy first of the goods of the sheriff, &c. As to the sufficiency of the declaration:—Held, that the judgment sued on was joint; that such judgment did not render the defendants therein joint contractors within C. S. U. C. c. 78, s. 6; and that the action could not be maintained against the sureties as survivors, the plaintiff's remedy being by revivor or suggestion under C. S. U. C. c. 22, s. 312. *Gilchrist* v. *Weller*, 14 C. P. 404.

United Counties—*Dissolution of Union—Duration of Covenant—3 Wm. IV. c. 8—4 & 5 Vict. c. 19.*]—See *Thompson* v. *McLean*, 17 U. C. R. 495; *Hutchinson* v. *Baby*, 2 P. R. 126.

XV. Miscellaneous Cases.

Absconding Debtor—*Property in Hands of Third Person—Delivery to Sheriff.*]—See *Buntin* v. *Williams*, 16 P. R. 43.

Action against — *Interpleader—Exemptions.*]—See *In re Gould* v. *Hope*, 21 O. R. 624, 20 A. R. 347.

——— *Malicious Prosecution—Liability for Acts of Bailiff.*]—See *Gordon* v. *Rumble*, 19 A. R. 440. See, also, *Beatty* v. *Rumble*, 21 O. R. 184.

——— *Venue.*]—The court will not change the venue where a sheriff is defendant, on the ground that he cannot attend at the trial. *Brock* v. *McLean*, Tay. 235.

In an action wherein a sheriff is plaintiff or defendant, the opposite party, if he so desire, may have the action tried in the county adjoining that in which the sheriff resides. *Brannen* v. *Jarvis*, 8 P. R. 322.

Benefit of Statute.]—Semble, that the sheriff, though a superior officer to the gaoler, comes equally within the benefit of 24 Geo. II. c. 44. *Fergusson* v. *Adams*, 5 U. C. R. 194.

Bill of Sale by Sheriff—*Filing—Individual Liability—Estoppel.*]—Under 12 Vict. c. 74 and 13 & 14 Vict. c. 62, a bill of sale of an execution debtor's goods executed by a sheriff to a purchaser, whether plaintiff in the execution or not, need not be filed. *Kissock* v. *Jarvis*, 6 C. P. 393.

There can be no estoppel on a sheriff when sued as an individual by reason of a deed executed by him exclusively in his character as a public officer. *S. C.*, 9 C. P. 156.

Conveyance of Prisoners.]—It is the duty of the sheriff of the county in which the city is, and not of the high bailiff of such city, to convey to the penitentiary prisoners sentenced at the recorder's court. *Glass* v. *Wigmore*, 21 U. C. R. 37.

Replevin against Sheriff—*Coroner.*]—Where the sheriff is defendant, a writ of replevin, under 14 & 15 Vict. c. 64, may be directed to the coroners, though the statute does not provide for such a case. *Gilchrist* v. *Conger*, 11 U. C. R. 197.

Sale of Land—*Resale for False Bidding—Sheriff's Deed—Registration of—Nullity.*]—See *Lambe* v. *Armstrong*, 27 S. C. R. 309.

Sale of Lands under Fi. Fa.—*Eviction—Substitution—Discharge of Incumbrance—Quebec Law.*]—See *Vadeboncœur* v. *City of Montreal*, 29 S. C. R. 9; *Deschamps* v. *Bury*, *ib.* 274.

Sheriff's Deed—*Operation.*]—A deed given by a sheriff after a sale of lands under a fi. fa., whereby he conveys all the estate and interest of the debtor, is not to be considered a mere deed of release in the strict sense of the term, so as to be inoperative for want of a previous estate in the grantee. *Doe d. Dissett* v. *McLeod*, 3 U. C. R. 297.

Sheriff—*Writ of Possession—Interference with Execution—Claim to Land—Costs.*]—Upon an attempt to execute a writ of possession under a judgment against G., who was in actual possession, the sheriff was served with a notice by B. claiming the land mentioned in the writ, and informing the sheriff that the house standing thereon was locked and that he (B.) had the key. B.'s claim was as mortgagee upon default in payment of interest:—Semble, that the sheriff's duty, as soon as he received the writ, was to break open the door and give the plaintiff possession. Held, that, as the sheriff was not bound to consider the legality of the claim put forward, he was entitled to an interpleader order. Costs of the sheriff ordered to be paid in the first instance by the party putting him in motion. *Hall* v. *Bowerman*, 19 P. R. 268.

Venditioni Exponas—*Order.*]—See *Lefeuntun* v. *Véronneau*, 22 S. C. R. 203.

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I. Agreements to Run Vessels.

Owner and Charterer—*Breach by Owner —Measure of Damages.*]—By an agreement under seal between plaintiff and defendant, defendant agreed with plaintiff to continue to run his vessel between two ports named, for six weeks, and at the time of the agreement plaintiff paid defendant $2,000, which the latter was to retain, subject to his continuing to run the vessel between such ports for the said period, and up to the 27th July then next, at his own risk and for his own benefit,

and for a further period named, provided that during the six weeks the gross earnings of the vessel should not be less than $75 per running day, with the same proviso as to the further period; and provided, also, that upon plaintiff paying up any deficiency in said rate of $75, at his option, he might require said vessel to continue her running during said period. On the expiration of the first week defendant ceased running his vessel. In an action at plaintiff's suit for breach of his agreement:—Held, that the measure of damages which the plaintiff was entitled to recover was such proportion, being five-sixths of the $2,000, and that he was not obliged to prove his damages, as this was fixed by the agreement in question. *Thompson* v. *Leach*, 18 C. P. 141.

Owner and Railway Company—*Account—Agent.*]—Defendants agreed to advance money to plaintiffs to enable them to procure a steamer which was to run in connection with defendants' railway, and guaranteed them against loss up to a specified sum. The earnings of the vessel were to be shared as provided for; and it was agreed that defendants should name and pay a person to act as purser and keep an account of the receipts and expenditure. He was to be subject to their authority, and to mess with the captain at the plaintiffs' expense:—Held, that defendants were not liable to account to the plaintiffs for moneys received by him and not paid over, for he was accountable to the plaintiffs. *Vancecry* v. *Buffalo and Lake Huron R. W. Co.*, 20 U. C. R. 630.

Rival Owners—*Settlement — Payment—Award.*]—G. and S., the managers of certain steamboats running in opposition, S. having only one boat running and G. two, submitted to arbitration to determine the terms and conditions on which the opposition should be settled and made to cease. The arbitrators awarded that each party should run one boat at different hours, and that S. should pay G. £150. Afterwards G. and some of the owners of the steamer for which S. was agent, entered into an agreement respecting the two boats which by the award were allowed to run, which stated that the parties had agreed to settle the disputes between them as steamboat owners on the following terms, and then specified the hours and days on which the boats were to leave the different ports; but it was expressly declared that this agreement was without prejudice to any demand which G. might have upon S.:—Held, that G.'s right to the £150 awarded was not affected by such agreement. *Gildersleeve* v. *Stewart*, 2 P. R. 114.

II. Carriage of Goods.

1. *Bill of Lading.*

Condition — *Negligence — Liability—Exemption — Public Policy—Construction.*]—A condition in a bill of lading, providing that the shipowners shall not be liable for negligence on the part of the master or mariners, or their other servants or agents, is not contrary to public policy nor prohibited by law in the Province of Quebec. When a bill of lading provided that glass was carried only on condition that the ship and railway companies were not to be liable for any breakage that might occur, whether from negligence, rough handling, or any other cause whatever, and that the owners were to be "exempt from the perils of the seas, and not answerable for damages and losses by collisions, stranding, and all other accidents of navigation, even though the damage and loss from these may be attributable to some wrongful act, fault, neglect, or error in judgment of the pilot, master, mariners, or other servants of the shipowners, nor for breakage or any other damage arising from the nature of the goods shipped," such provisions were held to apply only to loss or damage resulting from acts done during the carriage of the goods, and not to cover damages caused by neglect or improper stowage prior to the commencement of the voyage. *Glengoil S. S. Co.* v. *Pilkington*, *Glengoil S. S. Co.* v. *Ferguson*, 28 S. C. R. 146.

Construction—*Owner—Risk.*]—Where a bill of lading stated that the deck load was to be at the risk of the owners:—Held, that the construction of the bill was for the court, not the jury, and that the risk was to be that of the owners of the goods, not the owner of the vessel. *Merritt* v. *Ives*, M. T. 4 Vict.

Duties of Banks when Holders of, Bills of Lading as Collateral Security.]—See Banks and Banking, III. 2.

Evidence of Shipment—*Owners—Consignees.*]—33 Vict. c. 19, s. 3 (O.), making a bill of lading conclusive evidence of the shipment of goods as represented therein, does not apply to cases between masters of vessels and owners of goods, but only between masters and consignees or indorsees for value. *Allen* v. *Chisholm*, 33 U. C. R. 237.

Indorsement to Pledgee — *Effect of — Condition of Sale—Possession—Property.*]—The Brockville and Ottawa Railway Company, by indenture dated 7th March, 1854, granted, hypothecated, mortgaged, and pledged to the municipalities of Lanark and Renfrew, Elizabethtown, and Brockville, to secure a loan from them, the lands, roads, depots, wharves, stations, terminal and otherwise, tolls, revenues, and all other property of the said company now or during the existence of the said mortgage to be acquired. 20 Vict. c. 144, s. 5, recites these loans, and declares that the said mortgage shall be valid, and that the Chattel Mortgage Act shall not apply to it. A quantity of iron was purchased for the railway, the vendors stipulating at the time of the sale in these words, "these rails to be laid down upon the Brockville and Ottawa Railway Company of Canada," to which the vendees assented. The iron was shipped to the vendees, who indorsed the bills of lading to the municipality of Lanark and Renfrew, who paid the shipping charges, insurance, freight, &c., out of moneys which formed part of the advances secured by the mortgage of the 7th March, 1854, and the municipality having the iron in their possession at Brockville ready to be placed on the railway, it was seized under an execution against the railway company:—Held, that under the indorsement of the bill of lading to the municipality, who obtained possession of the iron by such indorsement, together with the stipulation of the vendors, and the assent thereto of the vendees, the plaintiffs acquired the possession and the property in the said iron. *Counties of Lanark and Renfrew* v. *Cameron*, 9 C. P. 109.

Proviso—*Excess in Cargo—Right of Carrier—Custom.*]—The N. and N. W. Railway Company and the G. W. Railway Company shipped on the plaintiff's vessel a quantity of wheat from Hamilton to Kingston, consigned to the Molsons Bank, in care of the defendants. The bills of lading contained the following provision: "All deficiency in cargo to be paid for by the carrier, and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee." The quantity described in the bills of lading was 15,338 10-60th bushels, while the actual quantity shipped was 15,838 10-60th bushels, and the discrepancy was shewn to have occurred by the omission by mistake to include a draft of 500 bushels, in making up the statement of the quantity shipped. The plaintiff, the carrier, claimed that he was entitled, for his own use, to the 500 bushels so shipped in excess:—Held, that the provision in the bill of lading did not give it to him, and that no custom or usage was proved, giving it such meaning. The defendants, who had accounted for such excess to the shipper, were therefore held not liable to the plaintiff. *Murton* v. *Kingston and Montreal Forwarding Co.*, 32 C. P. 366.

Recital—*Condition of Goods—Estoppel—Pleading.*]—The plaintiff, as assignee of a bill of lading which stated that the goods were shipped in good order and well conditioned, sued for non-delivery of the goods at their destination in the like good order and condition. Defendant pleaded: (1) That the goods were not in good order and well conditioned when shipped. (2) That defendant did deliver them in the like order and condition in which they were shipped:—Held, on demurrer, first plea bad, it being no answer to the breach; second plea good. Semble, that the Bills of Lading Act, 33 Vict. c. 19 (O.), creates no estoppel as to the condition in which goods are when shipped. *Chapman* v. *Zealand*, 24 C. P. 421.

Terms — *Custom of Port — Inconsistency.*]—A trade custom, in order to be binding upon the public generally, must be shewn to be known to all persons whose interests required them to have knowledge of its existence, and, in any case, the terms of a bill of lading, inconsistent with and repugnant to the custom of a port, must prevail against such custom. *Parsons* v. *Hart*, 30 S. C. R. 473.

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2. *Deck Cargoes.*

Usage—*Liability for Loss.*]—Where it is the usage of the trade to carry a deck cargo in inland navigation, and such usage is known to the shipper, he cannot hold the master or owner responsible for a part of the deck cargo swept off in a storm, the bill of lading excepting the dangers of navigation. *Stephens* v. *McDonell*, M. T. 6 Vict.

Whether the shipowner will be liable for loss of deck cargo depends on the usage which prevails in respect to deck loading in the particular navigation. *Paterson* v. *Black*, 5 U. C. R. 481.

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3. *Delivery.*

Notice to Consignee.]—It is sufficient to discharge the owner of a vessel conveying goods from port to port, from liability for non-delivery, to shew that the goods were delivered by the master at the port to which they were consigned, and notice given during the usual business hours to the consignee. *McKay* v. *Lockhart*, 4 O. S. 407.

——— *Inability to Give—Duty—Pleading.*]—To an action for not delivering goods shipped on board defendants' vessel, to be carried to Thunder Bay, on Lake Superior, and there delivered to the plaintiffs or their assigns, the defendants pleaded that they carried the goods to Thunder Bay, and there being no person there on the plaintiffs' behalf to receive the goods, or to whom notice of their arrival could be given, and no means of notifying the plaintiffs, who lived at a distance, the defendants, having no warehouse of their own, and there not being any other warehouse there in which they could store the goods, after waiting a reasonable time, landed the goods at the only wharf there, where it was usual and customary to land goods, and placed them in charge of the person in charge of the wharf, so far as he would consent to take charge of them:—Held, that the plea constituted no defence to the action. Semble, that where, after inquiry, the consignees or indorsees of a bill of lading cannot be found, the duty of the carrier is to retain the goods until they are claimed, or to store them prudently for the owner. *Close* v. *Beatty*, 28 C. P. 470.

Payment to Wharfinger—*Custom—Notice—Pleading.*] — Assumpsit for work and labour, &c., by plaintiffs, who were carriers by water. Plea, setting forth a delivery of the goods carried by plaintiffs to a wharfinger at Toronto, to whom defendants, "according to the custom and usage of forwarders and carriers at Toronto," paid the plaintiffs' claim:—Held, plea bad, for not averring notice of the custom to the plaintiffs. *Torrance* v. *Hayes*, 3 C. P. 274, 2 C. P. 338.

Separation of Consignments — *Owner—Charterer.*]—One H. had chartered defendant's schooner from Goderich to Chicago, and, not being able to fill her, told the plaintiffs' agent that they might send 1,000 barrels of salt by her, paying the same rate as he did. This salt was accordingly shipped at Goderich, and the plaintiffs' agent signed a bill of lading, by which it was to be delivered to P. & Co., Chicago, care of the Chicago, Burlington, and Quincy R. R. Co., Chicago. It had also P. & Co.'s brand on the barrels. There were about 2,400 barrels of salt on board besides, consigned to H. On the voyage about 300 barrels of the deck load, not being part of the plaintiffs' 1,000 barrels, were washed or thrown overboard by stress of weather; and the captain, on arriving, told the freight agent of the railway that it was the plaintiffs' salt which had been thus lost. This freight agent employed one Haines, who was also the shipping clerk for the agents of H., to receive the salt at Chicago, and load it on the cars there; and H., being there, directed about 300 barrels of the plaintiffs' salt to be put with his own, thus making up his own quantity, while the plaintiffs got only 610 barrels: — Held, (1) that the owner of the vessel, and not H., was her owner for the trip, and the contractor with the plaintiffs. (2) That if the master delivered the salt on the dock as H.'s salt, when it was in fact the plaintiffs', defendant would be answerable; that there was some evidence of his having done so; and that a verdict for the plaintiffs, therefore, should not be

disturbed. *Ontario Salt Co.* v. *Larkin*, 36 U. C. R. 486.

Stipulation in Contract—*Authority of Agent—Shortage—Expenses.*]—The plaintiffs having purchased 100 tons of iron from B. L. & Co., in Montreal, it was delivered by B. L. & Co. to McC., the defendant's shipping agent, to be carried on a vessel of defendant (Western Express Line) to Toronto, and a bill of lading was signed by a clerk of McC., which contained the stipulation, "to be landed at Beard's wharf." This delivery was also shewn in evidence apart from this document. The iron was actually shipped on the 8th October, 1872, on the Dromedary, one of the said line, and the freight paid to McC. The iron, less half a ton, arrived at Toronto between nine and ten at night, and was delivered at Toronto, at a wharf some distance from the plaintiffs' wharf, on the 10th October, and was taken away by plaintiffs. The defendant, who was on the vessel, said he sent first to the plaintiffs' wharf, who had no notice of its coming, but found no person there, and no light, and therefore delivered it as stated. He denied any right in McC. to make a special bargain for freight or delivery, and in McC.'s clerk to sign any bill of lading:—Held, that defendant, having accepted the freight paid by reason of the bargain with McC., could not deny McC.'s authority to make it. Held, also, too late to object that the document was signed by McC.'s clerk, and not the master or purser, the master having accepted the cargo represented by it. Held, also, that the consignees might properly sue in assumpsit for non-delivery of the goods, under the circumstances of this case, independently of 33 Vict. c. 19 (O.). Held, also, that, as the contract was to be performed in Ontario, it was governed by the law of Ontario. Held, also, that the plaintiffs were entitled to delivery at their own wharf, and that defendant's excuse for not delivering there was insufficient. Held, also, that defendant was liable for the shortage in weight, though all put on the vessel was delivered, for it was shewn that the full quantity was delivered to McC., and it was not shewn that it had all been put on board the vessel. The plaintiffs, therefore, were held entitled to recover for the shortage, and for the expense of carriage from Milloy's wharf to their own. *Beard* v. *Steele*, 34 U. C. R. 43.

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4. *Deviation.*

Notice to Agent.]—It is no defence for a forwarder deviating from his instructions as to the route, that after the deviation he told the plaintiff's agent he had done so, and no objection was made by the agent. Aliter, if he told the agent of his intention before the deviation, and could shew that the agent had discretion in the matter. *Fowler* v. *Hooker*, 4 U. C. R. 18.

Usage — *Liability.*]—Plaintiff shipped 90 barrels of flour at Port Credit, to be carried to Quebec, in a vessel of defendants capable of carrying 4,500. She proceeded to Toronto, where she took in 400 barrels more; and thence to Oswego, where 2,450 barrels were shipped for Quebec also. She was wrecked near Oswego. Defendant was held liable therefor, such deviation being beyond the established usages of trade. *Wright* v. *Holcombe*, 6 C. P. 531.

See Wallace v. *Swift*, 31 U. C. R. 523.

5. *Detention, Loss, and Non-delivery — Actions for.*

(a) *Generally—Liability of Owners.*

Bill of Lading—*Evidence of Receipt.*]—A box was put on board the defendant's steamer, some of the men employed on the steamer assisting. It was not delivered to any officer of the boat, but as the steamer was starting a bill of lading for it was handed to the purser. No receipt was given, but it was shewn that this was not customary until the return of the steamer. The bill of lading was handed by the purser to the wharfinger at Port Credit, and on the return trip was handed back to him, with the information that the box had not been delivered there:—Held, that the defendant was liable; for the bill of lading was notice that the shipper considered the box as being on board, and it should have been ascertained how the fact was before landing at Port Credit. *Howland* v. *Bethune*, 13 U. C. R. 270.

Defence — *False Invoices.*]—It is no defence to a common carrier by water for not carrying goods safely from a foreign country, or on a claim for general average, that the owner of the goods had prepared false invoices, to defraud the revenue laws of this Province. *Grousette* v. *Ferrie*, M. T. 6 Vict.

Delivery of Goods to Officer—*Reward—Negligence.*] — Where a person delivers a parcel to carry to a person on board a boat not as to a servant of the owners, but to be carried by such person himself, either for reward or otherwise, the person so engaging to carry it is alone responsible for its loss. If, however, the parcel is delivered to the person on board to be carried, not on any private undertaking, but as an officer of the boat, the owners of the boat would be chargeable with the loss, though they were to have no reward for carrying; but then, to establish the liability of the owners, it would be necessary for the jury to find gross negligence in the owners or their servants, or at least a want of that ordinary care which a prudent man would take of his own goods. *McLeod* v. *Eberts*, 7 U. C. R. 244.

Exemption — *Fire—Imperial Statute.*]—Declaration, that the defendant owned the schooner Elizabeth, and plaintiff at his request loaded her with 1,634 barrels of flour, to be shipped from C. (in Canada) to O. (in the United States) to be safely and securely delivered — dangers of navigation excepted. Breach, that the flour was wholly lost through defendant's negligence. Pleas, (1) as to 400 barrels, that a fire happened on board of the schooner, without any wilful negligence of defendant, by which the schooner and flour were destroyed; (2) as to the residue—related the accident as in first plea, and averred that the said residue was rescued in a damaged state and delivered to plaintiff, who accepted it; (3) to the whole declaration—like the first, in substance:—Held, that the Imperial statute 26 Geo. III. c. 86, s. 2, is in force here, and exonerated defendant from his promise to deliver the flour, by reason of the accidental fire. *Torrance* v. *Smith*, 3 C. P. 411.

——— *Fire — Imperial Statute—General Trader.*]—The owners of ships which are engaged as general traders are liable as common carriers, equally with those whose vessels

only carry goods between certain named places. Defendants seeking to avail themselves of the Imperial Act 26 Geo. III. c. 86, exempting ship owners from liability for loss by fire, need not aver that they are British subjects. *Hearle* v. *Ross*, 15 U. C. R. 259.

——— *Rock—Warehousemen.*]—Under a contract to that effect, the plaintiff, during the month of January, 1875, loaded defendants' vessel, which was frozen in the ice in Port Hope harbour, with a cargo of peas, to be carried in the vessel on the opening of navigation to Kingston or Oswego. While the goods were so on board, the vessel struck a sunken rock, unknown to all parties, at the bottom of the harbour, which broke a hole in the vessel's bottom, causing her to sink and damaging the cargo:—Held, assuming the defendants' liability to be that of carriers, that this was a loss caused by the "dangers of navigation," within the meaning of 37 Vict. c. 25, s. 1, so as to exempt the defendants from liability. Quære, whether defendants were responsible as carriers, or as warehousemen. *Clurton* v. *Dickson*, 27 C. P. 170.

——— *Tempest.*]—Where the owner of a vessel undertook by his bill of lading to carry goods, without any exception as to the dangers of navigation or otherwise, and the goods were lost in a violent tempest:—Held, that the owner was liable. *Warren* v. *Wilson*, 6 O. S. 435.

Lumber — *Carriage of—Insurance.*]—A lumberman agreeing to carry lumber for hire at the request of the owner thereof, does not thereby become a common carrier or render himself bound to carry safe at all risks, the act of God or the Queen's enemies excepted; and quære, whether he would be so liable even if it were shewn that he was in the habit of forwarding timber for any one who might choose to employ him to do so. Under such circumstances the party carrying the lumber is not bound, in the absence of any agreement on the point, to make good money paid by the owner for the purpose of insuring the property. *Re Coumbe, Cockburn, and Campbell*, 24 Gr. 539.

Mortgagee in Possession—*Joint Owners—Acquittal of One.*] — The owners of a vessel mortgaged, and in the possession of and navigated by the mortgagee, are not liable for the loss of goods shipped on her; and if they were liable, although sued in case, yet, as their liability would be founded on contract, and not custom, the acquittal of one would discharge the rest. *Wilkes* v. *Flint*, 4 O. S. 19.

See Waddel v. *Macbride*, 7 C. P. 382; *Ontario Salt Co.* v. *Larkin*, 36 U. C. R. 486.

(b) *Generally—Right of Action.*

Consignor — *Action by—Property Passing.*]—Three cases of goods exceeding $40 in value were orally ordered by L. at M. from plaintiff at T., through plaintiff's traveller, and were shipped, consigned to L., and carried by railway, and then by defendant's steamer to M. Two of the cases were received by L., one of which was in a damaged condition. The third case remained on board the vessel, as the purser refused to deliver it up until the freight on these cases, as well as on a variety of other goods consigned to L., was paid. L. refused to pay until he had first an opportunity of checking over the goods. Before the dispute was settled the vessel left, and was subsequently wrecked and this case lost. An arrangement was made between plaintiff and L. whereby plaintiff allowed L. twenty-five per cent. on the value of the two cases received by L. The plaintiff then brought an action against the defendants to recover the twenty-five per cent. so allowed, and the value of the case lost:—Held, that there was an acceptance and receipt of the goods by L. so as to pass the property therein to him; and therefore the action should, under the Mercantile Amendment Act, R. S. O. 1877 c. 116, s. 5, s.-s. 1, have been maintained by him and not by plaintiff. *Friendly* v. *Canada Transit Co.*, 10 O. R. 756.

See Langdon v. *Robertson*, 13 O. R. 497, *post* 8.

(c) *Damages.*

Delay in Delivery—*Measure of Damages—Increased Duty.*]—Defendant, a steamboat owner, agreed to carry certain wheat of the plaintiffs from Oshawa to a port in the United States, by the 17th March, when, as the defendant knew, the reciprocity treaty would expire and an import duty be payable there. He failed to do so, and the plaintiffs, having sent the flour afterwards, were compelled to pay a large duty:—Held, that such duty was recoverable as damages for the breach of contract; and that it was immaterial that prices rose in the States soon after the day fixed for delivery, so that the plaintiffs actually made more, after paying the duty, than they could have done by selling it on that day. *Gibbs* v. *Gildersleeve*, 26 U. C. R. 471.

——— *Measure of Damages—Market Price—Freight.*]—The plaintiff, a dealer in grains, &c., in Canada, consigned to his correspondent in Liverpool, England, a quantity of clover seed, and delivered the same to the agent of the defendant company at Waterford in Ontario, for the purpose of being carried to Liverpool, receiving from such agent the usual bill of lading. Before the seed had left the American frontier for the seaboard the plaintiff desired to change the consignee, and applied to one B., an agent of the company, resident in Toronto, for that purpose, who, on payment of the additional freight, granted a fresh bill of lading, agreeing to carry the seed to London. The change of destination was duly communicated by B. to the agent of the company at Black Rock, whose duty it was to have made the necessary changes in the instrument securing the passage of the goods duty free through the United States, but this he omitted to do, in consequence of which the seed went to Liverpool, so that, instead of being delivered in London on the 12th February, it did not reach there until the 23rd March, too late for the sowing trade, so that the seed had to be sold at a heavy loss:—Held, affirming the judgment in 1 O. R. 47, (1) that the Toronto agent was authorized to make the change in the destination of the seed, and (2) that the defendants were bound to indemnify the plaintiff against the loss sustained by reason of the fall in the market value of the seed, together with the additional sum paid for the freight from Liverpool to London. Semble, that the same rule applies where the goods are

not intended for immediate sale at their place of destination. *Montcith* v. *Merchants' Despatch and Transportation Co.*, 9 A. R. 282.

Delay in Transporting — *Measure of Damages.*]—On the 3rd October the plaintiff chartered the Erie Belle, a vessel owned by the defendants, to carry salt from Goderich to Milwaukee at seventy-five cents a ton. On the 11th October the defendants telegraphed informing the plaintiff that this vessel could not go, and requesting him to accept the services of another. Thereupon some correspondence ensued between the parties, the plaintiff insisting upon the defendants performing their contract, and they finally agreeing to do so. During all this time the plaintiff could have had the salt conveyed by other vessels at 81 per ton, but did not, preferring to wait for the defendants' vessel, which was loaded on the 25th November. Owing, however, to the apprehensions of the captain as to the weather, which deterred him from going out, the vessel was frozen up in Goderich harbour, and it was then impossible to forward the salt otherwise than by rail: and for the purpose of endeavouring to carry out a sale which the plaintiff had made, he did send several tons by rail, and paid his consignee the difference in price for salt which he had to buy in Milwaukee and that agreed to be paid to the plaintiff. The difference in expense in sending by rail and that agreed to be paid to the defendants, amounted to $3.25 per ton:—Held, affirming the judgment in 46 U. C. R. 235, that the plaintiff was not bound, at the peril of losing all claim against the defendants for any additional loss, to have chartered another vessel at $1 per ton, on receipt of the telegram of the 11th October; and that, under the circumstances, the plaintiff was entitled to recover the difference paid to his consignee, as also the excess of freight. *McEwan* v. *McLeod*, 9 A. R. 239.

Injury to Goods—*Nominal Damages.*]—Quære, if in assumpsit on a contract to carry goods safely, with an averment of total loss, and a plea that the goods were carried safely, and no evidence given to shew any goods lost, but only that the cask in which they were packed was injured, and some of the goods damaged—the plaintiff is entitled to recover anything, or more than nominal damages. *Hancock* v. *Bethune*, 3 U. C. R. 47.

Loss of Goods — *Fire—Disobedience of Directions — Measure of Damages.*] — The plaintiffs, living at Southampton, directed goods purchased by them in Montreal to be forwarded to Kingston, to the care of the schooner Regina. The captain of the Regina, being unable to wait for their arrival at Kingston, directed defendants, who were forwarders there, to send them on to Hamilton by the mail steamer, and thence by railway to Sarnia, where he would take them up. Defendants, however, shipped them by a propeller, which was burned with them on board in the river St. Clair. They had been insured to go by the Regina, and the policy was cancelled because of the change. It was held in the Queen's bench that on the contract for not sending as directed defendants were liable only for nominal damages, the loss by fire being remote; and that they were not liable in trover. On appeal: — Held, reversing the judgment, that defendants were liable on the contract for the value of the goods. *Wallace* v. *Swift*, 31 U. C. R. 523, 28 U. C. R. 563.

——— *Measure of Damages—Market Price —Freight.*]—The plaintiffs claimed from defendant damages for the loss of a quantity of wheat and flour, shipped at Southampton, consigned to the plaintiffs in Montreal. On the trial, a bill of lading was put in for 12,949 bushels of wheat, and 96 barrels of flour, received on account of V. and R. of Goderich, to be delivered in like order and condition to L. Y. & Co., at Montreal, dangers of navigation excepted. It further appeared that 12,598 bushels of wheat and 96 barrels of flour were delivered in good condition; 351 bushels of wheat having been destroyed by leakage of the vessel, which the captain and mate swore arose from a storm, but it was proved that the vessel was being pumped out before the wheat was put in, and that the captain complained that she leaked. A letter was also put in from defendant to the plaintiffs, stating a tender of the damaged wheat, and that all except 100 bushels had been stored in Montreal, which quantity had been thrown overboard. The jury were directed that the price of wheat in Montreal at the time of its arrival was the measure of damages, and they found for plaintiff accordingly: — Held, that the price of wheat in Montreal, less the freight, on its arrival there, was the measure of damage in the action, but the difference of the freight being only a few dollars, defendants were left to bring a cross-action for the amount, rather than disturb a just verdict for such a small sum. *Young* v. *Laidlaw*, 12 C. P. 612.

See Friendly v. *Canada Transit Co.*, 10 O. R. 756; *Lord* v. *Davidson*, 13 S. C. R. 166; *Canadian Locomotive Co.* v. *Copeland*, 16 A. R. 322; *Langdon* v. *Robertson*, 13 O. R. 497, *post* 8.

(d) *Evidence.*

Proof of Negligence—*Storm—Onus.*]—Where exception against loss by dangers of navigation is in a bill of lading, and the vessel is in fact lost in a storm, the evidence of negligence or improper conduct must be very clear in order to make the ship owner liable; and, although it lies upon the defendant in the first place to bring himself within the exception, yet this is sufficiently done by shewing a shipwreck from stress of weather; and the plaintiff is then called upon to establish that the loss would not have happened but from negligence or want of skill. *Harnden* v. *Proctor*, 9 U. C. R. 592.

See McKenzie v. *Dancey*, 12 A. R. 317, *post* 7.

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6. *Freight.*

Action for — *Defence—Failure to Complete Carriage—Delay — Acceptance.*] — Defendants shipped about 5,000 bushels of grain on the 4th December, on the plaintiff's vessel at Port Hope, to be carried to Oswego, at eight cents per bushel freight. She was driven by stress of weather into Presque Isle, where she was frozen in, and the plaintiff had to procure a tug to break the ice and tow her out. When on her way to Oswego a leak was discovered, in consequence of which they changed their course and went to Charlotte, at the mouth of the Genesee river. The captain then telegraphed to V., who had shipped the grain for defendants, and who, after communi-

cating with defendants, instructed him to discharge the cargo, which was done. About the 1st April the plaintiff had the vessel ready to take the wheat on, but being a Canadian vessel the American government refused to let him carry it, after it had been unloaded, from one American port to the other. Defendants did not again ask him to take it on, but sold it at Charlotte in April, the price being less than they would have got for it in December, at Oswego, and considerable expense having been incurred by the delay. It was said that, after discharging about 1,200 bushels, the vessel was so lightened that the leak could have been repaired, and she might have gone on; but the jury found that the captain's conduct was justifiable under the circumstances: — Held, that there was evidence to shew an acceptance by defendants of the grain at Charlotte, and that they dispensed with the further carriage of it; and that the plaintiff was entitled therefore to recover freight pro ratâ itineris. Held, also, that the loss caused by the delay, could form no defence to such claim, though it might be the subject of a cross-action. *Wright* v. *Cluxton*, 31 U. C. R. 246.

——— *Defence — Negligence — Benefit — Division Courts.*]—It is an established rule of English law that negligence or breach of duty cannot be set up as a defence in an action for the recovery of freight, where the defendant has derived a part benefit under the contract; but defendant must bring a cross-action for damages. Such rule must be taken to prevail in division courts, notwithstanding the provisions of the Division Courts Act enabling the Judge to decide according to equity and good conscience. A different rule prevails in several States of the neighbouring republic, and is highly convenient as calculated to prevent multiplicity of suits. *Brown* v. *Muckle*, 7 L. J. 298.

Deduction from, for Shortage — *Recovery—Request.*]—The master of the defendant's vessel, on the transhipment, at Kingston, of a cargo of wheat, on its way from Owen Sound to Quebec, into the plaintiff's vessel, gave a receipt to the plaintiff for the lake freight, stating that the defendant's vessel and her owner were thereby held responsible for the wheat, weighing 5,934 bushels, at Quebec. On arrival at Quebec, the cargo was found sixty-eight bushels short. The plaintiff allowed the value of that quantity to the consignee out of the river freight:—Held, that the plaintiff was not entitled to recover the amount deducted as money paid for the defendant, there being no request on the defendant's part express or implied. *Waddle* v. *McIntosh*, 7 C. P. 49.

——— *Set-off.*]—The plaintiffs agreed with defendant to carry 11,622¼ bushels of wheat from Toronto to Kingston, at 3¾ cents per bushel, the bill of lading being signed for the whole amount, and stipulating that the vessel was to deliver the quantity expressed or pay shortage. On the delivery to the consignees 181 bushels short, they, representing defendant, whose interest in the wheat continued, refused to pay freight:—Held, that defendant was liable for the freight, and had no right to deduct his claim for shortage, such claim not being a liquidated demand so as to form the subject of set-off against the freight. *Allen* v. *Chisholm*, 33 U. C. R. 237.

Delay in Transport — *Reduced Rate — Tender—Sale — Demurrage.*] — A schooner, carrying coal late in the autumn of 1883, from S. to K., was damaged by stress of weather. The cargo was unloaded to repair the vessel, and the coal could not be delivered before the spring of 1884. The bill of lading stated the rate of freight to be $1.50 per ton, but, if the coal were not delivered in the season of 1883, the freight was to be at the going rates when the coal was delivered, "the dangers of navigation, fire, and collision excepted." On the arrival of the schooner at K., the master tendered the coal to the consignees, who refused to accept it, disclaiming all title thereto, and contending that the consignor or insurers must take it. The master, too, refused to deliver unless upon payment of a larger rate of freight than that then prevailing. After ten days' delay the coal was, by consent of parties, unloaded on the consignees' wharf, they receiving it as wharfingers. It was afterwards sold by consent of parties, and was purchased on behalf of the consignees:—Held, reversing the decision in 14 O. R. 170, that freight was payable only at the reduced rate, but holding that it was the duty of the defendants to tender the coal to the plaintiffs with a demand for payment of freight at the reduced rate, and that, not having done so, the sale was unauthorized, and the expenses in connection therewith could not be charged against the plaintiffs. The court also held that, for the same reason, the allowance of damages in the nature of demurrage could not be sustained, but that the defendants were entitled to some compensation (fixed at $100) for the delay of the plaintiffs in unloading the vessel, after the duty of unloading was actually undertaken by them. *Canadian Locomotive Co.* v. *Copeland*, 16 A. R. 322.

Lien for — *Detention — Execution.*]—Replevin for railway iron. It appeared that the iron had been imported from England by the Buffalo, Brantford, and Goderich Railway Company, and was shipped from Kingston to Port Colborne, subject to ocean freight and the freight by schooner from Kingston. On arriving at Port Colborne, no one being ready to pay, the iron was left by the master in defendant's charge, to hold subject to the freight, and was piled on a piece of ground belonging to government, where other iron owned by the company was also lying, but separate from this. Afterwards the Buffalo and Lake Huron Railway Company, the plaintiffs, bought out the old company under 19 Vict. c. 21, and arranged certain writs of fi. fa. under which the sheriff seized this and the other iron; and they thereupon demanded the iron in question from defendant, who refused to give it up, claiming the ocean freight, which had in fact been paid, and the freight from Kingston, as well as demurrage, and some other charges not recoverable. The plaintiffs, however, refused to pay anything, and replevied:—Held, that the iron could not be considered as having been delivered to the old railway company, when landed as it was at Port Colborne. (2) That 19 Vict. c. 21 did not take away the right of lien; nor could anything done by the sheriff have that effect. (3) That defendant having a clear right to detain for the freight from Kingston, of which no tender had been made, his right was not prejudiced by having demanded more than was due. *Buffalo and Lake Huron R. W. Co.* v. *Gordon*, 16 U. C. R. 283.

——— *Execution — Time for Payment.*]—A carrier is entitled to a lien on the lumber

carried by him for his freight and charges, which will be defeated, however, by procuring it to be taken in execution at his own suit. A lumberman had a lien on lumber for freight, and C. wrote saying, "I wish you would advise your agents in Quebec to deliver to J. A. Coumbe the sawn stuff on your rafts. I am to pay the river freight, and will thank you to take Coumbe's draft on me at thirty days for river freight, which I will pay:"—Held, that the effect of this letter was not such as to render C. liable to pay the freight until the lumberman had obtained Coumbe's draft for the amount thereof. *Re Coumbe, Cockburn, and Campbell*, 24 Gr. 519.

See The Cargo ex Drake, 5 C. L. T. 471.

Payment to Wharfinger — *Custom — Notice—Agency.*]—Assumpsit on the common counts for work and labour, &c., by plaintiffs, who were common carriers by water. Plea, setting forth a delivery of the goods carried by plaintiff to a wharfinger at T., to whom defendants, according to the custom and usage of forwarders and carriers at T., paid the plaintiffs' claim:—Held, plea bad, for not averring notice of the custom to the plaintiffs. *Torrance* v. *Hayes*, 3 C. P. 274, 2 C. P. 338.

Declaration for work and labour by carriers by water. Plea, that a wharfinger, to whom the goods were delivered by plaintiffs for defendants, was agent of plaintiffs to receive payment, and that they paid him accordingly:—Held, that from the course of dealing between the parties, as set out in the evidence, the wharfinger was such an agent. Held, also, that after delivery of the goods without exacting freight, the wharfinger still continued plaintiffs' agent to demand and receive the freight, till his authority was revoked. *S. C.*, 3 C. P. 278.

Right to Recover — *Negligence — Damages.*]—The plaintiffs had undertaken to carry a cargo of stone in their schooner from C. to P., and had got as far as K., where she was injured by the negligence of defendants' servants in towing her. The stone was forwarded by defendants to P. In an action brought by the plaintiffs for the injury:—Held, that they could not recover as damages any part of the freight, for they might adopt defendants' act, and recover the whole from the consignees. *Stevenson* v. *Calvin*, 25 U. C. R. 102.

Special Rates — *Agent—Payment.*]—One C. entered into agreements with several persons to carry freights for them at certain named prices to be paid to the defendant—not mentioning any particular vessels in which the same were to be carried—and then agreed with the defendant, as part owner and master of vessels in which the plaintiffs had an interest, at rates considerably below the sums agreed upon. The defendant and C. both swore that the arrangement had not been made by C. as agent of the defendant, but for his own benefit:—Held, that the fact of the defendant having rendered an account in his own name and also sued for a portion of the freight, though aided by the other circumstances mentioned in the judgment, was not sufficient to countervail the positive denials of the defendant and C., that the contracts had not been made in behalf of and as agent for the defendant, freight being primâ facie payable to the master of a vessel, and the cargo need not be delivered by him until the freight thereof is paid; although in any other transaction such conduct would have been strong evidence that the defendant was the principal contractor. *Merchants Bank* v. *Graham*, 27 Gr. 524.

See Langdon v. *Robertson*, 13 O. R. 497, *post* 8; *Land* v. *Woodward*, 5 U. C. R. 190; *Lord* v. *Davidson*, 13 S. C. R. 166.

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7. *Shipment.*

Contract—*Discretion.*]—Construction of a contract entered into between the consignor and forwarder of goods, as to the discretion the forwarder may use in the time, mode, and place of shipping the goods. *Fowler* v. *Hooker*, 4 U. C. R. 18.

Failure to Receive—*Readiness to Ship —Evidence—Finding.*]—The plaintiffs alleged and proved an agreement with the defendants that the defendants' vessel should proceed to B. and carry thence to C. a cargo of lumber: that the vessel did not go to B. as agreed: and that in consequence the plaintiffs had to procure another vessel and pay a larger price than that agreed upon by the defendants. The defendants alleged that the reason they did not go for the lumber was, because the plaintiffs did not give them or send to the master of the vessel the necessary orders. The trial Judge found this allegation untrue, and gave judgment for the plaintiffs:—Held, that this court could not reverse the finding upon this question, as the view of the facts presented by the appellants derived no support from the documents in evidence, and the court did not see its way to taking a different view of the evidence from that taken by the Judge at the trial. Held, also, that it was sufficiently proved that the plaintiffs were ready and willing to ship the lumber. *McKenzie* v. *Dancey*, 12 A. R. 317.

False Representations — *Pleading — Knowledge.*]—The plaintiff declared that defendant—by falsely pretending and representing to the plaintiff, that if the plaintiff would go with his vessel to Willie's bay, for the purpose of carrying a load of defendant's wood thence to Cobourg, he would be able, by reason of the depth of water in said bay, to approach within a convenient distance from the shore, and load the wood on his vessel with scows—induced the plaintiff to go with his vessel to the said bay for that purpose, and to incur great expense, &c., whereas the depth of water was not sufficient, &c.:—Held, on motion in arrest of judgment, (1) that the declaration was sufficient, without averring that defendant knew of the want of water. (2) That it sufficiently appeared that defendant induced the plaintiff to go for the wood by his false representation, though no contract to carry was stated. *Harvey* v. *Wallace*, 16 U. C. R. 508.

Mixing Goods—*Recovery for Shortage—Owner.*] — The plaintiff employed S. & H., who owned a warehouse, to purchase and store wheat for him. One G. stored wheat in the same warehouse, and, having a quantity to ship, wrote to defendants offering to load their vessel at certain rates, which offer was accepted, and in the meantime he saw the plaintiff, who agreed to ship 2,000 bushels of his wheat in the same vessel, and gave directions

to S. & H. accordingly. 5,653 bushels of wheat in all were shipped en masse, as it had been stored. H., one of the firm of S. & H., superintending the shipping, and stating to the captain at the time (according to his own evidence) that he was shipping plaintiff's wheat first. The plaintiff's wheat turned out short some 400 bushels:—Held, first, that the plaintiff was entitled to recover, and secondly, that the owners of the vessel were liable. *Waddell* v. *Macbride*, 7 C. P. 382.

See Carvill v. *Schofield*, 9 S. C. R. 370, *post* IV.

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8. *Special Contracts.*

Particular Route—*Condition—Breach—Damages—Special Rates.*]—The plaintiffs ordered goods from K. L. & Co., to be shipped to plaintiffs at Flat Creek, Manitoba, viâ the C. M., &c., Railway, by which line plaintiffs had an arrangement for a special rate of freight, of which they informed K. L. & Co., but did not notify them of the terms thereof. K. L. & Co. delivered the goods to C. & M. at Montreal, as agents of the defendants' line of boats, consigned to the plaintiffs, to be sent by the said line of boats to M., and thence by the C. M. &c., Railway, and informed C. & M. of the fact of plaintiffs having a special rate. The bill of lading which C. & M. gave for the goods was prepared by a clerk of K. L. & Co., who stated that he attached thereto a ticket marked "ship our freight by C. M., &c., Railway; great bonded fast line; low rates." The goods were carried by defendants' vessel, not to M., but to D., and thence by railway to their destination, and were accepted by plaintiffs, but plaintiffs had to pay higher freight than if carried as directed. The goods were carried from D. as quickly, or more quickly, than they would have been from M., and the freight would have been less had it not been for plaintiffs' special agreement with the C. M., &c., R. W. Co. The defendants' conduct in sending the goods by D. was proved to have been wilful:—Held, that there was a valid contract to carry viâ M., and that plaintiffs were entitled to recover for the breach thereof in not carrying therefrom: but held, that the plaintiffs could only recover nominal damages. Held, also, following Friendly v. Canada Transit Co., 10 O. R. 756, that the plaintiffs were the owners of the goods, and entitled to maintain the action. Held, also, that the contract for the low rate could not be assumed to be illegal, as being contrary to public policy, because lower than the ordinary local rates; for, even if it could not be enforced by plaintiffs against the company this would be no defence to the defendant. Held, that the fact of the bill of lading having been made in the Province of Quebec, did not deprive plaintiffs of the benefit of R. S. O. 1877 c. 116, for not only was this not set up by the pleadings, but also it did not appear that the Quebec law was different from that of Ontario: and in the absence of proof it would be assumed to be the same. *Langdon* v. *Robertson*, 13 O. R. 497.

Place of Performance—*Exemption from Liability Beyond the Line.*]—The bill of lading containing the contract in question provided inter alia, "that the machinery in question is to be delivered at the port of Montreal unto the G. T. R. Co., by them to be forwarded upon the conditions above and hereinafter expressed, thence per railway to the station nearest to Ottawa, and at the aforesaid station delivered to order . . freight . . to be paid by the consignees." "That the goods are to be delivered from the ship's deck, when the ship owner's responsibility shall cease. Through goods sent forward by rail are deliverable at the railway station nearest to the place named hereafter." "That any loss, damage, or detention of goods on this through bill of lading for which the carrier is liable must be claimed against the party only in whose possession the goods were when the loss, damage, or detention occurred:"—Held, that the bill of lading shewed no contract on the part of the defendants to deliver at Ottawa, or the nearest station to Ottawa; nor any contract, the breach of which was made in Ontario, because, if there was such a contract in the bill, force and effect could not be given to the stipulation in it that the ship owner's responsibility should cease when the goods were delivered from the ship's deck. And, again, if there was a contract, and its terms expressly exempted the defendants from any and all liability for damage for any loss, &c., arising beyond their line, no damage for a breach in this Province would result to the plaintiff. *Perkins* v. *Mississippi and Dominion Steamship Co.*, 10 P. R. 198.

Risk—*Exemption from Liability.*]—Assumpsit upon an alleged special contract to carry safely for hire certain goods of the plaintiffs, dangers of the navigation excepted. Breach, damage to the goods, through the negligence of defendants and his servants, and not by reason of such dangers. Plea, non assumpsit. Defendant proved that, although he undertook to carry for hire, he so undertook at the plaintiff's risk; and the jury so found:—Held, that the qualification as proved exempted defendant from any damage or liability in respect of the contract. *Stevenson* v. *Gildersleeve*, 2 C. P. 495.

Case for negligence in conveying the plaintiff's goods. Pleas, (2) goods not delivered modo et formâ; (3) that the defendants received the goods on an express agreement that they were not to be in any wise answerable for any loss or damage in the course of the carriage or delivery; and that the damages happened without any negligence or want of care on the part of defendants or their servants. It was proved that the loss was occasioned by collision on the lake, and that the plaintiff by his agreement was subject to the risks of navigation:—Held, that the second plea denied only the delivery; but that on the third plea defendants were entitled to a verdict. *Crafford* v. *Browne*, 11 U. C. R. 96.

See ante 1.

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9. *Stowage.*

Excepted Peril—*Construction of Bill of Lading—Exemption from Liability.*]—A bill of lading acknowledged the receipt on board a steamer of the defendants, in good order and condition, of goods shipped by T. (fresh meat) and contracted to deliver the same in like good order and condition . . loss or damage resulting from sweating . . decay, stowage, . . or from any of the following perils, whether arising from the negligence, default, or error in judgment of the pilot, master, mariners, or other persons in the service

of the ship, or for whose acts the ship owner is liable (or otherwise howsoever) always excepted, namely (setting them out): —Held, that the clause "whether arising from the negligence, default, or error in judgment of the master," &c., covered as well the preceding exceptions as those which followed, and was not limited in its application by the words "from any of the following perils," and the defendants were, therefore, not liable for damage to the goods shipped resulting from improper stowage, which was one of the excepted perils. *Trainor* v. *Black Diamond Steamship Co. of Montreal*, 16 S. C. R. 156.

Knowledge of Shipper.]—The shipper's knowledge of the manner in which his goods are being stowed under a contract of affreightment does not alone excuse ship owners from liability for damages caused through improper or insufficient stowage. *Glengoil S. S. Co.* v. *Pilkington*, *Glengoil S. S. Co.* v. *Ferguson*, 28 S. C. R. 146.

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10. *Transhipment.*

Effect of—*Liability.*]—Fifty barrels of oysters having been shipped at Oswego for Toronto per defendant's vessel the "Junius," and the vessel having been obliged by stress of weather to go to Kingston, whence the goods were transhipped for Toronto by the steamer Oshawa, where they arrived in a damaged condition: — Held, that defendant was the carrier throughout, that is, from Oswego to Toronto via Kingston. *McConkey* v. *Gorric*, 5 C. P. 430.

Expenses of — *How Borne.*]—A. having agreed with B. to carry goods from Liverpool to Hamilton for a certain sum per ton of 40 cubic feet (as per agreement set out in the statement of case) transhipped them at M., a port on the line of route where harbour dues were charged, and sent them by rail from there. Upon an action brought for the harbour dues thus charged and paid by A.:— Held, that the contract being to deliver the goods at so much per ton, B. was entitled to have them delivered at that price free of all expenses. *Edmonstone* v. *Young*, 12 C. P. 437.

Option—*Obligation—Perishable Goods.*]—If a chartered ship be disabled by excepted perils from completing the voyage, the owner does not necessarily lose the benefit of his contract, but may forward the goods by other means to the place of destination and earn the freight. The option to tranship must be exercised within a reasonable time, and if repairs are decided upon, they must be effected with reasonable despatch, or otherwise the owner of the cargo becomes entitled to his goods. Quære, is the ship owner obliged to tranship? If the goods are such as would perish before repairs could be made the ship owner should either tranship, deliver them up, or sell, if the cargo owner does not object, and his duty is the same if a portion of the cargo, severable from the rest, is perishable. And if, in such a case, the goods are sold without the consent of the owner, the latter is entitled to recover from the ship owner the amount they would have been worth to him if he had received them at the port of shipment or at their destination at the time of the breach of duty. *Owen* v. *Outerbridge*, 26 S. C. R. 272.

11. *Warehousing.*

See Claxton v. *Dickson*, 27 C. P. 170, *ante* 5.

See, also, CARRIERS.

III. CARRIAGE OF PASSENGERS.

Assault and Imprisonment of Passenger by Purser.]—See *Emerson* v. *Niagara Navigation Co.*, 2 O. R. 528.

Breach of Contract—*Action in Rem.*]—The plaintiff, for an alleged breach of a contract to carry him from Liverpool to St. Michaels and thence to the Yukon gold fields, took proceedings against the ship and obtained a warrant for her arrest:—Held, that, if the breach alleged were established, the plaintiff was not entitled to a lien on the ship. *Cook* v. *The Manauence*, 6 Ex. C. R. 193.

Conveying Travellers on Sunday.]—See *Regina* v. *Daggett*, *Regina* v. *Fortier*, 1 O. R. 557.

Liability for Luggage.]—See *Dixon* v. *Richelieu Navigation Co.*, 15 A. R. 647.

Negligence in Landing — *Death of Party—Survival of Action.*]—Plaintiff was a passenger by defendant's steamboat from T. to N. Persons in charge of the boat refused to stop at the wharf at N. in the ordinary manner to land passengers, but ran the boat along close to the wharf, when plaintiff jumped ashore while the boat was in motion, and received serious injury by falling. The Judge charged that the defendant was responsible if he did not land the passengers in the ordinary and careful manner, but that the plaintiff could not recover if the injury to him arose from his own want of care in jumping or hurry in landing. The jury having found for defendant, a new trial was ordered, as the verdict was against the weight of evidence; and held, that a steamboat owner who departs from the ordinary and proper method of landing passengers is responsible for the increased danger of the method he adopts. *Cameron* v. *Milloy*, 14 C. P. 340.

After the commencement of the action defendant died, and plaintiff entered a suggestion on the record: — Held, that the action died with defendant, and could not be revived against the executor. *S. C.*, 22 C. P. 331.

See Georgian Bay Transportation Co. v. *Fisher*, 5 A. R. 383.

IV. CHARTERPARTY.

Delay in Taking Cargo—*Time—Condition—Repairs.*]—By a charterparty of 11th December, 1878, it was agreed that plaintiff's vessel then on her way to Shelburne, N. S., should proceed with all possible despatch after her arrival at Shelburne, to St. John, and there load from the charterers a cargo of deals for Liverpool; and if the vessel did not arrive at Shelburne on or before 1st January, 1879, the charterers were to be at liberty to cancel the charterparty. The vessel arrived at Shelburne in December, and sailed at once for St. John. At the entrance of the harbour of St.

John she got upon the rocks and was so badly damaged that it became necessary to put her on the blocks for repairs. Although she was repaired with all possible despatch, she was not ready to receive her cargo until 21st April following, prior to which time, on 26th March, the charterers gave the owners notice that they would not furnish a cargo for her. The owners sued for breach of the charterparty, and on the trial defendants gave evidence, subject to objection, that freights between St. John and Liverpool were usually much higher in winter than in summer; that lumber would depreciate in value by being wintered over at St. John, and also as to the relative value of lumber during the winter and in the spring in the Liverpool market; and it was contended that the time occupied in repairing the damage was unreasonable and had entirely frustrated the object of the voyage. The Judge directed the jury that if the time occupied in getting the vessel off the rocks and repairing her was so long as to put an end, in a commercial sense, to the commercial speculation entered into by the ship owners and charterers, they should find for the defendants. The verdict being for the defendants, the court below made absolute a rule for a new trial: —Held, affirming the judgment, that, as there was no condition precedent in the charter that the ship should be at St. John at any fixed date, and as the time taken in repairing the damage was not unreasonable, and the delay did not entirely frustrate the object of the voyage, the charterers were not justified in refusing to carry out the contract. *Carvill* v. *Schofield*, 9 S. C. R. 370.

Employment of Vessel—*Variance—Loss in Freight.*]—Defendant, in June, 1855, agreed to employ plaintiffs' vessel in carrying lumber from Bear Creek to Montreal, until the close of navigation. After some correspondence between plaintiffs and defendant's agent, she was sent for the last trip to Cleveland, and there took in a load of corn for Montreal, which brought £170 less freight than a cargo of timber from Bear Creek would have done:—Held, that the letters, set out in the case, contained no agreement on defendant's part to pay such difference; but that the plaintiffs' remedy was on the original contract. *McPherson* v. *Cameron*, 15 U. C. R. 48.

Failure to Take Cargo—*Conditions Precedent.*]—Where it was agreed that defendant was to send his vessel to Kincardine to load a cargo of salt for the plaintiffs, provided they would furnish a full cargo, at a stated price, or would guarantee 11½ feet of water in the harbour:—Held, that the stipulations as to a full cargo, and as to the depth of water, were conditions precedent to the performance of the contract, and not merely collateral or independent stipulations; and that, as there was not the depth of water guaranteed, nor such depth of water as would permit the defendant to load a full cargo, the defendant was not liable for not taking the plaintiffs' salt. *Gray* v. *Schooley*, 43 U. C. R. 209.

——— *Delay—Deviation for Repairs.*]—In September, 1882, a vessel sailed from Liverpool, G. B., for Bathurst, N. B., to load lumber under charter. Having sustained damages on the voyage, she was taken to St. John, N. B., for repairs, and when such repairs were completed it was too late in the season to proceed to Bathurst. In an action against the owner for breach of charterparty the jury found that the repairs could have been made at Sidney, C.B., in time to enable the ship to go to Bathurst:—Held, that the jury having pronounced on the questions of fact, and their verdict having been affirmed by the court below, the supreme court could not interfere with the finding. Held, also, that, under such finding, taking the vessel to St. John was such an unnecessary deviation from the voyage as to entitle the charterer to recover. *Cassels* v. *Burns*, 14 S. C. R. 256.

Indemnity—*Exception — Time.*]—Covenant to indemnify "generally and without exception" against a charterparty, which defendants had assumed:—Held, under the circumstances, to mean rather without exception as to the description of claim, than as to time; and that the defendants would be liable only for moneys accruing due under it during their co-partnership, and thence to the expiration of their charter by defendants. *Jones* v. *Walker*, 9 U. C. R. 136.

Liability for Loss of Anchor—*Repair.*]—Plaintiff declared on a charterparty of a vessel, for nonpayment of the sum agreed to be paid, and because defendants did not deliver her up in as good order as when delivered to them, reasonable wear and tear excepted, in this, that an anchor and chain belonging to her had been lost by them and not replaced. Defendants pleaded that the indenture contained a covenant (setting it out) by which it was agreed that all repairs under $20 should be paid by them and deducted from the price of the charterparty, and all over $20 by plaintiff: and they alleged that the costs of said anchor and chain amounted to more than $20, and that they were lost in the lake by tempest, and without any fault of defendants:—Held, on demurrer, no defence, for the loss of the anchor and chain was not within the exception of reasonable wear and tear, nor was the plaintiff bound to replace it as a repair, under the covenant pleaded. *Anglin* v. *Henderson*, 21 U. C. R. 27.

Liability on Contracts of Affreightment—*Owner—Charterer.*]—The chartering of a ship with its company for a particular voyage by a transportation company does not relieve the owners and master from liability upon contracts of affreightment during such voyage, where the exclusive control and navigation of the ship are left with the master, mariners, and other servants of the owners, and the contract has been made with them only. *Glengoil S. S. Co.* v. *Pilkington*, *Glengoil S. S. Co.* v. *Ferguson*, 28 S. C. R. 146.

Liability for Negligence—*Demise or Hiring.*]—The defendant hired a tug from the plaintiff by a contract signed by both parties in these words, "I agree to charter tug . . . to tow two barges from . . for which I agree to pay . . . owner to supply engineer and captain . . . " The tug on the voyage was run on a rock through the negligence of the captain:—Held, not a demise of the tug, but a contract of hiring, and that the defendant was not liable for the damage. *Thompson* v. *Fowler*, 23 O. R. 644.

——— *Demise or Hiring—Conditions—Repairs — Presumption of Fault — Evidence — Damages.*]—The company chartered the tug Beaver from K., by written contract dated

at Quebec, 22nd May, 1895, by which it was agreed that K. should charter the tug Beaver for not less than one month from date, at $45 per day of twenty-four hours. If kept longer than one month the rate to be $40 per day; K. to furnish tug, crew, provisions, oil, &c., and everything necessary except coal and pilots above Montreal; the tug to leave next morning's tide, and to be discharged in Quebec. The company took possession of the tug, put her in charge of their pilot (who assumed the control, employment, and navigation of the vessel), and used the tug for their purposes until 8th July, 1895, when, while still in their possession, the pilot took her, in the daytime, into waters at the foot of the Cornwall rapids, in the river St. Lawrence, where she struck against some submerged hard substance and sank. She was raised a few days afterwards, towed to port, and placed in dock for repairs at Montreal. The orders were to make the necessary repairs, to put the vessel in the same condition as she was immediately before the accident, and on the 30th July K. was notified that the repairs were completed, that the tug would be put out of dock the following day, and he was requested to receive the tug at Montreal. K. answered that the discharge was to be made at Quebec, that she was not in as good condition as when leased, and requested the company to join in a survey, which, however, they declined to do. The survey was made by a naval architect, who reported that, in addition to the repairs already made, it would cost $2,494.90 to restore the vessel to the same conditions as when leased to the company. On the 1st August K. took possession of the tug under protest, and brought the action for the amount of this estimate in addition to the rent accrued, with fees for survey and protest. The company admitted the rent due, and tendered that portion of the claim into court. The superior court rendered judgment for the amount of the tender, dismissing the action as to the remainder of the claim on the ground that K. had been sufficiently compensated by the repairs which had been made by the charterers. The courts of review and Queen's bench increased the verdict to the full sum claimed, $4,989.90, by adding the amount of the surveyor's estimate and the fees:—Held, that the contract between the parties was a contract of lease; that the taking of the vessel, in the daytime, into the waters where she struck was prima facie evidence of negligence on the part of the company; and that, as the company did not adduce evidence sufficient to rebut the presumption of fault existing against them, they were responsible under the Civil Code of Lower Canada for the damages caused to the vessel during the time she was controlled and used by them. Held, further, that the proper estimate of damages, under the circumstances, was the cost of the repairs, which should be assumed to be the measure of depreciation in value occasioned by the accident, and that no substantial error arose from regarding the condition and value of the vessel at the commencement of the lease as that in which she ought to have been discharged. *Collins Bay Rafting and Forwarding Co.* v. *Kaine*, 29 S. C. R. 247.

Loss of Vessel—*Payment of Hire—Pleading.*]—The plaintiff declared in covenant on defendant's agreement for the hire of a steamboat, for which certain sums were to be paid by instalments, and it was provided that defendant should employ an experienced and competent captain, officers, and men, and that if, from any other cause than carelessness or bad management on the part of the master or hands on board, she should be lost during the term, then the instalments should not further be paid; and the plaintiff assigned a breach in the non-payment of £1,250, the instalment due on 1st December, 1842. Defendant pleaded that before that sum became payable, the steamboat, from a certain cause other than such carelessness or bad management, to wit, because she was run into by a schooner, was sunk and wholly lost, of which the plaintiff had notice, and the defendant was thereby discharged:—Held, plea bad, because the accident was not so described as to except the master and hands on board from being the occasion of the loss. *Counter* v. *Hamilton*, 6 O. S. 612.

Refusal to Load—*Delay.*] — Where the plaintiff agreed that his vessel should with all convenient speed sail from Kingston to Dresden or Chatham, to take in a cargo of wheat for Kingston, and she took twenty-seven days to reach Detroit, but the delay arose from no fault of the captain or crew:—Held, that he had fulfilled his contract, and that the defendant was not justified in refusing to load her. *Brown* v. *Lamont*, 30 U. C. R. 392.

The plaintiff's vessel, then at Kingston, was engaged by defendant about the 24th October, 1869, to carry to Kingston a cargo of wheat, part of which was to be shipped at Dresden or Chatham, and the rest at Detroit. She left Kingston about the 27th October, and, owing to stress of weather, but to no fault of the plaintiff, did not reach Detroit until the 15th November, when it seemed improbable that she would have time to ship her cargo and get back to Kingston that season. The defendant on this ground refused to load her, for which the plaintiff sued:—Held, that he could not recover; for defendant was not bound to ship his wheat unless the vessel arrived within a reasonable time, and, under the evidence, he was justified in his refusal. *Brown* v. *Lamont*, 32 U. C. R. 167.

Return of Vessel — *Injury by Fire — "Dangers of Lake."*]—Where a defendant had agreed to return a steamer chartered by him on a certain day in good repair "dangers of the lake excepted":—Held, that damage by an accidental fire, not occasioned by lightning, did not come under the exception. Quære, whether a fire occurring in a steamer from some cause clearly connected with the use of steam, would come within "dangers of the lake." *Larned* v. *McRae*, 1 U. C. R. 99.

See Lord v. *Davidson*, 13 S. C. R. 166; *McEwan* v. *McLeod*, 9 A. R. 239.

V. Collision.

1. *Costs.*

See Ray v. *Landry*, 4 Ex. C. R. 94; *McCallum* v. *Odette, The M. C. Upper*, 7 S. C. R. 36.

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2. *Damages.*

Cost of Repairs.] — The plaintiffs were held entitled to recover for the cost of repairs done by the crew of their vessel. *Sutherland* v. *Bethune*, 10 U. C. R. 388.

——— *Market Value — Apportionment of Loss—Limit of Liability.*]—The owner of a ship wrongfully injured in a collision is entitled to have her fully and completely repaired, and if a ship is totally lost, the owner is entitled to recover her market value at the time of the collision. Where both ships are at fault, the law apportions the loss by obliging each wrongdoer to pay one-half the loss of the other. The provisions of s. 12 of R. S. C. c. 79, limiting the liability of the party at fault in a collision to a sum of $38.92 for each ton of gross tonnage, were applied to this case. *The Heather Bell and The Fastnet*, 3 Ex. C. R. 40.

——— *Towage — Survey—Notice—Demurrage.*]—The plaintiffs were held entitled to recover for the damage arising from the negligent navigation of a tug and her tow, to the amount of the actual cost of the repairs and also the cost of towage to the ship-yard. A survey of the damage done to their vessel was made at the plaintiffs' instance. Notice of intention to have a survey made was only given to one of the defendants, and that by mailing a letter to his address on the day before the survey was made. Notice of the result of the survey was given to the defendants:—Held, that the cost of the survey was not chargeable to the defendants, because reasonable notice was not given to enable them to be present or to be represented thereat. Held, also, that demurrage should not be allowed, inasmuch as the vessel was lying idle at the time of the collision, and that as soon as the plaintiffs obtained a commission for her the vessel went to work, although repairs were not then completed—no loss of earnings occurring by reason of the accident. *Charlton* v. *The Colorado and Byron Trevice*, 3 Ex. C. R. 263.

——— *Wages—Hire of Vessel—Profits.*]—In an action for injury to plaintiff's vessel caused by collision with defendants' steamboat:—Held, that the plaintiff was entitled to recover the cost of repairing his vessel, and for the permanent injury done to her, and the wages of his crew necessarily kept over during the repairs; but not for the sum expended in the hire of another vessel to take her place, nor for the profits which he would have earned by her employment. Semble, that in an action of trover for a vessel, the loss of profits may be recovered. *Brown* v. *Beatty*, 35 U. C. R. 328.

Loss—*Apportionment of.*] — Where both ships were at fault, the damages were ordered to be assessed and divided, each party paying his own costs. *Ray* v. *Landry*, 4 Ex. C. R. 94; *Landry* v. *Ray*, *ib.* 280.

See McCallum v. *Odette*, *The M. C. Upper*, 7 S. C. R. 36; *The Heather Bell and the Fastnet*, 3 Ex. C. R. 40; *Ward* v. *The Yosemite*, 4 Ex. C. R. 241.

Value of Cargo—*Carrier.*]—In a case of collision, the owner of the vessel not in fault may recover from the owner of the other vessel the value of goods on board not owned by him, but in his custody as a carrier. *Irving* v. *Hagerman*, 22 U. C. R. 545.

Value of Vessel—*Mortgage.*]—The mortgagor of a boat destroyed by collision may recover the full value against the owners of the other vessel, without abatement for the mortgage. *Shaw* v. *DeSalaberry Navigation Co. of Montreal*, 18 U. C. R. 541.

3. *Proof of Negligence.*

(a) *Admissibility of Evidence.*

Declarations as to Cause of Collision.]—Held, in an action for collision, that evidence of declarations made by the captain of defendants' vessel, as to the cause of the accident, on the day after it had happened, were inadmissible; but that the verdict should not be interfered with for their reception, as they appeared to have been only repetitions of what was said by him at the time of the accident. *Shaw* v. *DeSalaberry Navigation Co.*, 18 U. C. R. 541.

(b) *Both Vessels at Fault.*

General Rule.]—A defendant is not liable unless the whole fault can be attributed to his vessel. In this case it did not satisfactorily appear that all or any of the blame could be justly so attributed, and a verdict for the plaintiffs was therefore set aside. *Bowen* v. *Ewart*, 2 C. P. 542.

Particular Circumstances.] — On the 27th April, 1880, at Port K., on lake Erie, where vessels go to load timber, staves, &c., and where the Erie Belle, the respondent's vessel, was in the habit of landing and taking passengers, the M. C. Upper, the appellant's vessel, was moored at the west side of the dock, and had her anchor dropped some distance out, in continuation of the direct line of the east end of the wharf, thus bringing her cable directly across the end of the wharf from east to west, and without buoying the same or taking some measure to inform in-coming vessels where it was. The Erie Belle came in to the wharf safely, and in backing out from the wharf she came in contact with the anchor of the M. C. Upper, making a large hole in her bottom. On a petition filed by the owner of the Erie Belle, in the maritime court of Ontario, to recover damages done to his vessel by the schooner M. C. Upper, the Judge found, on the evidence, that both vessels were to blame, and held that each should pay one-half of the damage sustained by the Erie Belle. An appeal by the owner of the M. C. Upper and a cross-appeal by the owner of the Erie Belle, the supreme court of Canada, being equally divided, were dismissed without costs. *McCallum* v. *Odette*, *The M. C. Upper*, 7 S. C. R. 36.

By one of the general rules of the Quebec Yacht Club it is provided that while a race is in progress, boats, other than those in the race, shall keep clear of the competing yachts, and particularly that they shall not round any of the buoys that mark the course of the race. One of the conditions of the Ritchie-Gilmour cup race was, that "the yachts are to be manned entirely by members of the club, and sailed and steered by the owners or part-owners." Two yachts, the B. and the M., started upon a certain race for this cup, the former being in every way qualified to compete, the latter being disqualified from winning the cup by the fact that she was partly manned by a professional crew. It appeared from the evidence that the owner of the B. was under the impression that the M. was really not in the race; but, on the other hand, the M. carried a flag indicating that she was in the race, and in every way acted as if she was a competing yacht. The two boats rounded the

first buoy, the B. leading, and after one or two tacks had been made beating against the wind, they came towards each other close hauled, the M. on the starboard and the B. on the port tack. Under the sailing regulations of the club it was the duty of the B. in such a case to give way, and that of the M. to continue her course. Instead of this, they both continued their courses until the B., when too late, attempted to give way, and then ran into the M., doing her considerable damage. Those on board the B. asserted that they did not see the M. until they were immediately upon her, and that when they did see her they thought she would keep out of their way:—Held, that those in charge of the B. had no right to suppose, under the circumstances preceding the collision, that the M. would act in any other way than a competing yacht would do, and that they were at fault for not giving way to her, as the sailing rules required, quite irrespective of any rights which the M. might have with regard to the race. (2) That the M., not having complied with the conditions of the race with regard to the character of her crew, was wrong in sailing the course at all, and was, therefore, also at fault for the collision. The damages were ordered to be assessed and divided, each party paying his own costs. *Ray* v. *Landry*, 4 Ex. C. R. 94, 280.

See The Heather Bell and The Fastnet, 3 Ex. C. R. 40; *The Porter* v. *Heminger*, 6 Ex. C. R. 208.

(c) *Burden of Proof.*

Conflict of Evidence—*Findings of Trial Judge—Appeal.*]—In this case there was a conflict of testimony on two questions of fact material to the decision of the case, both of which were found by the local Judge in admiralty in favour of the defendants. The burden of proof being in each case upon the plaintiff, and there being evidence to support the findings, the court on appeal declined to interfere with the same. *Inchmaree S.S. Co.* v. *The Astrid*, 6 Ex. C. R. 178, 218.

Defence of Inevitable Accident—*Vessel at Anchor.*]—Where the defence is inevitable accident the plaintiff must begin. The fact of a steamer in motion colliding with a stationary vessel is, itself, primâ facie proof that the accident was caused by the steamer's fault. *The John Owen*, 5 C. L. T. 565.

Drifting Vessel.]—In an action against the owners of a steamboat for damage done to the plaintiffs' bridge, it appeared that the steamer was found drifting against the bridge one morning after a storm, and that the injury complained of was thus caused:—Held, sufficient primâ facie proof of negligence, and that it lay upon defendants to account for the accident. *Cathraqui Bridge Co.* v. *Holcomb*, 21 U. C. R. 273.

Moving Vessel.]—During the early hours of the morning of 12th August, 1891, a collision occurred between the plaintiffs' vessel, lying moored to a dock in Windsor, Ontario, and a barge in tow of a tug. The defendants in their pleadings admitted the collision, but claimed that the plaintiffs' vessel was in fault, since there was no light on board and no stern line out, in consequence of which latter neglect she swung out into the stream as the tug and its tow were passing at a reasonable distance away from her, and that the collision was occasioned thereby. Upon the question as to who should begin:—Held, that the defendants, having admitted that their vessel was moving and the plaintiffs' vessel was at rest, and that a collision had occurred, must begin on the question of liability for the accident, with a right to reply on the question of the amount of damage, if it were necessary to go into that question. *Charlton* v. *The Colorado and Byron Trevice*, 3 Ex. C. R. 263.

Where a collision occurs between a moving vessel and one lying at anchor, the burden of proof is upon the moving vessel to shew that such collision was not attributed to her negligence. The Annot Lyle, 11 P. D. 114, referred to. Where a collision is attributable to negligence on the part of both vessels, the loss must be equally apportioned between them, notwithstanding the fact that the negligence of one contributed to the accident in a greater degree than that of the other. *Ward* v. *The Yosemite*, 4 Ex. C. R. 241.

(d) *Contributory Negligence.*

Facts Shewing.]—A railway company had the control of a swing bridge over a canal. The plaintiff's ship was navigating the canal when trains were about passing and repassing the bridge. Notice was given of the plaintiff's vessel being about to pass, by blowing a horn and hailing, and notice was given by the company's servants by signal that the bridge could not then be swung, and the plaintiff's vessel was injured by running against the bridge while it remained closed:—Held, that, as the requirements of the railway traffic compelled the bridge to be closed, the company were not then bound to open the bridge, and were not liable for such injury, to which the plaintiff had contributed by his own negligence. *Turner* v. *Great Western R. W. Co.*, 6 C. P. 536.

About one-third of a mile above Snow Rapid on the Ottawa, there were two booms owned by the government, extending from the north and south side of and meeting at a capstan in the river, and another boom extended from the capstan down the stream to an island at the head of the rapid, thus dividing the river into two channels, of which the northern one was used by boats, and the other for running logs. The plaintiff had a pocket boom on the south side, into which he was running his logs, and he had nearly closed the government boom above it for this purpose, thus wrongfully obstructing navigation. When defendants' steamer arrived at the south government boom on her way down, it was not sufficiently open, and she struck and broke it about forty feet from the end, by which a number of the plaintiff's logs, gathered above it, escaped and were lost. The plaintiff charged as negligence that the steamer came to within 150 yards of the boom before slackening speed, and then did not reverse her engine. On the other hand, it appeared that the defendants had sent notice to the plaintiff the night before that the boat would be down next day, being the 15th April, and the first trip of the season; that it was the custom to have the boom open for her without waiting, which she could not do safely so near the rapid; that when the

accident happened the plaintiff was controlling the boom with a rope attached, instead of letting it swing open freely; and that until the boat came in sight, half a mile off, the plaintiff did not begin to get the rope ready by putting a chain on it to sink it under the vessel:—Held that there was at least contributory negligence on the plaintiff's part, if indeed the whole blame was not his; and that he could not recover. Quære, as to the correctness of a nonsuit upon one of two counts. *Brace* v. *Union Forwarding Co.*, 32 U. C. R. 43.

The owners of the tug B. H. sued the owners of the steam propeller St. M. for damages occasioned by the tug being run down by the propeller in the river Detroit:—Held, that, as the evidence shewed the master of the tug to have misunderstood the signals of the propeller, and to have directed his vessel on the wrong course when the two were in proximity, the owners of the propeller were not liable. *Robertson* v. *Wigle, The St. Magnus*, 16 S. C. R. 720.

Held, that it was necessary for the defendants to establish such negligence against the plaintiffs as would contribute to the accident, and that, as it was about daylight at the time of its occurrence, and the plaintiffs' vessel was admittedly seen by the tug when more than one hundred feet distant, the tow being at the time three hundred feet behind the tug, and further, since the evidence shewed that the plaintiffs' vessel was properly and securely moored to the dock, the absence of light did not constitute such negligence on the part of the plaintiffs as contributed to the accident. *Charlton* v. *The Colorado and Byron Trerice*, 3 Ex. C. R. 263.

Nature of — *Proof of.*]—Where a ship could with ordinary care, doing the thing that under any circumstances she was bound to do, have avoided the collision, she ought to be held alone to blame for it, although the other ship may have been guilty of some breach of the rules, not contributing to the collision. When the defence of contributory negligence is set up by the defendant in an action for collision, he must shew, with reasonable clearness, not only that the other ship was at fault, but that her fault may have contributed to the collision. *The Porter* v. *Heminger*, 6 Ex. C. R. 154, 208.

Necessity for Negativing—*Ship's Course —Statute.*]—To enable the owner of a vessel lost or injured by collision to recover, it must appear that the accident was not in any way owing to the negligence, misconduct, or want of skill in those navigating such vessel, and that the provisions of 7 Wm. IV. c. 22, as to the course to be taken, have been, as far as applicable, properly observed. *Eberts* v. *Smythe*, 3 U. C. R. 189.

(e) *Lights and Watch.*

Absence of Cause of Collision—*Statute.*]—Action for a collision. It appeared that the plaintiff's steamer had only one of the lights required by statute, which was not seen by defendants, and that the defendants' steamer was properly provided with lights, which were discerned in good time. The Judge stated to the jury that he had no strong impression of the right on either side, and left it to them to say, upon the evidence, who was to blame. A verdict was found for the plaintiff:—Held, that sufficient weight had not been given to the fact that the plaintiff's boat was without the lights required; that the evidence tended to shew the accident to be in some degree attributable to such default; and that a new trial should be had to determine whether it was so or not, for if it were, the act should be conclusive against the plaintiff. *Gildersleeve* v. *Bonter*, 12 U. C. R. 489. See *S. C.*, 13 U. C. R. 492.

Failure to Discern—*Cause—New Trial.*]—In an action for collision between two sailing vessels, owned by the plaintiffs and defendant respectively, it appeared that both vessels were running to windward close-hauled, the plaintiffs' vessel on the starboard, and the defendant's vessel on the port tack. Defendant's vessel, it was admitted, did what was best as soon as the plaintiffs' lights were seen, but the complaint was, that he should have seen them sooner. This was explained by alleging that there was a haze on the water, which the plaintiffs' witnesses denied. The jury were directed that if defendant used every means in his power to avoid a collision after he saw the plaintiffs' lights, he would not be liable, nor if they believed it was simply an accident without negligence on defendant's part:—Held, under the circumstances, not a misdirection; but the jury having found for defendant a new trial was granted, on affidavits shewing the discovery of new evidence to prove that there was no haze at the time. *Downey* v. *Patterson*, 38 U. C. R. 513.

Vessel at Anchor.]—When a vessel is lying at anchor not in a roadstead or fairway, and out of the course of ordinary vessels, she is not bound to keep an anchor watch. *The John Owen*, 5 C. L. T. 565.

——— *Negligence.*]—A wrecking steamer was lying at anchor during the night over a sunken wreck in mid-channel, about a mile and a quarter north from Colchester Reef lighthouse, on lake Erie. The existence of the wreck was well known to mariners sailing upon the lake. While the steamer was working on the wreck, there was no light exhibited at that point by the lighthouse keeper, but it was his custom to put a light there during the absence of the wrecking steamer. Upon the night in question the wrecking steamer had a white light burning on the top of her pilot house. The night was clear with a light breeze from the north-north-east. The Porter, a three-masted sailing vessel of seven hundred and fifty tons burthen, was pursuing her voyage, light, up the lake from Buffalo to Detroit. She had all her canvas set, and was making between two and a half and three and a half miles an hour, when she collided with the wrecking steamer so lying at anchor. It was proved that the wrecking steamer had no anchor watch on deck at the time of the collision, and there was some contradiction upon the evidence as to whether the light on the top of her pilot house was burning brightly at the time. It was also proved that the Porter was slow in answering her helm when light, and that the look-out on the Porter did not see the wrecking steamer until it was too late to so manœuvre the Porter as to avoid a collision:—Held, that the wrecking steamer's light satisfied the regulations. (2) That there was no duty upon the wrecking steamer to

maintain an anchor watch under the circumstances, and that the sailing ship was solely responsible for the collision, which was to be attributed to the negligence of those on board of her. *Heminger* v. *The Porter*, 6 Ex. C. R. 154, 208.

Wrong Lights—*Common Error—Statute—Repeal.*]—It appeared that both vessels were carrying the lights prescribed by 14 & 15 Vict. c. 126, although that Act had been repealed three years before by 22 Vict. c. 19, which required other lights in different places:—Held, that, as the error was common, and neither therefore could have been misled by it, the case must be treated as if both were carrying the proper lights. *Irving* v. *Hagerman*, 22 U. C. R. 545.

See Charlton v. *The Colorado and Byron Trevice*, 3 Ex. C. R. 263; *Inchmaree S.S. Co.* v. *The Astrid*, 6 Ex. C. R. 178, 218.

(f) *Overtaking Vessel.*

Lights — *Rules.*] — Held, following The Franconia, 2 P. D. 8, that where two ships are in such a position, and are on such courses, and are at such distances, that, if it were night, the hinder ship could not see any part of the side lights of the forward ship, and the hinder ship is going faster than the other, the former is to be considered as an overtaking ship within the meaning of rule 20 of the collision rules in force before July, 1897, and must keep out of the way of the latter. No subsequent alteration of the bearing between the two vessels can make the "overtaking" vessel a "crossing" vessel so as to bring her within the operation of rule 16 in force before July, 1897. (See now rule 24 of the collision rules adopted by order of the Queen in council on the 9th February, 1897, and which came into force on the 6th July, 1897.) *Inchmaree S.S. Co.* v. *The Astrid*, 6 Ex. C. R. 178.

(g) *Passing Vessels—Rule of Road.*

Dangerous Channel — *Manœuvres.*] — Two steamers of considerable length and draught, the one entering and the other leaving the port of N., signalled to each other that they both proposed to take the same channel, which, though short, was narrow and tortuous. The one steamer being fully committed to the channel, it was, under art. 18 of R. S. C. c. 79, the duty of the other steamer to remain completely outside until the first had passed completely through. (2) Where a collision appears possible, but as yet easily avoidable, neither vessel has a right to adopt manœuvres which place the other vessel in a position of unnecessary embarrassment or difficulty. The wrongdoer is solely responsible for damages from a consequent collision. *The City of Puebla*, 3 Ex. C. R. 26.

——— *Speed—Manœuvres.*]—If two vessels approach each other in the position of "passing" ships (with a side light of one dead ahead of the other), where unless the course of one or both is changed they will go clear of each other, no statutory rule is imposed, but they are governed by the rules of good seamanship. If one of two "passing" ships acts consistently with good seamanship and the other persists, without good reason, in keeping on the wrong side of the channel; in starboarding her helm when it was seen that the helm of the other was hard to port and the vessels rapidly approaching; and, after signalling that she was going to port, in reversing her engines and thereby turning her bow to starboard, she is to blame for a collision which follows. The non-observance of the statutory rule (art. 18.), that steamships shall slacken speed, or stop, or reverse, if necessary, when approaching another ship, so as to involve the risk of a collision, is not to be considered as a fact contributing to a collision, provided the collision could have been avoided by the impinging vessel by reasonable care exerted up to the time of the collision. Excusable manœuvres executed in "agony of collision" brought about by another vessel, cannot be imputed as contributory negligence on the part of the vessel collided with. The rule that in narrow channels steamships shall, when safe and practicable, keep to the starboard (art. 21), does not override the general rules of navigation. The Leverington, 11 P. D. 117, followed. Judgment in 5 Ex. C. R. 135 affirmed. *The Cuba* v. *McMillan*, 26 S. C. R. 651.

Question of Fact—*Appeal.*]—Action for damages to the plaintiff's schooner by a collision with the defendant's steamer in the Bay of Quinte. In the marine protest by the captain of the schooner, the cause of the collision was alleged to be that the steamer's wheel was put to port when it should have been put to starboard just before the collision. The action was twice tried. The judgment upon the first trial was set aside on the ground that the Judge, by adopting the opinion of assessors, had delegated his judicial functions (19 A. R. 298). The second trial resulted in a verdict for the plaintiff, which was affirmed by the court of appeal. The supreme court of Canada affirmed the judgment of the court of appeal. *Collier* v. *Wright*, 24 S. C. R. 714.

Refusal of Uninjured Vessel to Assist.]—Under the provisions of s. 10 of the Navigation Act, R. S. C. c. 79, where a collision occurs, the ship neglecting to assist is to be deemed to blame for the collision in the absence of a reasonable excuse. Two steamships, the C. and the J., were leaving port together in broad daylight, and a collision occurred between them. The J. received such injury as to be rendered helpless. The C. did not assist or offer to assist, the disabled ship, but proceeded on her voyage. The excuse put forward by the master of the C. was that the J. did not whistle for assistance, although the evidence shewed that he must have been aware of the serious character of the damage sustained by her. He further attempted to justify his failure to assist by the fact that other ships were not far off; but it was shewn that these ships were at anchor and idle:—Held, that the circumstances disclosed no reasonable excuse for failure to assist on the part of the C., and that the consequences of the collision were due to her default. Held, also, that the C. was in fault under art. 16 of s. 2 of the Navigation Act for not keeping out of the way of the J., the latter being on the starboard side of the C. while they were crossing. *Esquimalt and Nanaimo R. W. Co.* v. *The Cutch*, 3 Ex. C. R. 362.

Steamer and Sailing Vessel—*Speed—Change of Course.*]—The J. M., a sailing vessel, was proceeding, in the daytime, out of

Charlottetown harbour, by tacking, according to the usual course of navigation. The T., a steamship, was on her way into the harbour. When the T. was first seen by the J. M., the latter was on a course of W.S.W., standing across the harbour, towards and to the northward and eastward of Rocky Point black buoy. From that time until a collision occurred between the two vessels, they were in full view of each other. While the J. M. was underway on the starboard tack and going about three knots an hour, the T. was coming straight up the harbour at nearly full speed. The latter did not change her course, nor execute any manœuvre, nor make any attempt by slackening speed or stopping or reversing to keep out of the way of the J. M. The bow of the T. struck the J. M. on the starboard side aft of the fore-rigging and nearly amidships, cutting her almost through from her hatches to her keel, and causing her to become a total wreck:—Held, that the T. had infringed the provisions of arts. 20, 22, 23, and 25 of the rules for preventing collisions at sea, and was responsible for the collision. *Brine* v. *The Tiber*, 6 Ex. C. R. 402.

Steering-gear—*Speed—Question of Fact—Appeal.*]—The steamship S. was proceeding up the harbour of Sydney, C. B., at a rate of speed of about eight or nine miles an hour. When entering a channel of the harbour, which was about a mile in width, her steam steering-gear became disabled, and she collided with the J., a sailing vessel lying at anchor in the roadstead, damaging the latter seriously. It was shewn that the master of the S. had not acted as promptly as he might have done in taking steps to avoid the collision when it appeared likely to happen:—Held, by the exchequer court, that, even if the breaking of the steering-gear—the proximate cause of the collision—was an inevitable accident, the rate of speed at which the S. was being propelled, while passing a vessel at anchor in a roadstead such as this, was excessive, and that, in view of this and the further fact that the master of the S. was not prompt in taking measures to avert a collision when he became aware of the accident to his steering-gear, the S. was in fault and liable under art. 18 of s. 2 of R. S. C. c. 79. Held, also, that the provisions of art. 21 of s. 2 of R. S. C. c. 79 should be applied to roadsteads of this character, and that, inasmuch as the S. did not keep to that side of the fairway or mid-channel which lay on her starboard side, she was also at fault under this article, and responsible for the collision which occurred:—Held, by the supreme court of Canada, affirming the decision of the exchequer court, that only a question of fact was involved, and, though it was doubtful if the evidence was sufficient to warrant the finding, the decision was not so clearly wrong as to justify an appellate court in reversing it. *The Santanderino*, 3 Ex. C. R. 378, 23 S. C. R. 145.

See Eberts v. *Smythe*, 3 U. C. R. 189.

(h) *Speed.*

Half-speed—*Want of Fog-horn.*]—In a collision between a steamer and a sailing vessel, in a fog, the steamer was going half-speed. Had she been going dead-slow she might have been stopped in time to prevent the collision:—Held, that the steamer was partly in fault, although the collision was no doubt due to the want of a fog-horn on the sailing vessel. *The Zambesi and the Fanny Dutard*, 3 Ex. C. R. 67.

"Moderate" Speed—*Fog.*]—Two steamers were approaching each other near a public harbour in a dense fog, those in charge having mutually learned their approximate whereabouts by an interchange of blast signals. Notwithstanding such proximity, and the fact that the courses they were steering were such as would have brought them across each other's bows, one of them maintained a speed of from three to four miles an hour, and was running with a tide, at flood force, of one and a half knots per hour; the other was steaming at a speed of about three knots an hour, and no effort was made to alter her course. A collision occurred:—Held, that both vessels had infringed the provisions of arts. 13 and 18 of the Imperial regulations for preventing collisions at sea, and were, therefore, mutually to blame for the collision. (2) The word "moderate" in art. 13 is a relative term, and its construction must depend upon the circumstances of the particular case. The object of this article is not merely that vessels should go at a speed which will lessen the violence of a collision, but also that they should go at a speed which will give as much time as possible for avoiding a collision when another ship suddenly comes into view at a short distance. It is a general principle that speed such that another vessel cannot be avoided after she is seen, is unlawful. The Zadok, 9 P. D. 114, referred to. *The Heather Bell and The Fastnet*, 3 Ex. C. R. 40.

Rules of Navigation—*Deviation from—Special Circumstances.*]—Plaintiff sued defendants for running down his schooner while at anchor, by their steam tug with a raft in tow. It appeared that the schooner, while approaching Presque'isle harbour, which has a narrow channel, in a heavy sea and wind, became unmanageable, and grounded on the north side of the channel, the wind being southerly. Defendants' tug, with the raft, followed soon after, keeping as near the south side of the channel as she could, and going at a fair rate of speed, but the raft was driven against and sunk the schooner, the captain of the tug not knowing that it was aground. The tug could not have stopped without risking the loss of the raft, and it was alleged that the tow rope could not have been shortened, or speed slackened. Plaintiff contended that defendants were liable, having violated art. 16 of s. 2 of the Navigation Act, 27 & 28 Vict. c. 13, which enacts that every steamship, when approaching another ship, so as to involve risk of collision, shall slacken her speed:—Held, that it was a case within art. 19, which directs that in obeying the rules regard shall be had to all dangers of navigation, and to any special circumstances rendering a deviation from them necessary to avoid immediate danger; that it was a question for the jury, under all the circumstances, whether defendants had been guilty of negligence; and that the evidence warranted a verdict in their favour. *Stratton* v. *Chaffey*, 27 U. C. R. 515.

See The Cuba v. *McMillan*, 26 S. C. R. 651.

See, also, *ante* (g).

4. *Other Cases.*

Contravention of Regulations—*Cause of Action—Pleading—Negligence.*]—The declaration set out certain regulations, made in pursuance of the statute, for the proper use of the Welland canal, directing that boats waiting to enter a lock should lie in single tier, and advance in the order in which they lay; and that all vessels approaching a lock, while any other vessel going in a contrary direction was about to enter it, should be stopped and made fast as directed, and remain there until such vessel should have passed, under a penalty named. It then alleged that defendant's vessel, which was waiting to enter a lock with two other vessels, passed them out of its order, and endeavoured to enter first, and while it was so approaching, the plaintiff's steamboat, going in a contrary direction, was in the lock; but defendant did not stop or make fast his vessel, but wrongfully, and in violation of the regulations, went on and endeavoured to enter the lock, whereby it was driven against the plaintiffs' boat, which was forced against the side of the lock and injured:—Held, on demurrer, declaration bad, for the contravention of the regulations formed no cause of action, and no negligence on the defendant's part was alleged. *Jacques* v. *Nicholl*, 25 U. C. R. 402.

Insurance on Steamer — *Loss by Collision in American Waters — Application of Foreign Law.*]—See *Patterson* v. *Continental Ins. Co.*, 18 U. C. R. 9.

New Trial.]—In an action for injuries caused by collision of steamers, the court had set aside a former verdict given for the plaintiff, as being against law and evidence. On a second trial the jury found again for the plaintiff; and at the same assizes the defendant (in the common pleas) obtained a verdict in a cross-action for the damage done to his steamer upon the same occasion. The court, under these circumstances, granted a second new trial in the first case, with costs to abide the event. *Gildersleeve* v. *Bonter*, 13 U. C. R. 492.

See Downey v. *Patterson*, 38 U. C. R. 513.

Parties — *Plaintiff—Mortgagee in Possession.*]—A mortgagee in possession may maintain an action for damages occasioned by a collision. *Ward* v. *The Yosemite*, 4 Ex. C. R. 241.

VI. Demurrage, Detention, and Delay.

Contract of Consignee — *Transhipment—Responsibility.*] — A. & Co. shipped some stone to B., in Ottawa, by vessel, to be transhipped at Prescott, and carried by the O. and P. R. Co. A detention of eleven days took place at Prescott through the railway company, for which A. & Co. brought this action against B., claiming damages for the detention of the vessel. There being no evidence to shew that the consignee undertook more than to receive the stone at Ottawa:—Held, under the circumstances, that he was not responsible for the detention of the vessel. *McGrevy* v. *Rathbone*, 11 C. P. 186.

——— *Transhipment—Responsibility—Implication.*]—Defendant, the owner of wheat, shipped it on board plaintiff's vessel consigned to Montreal. The bill of lading made the freight payable by the consignees, but contained nothing as to the days allowed for unloading or demurrage. The vessel was delayed at Montreal several days, in transferring the wheat into a ship, which the consignees ordered the plaintiff to put it on board of; and the plaintiff, having sued as upon a contract by defendant to receive the wheat from him within a reasonable time after arrival, obtained a verdict:—Held, that such a contract was to be implied from the bill of lading and evidence, and the verdict was upheld. *Kemp* v. *McDougall*, 23 U. C. R. 380.

——— *Unloading—Cause of Delay.*]—P. N. & Co., brokers at Cleveland, shipped a cargo of coal on testator's vessel, consigned to defendant at Toronto, there being no stipulation in the bill of lading as to demurrage. The vessel was detained four and a half days in unloading, for which it was sought to make defendant liable. A verdict having been found for the plaintiff, a new trial was granted, as the facts with regard to defendant having hired the vessel had not been fully brought out. Quære, if it had been satisfactorily proved that defendant had employed the vessel, whether he would have been liable on the merits. Semble, not, for the substantial cause of delay seemed to have been the want of men to discharge the cargo, which it was the testator's duty to provide, the gangs of men being employed in unloading other vessels previously arrived at the wharf to which defendant first sent the said vessel, and defendant had told the master, when he complained of delay, that he might go to another wharf. *Burnett* v. *Conger*, 23 C. P. 590.

Contract of Consignor — *Unloading—Responsibility—Implication.*] — A cargo of wheat was shipped at Chicago by R. and T., "as agents and forwarders, for account and at the risk of whom it may concern," consigned in the margin "Order Bank of Montreal, for Messrs. T. & Co. (the defendants), care of G., J., & Co., Kingston." On arriving at Kingston the vessel was detained by G., J., & Co., as the jury found, an unreasonable time in unloading. Defendants paid the freight, enclosing it in a letter to G., J., & Co., in which they spoke of the grain as theirs:—Held, that there was evidence to shew that T. & Co. were both consignors and consignees, and that in the former capacity, though not in the latter, they were liable for the delay, as upon an implied contract to receive the wheat within a reasonable time. *Barker* v. *Torrance*, 30 U. C. R. 43, 31 U. C. R. 561.

Delay in Loading — *Charterparty—Provisions of—Lay Days.*]—By charterparty the appellants agreed to load the respondent's ship at Montreal, with a cargo of wheat, maize, peas, or rye, "as fast as can be received in fine weather," and ten days' demurrage were agreed on, over and above lay days, at £40 per day. Penalty for non-performance of the agreement was estimated amount of freight. Should ice set in during loading so as to endanger the ship, master to be at liberty to sail with part cargo, and to have leave to fill up at any open port on the way homeward for ship's benefit. The ship was ready to receive cargo on the 15th November, 1880, at eleven a. m., and the appellants began loading at two p. m. on the 16th November. After loading a certain quantity of rye in the forward hold, as it would not be safe to load the ship

down by the head any further, the captain refused to take any more in the forward hold. No other cargo was ready, and, as the appellants would not put the rye anywhere except in the forward hold, the loading stopped. At eight a. m. on the 19th the loading recommenced and continued night and day until six a. m., Sunday the 21st, at which time the vessel sailed, in consequence of ice beginning to set in. When she sailed she was 214½ tons short of a full cargo. If the ice in the canal had not detained the barges having grain to be loaded, the vessel would have been loaded on the night of the 19th. The respondent sued appellants because ship had not received full cargo, and claimed two and a-half days, 15th, 16th, and 17th November, and freight on 214½ tons of cargo not shipped. The appellants contended the delay was not due to them but to the ship in not supplying baggers and sewers to bag the grain; that the time lost on the first week was made up by night work; and that mere delay in loading could not sustain claim for dead freight:—Held, that, as there was evidence that the vessel could have been loaded with a full and complete cargo without night work before she left, had the freighters supplied the cargo as agreed by the charterparty, the appellants were liable for damages, and that the proper measure of the respondent's claim was the amount of agreed freight which would have been earned upon the deficient cargo. That the demurrage days mentioned in the charter were over and above the lay days, and had no reference to the loading of the ship. *Lord* v. *Davidson*, 13 S. C. R. 166.

Express Contract — *Pleading.*] — The count for demurrage can only authorize recovery of a sum of money due on an express contract to pay demurrage eo nomine, not a recovery for demurrage for wrongfully detaining the vessel when nothing had been specified about demurrage. *Brown* v. *Ross*, 5 U. C. R. 469.

Lien for.]—The plaintiffs were owners of the schooner Lady Bagot, in which wheat was brought down lake Erie to the defendant, to be stored for Y. & Co. When it was brought to the defendant, the master of the schooner demanded £22 10s. for freight and £190 for demurrage, and said he had a lien on the wheat to that amount, and wished the defendant to pay it before he would deliver the wheat. This the defendant declined, but it was agreed between them that the defendant should receive the wheat upon giving the following undertaking in writing: "I will retain 750 bushels of wheat, the property of Y. & Co. of Montreal, and part of the cargo of the Lady Bagot, until your claim for demurrage for detention for the schooner Lady Bagot at Sandusky is settled, also covering freight on amount retained." The plaintiffs subsequently demanded the wheat from the defendant, who declined to give it up, saying that he was indemnified by Y. & Co., who refused to pay the plaintiffs' claim. The plaintiffs sued defendants specially upon the case, alleging their right to lien for freight and demurrage, then setting out the agreement, and assigning as a breach of the defendant's duty his delivering the wheat to Y. & Co. without payment of plaintiffs' lien:—Held, that the evidence did not support the count, as defendant still retained the goods. Held, also, that the plaintiffs under the circumstances had no lien for either freight or demurrage. *Land* v. *Woodward*, 5 U. C. R. 190.

There is no maritime lien for freight or demurrage. *The Cargo ex Drake*, 5 C. L. T. 471.

Obstruction of Navigation—*Navigable Stream — Pleading.*] — Declaration, that the plaintiff's vessel was lying almost loaded at the railway wharf at Toronto near the mouth of the river Don, with a tug to tow it into the harbour, and before the loading could be finished and the vessel towed out, the defendant's vessel came into the harbour and near the mouth of the river; that the entrance to the dock where plaintiff's vessel lay was narrow, and not wide enough to allow the plaintiff's vessel to pass defendant's vessel, if the latter entered the mouth of the river before the other went out, of which defendant had notice; and as defendant was about to enter the river plaintiff gave him notice that the river was too narrow, that the plaintiff's vessel was nearly loaded, and defendant would be delayed only a short time if he waited until plaintiff's vessel passed out; that defendant refused to listen to the warning and remonstrance of the plaintiff, and wrongfully and injuriously brought his vessel into the Don, and kept it there three days after plaintiff's vessel was loaded, and the plaintiff, though ready to proceed with his vessel, was kept there that time idle, and was put to great loss and expense; and further, that defendant so delayed the plaintiff unnecessarily, and was during said time unable to load his (defendant's) vessel, and such delay was caused solely by the wilful and unnecessary act of defendant and his servants, from which defendant could reap no advantage:—Held, declaration bad, for want of an averment of the plaintiff's right to use the locus in quo, or that it was a navigable stream, and because it failed to shew an unreasonable obstruction of the stream after the defendant knew that the plaintiff had his vessel loaded, and required him to remove the obstruction to enable him to pass out. *Hall* v. *Ewart*, 33 U. C. R. 491.

Time—*Sunday.*]—Held, that in computing demurrage Sunday is to be reckoned as one of the days to be allowed for. "Days" mean the same as running days, or consecutive days, unless there be some particular custom. If the parties wish to exclude any days from the computation they must be expressed. *Gibbon* v. *Michael's Bay Lumber Co.*, 7 O. R. 746.

See Canadian Locomotive Co. v. *Copeland*, 14 O. R. 170, 16 A. R. 322; *Charlton* v. *The Colorado and Byron Trevice*, 3 Ex. C. R. 263.

VII. Fishing Vessels.

1. *Seal Fisheries—Imperial Statutes.*

Duty of Master — *Log—Penalty—Forfeiture.*]—By s. 1, s.-s. 2, of the Behring Sea Award Act, 1894, any ship employed in a contravention of any of the provisions of the Act shall be forfeited to Her Majesty as if an offence had been committed under s. 103 of the Merchant Shipping Act, 1854. Sub-section 3 enacts that the provisions of the Merchant Shipping Act, 1854, respecting official logs (including the penal clauses), shall apply to any vessel engaged in fur seal fishing. The penal clauses of s. 284 of the last mentioned

Act merely subject the master to a penalty, in the nature of a fine, for not keeping an official log-book, and do not attach any penalty or forfeiture in respect of the ship:—Held, following Churchill v. Crease, 5 Bing. 180, that, inasmuch as the particular provision of the Merchant Shipping Act, 1854, inflicting a fine only upon the master, was in seeming conflict with the general provisions of s.-s. 2 of s. 1 of the Behring Sea Award Act, 1894, imposing forfeiture for contravention of the latter Act, such provision of the last mentioned enactment must be read as expressly excepting a contravention by omission to keep a log. Section 281 of the Merchant Shipping Act, 1854, enacts that every entry in an official log shall be made "as soon as possible" after the occurrence to which it relates:—Held, following Attwood v. Emery, 1 C. B. N. S. 110, that the words "as soon as possible" should be construed to mean "within a reasonable time:" and what is a reasonable time must depend upon the facts governing the particular case in which the question arises. *The Queen* v. *The Beatrice*, 5 Ex. C. R. 9.

Firearms—*Use of—Burden of Proof.*]—A vessel had on board, within prohibited waters, certain skins with holes in them which appeared to have been made by bullets:—Held, that this was sufficient reason for the arrest of the vessel, and that the burden of shewing that firearms had not been used was imposed on such vessel. *The Queen* v. *The Aurora*, 5 Ex. C. R. 372.

Forbidden Waters—*Lawful Intention—Burden of Proof.*]—By s.-s. 5 of s. 1 of the Imperial Act 54 & 55 Vict. c. 19, the Seal Fishery (Behring's Sea) Act, 1891, it is enacted that "if a British ship is found within Behring's Sea having on board thereof fishing or shooting implements or seal skins or bodies of seals, it shall lie on the owner or master of such ship to prove that the ship was not used or employed in contravention of this Act." On 30th August, 1891, the ship Oscar and Hattie, a fully equipped sealer, was seized in Gotzleb Harbour, in Behring Sea, while taking in a supply of water:—Held, by the exchequer court, that the words "used or employed" are not to be confined to the particular use and employment of the ship on the occasion of her seizure, but extend to the whole voyage which she is then prosecuting; and if the ship is found in the condition described in the sub-section, she is liable to forfeiture unless the presumption therein raised can be rebutted by owner or master. Held, by the supreme court of Canada, affirming the judgment of the court below, that when a British ship is found in the prohibited waters of Behring Sea, the burden of proof is upon the owner or master to rebut by positive evidence that the vessel is not there used or employed in contravention of s.-s. 5. Held, also, reversing the judgment of the court below, that there was positive and clear evidence that the Oscar and Hattie was not used or employed at the time of her seizure in contravention of s.-s. 5. *The Queen* v. *The Oscar and Hattie*, 3 Ex. C. R. 241, 23 S. C. R. 396.

——— *Lawful Intention—Burden of Proof—Forfeiture—Fine.*] — Held, that the Seal Fishery (North Pacific) Act, 1893, and the Behring Sea Award Act, 1894, being statutes in pari materiâ, are to be read as one Act. McWilliams v. Adams, 1 Macq. H. L. Cas. 120, referred to. (2) Held, following The Queen v. The Minnie, 4 Ex. C. R. 151, that, under the provisions of the above Acts, the presence of a ship within prohibited waters, fully manned and equipped for sealing, requires the clearest evidence of bona fides to relieve the master from a presumption of an intention on his part to violate the provisions of such Acts; and where the master offers no explanation at all, and such evidence as is produced on behalf of the ship is unsatisfactory, the court may order her condemnation and forfeiture, or may commute the forfeiture into a fine. *The Queen* v. *The Shelby*, 5 Ex. C. R. 1.

——— *Mistake.*] — Under the Behring Sea Award Act, 1894, it is the duty of a master to be quite certain of his position before he attempts to seal. If he is found contravening the Act, it is no excuse to say that he could not ascertain his position by reason of the unfavourable condition of the weather. *The Queen* v. *The Ainoko*, 5 Ex. C. R. 366.

A master takes upon himself the responsibility of his position; and if through error, want of care, or inability to ascertain his true position, he drifts within the zone, and seals there, he thereby commits a breach of the Behring Sea Award Act, 1894. *The Queen* v. *The Beatrice*, 5 Ex. C. R. 378.

——— *Mistake—Evidence—Log.*] —Where the official log of a ship arrested under the Seal Fishery (North Pacific) Act, 1893, did not disclose the position and proceedings of the ship on certain material dates, an independent log kept by the mate was offered in evidence to prove such facts:—Held, not admissible. The Henry Coxon, 3 P. D. 156, referred to. (2) The mere presence of a ship within the prohibited zone, owing to a bonâ fide mistake in the master's calculations, is not a contravention of the Act. *The Queen* v. *The Ainoko*, 4 Ex. C. R. 195.

——— *Order in Council—Judicial Notice—Evidence—Examination of Foreign War Vessel—Protocol.*]—The admiralty court is bound to take judicial notice of the order in council from which the court derives its jurisdiction, issued under the authority of the Act of the Imperial parliament, 56 & 57 Vict. c. 23, the Seal Fishery (North Pacific) Act, 1893. A Russian cruiser, manned by a crew in the pay of the Russian government and in command of an officer of the Russian navy, is a "war vessel" within the meaning of the said order in council, and a protocol of examination of an offending British ship by such cruiser signed by the officer in command is admissible in evidence in proceedings taken in the admiralty court in an action for condemnation under the Seal Fishery (North Pacific) Act, 1893, and is proof of its contents. The ship in question in this case, having been seized within the prohibited waters of the thirty mile zone round the Komandorsky Islands, fully equipped and manned for sealing, not only failed to fulfil the onus cast upon her of proving that she was not used or employed in killing or attempting to kill any seals within the seas specified in the order in council, but the evidence was sufficient to prove that she was guilty of an infraction of the statute and order in council. Judgment in 4 Ex. C. R.

151 affirmed. *The Minnie* v. *The Queen*, 23 S. C. R. 478.

Illegal Sealing—*Unintentional Offence—Nominal Fine.*]—Where the owner of a ship employs a competent master, and furnishes him with proper instruments, and the master uses due diligence, but, for some unforeseen cause, against which no precaution reasonably necessary to be taken can guard, is found sealing where sealing is forbidden, the court may properly exercise its discretion and impose a nominal fine only. *The Queen* v. *The Otto*, 6 Ex. C. R. 188.

Infraction by Foreigner.] — The punitive provisions of the Behring Sea Award Act, 1894, operate against a ship guilty of an infraction of the Act, whether she is "employed" at the time of such infraction by a British subject or a foreigner. *The Queen* v. *The Viva*, 5 Ex. C. R. 360.

Use of Evidence—*Costs.*]—Article 6 of schedule 1 of the Behring Sea Award Act, 1894 (57 Vict. c. 2 (Imp.)), prohibits the use of nets, firearms, and explosives in the fur seal fishing in certain waters mentioned in the Act, during the season therein prescribed. A vessel left the port of Victoria, B.C., on the 11th January, 1895, to prosecute a fur sealing voyage in the North Pacific, her equipment including a supply of firearms and explosives. The Behring Sea Award Act, 1894, came into force on the 23rd April, 1894. On the 18th June of that year, the master of such vessel received notice of the Act, with instructions to proceed to Copper Island for the purpose of getting his firearms sealed up. On the 27th July the vessel reported to the American custom house officer there, who informed the master that he had no authority to seal up the arms and ammunition, but, after making a manifest of the things on board, gave the master a clearance permitting his vessel to proceed to Behring Sea for the purpose of hunting for seals. The manifest shewed that the vessel had on board a certain number and certain kinds of loaded and empty cartridge shells. On the 2nd September the vessel was boarded by officers of the H.M.S. Rush, and afterwards arrested by them and taken to Ounalaska, and there handed over to H.M.S. Pheasant as being guilty of an infraction of article 6 of the Behring Sea Award Act, 1894. The grounds upon which the arrest was based were: (1) the fact that among the 336 sealskins on board, one had a hole in it which might have been caused by a bullet or buckshot; and (2) that there was a less number, as well as another kind, of shells found on board the vessel when arrested than appeared in the manifest. At the trial it was not established beyond a doubt that the hole in the skin in question was produced by a gun shot, or, if so, by one fired by those on board the defendant's vessel. On the other hand, it could be reasonably inferred from the evidence that the number and the kinds of shells on board the vessel were incorrectly stated in the manifest. Although the evidence disclosed doubts as to a breach of the provisions of the Act, which the court resolved in favour of the vessel, yet it was held that the circumstances created sufficient suspicion to warrant the arrest, and no costs were given against the Crown in dismissing the petition. *The Queen* v. *The E. B. Marvin*, 4 Ex. C. R. 453.

Wrongful Arrest—*Damages—Interest.*] —Where a merchant vessel was seized by one of Her Majesty's ships, acting under powers conferred in that behalf by the Behring Sea Award Act, 1894, and such vessel was found to be innocent of any offence against the said Act, the court awarded damages for the wrongful seizure and detention, together with interest upon the ascertained amount of such damages. *The Queen* v. *The Beatrice*, 5 Ex. C. R. 160.

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2. *Other Cases.*

Foreign Vessel — *Three Mile Limit — "Fishing"—Forfeiture.*] — Where fish had been enclosed in a seine more than three marine miles from the coast of Nova Scotia, and the seine pursed up and secured to a foreign vessel, and the vessel was afterwards seized with the seine still so attached within the three mile limit, her crew being then engaged in the act of bailing the fish out of the seine: —Held, affirming the decision in 5 Ex. C. R. 164, that the vessel when so seized was "fishing" in violation of the convention of 1818 between Great Britain and the United States of America and of the Imperial Act 59 Geo. III. c. 38, and R. S. C. c. 94, and consequently liable with the cargo, tackle, rigging, apparel, furniture, and stores to be condemned and forfeited. *The Frederick Gerring Jr.* v. *The Queen*, 27 S. C. R. 271.

——— *Three Mile Limit—Inland Waters —Forfeiture.*]—On the 21st April, 1894, the American steamer Grace was seized on Lake Erie by a Canadian government cruiser for an alleged infraction of R. S. C. c. 94, intituled "An Act respecting Fishing by Foreign Vessels." In an action for condemnation it was found by the court that the vessel, when seized, was more than three marine miles from the shore, but clearly north of the international boundary line, between Canada and the United States of America: — Held, that the three mile limit to the maritime territory of a State, as fixed by the rules of international law, does not apply to the waters of the great lakes between Canada and the United States, and the territorial limits of both countries are determined by the international boundary line. (2) An American vessel fishing without a license upon the Canadian side of the boundary line on one of the great lakes is subject to seizure and condemnation under the provisions of R. S. C. c. 94. *The Grace*, 4 Ex. C. R. 283.

——— *Three Mile Limit—License—Burden of Proof.*]—By s. 3 of R. S. C. c. 94 (an Act respecting Fishing by Foreign Vessels) fishing by a foreign vessel in certain British waters within three marine miles of the coasts of Canada, without a license from the governor in council, renders such vessel liable to forfeiture. Where the Crown alleged in its petition, in an action in rem for condemnation and forfeiture, that a certain vessel had violated the provisions of the Act by fishing in prohibited waters without a license, but offered no evidence in support of such allegation:—Held, that the burden of proving the license to fish was upon the defendant. *The Queen* v. *The Henry L. Phillips*, 4 Ex. C. R. 419. Affirmed, 25 S. C. R. 691.

VIII. Lien on Ship.

1. *For Necessaries.*

Foreign Ship in Foreign Port — *Owners Domiciled out of Canada—Jurisdiction.*]—The exchequer court of Canada, under the provisions of 24 Vict. c. 10, s. 5, may entertain a suit against a foreign ship within its jurisdiction for necessaries supplied to such in a foreign port, not being the place where such ship is registered, and when the owners of the ship are not domiciled in Canada. Cory v. The Mecca, [1895] P. 95, followed. Under the principles of international law, the courts of every country are competent, and ought not to refuse, to adjudicate upon suits coming before them between foreigners. This doctrine applies with especial force to commercial matters; and is declared in the provisions of art. 14, C. C. P. (L. C.) and arts. 27, 28, and 29, C. C. (L. C.). *Coorty* v. *The George L. Caldwell*, 6 Ex. C. R. 196.

Foreign Ship in Home Port.]—In the absence of a contract express or implied to build, equip, or repair within the meaning of s. 4 of 24 Vict. c. 10 (Imp.), the court cannot entertain a claim for necessaries against a foreign vessel, when such necessaries are supplied in the home port of the ship where the owner resides. *Ship Owners' Dry Dock Co.* v. *The Flora*, 6 Ex. C. R. 135.

——— *Payment.*]—A claim for money advanced to a foreign ship to pay for repairs, equipment, and outfitting is a claim for necessaries, but where the work is done in the home port of the ship, the court has no jurisdiction, the same coming within the exception contained in s. 5 of the Admiralty Court Act, 1861 (24 Vict. c. 10 (Imp.)) Payment by the agent of the owner satisfies and discharges any lien in respect to the original claim of workmen or supply men to the extent of such payments. *Williams* v. *The Flora*, 6 Ex. C. R. 137.

2. *For Negligence.*

Personal Injury Done by Ship—*Jurisdiction — Fellow-workmen — Hospital Expenses.*]—An engineer while working on a steamer was injured by the breaking of a stop valve:—Held, that the admiralty court has jurisdiction to try a suit for damages done by a ship to a person. Adequacy of construction is to be determined by the generally approved use at the time of manufacture, and the absence of the best possible construction is not of itself conclusive evidence of negligence. The officers of the ship as well as the men are fellow-workmen, and for the negligence of the one the steamer is not liable to the other. Improving machinery after an accident is not evidence of insufficiency of its former state. A seaman shipped in Canada injured in Canada has no claim for hospital expenses under the Merchants Shipping Act, 1894. A plaintiff's claim is confined to the particulars indorsed on the summons. *Wyman* v. *The Duart Castle*, 6 Ex. C. R. 387.

3. *For Other Matters.*

Collusive Sale to Defeat Lien.] — A schooner was in tow of a tug, and through the fault of the latter collided with another vessel and was sunk. To defeat the lien for damage for which proceedings had been taken in a foreign court, the owner of the tug allowed the engineer's wages to run in arrear, and thus procured a petition to be filed in the maritime court and the schooner to be sold to a nominal purchaser:—Held, that the proceedings were an abuse of the process of the court. Held, also, that petition was the proper mode of proceeding. *The Jerome*, 6 C. L. T. 263.

Master for Wages and Disbursements.]—See *post* IX. 1.

Salvors for Services.]—See *post* XIV. 3.

Seamen for Wages and Expenses.]—See *post* XV.

Towage — *Personal Credit — Waiver by Taking Security.*]—The fact that towing was on the personal credit of the owner of a scow:—Held, not sufficient to relieve the scow for the work done. Held, also, that taking an order for the amount of the claim on a third person who did not accept or pay was not a waiver of petitioner's lien. *The Oscar Wilde*, 5 C. L. T. 335.

Unregistered Equitable Interests.] — See *post* XIII.

Vendor for Purchase Money.] — See *post* XIII.

IX. Master.

1. *Wages and Disbursements.*

Damages as Wages — *Jurisdiction — Vessel Registered in Ontario*] — The restriction of the jurisdiction in the case of master's wages to claims over £50 does not apply to masters of vessels registered in Ontario. Damages for wrongful dismissal may be sued for and recovered as wages. *The W. B. Hall*, 8 C. L. T. Occ. N. 169.

Lien for—*Detention.*]—The master has no right against the owners to detain the ship or freight for wages, or any disbursements made by him on account of the ship. *Land* v. *Malden*, 5 U. C. R. 309.

——— *Necessaries—Mortgage — Priorities —Power to Borrow.*]—The master of a ship registered at Windsor, Ontario, instituted an action for wages, or damages in the nature of wages, for alleged wrongful dismissal, for disbursements, and liabilities incurred by him for necessaries supplied and repairs done to the ship by persons in Ontario. The owner did not appear, but the claim was opposed by mortgagees of the ship, who intervened. During the time these liabilities were incurred by the master, his means of communication with the owner were limited:—Held, that the master was entitled to a maritime lien on the ship for his wages, and, as the power of communication by the master with the owner was not correspondent with the existing necessity, he was entitled to recover for disbursements properly made by him and for liabilities properly incurred by him on account of the ship. (2) That the master's claim for his wages and for disbursements were to be preferred to the mortgage. (3) That as to

liabilities properly incurred but not paid, the master's claims were also to be preferred to the mortgage, but vouchers of their due payment must be filed by the master with the registrar before the master could receive out of court sums awarded in respect of such claims. *Symes* v. *The City of Windsor*, 4 Ex. C. R. 362.

See S. C., 5 Ex. C. R. 223, *post* XIX.

——— *Necessaries—Mortgage — Priorities — Power to Borrow — Home Port.*]—The object of 56 Vict. c. 24 (D.), intituled An Act to amend "The Inland Waters Seamen's Act," is to give the master of a ship navigating the inland waters of Canada above the harbour of Quebec a lien for disbursements made and liabilities incurred by him on account of the ship in all matters in which, prior to the case of The Sara, 14 App. Cas. 209, it had been held by the courts in England that the master of a ship had such a lien for his disbursements. (2) The master's lien for disbursements and liabilities of this character is preferred to the claim of a mortgagee taking possession after such disbursements had been made and such liabilities incurred. (3) The rule that the master has authority to borrow money on the ship and to pledge the owner's credit whenever the power of communication is not correspondent with the existing necessity, applies as well to a case where a vessel, subject to the Inland Waters Seamen's Act, is in a home port as where she is in a foreign one. *Third National Bank of Detroit* v. *Symes*, 4 Ex. C. R. 400.

——— *Power to Assign.*]—The holder of a maritime lien cannot transfer the same, and the assignee of a claim for master's wages has no right of action in rem against the ship. (2) There is no distinction to be made between the lien existing in favour of common seamen and that in favour of the master of a ship in relation to the power to assign; and it has always been contrary to the policy of maritime law to invest a seaman with any capacity to transfer this remedy against the res to a third person. *Rankin* v. *The Eliza Fisher*, 4 Ex. C. R. 461.

——— *Promissory Note—Power to Borrow —Mortgagee.*]—The master of a ship sought to enforce a claim in rem for wages as well as for disbursements and liabilities assumed in respect of necessaries supplied the ship, for which he had made a joint note with the owner for $250 under an agreement that the note should be paid out of the earnings of the ship. This agreement was made without the consent or knowledge of the mortgagee:—Held, that the master had a maritime lien for his wages, as well as for disbursements actually and necessarily made, and liability incurred in connection with the proper working and management of the ship, and that the limit of such liability would be to the value of the vessel and freight. (2) That the master did not exceed his authority in borrowing money on the note for the purposes of the ship, it appearing that the sum so borrowed had been duly and properly expended for the ship. *Beide* v. *The Queen of the Isles*, 3 Ex. C. R. 258.

——— *Statutes—Retroactivity—Courts.*]—The master of a vessel registered at the port of Winnipeg, and trading upon Lake Winnipeg, had, in the years 1888, 1889, and 1890, no lien upon the vessel for wages earned by him as such master. (2) Even if such a lien were held to exist, there was in the years mentioned no court in the Province of Manitoba in which it could have been enforced; and it could not now be enforced under the Colonial Courts of Admiralty Act, 1890, 53 & 54 Vict. c. 27 (Imp.), or the Admiralty Act, 1891, 54 & 55 Vict. c. 29 (D.), because to give those statutes a retroactive effect in such a case as this would be an interference with the rights of the parties. *Bergman* v. *The Aurora*, 3 Ex. C. R. 228.

Right to Wages—*Jurisdiction of Court—Vessel Registered in Ontario—Disobedience by Master of Orders.*]—When the master of a vessel by his wilful disobedience of the direct and positive orders of the owners causes the vessel to be driven ashore, he forfeits all right to wages. The maritime court of Ontario has jurisdiction over all claims for master's wages, whether the vessel is "within the jurisdiction of the government" or not, and this jurisdiction is not ousted by any collateral agreement between the master and the owner, or an agreement for an increased rate of wages depending upon the amount earned by the vessel during the season. Objections to the jurisdiction of the court may be raised at the trial, though not taken in the answer. *The Huron*, 6 C. L. T. 127.

Second Suit — *Rearrest for same Cause of Action — Effect of Arrest and Bail in a Foreign Court—Effect of Foreign Judgment —Lien of Master for Wages against Mortgagee—Rights of Master, Part Owner—Master's Right to Ten Days' Double Pay—Estoppel—Right to Raise at the Hearing Defences not Set up in the Answer.*]—See *The C. N. Pratt*, 5 C. L. T. 417.

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2. *Other Cases.*

Bottomry Bond—*Essentials of—Broker's Commissions.*]—The hypothecation of a ship is only justified when it is done to secure amounts due for necessary repairs to enable the ship to proceed with her voyage, or for necessaries or provisions required for the same purpose. Furthermore, in order to enable the creditor to benefit by the hypothecation, the following elements must be present in the transaction:—(a) The repairs must be performed and the necessaries or provisions supplied on the express condition that the claim is to be secured by a bond; (b) there must be a total absence of personal credit on the part of the owner or master; (c) before pledging the ship, the master should, if it was at all possible to do so, have communicated with the owner; and (d) there must not be sufficient cash or credit available to the master to pay the amount of the indebtedness so incurred. (2) A master gave a bottomry bond on his ship for repairs executed some time previous to the voyage he was then prosecuting, and which were done entirely on his personal credit at the time, and upon the distinct understanding that he would not be required to pay for them until his return from another voyage. It also appeared that the master had not communicated with the owners before entering into the bond, although means of communication were open to him; and it was, moreover, shewn that the ship had enough credit at the place where the bond was made to pay the whole amount of the claim:—Held, that the

bond was void. (3) A shipbroker's commissions cannot be the subject of a bottomry bond. *Christian* v. *The St. Joseph*, 3 Ex. C. R. 344.

Dismissal of Master for Disobedience — *Shareholder in Company.*] — *See Guildford* v. *Anglo-French Steamship Co.*, 9 S. C. R. 393.

Employment of Master "for the Season"—*Renunciation—Loss of Vessel.*]—See *Ellis* v. *Midland R. W. Co.*, 7 A. R. 464.

Negligence of Master—*Hiring of Vessel—Liability.*]—See *Thompson* v. *Fowler*, 23 O. R. 644; *Cram* v. *Ryan*, 24 O. R. 500, 25 O. R. 524.

Selection of Crew—*Delegation by Owners to Master.*]—A master may, among other duties, delegate to a superintendent or foreman the duty of selecting fellow workmen or servants, and in such a case the master's obligation is limited to the exercise of reasonable care in selecting a competent person for such purpose. In an action against defendants, the owners of a vessel, for employing incompetent sailors, whereby an accident happened to the plaintiff, it appeared that the duty of hiring the sailors had been delegated by the owners to the captain, a competent person for such purpose, and that he had hired the men in question:—Held, that defendants were not liable. *Wilson* v. *Hume*, 30 C. P. 542.

See post XI.

X. Mortgage.

Account of Earnings of Ship.] — Semble, that a mortgagee of a vessel, until he takes possession or does something equivalent thereto, is not entitled to an account of the money earned by the vessel for freight, &c.; but where, in a suit by the mortgagees of a part owner of a vessel, the defendant, the owner of the other shares, admitted that he was sailing the vessel for the joint benefit of himself and the other owners, other than the plaintiffs, though previous to the institution of the suit he had only asked for evidence that the agent of the plaintiff really held the shares for them:—Held, that the fair inference was that the defendant was sailing for whomsoever might be the owners or entitled to the earnings; and that, having had sufficient information to acquaint him with the fact that the plaintiffs had acquired the shares either as mortgagees or owners, he had thus recognized their right to demand an account. *Merchants Bank* v. *Graham*, 27 Gr. 524.

Contract for Purchase—*Breach—Damages—Deduction.*]—In an action against the vendee, upon a contract to accept a deed of conveyance of a vessel, and to give a mortgage security upon it for the purchase money, the declaration, which shewed a delivery of the vessel by the plaintiff to defendant under the contract, alleged as a breach the refusal of defendant to accept such deed; and averred that by means thereof the vessel and its price had been lost to the plaintiff. At the trial the jury gave the plaintiff the whole value of the vessel, and the court refused to disturb the verdict. *Phillips* v. *Merritt*, 2 C. P. 513.

Merger—*Purchase by Mortgagee at Wages Sale—Action on Covenant—Offer to Reconvey.*] — Declaration on a covenant to pay money. Plea, that the plaintiff sold a vessel to defendants, and that the deed containing the covenant sued on was a mortgage and reconveyance thereof to the plaintiff to secure the purchase money, and that while the plaintiff was mortgagee, the vessel and all defendants' interest therein was sold, and the plaintiff became and is the absolute owner thereof, whereby the said mortgage became merged and satisfied. Equitable replication, that the vessel was seized and libelled for wages due to her crew, and condemned and sold in Detroit, in the United States, under the admiralty law there, and the plaintiff purchased her for about $2,300; that she was sold without plaintiff's privity or consent; that by the foreign law the purchaser acquires an absolute and paramount title thereto, and purchased at the sale, as any stranger might, and thereby bought the same absolutely, and not merely the interest or equity of redemption of the defendants therein as in the plea alleged; and that he holds the same by title paramount, and not as a mortgagee having purchased the equity of redemption thereof; and that said mortgage did not thereby become merged and satisfied as alleged:—Held, on demurrer, that defendant was not liable, for that the mortgagee could not sue for the mortgage money, while asserting his right to the property mortgaged wholly independent of any title derived from the mortgagor, and without any right to redeem. *Parkinson* v. *Higgins*, 37 U. C. R. 308.

The replication, having been amended, alleged that the vessel, being a British ship, was seized for wages due to the crew, and sold at Detroit, in the United States, solely through defendants' default; that by the law of the United States the wages formed a lien prior to the mortgage, and the plaintiff, wholly to protect himself, and not to gain any advantage over defendants, became the purchaser; that he offered and was always willing to reconvey and deliver her to the defendants on being paid the mortgage money and the sum paid by him at such sale, which defendants refused to pay; that the plaintiff, having possession of the vessel, insured her, and on her loss by the perils of the sea received the insurance money, which the plaintiff is and always has been ready to apply on the purchase money:—Held, on demurrer, a good replication, and that the plaintiff, under the circumstances stated, was not precluded from recovering on the covenant. *S. C.*, 40 U. C. R. 274.

Mortgagee — *Lien-holder—Priorities.*]—Where the res is not of sufficient value to pay the claim of a lien-holder and a mortgagee in full, the lien-holder is entitled to apply all the proceeds in payment of his claim. *Sidley* v. *The Dominion, Sidley* v. *The Arctic*, 5 Ex C. R. 190.

The mortgagee of a ship who takes possession under his mortgage before the institution of an action in rem for the recovery of a claim which constitutes a maritime lien, does not thereby become a subsequent purchaser, within the meaning of s.-s. 5 of s. 14 of the Maritime Court Act, as against the lien-holder, although the lien may have arisen since the date of the mortgage. (2) In such an action the lien-holder is preferred to the mortgagee. *Sylvester* v. *The Gordon Gauthier*, 4 Ex. C. R. 354.

Power of Sale—*Purchase by Trustee for Mortgagee.*]—The plaintiffs, who were mortgagees of a vessel, in exercise of a power of sale contained in their security, on default of payment, sold the interest of their debtor by auction, when the same was bought by one who held it in trust for the mortgagees:—Held, that the effect of such sale and purchase was, that the plaintiffs remained mortgagees only of the interest so sold. *Merchants Bank* v. *Graham*, 27 Gr. 524.

Registration.]—See *post* XII.

Right to Furniture in Vessel—*Removal.*]—Plaintiff was mortgagee of sixty-four shares in a vessel belonging to defendant, and on the defendant's insolvency was allowed by the creditors and the assignee to take her as she stood at a valuation. Defendant had previously removed from the vessel a piano and several other articles, and had substituted stoves for steam heaters:—Held, that, in the absence of fraud, the plaintiff was concluded by the settlement with the assignee by which he took the vessel as she then stood, and could not recover these articles; and that the mortgagor, being in possession, was entitled to manage the vessel as he thought best, and to remove such articles upon substituting others for them. Semble, that a piano on board of a vessel would not pass to a mortgagee under the words "with her boats, guns, ammunition, small arms, and appurtenances." *St. John* v. *Bullivant*, 45 U. C. R. 614.

Unregistered Mortgage—*Freight and Cargo—Exchequer Court.*]—A mortgagee under an unregistered mortgage of a ship has no right of action in the exchequer court of Canada against freight and cargo; and unless proceedings so taken by him involve some matter in respect of which the court has jurisdiction, they will be set aside. *Strong* v. *Smith, The Atalanta*, 5 Ex. C. R. 57.

XI. Owners.

(*See*, also, *ante* IX.)

1. *Co-owners.*

Account—*Costs.*]—In actions for account between co-owners the rule as to the incidence of costs followed by the courts of law in partnership actions may be adopted in a court of admiralty. (2) In an action of account, where there is a deficiency of assets, the court may order the costs of the proceedings to be borne equally by the co-owners. *Sidley* v. *The Dominion, Sidley* v. *The Arctic*, 5 Ex. C. R. 190.

——— *Jurisdiction of Exchequer Court—Indorsement of Writ.*]—The exchequer court has jurisdiction to hear and determine actions of account between co-owners of a ship. Semble, in an action by the managing owner of a ship against his co-owner, that the indorsement on the writ need not shew that there is any dispute as to the amount involved. *Hall* v. *The Seaward*, 3 Ex. C. R. 268.

Profits — *Venture* — *Dissent.*] — Quære, whether co-owners of a vessel have a share in the profits thereof earned in ventures to which they did not assent, as a majority of the owners can employ the vessel against the will of the minority, who, however, can compel the majority to give a bond to restore the vessel in safety or pay the value of their shares. In such cases the minority do not share the hazard, neither are they entitled to the benefit of the voyage. *Merchants Bank* v. *Graham*, 27 Gr. 524.

Running Expenses — *Advance Charge—Trust.*]—Where certain persons, including G., advanced money to complete the building of a yacht at Cobourg, to sail for prizes at New York and Philadelphia, and scrip under seal was executed declaring that G. was to hold the yacht in trust as security for the advances; and G. incurred certain running expenses in taking the yacht to the race:—Held, that G. was entitled to a first charge on the proceeds of the sale of the yacht, for these expenses, as they had been incurred in prosecuting the enterprise for which the trust was created. *Burn* v. *Gifford*, 8 P. R. 44.

Sale of Vessel by One—*Trover.*]—One of two joint tenants of a chattel is not liable in trover at the suit of his co-tenant, for a sale of his chattel not in market overt. The plaintiff and one F. being joint owners of a vessel, F. caused it to be registered in his own name, and sold and conveyed it to a purchaser, who disposed of it. The plaintiff brought trover against F. and his partner in business (who appeared to claim no interest in the vessel), and a verdict being found for both defendants against the Judge's charge, the court granted a new trial, costs to abide the event. *McNab* v. *Howland*, 11 C. P. 434.

See Baker v. *Casey*, 19 Gr. 537; *Harrison* v. *Harris*, 1 C. P. 235, *post* X. 3 (e); *Weldon* v. *Vaughan*, 5 S. C. R. 35; *Rourke* v. *Union Ins. Co.*, 23 S. C. R. 344, *post* 4.

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2. *Evidence of Ownership.*

(a) *Actions against Owners.*

Joint Contract—*Parties—Certificate of Registration.*]—Held, that the certificate of registration under 8 Vict. c. 5 is the legal evidence by which ownership can be proved: and upon an action on a joint contract against more than one defendant, the evidence failing in proof as to one, a nonsuit was ordered, the recent decisions under the English C. L. P. Act not permitting the striking out of a defendant's name in such case. *Bochus* v. *Shaw*, 8 C. P. 391.

Negligence—*Oral Evidence—Share List.*]—In an action against defendants, as owners of a steamer, for negligence in the carriage of goods, the captain of the vessel swore that they were shareholders, and that he sailed her for them, and on their account:—Held, sufficient proof of ownership, without producing the share list. *O'Neill* v. *Baker*, 18 U. C. R. 127.

Price of Goods Furnished—*Assignment of Interest — Registration.*] — Assumpsit for goods furnished for a vessel. Defendant was called as a witness, and proved that he had subscribed £50 towards a line of freight vessels from Toronto to Quebec, and that he had never had anything to do with this boat, or

with the plaintiff with respect to her; but being sued for and obliged to pay some demands on her account, he had assigned what interest he had. It appeared, too, that the vessel was registered:—Held, not sufficient evidence of ownership to charge the defendant. *Maitland* v. *Harris*, 13 U. C. R. 118.

Price of Supplies—*Shareholders—Certificate.*]—In an action against several defendants for wood furnished to a steamer, the proof of ownership consisted of parol evidence that one defendant had taken stock in the vessel and paid for it, and had represented several stockholders at a meeting held after she had been lost. A certificate was also produced, signed by the collector of customs, stating the names of the registered owners, and the number of their shares:—Held, insufficient. Quære, whether the certificate was admissible in evidence under 16 Vict. c. 19. *Lynch* v. *Shaw*, 17 U. C. R. 241.

Services of Disabled Ship—*Parties—Striking out—Oral Evidence—Certificate of Registration.*]—Defendants' vessel having got on shore, the plaintiffs' vessel, the Manitoba, took off her passengers and freight and conveyed them to their destination, upon an order to do so signed by the purser of defendants' vessel. In an action for the services so rendered, the plaintiffs proved orally that the four defendants sued owned the Manitoba. One of the defendants was then called, and swore that another defendant, W. B., had ceased to have any interest in the Manitoba when the services were rendered, though he was still a registered owner. The name of this defendant was then struck out. No certificate of registration was produced:—Held, (1) that under the C. L. P. Act, s. 68, the amendment was authorized; and that the name of a defendant improperly joined may be struck out without his consent, and even against his express objection. (2) That the oral evidence of ownership was admissible, and that it was not necessary to produce the certificate; for, assuming that in actions by or against owners of a registered vessel as owners the ownership must be proved by the certificate, yet the mere ownership may not create a liability, and defendants may be liable apart from it under a contract made by their agent, as in this case by the purser. Semble, that the objection was not open to defendants after their proof, without production of the certificate that W. B. had ceased to be owner. *Lake Superior Navigation Co.* v. *Beatty*, 34 U. C. R. 201.

(b) *Actions by Owners.*

Collision—*Oral Evidence—Deed.*]—In an action for running down a ship it appeared that the plaintiffs were owners of the vessel at the time of the collision, and in receipt of the profits; and that there was a deed of partnership executed by some of the owners, but not by others, which provided for the mode of transfer:—Held, sufficient as against a wrongdoer; and that it was not necessary to produce this deed. *Sutherland* v. *Bethune*, 10 U. C. R. 388.

Insurance — *Mortgagor — Sale under Fi. Fa.*]—In an action for insurance upon a vessel under the usual interim receipt:—Held, that the mortgagor of a non-registered vessel had not an interest saleable under a fi. fa., s. 23 of 8 Vict. c. 5 only declaring that the registered owner, although a mortgagor, shall be considered the owner. *Scatchard* v. *Equitable Fire Ins. Co.*, 8 C. P. 415.

Replevin—*Transfers.*]—In replevin for a steamer:—Held, that, under the various transfers set out in this case, the plaintiff was the legal owner of the vessel. *Gildersleeve* v. *Corby*, 15 U. C. R. 150.

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3. *Liability of Owners.*

(a) *For Disbursements of Master.*

Evidence—*Guarantee.*]—On a ship under charter being loaded, it was found that a sum of £173 was due the charterer for the difference between the actual freight and that in the charterparty, and, as agreed, a bill for the amount was drawn by the master on the agents of the ship, and also a bill of £753 for disbursements. These bills not being paid at maturity, notice of dishonour was given to V., the managing owner, who sent his son to the solicitors who held the bills for collection, to request that the matter should stand over until the ship arrived at St. John, where V. lived. This was acceded to, and V. signed an agreement, in the form of a letter addressed to the solicitors, in which, after asking them to delay proceedings on the draft for £753, he guaranteed, on the vessel's arrival or in case of her loss, payment of the said draft and charges, and also the payment of the draft for £173 and charges. On the vessel's arrival, however, he refused to pay the smaller draft, and to an action on his guarantee he pleaded payment, and that he was induced to sign the same by fraud. By order the pleas of payment were struck out. On the trial the son of V. who had seen the solicitors swore that they told him that both bills were for disbursements, but it did not clearly appear that he repeated this to his father. V. himself contradicted his son, and stated that he knew that the smaller bill was for difference in freight, and there was other evidence to the same effect. His counsel sought to get rid of the effect of V.'s evidence by shewing that from age and infirmity he was incapable of remembering the circumstance, but a verdict was given against him:—Held, that the defence of misrepresentation set up was not available to V. under the plea of fraud, and, therefore, was not pleaded; that, if available without plea, it was not proved; that nothing could be gained by ordering another trial, as, V. having died, his evidence would have to be read to the jury, who, in view of his statement that he knew the bill was not for disbursements, could not do otherwise than find a verdict against him. Held, further, that the delay asked for by V. was sufficient consideration to make him liable on his guarantee, even assuming that he would not have been originally liable as owner of the ship. *Vaughan* v. *Richardson*, 21 S. C. R. 359.

(b) *For Fire from Steamboats.*

Evidence—*Admissibility.*]—Action against defendants for negligence in the construction and management of their steamboat, by which sparks escaped from the funnel at a wharf, and the plaintiffs' lumber and mills there were burned. The alleged negligence consisted in

leaving the screens of the steamer open; and on the part of the plaintiffs evidence was received, though objected to, that on other occasions, at different times and places, the screens were open, and cinders had escaped. The engineer and firemen on the boat, being afterwards called for the defendants, swore that the screens were closed, and had never on any occasion been left open. The Judge ruled, at the close of the case, that the evidence objected to was admissible, particularly as touching the credit of defendants' witnesses:—Held, that such evidence was inadmissible either to support the plaintiffs' case when it was tendered and received, or for the purpose for which it was afterwards admitted; and the jury having found for the plaintiffs, a new trial was granted without costs. *Edwards* v. *Ottawa River Navigation Co.*, 39 U. C. R. 264.

Evidence of Negligence—*Sufficiency—Proof of Actual Negligence—License.*]—Held, that the evidence in this case was sufficient to go to a jury to establish negligence in the management of the defendant's steamboat. The owner of a steamboat navigating the inland waters of Ontario, without legislative authority, is liable for loss occasioned to property by fire communicated thereto by the steamer, without any proof of actual negligence. The fact that a steamboat has been granted a license by the inspector under the authority of the Act for the Inspection of Steamboats, 31 Vict. c. 65 (D.), does not remove, neither was it intended to remove, the common law liability of the owner of such steamboat to a person whose property is injured. *Hilliard* v. *Thurston*, 9 A. R. 514.

See Brown v. *McRae*, 17 O. R. 712; *Cram* v. *Ryan*, 24 O. R. 500, 25 O. R. 524.

(c) *For Negligence.*

Evidence—*Onus of Proof.*]—In an action to recover damages for death caused by alleged negligence, the onus is on the plaintiff to prove not only that the defendant was guilty of actionable negligence, but also, either directly or by reasonable inference, that such negligence was the cause of the death. Where, therefore, a man employed on the defendant's tug was drowned, and it was shewn that wood was piled upon the tug's deck in such a way as to make it dangerous to pass along the deck, but it was also shewn that there was a safe passageway on a scow lashed to the tug, and there was no evidence whatever as to the cause of the accident, the action was dismissed. *Young* v. *Owen Sound Dredge Co.*, 27 A. R. 649.

Injury to By-stander—*New Trial.*]—In an action for negligence against the owners of a steamboat, for injuries sustained by the plaintiff in consequence of one of the fenders having broke loose from the steamboat while in the act of leaving a wharf, and striking and injuring the plaintiff, who was standing on the wharf; and it appearing that the plaintiff had received warning to stand clear of the fenders, and that a person with ordinary care might have escaped, the court set aside a verdict for plaintiff, and granted a new trial on payment of costs. *Grieve* v. *Ontario Steamboat Co.*, 4 C. P. 387.

(d) *For Obstruction to Navigation.*

Information—*Negligence — Expenses of Removal—Lighting.*]—Where a ship had become a wreck and, owing to her position, constituted an obstruction to navigation, the court held that it was not necessary in an information against the owners for the recovery of moneys paid out by the Crown under the provisions of 37 Vict. c. 29 and 43 Vict. c. 30 for removing the obstruction, to allege negligence or wrongdoing against the owners in relation to the existence of such obstruction. (2) Under the Acts above mentioned it is only the owner of the ship or thing at the time of its removal by the Crown who is responsible for the payment of the expenses of such removal. (3) The right of the Crown to charge the owner with the expenses of lighting a wrecked ship during the time it constitutes an obstruction was first given by 49 Vict. c. 36, and such expenses could not be recovered under 37 Vict. c. 29 or 43 Vict. c. 30. *The Queen* v. *Mississippi and Dominion Steamship Co.*, 4 Ex. C. R. 298.

(e) *For Repairs.*

Joint Owners.]—Where the plaintiff, at the request of A., the managing owner of a vessel, did certain repairs on the vessel, at the time not knowing that she was owned by A. jointly with others:—Held, that all the owners were jointly liable to plaintiff. *Harrison* v. *Harris*, 1 C. P. 235.

Part Owners—*Contribution.*]—Part owners of a ship are tenants in common of the ship, and partners in the earnings only. One part owner of a ship having taken possession of it, and expended in repairs more than the ship's earnings:—Held, that the other part owner was not bound to contribute to the payment of the difference. *Baker* v. *Casey*, 19 Gr. 537.

(f) *For Supplies.*

Order Given by Master.]—Where a steamboat was mortgaged and in possession of the mortgagees, who navigated her for their own benefit to secure their advances, and she was tortiously taken possession of by the captain, who received the profits arising from her, for his own use:—Held, that the mortgagor was not liable for goods furnished for the vessel while in the tortious possession of the captain. *Fraser* v. *Flint*, 4 O. S. 12.

See, also, *Wilkes* v. *Flint*, 4 O. S. 19.

The master has no right against the owners to detain the ship or freight for wages paid, or any disbursements made by him on account of supplies for the ship. *Land* v. *Malden*, 5 U. C. R. 309.

In an action against defendant for goods supplied by plaintiffs to certain vessels, at the request of the masters thereof, there was no evidence of defendant having employed the masters, and, though the vessels appeared to have been transferred to defendant before the goods were supplied, the transfers were not registered until after, nor was any express contract with defendant proved:—Held, that defendant was not liable. *Hawn* v. *Roche*, 27 C. P. 142.

Order Given by Other Persons.]—The mere owner of a chartered boat is not liable for supplies furnished to the person chartering, or at the request of his agents, unless he is so liable by express agreement between himself and the charterer. *Lyman* v. *Bank of Upper Canada*, 8 U. C. R. 354.

Action for provisions furnished by plaintiffs to steamboats belonging to and run by defendants. It appeared that the steward of each boat was bound by contract with defendants to furnish these supplies, but there was contradictory evidence as to the plaintiffs' knowledge of this arrangement, and as to the circumstances under which the goods were ordered and furnished. The jury having found for the plaintiffs:—Held, that upon the evidence set out in the case, a new trial was properly granted in the county court. (2) That no absolute rule can be laid down as to the liability of ship owners in such matters, but each case must depend on its own facts; and that here the jury should be asked, upon all the evidence, and considering the nature of the business, to whom was the credit given; were the persons ordering the supplies the defendants' agents for that purpose within the ordinary rules as to principal and agent, and was the natural inference of the defendants' liability sufficiently rebutted by the plaintiffs' knowledge of the true arrangement? *Cloy* v. *Jacques*, 27 U. C. R. 88.

In an action brought against the registered owners of a certain vessel for the value of goods supplied before they became such owners, not on the order of the defendants, but on the order of a third person, between whom and the defendants no relation of agency was proved:—Held, that the plaintiff could not recover. Held, also, that it was open to the defendants to shew that their real interest was that of mortgagees, though ostensibly registered owners. The fact that the vessel got the benefit of the supplies and necessaries did not make the registered owner liable. *Nelson* v. *Wigle*, 8 O. R. 82.

4. *Ship's Husband.*

Contract—*Percentage of Earnings—Performance.*]—In an action upon an alleged agreement by defendants, that if the plaintiff would purchase for them a certain vessel, and would perform the duties of a ship's husband in respect of her, they would pay him five per cent. on her gross earnings up to the time of the last voyage for which he should as such ship's husband prepare her:—Held, that, upon the evidence, the plaintiff's contract was not shewn to have been performed, and the jury having found in his favour a new trial was granted. *Hall* v. *Duncan*, 22 U. C. R. 602.

Conversion of Vessel—*Joint Owners—Marine Insurance—Abandonment—Salvage.*]—A sale by one joint owner of property does not amount, as against his co-owner, to a conversion, unless the property is destroyed by such sale, or the co-owner is deprived of all beneficial interest. A vessel, partly insured, was wrecked, and the ship's husband abandoned her to the underwriters, who sold her and her outfit to one K. The sale was afterwards abandoned, and the underwriters notified the ship's husband that she was not a total loss, and requested him to take possession. He paid no attention to the notice, and the vessel was libelled by K. for salvage, and sold under decree of the court. The uninsured owner brought an action against the underwriters for conversion of her interest:—Held, that the ship's husband was agent of the uninsured owner in respect of the vessel, and his conduct precluded her from bringing the action; that he might have taken possession before the vessel was libelled; and that the uninsured owner was not deprived of her interest by any action of the underwriters, but by the decree of the court under which the vessel was sold for salvage. *Rourke* v. *Union Insurance Co.*, 23 S. C. R. 344.

XII. Registration.

[8 Vict. c. 5, providing for the registration of inland vessels, was consolidated by C. S. C. c. 41, which was repealed by 36 Vict. c. 128 (D.); R. S. C. c. 72.]

1. *Foreign Vessels.*

Right to Register.]—Under the Imperial statute 12 & 13 Vict. c. 29, and previous statutes, foreign-built ships navigating our inland waters were entitled to be registered here. *Smith* v. *Brown*, 14 U. C. R. 9.

But under our statute 8 Vict. c. 5, and Imperial statute 17 & 18 Vict. c. 104, they cannot be. *Smith* v. *Jones*, 5 C. P. 425.

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2. *Recital of Certificate.*

Necessity for — *Bond for Transfer.*] — Semble, that a bond given by third parties for the assignment of a vessel, but which is not intended to operate as an assignment, need not recite the certificate. *Corby* v. *Cotton*, 3 L. J. 50.

——— *Mortgage.*] — Under 8 Vict. c. 5, ss. 13, 23, 24 (C.), the certificate of registry of ownership must be recited in a transfer by way of mortgage or security (with power of sale in case of default), as well as upon an absolute or immediate sale; and if omitted the mortgage will be void. *Watkins* v. *Corbett*, 6 U. C. R. 587.

——— *Sale under Execution.*]—It is not necessary that the transfer of a vessel by the sheriff upon a sale under execution should be registered or recite the certificate of ownership. *Smith* v. *Brown*, 14 U. C. R. 9; *Smith* v. *Jones*, 5 C. P. 425.

Sufficiency of — *Mortgage — Identity of Vessel.*]—The following recital in an indenture of sale by way of mortgage of a vessel: The schooner "James Coleman of Dundas, and duly registered according to the statute in such case made and provided, and the certificate of ownership of which is granted to the said William Colcleugh, whereby it is certified that the said vessel was registered at the custom house in the port of Hamilton the 8th day of April, 1847, and is of the burthen of 232.70, and which said certificate is under the hand of John Davidson, the collector in and for the said port of Hamilton, as on reference to the said certificate will fully appear:"—Held, not a sufficient compliance with 8 Vict.

c. 5, ss. 2, 7, 13, and that therefore the indenture was void. The recital was held insufficient in giving the tonnage alone of the vessel, which could not be said, within the terms of s. 13, to be such a description of the vessel as to shew the identity of the vessel transferred with that described in the certificate of registry. *Sherwood* v. *Coleman*, 6 U. C. R. 614.

3. *Other Cases.*

Application of Statutes — *Inland Waters.*]—The Imperial Act 17 & 18 Vict. c. 104 does not repeal altogether 8 Vict. c. 5, but applies only to vessels proceeding to sea, and our statute remains in force as to all vessels navigating exclusively our inland waters. *Scott* v. *Carveth*, 20 U. C. R. 430.

Certificate—*Indorsement on—Mortgage.*]—This court cannot relieve against the omission of a mortgagee of a registered vessel, to have the proper indorsement of such mortgage made on the certificate of ownership. *Coleman* v. *Sherwood*, 2 Gr. 652.

——— *Requisites.*]—A certificate of ownership under 8 Vict. c. 5, s. 2, is not invalid because the additions of the owners are omitted, the statute on that point being directory only. *Gildersleeve* v. *Corby*, 15 U. C. R. 150.

Effect of not Registering — *Action by Transferees.*] — Plaintiffs, being registered owners of a vessel, transferred her by bill of sale, which the vendee neglected to register; and in an action by plaintiffs for injury, not of a mere temporary character, sustained by the vessel, the vendee came forward as a witness on their behalf:—Held, that the defendant could not set up the vendee's right to defeat the action, the plaintiffs under the Ship Registry Act still appearing as legal owners. *Wilson* v. *Cameron*, 22 C. P. 198.

Effect of not Registering—*Promissory Notes—Title.*]—Where an action was brought for refusing to sign certain notes, the sale and delivery to defendants of shares in a schooner being alleged as the consideration for the promise; and it appeared that the plaintiff had surrendered his interest to defendants, and that they had continued in exclusive possession of the vessel, but that no assignment had been made as the statute directs, and no transfers indorsed on the registry, nor any new certificate of ownership granted, the court ordered a nonsuit. But if defendants had given their notes, they could not have resisted payment on the ground that they had not received a valid title. *Orser* v. *Mounteny*, 9 U. C. R. 382.

Mortgagee—*Rights of.*] — Held, that the plaintiff, under the facts, was not prevented from asserting his right as mortgagee by anything in the Ship Registry Act, 8 Vict. c. 5. *Cauley* v. *McDonell*, 8 U. C. R. 454.

Necessity for Registration—*Builder—Property Passing.*]—Held, that a builder of a ship is not compelled to have her registered before he can make a valid sale. Held, that a written instrument is not requisite to pass property in a vessel which need not be registered under the Act. *Chisholm* v. *Potter*, 11 C. P. 165.

Place of Registration.]—Held, that under s. 4 some of the owners, living at Bath, might properly register the vessel at Kingston. *Gildersleeve* v. *Corby*, 15 U. C. R. 150.

Proof of Ownership by Registration.]—See *ante* XI. 2.

See Hawn v. *Roche*, 27 C. P. 142, *ante* XI. 3 (f); *Georgian Bay Transportation Co.* v. *Fisher*, 27 Gr. 346, 5 A. R. 383, *post* XVII.; *Luffman* v. *Luffman*, 25 A. R. 48, *post* XIII.

XIII. Sale and Transfer.

Contract for Purchase — *Specific Performance—Change in Position.*] — A steam vessel owned by the members of a limited partnership was registered in the name of the general partner. During his absence from this country the special partners agreed for the sale of the vessel, and gave their bond conditioned to obtain a good and sufficient transfer thereof to the purchasers, within three months, and placed the purchasers in possession. Two years afterwards the vessel was sold under execution issued against the general partner, and was taken out of the possession of the purchasers by a writ of replevin, the purchasers giving notice of these proceedings to the special partners, who took no steps to prevent the removal of the vessel; and the purchasers thereupon proceeded at law against the obligors in the bond, and recovered judgment against them, after which they filed a bill for specific performance of the contract, and an injunction to stay proceedings under the judgment. The court, taking into consideration the great changes which had taken place in the position of the parties, and the depreciation in value of the steamer, refused specific performance, and dismissed the bill with costs. *Cotton* v. *Corby*, 7 Gr. 50, 8 Gr. 98.

Covenant against Other Sales—*Notice to Purchaser — Injunction.*] — The owner of several steamers, who was carrying on business as a forwarder, sold one of them to another forwarding firm, and upon the sale covenanted that he would not directly or indirectly have any interest in any vessel navigating the St. Lawrence below Ogdensburgh at any time thereafter; and also that he would not dispose of two other steamers then owned by him to any person or persons for the purpose of navigating the St. Lawrence below Ogdensburgh. The court held the purchasers from this firm, with knowledge of the covenant, bound by the covenant entered into by the original proprietors, and granted an injunction restraining them from navigating the river below Ogdensburgh with those vessels. *Holcomb* v. *Nixon*, 5 Gr. 278, 373.

Incumbrances—*Covenant against—Action on — Effect of Notice to Vendee of Incumbrance—Equitable Defence—Payment of Purchase Money.*]—See *McDonell* v. *Thompson*, 16 U. C. R. 154.

Lien for Purchase Money.]—The part owner of a British registered ship sold his shares therein on credit to defendant D., who having made default in payment of the balance of purchase money, an execution at law was obtained therefor, under which their interest

in the vessel was sold by the sheriff to C., another defendant, and a bill was thereupon filed by the vendor claiming a lien on the vessel for unpaid purchase money. A demurrer thereto for want of equity was allowed. *Baker* v. *Dewey*, 15 Gr. 668.

Non-acceptance—*Tender—Incumbrances—Pleading.*]—Special assumpsit for not accepting a schooner, which the plaintiff agreed to sell to defendant, together with the apparel, tackle, furniture, &c., and to convey free from all incumbrances, for a stated price. Upon special demurrer the declaration was held bad for not alleging that the conveyance tendered embraced the "apparel, tackle, and furniture," and because it was not inconsistent with all the averments that the "apparel, tackle, and furniture" might not be free from incumbrances. *Phillips* v. *Merritt*, 2 C. P. 209.

Non-conveyance—*Incumbrance — Application of Payments — Waiver — Pleading — Damages.*] — Declaration on a bond conditioned to convey to the plaintiffs within three months a certain steamboat, and for quiet possession of the same from the making of the bond, assigning as breaches: (1) not conveying within three months; (2) an eviction by one O. S. G. under a mortgage derived from defendants. Plea, to the first breach, that said steamboat was mortgaged to J. H. C. at the time of the execution of the bond, for the same amount as plaintiffs had agreed to pay defendants, and that defendants had handed him the notes given by plaintiffs for the price; and the said J. H. C. held the mortgage only as security for due payment thereof, and plaintiffs thereupon discharged defendants from procuring such conveyance. The plea to the second breach, after stating a similar agreement, alleged a transfer of the mortgage from J. H. C. to O. S. G., and that the plaintiffs made default in their agreement by non-payment of one of the notes, whereupon O. S. G. took possession, claiming an equitable interest by virtue of said agreement with defendant and his assignees. Both pleas held bad on demurrer, the plaintiffs engaging to apply their payments towards an incumbrance not amounting to a waiver of their right to a conveyance from the vendors. *Corby* v. *Cotton*, 7 C. P. 209.

The question on a motion was (on the same facts and pleadings as above) whether the plaintiffs were entitled to the damages as assessed by the jury (£6,675), the defendants contending that the measure of damages should have been the amount necessary to redeem the steamboat. The court held that the damages were properly assessed. *S. C., ib.* 392.

Possession — *Unpaid Purchase Money—Retaking—Removal of Machinery.*]—On an agreement for the sale of a steamboat, the vendor delivered possession to the vendee, and covenanted to transfer the vessel with her machinery and furniture to the purchaser absolutely, upon payment of the balance of purchase money by instalments; and on default in payment of any portion the vendor should be at liberty to resume possession of the vessel, with her machinery and furniture. The court restrained the purchaser from removing the machinery from the vessel, so long as any part of the money remained unpaid. *Laughton* v. *Thompson*, 7 Gr. 30.

Unregistered Lien — *Notice.*] — While under s. 57 of the Merchant Shipping Act, 1894, 57 & 58 Vict. c. 60 (Imp.), unregistered equitable interests can be enforced as between the parties immediately affected, the effect of s. 56 is that a purchaser from the registered owner takes a title free from unregistered equitable interests even though he has notice of them. *Luffman* v. *Luffman*, 25 A. R. 48.

Warranty — *Oral Evidence—Failure of Consideration — Surety.*] — Assumpsit on a note made by defendant jointly with A. and B. Plea, that the note was given for the purchase money of a schooner sold by plaintiff to A. and B., defendant being their surety; that the plaintiff on such sale guaranteed the vessel to be sound, but she was not sound, but unsafe and rotten, as the plaintiff well knew, and the said A. and B., immediately after the sale, discovered the unsoundness, returned the vessel to plaintiff, and repudiated the sale. At the trial the written instrument was produced, from which it appeared that the sale was to defendant alone, and no such guarantee as alleged was contained in it. It was proved that A. and B., after keeping the vessel a fortnight, tendered her back to the plaintiff, but she was refused, and they went on using her:—Held, that oral evidence of the warranty stated in the plea was not admissible. Semble, that the facts did not shew a total failure of consideration, and therefore formed no defence. Semble, also, that the defendant could not shew on the face of the writing produced that the sale was to A. and B., and not to himself. *Henderson* v. *Cotter*, 15 U. C. R. 345.

Warranty as to Class—*Breach—Damages.*]—The defendants bought a vessel from the plaintiff, who, as the jury found, warranted her to class B. 1, and promised to get her insured in a company of which he was agent, for $1,400. She would not class as B. 1, and no insurance could be effected under that class; but defendants sailed her uninsured until she foundered and was totally lost. In an action for the purchase money:—Held, that the measure of damages to which defendants were entitled for breach of the warranty was not the $1,400 for which she might have been insured, but the sum which it would have taken to make her class B. 1, which it was for defendants to shew. *La Roche* v. *O'Hagan*, 1 O. R. 300.

XIV. Salvage, Average, and Contribution.

1. *Contribution to Expenses.*

(a) *Occasioned by Stranding.*

Lien—*Pleading.*]—Where a vessel carrying goods is stranded and lost by stress of weather, the master may, to save the cargo, employ another vessel to take it to the place of destination, and the owners of such goods will be liable for any extraordinary expense so incurred, in addition to the freight. Declaration against defendants as common carriers, charging that the plaintiff delivered to them goods, to be carried from Montreal to Cobourg, and there delivered to the plaintiff within a reasonable time, dangers of navigation excepted, and that they did not so safely carry or deliver said goods, although no dangers of navigation prevented, but through their negligence the same were wholly lost. It appeared that the goods were shipped at Montreal, with the goods of several other persons, on board defendants' vessel, which, without any negligence

of the master, was driven on shore between Kingston and Toronto, and became a total loss. The master, in order to save the goods, procured another vessel, by which they were taken to Cobourg; and the defendants there, in addition to the freight agreed on, claimed from the plaintiff his share, upon an average, according to the value of the goods of the several freighters which were saved, of the charge of transporting his goods from the wreck to Cobourg. The plaintiff paid the charge for freight only, but refused to pay the extra claim or execute an average bond, and defendants detaining the goods, he brought this action:—Held, that the plaintiff was liable to such charge, and that defendants had a lien upon the goods for it. *Rogers* v. *Hooker*, 15 U. C. R. 63.

Towage.]—Where a vessel was dangerously stranded on our lakes by accident arising from the perils of navigation, and without fault of the master:—Held, that the expense incurred by the master in hiring a steamer to haul her off, and by which he was enabled to proceed to his destination, gave a claim for contribution against the owners of the cargo, upon general average. *Grover* v. *Bullock*, 5 U. C. R. 297.

Voluntary Stranding.]—The owners of a vessel have no right to average on account of expenses occasioned by stranding, when the stranding was not voluntary; and the mere steering a vessel to a less dangerous place for stranding, when she is inevitably driving to the shore, is not a voluntary stranding. *Gibb* v. *McDonell*, 7 U. C. R. 356.

Where a vessel was disabled by a gale near a lee shore, so that she could not work off, and after the anchors had dragged until she began to pound on the bottom, the master, with the view not of saving the cargo, but of enabling the crew to escape, headed her round to the shore, where she was stranded and abandoned by the crew, and the defendant, the owner of the cargo, afterwards got it out at his own expense:—Held, that the stranding was not voluntary, and that the cargo was not liable to general average. *Dancey* v. *Burns*, 31 C. P. 313.

Wages and Maintenance of Crew— *Repairs.*]—Held, that the plaintiff was not entitled to recover from the defendants for the wages and provisions of the crew while the vessel was stranded, and in endeavouring to get her off the beach, even though the damage done to the vessel was itself a ground for general average. Held, also, that defendants were liable for the value of the repairs rendered necessary by the stranding, whether it was a general average loss or not, for it was a loss by perils of the sea. Held, also, that the plaintiff was entitled to recover from defendants the proportion charged against the cargo and freight, and was not himself obliged to collect the share, if any, of general average stated against the owners of the cargo. *Steinhoff* v. *Royal Canadian Ins. Co.*, 42 U. C. R. 307.

See McCart v. *Young*, 1 L. J. 76; *Phœnix Ins. Co.* v. *Anchor Ins. Co.*, 4 O. R. 524; *Western Assurance Co.* v. *Ontario Coal Co.*, 19 O. R. 462, 20 O. R. 295, 19 A. R. 41, 21 S. C. R. 383.

(b) *Other Expenses.*

Rescue of Cargo and Hull—*Lien.*]—The plaintiffs in October, 1873, shipped 92 tons of pig iron on the defendant's vessel at Montreal, to be carried to Hamilton. She accidentally caught fire in the canal on her voyage and was destroyed, and the iron sank. The vessel was insured, but not the cargo, and the inspector of the insurance company, after consultations with the captain, made a contract for raising the hull, machinery, and cargo. The iron was piled up at the lock ready for shipping in the spring, and was then sent on, but defendant claimed a lien upon it for a portion of the expenses incurred in raising the hull and engine:—Held, that there was no such lien; that the services rendered could not be considered as in the nature of salvage services or general average, the iron not being in danger of destruction or loss; and that the master could not be considered as the plaintiffs' agent to make the contract, for there was no difficulty in communicating with the plaintiffs and getting their instructions, and such implied agency only arises in case of necessity. *Gurney* v. *MacKay*, 37 U. C. R. 324.

Towage — *Lien.*] — Defendant's schooner was engaged to carry a cargo of timber from Spanish River to Chippewa. She left Spanish River with the timber on the 15th October, and anchored on that day at Bayfield Sound, leaking badly, where she remained till the 10th November, and was then towed by a tug to Sarnia. There she got a steam pump, and with it on board was towed to the Welland canal, where she arrived on the 25th November, and being frozen up the cargo had to be unloaded. Defendant refused to give up the lumber unless, in addition to the freight, the plaintiff would pay his share for general average of: (1) the expenses incurred for charges of the tug, $1,200; (2) use of hawser, $50; (3) use of steam pump, $315; (4) telegrams, protest, adjustment, $25; (5) extra help for discharging, $120; — Held, that if the vessel had been seaworthy the first, second, and fifth items would not have been chargeable; and that the third might be. Held, also, that the evidence shewed the vessel to have been unseaworthy at the commencement of and during the whole voyage, and that the expense was occasioned thereby; and that the defendant therefore had no claim. *Chaffey* v. *Schooley*, 40 U. C. R. 165.

——— *Ice.*] — A liability to general average contribution arises only where both ship and cargo are in imminent and uncontemplated peril and there is expenditure or sacrifice to secure their safety. There is, therefore, no liability on the part of the cargo of a ship to general average contribution when, at a season of the year when such an occurrence is to be expected, ice forms in a harbour where a ship is lying in safety, and a tug is employed for the purpose of releasing her to enable her to complete her voyage. *Kidd* v. *Thomson*, 26 A. R. 220.

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2. *Jettison.*

Deck Cargo—*Average.*]—Where the usage is proved to carry a deck cargo, if that cargo be thrown overboard in a storm to lighten the vessel, the owner of the vessel is liable for average to the owner of the deck cargo, without proving the value of the cargo in the hold,

and taking it into account. *Grouselle* v. *Ferrie*, 6 O. S. 454.

See Stephens v. *McDonell*, M. T. 6 Vict., R. & J. Dig. 3580; *Merritt* v. *Ives*, M. T. 4 Vict., R. & J. Dig. 3586.

——— *Contribution.*]—The owners of goods stored under the deck, are not liable to contribute by way of general average to the loss of goods laden on deck and thrown overboard from necessity in a storm, and with the hope of saving the ship and cargo. Semble, that the ship owner would, in such a case, be liable to general average. *Gibb* v. *McDonell*, 7 U. C. R. 356.

——— *Contribution—Insurers.*]—A marine policy upon a vessel described as a "steam barge" was warranted by the assured "to be free from any contribution for loss by jettison of property laden on deck of any sail vessel or barge." There was nothing else in the policy as to the vessel insured carrying a deck load:—Held, that the "barge" mentioned in the policy did not mean the insured vessel, nor did it refer to a steam barge. The vessel went ashore on Lake Huron, and was beached, after throwing out part of the cargo, as the only means, in the judgment of the captain, of saving all concerned:—Held, that the plaintiff was entitled to recover for the deck load as for general average, it not being excluded by the condition above mentioned, and there being evidence of a custom on the lakes for steamers to carry such loads, and to deal with them as subject to general average. *Steinhoff* v. *Royal Canadian Ins. Co.*, 42 U. C. R. 507.

——— *Contribution — Insurers — Bill of Lading.*]—Defendants insured the plaintiffs' vessel by a policy containing nothing as to deck loads. A hold full and deck load of coal was shipped upon her at Cleveland for Toronto, by a bill of lading, which provided "all property on deck at risk of owners." She went ashore during the voyage, and the coal upon deck was thrown overboard in order to get her off and save the vessel and the rest of the cargo, which was thereby accomplished. It was admitted that the usage at the date of the policy, as well as at the time of the loss, was for vessels trading between Toronto and Cleveland to carry deck loads:—Held, looking at the special terms of the bill of lading, that the defendants were not liable to contribute to their share of the loss. Semble, however, that but for the bill of lading the defendants would be liable, for that the usage to carry deck loads being admitted, the jettison of such load, in the absence of any usage to the contrary, must be contributed for in general average. *Spooner* v. *Western Assurance Co.*, 38 U. C. R. 62.

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3. *Lien for Salvage Services.*

Crew — *Agent—Release—Bar to Action.*]—A crew of a fishing schooner had performed certain salvage services in respect of a derelict ship, and gave the following power of attorney respecting the claim for such services to the agent of the owner of the schooner: "We, the undersigned, being all the crew of the schooner Iolanthe at the time said schooner rendered salvage services to the barque Quebec, do hereby irrevocably constitute and appoint Joseph O. Proctor our true and lawful attorney, with power of substitution, for us and in our name and behalf as crew of the said schooner, to bring suit or otherwise settle and adjust any claim which we may have for salvage services rendered to the barque Quebec recently towed into the port of Halifax, Nova Scotia, by said schooner Iolanthe; hereby granting unto our said attorney full power and authority to act in and concerning the premises as fully and effectually as we might do if personally present, and also power at his discretion to constitute and appoint, from time to time, as occasion may require, one or more agents under him, or to substitute an attorney for us in his place, and the authority of all such agents or attorneys at pleasure to revoke."—Held, that this instrument did not authorize the agent to receive the salvage payable to the crew or to release their lien upon the ship in respect of which the salvage services were performed. (2) That payment of a sum agreed upon between the owners of such ship and the agent, and the latter's receipt therefor, did not bar salvors from maintaining an action for their services. *The Quebec*, 3 Ex. C. R. 33.

Limitation of Action—*Purchaser—Notice of Claim.*]—An action in rem against a tug was brought claiming $800 for salvage under an alleged agreement made in the Province of Ontario with the master of the tug at the time the salvage services were rendered. Subsequently, but before action was brought, the tug was sold by the Quebec Bank, under a mortgage held by the bank, to a purchaser, who it was alleged had notice of the claim. The purchaser paid part cash and gave a mortgage on the vessel to the bank for the balance which remained unpaid. The action was not begun until after ninety days from the time when the alleged claim accrued. The purchaser claimed in his defence the benefit of s. 14, s.-s. 5, of the Maritime Court Act, R. S. C. c. 137, re-enacted by s. 23, s.-s. 4, of the Admiralty Act, 1891, 54 & 55 Vict. c. 29, as a bar to plaintiff's claim:—Held, that, as against a bonâ fide purchaser, the plaintiff's claim (if any) was barred, and the lien on the vessel (if any) destroyed, even though the purchaser had actual notice of the claim at the time of or before his purchase. *The C. J. Munro and The Home Rule*, 4 Ex. C. R. 146.

Right of Charterers — *Set-off—Costs.*]—A wrecking company chartered a steam tug from the owners, who insured themselves for all insurable risks over five per cent., the company to make good all repairs, losses, and damages not insurable under the usual policy, and all injuries, &c., up to five per cent. of the estimated value of the vessel. Through the negligence of the company's servants the vessel was sunk, and the company raised her:—Held, that they were entitled to a lien for the salvage; but, the company being largely indebted to the owners, no costs were given. Held, also, that there is no set-off against a maritime lien except in the case of master's wages under the Merchant Shipping Act, 1854. *The Conqueror*, 5 C. L. T. 332.

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4. *Nature of Salvage Services.*

Blasting — *Stranded Ship—Court.*]—A ship was stranded on a rocky shore with a point of rock protruding through her hull. H. was employed to blast it away and so free the ship:—Held, that this was not a salvage service. *The Costa Rica*, 3 Ex. C. R. 23.

Towage — *Other Services.*] — A stranded vessel, abandoned by the owners to the underwriters and sold by them, was saved, and was brought by the purchasers to a shipwright for repairs:—Held, that the towage of the vessel from the place where stranded to the dry dock was a salvage service. (2) Claim for use of anchor, chains, &c., used in saving vessel:—Held, a salvage service. (3) Claim for personal services not performed on vessel:—Held, not a salvage service. (4) Claim for services of tug in an unsuccessful attempt to remove vessel:—Held, not a salvage service. Salvage is a reward for benefits actually conferred. *The Gleniffer*, 3 Ex. C. R. 57.

Towage and Salvage—*Distinction.*]—In a collision between a steamer and a sailing vessel, the latter immediately became waterlogged and helpless, and in a position where, though safe for the moment, she might very shortly have been in great danger:—Held, that to rescue her was a salvage and not merely a towage service. *The Zambesi and The Fanny Dutard*, 3 Ex. C. R. 67.

Salvage means rescue from threatened loss or injury. No danger, no salvage. If the ship be in danger, then the rescuers earn a salvage reward, which, on the grounds of public policy, is to be liberal, but yet varies according to the imminence of the danger to the ship on the one hand, and the skill and enterprise and danger of the salvors on the other hand. (2) A small packet steamer, while performing one of her regular trips between certain points in thick weather, discovered a large steamship lying at anchor in such a position as to be in imminent danger of becoming a total loss. The latter signalled the former, and asked to be towed into port. This the packet steamer refused to do, wishing to prosecute her voyage, but agreed to tow the ship out of her dangerous position to the open sea, and then give her captain directions to enable him to reach his port of destination. This offer was accepted and acted upon. In conducting the ship to the open sea the packet steamer performed the services both of a pilot and a tug, and shewed skill and enterprise, and incurred appreciable risk, while so engaged:—Held, a salvage and not a mere towage service. *Canadian Pacific Navigation Co. v. The C. F. Sargent*, 3 Ex. C. R. 332.

Yacht Dragging Anchor in Public Harbour—*Jurisdiction of Exchequer Court—Amount in Dispute.*]—A yacht, with no one on board of her, broke loose from anchorage in a public harbour during a storm, and was boarded by men from the shore when she was in a position of peril, and by their skill and prudence rescued from danger: — Held, that they were entitled to salvage. The plaintiffs claimed the sum of $100 for their services:—Held, that, inasmuch as the right of salvage was disputed, the provisions of s. 44 (a) of R. S. C. c. 81 did not apply, and that the court had jurisdiction in respect of the action. *Lahey v. The Maple Leaf*, 6 Ex. C. R. 173.

See Hine v. The Thomas J. Scully, 6 Ex. C. R. 318, *post* XVIII.

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5. Remuneration for Salvage Services.

Collision—*Both Ships at Fault.*]—Where two vessels in collision are both at fault, and one vessel renders salvage services to the other, when the value of such services is determined, it should be divided and the salvaged vessel only be required to pay one-half of the amount. *The Zambesi and The Fanny Dutard*, 3 Ex. C. R. 67.

Rule of Admiralty Court—*Costs.*]—Held, following the usual rule, that not more than a moiety of the value of the res at the time when saved should be awarded to salvors, there being no exceptional feature except the small value of the res. Costs of salvors awarded out of other moiety. Costs of arrest and sale and of bringing fund into court paid in priority to claims out of fund, in proportion to the value of the res at the time of delivery to a dry dock company, and balance of the proceeds of sale, which was not sufficient to pay claim of possessory lien holder. *The Gleniffer*, 3 Ex. C. R. 57.

——— *Wrecking Company—Contract.*]—A vessel being stranded on the northern shore of lake Erie, the master telegraphed to the manager of a wrecking company at Detroit for tugs and wrecking apparatus, to which the manager answered agreeing to furnish the same. They were accordingly sent and the vessel rescued and saved. The plaintiffs claimed to recover an amount exceeding the value of the vessel, made up of per diem charges for the tugs and apparatus:—Held, that in actions in the high court, salvors, in the absence of a specific or express agreement to the contrary, must be taken to render their services under and subject to the rule of the admiralty court limiting the maximum amount of salvage to a moiety of the value of the saved vessel, and cargo, if any, which rule is equally applicable to wrecking companies as to ordinary vessel owners; that the agreement must define a specific amount as to the salvage to be paid, or a rule whereby it may be determined; and that there was no agreement here, but merely a request to perform the services. Semble, that the master of a vessel cannot by express agreement bind the owners to pay salvage beyond the value of the vessel. *International Wrecking and Transportation Co. v. Lobb*, 11 O. R. 408.

Special Contract — *Enforcement.*] — Where an agreement for salvage services had been entered into between the master of a stranded ship and the master of a tug, unless it appears that the latter had taken advantage of the distressed condition of the stranded ship to make an extortionate demand, the court will enforce such agreement and not decree a quantum meruit. (2) In such a case the agreement is valid primâ facie, and the onus is upon the defendant to shew that the price stipulated for was unjust and exorbitant, and the promise to pay it extorted under unfair circumstances. *Connolly v. The Dracona*, 5 Ex. C. R. 146.

If an agreement for salvage service was just and reasonable when entered into, it will not be disregarded because something has happened subsequently, or some contingency, of which one party or the other has taken the risk, has occurred to make it more onerous on one or the other than was anticipated when it was entered into. The Strathgarry, [1895] P. 264, referred to. *The Dracona v. Connolly*, 5 Ex. C. R. 207.

——— *Petition of Right.*]—A steamship belonging to the Dominion government went

ashore on the Island of Anticosti, and suppliants rendered assistance with their wrecking steamer in getting her afloat. The service rendered consisted in carrying out one of the stranded steamship's anchors, and in taking a hawser and pulling on it until she came off. For carrying out the anchor it was admitted that the suppliants had bargained for compensation at the rate of $50 an hour, but whether the bargain included the other part of the service rendered or not was in dispute. The service was continuous—no circumstances of sudden risk or danger having arisen to render one part of the work more difficult or dangerous than the other:—Held, that the rate of compensation admittedly agreed upon in respect of carrying out the anchor must, under the circumstances, be taken as affording a fair means of compensation for the entire service. (2) A petition of right will not lie for salvage services rendered to a steamship belonging to the Dominion government. *Couette* v. *The Queen*, 3 Ex. C. R. 82.

Vice-Admiralty Court.]—The vice-admiralty court has jurisdiction to award reasonable remuneration in respect of services to a stranded ship which were not strictly salvage services. The Watt, 2 W. Rob. 70, referred to. *The Costa Rica*, 3 Ex. C. R. 23.

Volunteer.]—Semble, while the court is disposed to confine the claims of professional pilots and tugs to the tariff scale for professional services, a volunteer ought to be allowed a more liberal rate of compensation. *Canadian Pacific Navigation Co.* v. *The C. F. Sargent*, 3 Ex. C. R. 332.

XV. Seamen's Wages and Expenses.

Action in Rem — *Jurisdiction of Exchequer Court—Personal Remedy—Owner—Purchaser—Bill of Sale.*]—In the year 1887 A. sold a vessel to M. and S. under an agreement stipulating, among other things, that the vessel was to remain in the name and under the control of A., until the purchase money was fully paid, and that, in the event of the terms of the contract not being performed by the vendees, A. was entitled to take possession, and the vendees would thereupon lose all claim or title they might have to the ship or to moneys paid to them in respect to the contract. This agreement was not registered. For some time the vendees performed the terms of the agreement, but having failed to do so after a certain period, A. resumed possession of the vessel. In an action in rem for wages due to a seaman employed by the vendees and which were earned during their possession of the vessel:—Held, that the amount of the claim being below $200, the exchequer court had no jurisdiction under s. 34 of the Inland Waters Seamen's Act. (2) That the property in the vessel had not passed to the vendees under the agreement, and that whatever rights the seaman had in personam must be enforced against the persons who employed him and not against the vendor. (3) That the agreement was not a bill of sale within the meaning of the Merchants Shipping Act, 1854, s. 55. (4) That if summary proceedings had been taken as provided by the Inland Waters Seamen's Act, a direction might have been made to provide for the realization of the seaman's claim against the vessel, and she might have been tied up by the court on his shewing that the vendees who employed him were then the supposed owners of the vessel, and when the action was brought were insolvent within the meaning of s. 34 of the said Act. *The Jessie Stewart*, 3 Ex. C. R. 132.

——— *Jurisdiction of Exchequer Court — Trifling Amount in Question — Costs.*]—A seaman, the engineer of a tug, took proceedings in the exchequer court, admiralty side, on a claim for $136 wages, and arrested the ship. On the trial it was contended that the court had no jurisdiction to try a claim for less than $200, the owner not being insolvent, the ship not being under arrest, and the case not referred to the court by a Judge, magistrate, or justice pursuant to R. S. C. c. 75, s. 34 (the Inland Waters Seamen's Act):—Held, that the Admiralty Act, 1891, conferred upon the exchequer court all the jurisdiction possessed by the high court, admiralty division, in England, as it stood on the 25th July, 1890, the date of the passing of the Colonial Courts of Admiralty Act, 1890, and that the admiralty court in Canada could now try any claim for seamen's wages, including claims below $200, and that s. 34 of R. S. C. c. 75 was repealed by implication (not having been expressly preserved) to the extent, at any rate, that it curtailed the jurisdiction of the admiralty court to entertain claims for seamen's wages below $200 in amount. Held, as to the costs of any such action, that they were in the discretion of the Judge trying the cause under rule 132 of the admiralty rules of the exchequer court of Canada. This was the practice and rule in England on the 25th July, 1890, and since. Tenant v. Ellis, 6 Q. B. D. 46, Rockett v. Clippingdale [1891] 2 Q. B. 293. The Saltburn, [1892] P. 333, referred to. *The W. J. Aikens*, 4 Ex. C. R. 7.

——— *Rights of Assignee.*]—The right of action in rem for wages cannot be assigned. Rankin v. The Eliza Fisher, 4 Ex. C. R. 274, followed. *Bjerre* v. *The J. L. Card*, 6 Ex. C. R. 274.

Expenses of Seamen Left in Foreign Port—*Liability of Owner—Proof of Payment—Proof of Ownership—Certiorari—Appeal.*]—An appeal lies to the supreme court of Canada from the judgment of a provincial court making absolute a rule nisi for a certiorari to bring up proceedings before a police magistrate under the Merchants Shipping Act with a view to having the judgment thereon quashed. Section 213 of the Merchants Shipping Act, 1854, makes the expenses of a seaman left in a foreign port and being relieved from distress under the Act a charge upon the ship, and empowers the board of trade, in Her Majesty's name, to sue for and recover the same from the master of the ship or "owner thereof for the time being:"—Held, that the latter words mean the owner at the time of action brought. Held, further, that a certificate of the assistant secretary of the board of trade that such expenses were incurred and paid is sufficient proof of payment under the Act, though the above section does not provide for a mode of proof by certificate. Notwithstanding the provision in the Imperial Interpretation Act of 1889 that the repeal of an Act shall not affect any suit, proceeding, or remedy under the repealed Act, in proceedings under the Merchants Shipping Act of

1854 proof of ownership of a ship may be made according to the mode provided in the Merchants Shipping Act, 1894, by which the former Act is repealed. Under the Act of 1894 a copy of the registry of a ship registered in Liverpool, certified by the registrar-general of shipping at London, is sufficient proof of ownership. Quære, where the Merchants Shipping Act of 1854 provides that every order of two justices in an action for seamen's wages shall be final, will certiorari lie to remove the proceedings into a superior court? *The Queen* v. *Sailing Ship "Troop" Co.*, 29 S. C. R. 662.

Right of Lien—*Musician.*]—In the absence of a contract to pay him wages a musician is not a "seaman" within the meaning of the Merchants Shipping Act, and therefore is not entitled to a maritime lien for his services. *McElhaney* v. *The Flora*, 6 Ex. C. R. 129.

——— *Saleswoman.*]—Held, that the word "seaman" as used in s. 2 of the Merchants Shipping Act, 1854, and the Inland Waters Seaman's Act (R. S. C. c. 75), included a woman in charge of a confectionery stand on board a vessel, who was engaged by the owner of the boat to take charge thereof. *Connor* v. *The Flora*, 6 Ex. C. R. 131.

——— *Watchman.*]—The caretaker of a ship not in commission is not a "seaman," and has no lien for his wages. *Brown* v. *The Flora*, 6 Ex. C. R. 133.

See Sylvester v. *The Gordon Gauthier*, 4 Ex. C. R. 354; *Wyman* v. *The Duart Castle*, 6 Ex. C. R. 387.

XVI. Seizure of Vessels.

British Built—*Burden of Proof.*]—Where a vessel is seized as not being British built, under the provisions of 7 & 8 Wm. III., the onus probandi lies upon the claimant, i. e., to recover, he must prove that the vessel in question was built at a British port. *Rex* v. *Nash*, Tay. 197.

Distress for Rent.]—Where a wharf has been leased, "with all the privileges thereto belonging," a vessel attached to the wharf by the usual fastenings cannot be distrained for rent. *Sanderson* v. *Kingston Marine R. W. Co.*, 3 U. C. R. 168.

Execution—*Title of Purchaser at Judicial Sale.*]—A steamboat said to belong to one M., in this country, against whom defendant had an execution, was sold at Detroit while the writ was in the sheriff's hands, under a judgment of condemnation and sale in the admiralty court there, for certain claims which by their law formed a lien upon her. In an interpleader between the plaintiff, claiming under that sale, and defendant, the jury found that the vessel was not the property of M., the execution debtor. The court held that the evidence supported their verdict:—Held, also, that at all events the plaintiffs' title under the sale made upon the judgment in rem must have prevailed. *VanEvery* v. *Grant*, 21 U. C. R. 542.

——— *Sale of Equity of Redemption under.*]—See Execution, VIII. 1.

Revenue Laws.]—If dutiable goods be brought by inland navigation to a port of entry and there entered, and the goods are afterwards landed without a permit, they are liable to seizure, but the vessel in which they were brought is not. *McKenzie* v. *Kirby*, 6 O. S. 422.

——— *Replevin.*]—A vessel seized for breach of the revenue laws having been replevied from the collector, the writ of replevin was set aside. *Scott* v. *McRae*, 3 P. R. 16.

——— *Restitution of Vessel—Exchequer Court—Jurisdiction.*]—The controller of customs had made his decision in respect of the seizure and detention of a vessel under the provisions of the Customs Act, confirming such seizure. The owner of the vessel, within the thirty days mentioned in ss. 181 and 182 of the Act, gave notice in writing to the controller that his decision would not be accepted. No reference of the matter was made by the controller to the court as provided in s. 181, but the claimant presented a petition of right and a fiat was granted. The Crown objected that the court had no jurisdiction to entertain the petition, and that the only procedure open to the claimant was upon a reference by the controller to the court:—Held, that the court had jurisdiction. (2) Damages cannot be recovered against the Crown for the wrongful act of a customs officer in seizing a vessel for a supposed infraction of the customs law, but the claimant is entitled to the restitution of the vessel. *Julien* v. *The Queen*, 5 Ex. C. R. 238.

See ante VII.

XVII. Statutes (Imperial)—Application of.

Insolvency — *Assignee—Property Passing.*]—Held, that the provisions of the Imperial Merchants Shipping Act did not prevent the property in the ship passing to the assignee under the Insolvent Act, 1876. *Jones* v. *Kinney*, 11 S. C. R. 708.

Limitation of Liability—*British Ship—Registration—Collision.*]—Held, that, as the tugs in question were not registered as British ships at the time of the accident, their owners were not entitled to have their liability limited under 25 & 26 Vict. c. 63 (Imp.) That the limited liability under s. 12 of 31 Vict. c. 58 (D.) does not apply to cases other than those of the collision. *Sewell* v. *British Columbia Towing and Transportation Co.*, 9 S. C. R. 527.

——— *British Ship—Registration—Injunction — Offer.*] — The defendant, as administratrix of her husband, who lost his life by the foundering of a steamer called the Waubuno, belonging to the plaintiffs, on which he was a passenger, sued the plaintiffs to recover damages under R. S. O. 1877 c. 128. The plaintiffs, who claimed limited liability under s. 54 of 25 & 26 Vict. c. 63 (Imp.), filed a bill under the Merchants Shipping Act, 1854, 17 & 18 Vict. c. 104, s. 514 (Imp.), to restrain the action, and prayed that it might be determined by the court whether they were liable for loss of life or merchandise, and, if so for what amount, and the persons entitled thereto:—Held, reversing the decision in 27 Gr. 346, that the Waubuno, not having

been registered under 17 & 18 Vict. c. 104 (Imp.), was not a British ship within the meaning of that Act, by virtue of 36 Vict. c. 128 (D.), and therefore not entitled to take aavantage of the limitation clause; and that, even if she were, the plaintiffs were not entitled to an injunction, as they did not admit their liability for damages to the extent mentioned in the Act, and bring into court or offer to secure the amount. *Georgian Bay Transportation Co.* v. *Fisher*, 5 A. R. 383.

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

See Smith v. *Brown*, 14 U. C. R. 9; *Smith* v. *Jones*, 5 C. P. 425; *Scott* v. *Carveth*, 20 U. C. R. 430; *Hearle* v. *Ross*, 15 U. C. R. 259, and *Torrance* v. *Smith*, 3 C. P. 411, *ante* II. 5.

XVIII. Towage.

Contract — *Non-performance — Excuse.*] —Semble, that it is no defence to an action against the commander of a steamboat for not towing, &c., that he could not perform his contract by reason of his tow-boat being unavoidably frozen in the ice. *Dorland* v. *Bonter*, 5 U. C. R. 583.

Damage to Tow — *Jurisdiction of Maritime Court—Demurrer—Costs.*] — The maritime court cannot entertain a cause of damage to a tow, arising from the negligence of the towing vessel where no collision between vessels occurs. Instead of filing a demurrer the defendant raised the objection to jurisdiction by answer:—Held, that a demurrer should have been filed, and the court in giving effect to the objection made no order as to costs. *The Sir S. L. Tilley*, 8 C. L. T. Occ. N. 156.

Delay—*Contract with Government—Public Notice — Implied Contract with Ship Owner.*]—Declaration, that defendants were owners of a line of tow-boats on the St. Lawrence river and canals, and received a schooner of plaintiff's to be towed from Lachine to Kingston for reasonable reward, &c., and undertook to use due diligence in towing said schooner. Breach, want of diligence and unreasonable delay, &c. Defendants had contracted with the government to tow vessels on the river. A public notice, signed by the secretary of the board of works, and containing regulations for towing, &c., also signed by defendants, appeared in a public newspaper at Kingston, and one of the defendants, examined as a witness, proved the contract with the government. The plaintiff's schooner was taken in tow at Lachine by one of the line, and, through the tow-boat, was several times delayed before reaching the place of destination:—Held, that the contract with the government was sufficiently proved: that the line of tow-boats having been established according to the printed notices, such notices imported the basis on which future constructive or implied agreements with individual ship owners were to be rested; that the plaintiff's vessel, with a fixed and known destination, having been taken in tow by a tug of defendants, the inference must be that she was to be towed through to her place of destination with due and reasonable diligence according to the provisions in the public notice; and that without a special agreement she should not be dropped or deserted at the pleasure of the owner of the tug. *Gaskin* v. *Calvin*, 2 C. P. 527.

Extraordinary Services—*Remuneration —Void Contract.*] — A ship, having been stranded, was set afloat again by her crew. She was leaking badly when boarded by the master of a tug, who made an offer to the mate of the ship to tow her into port for a specified sum. In making this offer to the mate the master of the tug was under the impression that the former was the captain of the ship, and in accepting the offer, without authority therefor, the mate allowed himself to be addressed and treated as such by the master of the tug. Apart from this suppressio veri on the part of the mate, he did not, although he was aware of it, disclose the dangerous condition of the ship at the time of entering into the towage agreement:—Held, that the agreement was void, and that the tug was entitled to be remunerated upon a quantum meruit for extraordinary towage services. *Dunsmuir* v. *The Harold*, 4 Ex. C. R. 222.

Negligence — *Contributory Negligence—Costs.*]—In an ordinary contract of towage the vessel in tow has control over the tug, and if the pilot of the tow negligently allows the tug to steer a dangerous course whereby the tow is injured, the tug is not responsible in damages therefor. (2) Where a very great part of the blame is to be attributed to the tug, the costs of the latter in defending the action may not be allowed. *The Prince Arthur* v. *Jewell* (*The Florence*), 5 Ex. C. R. 151.

A sailing vessel in tow of a steam tug was passing up the St. Lawrence river. The pilot of the tow and the pilot of the tug were both at fault in not having the course changed after passing a certain point in the river. The pilot of the tow discovered the mistake and gave notice to the tug, by executing the proper manœuvre in that behalf, but not until it was too late to avoid an accident which befel the tow:—Held, that the owners of the tow could not recover from the owners of the tug. *The Prince Arthur* v. *The Florence*, 5 Ex. C. R. 218.

——— *Omission of Precautions—Joinder of Parties—Company—Powers.*]—The B. C. T. Co. entered into a contract of towage with S. to tow the ship Thrasher from Royal Roads to Nanaimo, there to load with coal, and when loaded to tow her back to sea. After the ship was towed to Nanaimo, under arrangement between the B. C. T. Co. and the M. S. Co., the remainder of the engagement was undertaken between the two companies, and the M. S. Co.'s tug boat, Etta White, and the B. C. T. Co.'s tug, Beaver, proceeded to tow the Thrasher out of Nanaimo on her way to sea, the Etta White being the foremost tug. Whilst thus in tow the ship was dragged on a reef, and became a complete wreck. The night of the accident was light and clear; the tugs did not steer according to the course prescribed by the charts and sailing directions; and there was on the other side of the course they were steering, upwards of ten miles open sea free from all dangers of navigation, and the ship was lost at a spot which was plainly indicated by the sailing directions, although there was evidence that the reef was unknown. The ship had no pilot, and those aboard were

strangers to the coast. In an action for damages for negligently towing the ship, and so causing her destruction:—Held, (1) that, as the tugs had not observed those proper and reasonable precautions in adopting and keeping the courses to be steered, which a prudent navigator would have observed, and the accident was the result of their omission to do so, the owners of the tugs were jointly and severally liable. (2) That under the British Columbia Judicature Act the action was maintainable in its present form by joining both companies as defendants. (3) That, as there was nothing in the M. S. Co.'s charter or Act of incorporation to prevent their purchasing and owning a steam tug, and as the use of such a vessel was incidental to their business, they had a perfect right to let the tug to hire for such purposes as it was used for in the present case. *Sewell* v. *British Columbia Towing and Transportation Co.*, 9 S. C. R. 527.

Ordinary Services—*Remuneration for—Owner—Payment into Court—Costs.*] — The steam tug T. J. S., of 111 tons burthen, bound from New York, U. S. A., to St. Johns, P.Q., was prosecuting her voyage off Cape Chatte, in the Lower St. Lawrence, when a slight accident happened to her boiler, in consequence of which her fires had to be extinguished so that the boiler might cool and allow the engineer to make the necessary repairs. At the time she was in the ordinary channel of navigation, and the weather was fine and the sea calm. The accident happened at 8 p. m. Three hours afterwards, and before repairs could be made, the steamship F., of 2407 tons burthen, bound from Maryport, G.B., to Quebec, approached the tug, and at the request of her captain, took the tug in tow. The towage covered a distance of some 230 miles, and continued for a period of thirty hours, during which neither ship was in a position of danger, nor were the crew of the F. at any time in peril by reason of the services rendered to the disabled tug:—Held, that, as the service to the disabled tug was rendered under the easiest conditions, without increase of labour or delay to the F., it was clearly a towage and not a salvage service. It not being a case of salvage, the officers and crew of the F. were not entitled to participate in the amount awarded for the towage, but it belonged to the owners of the ship. The defendants having paid into court an amount sufficient to liberally compensate the plaintiff for the service rendered, they were given their proper costs against the plaintiff. *Hine* v. *The Thomas J. Scully*, 6 Ex. C. R. 318.

XIX. Miscellaneous Cases.

Assessment — *Personalty—Place of Rating.*]—A steamboat was held personal property, and properly assessable at one of the two places between which in summer it plied, and at which in winter it was laid up. *In re Hatt*, 7 L. J. 103.

——— *Registration—Place of.*]—K. resided and did business in the city of Halifax, and was owner of ships which were not registered at the city of Halifax, and which had never visited the port of Halifax. Under the authority of 37 Vict. c. 30, s. 1, and 27 Vict. c. 81, ss. 340, 347, 361, the assessors of the city of Halifax valued the property of K., and included therein the value of said vessels:—Held, that vessels owned by a resident, but never registered at Halifax, and always sailing abroad, did not come within the meaning of the words "whether such ships or vessels be at home or abroad at the time of assessment," and therefore were not liable to be assessed for city taxes. *City of Halifax* v. *Kenny*, 3 S. C. R. 497.

Bank—*Mortgagee.*]—The Bank of Upper Canada by their amended charter, 6 Vict. c. 27, s. 19, are disabled from holding ships as mortgagees. *McDonell* v. *Bank of Upper Canada*, 7 U. C. R. 252. See also *Lyman* v. *Bank of Upper Canada*, 8 U. C. R. 354.

Contract — *Steamship — Difference in Freight.*]—Plaintiff undertook to build for defendants all the bridges on a portion of the Grand Trunk Railway, and furnish the iron, "same to be shipped on board steamships from Great Britain to Montreal, defendants paying the difference between freight and insurance by steamships and first-class sailing ships:"—Held, that they were bound to pay such difference on all shipments, not merely on those made at a time when sailing vessels could be procured. *Coulson* v. *Gzowski*, 22 U. C. R. 33.

Crown — *Lien — Enforcement—Priorities —Writ of Extent—Costs.*]—Where the Crown invokes the aid of a court of admiralty to enforce a maritime lien, it is in no higher position than an ordinary suitor, and its rights must be determined in such court by the rules and principles applicable to all claims and suitors alike. (2) Where the Crown sued the owners of a steamship for damages to a government canal occasioned by the ship colliding with the gates, but had obtained judgment subsequent in date to one obtained by the master of the ship upon a claim for wages and disbursements accrued and made after the time of such collision, the latter judgment was accorded priority over that held by the Crown. (3) Where a party in an action in rem has incurred costs which have benefited not only himself but parties in other actions against the res, the costs so incurred by him will, if the proceeds of the property are insufficient to satisfy all claims in the various actions, be paid to him out of the fund in court before any other payment is made thereout. Semble, where the Crown pursues its remedy by writ of extent against the owners of a ship, it can only take under the writ of extent the property of the debtor at the time of the issue of the writ. If the debtor has assigned his property before that, the Crown can realize nothing under the writ in respect to the res. *The Queen* v. *The City of Windsor, Symes* v. *The City of Windsor*, 5 Ex. C. R. 223.

——— *Government Canal — Accident to Vessel.*]—Under the provisions of the Exchequer Court Act, s. 16 (c), the Crown is liable in damages for an accident to a steamer and cargo while in a government canal, where such accident results from the negligence of the persons in charge of the said canal. *McKay's Sons* v. *The Queen*, 6 Ex. C. R. 1.

Injury to Sub-marine Cable.]—By the regulation passed by the Quebec harbour commissioners in 1895, and subsequently approved by the governor in council and duly published, the commissioners prohibited vessels from casting anchor within a certain defined space of

the waters of the harbour. Some time after this regulation had been made and published, the commissioners entered into a contract with the plaintiffs whereby the latter were empowered to lay their telephone cable along the bed of that part of the harbour which vessels had been so prohibited from casting anchor in. No marks or signs had been placed in the harbour to indicate the space in question. The defendant vessel, in ignorance of the fact that the cable was there, entered upon the space in question and cast anchor. Her anchor caught in the cable and in the efforts to disengage it the cable was broken:—Held, that she was liable in damages therefor. *Bell Telephone Co.* v. *The Rapid*, 5 Ex. C. R. 413.

Rescue of Sunk Vessel—*Expenses—Liability—Insurers—Negligence.*] — Defendants and another company had insured a vessel, which was sunk while being towed by the plaintiffs for her owners. An agreement was then entered into between the plaintiffs and the two insurance companies, by which, after reciting that the liability for raising the vessel was undetermined, the plaintiffs undertook to raise her for a sum named, and it was agreed to submit to arbitration by whom such sum and the other expenses of repairing the vessel should be borne. After this the owners sued the plaintiffs for negligence in sinking the vessel, and recovered. The defendants refused to arbitrate, and the plaintiffs then sued them for work and labour:—Held, that they could not recover, for defendants had agreed only to pay in the event of the arbitrators deciding that they were liable, and it was not certain whether the plaintiffs were entitled to be paid at all. The question as to the plaintiffs' negligence was left to the jury and found in their favour; but held, that such question could not be tried in this action; and semble, that on the evidence the verdict was wrong. *Calvin* v. *Provincial Ins. Co.*, 27 U. C. R. 403.

Sale of Part of Vessel — *Conversion—Statute of Limitations.*] — About 1857 the plaintiff purchased from the owner of a certain steamer the copper sheeting, &c., thereon, it being understood that he was to get it when a suitable time arrived, as by drydocking or hauling out the vessel. A yacht club soon after bought the hull, which they used as a club ship, having the same understanding with the plaintiff. Shortly afterwards the plaintiff with the consent of the club took off the sheeting to the waterline, when the club, thinking that the vessel was being injured, but without disputing the plaintiff's ownership, refused to allow him to take off any more, and the plaintiff desisted. In 1869 the club sold the vessel to one C., who gave a chattel mortgage for the unpaid purchase money, and on making default, judgment was recovered against him, and, under a fi. fa. goods thereon, C.'s interest was sold to defendant, the plaintiff being at the sale and informing defendant of his claim. It was proved that the vessel had become a total wreck, and useless as a ship. The defendant having refused to give up the copper after demand made, the plaintiff in December, 1875, brought trover therefor, when defendant insisted that plaintiff's right was barred under the Statute of Limitations, for that there was a conversion by the club's refusal to allow the copper to be taken off, or at all events by the sale to C.; and that six years had elapsed in either case before action brought:—Held, that the plaintiff was entitled to the copper, and to maintain trover for it, and that neither of the acts relied on by defendant amounted to a conversion or could be so set up by him. *Keith* v. *McMurray*, 27 C. P. 428.

Seizure of Shares in Ships.]—See *Trerice* v. *Burkett*, 1 O. R. 80.

Vice-admiralty Court—*Jurisdiction.*]—See *The Costa Rica*, 3 Ex. C. R. 23.

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I. ADMISSION AND RIGHT TO PRACTISE.

1. *Admission.*

Admission — *Scots Writer.*]—A solicitor in the sheriff's court in Scotland is not entitled to be admitted on proof of service here for three years, under 7 Wm. IV. c. 15. *In re Macara*, 2 U. C. R. 114.

Appeal to Supreme Court of Canada.]—It was never intended that the supreme court of Canada should interfere in matters respecting the admission of attorneys and barristers in the several Provinces. *In re Cahan*, 21 S. C. R. 100.

See post III. 1.

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2. *Persons Prohibited from Practising.*

County Court Judge — *Profits.*]—To a declaration against a county court Judge under C. S. U. C. c. 15, s. 5, as amended by 29 Vict. c. 30, to recover the penalty imposed for acting as an attorney and conveyancer, and preparing documents for one G. to be used in a court, the defendant pleaded that he did not practise in the profession of the law as an attorney for said G., or as such attorney prepare any papers or documents to be used in said court. The evidence shewed that defendant prepared gratuitously for G., who was a widow in poor circumstances, the petition, bond, and affidavits required to enable her to obtain administration to the estate of her late husband: — Held, that the second plea was proved, and a verdict was therefore entered for defendant on the leave reserved. The evidence did not bring defendant within the spirit of the Act, or the mischief against which it was directed, which was the doing the acts prohibited for profit. *Allen* v. *Jarvis*, 32 U. C. R. 56.

Local Master — *Partnership.*] — Local masters and deputy registrars of the court are not at liberty to practise in partnership with solicitors practising in the court of chancery, although they may not actually share in the emolument of suits. *McLean* v. *Cross*, 3 Ch. Ch. 432.

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3. *Practising without Certificate.*

Crown Attorney.]—A Crown county attorney practising only as such need not take out a certificate. *Re Coleman*, 33 U. C. R. 51.

Member of Firm — *Holding-out—Estoppel.*]—M., a solicitor who had not taken out the certificate entitling him to practise in the Ontario courts, allowed his name to appear in newspaper advertisements and on professional cards and letter heads as a member of a firm in active practice; he was not, in fact, a member of the firm, receiving none of its profits and paying none of its expenses, and the firm name did not appear as solicitors of record in any of the proceedings in their professional business. The Law Society took proceedings against M. to recover the penalties imposed on solicitors practising without certificate, in which it was shewn that the name of the firm was indorsed on certain papers filed of record in suits carried on by the firm: —Held, reversing the judgment in 15 A. R. 100 and 13 O. R. 104, that M. did not "practise as a solicitor" within the meaning of the Act imposing the penalties, R. S. O. 1877 c. 140, and that he was not estopped, by permitting his name to appear as a member of a firm of practising solicitors, from shewing that he was not such a member in fact. *Macdougall* v. *Law Society of Upper Canada*, 18 S. C. R. 203.

Penalty.]—The penalty of £4 for omitting to take out a certificate in proper time is payable in each court. Quære, as to the amount to be paid for his certificates, where the attorney has allowed the time specified for the courts of common pleas and chancery to pass, but not for the Queen's bench. *Re Latham and Law Society*, 9 U. C. R. 269.

——— *Suspension—Interest.*]—A solicitor who has not taken out his annual certificate

cannot, without rendering himself liable to suspension, &c., under the provisions of ss. 22, 23, and 24 of the Act respecting solicitors, R. S. O. 1897 c. 174, practise as such, even in an isolated instance, and he is not relieved by the fact that he is interested in the subject matter of the litigation. *Re Clarke*, 32 O. R. 237.

II. AGENT OF SOLICITOR.

1. *Service of Papers on.*

Agent Entering Appearance—*Service of Declaration.*]—The fact that a man employed another to do a specified act for him at a particular time, raises no presumption whatever that the person so employed has authority to do a similar act at a different time. Where defendant's attorney, living at St. Thomas, sent an appearance to B. of London, whence the writ of summons issued, to enter there for him, which was done, and on the 24th January plaintiff's attorney served the declaration and demand of plea on B., which did not reach defendant's attorney till the 25th January:—Held, that, although B. had twice entered appearances in like manner for defendant's attorney, B. was not to be deemed his general agent to accept service of papers; and therefore that the time for pleading did not count till the 25th January, when the declaration and demand of plea was received by defendant's attorney, at St. Thomas. Held, also, that the receipt of the declaration and demand of plea by defendant's attorney from B. and sending a plea to him to be filed and served, was not a ratification of the service on B. as his agent. *Smith* v. *Roe*, 1 C. L. J. 154. See *Workman* v. *McKinstry*, 21 U. C. R. 622.

A defendant sued in the county of Wentworth, but who lived in York, employed an attorney in Toronto to defend him, who instructed another attorney in Hamilton to enter an appearance; a declaration was then offered to the attorney in Hamilton, and declined. Interlocutory judgment was signed and damages assessed. A summons to set these proceedings aside was obtained, but it was not shewn that a copy of the declaration had not been served by affixing a copy in the county office:—Held, that on account of this omission, and for other reasons, the summons must be discharged. *Hamilton* v. *Brown*, 1 C. L. Ch. 257.

Agent in Cause.]—Service on the agent in the cause, though not the general agent, is good. *Crooks* v. *Davis*, 5 O. S. 141.

Dual Agency.] — A summons cannot be taken out by an agent for one attorney and served on himself as agent for another attorney. *Ontario Bank* v. *Fisher*, 4 P. R. 22.

Toronto Agent.]—See *Prittie* v. *Lindner*, 11 P. R. 313; *Robinson* v. *Robinson*, 13 P. R. 51.

——— *Entry of Name—Effect—Service by Posting.*]—Where a solicitor has not entered the name of his agent in a county town, service of papers in an action where the proceedings are being carried on in such county town cannot be effected upon him by posting up copies in the office of the local registrar there, if he has the name of a Toronto agent duly entered. Con. rules 203, 204, and 461 considered. *Essery* v. *Grand Trunk R. W. Co.*, 13 P. R. 221.

——— *Notice — Time.*]—Held, that the "two clear additional days to the time now allowed by law" for service on the agent of a country attorney under 34 Vict. c. 12, s. 12 (O.), means the allowance of two days between the day of service and the day of the happening of the event to which the notice relates. *Nordheimer* v. *Shaw*, 6 P. R. 14.

——— *Notice of Trial—Setting aside—Time.*]—Held, that an application on the part of an attorney resident in the country, made to set aside a notice of trial served on his Toronto agent as irregular, and made within eight days after such service, is not too late. *Anderson* v. *Culver*, 10 L. J. 159.

See PRACTICE—PRACTICE AT LAW BEFORE THE JUDICATURE ACT, XV.—PRACTICE IN EQUITY BEFORE THE JUDICATURE ACT, XXII.—PRACTICE SINCE THE JUDICATURE ACT, XIII.

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2. *Other Cases.*

Affidavit—*Presumption.*]—In applications of strict technical right it will not be assumed that an affidavit made by "the agent" of a person is by his professional Toronto agent, and that such person is a practising attorney. *Leslie* v. *Foley*, 4 P. R. 246.

Charges of Agent—*Half-rates—Accounting with Client.*]—In a certain suit D. acted generally as solicitor for H., who had been appointed administrator pendente lite. In certain matters, however, in connection with the proceedings, D. advised H. to retain another solicitor, deeming it improper to act himself for H. in respect to these matters, as he was also acting for another party. The solicitor thus retained by H. agreed with D. to do the work which he was retained to do for agency charges, of which he rendered D. an account. D. made up one bill of costs and rendered it to H., which included at full rates the services which the other solicitor had performed at agency rates. H. paid the bill with these charges to D.:—Held, that the master, on taking H.'s account with respect to the estate of which he had been appointed administrator, should have allowed the bill as properly paid so far as concerned the said charges, for there was nothing improper in the transaction. *Beatty* v. *Haldan*, 10 O. R. 278.

Lien of Agent — *Papers — Payment by Client—General Agency Bill.*]—The agent of a solicitor has a lien on the papers, or on a fund recovered, against his principal, and to the same extent against the principal's client, and such client is justified in paying the agent so as to discharge such lien and obtain his papers. Where the client has paid the Toronto agent, who retained the bulk of the funds recovered on account of his agency bill, and offered the principal the balance, who refused it and issued execution against the client for the whole amount; such execution was stayed with costs. The agency charges in this case were wholly for work in the suit in which the client was a party; sed quære, would the solicitor's lien attach for the amount of his agency bill generally? *Re Cross*, 4 Ch. Ch. 11.

——— *Unpaid Agency Charges.*]—See *Re Ryan*, 11 P. R. 127.

Payment of Money.]—Where money by an award is to be paid to the plaintiff, or to the plaintiff's attorney, the attorney cannot substitute another attorney under him to receive the money. *Masecar* v. *Chambers*, 4 U. C. R. 171.

Privity between Client and Agent—*Payment—Account.*]—W. & Co., attorneys in the Province of Quebec for B. & Co., there, requested the defendant, an attorney in the Province of Ontario, to sue a company there on a promissory note made by them, of which B. & Co. were the holders. Defendant issued a writ in the name of B. & Co., and indorsed his own name as attorney. He, however, never had any communication with them, treating only with W. & Co., who had sent him many similar claims to collect, and crediting them with the amount of the note when collected:—Held, that the plaintiff, who was the assignee of B. & Co., was entitled to recover from defendant the amount so collected; the rule that the town agent of a country principal is not accountable to a client for the latter not being applicable, as W. & Co. were merely the agents of B. & Co. to retain the defendant to act as their attorney, between whom and W. & Co. a direct privity of contract therefore existed. *Ross* v. *Fitch*, 6 A. R. 7.

III. Articled Clerks.

1. *Application for Admission to Practise.*

Affidavit.]—A person was admitted upon his own affidavit of service, the attorney being absent from the Province. *Ex parte Radenhurst*, Tay. 138.

——— *Certificate.*]—A certificate from the master, and an affidavit of the clerk "that he had during his clerkship done everything required of him." was held not sufficient. *Ex parte Lyons*, Tay. 171.

Expiry of Articles.]—The time of a clerk articled after the 1st July, 1858, must expire fourteen days before the term of his admission, for the affidavit of service cannot be accepted at a later period. Where, therefore, M. was articled for a year on the 25th January, 1860, and Hilary term began on the 4th February, 1861:—Held, that he could not be admitted in that term. *In re MacGachen*, 20 U. C. R. 321.

Loss of Articles.]—Where an attorney's clerk had lost his articles, he was sworn in on an affidavit of the loss, and producing the usual certificate of service. *In re Loring*, M. T. 2 Vict.

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2. *Discharge by Court from Articles.*

Absconding Attorney — *Service.*] — A clerk articled to an attorney who absconds, will be discharged. Delivery of a copy of the rule nisi to the attorney's town agent, and leaving copies at the attorney's last place of residence, and at his office:—Held, sufficient service. *In re McGregor*, 15 C. P. 54.

Refusal of Attorney.]—The court ordered a clerk's discharge, the attorney refusing to release him or assign the articles. *In re Patterson*, 18 U. C. R. 250.

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3. *Service under Articles.*

Absence Abroad.] — A clerk, having served four years, obtained his master's consent to go to Ireland for the benefit of his health, intending to return in six months, but his health still continuing bad, he with his master's permission remained six months longer. The court on his return admitted him as an attorney. *In re Hagarty*, 6 O. S. 188.

Absence—*Business Elsewhere.*] — Where an articled clerk carries on business in a place where the master does not reside, the time so spent will not be computed in his service. *McIntosh* v. *McKenzie*, M. T. 1 Vict.

——— *Engaging in Other Pursuits.*]—H., having been articled on the 21st November, 1854, for five years, was permitted to be absent during 1855 for six months, under the belief that that period would be allowed. This he spent at a grammar school preparing for the university. He was afterwards absent for eight and five weeks respectively in 1856, to prepare for his examination at the university:—Held, that the six months could not be allowed, but that the other periods might be. *In re Hume*, 19 U. C. R. 373.

——— *Illness—Costs.*]—On an application for an attachment against an attorney for having improperly granted a certificate of actual service to A. B., an articled clerk, when he had been absent from his service on account of ill health for nearly two years, whilst he was under articles, and to strike A. B. off the rolls, on which he had been admitted more than two years before, the court refused both rules, on the ground of the long time that had elapsed since the clerk's admission as an attorney; but they made his master pay the costs of the application. *In re Holland*, 6 O. S. 441.

——— *Public Employment.*]—An attorney was struck off the rolls, where it was shewn on affidavit that during the entire period he was under articles he was a salaried clerk attending a public office. *In re Ridout*, T. T. 2 & 3 Vict.

Absence of Attorney abroad — *Rearticling to Another.*] — The applicant, in 1847, articled himself to J. M., an attorney, then in partnership with E. J. In November, 1850, J. M. went to England and did not return: in February, 1852, his partnership with E. J. was dissolved. In March, 1852, the clerk articled himself, of his own accord, to T. G. for the residue of his five years—J. M. not consenting to this arrangement. The court would not allow the time served with the last master. *Ex parte McIntyre*, 10 U. C. R. 294.

Agent of Attorney.]—An articled clerk can serve only one year with the agent of the attorney in this Province. *In re Gilkison*, H. T. 7 Wm. IV.

Compensation for Services — *Contract—Action.*]—An attorney agreed with a clerk

to take him into partnership at the expiration of his articles, and that his share in the profits should commence from the date of his articles. The evidence did not shew that the clerk had been admitted. A separation took place, and an action was brought for compensation for services:—Held, within 22 Geo. II. c. 46, which is in force here, although repealed in England, and that the action was not maintainable. *Dunne* v. *O'Reilly*, 11 C. P. 404.

IV. AUTHORITY.

1. *In Actions and Suits.*

Agreement Not to Appeal.]—An attorney ad litem has no authority to bind his client not to appeal by an agreement with the opposing attorney that no appeal would be taken. *Société Canadienne-Francaise de Construction de Montreal* v. *Daveluy*, 20 S. C. R. 449.

Appearance—*Ratification — Disavowal.*]—In an action brought in 1866 for the sum of $800 and interest at twelve and a half per cent. against two brothers, S. J. D. and W. McD. D., being the amount of a promissory note signed by them, one copy of the summons was served at the domicile of S. J. D. at Three Rivers, the other defendant, W. McD. D., then residing in the State of New York. On the return of the writ, the respondent filed an appearance as attorney for both defendants, and proceedings were suspended until 1874, when judgment was taken, and in December, 1880, upon the issue of an alias writ of execution, the appellant, having failed in an opposition to judgment, filed a petition in disavowal of the respondent. The disavowed attorney pleaded inter alia that he had been authorized to appear by a letter signed by S. J. D., saying: "Be so good as to file an appearance in the case to which the enclosed has reference," &c.: and also prescription, ratification, and insufficiency of the allegations of the petition of disavowal. The petition in disavowal was dismissed:—Held, that there was no evidence of authority given to the respondent or of ratification by the appellant of the respondent's act, and therefore the petition in disavowal should be maintained. *Dawson* v. *Dumont*, 20 S. C. R. 709.

Appointment by Court—*Representation of Creditors—Repudiation.*]—Where a solicitor had been appointed by the master to represent certain creditors as a class:—Held, that one of such creditors, who repudiated the act of such solicitor, was bound by the solicitor's proceedings. Held, further, that the solicitor was not only authorized to act for such creditors in the proceedings in the master's office, but also in proceedings arising out of or connected with these,—such, for instance, as a motion in chambers on their behalf. *Re McConnell*, 3 Ch. Ch. 423.

Bail—*Attorney for Principal.*] — Semble, that bail are not bound by what the attorney for their principal may choose to do as such. *Mitchell* v. *Noble*, 1 C. L. Ch. 284.

Bringing Action without Instructions.]—See *post* IX. 1 (a).

——— *Costs.*]—An action, brought by solicitors in the plaintiff's name, was dismissed with costs, and judgment entered against the plaintiff. The solicitors had acted without any written retainer from the plaintiff, or any instructions from her personally, relying on instructions received from the plaintiff's husband, which she positively denied ever having given, and also on letters written to her, the sending of which was not strictly proved, and which she denied ever having received:—On a motion made therefor by the plaintiff, the judgment and all subsequent proceedings were set aside, and the solicitor ordered to pay the plaintiff's costs as between solicitor and client, and the defendant's costs as between party and party. *Scribner* v. *Parcells*, 20 O. R. 554.

By a resolution of the council of a municipal corporation, the mayor and clerk were instructed to grant a certificate under the corporate seal to the solicitors for the other plaintiffs authorizing them to join the corporation as plaintiffs in this action, upon receiving a bond, to the satisfaction of the mayor, indemnifying the corporation against all costs. A bond was accordingly handed to the mayor, who retained it, but the action was brought by the solicitors, and the corporation joined therein as plaintiffs, without the granting of any certificate under the corporate seal. After the action had been begun the mayor informed the defendants' solicitors that no certificate had been issued, and stated that he would not sign one until he had been properly advised by counsel:—Held, that the action was brought in the name of the corporation without authority: and that the defendants had the right to move to have such name struck out. Semble, that the corporation should have been parties to the motion. Held, also, that as the solicitors for the plaintiffs other than the corporation were not guilty of any intentional wrongdoing in joining the corporation as plaintiffs, they should not be made liable for the defendants' costs. *Town of Barrie* v. *Weaymouth*, 15 P. R. 95.

Solicitors who began an action in the name of a public school board and an individual as plaintiffs were retained for the board by a special committee appointed by resolution of the board, not under the corporate seal; the purposes of the appointment, as stated on the face of the resolution, embraced the commencement of any action respecting the matters referred to and the employment of counsel, the subject of the action being one of such matters:—Held, that this was not proper authority from the school board to the solicitors to bring the action, and the defendants had the right to have the name of the board as plaintiffs struck out. Town of Barrie v. Weaymouth, 15 P. R. 95, followed. The solicitors having acted in good faith and under the belief that their retainer was sufficient, no costs were awarded. *Barrie Public School Board* v. *Town of Barrie*, 19 P. R. 33.

——— *Judgment—Relief—Laches—Repayment of Moneys.*]—A person who finds himself a party plaintiff to proceedings which he has never authorized, is entitled to be relieved from liability in connection with them, whether the solicitor in fault be solvent or not; and the fact that an order dismissing the action has been issued before the applicant becomes aware that his name has been used, makes no difference in the rule. Nurse v. Durnford, 13 Ch. D. 764, followed. Delay in moving to set aside the proceedings from the 1st August to the 25th September:—Held,

not a bar to relief, where no detriment had resulted to the defendants thereby. The sheriff having seized the plaintiff's goods under execution upon an order dismissing the action with costs, the plaintiff paid the costs to the sheriff, who undertook to hold the amount for ten days, "to be returned if writ set aside, and if not within that time, to be applied in payment of execution." After the lapse of more than ten days, during which the plaintiff took no step, the sheriff paid over the money to the defendants. The plaintiff having afterwards established his right to be relieved from liability:—Held, that he was entitled to be repaid by the defendants. *Morris* v. *Confederation Life Association*, 17 P. R. 24.

——— *Motion against Solicitor—Security for Costs.*]—When plaintiffs in an action repudiate the authority of the solicitor to take the proceedings, and move to set them aside, they cannot be compelled by the solicitor to give security for costs on the ground that they reside out of the jurisdiction. Re Percy and Kelly Nickel Co., 2 Ch. D. 531, followed. Where a charge of improper conduct is made against a solicitor, who is an officer of the court, by a person out of the jurisdiction, the court ought not to order security for costs, and thus prevent such a charge being investigated. *Sample* v. *McLaughlin*, 17 P. R. 490.

——— *Second Action.*]—Upon an application by the defendant under rule 1243 for security for costs, upon the ground that the costs of a former action brought against him by the same plaintiff for the same cause, and discontinued, remained unpaid, the plaintiff contended that the former action, though brought by a solicitor in his name, was brought without his authority:—Held, that there should be no discussion as to the incidence of the costs of a prior action, known to the plaintiff, he not having taken the proper steps to get rid of these costs prior to the launching of the second action. *Lea* v. *Lang*, 17 P. R. 203.

Discharge of Defendant in Execution.]—An attorney (merely as such) is not authorized to discharge a defendant in execution, certainly not without receiving the debt, and a sheriff so discharging a debtor upon his authority will be liable as for an escape. *Brock* v. *McLean*, Tay. 398.

See, also, *Stocking* v. *Cameron*, 6 O. S. 475.

Indemnity to Sheriff — *Adoption.*]—A promise of indemnity to the sheriff by an attorney is binding on his client where the attorney has the conduct of the suit in the course of which such promise is made, and the subsequent acts of the client shew that he has adopted the attorney's proceedings. *Muirhead* v. *Shirreff*, 14 S. C. R. 735.

Instructions — *Arrangement without — Bona Fides.*]—Where a solicitor in good faith gives his consent and enters into an arrangement, even without instructions, the client cannot be relieved. Where the solicitor has acted fraudulently the case is different. *Bailey* v. *Bailey*, 2 Ch. Ch. 58.

——— *Arrangement without—Repudiation.*]—An agreement by a solicitor that his client's suit should abide the event of another suit by the same plaintiff against another party, made without instructions from the client, who afterwards repudiated it:—Held, not binding on the client. *Dewar* v. *Orr*, *Dewar* v. *Sparling*, 3 Ch. Ch. 224.

——— *Disobedience to.*]—Application for new trial where attorney had acted contrary to instructions. *Williams* v. *Knapp*, H. T. 4 Vict.

Matters of Practice.]—A client is not to be regarded as having a right to govern the conduct of his attorney, as to the degree of liberality he shall observe in his practice. *Shaw* v. *Nickerson*, *Gillespie* v. *Nickerson*, 7 U. C. R. 541. See, also, *Vail* v. *Duggan*, 7 U. C. R. 568.

Next Friend—*Retirement—Withdrawal of Authority—Costs.*]—Upon application to the court therefor, the next friend of an infant plaintiff may be allowed to withdraw, upon such terms as the circumstances of the case and the welfare of the infant may require. Solicitors began an action in the name of an infant as plaintiff by her mother as next friend, with the consent of the latter. After the action had been some time in progress, the mother wrote a letter to the solicitors revoking the authority to use her name, to which they replied that proceedings would not be stayed unless she paid costs up to date, and that if she did not do so they would assume that she intended them to continue the action. She took no notice of this, and they went on with some proceedings, whereupon the defendant, instructed by the mother, moved to dismiss the action on the ground that it was being prosecuted without authority, and asked for costs against the solicitors:—Held, in staying the proceedings, that there was nothing to prevent the mother from renouncing her character of next friend, and withdrawing from the litigation, subject to her remaining amenable to the jurisdiction of the court as to liability for costs theretofore incurred. As to costs:—Held, that the court reaches the solicitors of a plaintiff directly for the benefit of the defendant only where the plaintiff, as client, has a right to be recouped by the solicitor, and to the extent of that recoupment. The next friend here was liable to the solicitor for costs up to her letter, and the solicitor was liable to the next friend for costs subsequent thereto; and as the former costs exceeded the latter, and, as between the next friend and the defendant, the former was liable for costs so long as she did not make a direct application against the solicitors, no order could be made in favour of the defendant; but the next friend was entitled to be indemnified by the solicitors for costs incurred after her letter. Held, also, that it was competent for the defendant to move to stay the proceedings, although the normal practice is for the next friend to move. *Taylor* v. *Wood*, 14 P. R. 449.

Partner of Attorney—*Notice of Trial.*]—A. and B. were in partnership as attorneys, A. being the attorney on the record in this suit. Notice of trial was given in the name of B.:—Held, that the notice was irregular only, and not a nullity. Semble, a notice of trial given in the partnership name would not be irregular. Nor would a notice subscribed "the plaintiff's attorney," without giving his name. *Macaulay* v. *Phillips*, 9 C. L. J. 237.

Seizure of Goods under Execution—*Direction to Sheriff.*]—See *Wilkinson* v. *Harvey*, 15 O. R. 346.

Settlement of Action — *Corporation — Parol.*]—As to the power of the attorney on the record to compromise suits against a corporation, and how far he may bind them by parol, when authorized under seal. *Doran* v. *Great Western R. W. Co.*, 14 U. C. R. 403.

——— *Instructions—Disobedience to—Consent Judgment—Setting aside.*] — After the trial of an action had been postponed at the assizes and the defendant had left the assize town, his solicitor and counsel effected a settlement with the plaintiff, which was given effect to by the entry of a verdict and judgment by consent. The solicitor admitted that he was not instructed, but relied on his client adopting the settlement, which was, in the solicitor's opinion, a favourable one. The client said that he had instructed the solicitor not to settle in the way he did:—Held, that the defendant was entitled to have the verdict and judgment set aside and a new trial, on payment of costs. *Watt* v. *Clark*, 12 P. R. 359.

Where counsel, acting upon the instructions of the plaintiff's solicitor, effected a compromise of the action not authorized by the plaintiff and contrary to the express instructions given by her to the solicitor, the compromise was set aside and the plaintiff allowed to proceed to trial, but, as the plaintiff and defendant were innocent parties, without costs to either against the other. Stokes v. Latham, 4 Times L. R. 305, followed. *Benner* v. *Edmonds*, 19 P. R. 9.

——— *Negotiations for—Withdrawal.*]—If parties to an action authorize their solicitors to enter into negotiations for a settlement, and, while the negotiations are proceeding, one party, unknown to his own or to the opposite solicitors, writes to the other party personally withdrawing from the negotiations, and the respective solicitors, not knowing what has taken place between their clients meanwhile, conclude the terms of a settlement, such settlement will not be binding on the party who had thus withdrawn from the negotiations, because the other party had direct notice of his withdrawal. Semble, that if the principals had, between themselves, entered into an agreement, and the solicitors, in ignorance of what the clients were doing, had previously concluded a different agreement, the agreement made by the solicitors would bind because prior in time. On the same reasoning where the two principals negotiate, and either perfect a contract or put an end to proposals for one before the delegated power to their agents has been fully exercised, the acts of the principals are the binding acts, and the subsequent acts of the agents are of no avail as against their principals. In this case, upon the letters and evidence:—Held, that the defendant had not withdrawn his prior proposals and abandoned the negotiations before a final arrangement had been come to by the respective solicitors. *Vardon* v. *Vardon*, 6 O. R. 719.

——— *Provisional Settlement.*]—The order of the master in chambers, 9 P. R. 220, staying proceedings on the ground that the action had been settled by the plaintiff's solicitor, was reversed because the evidence shewed that the settlement was a provisional one, and that the plaintiff himself had not adopted it. *McDonald* v. *Field*, 12 P. R. 213.

——— *Unpaid Costs—Beneficial Plaintiff—Collusion—Notice — Lien.*] — A Montreal firm of solicitors brought an action for one C. against H., the now plaintiff, which was settled for $3,700, of which H. paid $3,000, and gave the solicitors a note for $5,500 made and indorsed respectively by the defendants Griffith and Gimson, and held by H. as indorsee, out of which the solicitors were to take the $700 and their costs. They sent a clerk to Toronto, where defendants lived, to effect a settlement, but, being unable to do so, he left the note for collection with M. & Co., a Toronto firm of solicitors. After legal proceedings had been instituted, plaintiff paid C. the $700. A settlement was discussed between the solicitors, which M. & Co. agreed to, provided their costs and the charges for the clerk's expenses to Toronto were paid. Negotiation for a settlement had been going on between the parties themselves, and on the 2nd December an agreement was entered into, that defendants should pay $5,000 clear of everything, to the plaintiff. On the 4th December defendants' solicitors were informed by M. & Co. of other parties, besides the plaintiff, being interested in the note. On 6th December the parties met and effected a settlement, by plaintiff accepting $5,000 in full of all claims under the action. The note which was held by M. & Co. was never delivered up to the defendants:—Held, that the action was not the plaintiff's, but that of C., or for his benefit, and that M. & Co. could proceed therewith, as C.'s solicitors, to enforce payment of their costs, and the Montreal solicitors' charges; that the settlement of a claim under a negotiable security without the security being delivered up, subjected the defendants to such charges as were a specific lien thereon, of which they had notice; or, semble, even without notice: that the effect of the agreement of the 2nd December was that the defendants should pay M. & Co.'s costs, and defendants afterwards on the settlement made not providing therefor, and leaving the note outstanding, was some evidence of collusion to deprive M. & Co. of their costs; and that the notice given not to settle without providing for M. & Co.'s costs, &c., gave M. & Co. an equitable claim to the interposition of the court. *Hall* v. *Griffith*, 5 O. R. 478.

——— *Unpaid Costs—Judgment—Absence of Collusion.*]—A settlement of an alimony action after judgment for permanent alimony, upon which writs of execution were in the sheriff's hands, was effected between the parties without the intervention of the solicitors on the record. To carry out the settlement a third solicitor was instructed to withdraw the writs from the sheriff's hands, which he did without paying the costs of the plaintiff's solicitor, which he knew were unpaid. There was no collusion or actual fraud against the plaintiff's solicitor proved:—Held, that the plaintiff's solicitor had control of the writs in the sheriff's hands to the extent of his unpaid taxable costs, and that he was entitled to have the writs replaced, or new writs placed in the sheriff's hands at the expense of the solicitor who withdrew them and the plaintiff, or to an order directly against the defendant for payment of his unpaid taxable costs, and for the costs of the motion against the plaintiff and the solicitor who withdrew the writs; but that he was not entitled to an order for payment of his unpaid costs by the solicitor or the sheriff. This judgment was affirmed with this variation, that the solicitor who

withdrew the writs was relieved from the payment of costs. *Friedrich* v. *Friedrich*, 10 P. R. 308, 546.

See TRIAL, XVI. 8.

Terms of Order — *Abandonment.*]—The court will not hold defendant to terms accepted by his attorney, at the suggestion of a Judge at chambers, when he immediately abandons the Judge's order. *Young* v. *Shore*, 2 O. S. 314.

——— *Alteration of—Consent — Interlocutory Order.*]—Where solicitors properly representing the claimant and the execution creditors in an interpleader made an arrangement by which $441 of the claim made and provided for in the interpleader order was abandoned, and the sheriff, by the direction and consent of both the solicitors, in good faith distributed $441 among the creditors entitled, and paid only the balance into court, instead of the whole proceeds of the sale, as directed by the interpleader order, which was not amended:—Held, that the solicitors had authority to make such a variation of the order, and the sheriff was justified in acting upon it; and it made no difference that the interpleader order was a consent order, for it was an interlocutory order, and the variation did not affect third parties. *Hackett* v. *Bible*, 12 P. R. 482.

——— *Consent to Alteration—Counsel—Agent of Solicitor.*]—A rule for a reference in this cause was granted on reading the consent to refer indorsed on the record at nisi prius; it provided that the cause and all matters in difference between the parties should be referred to S. C., and among other things stated that the evidence as taken before the Judge at nisi prius should be read before the arbitrator, and that any question of law which should arise at the request of either party should be referred to the court, and costs of cause, reference, and of the award should abide the event. The order of reference, as made a rule of court, differed from the above memorandum in these among other things: (1) it directed that costs, &c., should be in the discretion of the arbitrator; (2) that the arbitrator should not be required to reserve any legal questions for the decision of the court. W. P. & B. acted throughout as agents for the defendant's attorney, all the papers in the suit being served upon them, and W., one of the members of the said firm, was counsel for defendant in the cause, both at nisi prius and before the arbitrator. It was proved that on an undertaking of W., as counsel for defendants, not to raise any question of law, the terms of the reference were altered by consent of W., and of counsel for the plaintiffs. On motion to set aside the award and final judgment:—Held, that W. had power, either as counsel or as agent for defendants' attorney, in his discretion, in the matters of this suit, to bind the defendants; and the award was upheld. *Wilson* v. *Counties of Huron and Bruce*, 11 C. P. 548.

See Johnston v. *Johnston*, 9 P. R. 259.

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2. *In Other Proceedings.*

Arbitration.] — See *Wilson* v. *United Counties of Huron and Bruce*, 11 C. P. 548, *ante* 1.

——— *Agreement—Railway Crossing.*]—In treating with the owner of lands for the right to cross the same by a railway, or in proceedings before arbitrators appointed between him and the company, with a view to ascertain the amount of compensation, the solicitor acting for the company at the arbitration is not qualified to enter into any special agreement binding the company to construct and maintain a crossing. *Wood* v. *Hamilton and North-Western R. W. Co.*, 25 Gr. 135.

Mortgage—*Notice Demanding Payment.*]—Where a mortgage provided that no means should be taken by the mortgagee to obtain possession of the land until he should have given to the mortgagor one calendar month's notice in writing, after default made, demanding payment:—Held, in ejectment by the mortgagee, that a notice signed by the plaintiff's attorney, who was also his attorney in a suit brought upon the covenant, more than a month before this action, was sufficient, without any proof of authority. *Keyworth* v. *Thompson*, 16 U. C. R. 178.

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3. *To Receive Money.*

Mortgage.]—M. applied to McM., a solicitor, for a loan of $6,200 on his land. McM. got P. to advance the money. He then drew the mortgage, which was executed by M. and wife and left with him till P. came to pay the money. P. subsequently called on McM., and, upon his registering and delivering over the mortgage, paid him the money. McM. after this told M., on his calling on 6th March, that P. had not as yet been able to get the money, and on M. stating he required $400 at once, McM. gave him his own cheque for that amount. M. swore this was a loan, and was subsequently repaid. On 2nd April McM. absconded without having accounted for the $6,000. After his departure, two receipts were found among his papers, signed by M., and dated 6th March, for $400 and $89.36, respectively, as money received from McM. on account of the P. mortgage, and a memorandum from which it appeared that $205.55 had been paid out of the mortgage money by McM. to discharge execution debts of M.'s which he had instructed McM. to settle:—Held, in this affirming the judgment in 12 O. R. 702, that it must be shewn that either express or implied authority had been given McM. by M. to receive the money to justify P.'s paying it to him; that his possession of the mortgage with an indorsed receipt did not give such authority; but (in this reversing the judgment) that there was evidence of authority to receive to his own use, out of the mortgage money when paid, the above three sums sufficient to entitle P. to hold the mortgage as a security to that extent. *McMullen* v. *Polley*, 13 O. R. 299.

The onus of shewing that a solicitor who is in possession of a mortgage and collects the interest has authority also to collect the principal, is upon the mortgagor, and unless this onus is clearly discharged, the mortgagor and not the mortgagee must bear the loss arising from the solicitor's misappropriation of the funds. *In re Tracy, Scully* v. *Tracy*, 21 A. R. 454.

See Gillen v. *Roman Catholic Episcopal Corporation of Kingston*, 7 O. R. 146; *In re Flint and Jellett*, 8 P. R. 361; *McCormick* v. *Cockburn*, 31 O. R. 436.

Proof of Agency.]—Held, that, under the circumstances of this case, the solicitor could not be considered the agent of the plaintiff, so as to make a payment to the solicitor from the defendant a payment to the plaintiff. *Proudfoot* v. *Murray*, 7 U. C. R. 456.

Retainer to Collect.]—The retainer of an attorney or solicitor to collect a demand, and to take such proceedings as he may deem proper to effect this object, gives him authority to receive the amount before or after suit, and to discharge effectually the party making the payment, unless the client restricts or terminates the authority given to his attorney or solicitor. *Moody* v. *Tyrrell*, 6 P. R. 313.

Right to Payment as against Client —*Recovery of Judgment.*]—When a solicitor has recovered a judgment on behalf of a client, he has a right to insist on payment of the amount thereof to himself, and to issue execution in default of payment, and this although tendered a cheque payable to the client for the amount. *Knowlton* v. *Fauquier*, 11 C. L. T. Occ. N. 327, 12 C. L. T. Occ. N. 32.

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4. *Other Cases.*

Contract for Sale of Lands.]—The solicitor of a party has not, as such, any authority to contract for the sale of his client's lands. *Cameron* v. *Brooke*, 15 Gr. 693.

Payment of Interest — *Fraud — Negligence of Executor—Representation—Statute of Limitations.*]—Executors, relying upon the word of a solicitor who had managed the testator's affairs in his lifetime, procured from him a list of mortgages alleged to have been taken by the testator, representing a trust fund of $5,000 set apart by the will for the widow, but without the actual production of the mortgages, and shewed it to her, informing her that the solicitor would pay her the interest. As a matter of fact the mortgages never had any existence, but the solicitor regularly paid her the interest up to the time of his death:—Held, that the executors had neglected their duty in not setting aside the $5,000 in money or securities, and that their duty in that respect could not be delegated. Held, also, that they had appointed the solicitor their agent for the purpose of paying the interest, and that statements and payments made by him were made in the course of the business for which they had employed him; that each payment was a renewal of the representation that the $5,000 was still in their hands, invested for her benefit; and they could not be allowed to set up the Statute of Limitations in answer to the plaintiff's claim, or that the statements they made were not true; and that they were liable to make the fund good. *Clark* v. *Bellamy*, 30 O. R. 532. But see *S. C.*, 27 A. R. 435.

V. CHANGE OF.

Alteration of Name in Proceedings— *Authority.*]—J., an attorney, sued out a writ for the plaintiff, an infant. Next day it was agreed that B. should be substituted as attorney, and the plaintiff's agent, with J. and B., went to the Crown office, where, with the permission of the clerk, J.'s name was struck out and B.'s name inserted in the præcipe. The same change was made in the writ and copy before service:—Held, that the alteration was unauthorized, and that the copy and service must be set aside. *O'Reilly* v. *Vancevery*, 2 P. R. 184.

Death—*Appointment of New Attorney— Notice.*]—Where the attorney for plaintiff died after service of replication, and before service of notice of trial, and a new attorney, signing himself plaintiff's attorney, gave notice of trial without a notice of the appointment of a new attorney having been previously given, the notice of trial was set aside with costs. *Steel* v. *Manning*, 8 L. J. 167.

On the death of an attorney in a suit it is only necessary to notify the other side of his death, and the appointment of another in his place. *Bank of Montreal* v. *Harrison*, 4 P. R. 331.

Notice of Action—*Declaration.*]—It is no ground of objection to a notice of action against a magistrate, that the plaintiff declared by a different attorney from the one by whom notice was given and process issued. *McKenzie* v. *Mewburn*, 6 O. S. 486.

Notice of Trial—*Partner of Attorney.*]—Semble, that a notice of trial cannot be said to be irregular, because A., one of two partners as attorneys, signs the notice of trial as the plaintiff's attorney, although B., the other partner, appeared as the attorney on the record, there having been no order to change the attorney. *Gamble* v. *Rees*, 7 U. C. R. 406.

Order Changing—*Affidavit.*]—No affidavit is necessary to obtain a summons to change the attorney. *Re Glasse and Glasse*, 2 L. J. 213.

——— *Costs.*]—The plaintiff had paid costs of a suit to A., of the firm of A. & B., his attorneys. A. & B. dissolved, B. retaining the suit. Application to change attorney to A. granted, without any condition as to payment of costs. *Slater* v. *Stoddard*, 6 P. R. 299.

The court will order a party's solicitor to be changed without any condition as to paying the solicitor his costs. *Meyers* v. *Robertson*, 1 Gr. 439.

——— *Necessity for.*]—On an appeal from a master's report it was objected that the solicitors appealing were not the solicitors who proved the claims before the master:—Held, that the solicitor might be changed without order, that being the English practice in 1837, and there being in this Province no order to the contrary. *Bailey* v. *Bailey*, 2 Ch. Ch. 57.

Where a replication was filed several years after the filing of the answer, by a different solicitor from the one who had filed the bill, but no order changing the solicitor had been taken out, and no notice of filing replication given, the replication was ordered to be taken off the files and the bill dismissed. *Rathbun* v. *Hughes*, 3 Ch. Ch. 160.

——— *Præcipe.*]—The common order to change the solicitor is obtainable as of course on præcipe. *In re Mylne*, 1 Ch. Ch. 199.

VI. Costs.

(Lien for Costs—See *post* VII.)

1. *Agreement as to Costs and Security.*

(a) *Between Solicitor and Client.*

Champerty.]—See *O'Connor* v. *Gemmill*, 29 O. R. 47, 26 A. R. 27.

Effect of, on Taxation.]—When conveyances are prepared under a special agreement, it will bind the master. *In re McPeasley and Eccles*, 5 L. J. 279.

The master in taxing a bill must decide as best he can, according to the contract expressed or implied between the parties. *In re Eccles*, 6 L. J. 59.

Non-liability — *Taxation against Opposite Party.*]—Costs of suits being in all cases the money of the client:—Held, that an attorney taking an annual salary in lieu of such costs, cannot tax more than disbursements (which by his agreement he was entitled to recover from his client) from a defendant, though all such costs were the property of the attorney by the arrangement. *Jarvis* v. *Great Western R. W. Co.*, 8 C. P. 280.

Under an agreement between the defendants and their solicitor, he was to be paid a fixed salary, to cover all his professional services to the city, exclusive of counsel fees and other disbursements paid by him, but he was to have the right to costs from parties against whom the corporation should succeed, and be entitled only to disbursements when they should fail. In a case in which the defendants succeeded, judgment was entered against the plaintiff and the usual costs taxed. On motion for revision:—Held, following Jarvis v. Great Western R. W. Co., 8 C. P. 280, that as under their agreement the defendants were not liable to pay the attorney the costs taxed except disbursements, all costs except disbursements must be disallowed. *Stevenson* v. *City of Kingston*, 31 C. P. 333.

Where, by the terms of an express contract, a party is not to be liable for costs to the solicitor representing him in an action, he cannot tax costs against the opposite party. Jarvis v. Great Western R. W. Co., 8 C. P. 280, and Stevenson v. City of Kingston, 31 C. P. 333, approved. Decision in 16 P. R. 410 affirmed. *Meriden Britannia Co.* v. *Braden*, 17 P. R. 77.

See Scott v. *Daly*, 12 P. R. 610.

If the client be not liable to pay costs to his solicitor, he cannot recover these costs against the opposite party. Jarvis v. Great Western R. W. Co., 8 C. P. 280, and Meriden Britannia Co. v. Braden, 17 P. R. 77, followed. This rule applied to a case where the defence to an action for damages for personal injuries sustained by a workman in the employment of the defendants was undertaken by a guarantee company who had contracted to indemnify the defendants against such claims, and who employed their own solicitors to defend the action, exercising a right given by the contract; and extended, beyond the actual costs of the defence, to subsequent costs arising out of an application made by the plaintiff's solicitors, where the defending solicitors continued to act upon the retainer of the guarantee company. *Walker* v. *Gurney-Tilden Co.*, 19 P. R. 12.

Payment of Annual Salary.] — The agreement to pay a solicitor a fixed sum as a yearly salary in lieu of paying items in detail, is neither illegal nor unusual, whether it provides for the past or the future. *Falkiner* v. *Grand Junction R. W. Co.*, 4 O. R. 350.

See Jarvis v. *Great Western R. W. Co.*, 8 C. P. 280; *Stevenson* v. *City of Kingston*, 31 C. P. 333, *supra*.

Rate of Remuneration.] — No bargain between a solicitor and client, whereby the latter undertakes to pay more than the recognized fees for the work to be done, can be enforced. Where a solicitor's Toronto agent made a bargain with the client for $2 an hour for attendance in the master's office, such bargain was held not binding, although reasonable, the sufficiency or insufficiency of the amount being immaterial where the item is fixed by tariff. *Re Geddes and Wilson*, 2 Ch. Ch. 447.

Where an order was applied for for the taxation of costs incurred in suits in the common pleas, the county court, and division court, according to the terms of an alleged agreement as to the rate of remuneration, an order was granted with a direction to the master to ascertain whether any valid agreement existed between the parties. *Re Wetenhall*, 4 Ch. Ch. 82.

——— *Lump Sum — Future Business.*] — An agreement that the solicitors should retain $500 as commission for business done and to be done cannot stand in the way of the taxation of the solicitors' bill, for such an agreement is against the policy of the law, and solicitors cannot enter into any stipulation on the terms of getting a better benefit than they would get by the costs which they are entitled to charge. The agreement relied on in this case was void as being for business done and to be done, and upon the taxation it should be disregarded. *Re McBrady and O'Connor*, 19 P. R. 37.

Security for Costs Incurred—*Retaining Fees.*]—The solicitor acted for a client in defending him upon a charge of arson, and in prosecuting actions against two insurance companies to recover for a loss by fire. At the time the solicitor's services were required the client had no money and had no prospect of getting any, and, in consequence of the risk the solicitor ran of getting nothing and losing a considerable sum for disbursements, the client offered him a retaining fee to be paid out of the insurance moneys when recovered, and it was agreed between them that such fee should be $150 for the two actions, the amount claimed therein being about $1,250. Subsequently, and when some costs had been incurred, the client made an assignment to a third party of the moneys due to him from the insurance companies, in trust, to pay the solicitor his costs, including the retaining fees agreed upon, and to pay the balance to creditors. The client at a later date made a general assignment for the benefit of creditors:—Held, upon appeal by the assignee from the taxation of the solicitor's costs, that the first assignment in trust was a security for costs already incurred, a confirmation of the original agreement, and a quasi appropriation of the money; and, as it appeared that the

client understood that the payment of retaining fees was voluntary, and that they could not be recovered from the opposite party, the retaining fees were properly allowed to the solicitor by the taxing officer; and under the exceptional circumstances of the case the amount was not unreasonable. *Re Fraser*, 13 P. R. 409.

Security for Future Costs.]—A security taken from a client by an attorney or counsel for costs to accrue in respect of services to be rendered to the client, is invalid and cannot be enforced. *Hope* v. *Caldwell*, 21 C. P. 241. Followed in *Robertson* v. *Caldwell*, 31 U. C. R. 402.

——— *Mortgage — Part Validity.*] — The clear rule of law is, that a mortgage given by a client to his solicitor to secure costs to be incurred in the future, is absolutely void as being against public policy. A mortgage for $1,200 was created by a third party, who was indebted to G., in favour of a solicitor, as security for such costs as he might incur in carrying on a suit for G. The client afterwards consented to the solicitor assigning the mortgage to an amount not to exceed $500, which was done. In a suit afterwards instituted by the assignee of the security, to enforce payment of that amount, to which the solicitor was made a defendant:—Held, that the security was valid to the extent only of what was actually due to the solicitor for the costs at the date of the mortgage. And the assignee having failed to notify the mortgagor of the assignment, by reason of which a sum of $530 had been by the client allowed to be paid to the solicitor:—Held, that the assignee could only recover what might be found due in respect of such costs over and above the amount so paid to the solicitor. *Atkinson* v. *Gallagher*, 23 Gr. 201.

——— *Promissory Note — Fraud.*] — The plaintiff, who was a barrister and attorney, having refused to defend one H., who had been arrested for embezzlement, in that and other matters, until satisfied as to his remuneration, agreed to do so on H.'s wife indorsing over to him an overdue note which H. had procured defendants to make to her, and on F., one of the defendants, admitting it to be "all right" and agreeing to pay it to plaintiff. Subsequently, and after the plaintiff had performed some trifling services for H., defendants discovered that no value had been given for the note, but that it had been obtained by H.'s fraud, of which, however, the wife was ignorant, and they then notified the plaintiff that they did not acknowledge any liability thereon, and would not pay it. In an action by plaintiff against defendants on the note:—Held, that he could not recover, for that, whether the note was received by plaintiff as security or as a payment in full for future services, the transaction was void as against public policy; and that this was a good defence available to the defendants under the plea that the plaintiff was not the lawful holder. Held, also, that the plaintiff, having become the holder after maturity, could stand in no better position than the wife, who was bound by the fraud of her husband, who acted as her agent in procuring the note to be made to her. *Robertson* v. *Furness*, 43 U. C. R. 143.

"Solicitor's Fees" — *Agreement not to Charge — Counsel Fees of Solicitor.*] — An agreement between a solicitor and client by which the former agrees not to charge "solicitor's fees," but only disbursements, does not include counsel fees charged by the solicitor, who, being a barrister, acted as counsel. *Re Solicitor*, 17 C. L. T. Occ. N. 123.

See Re Malcolmson and Wade, 9 P. R. 242; *Arnoldi* v. *O'Donohoe*, 2 O. R. 322; *Re C. & L.*, 15 C. L. J. 139; *Re Beaty*, 19 P. R. 271.

(b) *Between Solicitor and Opposite Party.*

Appropriation of Payment—*Accounting to Client.*]—The applicant, M., having a claim against one P., placed it in the hands of attorneys to prosecute the action, as she said, but to effect a settlement with P., as they alleged, and forbidding them to sue. P. agreed to pay $300 in full, including all costs. The attorneys alleged that $250 only of this was to go to M. according to her agreement with P., and the remaining $50 to them for the costs; while M. denied this, asserting that she was entitled to the $300, subject to their claim for costs to be taxed:—Held, there being a doubt as to the facts, that the general rule should prevail, that the attorney must account for all the money received and the client pay his costs. *In re Attorneys*, 41 U. C. R. 372.

——— *Solicitor and Client—Costs—Party and Party.*]—Where an attorney, having had for three years a judgment on confession for a large amount, gave defendants to understand that his charges against plaintiff were $200, which defendants understood to mean all his charges, which sum defendants paid, the attorney was not allowed afterwards to treat the $200 as paid for costs between attorney and client only, and to proceed for costs between party and party. *Gillespie* v. *Shaw*, 10 L. J. 100.

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2. *Moderation.*

Administrator's Solicitor — *Nature of Proceeding.*]—On an appeal from a certificate of the master in which he held that under an order which directed him to "ascertain and state what amount (if any) is properly chargeable by J. H. against the estate of T. W., deceased, in respect of legal proceedings taken by the said J. H. as administrator pendente lite of the said estate in the courts or otherwise," the bills of costs of the solicitor of the administrator should be taxed in order to ascertain the amount due:—Held, that the master was wrong; that the bills should, if necessary, be subjected to moderation, and not taxation; that moderation is a well understood term, and is more liberal than taxation even as between solicitor and client. *Beatty* v. *Haldan*, 6 O. R. 715.

Executor's Solicitor—*Payment of Bills —Nature of Proceeding.*]—Bills of costs for services rendered to an estate after a testator's death, down to the date of an order for the administration of the estate, were paid by the executor after the order and pending administration proceedings:—Held, that there could be no taxation of the bills as against the executor at the instance of creditors, but that the bills should be moderated. So far as the solicitors were concerned, the payment by the executor was to be regarded as payment

of the bills, and to obtain a taxation after payment a case would have to be made against the solicitors. Practically the moderation might be so conducted, if warranted by special circumstances, as to differ but little from a taxation. *Re Hague, Traders Bank* v. *Murray*, 12 P. R. 119.

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3. *Recovery by Action.*

Cause not Concluded—*Explanation.*] — An attorney may sue for his fees in a cause which he does not conclude, if he can account satisfactorily for not proceeding. *Ford* v. *Spafford*, 5 O. S. 440.

See Smith v. *Graham*, 2 U. C. R. 138.

Costs of Action.]—Where the plaintiffs, suing as attorneys for the amount of a bill of costs, proceeded by an attorney, and not in person by attachment of privilege, and assessed damages at a sum under £10, the court refused to allow them full costs. *Strachan* v. *Bullock*, 2 U. C. R. 382.

Counsel Fees—*Recovery from Solicitor.*] —On the trial of an election petition against the return of a member to the provincial legislature, which resulted in favour of petitioner, to whom the costs were awarded the defendant was retained by an association for prosecuting the petition, and acted as petitioner's attorney, and M., one of the plaintiffs, a firm of attorneys as well as barristers, acted as petitioner's senior counsel, under an agreement to that effect with defendant, neither he nor his firm being retained by petitioner. The petitioner's costs were settled by defendant and the respondent's attorney, and defendant received $1,000, including $365 counsel fees to M., which M. proved became the property of his firm. The plaintiffs having brought an action against defendant to recover these counsel fees, as moneys had and received to their use:—Held, that they could not recover, for that the costs, including these fees, belonged to the petitioner and not to defendant as attorney. *Miller* v. *McCarthy*, 27 C. P. 147.

In this Province a counsel's right of action for his fees for services in the nature of advocacy, is against the client of the solicitor retaining him, and not against the solicitor, unless by special agreement, or when there is evidence of credit having been given to the solicitor alone, or of money in the solicitor's hands to answer the claim; and a solicitor so employing counsel has implied authority to pledge his client's credit for the payment of counsel fees. *Armour* v. *Kilmer*, 28 O. R. 618.

Delivery of Bill — *Lapse of Month.*]— The month required by 2 Geo. II. c. 23 to elapse between delivery of the bill and action thereon, is a lunar, and not a calendar, month, and the day of the service of the bill is included. *Berry* v. *Andruss*, 3 O. S. 645.

——— *Lapse of Month—Burden of Proof.*] —Where an attorney served his bill on the 20th May, and the placita on the record were instituted as of Trinity term, which commenced on the 16th June—not a lunar month after such service—but a memorandum was added, "to wit, 11th July," and the plaintiff proved that his declaration was filed on that day, but did not produce the writ:—Held, sufficient, and that if the writ were issued too soon, defendant should shew it. *McMartin* v. *Spafford*, 4 O. S. 332.

——— *Lapse of Time — Allegation — Demurrer.*]—In an action by a solicitor to recover the amount of a bill of costs, the fact that he does not, in his statement of claim, allege that the bill was delivered a month before action brought, is not now, any more than before the Judicature Act, ground for demurrer, but only for defence. Though under R. S. O. 1877 c. 140, s. 32, the right of action on a bill of costs may be suspended pending a month from delivery to the party to be charged therewith, nevertheless the solicitor is a creditor, and may as such, before the expiration of such month, bring an action to set aside a voluntary conveyance as fraudulent and void. *Scane* v. *Duckett*, 3 O. R. 370.

——— *Plea of Non-delivery.*] — A defendant is entitled to a copy of the bill according to the statute, even though he may have admitted the amount to be due. Where, therefore, to a declaration for fees, containing a count upon the account stated, defendant pleaded no bill delivered, &c.:—Held, plea good. *Dempsey* v. *Winstanley*, 5 U. C. R. 317.

Non-delivery of the bill is not a plea to the merits. Judgment for defendant, therefore, is no bar to a second action. *Dempsey* v. *Winstanley*, 6 U. C. R. 409.

Pleading non-delivery of a bill is not an issuable plea. A plea denying the retainer is. *Eccles* v. *Johnson*, 1 C. L. Ch. 93.

——— *Plea of Non-delivery—Replication.*] —Action for services as attorneys. Plea, that though the plaintiffs did, before suit, to wit, on the 10th September, 1851, deliver to defendant a bill, yet that a month from such delivery had not expired before suit. Replication, that a month from the delivery of the bill in the plea mentioned had expired before this suit:—Held, replication good. *Draper* v. *Steen*, 8 U. C. R. 441.

——— *Proof of.*] — In an action by an attorney for his fees, proof by a copy made up from his books after delivery to defendant, is sufficient. *Hall* v. *Shannon*, E. T. 2 Vict.

In an action by an attorney for his fees, he must prove the delivery of his bill, although the defendant has suffered judgment by default. *Ridout* v. *Brown*, 4 O. S. 74.

See also *post* 5.

Proposed Action — *Judgment against Solicitors—Stay — Set-off.*] — Defendants, as attorneys, delaved to register a mortgage to B., their client, by which the security was defeated. They then obtained another mortgage from the same mortgagor to B. on different land, subject to two prior incumbrances, and it authorized their proceeding to foreclose this mortgage, expressly without prejudice to his rights as against them. B. having died pending a suit against the defendants for negligence, his administrators obtained a verdict in it and issued execution. Defendants then applied to stay proceedings until they could obtain judgment for the costs taxed in the foreclosure suit, in order to set it off, B.'s estate being insolvent. In answer it was argued that the second mortgage and foreclosure (which turned out of no benefit), as

well as the insolvency, resulted from defendants' negligence, and that the judgment against them was the only asset to which the plaintiffs had to look for the expenses of administration, &c., for which they were personally liable. Under these circumstances the application was refused. *Lynch* v. *Wilson*, 3 P. R. 169.

Quantum Meruit—*Services in Exchequer Court.*]—In proceedings before the exchequer and supreme courts, there being no tariff as between attorney and client, an attorney has the right in an action for his costs to establish the quantum meruit of his services by oral evidence. *Paradis* v. *Bossé*, 21 S. C. R. 419.

——— *Services in Exchequer Court — Agreement — Compensation — Champerty — Jurisdiction — Taxation.*] — The plaintiff, a suppliant in an action brought against the Crown, by its permission, in the exchequer court of Canada, made an agreement with the defendants, a firm of solicitors, that they should conduct her case to judgment, and, in consideration of their doing so at their own expense, that they should be entitled to retain to their own use one-fourth of the sum which should be recovered, and she assigned her claim to them as security for the performance of the agreement:—Held, a champertous agreement, and not binding on the plaintiff. Ball v. Warwick, 50 L. J. N. S. C. L. 328, and In re Attorneys and Solicitors Acts, 1 Ch. D. 573, followed. (2) Although the services of the defendants under the agreement were performed in a Dominion court, a provincial court had jurisdiction to entertain an action for an account against the solicitors in respect of moneys received by them from the Crown in satisfaction of the claim. (3) The services performed by the defendants in the exchequer court were not performed as officers of the courts of Ontario, and, with respect to such services and the remuneration therefor, the defendants were not subject to the Solicitors Act, R. S. O. 1887 c. 147, and could not be compelled to deliver a bill of costs. (4) In the absence of a tariff of costs between solicitor and client in the exchequer court, the defendants were entitled to a remuneration upon a quantum meruit, to be established by such evidence as would be appropriate in the forum of litigation. Paradis v. Bossé, 21 S. C. R. 419, and Armour v. Kilmer, 28 O. R. 618, followed. *O'Connor* v. *Gemmill*, 29 O. R. 47.

An agreement by a solicitor to prosecute a claim to judgment at his own expense in consideration of his receiving one-fourth of the amount which should be recovered is champertous and void. A solicitor of the supreme court of judicature for Ontario who as such does business in carrying on proceedings for a client in the exchequer court of Canada is subject to the provisions of the Solicitors Act with regard to delivery and taxation of his bill of fees, charges, or disbursements in respect of such business. Judgment in 29 O. R. 47 reversed in part. *O'Connor* v. *Gemmill*, 26 A. R. 27.

Right to Bring Action—*Partner.*]—Defendant signed a written retainer of D. & E. as his attorneys, to prosecute one M. While the suit was pending, their partnership was dissolved, and E. retired, assigning to D. all his rights. D. alone appeared as plaintiff's attorney on the record:—Held, that E. might sue alone for costs. *Dougall* v. *Ockerman*, 9 U. C. R. 354.

Set-off—*Special Services.*]—In an action by a firm of attorneys for costs due from clients, the defendants were not allowed to set off against the plaintiffs' claim a sum paid by one of them to one of the solicitors for special services to be rendered by him, there being no mutuality, and the payment not being for the general services covered by the retainer to the firm. *McDougall* v. *Cameron*, *Bickford* v. *Cameron*, 21 S. C. R. 379.

Statute of Limitations.]—In an action by an attorney against his client for costs of prosecution, it appeared that the claim was barred by the Statute of Limitations, but that the lands of the defendant in the suit had been sold under a fi. fa. sued out within six years, and bought in by this defendant under his own execution:—Held, that this would not revive the claim, by making the defendant accountable to the plaintiff as if he had then received the costs to his use, but that only the costs of the fi. fa. could be recovered. *Jones* v. *Hutton*, 11 U. C. R. 554.

The plaintiff, an attorney, sued in 1870 for bills of costs in suits brought for the defendant, in which suits judgments were entered, respectively, in 1860 and 1861, and executions, which were issued in 1863, had been renewed yearly, at defendant's request, until 1870:—Held, that the plaintiff could not recover for any costs incurred before the entry of the judgments; for he was entitled on the recovery of judgment to sue for his bill, and was barred by the statute, which then began to run. Harris v. Quine, L. R. 4 Q. B. 657, distinguished. *Lizars* v. *Dawson*, 32 U. C. R. 237.

Taxation during Action—*Undertaking —Attachment—Payment—Judgment.*] — The plaintiff, an attorney, sued defendant for costs as between attorney and client. Before appearance defendant procured an order for taxation, on undertaking to pay what should be found due. An attachment was irregularly issued upon this order, under the pressure of which defendant paid the amount taxed. The plaintiff also proceeded in the suit by signing interlocutory judgment. The court, under these circumstances, ordered that the plaintiff (as an attorney) should pay the money received by him into court; that the defendant should be relieved from his undertaking; that the interlocutory judgment should be set aside without costs; and that the plaintiff should pay the costs of this application. *Regina* v. *McLeod*, *In re Miller* v. *McLeod*, 10 U. C. R. 588.

Trial of Action—*Disputing Items—Order for Taxation.*]—A client, not having obtained a regular order for taxation before the trial, will not be allowed, by producing the master's allocatur at the trial, shewing a less sum taxed than claimed, to dispute the items of the bill. *Brock* v. *Bond*, 3 U. C. R. 349.

See Duff v. *Canadian Mutual Fire Ins. Co.*, 9 P. R. 292, 2 O. R. 560; *Macdonald* v. *Piper*, 10 P. R. 586; *Millar* v. *Cline*, 12 P. R. 155; *Re Burdett*, 9 P. R. 487; *Shaw* v. *Drummond*, 13 Gr. 662; *Re Green*, 7 P. R. 89; *Macpherson* v. *Tisdale*, 11 P. R. 261; *Sale* v. *Lake Erie and Detroit R. W. Co.*, 32 O. R. 159.

4. *Reference to Taxation and Proceedings Relating to Taxation.*

(a) *Appeal from Taxation.*

Local Master—*Review.*]—When an order is obtained by a client referring the taxation of a solicitor's bill to the master in the county where the work was done, any review of the master's conclusions must be obtained by way of appeal to a Judge. *In re Bleeker and Henderson*, 9 P. R. 182.

Motion or Petition.]—The proper mode of appealing from the master's certificate of taxation is by motion, and not by petition. *In re Ponton*, 15 Gr. 355.

Notice of Appeal — *Forum—Report.*] — The certificate of a taxing officer upon a reference to taxation of a solicitor's bill of costs, at the instance of a client, is a report; and, under rules 848, 849, and 850, the appeal therefrom should be to a Judge in court upon seven clear days' notice. *Re Crothers*, 15 P. R. 92.

The report or certificate of an officer upon the taxation of the costs of a solicitor as against his client falls under the provision of rule 1226 (d) as to its confirmation, and is, for the purposes of an appeal, a report within the meaning of rules 848 and 849. *Ford* v. *Mason*, 16 P. R. 25.

Upon an appeal by the solicitor from the decision in 16 P. R. 423, rendered on appeal from the taxation of his bill of costs against his client, under the common order for taxation, the court was divided in opinion as to one of the grounds of appeal, viz., that the appeal was not properly before the court below; two of the Judges holding that such an appeal is regulated by the same rules and practice as apply to an appeal from a taxation of costs between party and party; and the provisions of rules 1230 and 1231 not having been complied with, an appeal could not be taken under rule 851. *Re Robinson*, 17 P. R. 137.

An appeal from the certificate of taxation of a bill of costs between solicitor and client is to the court, as if it were an appeal from a master's report. *Re Mowat*, 17 P. R. 180.

[The rules referred to in the above cases are the con. rules 1888. See (1897) con. rule 773.]

Notice of Appeal — *Time.*] — The notice of appeal from a certificate of taxation of a solicitor's bill of costs by a local master, must be seven days, as required by G. O. 642. Such a case is not within rule 449, O. J. Act. *Exchange Bank* v. *Newell*, 9 P. R. 528.

Right of Appeal — *Reference* — "*In a Summary Way.*"]—An action on a solicitor's bill was stayed upon agreement providing for evidence to be given to an accountant named, and "in case of dispute, the matters disputed are to be referred in a summary way to ——— under R. S. O. (1897) c. 174 for decision:" — Held, that by "a summary way" the parties meant that the reference was to be without ceremony or delay, the words "under R. S. O. c. 174" merely introducing the procedure under that Act (the Act respecting Solicitors), and not to be construed as providing for an appeal. *Sale* v. *Lake Erie and Detroit R. W. Co.*, 32 O. R. 159.

Supreme Court of Canada—*Matter of Practice.*]—See *O'Donohoe* v. *Beatty*, 19 S. C. R. 356; *McGugan* v. *McGugan*, 21 S. C. R. 267.

Time for Commencement.] — The time for appealing from a taxation of costs begins to run from the date of the certificate of taxation, not from the date of each ruling in the course of taxation. *Re O'Donohoe*, 12 P. R. 612.

(b) *Applicants for Taxation — "Parties Liable."*

Assignee in Insolvency — *Prior Assignee's Costs.*]—An assignee in insolvency employed a firm of attorneys to perform certain services in connection with the estate. Subsequently he resigned the position and gave these attorneys the moneys of the estate remaining in his hands, with instructions to pay their own costs first, and then hand the balance to the new assignee. This they did and rendered their bill of costs:—Held, that the estate of the insolvent was, within the meaning of C. S. U. C. c. 36, s. 38, the "party liable to pay," though "not chargeable as a principal," and the second assignee was entitled to have the bill taxed. *In re A. & B.*, 6 P. R. 68.

Cestui que Trust — *Trustees' Costs.*]—Any one cestui que trust may, in the discretion of the court, obtain an order under the third party clauses of the Solicitors Act for the taxation of a bill of costs for business connected with the trust estate of a solicitor employed by a trustee. *Sandford* v. *Porter*, 16 A. R. 565.

Defendant—*Agreement to Pay Plaintiff's Costs.*]—Where, on a settlement of several suits between the parties, it was agreed that defendant should pay, among other things, all the costs of every kind, including retainers, for which the plaintiff was liable to his attorney, it was held that defendant, though he had not paid the bills, was entitled to have the bills referred to taxation on the usual terms. Quære, is such a defendant, a party "liable to pay," within s. 38 of C. S. U. C. c. 35? *In re Greenwood*, 10 L. J. 131.

——— *Agreement to Pay Plaintiff's Costs—Account—Parties.*]—All ex parte orders are periculo petentis. And where the defendants in an action had agreed with the plaintiff to pay the costs of his solicitors, and, being furnished with a bill of such costs, obtained on præcipe an order for taxation thereof, which order was drawn up as an order to tax upon an application by the client, and directed that the taxing officer should take account of all sums of money received by the solicitors for or on account of the applicants, such order was vacated with costs. The defendants were to be regarded as third persons liable to pay, and were entitled to an order for taxation; but they should have disclosed all the facts and applied for a special order; and the plaintiff should have been made a party to the proceeding under rule 1229, for the purpose of taking an account between him and the solicitors. *Re McCarthy, Pepler, and McCarthy*, 15 P. R. 261.

Married Woman—*Next Friend.*]—Married women joined with their husbands in an application for taxation of costs:—Held, that notwithstanding 35 Vict. c. 16 (O.), the married woman must in such cases have a next friend. *In re Spencer*, 19 Gr. 467.

Mortgagor — *Mortgagee's Costs.*] — The mortgagees of land having brought ejectment, and sold under the power of sale, their solicitor sent the surplus purchase money to the mortgagor, accompanied by a statement of the amount due, in which one item was for "solicitor's costs, $143." The particulars being asked for, he rendered two separate bills, one of the ejectment, the other of the sale:—Held, that the mortgagor was clearly a person entitled to apply for taxation within C. S. U. C. c. 35, s. 8. *Ex parte Glass, In re Macdonald*, 3 P. R. 138, 9 L. J. 111.

See Re Moffatt, 12 P. R. 240.

Ratepayer — *School Trustees' Costs.*] — Held, by the court of appeal, reversing the decision in 21 O. R. 289, that an individual ratepayer of a school section is not, merely by reason of his having to contribute as a ratepayer, entitled to obtain an order for taxation of a bill of costs delivered to and paid by the board of public school trustees, either under R. S. O. 1887 c. 147, ss. 32 and 42, or under con. rule 1229. Upon appeal to the supreme court of Canada:—Held, that, assuming the court had jurisdiction to entertain the appeal, the subject matter being one of taxation of costs, the court should not interfere with the decision of the provincial courts, which are the most competent tribunals to deal with such matters. Held, also, that a ratepayer is not entitled to an order for taxation under said section. *McGugan* v. *McGugan*, 19 A. R. 56, 21 S. C. R. 267.

Residuary Legatees—*Executors' Costs.*] —Residuary legatees may apply for taxation of bills of costs rendered to executors for services to the estate; for they come within s. 42 of the Solicitors Act, R. S. O. 1887 c. 147, as being "liable to pay," i.e., by the lessening of the amount of the residuary estate. *Re Skinner*, 13 P. R. 276.

Second Mortgagee — *First Mortgagee's Costs.*]—See *Re Crerar and Muir*, 8 P. R. 56; *Re McDonald, McDonald, and Marsh, ib.* 88; *Re Cronyn, Kew, and Betts, ib.* 372.

Subsequent Incumbrancers — *Mortgagee's Costs.*] — See *Re Malcolmson and Wade*, 9 P. R. 242.

See Re Rogers and Farewell, 14 P. R. 38, *post* (c); *Re Becher*, 2 Ch. Ch. 215.

(c) *Costs of Taxation.*

Application after Settlement.]—When after settlement the client applies for taxation, and nothing is found due to him, he must pay the costs of application. *In re Francis* v. *Boulton*, 6 L. J. 20.

Discretion—*Absence of Client.*]—Held, that the court has no discretion as to allowing costs of taxation, when the party chargeable neither obtains the order nor attends under an order obtained by the solicitor. *In re Kerr*, 2 Ch. Ch. 47, 2 C. L. J. 302.

Execution for.]—An order is not necessary in order to issue execution for the costs of taxing an attorney's bill. *Re S. & R.*, 13 C. L. J. 200.

Liability for—*Assignee for Creditors—Set-off.*]—The parties who initiate and intervene upon the taxation of a solicitor's bill of costs become personally liable to pay the costs of taxation. And where solicitors rendered to the assignee of an insolvent their bill for services to the insolvent, and the assignee taxed the bill and had it reduced by more than one-sixth:—Held, that he had a right personally to recover from the solicitors the costs of the taxation, and that there should be no set-off against the amount coming to the solicitors from the estate of the insolvent as a dividend upon their bill. *Re Rogers and Farewell*, 14 P. R. 38.

Offer to Reduce Bill.]—Where a solicitor offered to make a deduction from his bill, the court held that the master should not charge the solicitor with the costs of taxation unless the bill had been reduced one-sixth independently of the voluntary deduction. *Re Freeman*, 1 Ch. Ch. 102.

Where a solicitor has offered to take in full settlement less than the amount of a bill of costs as rendered, and has made the offer in a manner unequivocal and binding upon him, then and not otherwise he is to be allowed the benefit of the offer upon taxation if the client reject it and proceed to tax the bill. Re Freeman, 1 Ch. Ch. 102, and Re Carthew and Re Paull, 27 Ch. D. 485, considered and explained. Where the offer to make a reduction in the bill was not upon the face of it nor in any letter accompanying it, but was made orally and in the course of a conversation on the subject after the delivery of the bill:—Held, that the offer was not of an unequivocal character made so as to be binding upon the solicitor, but left him free when it was not accepted to claim all he could get upon a taxation, and he was therefore not entitled to the benefit of it. *Re Allison*, 12 P. R. 6.

The solicitors rendered to a client ten bills of costs, amounting in all to $428.83. The client obtained an order for taxation, reserving his right to dispute his liability to pay the bills, and reserving also the costs of the order and taxation. The bills were taxed at $329.76, more than one-sixth being taxed off; but the solicitors contended that they were not liable for the costs of the taxation under R. S. O. 1887 c. 147, s. 35, because of an offer made by them before the order but after service of the notice of motion therefor, to take $250 in full of all the bills, and a subsequent offer to take $200 in full of all but one. These were not offers to reduce the bills to the sums named, but were offers to take such sums if the bills were paid without dispute as to the client's liability upon them. The offers were rejected and the taxation proceeded with the above result. When the question of the liability upon the bills was still undetermined, the client applied for costs of the order and taxation:—Held, that the solicitors when their offers were rejected remained in a position to claim the full amount at which their bills might be taxed; and, therefore, such offers could not avail them; and they must pay the costs of the order and taxation. Re Allison, 12 P. R. 6, approved and followed. *Re Cameron*, 13 P. R. 173.

Preliminary Order for Delivery of Bill—*Costs of.*]—Held, where an order, silent as to costs, was made upon attorneys for the delivery of bills to a client, and the bills were afterwards delivered, and a subsequent order made for the taxation, costs of the reference to abide the event, that costs of the first order could not be taxed as part of the costs of the reference. Held, also, that no order could be made upon the attorneys by a Judge different to the one who signed the first order, for payment by them of the costs of the first order. *Re Lemon*, 1 C. L. J. 19.

Reduction on Taxation—*Abandonment of Item.*]—Where one item had been abandoned by an attorney after a summons taken out for the taxation, but before actual taxation, and one-sixth was afterwards struck off the whole bill, including such item:—Held, that the attorney was properly ordered to pay the costs of taxation. *In re Davy*, 5 P. R. 55.

——— *Amended Bill.*]—Where an attorney obtains leave to amend his bill after taxation commenced, it is improper to strike out any items in the bill. The charges alleged to be omitted should be added, and if one-sixth be taxed off the bill as amended, the attorney must pay the costs. *In re Martin*, 7 P. R. 90.

——— *Items not Taxable.*]—In a bill rendered by an attorney and referred to the master, he is not to take into consideration—in determining whether one-sixth has been taxed off the bill, so as to make the attorney pay the costs of the reference—items which are not properly taxable items, such as sheriff's fees and witness fees, &c., not actually to be repaid to the attorney nor a part of his claim. *In re Davy*, 2 C. L. J. 70.

Security for Costs.]—Held, that the fact that a client, who has applied to have an attorney's bill taxed, is out of the jurisdiction, is not a sufficient ground for an order for security for costs, but, upon special circumstances being shewn, it may be. *In re A. B.*, 6 P. R. 210.

See In re Crawford and Crombie, 2 Ch. Ch. 13; *Re Green*, 7 P. R. 89.

See COSTS, VIII.

(d) *Disputing Retainer.*

Conflicting Evidence.]—Where a solicitor has no written retainer, and his retainer is disputed, and the evidence is conflicting, the court will give weight to the denial of the client as against the solicitor. *In re Eccles and Carroll*, 1 Ch. Ch. 263.

Præcipe Order—*Suppression of Fact.*]—Where an order for the delivery and taxation of bills had been taken out on præcipe, on the application of the administrator of the client, and the fact that the solicitor disputed the retainer by such client was not brought to the notice of the court on the issuing of the order, but it was established that the administrator did not then know that the retainer was disputed:—Held, that there was no suppression of a material fact, and that the order was regular. *In re Toms, In re Cameron*, 2 Ch. Ch. 204.

Reference of Dispute.]—Where on an application by a solicitor for a taxation, the client disputed the retainer as to the whole bill, and also set up the Statute of Frauds, it was held that the court could refer these defences to the master. *Re Bacon*, 3 Ch. Ch. 79.

Where in an action upon a bill of costs the defendant denied the retainer, a motion for summary judgment under rule 80 was refused, and it was held that the question of liability could not be referred to the taxing officer, the Judicature Act having altered the practice laid down in Re Bacon, 3 Ch. Ch. 79. *Macdonald* v. *Piper*, 10 P. R. 586.

Reserving Right.]—In referring to taxation, there is no authority here, without consent, to reserve the right to dispute the retainer. It exists in England under 6 & 7 Vict. c. 73, which differs in this from C. S. U. C. c. 35, s. 44. *In re Totten*, 27 U. C. R. 449. *See, contra, In re Lewis*, 9 L. J. 81.

Where one of two alleged clients, against whom solicitors seek to obtain a taxation of certain bills of costs, disputes the retainer, the usual order for taxation should be made against the unresisting client, such taxation to be on notice to the other, with liberty to him to attend and intervene, and to be conclusive against him as to the quantum of liability in case he is ultimately found liable in the dispute as to the retainer. In re Jones, 36 Ch. D. 105, In re Salaman, [1894] 2 Ch. 201, and In re Totten, 27 U. C. R. 449, discussed. *Re Macdonald*, 16 P. R. 498.

See Millar v. *Cline*, 12 P. R. 155, *post* (e).

(e) *Order for Payment.*

When Granted.]—Where an order is made for taxation of an attorney's bill, as between attorney and client under R. S. O. 1877 c. 140, s. 49, a common law court has no power here, as it has in England, under 6 & 7 Vict. c. 73, s. 43, to make a summary order for payment of the amount found due from the client, except by consent. *In re A. B. and C. D.*, 8 P. R. 126.

An order for the taxation of a solicitor's bill, at the instance of the client, should refer the bill simply for taxation. A clause in such an order directing payment to the solicitor of the amount of the taxed bill, was struck out. *Re Clarke*, 9 P. R. 197.

Held, that by the O. J. Act, the former practice has been changed, and an order referring a bill of costs to a taxing officer, should not direct the officer to do more than ascertain the proper amount of it. *Macdonald* v. *Piper*, 10 P. R. 586.

Under the common order for taxation of a solicitor's bill of costs, form 136, O. J. A., a taxing officer has power to investigate and dispose of questions of carelessness, impropriety, and negligence in the conduct of the business to which the bill relates; and the officer's certificate is conclusive as to all matters within his jurisdiction. Where, therefore, after action brought upon a bill of costs there has been a taxation under such an order,

there is an end to litigation, and it only remains to enforce payment of what has been found due, which may be done upon a subsequent application by the solicitor. The original order for taxation may reserve questions of retainer and negligence in a proper case, but, if it does not, the client should not be allowed a double chance of defeating the solicitor's claim, by proceeding to defend the action after the conclusion of the taxation. Re Clarke, 9 P. R. 197, and Macdonald v. Piper, 10 P. R. 586, distinguished. *Millar* v. *Cline*, 12 P. R. 155.

A solicitor who has obtained an order for taxation of his bill of costs against his client, and taxed his bill under it, is not entitled to a summary order for payment of the amount found due. Where the client obtains the order for taxation, he thereby submits himself to the summary jurisdiction of the court, and should be ordered to pay the amount found to be due to the solicitor. Semble, that the order for taxation under con. rule 443 should, under the authority of s-s. (d) of that rule, where it is made upon the client's application, contain an order for the payment by him of the amount to be found due upon the reference, but when it is made upon the solicitor's application, should contain no such order. The solicitor should be entitled to add the costs of the reference to his claim only in the event of the client appearing upon the reference. Millar v. Cline, 12 P. R. 155, distinguished, and In re Harcourt, 32 Sol. J. 92, followed. *Re Washington*, 12 P. R. 386.

(f) *Place of Reference and Proper Officer.*

Consent—*Local Master.*]—An order will not be granted for taxation before a master in an outer county even on a consent. *Re Solicitors*, 3 Ch. Ch. 90.

Local Master.]—Under 34 Vict. c. 12, s. 13 (O.), where a month has elapsed since the delivery of a bill of costs, the solicitor is entitled to a reference for taxation to the master of the county in which the work was done. *In re Solicitors*, 7 P. R. 263.

Bills of costs between solicitor and client should primâ facie be referred for taxation to the master of the county in which the work was done. *Re Idington and Mickle*, 8 P. R. 596.

——— *Deputy Registrar—Decisions of Court.*]—R. S. O. 1887 c. 147, s. 32, provides that a bill of costs may be referred for taxation to the proper officer of any of the courts in the county in which any of the business charged for was done:—Held, that "courts" here does not mean "divisions of the high court:" and where the business charged for was done in the office of the local registrar and master at Belleville, the reference for taxation was properly made to the deputy clerk of the Crown at Belleville, both being officers of the same court. *Re Clute and Williams*, 13 P. R. 110.

Taxing Officer—*Business in Outer County—Agency Work.*]—Held, affirming the decision in 13 P. R. 276, that a reference for taxation of bills of costs between solicitor and client may properly be directed to one of the taxing officers at Toronto, even where the business charged for in the bills, with the exception of agency work done at Toronto, was all done in an outer county. The words of s. 32 of the Solicitors Act, R. S. O. 1887 c. 147, "any of the business charged for in the bill," include business performed at Toronto by the agent of the principal solicitor. *Re Skinner*, 13 P. R. 447.

——— *Form of Order.*]—On an application to tax a solicitor's bill, more than a month having elapsed since its delivery, an order was issued in the long form in use before the O. J. Act, instead of the form under rule 443, as the master is mentioned in that order, but the taxing officer is the proper officer to tax bills of costs under rule 438 of the Act. *Re Solicitors*, 9 P. R. 90.

See In re Wilson and Hector, 9 L. J. 132, *post* (g); *In re Fitch*, 2 Ch. Ch. 288, *post* (g).

(g) *Procedure on Application for Reference.*

Courts—*Reference from Law to Equity—Abandonment of Order.*]—A common law Judge in chambers may refer for taxation to the proper officer of the court of chancery a bill for services in that court. If such an order be waived or abandoned by the party who obtained it, it is necessary to move to set it aside. Whether it has or not can be properly decided in the court of chancery, especially in a case where one party treating the order as in force obtained from the master of that court a warrant for taxation under the order, and the other party, treating the order as waived or abandoned, obtained an independent order of that court for taxation. A common law Judge will, under such circumstances, decline to interfere. *In re Wilson and Hector*, 9 L. J. 132.

Ex Parte Order.]—On an ex parte application of a client by petition for taxation, the common order only can be obtained; if a special order is required, notice must be given. *In re Atkinson and Pegley*, 1 Ch. Ch. 187.

An order of reference of a bill of costs between attorney and client granted on the ex parte application of defendant. *Gifford* v. *Johns*, 2 L. J. 213.

——— *Applicant — Joint Retainer.*] — Where an order for taxation had been obtained ex parte at the instance of one or two clients who had jointly retained the solicitors, such order was set aside as irregular. *Re Becher*, 2 Ch. Ch. 215.

——— *Dispute as to Facts—Affidavit—Scandal.*]—An order to tax is not to be granted ex parte to the solicitor where there appear to be any facts in dispute between him and the client. He must make known such facts to the court, or the order will be set aside. Such motions for taxations should be on notice, and the reference should, as a rule, be to the master at Toronto. Where the affidavit, on which a motion to review taxation was grounded, contained allegations of misconduct on the part of the solicitor altogether unconnected with the dealings between the solicitor and the client, such allegations were held to be scandalous, and were ordered to be struck out of the affidavits. *In re Fitch*, 2 Ch. Ch. 288.

——— *Reference to Defences.*]—An order of course for the taxation of costs is not to be discharged for the omission therefrom of any reference to defences of which the petitioners had no previous intimation. *Re Bacon*, 3 Ch. Ch. 70.

Forum.]—An order to tax between attorney and client must be made in the court in which part of the business is done, and the bill referred must be for professional services. *In re Jones and Ketchum*, 3 J. L. 203.

Intituling.]—An application to have a bill referred under 16 Vict. c. 175, s. 20 must be made in the matter of such solicitor. *Duggan* v. *Cotton*, 3 L. J. 15.

Praecipe Order.]—The common order to tax may be obtained by a client on praecipe; it is not necessary to apply to a Judge in chambers for it. *In re Daniel*, 1 Ch. Ch. 224.

——— *Lapse of Month.*]—Where the bill had been delivered more than a month, the client must apply for taxation in chambers; otherwise the order can be obtained on praecipe. *Re Boulthee*, 2 Ch. Ch. 58.

See Re McCarthy, Pepler, and McCarthy, 15 P. R. 261, *ante* 4 (b); *Re Moffatt*, 12 P. R. 240; *Re Fitzgerald*, 10 P. R. 279.

——— *Dispute as to Facts.*]—Where it is a matter of dispute whether there has or has not been an agreement between solicitors and client as to costs, an order for delivery and taxation should be applied for on motion and not on praecipe. *Re C. & L.*, 15 C. L. J. 139.

(h) *Revision and Retaxation.*

When Ordered.]—A revision will not be ordered where the grounds of the original taxation have for any reason failed or become or been found invalid. *In re Jones and Ketchum*, 3 L. J. 203.

Rules 447-449 O. J. Act, are not necessarily applicable to a taxation had under 48 Vict. c. 13, s. 22 (O.), and where upon a taxation by a local officer these rules had not been complied with by the party objecting to the taxation, a revision was nevertheless ordered, the court thinking the bill so exorbitant as to shew special circumstances. *Snider* v. *Snider*, *Snider* v. *Orr*, 11 P. R. 140.

Defendant's costs not having been taxed with sufficient liberality as between attorney and client, a revision was ordered. *Cameron* v. *Campbell*, 1 P. R. 170.

A retaxation will not be ordered unless improper charges are specified and established. *Eastman* v. *Eastman*, 2 Ch. Ch. 325.

See Clarke v. *Manners*, *Re Manners*, 4 Gr. 432; *In re Attorneys*, 26 C. P. 495; *Connors* v. *Squires*, 2 P. R. 149; *In re Jones and Ketchum*, 3 L. J. 167, *post* (i).

(i) *Subject and Scope of Reference.*

Accounting—*Determination of Dispute as to Agreement.*]—By an order, obtained by clients upon praecipe, a bill of costs was referred to taxation, and the taxing officer was directed to take an account of all sums of money received by the solicitor of or on account of the applicants. Under this the taxing officer taxed the bill and took an account of the moneys received by the solicitor, and in so doing inquired into and determined the validity of a disputed agreement in the nature of a compromise relating to some older bills of costs not referred to taxation, but which the solicitor now contended should be allowed at their face value against moneys received by him, and which the applicants contended should be allowed only at the amount settled by the disputed agreement. The court of appeal was divided upon the question whether the officer had jurisdiction under the order to determine the validity of the agreement, and the decisions in 12 P. R. 612 were affirmed:—Held, by the supreme court of Canada, that the officer not only had authority, but was obliged, to proceed and report as he did, and his report should be affirmed. It is doubtful if a matter of this kind, which relates wholly to the practice and procedure of the high court of justice for Ontario, and of an officer of that court in construing its rules and executing an order of reference made to him, is a proper subject of appeal to the supreme court. *Re O'Donohoe*, 14 P. R. 317, *O'Donohoe* v. *Beatty*, 19 S. C. R. 356.

Agency Charges — *Commission—Settlement.*]—Charges by a solicitor who acted as agent for the principal solicitor, are subject to taxation, though the principal receives a commission. Upon such taxation a master should without special direction regard any settlement arrived at between the solicitors. *Re Idington and Mickle*, 8 P. R. 566.

Business other than Attorney's—*Revision.*]—Items not appertaining to the business of an attorney cannot be taxed. A revision will be granted when the master, upon a reference of a bill "for fees and disbursements in his professional business," has allowed charges for other business. *In re Jones and Ketchum*, 3 L. J. 167.

Charges Adjudicated upon in Action.]—A solicitor sued his client in a division court for the amount of his bill of costs. While the action was standing for judgment the client obtained from the master in chambers an order for taxation. Pending an appeal from that order judgment was given, which shewed that all the items in the bill which were in dispute were considered and adjudicated upon:—Held, that, considering the nature of the charges and the circumstances disclosed in the affidavits filed on the application, the order of the master was right. *Re Burdett*, 9 P. R. 487.

Claim for Costs in Winding-up Proceedings.]—In proceeding under a judgment for the winding-up of a company, the former solicitor of the company brought in a claim for bills of costs alleged to be due him, which the master referred to one of the taxing officers to tax:—Held, that the master had authority to direct such reference. On such a reference the taxing officer gives his opinion as to whether the fees and charges claimed should be allowed or not, and on that opinion the master makes his adjudication. *Clarke* v. *Union Fire Ins. Co., Caston's Case*, 10 P. R. 339.

Conveyancing Charges.] — A bill for conveyancing only cannot be referred. Contra, where it consists either wholly or in part of business done in court. *Re Lemon and Peterson*, 8 L. J. 185; *Ex parte Glass*, 3 P. R. 158.

See Re Eccles, 6 L. J. 59.

The right to tax a solicitor's bill of charges for conveyancing, in the absence of a special agreement, considered. *Ostrom* v. *Benjamin*, 20 A. R. 336.

Counsel Fees.]—A bill for counsel fees exclusively may be referred to the taxing officer for taxation. *Re C. K. & C.*, 6 P. R. 226.

County Court Proceedings.] — On an application by a client for taxation of costs in a suit in chancery, and in another suit in a county court, his affidavit admitted a retainer in the latter suit, but denied one in the former. The solicitor making no claim for costs in the former suit:—Held, that the court of chancery could not order taxation between the client and solicitor. *In re Cameron*, 1 Ch. Ch. 356.

——— *Funds—Lien.*]—Where a solicitor has funds of a client in his possession, or has papers over which he claims a lien, this court will order delivery and taxation of his bills and payment of any balance, though the services for which he claims have been wholly in county court proceedings. *Re Prince*, 3 Ch. Ch. 282.

Part of Bill.]—The bill is an entire matter, and in taxation the client cannot separate certain charges for taxation and ask that they alone be referred. *In re Davy*, 1 C. L. J. 213.

Proceedings not in Court — *Mortgage Sale.*]—The mortgagees of land having brought ejectment and sold under the power of sale, their solicitor sent the surplus purchase money to the mortgagor, accompanied by a statement of the amount due, in which one item was for "solicitor's costs, $143." The particulars being asked for, he rendered two separate bills, one of the ejectment, the other of the sale:—Held, that the two bills might be considered as particulars of the one item in the previous statement, and that the bill of costs in the suit drew with it the other bill, which would not alone have been subject to taxation; and both bills were therefore referred. *Ex parte Glass, In re Macdonald*, 3 P. R. 138, 9 L. J. 111.

See Re Crerar and Muir, 8 P. R. 56; *Re McDonald, McDonald, and Marsh, ib.* 88; *Re Cronyn, Kew, and Betts, ib.* 372; *Re Moffatt*, 12 P. R. 240; *Re Fitzgerald*, 10 P. R. 279.

Services as Agent—*Notary.*]—A solicitor, who is also a notary, and acting in the latter capacity obtains for a client the allowance of a pension from the United States government, is entitled to charge for his services such sum as may be agreed upon, and is not bound by the statutory regulations affecting solicitors' charges, or liable to have his charges taxed. *Ostrom* v. *Benjamin*, 20 A. R. 336.

Services as Parliamentary Agents.]—See *In re Chisholm and Logie*, 16 P. R. 162.

Transaction of Business—*Foreign Estate—Scope of Employment.*]—Where the employment of a solicitor is so connected with his professional character as to afford a presumption that his character formed the ground of his employment by the client, the court will exercise its summary jurisdiction over him. Re Aitkin, 4 B. & Ald. 47, followed. Solicitors in Ontario being employed to transact business in relation to a claim of their client upon an estate in England:—Held, that they were employed because they were solicitors, and the business was within the scope of the business of solicitors, and it made no difference that the estate was in England, for they were employed in Ontario, and the business was transacted there. *Re McBrady and O'Connor*, 19 P. R. 37.

See In re Wilson and Hector, 9 L. J. 132.

(j) *Supplementing Bill of Costs.*

Amendment — *Leave — Mistake.*] — If through mistake an attorney has delivered an erroneous bill, he may, upon special application, shewing clearly how the mistake has arisen, be allowed to amend it or deliver another; but not of his own mere motion. *In re Davy*, 1 C. L. J. 213.

Item Omitted—*Leave to Supply—Costs.*] —An application for leave to add a counsel fee paid and omitted was granted, on payment of costs, such costs being set off against the taxed costs; but the adding of such item was not to affect the question of the costs of taxation. See Re Whalley, 2 Beav. 576. *In re Crawford and Crombie*, 2 Ch. Ch. 13.

Items Omitted—*Special Circumstances—Time.*]—A solicitor in delivering a bill of costs omitted to make any charges for "days employed in going to and returning from Ottawa" upon business for his clients. He stated that the omission was through inadvertence; and after taxation of his bill, but before the certificate was signed, applied for leave to deliver a supplemental bill, alleging that he would not have sought now to make these charges if the taxing officer had allowed him certain sums charged in the original bill for travelling expenses, but which were disallowed on the ground that he was travelling on a pass:—Held, that there was no clear evidence that the omission arose from mere accident or mistake, and that the court below could not be said to be wrong in holding that no special circumstances were disclosed for making the amendment. As a general rule, it is too late to make such an application after the result of the taxation is known. Judgment in 14 P. R. 571 affirmed. *Re O'Donohoe*, 15 P. R. 93.

See In re Malloch, 10 L. J. 327.

Substituted Bill—*Undertaking.*]—On an application to refer an attorney's bill to taxation, an amended bill of costs was allowed to be substituted for the bill delivered to the client; the attorneys undertaking to receive in full of their fees, charges, &c., the amount of the original bill or the amended bill as taxed, whichever might be the least. *In re B. & S.*, 6 P. R. 18.

(k) *Time for Applying for Reference.*

After Judgment in Action for Costs —*Laches — Amount of Excess.*] — Although

the courts will interfere and order a retaxation of costs, even after a judgment has been obtained for them, when the overcharges are gross and excessive, yet a client must come promptly, more especially when the relationship of solicitor and client has ceased to exist, to obtain such relief, and it will not be granted if the amount overpaid is small. Where the alleged excess was only $15, making about one-twelfth of the whole bill, and the application was not made until after great delay, the referee refused an order for retaxation, and his decision was upheld on appeal. The proper style of proceedings in such a matter is in the matter of the solicitor only, without the style of any cause. *Re Scott, Scott* v. *Burnham*, 3 Ch. Ch. 467.

After Payment.] — A bill with exorbitant charges was ordered for taxation, although paid, and several months had elapsed since its delivery. *Doe d. Fraser* v. *Eaglesum*, 5 O. S. 77.

An order was refused where the bill had been paid and acquiesced in. *Morden* v. *Morgan*, E. T. 2 Vict.

See Re Walker, Walker v. *Rochester*, 10 P. R. 400, *post; Re Thompson*, 2 Ch. Ch. 100, *post*.

——— *Application within Year — Special Circumstances—Death of Solicitor—Terms.*] —A bill of costs rendered by a solicitor in October, 1888, was paid shortly afterwards, but upon the undertaking of the solicitor, contained in letters written by him, that the payment was to be subject to the taxation of the bill at any time. The solicitor died in May, 1889, and no application for taxation was made till the 2nd September, 1889, when an ex parte order was obtained from the master in chambers for taxation, the letters of the solicitor not being produced nor any special circumstances shewn. Upon the application of the executrix of the solicitor to the master to set aside his ex parte order, the letters were produced:—Held, that the master was not bound to vacate his first order, although it was wrong; but, there being no imputation of bad faith, he was right in giving leave to amend the order so as to do substantial justice; and, notwithstanding the death of the solicitor after being paid, there was jurisdiction to order a taxation as against the representative, under the circumstances. The application, being within the year, came under s. 46 of R. S. O. 1887 c. 147; and "special circumstances" to justify a taxation existed in the fact of the letters having been written by the solicitor; but the delay of the applicants and the death of the solicitor were reasons for imposing terms; and it was ordered that upon the taxation the books of the solicitor should be primâ facie evidence of the correctness of his charges, or if the books were not available that the bill should be so taxed as to throw the onus of impeaching any charges on the applicants. *Re Baker, Re Macdonald*, 13 P. R. 227.

——— *Lapse of Time.*] — A solicitor had been employed to conduct a suit, and otherwise rendered professional services. Without furnishing a bill he demanded £45, but compromised for the client's note for £40, which was renewed and ultimately paid. A motion by the client, after eleven months, for an order to furnish a bill and to refer it for taxation, was refused with costs. *In re Fairbanks*, 1 Ch. Ch. 222.

——— *Lapse of Years.*]—A bill settled for more than twelve months will not be ordered to be taxed, and if taxed by mistake taxation will be set aside. *In re Jones and Ketchum*, 3 L. J. 167; *S. C., ib.* 203.

——— *Lapse of Years—Connected Charges —Agreement—Unsigned Bills—Delay—Overcharges.*]—A firm of solicitors for about eight years acted for an estate in the collection of moneys and realization of securities relating to a block of land sold by the testator. During this period the solicitors from time to time rendered statements of account to the executors and paid them cheques for balances in their hands as shewn by such statements, and also rendered detailed bills of their costs for their services, in respect of different actions and proceedings taken, though not in all cases, such bills being paid by the retention by the solicitors, without objection on the part of the executors, of part of the moneys collected. Two or three of the larger bills were moderated by a taxing officer shortly after they were rendered. Upon an application by the executors for taxation of all the bills after the eight years:—Held, that this could not be regarded as one continuous dealing keeping the right to tax in suspense till the collection or exhaustion of all the securities. Held, also, upon the evidence, that there was no agreement between the solicitors that the right to tax generally should remain open to the executors. As to certain of the bills of costs said not to have been actually signed by the solicitors:—Held, that they were substantially sufficient, and, after being paid out of the funds collected, with the knowledge and sanction of the executors, they could not be treated as open to taxation, after years of delay and no specific overcharges being indicated. In re Sutton and Elliott, 11 Q. B. D. 377, followed. *Re Beaty*, 19 P. R. 271.

——— *Meaning of "Payment"—Delivery of Bill.*]—See *Re Pinkerton and Cooke*, 18 P. R. 331; *Schragg* v. *Schragg*, 11 P. R. 218.

Before Expiry of Month — *Solicitor's Application.*]—On an application by solicitors to tax costs against their clients, when the bill was rendered on the 22nd August, and the petition presented on the 22nd September:—Held, too soon. The month must be reckoned exclusive of the day of rendering the bill and presenting the petition. *In re Morphy and Kerr*, 2 Ch. Ch. 56.

Lapse of Several Years—*Ex Parte Taxation.*] — Where a solicitor had irregularly proceeded to tax as between solicitor and client, in the client's absence, the court, upon a petition presented seven years afterwards, ordered a taxation, treating the previous taxation as void, and ordered the solicitor to pay costs of the application. *Clarke* v. *Manners, Re Manners*, 4 Gr. 432.

Lapse of Year—*Payment—Excess.*]—In the absence of gross overcharge or pressure, the court will not tax a bill rendered several years and treated as paid, the solicitor having abandoned any excess over certain sums received by him. *Re Thompson*, 2 Ch. Ch. 100.

——— *Special Circumstances.*] — A petitioner seeking to tax a bill rendered over a year, must allege and establish items of overcharge, and shew special circumstances. *In re Cameron*, 2 Ch. Ch. 311.

The court cannot refer a bill after it has been delivered twelve months, unless under special circumstances. The fact that an action is brought on a number of bills delivered during several years, while defendant was plaintiff's client, is not a "special circumstance," within the Act. Quære, is an overcharge, in the absence of fraud, a "special circumstance?" *Read* v. *Cotton*, 6 L. J. 114.

Where several bills were delivered by plaintiff to defendant, the first in January, 1854, and the last in January, 1859, and there were several applications for payment, and a payment made in January, 1860, and an action was commenced in respect of the bills in August, 1861, and no application made to refer them till 4th November, 1861, a summons to refer them was discharged. Read v. Cotton, 6 L. J. 114, approved. *Ruttan* v. *Austin*, 8 L. J. 47.

Where defendants, in 1860, in consideration of forbearance, promised to pay a demand of $200, which the attorney said he had charged to his clients, but which was not strictly in whole recoverable from defendants, it was held that it was too late in 1863 to call upon the attorney to deliver a bill of items for the $200, although such a bill was demanded at the time the note was given; and it was also held that the pressure of an execution against lands in 1860 was not a sufficient "special circumstance" to entitle the application to succeed, notwithstanding the lapse of time. *Gillespie* v. *Shaw*, 10 L. J. 100.

Plaintiffs acted as attorneys for defendants from 1854 to 1858. In 1855 they had a large claim for costs, which defendants settled on a reduction being made. They continued to act, and rendered full bills each half year, no objection being made to them until a short time before this action, brought by the plaintiffs in January, 1860. Defendants on being sued applied to have the bills taxed, not pointing out any particular error, but alleging generally that the charges were excessive:—Held, that no "special circumstances" were shewn, and the order was refused as to all bills delivered more than twelve months. *Read* v. *Cotton*, 3 P. R. 118.

On an application under C. S. U. C. c. 35, s. 30, for taxation of a solicitor's bill, after the expiration of twelve months from its delivery, the special circumstances relied upon by the petitioner to entitle him to an order must be specified in the petition, and must be proved by proper evidence. Where alleged overcharges constituted the special circumstances relied upon, and these were not specified in the petition, were not apparent by the production of the bill itself, and were not otherwise proved, an order for taxation was refused with costs. A payment within C. S. U. C. c. 35, s. 42, means a payment of the whole amount, or some specific portion of the amount claimed to be due in respect of the bill of costs. *Re Gildersleeve and Walkem*, 6 P. R. 117.

Where a client applies for taxation of an attorney's bill after the expiration of a year from its delivery, he should shew such special circumstances as would have justified a reasonable man in not previously seeking a taxation, or that he was prevented by some unavoidable cause. Where judgment had been signed against the client in an action on the bill during the pendency of negotiations for a settlement, this was held a sufficient reason for directing a taxation after a year. *Pattullo* v. *Church*, 8 P. R. 363.

On a sale of property under a power in a mortgage, the solicitors more than a year before this application, with the approbation of the agent of the mortgagee (who was out of the country), retained out of the proceeds of the sale a lump sum for their costs, and delivered no bill:—Held, a special circumstance under R. S. O. 1877 c. 140, s. 44, entitling a subsequent incumbrancer to have a bill of costs in detail delivered to him upon payment of the costs of a copy. *Re Malcolmson and Wade*, 9 P. R. 242.

On 20th July, 1877, A. and B., a firm of solicitors, rendered their bill to C., also a solicitor, for professional services. On 30th May, 1878, C. wrote to A. and B. claiming a reduction of the bill, and alleging overcharge, and an agreement to do the work for half fees. No notice was taken of this letter, nor did C. take steps to have the bill taxed. On 8th July, 1882, A. and B. sued in a county court on this bill, and judgment was entered therein on 19th July, 1882, for default of appearance, which judgment was, by consent, subsequently waived. On 27th July, 1882, a bill for services rendered subsequently to July, 1877, was delivered to C. by A. and B. In this bill was included the following item: "To amount of judgment entered July 19th, 1882, $268.67 for previous accounts rendered." An action was then commenced in the chancery division for the amount of the two bills. On the trial of the action, judgment was given for the amount of the first bill, as rendered, and also for the amount of the second bill, subject to taxation:—Held, that neither the existence of a controversy as to the terms on which the business was done, nor the continuance of the employment after the delivery of the first bill, were "special circumstances" within R. S. O. 1877 c. 140, s. 35, entitling C. to tax the first bill after the lapse of a year. Held, also, that the reference in the second bill to the amount claimed in respect of the first bill did not amount to a rerendering of the first bill so as to entitle the client to a taxation. *Arnoldi* v. *O'Donohoe*, 2 O. R. 322.

The rule requiring special circumstances to warrant the reopening or taxation of a bill of costs after twelve months, does not apply where the bill has been delivered after a company has been ordered to be wound up. *Clarke* v. *Union Fire Ins. Co.*, *Caston's Case*, 10 P. R. 339.

The bill of costs in question was for professional services rendered the defendant in an investigation of his conduct as a public official before a commissioner appointed by the Ontario government. The special circumstance relied upon to enable the defendant to obtain the order for taxation after the lapse of more than a year from the delivery of the bill was, in the words of the defendant, that "there was a distinct understanding between me and the above named plaintiffs that the payment of the said bill of costs was to lie over to await the decision of the Ontario government, who were by both me and the said plaintiffs, as they stated, expected to pay the said bill of costs, I being one of their officers, and the charges against me having fallen through:"—Held, that the existence of the above understanding, if proved, was not a special cir-

cumstance within R. S. O. 1877 c. 140, s. 35, to justify an order for the taxation of the bill after the lapse of a year from its delivery; but that the bill should have been taxed subject to such understanding. *Fletcher* v. *Field*, 10 P. R. 608.

After payment of a bill of costs, the court will not disturb it on the ground of overcharge unless it appears to be a case of gross and exorbitant overcharge amounting to fraud. But before payment it is enough if the items are unusual or more than ordinarily large so as to require justification; and if no explanation is furnished by the solicitor, upon whom the onus to do so rests, then taxation will be ordered. The following circumstances were held not to be special circumstances which would entitle the client to tax his solicitor's bills after a year from their delivery, because these circumstances could be as well considered at the trial of the action as on a reference to a taxing officer: (1) That the bills sued on contained certain items included in other bills paid by the client; (2) that some work was charged for which never was done; (3) that a payment of $200 on account by the client was disputed. Held, however, that the conjunction of the following circumstances, viz.: (1) that the relationship of solicitor and client was continued after delivery of the bills; (2) that there was an offer by the solicitor to make a substantial deduction from the bills sued on; and (3) that there were items of apparent overcharge as to which no explanation was offered by the solicitor; would justify an order for taxation. *Re Walker*, *Walker* v. *Rochester*, 10 P. R. 400.

See Re Bethune & Co., 4 C. L. T. 251.

In this case the large amount of the bills, and the fact that retaining fees were charged by the solicitor, were looked upon as special circumstances. *Re Skinner*, 13 P. R. 276.

The solicitor defended an action of ejectment and prosecuted three actions for malicious prosecution on behalf of the applicants. On the 18th October, 1889, before the termination of any of the actions, the solicitor delivered to the applicants his bills of costs in them all up to that time. On the 29th April, 1890, he delivered further bills of costs in all the actions, which had then been brought to an end. Application for a reference of all the bills to taxation was made on the 20th November, 1890:—Held, that the application was in time; for the retainer existed until the litigation ended; and the applicants had a full year from the delivery of the bills last delivered to apply for the taxation of all the bills. Held, also, that the "special circumstances" which, by s. 34 of R. S. O. 1887 c. 147, must exist to justify a reference to taxation after twelve months from delivery of the bills, are not confined to cases of actual fraud or gross overcharge and pressure. Re Norman, 16 Q. B. D. 673, followed. Held, also, that bringing three separate actions which might all have been joined in one, and charging excessive counsel fees, were special circumstances to be regarded in ordering a taxation after twelve months. *Re Butterfield*, 14 P. R. 149.

Where a bill of charges and disbursements rendered by solicitors was posted to the client on the 11th April, 1893, but did not reach the client till a day or two later:—Held, by the master in chambers, that an ex parte order for taxation made on the 11th April, 1894, was made after the expiry of twelve months, and should be set aside. The bill was for services rendered and moneys expended in obtaining an Act of parliament for the divorce of the client from her husband:—Held, by the master, that it was a solicitor's bill, and as such taxable under the Solicitors Act. Quære, as to this. Held, by a Judge in chambers, that "special circumstances" justifying an order for taxation after twelve months from delivery of the bill must be proved by the affidavits filed upon the application, and where they consist of alleged overcharges, they should be plainly indicated by the applicant, on whom lies the onus of establishing them. And where the only overcharge indicated was the payment to a physician, who was absent from his business three days for the purpose of giving evidence before a parliamentary committee, of $50 and his disbursements, and it appeared that the solicitors had paid the amount in good faith, and the client had at one time assented to it, and it did not appear that the physician's attendance could have been secured for any lesser sum:—Held, that there were no special circumstances warranting an order for taxation after the lapse of twelve months and after settlement of the bill by cash and notes, which latter had been paid in part and renewed from time to time. *In re Chisholm and Logie*, 16 P. R. 162.

See In re Solicitors, 7 P. R. 263; *Shaw* v. *Drummond*, 13 Gr. 662.

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(1) *What Recoverable.*

Charge for Attendance on Taxation.]—A master or a single Judge has no discretion to allow a solicitor more than $1 per hour for attendance on the taxation of a bill of costs, either between solicitor and client, or party and party: the tariff being fixed at that rate by G. O. 608. *Re Totten*, 8 P. R. 385.

Charges for Proceedings not in Court.]—Practice defined as to the manner in which the master will tax solicitor's costs for professional services rendered in the sale of lands and collection and transmission of the purchase money. *In re Richardson*, 3 Ch. Ch. 144.

Charges for Special Journey—*Examination of Parties.*]—Where costs as between solicitor and client were to be paid by the plaintiff to the defendant, and where it appeared that the defendant's solicitor had at the request of his client, made in good faith and on reasonable grounds, travelled from Sarnia to Toronto, to attend on the examination of the plaintiff on the bill:—Held, that the defendant could tax against the plaintiff a sum of $60, paid to defendant's solicitor for two days' services and travelling expenses. *Gough* v. *Park*, 8 P. R. 492.

——— *Ratification—Block Charge.*]—A solicitor acted for a municipal corporation as solicitor and sole counsel in a matter in litigation which was contested in the high court, court of appeal, and supreme court of Canada. The municipal council passed a resolution authorizing an application for leave to appeal to the privy council, a copy of which was forwarded to the solicitor, who thereupon, without specific instructions, proceeded to

England for the purpose of obtaining leave, and while there drew upon the treasurer of the corporation a bill for a part of his expenses, which was honoured:—Held, that the resolution, the payment on account of expenses, and other acts of ratification, without protest as to the solicitor's course, were sufficient authority to him; and he was entitled to tax against the corporation his expenses in transit and in residence in England, an allowance for services rendered in England as solicitor and counsel, and a per diem charge for waiting, having regard to his being absent from his own business. The solicitor made a block charge of $1,400 for his services, time, and expenses:—Held, that it should be resolved into details and taxed in items. *Re Mowat*, 17 P. R. 180.

——— *Company.*]—A solicitor for a company is entitled to charge such company for special work and journeys undertaken at the request of individual directors and the general manager. *Clarke* v. *Union Fire Ins. Co., Caston's Case*, 10 P. R. 339.

Charges of Attorney Suing in Person —*Assignee in Insolvency.*]—The plaintiff, an attorney, was the official assignee of an insolvent estate. He brought an action on behalf of the estate, and used his own name as the attorney on the record. The plaintiff obtained a verdict:—Held, that under s. 32 of the Insolvent Act, 1875, he was entitled to tax disbursements only against the defendant. *Agnew* v. *Ross*, 8 P. R. 67.

——— *Counsel Fees.*]—Quære, whether an attorney suing as an unprivileged person, is entitled to charge fees. *Beardsley* v. *Clench*, Tay. 309.

Attorneys suing in person are allowed fees for the same services as in England; but if also a barrister he cannot tax a counsel fee to himself for conducting his own cause at nisi prius. *Smith* v. *Graham*, 2 U. C. R. 268.

——— *Using Name of Another—Instructions.*]—The plaintiff, a solicitor, obtained a verdict for damages and costs in an action for libel, in which, although another solicitor appeared as acting for him in all the pleadings and proceedings in the suit, he actually did the work, and carried on the suit himself:—Held, that full fees and disbursements except "instructions," had been properly allowed to him, and that his acting as agent for the solicitor whose name appeared in the proceedings as his solicitor did not affect his right. *King* v. *Moyer*, 9 P. R. 514.

Charges where Negligence Alleged.] —If the usual charges are made, but the client complains of negligence or unskilfulness not apparent on the face of the bill, then the onus rests on him to establish his case. *In re A. B.*, 8 C. L. J. 21.

The court refused to interfere with the discretion of the taxing officer in allowing certain costs to the solicitor of proceedings which had been set aside as irregular, and as to which negligence and want of skill were alleged. *Gall* v. *Collins*, 12 P. R. 413.

Commission on Money Paid out—*Responsibility—Discretion.*]—An English company agreed to purchase several thousand acres of land in Canada, and sent out to their attorneys here between $600,000 and $700,000, to be applied on such purchase, which the attorneys lodged in a bank to their own credit, but credited the company with the interest allowed by the bank. The business done by the attorneys was of an important and responsible nature, involving the investigation of many titles, the conducting of negotiations or proceedings before parliament, and the paying out $652,000 in thirty-four different payments, extending over several months. The master, in addition to the charges, including attendances to pay the money, &c., on each parcel, allowed the attorneys for their care and responsibility the sum of $816, being a commission of one-eighth per cent. on the $652,000. On a motion to revise the taxation and disallow this amount:—Held, that it was a matter entirely within the master's discretion, and the court refused to interfere. *In re Attorneys*, 26 C. P. 495.

Costs of Defence—*Charge of Fraud.*]—Fraud having been charged against a defendant, who was a solicitor, and the charge being wholly unsupported:—Semble, that it would have been proper not merely to deprive the plaintiff of her costs, but to allow such defendant all his costs. *Freed* v. *Orr*, 6 A. R. 690.

Costs of Infant's Guardian.]—A solicitor upon the plaintiff's application having been appointed guardian ad litem to infant defendants, and being unable to recover his costs from the plaintiff, or from the infants' estate, it was ordered that they be paid out of the suitors' fee fund. *McKay* v. *Harper*, 6 P. R. 54.

Costs of Unsuccessful Application—*Costs Paid to Opposite Party—Counsel Fees.*] —By the judgment in an action it was ordered that the plaintiffs should recover against the defendant whatever amount should be found due to them on the taxation of their solicitors' bills of costs of certain litigation, as between solicitor and client, and certain bills were referred for taxation between solicitor and client. Upon appeal from the taxation: —Held, that it was to be treated as if it had been directed on an application, under s. 32 of the Solicitors Act, R. S. O. 1887 c. 147, by the defendant as the person chargeable, and was a taxation between the solicitors and their clients, the plaintiffs. (2) That the decision of the taxing officer allowing to the solicitors the costs of an unsuccessful interlocutory application, undertaken in the exercise of an honest and fair discretion, should not be interfered with. (3) That the payment by the solicitors to the opposite party in the litigation of a sum for interlocutory costs which the plaintiffs were ordered to pay, while not properly such a disbursement as should be included in the bill of the costs of the action, was a proper payment on behalf of the clients, to which payments credited on the reference might have been applied, and should be treated as so applied. (4) That, notwithstanding the provisions of the tariff, the taxing officer was justified in taxing larger counsel fees upon this taxation than had already been allowed between solicitor and client for the same services, and that his discretion as to the amount thereof should not be interfered with. Re Geddes and Wilson, 2 Ch. Ch. 447, followed. *Smith* v. *Harwood*, 17 P. R. 36.

Costs of Taxation—*Attachment for.*]—Where on the taxation of a solicitor's costs,

the master, without any order as to the costs of taxation, taxed them and included them in his certificate, and a subpœna and attachment issued in due course for the whole amount included in such certificate, and the client remained in close custody for a considerable time under the attachment, before making any application in regard to the supposed error as to the costs of taxation, the court refused to set aside the subpœna and attachment. *McGill* v. *Sexton*, 1 Gr. 311.

Counsel Fees.]—Fees paid to counsel at the trial are recoverable. *Brock* v. *Bond*, 3 U. C. R. 349.

——— *Reference—Unnecessary Length—Brief—Copies of Depositions.*]—Upon appeal from the taxation between solicitor and client of a bill of costs for the defence of an action of redemption, in which, before the beginning of the sittings at which the action was entered for trial, an arrangement had been made between the parties that all the matters in question should be referred to a master, and accordingly no witnesses were subpœnaed, and a reference was directed at the sittings:—Held, that the taxing officer had no discretion to allow an increased counsel fee with brief at the trial, as the action could not be said to be of a special and important character, nor to allow a fee for advising on evidence. The reference lasted for 137 hours, 18 of which were occupied in argument. Nearly the whole of the time was devoted to the main matter in contest, viz., whether the defendants should be charged with an occupation rent, and if so, at what amount. The master found that they were chargeable with a rent of $312.50. The taxing officer allowed the solicitor $302 for the time occupied in taking the evidence, and $47 for the argument:—Held, that the allowance of counsel fees upon a reference, under clause 107 of the tariff, should be exceptional, and made only when matters of special importance or difficulty are involved at some particular sitting; and also that the taxing officer should have taken into consideration the unreasonable time occupied over so small a matter, and have exercised his discretion by confining the solicitor to the minimum allowance of $1 an hour, under clause 104 of the tariff, for the argument as well as for the taking of the evidence. The taxing officer allowed the solicitor $77.50 for brief upon appeal from the master's report; this amount included $67.80 paid to the master for copies of the depositions:—Held, that the solicitor had no primâ facie right to order and charge for these copies, and, in the absence of any authority from his clients, should not be allowed for them upon taxation. The taxing officer allowed the solicitor $35 counsel fee upon the appeal, $12 for travelling expenses, and $10 counsel fee upon the plaintiff's motion for judgment, which came before the court with the appeal:—Held, that these allowances, though liberal, were not so clearly wrong as to justify the court in interfering. *Re Robinson*, 16 P. R. 423. See *S. C.* in appeal, 17 P. R. 137, *ante* 4 (a).

——— *Increased Amounts.*]—Solicitor and client taxations are distinct from party and party taxations, both as to the scope of the inquiry and as to the powers of the officer to whom the reference is made, in regard to the allowance of items. In solicitor and client taxations there is no power of intervention on the part of the taxing officer at Toronto in order to obtain an increase in amount under such items in the tariff as 104, 145, 150, 153; but the officer charged with the reference has power to exercise the discretion recognized by the tariff in increasing the amount chargeable for certain services, ordinarily exerciseable by the officer at Toronto in party and party taxations. *Re Macaulay*, 17 P. R. 461, 18 P. R. 184.

——— *Agreement not to Charge Solicitors' Fees, but only Disbursements.*]—See *Re Solicitors*, 17 C. L. T. Occ. N. 123.

Fees of Solicitor Being also Trustee or Executor.]—See TRUSTS AND TRUSTEES.

Interest on Costs.]—Interest may be allowed on a solicitor's bill of costs, if a demand in writing is made for it. *In re McClive*, 9 P. R. 213.

The taxing officer has no power to allow interest, unless the matter has been specially referred to him by the order for taxation. *Ib. See Archer* v. *Severn*, 12 P. R. 648.

Interest on Moneys in Solicitor's Hands.]—A taxing officer cannot charge a solicitor with interest upon moneys in his hands belonging to his client. *Re O'Donohoe*, 12 P. R. 612. See *S. C.*, 14 P. R. 317.

Quantum of Costs—*Inferior Court—Superior Court.*]—Held, that a party who gave instructions to commence an action, specifying the court (the attorney not stating that he would expect him to pay the difference should the verdict be within the county court jurisdiction, and commencing the action in the superior court), was only liable for county court costs between attorney and client, the sum recovered being within the jurisdiction of the county court, and no higher costs being taxable between party and party. *Scanlan* v. *McDonough*, 10 C. P. 104.

Where a solicitor incurs useless and unnecessary costs by instituting in chancery a suit within the jurisdiction of the county court, the surplus of the costs in chancery over the inferior court tariff, will not be allowed to him against his client. Where in such a suit the costs in chancery had been disallowed in toto between the parties, the master allowed the plaintiff's solicitor county court costs, the client having derived some benefit from the suit. *Re Hardy, Poole* v. *Poole*, 3 Ch. Ch. 179.

——— *Inferior Court—Superior Court—Knowledge of Facts.*]—On an appeal by the client from a local master's taxation, as between solicitor and client, of the solicitor's bill in an action against a bank, which was dismissed, and in which the real claim, if any, was on a deposit receipt, with interest amounting to $355, or the moneys secured thereby, alleged to belong to the plaintiff as administratrix, and in which action the facts, as set out in the report, only came to the knowledge of the solicitor and client after the action was brought, there being sufficient room for doubt whether a claim could be ascertained, after the death of the creditor, by the signature of the debtor, to warrant the bringing of the action in the high court:—Held, that the solicitor was entitled to high court costs. *Re Jackson*, 18 P. R. 326.

——— *Summary Proceedings—Action.*]—The solicitors instituted an action on behalf

of a young woman, one of two residuary legatees and devisees under a will, against the executors and trustees, for an account. Upon the pleadings, charges of negligence in getting in rents, &c., and of refusal to account, were made against the defendants, and it was stated that a release was obtained from the other residuary legatee in the absence of his solicitor, immediately after his coming of age, by taking advantage of his necessities. At the trial judgment was given in the usual terms of an administration order, reserving further directions and costs; and by the judgment on further directions the plaintiff was given the general costs of the action against the defendants, saving, however, costs incurred by the plaintiff proceeding by writ of summons instead of by summary application for an administration order, and the plaintiff was ordered to pay the extra costs occasioned to the defendants by such proceeding:—Held, that no question was raised by the plaintiff which could not have been disposed of in the master's office; and, under the circumstances, in the absence of any evidence to shew that the client had, with knowledge of the practice of the court and the risk she ran, expressly instructed the solicitors to proceed in the way they did, they could not tax against her any more costs than they would be entitled to had they proceeded by notice of motion instead of by writ of summons. Scanlan v. McDonough, 10 C. P. 104, specially referred to. *Re Allenby and Weir*, 13 P. R. 403, 14 P. R. 227.

Retaining Fee.] — A retaining fee paid by the executors to their solicitors in an administration suit may, under certain circumstances, be a perfectly reasonable disbursement. *Chisholm* v. *Barnard*, 10 Gr. 479.

A retaining fee of £5 was held not taxable in this case. *Cullen* v. *Cullen*, 2 Ch. Ch. 94.

No retaining fee will be allowed to a solicitor who is also counsel. *In re McBride, Farley* v. *Davis*, 2 Ch. Ch. 153.

Such a fee was allowed under exceptional circumstances. *Re Fraser*, 13 P. R. 409.

The solicitor, during the progress of the action in respect of which the costs in question were incurred, made a contract in writing with his clients for the payment to him of a retaining fee of $100, explaining fully to them the effect of the bargain, and that, in case of their success in the action and costs being awarded to them, they would not be able to tax against or claim from the opposite party the amount of this fee. The officer allowed the retaining fee on taxation, and reported that the contract was a fair and reasonable one:—Held, on appeal, that the contract could not be enforced against the clients. Section 51 of the Act respecting solicitors, R. S. O. 1887 c. 147, relates to matters of conveyancing, &c., and not to the conduct of an action in the ordinary way. *Ford* v. *Mason*, 16 P. R. 25.

By the judgment in an action the defendant was required to pay the plaintiffs' costs of a former action, as between solicitor and client, to be taxed:—Held, that an unpaid retaining fee which the plaintiffs had agreed in writing to pay to their solicitors, over and above the costs of the action, could not be taxed against the defendant. Re Geddes and Wilson, 2 Ch. Ch. 447, and Ford v. Mason, 16 P. R. 25, approved and followed. Re Fraser, 13 P. R. 409, distinguished. *McKee* v. *Hamlin* v. *Connelly*, 16 P. R. 207.

Set-off of Costs—*Undelivered Bill.*]—See *Macpherson* v. *Tisdale*, 11 P. R. 261, *post* 5.

Unusual Charges.]—If charges in a bill are unusual or exceptional, the solicitor has to make out a very clear case to have them allowed. *In re A. B.*, 8 C. L. J. 21.

See, also, COSTS, V.

(m) *Other Cases.*

Action—*Reservation of Rights—Costs.*]—Where an action was brought on an attorney's bill together with another claim, an order was made referring the bill for taxation and reserving the right to raise any defence to the action, costs to abide the event of the taxation, not of the cause. *Re Green*, 7 P. R. 89.

Appeal from Order for Taxation.]—The right of appeal from chancery is confined to orders or decrees made in a cause pending between parties. Where, therefore, an appeal was made to the court of error and appeal from an order directing the taxation of a solicitor's bill against his client in a particular mode, the court dismissed the appeal with costs. The respondent, although he may, is not bound in such a case to move at an earlier stage to quash the proceedings. *Re Freeman*, 2 E. & A. 109.

Certificate of Taxing Officer—*Effect of.*]—The taxing officer's allocatur is sufficient proof that the business charged for was done by the solicitor. *Clarke* v. *Union Fire Ins. Co., Caston's Case*, 10 P. R. 339.

Interlocutory Costs—*Set-off—Discretion.*]—Decisions in 15 P. R. 269, refusing to order a set-off of certain interlocutory costs against the amount alleged to be due to the solicitors upon bills in course of taxation, affirmed on appeal:—Held, that, as the taxation had never been completed, and the solicitors declined to proceed with it, they were not entitled to set-off. If the taxation had been completed, the fact of the interlocutory costs being ordered to be paid forthwith after taxation would not have prevented their being ordered to be set-off; but it raised an inference that it was not intended that they should be set off. Whether the costs in question should be set off or not was in the master's discretion, and, having regard to the fact that they had been assigned, and to the other circumstances before the court, it could not be said that an improper discretion had been exercised. *Re Clarke and Holmes*, 16 P. R. 94.

Mortgage for Costs—*Foreclosure—Taxation.*]—In a suit of foreclosure on a mortgage taken by a solicitor from his client to secure advances and costs, the court refused to direct taxation, there being no overcharge pointed out, or any undue pressure shewn. *Shaw* v. *Drummond*, 13 Gr. 662.

Refund of Amount Overpaid.] — An attorney may be ordered to return moneys which he has retained beyond the amount of his bill as taxed to the person at whose instance the taxation has taken place, under

C. S. U. C. c. 35, though such person be a third party who is liable to pay and has paid the bill to the attorney or party entitled thereto. *In re Glass* v. *Macdonald*, 13 C. P. 419.

An attorney received from his client a note for £50, the costs in three suits. The client, being sued upon this note in the name of one W., apparently a nominal plaintiff, paid £29, and gave a confession for the balance: the bills were afterwards taxed at £24; and the court then ordered the attorney to refund the amount overpaid. *Ex parte Colborn*, 1 P. R. 208.

——— *Taxation—Parties.*]—In an action instituted by the widow of T. W. to set aside a will alleged to have been executed by him under undue influence, D. acted as her solicitor and obtained a decree as prayed. During the pendency of such action one H. was appointed by the court administrator, with the view of getting in certain debts due the estate before they should be barred by lapse of time. Numerous actions were brought by D. in the name of H., in some of which moneys aggregating a large sum were recovered, whilst in many no benefit whatever resulted to the estate, and costs amounting in the whole to $2,738.37 were incurred, which had been taxed as between solicitor and client, on H. passing his accounts before the master, and were paid to D. partly by H. out of moneys of the estate, and partly by funds coming into D.'s hands as such solicitor and retained by him. Subsequently a prior will of T. W. was duly proved by the executors named therein, who took proceedings to obtain an account of H.'s administration and a taxation of D.'s costs. These proceedings finally resulted in a dismissal thereof as against D., and an order on H. to pass his accounts, which he did, charging the estate with the amount of costs so paid to D., but on a retaxation of D.'s bills the aggregate amount was reduced to $725.56, several of the bills having been disallowed in toto, on the alleged ground that the actions had been brought without the leave of the court, and H. was ordered to pay in the difference. H. was unable to do so, and thereupon he, as also the executors, by their several petitions applied for and obtained an order upon D. to repay the amount with costs, or in default be struck off the roll of solicitors. (29 Gr. 280.) On appeal the order was reversed, the court being of opinion that the taxation and all the other proceedings in reference thereto having been had in a proceeding to which D. was not a party, he could not be bound thereby. *Wilson* v. *Beatty, In re Donovan*, 9 A. R. 149.

Solicitors Act—*Effect of—Inherent Jurisdiction to Order Taxation.*]—The Act respecting solicitors does not deprive the court of its inherent jurisdiction over them as officers of the court, but that jurisdiction is expressly preserved by s. 56, and under it an order may be made for the taxation of a bill, although not in terms of that Act. *Re McBrady and O'Connor*, 19 P. R. 37.

Third Party—*Right to Intervene on Taxation—Interest.*]—G., a judgment creditor of W. A. C., garnished a fund recovered by J. W. C., suing as the assignee of W. A. C.; G. disputed the validity of the assignment from W. A. C. to J. W. C., and an issue was directed to be tried between G. and J. W. C., as to the portion of the fund which would remain after satisfying the claim of the solicitor of J. W. C., who had a lien upon the fund for his costs incurred in the recovery of it. Upon appeal from the taxation of these costs, before the trial of the issue:—Held, that G. had the right to be represented upon the taxation and appeal, as in one event he had an interest in the reduction of the solicitor's bill, and there could not be two taxations, one as against J. W. C., and the other against G. if he succeeded in the issue. *Gall* v. *Collins*, 12 P. R. 413.

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5. Signing and Delivery of Bill.

Admission of Signature.]—The month required by 2 Geo. II. c. 23 for the delivery of an attorney's bill is a lunar, and not a calendar month, and the day of the service of the bill is included. A defendant having indorsed an admission of service on the bill produced:—Held, to have admitted that the copy received was signed by the attorney. *Berry* v. *Andruss*, 3 O. S. 645.

Alteration after Delivery—*Items.*]—An attorney having once rendered his bill, cannot, after steps taken to have it taxed, add to it, or deduct from it, without leave of the court. If he has rendered his bill making charges in a lump sum, though he may perhaps make up items to shew it correct as to the amount, yet he cannot recover or tax more than this amount. *In re Davy*, 1 C. L. J. 213.

Attorneys' Firm—*Sufficiency of Signature.*]—The attorneys who commence the action must sign the bill delivered. Where, therefore, three attorneys composing a firm commenced the action, and only one of them signed the bill:—Held, insufficient. *Sullivan* v. *Bridges*, 5 U. C. R. 322.

Conditional Delivery—*Reservation.*]—Solicitors delivered bills of costs, indorsing on each, "In the event of taxation, we reserve to ourselves the right of delivering another and more complete bill:"—Held, an absolute delivery. Re Pender, 8 Beav. 299, and Re Chambers, 34 Beav. 177, considered. *In re Spencer and McDonald*, 19 Gr. 467.

Delivering Amended Bill.]—See *ante* 4 (j).

Delivery before Action.]—See *ante* 3.

Delivery to Another Attorney—*Time—Action.*]—Where one attorney sues another, it is not necessary to deliver a bill one month before action. But by 3 Jac. I., a bill must be delivered at some time before action in a case where the business done is not agency business, but as for any other client. *Draper* v. *Beasley*, 8 U. C. R. 260.

Delivery of Second Bill—*Taxation of—Estoppel.*]—An attorney, upon the request of his clients, on the 27th March, 1863, delivered to them a bill of costs. They afterwards, disregarding this, obtained an order upon him to deliver a bill of costs of all causes and matters wherein he had been concerned for them, which he did, including the services for which his former bills had been delivered. No objection was made to the taxation of the new bills till after it was pretty well ascertained that the balance would be against the

clients, when they endeavoured to hold the attorney to his first bill, which, with a receipt indorsed upon it, would have made a balance against him:—Held, that the clients could not revert to the old bill, to the prejudice of the attorney. *In re Malloch*, 10 L. J. 327.

Necessity for Delivery — *Set-off.*]—An attorney's costs will be allowed as a set-off and as a debt, though no bill has been delivered. *Macpherson* v. *Tisdale*, 11 P. R. 261.

Necessity for Itemized Account.]—In an action on a bill, where the costs were charged at one lump sum, although the costs as between party and party had been taxed at that sum in the original suit, and no bill of items had been delivered by the plaintiffs to their client:—Held, not a compliance with C. S. U. C. c. 35, s. 27. *Stanton and Warren* v. *McLean*, 9 L. J. 301.

See Re Mowat, 17 P. R. 180.

Order for Delivery—*Affidavits.*]—A bill must be delivered before it will be referred for taxation. The first application should therefore be for delivery. Affidavits filed in support of such application must be intituled in the court, and, under the statute, "in the matter of A. B." *In re Eccles*, 6 L. J. 59.

——— *Business out of Court.*]—An attorney or solicitor may be ordered to deliver a bill of his charges for business done by him as such, though the services performed were not in whole or in part for business done in court, as in this case, where the retainer was to investigate the title of and purchase property. *In re O'Donohoe and Warmoll*, 4 P. R. 295.

——— *Costs.*]—Quære, can attorneys properly be made to pay the costs of an order for delivery of bills of costs. *In re Lemon*, 1 C. L. J. 19.

——— *Nominal Plaintiff.*]—A client who is merely a nominal plaintiff—being in this case the person in whose name an election petition had been filed, and who lent his name for the purpose of convenience, and was not held responsible by the attorney for his costs—is not entitled to an order on the attorney for delivery of his bill of costs, &c. *Re Attorneys*, 6 P. R. 319.

——— *Payment — What Amounts to.*] — Solicitors retained out of moneys in their hands belonging to their client, sufficient to pay their costs, and handed the client a cheque for the balance. The client took the cheque but did not cash it until she had written to the solicitors stipulating that the cashing should be without prejudice to her right to recover a larger sum, if such was due her. After the lapse of a year from the receipt of the cheque, the client applied for an order for the delivery of a bill of costs:—Held, that the circumstances did not amount to payment of the costs, and the order for delivery was made. Re Sutton, 11 O. R. D. 377, distinguished. *Schragg* v. *Schragg*, 11 P. R. 218.

——— *Settlement—Costs.*] — An attorney may be ordered to deliver his bill though it has been fully settled, and to give credit therewith for all moneys received. When after such an order he makes default in delivery, he will have to pay the costs of such order. *In re Francis* v. *Boulton*, 6 L. J. 20.

——— *Payment—Taxation.*] — The jurisdiction granted by the provisions of the Act respecting solicitors, R. S. O. 1897 c. 174, to order the delivery of a bill of fees, charges, or disbursements for business done by a solicitor as such, is distinct from and independent of the jurisdiction thereby granted to order the same to be taxed; and there is power to order delivery of a bill whether it has been paid or not, and whether or not it is one which the court would have power to refer to taxation. Duffett v. McEvoy, 10 App. Cas. 300, Re West, [1892] 2 Q. B. 102, and Re Baylis, [1896] 2 Ch. 107, followed. *Re McBrady and O'Connor*, 19 P. R. 37.

Order for Delivery and Taxation — *Business out of Court—Præcipe Order.*]—Upon a motion in chambers for an order for the delivery and taxation of a solicitor's bill of costs relating to certain proceedings under a mortgage:—Held, that the chancery practice of obtaining such orders on præcipe is the more convenient one, and should prevail in all divisions of the high court of justice. Order made with costs as of a præcipe order. *Re Fitzgerald*, 10 P. R. 279.

Upon the application of a mortgagor the mortgagee's solicitor was ordered, by a county Judge, to deliver to the applicant a copy of the bill of costs of a sale under the power in the mortgage; and the bill was delivered pursuant to the order:—Held, that, although the delivery was, under s. 45 of the Attorneys Act, to be regarded as for the purposes of a reference to taxation, yet the person so obtaining the copy of the bill had not necessarily the right to tax the bill; and a præcipe order for taxation was set aside, where at the time of making it there were two matters in dispute, viz., whether payment as such had been made by the mortgagees to the solicitor, and whether the mortgagees had precluded themselves from the right to tax the bill. *Re Moffatt*, 12 P. R. 240.

——— *Payment—What Amounts to.*]—Where no bill of costs has been delivered by a solicitor to his client, there cannot be payment within the meaning of s. 49 of the Solicitors Act, R. S. O. 1897, c. 174, which refers to the payment of a delivered bill. And where one of the solicitors and their client, according to the solicitor's evidence together examined the items in the solicitors' dockets, which amounted to over $1,500, and the solicitor explained that certain entries had not been made which would amount to $300, and the client paid the solicitors $1,500 in full settlement:—Held, that this was not equivalent to the delivery of a bill and payment after consideration. *Re Pinkerton and Cooke*, 18 P. R. 331.

——— *Stay of Proceedings.*] — A Judge cannot by the same order direct the delivery and reference to taxation of a bill. Nor can he, in an action for such bill, stay proceedings until delivery and taxation; for, semble, that the right to restrain the action under the statute, only attaches on a reference of the bill to taxation. Quære, whether there may not be an order for delivery after action commenced; but, unless a very strong case is made out, defendant should be left to plead the non-delivery. *Boomer* v. *Anderson*, *In re Boomer*, 16 C. P. 163.

Person to whom Delivered — *Several Clients.*]—Service of the bill on one of several clients acting in conjunction by the same solicitor, but not co-partners, is sufficient service on all. Service on a solicitor appointed by the one of several clients who had been active in the suit, and through whom instructions had been given, deemed sufficient. *Re Morphy and Kerr*, 2 Ch. Ch. 82.

Summons for Delivery — *Amendment.*] —A summons calling upon an attorney to deliver his bill of costs did not refer to any affidavit or papers filed. Amendment allowed. *Re Barton*, 4 P. R. 237.

What Amounts to Delivery — *Reference to Former Bill.*]—See *Arnoldi* v. *O'Donohoe*, 2 O. R. 322.

See Re Lemon, 1 C. L. J. 19; *Re Prince*, 3 Ch. Ch. 282; *Gillespie* v. *Shaw*, 10 L. J. 100; *In re Fairbanks*, 1 Ch. Ch. 222; *Re Malcolmson and Wade*, 9 P. R. 242; *O'Connor* v. *Gemmill*, 29 O. R. 47, 26 A. R. 27; *Re Beaty*, 19 P. R. 271.

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6. *Substituting Bill of Costs for Commission.*

Administration Suit—*Large Amount—Reducing—Notice.*] — In an administration suit the estate was insolvent, the total assets being $72,000, the liabilities $138,475, and the creditors 180 in number. The commission of the solicitor who acted for all parties was allowed by the master, under G. O. Chy. 643, at $995. Eight creditors, at the close of the suit, and without notice to the solicitor until fourteen days before moving, applied for an order for the delivery and taxation of the solicitor's bill instead of the allowance of the commission, on the ground that the commission was excessive:—Held, that the commission was not so exorbitant as to warrant the substitution of a taxed bill, and a probable reduction by that mode of payment, especially as the benefit to the creditors would be trifling. The scope of G. O. Chy. 643 is merely to aid in fixing a solicitor's remuneration. It is not intended to do strict justice, but is only a sort of convenient expedient for fixing costs without taxation. A very liberal compensation in such cases is not per se a reason for reducing the commission, or directing the taxation of a bill in its stead, nor per contra, is a low or inadequate compensation a reason for increasing the commission, or directing payment by a taxed bill. Semble, in cases affected by G. O. Chy. 643, any party interested in the estate, who may desire that a solicitor should be paid in the particular matter or suit on the scale of a taxed bill instead of by commission, should give notice to the solicitor to that effect, and have the master note it in his book, at the earliest stage possible in the proceedings, but there is no practice authorizing the substitution of a bill of costs for commission at the option of any party. *In re Stuebing, Anthes* v. *Dewar*, 10 P. R. 236.

——— *Small Amount—Increasing.*] — See *Wright* v. *Bell*, 16 C. L. T. Occ. N. 193.

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7. *Unnecessary Proceedings.*

After Offer of Settlement.]—The mere non-communication by a solicitor to his client of an offer of settlement does not prove that proceedings after the offer were unnecessary, and that the costs of them should be disallowed under con. rule 1215, unless it be shewn that the offer was an advantageous one, the acceptance of which the solicitor ought to have advised, and it can be fairly inferred that he refrained from communicating it and advising its acceptance merely for the purpose of putting costs into his own pocket, and without regard to the interests of his client. *Re O'Donohoe*, 12 P. R. 612, 14 P. R. 317.

Multiplicity of Actions.]—A solicitor, acting on behalf of three clients, brought three separate actions for malicious prosecution against the same defendant. The three causes of action all arose out of an information for an assault laid by the defendant against the plaintiffs: — Held, that under rule 300 the three causes of action could have been joined in one action; that it was the duty of the solicitor to have so advised his clients; and that, not having done so, he could not be heard to say that his clients had instructed him to bring three separate actions. And upon taxation of his bill between solicitor and client he was allowed costs as of one action only. Booth v. Briscoe, 2 Q. B. D. 496, and Gort v. Rowney, 17 Q. B. D. 625, followed. Appleton v. Chapel Town Paper Co., 45 L. J. Ch. 276, not followed. *Re Butterfield*, 14 P. R. 567.

——— *Several Affidavits—Useless Motion for Judgment.*]—Two actions were brought by the same plaintiffs against different defendants to recover rent for different parcels of land, in which the defences were not identical. A compromise was effected, and it was agreed between the parties "that judgment shall be entered in each of the said actions for the amounts claimed therein by the plaintiffs, with costs of suit between solicitor and client;" and judgments were entered accordingly:—Held, that the plaintiffs were entitled to tax a separate set of costs for each action. The plaintiffs made six affidavits on production, either prompted by the action of the defence or by way of voluntary supplement to the original affidavit:—Held, that they were entitled to tax the costs of one affidavit only, with extra folios for the additional matter contained in the subsequent affidavits. Held, that upon the taxation "between solicitor and client" of the plaintiffs' costs, they were not entitled to the costs of a motion for summary judgment under rule 739, which was useless and not according to the practice, and was refused because the indorsement on the writ of summons claimed "interest on arrears of rent," and was, therefore, not a good special indorsement. *Baldwin* v. *Quinn*, *Baldwin* v. *McGuire*, 16 P. R. 248.

Proceeding by Action instead of Summarily — *Relief against Solicitors.*]—The order and decision of Robertson, J., 13 P. R. 403, upon appeal from taxation of costs between solicitor and client, disallowing to the solicitors the additional costs occasioned by their bringing on their client's behalf an action for administration, where a summary application would have sufficed, was affirmed by the court of appeal. In the administration action the additional costs incurred by the defendants in that action were allowed to them by way of set-off against the costs awarded to plaintiff:—Held, that no relief could be obtained by the client, upon a proceeding for taxation of costs, in respect of the loss suffered by her in virtu-

ally paying these costs to the defendants. *Re Allenby and Weir*, 14 P. R. 227.

See ante 4 (1).

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8. *Other Cases.*

"As between Solicitor and Client."]—Costs "as between solicitor and client" in an action include such costs as a solicitor can tax against a resisting client under the general retainer to prosecute or defend the action. *Cousineau* v. *City of London Fire Ins. Co.*, 12 P. R. 512.

Continuing Action for Costs only.]—An attorney cannot proceed for his costs after a plea of release puis darrein continuance, unless he establish a clear case of fraud. *White* v. *Boulton*, E. T. 2 Vict. See *Parent* v. *McMahon*, 4 O. S. 120, *post* VII. 1 (b).

Director of Company — *Profit Costs—Contributory—Set-off.*] — Where a director, who was also president, of a company was appointed by the board of directors and acted as solicitor for the company:—Held, in winding-up proceedings, that he was entitled to profit costs in respect of causes in court conducted by him as solicitor for the company, but not in respect of business done out of court, and was entitled to set off the amount of such costs against the amount of his liability as a shareholder. Cradock v. Piper, 1 Macn. & G. 644, followed. *Re Mimico Sewer Pipe and Brick Mfg. Co., Pearson's Case*, 26 O. R. 289.

Enforcing Payment—*Attachment.*]—To enforce payment of solicitors' costs taxed upon the petition of the client, intituled in a cause depending, the proper course, under the 92nd of Vice-Chancellor Jameson's orders, is by subpœna and attachment, though such costs include costs at law. *McGill* v. *Sexton*, 1 Gr. 311.

Examination of Client as Judgment Debtor.]—A solicitor whose costs have been taxed on the application of the client and not paid, a fi. fa. having been returned nulla bona, is entitled to an order for the examination of his client touching his estate and effects. *Re Blain*, 1 Ch. Ch. 345.

Indemnity — *Covenant — Solicitor and Client Costs.*]—W. sold land to H., and covenanted to indemnify him against a mortgage thereon:—Held, that H. was not entitled to solicitor and client, but only to party and party, costs of an action on the covenant. *Hutton* v. *Wanzer*, 11 P. R. 302.

Insolvency — *Preferred Claim—Opposing Lunacy Petition.*]—A petition was presented by the husband of D. to declare his wife a lunatic, which was opposed by her. Pending the hearing of the petition D. assigned her separate estate for the benefit of her creditors. The court dismissed the petition. D.'s solicitor presented a petition for taxation of D.'s costs, and for payment by the assignee in priority to the claims of the creditors:—Held, that the costs of opposing the petition might be classed as necessaries which the wife is liable to pay out of her separate estate, and for which that estate is liable in the hands of her assignee, but that they could not be put on the footing of maintenance. Such costs should be paid ratably out of the assets, and costs subsequent to the assignment should not rank in competition with creditors before the assignment. *Re Dumbrill*, 10 P. R. 216.

Interim Disbursements in Alimony Suit — *Counsel Fees.*]—See HUSBAND AND WIFE, I. 2.

Judgment — *Assignment to Solicitor — Validity upon Insolvency—Restriction.*] — G. recovered a judgment against D., and afterwards, though in insolvent circumstances, assigned the same by two assignments to his attorney, one for costs due him by G., and the other for a debt due to R. by G. Afterwards C. obtained a judgment against G., and attached the debt so due him by D., and gave notice of the attachment to D. before the assignee of G. had given notice of his assignments. D. paid to the sheriff the moneys due to G. by himself under an execution issued at the instance of the assignee of G.:—Held, that the solicitor of G. must be restricted to the costs incurred by him in the action brought by G. against D., and that R. must stand as an ordinary creditor. *Davidson* v. *Douglas*, 15 Gr. 347.

Lost Bill of Costs—*Voucher—Secondary Evidence.*]—On the reference in this case H. sought to use a certain bill of costs as a voucher of moneys properly expended by him in legal proceedings, and it was shewn that the said bill had been properly brought into the master's office on a former reference, and properly left there, and that search had been made for it, but without success, although there was no evidence that it had been removed, or that it had been noticed or seen elsewhere afterwards, nor of any occasion when it would probably have been removed from the office:—Held, that the master should have admitted secondary evidence of its contents, and proceedings should have been taken in respect to it as nearly as might be the same as if H. had been able to produce it. *Beatty* v. *Haldan*, 10 O. R. 278.

Municipal Corporation—*Councillor as Solicitor.*]—A solicitor who is a member of a municipal council cannot recover from the corporation for services rendered them, he being a trustee under C. S. U. C. c. 54, s. 217. *Town of Peterborough* v. *Burnham*, 12 C. P. 103.

Uncertificated Solicitor—*Payment to.*]—The defendant in this action was represented by a firm purporting to be a firm of solicitors, one of the members, however, not being a duly admitted or certificated solicitor. The plaintiff objected to the costs awarded the defendant in the action being taxed to him:—Held, that, in the absence of proof that these costs had not been paid by the defendant to the persons who acted as his solicitors, the objection could not prevail; nor could it even if that proof had been given. Reeder v. Bloom, 3 Bing. 9, and ——— v. Sexton, 1 Dowl. 180, followed. *Scott* v. *Daly*, 12 P. R. 610.

Undertaking to Refund.]—See *Kelly* v. *Imperial Loan Co.*, 10 P. R. 499; *Agricultural Ins. Co.* v. *Sargent*, 16 P. R. 397.

VII. DUTIES.

(*See post* XI.)

1. *Conduct and Management of Business.*

(a) *Vexatious Conduct.*

Attachment — *Stay—Costs.*]—Where expenses have been vexatiously incurred in

conducting a suit by the attorneys on both sides, the court, to protect the client, will order an attachment, though regularly issued, to be stayed without costs, upon payment of the money due. *Regina* v. *Cameron*, *Playter* v. *Cameron*, 4 U. C. R. 165.

Fi. Fa.—*Affidavit—Costs.*]—On an application to set aside a fi. fa. vexatiously issued, the plaintiff's attorney was ordered to pay the costs of the application, he having stated impertinent and irrelevant matter in his affidavit. *Anon.*, 4 P. R. 242.

——— *Enforcement—Affidavit.*]—Remarks upon the vexatious and oppressive conduct of an attorney in enforcing a levy for costs without any necessity, after an offer of payment in a reasonable time and manner; and upon the introduction of irrelevant and improper matter into an affidavit. *Davidson* v. *Grange*, 5 P. R. 258.

——— *Enforcement in Several Counties—Costs.*]—Held, under the facts of this case, there being no ground for apprehension of losing the debt, that the conduct of the attorney in issuing and enforcing three executions to different counties was improper, and that his client's instructions could form no justification. The court, therefore, ordered him at once to refund to defendants the poundage retained by two of the sheriffs, and to pay the costs of the executions directed to them, and of this application. *Henry* v. *Commercial Bank*, 17 U. C. R. 104.

——— *Prompt Issue of.*]—It is irregular to take out a fi. fa. the instant costs have been taxed, without allowing a reasonable time to the solicitor whose client has to pay them to communicate the result of the taxation. *Cullen* v. *Cullen*, 2 Ch. Ch. 94.

But see *Coolidge* v. *Bank of Montreal*, 6 P. R. 73; *Smith* v. *Cronk*, *ib.* 80.

Judgment—*Omission of Credit—Excessive Seizure—Pleading.*]—Held, that the second count of the declaration, charging defendants, as attorneys, with having entered judgment and levied on plaintiff for the full amount of a claim, without deducting a payment made, and the third count, charging a levy on other goods after enough had been seized, were both good in substance. *Reid* v. *Bull*, 15 U. C. R. 568.

Penalty for Conduct—*Costs.*]—Quære, as to plaintiff's right under the circumstances of this case to costs as between attorney and client, to be paid by defendant's attorney, as a punishment for his vexatious conduct. *Gore District Mutual Fire Ins. Co.* v. *Webster*, 10 L. J. 190.

Refusal to Deposit Document—*Costs.*]—Where a solicitor adopts a course obviously unreasonable and perverse, he will be ordered to pay the costs occasioned thereby. Where, therefore, a solicitor refused to leave with the master a mortgage under which he claimed on behalf of a creditor, and the master disallowed the claim, the court refused to interfere with the master's finding, and made an order for costs against both the solicitor and client. But they gave the client, the creditor, a further opportunity of proving his claim, unless the solicitor should shew that he acted under express instructions. *Brigham* v. *Smith*, 2 Ch. Ch. 462.

(b) *Other Cases.*

Affidavit as Attorney before Appearance.]—Until after appearance a defendant has no attorney in the cause, and an affidavit by a person calling himself such was, therefore, held insufficient to support an application to change the venue. *Hood* v. *Cronkrite*, 4 P. R. 279. Commented upon in *Attorney-General* v. *McLachlin*, 5 P. R. 63.

Answer Sworn before Solicitor—*Irregular Transmission.*]—The fact that an answer had been sworn before a commissioner who had been formerly concerned as a solicitor in the cause, was not held to be ground for taking the answer off the files; but where an answer had been irregularly transmitted, it was ordered to be re-sworn within a given time, with costs against the defendants. *Gordon* v. *Johnson*, 2 Ch. Ch. 205.

Appearing as Attorney for Infant—*Costs.*]—An infant cannot appear by attorney, but must appear by guardian. If the appearance is by attorney, all subsequent proceedings are irregular. An attorney who appears for an infant, knowing his infancy, will be ordered to pay the costs of all subsequent proceedings, and of the application to set the same aside. *Macaulay* v. *Neville*, 5 P. R. 235.

Appearing for Parties not Interested—*Costs.*]—Where a solicitor appeared to represent parties who had been served with notice, being claimants in the master's office, but were not in the least interested in the question then at issue, and asked for costs, the court held that such conduct ought to be discouraged, and refused him costs. *Simpson* v. *Ottawa R. W. Co.*, 2 Ch. Ch. 226.

Ascertainment of Facts before Suit.]—A solicitor before commencing a suit should examine the instrument on which it proceeds, or in case of its loss should use due diligence in resorting to the means of information open to him, and to which he is referred by the client. *Roe* v. *Stanton*, 17 Gr. 389.

Becoming Security for Costs.]—It is irregular for a solicitor to become security for costs for his client. *Beckitt* v. *Wragg*, 1 Ch. Ch. 5. See *Re Gibson*, 13 P. R. 359.

Breach of Undertaking—*Dismissal of Suit.*]—The court has jurisdiction to relax its general as well as its special orders, and will in its discretion do so to further the ends of justice, or to relieve a suitor against difficulties occasioned by a solicitor. Where a defendant moved to dismiss the plaintiff's bill, the plaintiff having failed to comply with an undertaking, such failure having arisen through a slip of the plaintiff's solicitor, the application to dismiss was refused. *Devlin* v. *Devlin*, 3 Ch. Ch. 491.

Carelessness—*Costs.*]—Where the plaintiff's attorney had conducted his proceedings with little care, the defendant's rule to set them aside was discharged without costs. *Harrington* v. *Fall*, 15 C. P. 541.

Carrying out Sale of Land—*Acting for both Vendor and Purchaser—Fraud—Imputation of Knowledge.*]—See *Driffil* v. *Goodwin*, 23 Gr. 431; *White* v. *Curry*, 39 U. C. R. 569; *Cameron* v. *Hutchison*, 16 Gr. 526.

Delay in Trial—*Error in Judgment—Dismissal.*]—On a motion to dismiss, it appeared that the case had not been brought to a hearing, through an error in judgment of the plaintiff's solicitor:—Held, that it was proper to take into account such error in considering the application, in connection with the other circumstances of the case. *McFeetors* v. *Dixon*, 3 Ch. Ch. 84.

——— *Replevin Bond.*]—Semble, that the inability of the plaintiff's attorney in replevin to communicate with his client, not knowing where he was, affords no excuse for allowing two assizes to elapse, for it is the plaintiff's delay, not that of his attorney, which is a breach of the bond. *Bletcher* v. *Burn*, 24 U. C. R. 124.

Execution of Notarial Deed—*Illiterate Grantor—Explanation.*]—See *Ayotte* v. *Boucher*, 9 S. C. R. 460.

Misleading Opposite Solicitor—*Judgment—Costs.*]—An attorney having received a declaration without denying that he was the defendant's attorney, and a plea having been requested from him several times, he not denying his character as attorney for the defendant, the court set aside interlocutory judgment, signed for want of a plea, without costs, but stated that they would on application against the attorney order him to pay the costs. *Dobie* v. *McFarlane*, 2 O. S. 285.

Mistake in Law—*Relief—Pleading.*]—An application was made to vacate a præcipe decree taken into the master's office, and to allow, instead of a disputing note, an answer to be filed setting up the Statute of Limitations. The application was held to be properly made in chambers, and was granted, it being shewn that the note was filed through a mistake of the solicitor in supposing that the defence of the statute was available under it. *Cattanach* v. *Urquhart*, 6 P. R. 287.

Neglect to Plead Unmeritorious Defence.]—Semble, that an attorney would not be liable for culpable negligence, in not urging for his client the defence that the agreement sued upon was made on a Sunday, as it is not part of his professional duty to take all dishonest advantages. *Vail* v. *Duggan*, 7 U. C. R. 568.

Proceeding for Costs after Settlement.]—When, after process served, the parties settled, and the plaintiff agreed to pay his own costs, but, notwithstanding, the attorney went on, thinking that the defendant should pay the costs, the proceedings were set aside for irregularity. *Parent* v. *McMahon*, 4 O. S. 120.

Suppressing Facts—*Motion on Irregularities.*]—Defendant moved against the verdict because no issue book had been served in time, shewing by his affidavits that notice of trial was given on the 11th October, and that on the commission day an issue book, with notice of plaintiff's, but not of defendant's, title, was served. In answer it was sworn that with the notice of trial an issue book had been served, with which, for a reason explained, no copy of plaintiff's notice of title was given, and that, according to promise, such notice was given afterwards, to which a copy of the issue book was attached, to make it intelligible. The court severely censured the conduct of defendant's attorney in suppressing the fact of an issue book having been delivered with the notice of trial. *Parsons* v. *Ferriby*, 26 U. C. R. 380.

Taking Examination of Married Woman.]—The solicitor of the husband is not as such disqualified from taking the examination of a married woman for the conveyance of her land. *Romaens* v. *Fraser*, 16 Gr. 97, 17 Gr. 267.

Taking Instructions for Will—*Pointing out Effect—Language.*]—See *Wilson* v. *Wilson*, 22 Gr. 39.

Treating with Opposite Party.]—A solicitor should not treat with a party to a cause in the absence of his solicitor. *Bank of Montreal* v. *Wilson*, 2 Ch. Ch. 117.

Using Name of Clerk in Litigation.]—The practice of an attorney using the name of his clerk as nominal plaintiff, instead of the name of his client, is reprehensible. *Dickson* v. *McMahon*, 14 C. P. 521.

Withholding Notice of Objections—*Subsequent Advantage—Costs.*]—In this case the verdict, though irregularly obtained, was set aside without costs, as defendant's attorney had not raised the objection upon which it was set aside until after it had been obtained, and his conduct was wanting in candour in not drawing attention to such objections to the procedure as he intended to insist upon until the day before the trial, although he might have done so some two months before. *Cushman* v. *Reid*, 20 C. P. 147.

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2. *Dealing with Client.*

Loan of Money—*Fraud—Want of Advice.*] — The attorney (defendant) having made a loan to his client (the plaintiff), the court, under the circumstances of the case, refused to interfere on the alleged ground of fraud by the attorney, he having denied all the allegations of fraud set up by the plaintiff, and his statements being corroborated by the signature of the plaintiff to a memorandum prepared by defendant when the loan was effected, although the latter should have refused to proceed with the loan without the appointment of a solicitor to act on behalf of the borrower. *Rees* v. *Wittrock*, 6 Gr. 418.

Management of Estate—*Trustees—Breach of Duty.*]—See *Taylor* v. *McGrath*, 10 O. R. 669.

Obtaining Release for Another Client—*Evidence.*]—An old man, whose mental faculties had been somewhat impaired by age, being in difficulties with his son, applied for advice to the attorney of persons against whom he had recovered a judgment for one debt and a verdict for another debt; the attorney obtained from him a release of the two debtors without any consideration, and without his having any other advice in regard to the transaction; and the only evidence of what had passed between the two was the evidence of the attorney himself, the client being dead:—Held, that the release could not be maintained in equity. *Dewar* v. *Sparling*, 18 Gr. 633.

See, also, *McLean* v. *Grant*, 20 Gr. 76.

Purchase of Land — *Evidence of Fair Dealing — Impeaching — Time.*] — Conveyances obtained by a solicitor from his client must state the transaction correctly; and the solicitor must preserve evidence that an adequate price was paid, and that the transaction was in all respects fair, and such as a competent and independent adviser of the client would have approved of. Where these obligations are neglected, the suit of the client must be brought within twenty years, but an unexplained delay of less than that period may, under circumstances, be a bar. Where nineteen years had elapsed, and the delay was accounted for, the heirs of the client were held entitled to relief. *Oakes* v. *Smith*, 17 Gr. 660.

——— *Fraud.*]—On a bill filed by one of two infant plaintiffs in an administration suit (after attaining majority), seeking to impeach the proceedings therein on the ground of fraud:—Held, that the fact that the plaintiffs in that suit, as also the trustees and the executors, had been represented by one solicitor, the omission from the decree of any direction as to wilful neglect or default on the part of the defendants therein; a material difference between the decree and the decree on further directions as to the lands directed to be sold for satisfaction of debts; a purchase by the solicitor, so acting for the several parties, of a valuable portion of the estate—did not of themselves evidence fraud and collusion. *McDougall* v. *Bell*, 10 Gr. 283.

——— *Sale under Mortgage.*]—A solicitor of a mortgagee cannot become a purchaser under a power of sale contained in the mortgage, though the proceedings for the sale were not taken in his name, and it was not shewn that any loss had occurred by reason of his being the purchaser. *Howard* v. *Harding*, 18 Gr. 181.

Purchase of Mortgage — *Estate—Solicitor for Administrator.*] — The widow of an intestate obtained letters of administration, and her brother, a lawyer, acted for her as a friend, not professionally, in the management and settlement of the affairs of the estate. While so employed, the brother with his own money purchased a mortgage which had been created by the intestate:—Held, that he was entitled to hold the mortgage for his own benefit. *Paul* v. *Johnson*, 12 Gr. 474.

——— *Fiduciary Relationship.*]—In a foreclosure suit the defendant alleged that the plaintiff, a solicitor, had been employed by him in April, 1878, to procure a loan of $1,400, which he required to pay off a mortgage for $2,000, on which there was due $2,120, and that, taking advantage of the information so acquired, the plaintiff had purchased the mortgage for himself at the price of $1,400. It appeared that the defendant had, in the spring of 1877, obtained a loan of $600 on a portion of the land in question, through the plaintiff acting as agent and legal adviser of a loan company; that in January following, the defendant had applied to the plaintiff, acting in the same capacity, to procure a small loan from the company on the property in question, which the plaintiff told him he could not recommend to the company; that afterwards one B., who held the $2,000 mortgage, tried to sell it to the company through the plaintiff, who, finding that the land comprised in it did not come up to the value required by the company, wrote B. to that effect, and subsequently the plaintiff, who denied that the defendant had ever requested him to obtain the $1,400 loan, purchased the mortgage for himself for $1,625:—Held, reversing the decree in 27 Gr. 429, that the evidence shewed that the defendant had not applied to the plaintiff for the $1,400 loan, and that there was no confidential or fiduciary relationship existing between the parties which precluded the plaintiff from purchasing the mortgage. *Kilbourn* v. *Arnold*, 6 A. R. 158.

Purchase of Securities from.]—An attorney purchasing securities from his client, taking no undue advantage, cannot be punished as for any violation of his duty. *In re Bartlett* v. *Meyers*, 1 U. C. R. 262.

——— *Usurious Interest.*]—In August, 1860, the plaintiff, being pressed for money, applied to defendant to purchase from him a mortgage, which the defendant agreed to purchase on such terms as would give the defendant fifteen per cent. per annum. In October of the same year the transaction was completed. In 1865 the plaintiff filed his bill, alleging that the defendant was his solicitor, and had taken advantage of his necessities, and praying that he might be relieved. The defendant did act as attorney for the plaintiff in 1854, but not from that time until February, 1860, when the plaintiff put two claims into the defendant's office for collection, one of which proceeded no further than issuing a writ. The money in the other had been collected and paid over to the plaintiff in June, 1860; the defendant knew nothing of either suit, and was never afterwards employed professionally by the plaintiff. The court, having reference to all the circumstances and the delay in instituting proceedings, dismissed the bill with costs. *McLennan* v. *McDonald*, 14 Gr. 61.

Purchase of Title Paramount—*Resale—Trustees — Notice — Account.*]—An attorney, retained to recover an estate for the heir-at-law of a former owner, bought up a title paramount to his client's, and obtained possession of the property, which he conveyed to a brother of his client, as the heir-at-law, who subsequently sold portions of it to several purchasers, all of whom but one had not paid their purchase money, and that one had employed the same attorney in effecting his purchase. In fact the person in whose behalf the proceedings had been taken was not dead. On a bill filed for that purpose the purchasers were declared the trustees of the heir-at-law. *Graves* v. *Henderson*, 8 Gr. 1.

An attorney in the prosecution of suits to recover an estate for the supposed heir-at-law, A., buys in a paramount title for the heir-at-law, and subsequently conveys the estate to the supposed heir, who sells and conveys to divers purchasers. On a bill filed by B., the real heir, against the attorney and A., and the purchasers from them, the court—in this respect affirming the decree below, sub nom. Graves v. Smith, 6 Gr. 306—adjudged them to be trustees for B., although it appeared that the ancestor had long before his death conveyed away all his interest in the lands for value. But some of such purchasers having had a prior or better equity than the plaintiff, the court—varying the decree of the court below in this respect—directed that they should not be dis-

turbed, although they got in the legal estate with constructive notice of the opposing claim; and also varied the decree as to the other purchasers, by directing that under the circumstances the accounts of rents and profits against them should be limited to commence with the filing of the bill, and that they should be allowed the fair value of all substantial repairs and permanent improvements made by them prior to that date. *Henderson* v. *Graves*, 2 E. & A. 9.

Sale of Land—*Failure of Title—Relief—Covenants.*]—An attorney, selling property of which he was the apparent, but not the real, owner, acted for the purchaser, who had confidence in him and employed no other solicitor in the matter. The attorney did not disclose to the purchaser the true state of the title, but alleged it to be good, though without any fraudulent intention. The true owner having, after the conveyance was executed, recovered the property from the purchaser:—Held, that the purchaser was entitled to have his payment and expenditure on the property made good to him by his vendor, and the latter was not protected by having given only limited covenants for title. *McRory* v. *Henderson*, 14 Gr. 271.

——— *Taking Mortgage—Enforcement of Covenant—Assignee.*]—An attorney sold lands to his client at a most exorbitant price, and took back a mortgage on the estate sold and on other lands securing the purchase money. The court on a bill filed declared that the sale was fraudulent, and that an assignee of the mortgage, without notice of the fraud, was not at liberty to sue on the covenant for the mortgage money; although, as a bonâ fide purchaser for value without notice, he was entitled to hold the land in security. They, however, ordered the attorney to discharge the land from the incumbrance thus created. *Davis* v. *Hawke*, 4 Gr. 394.

Sale of Security — *Costs — Promissory Note—Renewal — Commission.*]—An attorney assigned to his client a mortgage securing £175, with a payment of £50 indorsed, leaving £125 due. In reality nothing had been paid, but the £125 was the amount for which the attorney (the mortgagee) had sold the land to the mortgagor. Afterwards the attorney claimed certain costs from the client for proceedings taken upon this mortgage against the mortgagor, and obtained his note for the amount. When the note became due, the attorney charged the client five per cent. commission, in addition to legal interest, on renewing it, on three several occasions. The court set aside the assignment of the mortgage, and directed an account of all dealings between the attorney and client, with costs to the hearing. *Grantham* v. *Hawke*, 4 Gr. 582.

Settlement—*Acknowledgment—Onus.*] — An attorney had for a long time advised his client as to raising money and also got bills discounted for him. Upon an alleged settlement between them the client signed a formal acknowledgment of indebtedness in a large sum. The court, upon a bill filed impugning the bonâ fides of such settlement, refused to admit this acknowledgment as primâ facie evidence in favour of the attorney. *Davis* v. *Hawke*, 4 Gr. 394.

Taking Conveyance from Solicitor—*Breach of Trust—Redemption—Costs.*] — An execution being in the hands of the sheriff against lands, the defendant applied to a solicitor to procure his services in obtaining a settlement of the demands against him. To enable the solicitor to raise funds for that purpose, the client, at his suggestion, conveyed his lands to him in fee, taking back a defeasance stating the object for which the deed was made, which was subsequently lost. To raise money the solicitor executed a mortgage for £245, and the mortgagee sold the same to another person for £150, which was handed to the solicitor, and thereout he paid the claims against the client, amounting in all to about £90. Afterwards the solicitor demanded from the client £245, and subsequently £300 as the price at which the client would be allowed to redeem; and, this demand not having been complied with, the solicitor sold to a third person for £125 over and above the mortgage, but the purchaser had notice of the claim of the client. The court declared the acts of the solicitor a plain breach of trust; that the client was entitled to redeem upon payment of what was actually expended on his behalf; that the purchaser of the mortgage was, under all the circumstances, entitled to hold the land only for what he had actually paid, and interest; the excess of which over and above the amount expended for the client the solicitor was ordered to pay, together with costs of the suit to the hearing. *McCann* v. *Dempsey*, 6 Gr. 192.

Taking Conveyance in Name of Solicitor—*Trust—Agreement—Promissory Notes—Specific Performance.*]—An attorney took a conveyance of property in trust for a client, but did not sign any writing acknowledging the trust. An oral agreement was subsequently entered into, that the attorney should accept the property in discharge of two notes which he held against the client:—Held, that this agreement was binding on the attorney, though not in writing. After making the agreement, the attorney put the two notes in suit, in the name of a third person, and obtained judgment by default:—Held, that the judgment was no bar to a suit by the client for specific performance of the agreement. *Fleming* v. *Duncan*, 17 Gr. 76.

Taking Crown Patent in Name of Solicitor—*Mortgage—Account.*] — A person in indigent circumstances, being entitled to a grant of land from the Crown, had consulted a solicitor with a view of obtaining it. In the course of their transactions the solicitor wrote, "I think I can manage for you so effectually that I can get your deed from government, probably through some assistance on my part." The client having executed an assignment, as he alleged, by way of security to the solicitor, and the patent for the land having been issued, the solicitor set up the transaction as an absolute purchase, in consequence of which the wife of the plaintiff, acting as his agent, took steps to assert her husband's claim, and procured the assistance of her brother. After repeated applications the solicitor agreed to reconvey upon being paid £170, asserted by him to be due. This the brother advanced, and took a conveyance of the property, said to be worth £800, in his own name, and then alleged he had purchased for his own benefit. The court declared the deed to the solicitor a mortgage only; that his assignee had in fact acted as agent of the plaintiff, and could not purchase for his own benefit; and directed an inquiry as to certain points left in doubt by the evidence before the

court, and an examination of the solicitor's books; unless the purchaser would consent to reconvey upon receiving back the amount paid by him to the solicitor. *McIlroy* v. *Hawke*, 5 Gr. 516.

Taking Security for Costs—*Assignment of Lease—Parties.*]—D., being indebted to the plaintiff for costs in some suits and other matters, by an instrument not under seal assigned to him a lease of certain premises made by D. to the defendant, together with all rent in respect of said lease and the term thereby created. In an action to recover from the defendant the rent which accrued due after the making of the assignment, the Judge charged the jury that, while plaintiff remained D.'s solicitor, he could not take any security for his benefit, and that he should have dissevered the connection between them, and let D. have independent legal advice: — Held, misdirection, for that the assignment, if not invalid in other respects, was valid so far as it was a security for costs already incurred. Held, also, that D. was not a necessary party. *Galbraith* v. *Irving*, 8 O. R. 751.

——— *Lien.*] — Actions were brought by one G. against two insurance companies to recover losses occasioned by a fire. The actions were tried together, and in one the plaintiff recovered judgment, but the other was dismissed with costs. The defendants acted as G.'s solicitors in each action. By a special agreement, upon the faith of which each action was carried on, the solicitors were to have a lien upon the amount recovered in each action for the costs of that action and of the other. The insurance company against whom the unsuccessful action had been brought, attached the moneys due to G. by the company against whom G. had succeeded, and the defendants claimed a lien on the judgment which had been thus attached for all their costs in both actions:—Held, that, so far as the lien claimed by the defendants depended upon the agreement, it must fail, because that agreement was nothing more than an agreement to secure costs to be incurred in the future, and the general proposition that a solicitor will not be permitted to take a security for costs to be incurred, is established beyond controversy. Held, also, that the solicitors had no lien for the costs of the unsuccessful action upon the fund recovered in the other, that fund not having been recovered or preserved by means of the costs incurred in the action which was lost, and the two actions not being so intimately connected as to be regarded as one. *London Mutual Fire Ins. Co.* v. *Jacob*, 16 A. R. 392.

——— *Mortgage — Sale under Power — Notice.*]—Plaintiff was a purchaser under a power of sale in a mortgage for $200 taken by a solicitor for costs, only $30 of which had been incurred at the date of the mortgage. The power was exercised to collect the full amount of the mortgage and interest. Before the purchase was completed the mortgagee's right to sell was raised as a question of title by the plaintiff, who had become aware of these facts. Before the objections were removed, the property was sold again under a prior mortgage:—Held, that the mortgage was a valid security for no more than $30; that the plaintiff, having become aware of the vexatious user of the power, was justified in refusing to complete the purchase, and was entitled to recover back the deposit paid by him. *Locking* v. *Halsted*, 16 O. R. 32.

Termination of Relationship—*Order.*]—Although a solicitor may for sufficient cause, by notice to his client, terminate the connection between them, the court will not make an order for that purpose upon the ex parte application of the solicitor. *Bicker* v. *Ansell*, 1 Ch. Ch. 367.

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3. *Other Cases.*

Acting for Opposite Party.] — Where there were several plaintiffs in a suit, and a final order of foreclosure had been obtained by their solicitor:—Held, that their solicitor could not afterwards move on behalf of the defendants foreclosed to set aside the order for foreclosure, though two of the plaintiffs concurred in the application, and only the third objected. *Boulton* v. *Don and Danforth Road Co.*, 1 Ch. Ch. 329.

Knowledge of Solicitor—*Imputation of —Acting for both Vendor and Purchaser.*]—Where such motives exist in the mind of a solicitor as would be sufficient with ordinary men to induce them to withhold information from the client, the presumption is, that it was withheld; and the uncommunicated knowledge of the solicitor is not imputed to the client as notice. Where the mortgagees sold the mortgage to defeat or delay their creditors, but the vendees had no actual notice of the purpose, it was held that the circumstance of his having employed one of the mortgagees as solicitor in drawing the assignment, did not make the knowledge of the solicitor notice to the vendee. *Cameron* v. *Hutchison*, 16 Gr. 526.

VIII. Lien of Solicitor.

1. *Existence of Lien.*

On Books of Account.]—Quære, as to the right of an attorney to detain books of account belonging to his client, on an alleged claim. *McLean* v. *Maitland*, 5 L. J. 279.

On Documents and Property—*Agent of Solicitor.*]—Held, that as against their principal, a country attorney, town agents have a general lien upon all documents, money, and articles coming into their hands in the course of their agency business, without regard to the purpose for which they were received. *Re A., B., and C.*, 14 C. L. J. 142.

On Fund Recovered—*Cheque—Notice.*]—Where D., a solicitor, had recovered certain money for his client B., and another solicitor, acting on the instructions of B., had obtained a cheque for the amount payable to the order of B., and had parted with the control of the cheque without first giving proper notice to D.—he was held liable to D. to the extent of D.'s lien on the said money so recovered through him. *McPhatter* v. *Blue*, 15 C. L. J. 162.

On Insolvent Estate — *Preferential Lien.*]—Two actions were brought by a trader to restrain proceedings under a chattel mortgage against the trader's stock of goods, and interlocutory injunctions were granted, but

the actions were not carried further. The chattel mortgagee brought an action to recover the mortgage money and to restrain the mortgagor from selling the goods, whereupon the latter made an assignment for creditors, and, by arrangement in that action, the goods were sold by the assignee, and payment was made in full to the mortgagee for debt, interest, and costs of that action, after notice and without objection on the part of any of the creditors or of the solicitor who conducted the actions brought by the trader. The solicitor asserted that by his exertions in these actions he had saved the goods from being sacrificed by summary sale, and brought this action to have it declared that he was entitled to a preferential lien for costs upon the estate in the hands of the assignee:—Held, that, even if it were shewn that stopping the sale under the mortgage was a benefit to the estate, there was no jurisdiction, without the direction of a statute, to charge the property recovered or preserved, and without a money fund there was no subject for a lien. Costs as of a successful demurrer only were allowed to the defendant. *Tremeear* v. *Lawrence*, 20 O. R. 137.

On Judgment—*Agent of Plaintiff in Person.*]—Held, that the Toronto agents of a party suing in person have no lien for the costs incurred in the suit by such agents. *Ross* v. *McLay*, 7 P. R. 97.

On Promissory Note for Costs—*Agent of Solicitor.*]—An attorney sent to his Toronto agent a promissory note, given to such attorney for costs, to be used upon a taxation pending between him and the maker of the note:—Held, that the agent had a general lien upon the note for his agency costs, notwithstanding that the relationship of principal and agent had been dissolved by the agent; and an order to deliver it up was refused. *Re Attorney*, 7 P. R. 311.

On Title Deeds—*Mortgage.*] — A mortgagor after foreclosure, having retained the title deeds, delivered them to a third party to whom he had sold, whose solicitor claimed a lien as against such third party, and declined to deliver them to the mortgagee. On a motion for that purpose, an order was made for their delivery. *Stennett* v. *Aruyn*, 2 Ch. Ch. 218.

See Re Ryan, 11 P. R. 127, *post* 4; *London Mutual Fire Ins. Co.* v. *Jacob*, 16 A. R. 392, *ante* VI. 2; *Kennin* v. *Macdonald*, 22 O. R. 484, *post* 3; *Wardell* v. *Trenouth*, 8 P. R. 142, *post* 4; *Brownscomb* v. *Tully*, *Re Fairbairn*, 3 Ch. Ch. 71, *post* 6.

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2. *Extent of Lien.*

On Deed—*Costs of Executing.*] — A deed ordered to be executed under a decree was sent by the vendor's solicitor, after being executed by him, to the defendants to be executed by them, which they did before their attorney employed by them for that purpose:—Held, that such attorney was not entitled to a lien upon the deed beyond his disbursements and for preparing the affidavit of execution. *Crooks* v. *Street*, 1 Ch. Ch. 220.

On Fund Recovered—*General Costs.*]—The lien upon a fund recovered extends only to the costs incurred in the particular suit or proceeding, and not to the attorney's general costs against the client in other matters. *Canadian Bank of Commerce* v. *Crouch*, 8 P. R. 437.

On Judgment—*Charging Order — Taxed Costs—Sale of Judgment.*]—The power given by rule 1129 to make an order in favour of a solicitor for a charge upon a judgment recovered by his exertions, is a discretionary one; the right given by the rule is ancillary to the solicitor's right to be paid on his retainer. And where an infant recovered judgment for damages for personal injuries, the solicitor retained by his father was allowed a charge upon the judgment, but only to the extent of the costs taxed against the defendant; and the court refused to direct a sale of the judgment to enforce the charge. *Nevills* v. *Ballard*, 18 P. R. 134.

——— *Division Court — Garnishment.*] — Where solicitors claimed a lien for costs upon a judgment recovered, the amount of which was the subject of a garnishee suit in a division court:—Held, that the Judge in the division court had power under s. 197 of the Division Courts Act, R. S. O. 1887 c. 51, to decide upon the proper sum to be allowed in respect of such lien, and was not bound to refer to it elsewhere. *Davidson* v. *Taylor*, 14 P. R. 78.

——— *Solicitor and Client Costs — Other Actions.*] — The plaintiff having recovered judgments against B. and his sureties on a replevin bond, B. moved to have satisfaction entered. The plaintiff's attorney claimed a lien on the judgments for his costs as between attorney and client, not only in these suits, but in other actions between the parties upon the same subject:—Held, that he was entitled only to the taxed costs as between attorney and client in the suits. *Bletcher* v. *Burn*, *Bletcher* v. *Marsh*, 25 U. C. R. 92.

See Re Ryan, 11 P. R. 127, *post* 4; *Yemen* v. *Johnston*, 11 P. R. 231, *post* 4.

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3. *Loss of Lien.*

On Deed—*Costs of Preparation—Delivery for Engrossment.*]—Property was sold under order in the suit, and the conveyance and a mortgage, which was to be given back to the vendor, were prepared at the purchaser's expense. After engrossment of the deeds by the solicitor for the purchaser, they were given to the parties for execution, and the conveyance (executed) was returned to the solicitor of the purchaser, the mortgage being retained by the vendor:—Held, that the solicitor by delivering the engrossment to the vendor for execution had lost his lien thereon for the costs of preparation, as against the vendor (the mortgagee), and was bound to deliver it up to him:—Held, also, that the application to deliver was properly made in the matter in which the sale had taken place. *In re Sproule*, 1 Ch. Ch. 396.

On Documents—*Assignment of Bills.*]—An attorney has no lien on his client's papers after he has assigned his bills against him. *Recsor* v. *Ella*, 7 P. R. 371.

——— *Waiver—Replevin.*]—The plaintiff, a solicitor, claiming on the defendant's papers a lien for costs, settled with him, taking a

note therefor payable on demand. He then went to the United States, leaving the note and papers with another solicitor as his agent. The defendant, stating that he required the papers, or some of them, for use in his business, brought replevin proceedings in a division court, giving a bond to prosecute the suit with effect and without delay, or to return the property replevied and to pay the damages sustained by the issuing of the writ, and there was a breach of the bond in not prosecuting the suit with effect. Under the replevin the defendant procured some of the papers only, which were tendered back to the plaintiff and refused, the defendant stating that they were of no value, the agent having retained the valuable ones. In an action on the bond by the plaintiff to recover the amount of the note as damages he had sustained by the replevin:—Held, that, if any lien existed, which was questionable, by reason of the taking of the note and departure from the country, it was not displaced by the delivery in the replevin suit; but the plaintiff had failed to prove any actual damage; and, though there might be judgment for nominal damages and costs, there would be a set-off of the defendant's costs of trial: and the action was dismissed without costs. Under the Division Courts Act, R. S. O. 1887 c. 51, s. 266, the whole matter could have been litigated in the division court. Quære, as to the amount of damages recoverable. The fact of the conditions of the bond being in the alternative instead of the conjunctive, remarked on. *Kennin* v. *Macdonald*, 22 O. R. 484.

On Fund Recovered—*Receiver of Suit—Lien of Original Solicitor.*] — The plaintiff's solicitor carried on a suit to wind up a partnership till a decree was obtained and some progress made with the reference thereby directed. The plaintiff became embarrassed, and assigned to a creditor, in whose name, acting by another solicitor, the suit was revived, and a sum was ultimately found due to him:—Held, that the solicitor of the original plaintiff had not lost his lien for costs, but was entitled to be paid next after satisfaction of the costs of the solicitor of the plaintiff who had concluded the suit, out of the fund realized. *Clark* v. *Eccles*, 3 Ch. Ch. 324.

On Promissory Note — *Constructive Change of Possession.*]—The plaintiff, being the holder of a note made by F. S. and indorsed by T. S., employed B., his attorney, to collect the same, who sent it to C., a clerk of a division court, to issue process thereon. B. obtained judgment against the maker, and failed against the indorser. Another suit was afterwards brought in the name of the same plaintiff, by instructions of B., against T. S. upon an alleged promise to join in a new note with F. S., the consideration being the discharge of the former judgment against F. S. in the division court. The evidence, although it did not prove the plaintiff to have been a party directly to the new arrangement, still shewed that he was present, and cognizant of it. Upon demand made by the plaintiff upon C. for the note, he refused to give it up unless paid $10, and afterwards sent it to B., the attorney. An action of trover being brought for the same:—Held, that the plaintiff, being present and cognizant of the arrangement between C. and T. S., was to be considered as in possession of the note, and, as there can be no lien without possession, B.'s claim failed, and the plaintiff was entitled to recover. *English* v. *Clark*, 12 C. P. 451.

On Title Deeds—*Mortgage — Sale.*]—A solicitor, having a lien on title deeds as against his client for costs generally, was employed by A. to prepare a mortgage from such client, when his professional connection with the mortgagee ceased. A second mortgage was created in favour of another person. On default in such second mortgage, the mortgagee sold under a power of sale in the mortgage:—Held, that the lien on the deeds in his possession, as against the mortgagor, continued as against the purchaser. *Gill* v. *Gamble*, 13 Gr. 169.

See Berneski v. *Tourangeau*, 18 P. R. 263, *post* 4.

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4. *Priorities.*

As against Assignee of Fund in Court.]—An assignment was made by the mortgagor to a creditor of a portion of a fund in court, as to which litigation was pending between mortgagor and mortgagee as to their respective shares:—Held, that to the extent to which the solicitors of the mortgagor incurred costs in resisting and prevailing against the accounts brought in on behalf of the mortgagee, to that extent their lien should precede the assignment. *Yemen* v. *Johnston*, 11 P. R. 231.

As against Attaching Creditor.]—An award for an amount, together with costs, having been made in favour of a party, the costs were taxed by consent, and the amount promised to be paid to the solicitor of the party ordered to receive such costs. A garnishee order was subsequently obtained by a third party, under which the amount awarded and the costs were paid over to such third party, with notice, however, of the solicitor's lien for the costs. Under these circumstances, a motion made to stay proceedings to enforce payment of the costs under the award, at the instance of the solicitor to whom they were payable, was refused with costs. *McLean* v. *Beatty*, 1 Ch. Ch. 138.

An attorney's lien for costs as between him and his client, the judgment debtor, will not be allowed to stand in the way of an attachment. *Regina* v. *Benson*, 2 P. R. 350; *Bank of Upper Canada* v. *Wallace*, *ib.* 352.

Upon the application of a solicitor having a lien in respect of a debt attached, the attaching order will be discharged as against him, but the party against whom such an order has been made is not entitled to its discharge on the ground of the existence of the lien in favour of his solicitor. Where an application for the discharge of an attaching order was made nominally by a plaintiff against whom the attaching order had been granted, but really by and for the benefit of his solicitor, who had a lien on the debt attached, leave was given to amend the proceedings by making the solicitor the applicant, and the order was discharged, but without costs. *Cotton* v. *Vansittart*, 6 P. R. 96.

In garnishee proceedings a court of law will, as against the attaching creditor, protect an attorney's lien for costs of the action or suit in which or by which the debt attached has

been recovered, where the garnishee has notice of the lien. A court of equity will restrain a creditor who has obtained an attaching order at law from enforcing it against a fund recovered by means of a suit in equity, to the prejudice of the attorney's lien for costs in that suit. *Canadian Bank of Commerce* v. *Crouch*, 8 P. R. 437.

The lien of a solicitor upon a verdict recovered for his client will prevail against an attaching order obtained by a creditor of the client. Shippey v. Grey, 28 W. R. 877, followed. But in the circumstances of this case, where the defendant had paid over to an attaching creditor of the plaintiff the amount of the verdict recovered by the plaintiffs under the full belief that he was obliged to do so, and that the plaintiff's solicitors had no right to prevent the attaching creditor from recovering the money, and the solicitors, being aware of the existence of the attaching order, had conduced to this belief by their neglect to enforce their rights, they were not allowed to claim payment over again from the defendant. *Berneski* v. *Tourangeau*, 18 P. R. 263.

As against Execution Creditor—*Fund in Court — Stop Order — Defendant's Solicitor.*]—A defendant's solicitor as well as a plaintiff's solicitor may have a lien for costs on a fund in court. A bill was filed by a purchaser against the vendor for rescission or specific performance of a contract for sale of lands in the county of Simcoe, made the 12th October, 1870, and registered in July, 1875, and by the decree made in October, 1876, the plaintiffs were ordered to pay certain overdue purchase money. C., a creditor of the defendant, having placed a fi. fa. lands in the hands of the sheriff of Simcoe in December, 1878, obtained a stop order in January, 1879, against the purchase money in court. The defendant's solicitor claimed a prior lien for costs of this suit but had obtained no stop order:—Held, on the application of the defendant's solicitors for payment of the fund to them, that their lien had priority. Part of the fund in court was a balance of purchase money paid into court by the plaintiff in March, 1879, pursuant to the decree on further directions made in October, 1878. C., seeking to attach this balance, in addition to his stop order obtained in January, 1877, placed a fi. fa. goods in the hands of the sheriff of York in February, 1879:—Held, that as to this balance the solicitors' lien had also priority. *Wardell* v. *Trenouth*, 8 P. R. 142.

As against General Creditors—*Fund in Court—Agent of Solicitor.*]—The Toronto agents of a deceased solicitor were held entitled to a lien on a sum of money in court to the credit of this matter, to which the solicitor was entitled for his costs, to the extent of their unpaid agency bill of charges in this matter, and it was ordered that their bill should be paid out of the fund in priority to the claims of the other creditors of the solicitor. *Re Ryan*, 11 P. R. 127.

As against Parties to Suit—*Fund in Court.*]—In a suit for construction of a will and administration of testator's estate, where the land of the estate had been sold and the proceeds paid into court, J. J. B., a beneficiary under the will and entitled to a share in the fund, was ordered personally to pay certain costs to other beneficiaries:—Held, reversing the decision of the court of appeal, 16 P. R. 335, that the solicitor of J. J. B. had a lien on the fund in court for his costs as between solicitor and client, in priority to the parties who had been allowed costs against J. J. B. personally. Held, also, that the referee before whom the administration proceedings were pending had no authority to make an order depriving the solicitor of his lien, not having been so directed by the administration order, and there being no general order permitting such an interference with the solicitor's primâ facie right to the fund. *Bell* v. *Wright*, 24 S. C. R. 656.

See Taylor v. *Robinson*, 19 P. R. 31, and *Orford* v. *Fleming*, 18 C. L. T. Occ. N. 142, 241, *post* 7.

As against Subsequent Solicitor—*Fund in Court.*]—In an action for an account against a trustee, the plaintiffs changed their solicitor during the course of the action. Before the change the first solicitor obtained a judgment of reference, and, on the defendant's consent, an order for payment into court by the defendant of $250, which he paid in, after the change, subject to further order and to a claim for commission. Nothing was done by the second solicitor to procure the payment in. The second solicitor then conducted the reference and brought the action to an end, with the result that the $250 was freed from all claims for commission and left absolutely as money recovered for the plaintiffs:—Held, in chambers, that the fund in court had been directly "created" by the exertions of the first solicitor, and that he had a first charge upon it for his costs. Held, by the court, that the general rule is that the solicitor who conducts the action to a successful termination is entitled to be paid first. But the court (composed of two Judges) was divided upon the question whether there was anything in the circumstances to take this case out of the general rule. Cormack v. Beisly, 3 DeG. & J. 157, and Re Knight [1892] 2 Ch. 368, discussed. *Ford* v. *Mason*, 15 P. R. 392.

See Genge v. *Freeman*, 14 P. R. 330, *post* 6; *Clark* v. *Eccles*, 3 Ch. Ch. 324, *ante* 3.

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5. *Set-off—Effect of Lien on.*

(a) *Claims Arising in Different Actions.*

Costs against Debt—*Accrual of Lien—Injunction.*]—A., having obtained a decree against B. for payment of a large sum of money, issued an attachment to enforce payment, upon which B. was arrested. The attachment was afterwards set aside for irregularity, and an action for false imprisonment brought by B. against A. and his solicitor. An injunction to restrain the proceedings at law was granted, but A. and his solicitor were ordered to pay B. his costs of the action at law and of the motion for injunction. On an application by A. and his solicitor to set off these costs against the debt due by B. to A.:—Held, that the lien of the attorney at law for costs not having accrued, and as, by reason of the injunction, it never could accrue, and B.'s right to the costs being derived from an order of the court of chancery, A. was entitled to a set-off. *Wilson* v. *Switzer*, 1 Ch. Ch. 75.

Cross-judgments.]—One of the several defendants in a cause, against all of whom a verdict had been recovered, was allowed, on a summary application after judgment, to set off the amount of a judgment which he had recovered against the plaintiff, against the plaintiff's judgment against him and his co-defendants, saving to the attorney his lien for costs. *Fortune* v. *Hickson*, 1 U. C. R. 408; *Tippete* v. *Huacke*, 1 P. R. 365.

See, also, *Reed* v. *Smith*, 1 P. R. 321.

Damages and Costs.]—There can be no set-off of damages or costs between the same parties in different actions, to the prejudice of the solicitor's lien; that is the effect of rule 1205. The lien is simply a right to the equitable interference of the court not to leave the solicitor unpaid for his services, and it exists if it is made to appear that the solicitor has not been paid his costs. *Turner* v. *Drew*, 17 P. R. 475.

See Lynch v. *Wilson*, 3 P. R. 169; *Canadian Pacific R. W. Co.* v. *Grant*, 11 P. R. 208, *post* (b).

(b) *Claims Arising in same Action.*

Claim and Counterclaim — *Cross-judgments.*]—Where judgments were recovered in the same action by the plaintiff on his claim with general costs of action, and the defendant on his counterclaim with costs thereof, such claim and counterclaim arising out of the same subject matter, the judgment for counterclaim largely exceeding the former in amount, a set-off was allowed of so much of the money recovered by the defendant against the plaintiff on defendant's counterclaim as would cover the costs adjudged to the plaintiff on his recovery of judgment against the defendant, notwithstanding the claim of the plaintiff's solicitors to a lien on the costs adjudged to the plaintiff. Quære, when a judgment, as in this case, has been framed without directing a set-off, whether a Judge in chambers has power to direct it to the prejudice of the solicitor, so as to vary the decree of the court. *Brown* v. *Nelson*, 11 P. R. 121.

The plaintiffs sued for freight for the carriage of timber, and the defendants pleaded a counterclaim for neglect and delay in the carriage of the timber. The judgment at the trial was as follows: "The verdict will be for the plaintiffs for $2,122, and for the defendants upon their counterclaim for $1,420, and each party will be entitled to costs against the other, as if the statement of claim and counterclaim were separate actions, and I direct that judgment be entered accordingly:"—Held, that the judgments recovered by the plaintiffs and defendants must be treated as judgments in separate actions, and therefore, that in setting off the judgments the claim for costs of the defendants' solicitors upon the judgment against the plaintiffs should be protected. *Canadian Pacific R. W. Co.* v. *Grant*, 11 P. R. 208.

Costs up to Hearing—*Further Directions—Debt—Affidavit.*]—By the terms of the judgment pronounced at the trial costs up to the hearing were to be paid to the plaintiff out of the fund in court, a reference was directed to take the accounts, and further directions and subsequent costs were reserved. The report of the officer to whom the reference was directed found the plaintiff indebted to the estate in a considerable amount, and a motion was made by the defendant Moffatt (pending an appeal from the report) to stay payment out of court of the costs of the plaintiff up to the trial until after the hearing on further directions in order that the amount found due to the estate by the plaintiff might be set off pro tanto against the costs awarded to the plaintiff:—Held, that the judgment pronounced at the trial gave the plaintiff and his solicitor a vested right to be paid out of the fund in court prior to the defendant's equity to ask a set-off, and no set-off should be allowed to the prejudice of the solicitor's lien thus arising. A solicitor's lien having been asserted at the bar during the argument, an affidavit proving it was allowed to be put in subsequently, following the suggestion of Strong, V.-C., in Webb v. McArthur, 4 Ch. Ch. 63. *Dawson* v. *Moffatt*, 10 P. R. 366.

Cross-judgments for Costs — *Discretion.*]—By the judgment in the action costs were awarded to the plaintiff against the chief defendant, and to the other defendants against the plaintiff, without any direction as to setting off costs, and the plaintiff's solicitor asserted a lien upon the costs awarded to his client against the chief defendant. The defendants all defended by the same solicitor:—Held, that, under rule 1204, the question of setting off costs was in the judicial discretion of the taxing officer, and that discretion was rightly exercised by the officer in refusing to set off the costs ordered to be paid to the plaintiff by the chief defendant against the costs ordered to be paid by the plaintiff to the other defendants. Construction of rules 1204 and 1205. The older decisions as to set-off are not applicable since rule 3. *Flett* v. *Way*, 14 P. R. 312.

See, also, *S. C.*, 11 C. L. T. Occ. N. 130.

Interlocutory Costs—*Judgment—Order for Set-off.*]—The costs of a motion, and appeals following, to discharge the defendant out of custody under an order for arrest before judgment, are properly interlocutory costs, though partly incurred after judgment; and where such costs are awarded to the defendant, they ought to be set off against the judgment which the plaintiff has obtained against the defendant in the action, and which the defendant is unable to pay. As against such a set-off, the defendant's solicitor has no lien on the costs which the plaintiff has been ordered to pay, and such costs may be ordered to be set off or deducted, as provided in rule 1165. In this case the order allowing the defendant costs was not made until after judgment, and therefore an application to the court for a direction to set off was necessary; had the order been made before judgment, the taxing officer would have made the deduction. *Elgie* v. *Butt*, 18 P. R. 469.

Judgment for Costs—*Subsequent Costs—Garnishment.*]—Where judgment was given for payment by the plaintiff to the insolvent defendant of the costs of the action, and the defendant's solicitors were by an order of court declared to have a lien upon such judgment, and to have the sole right to control the judgment and execution to the extent of their costs between solicitor and client, and the plaintiff became entitled against the defendant to costs of garnishing proceedings upon the judgment, begun before the lien was

declared:—Held, reversing the decision in 14 P. R. 34, that rule 1205 did not apply to enable a set-off of the costs to be made. *Clarke* v. *Creighton*, 14 P. R. 100.

Order—*Discretion—Other Sources of Payment.*]—The plaintiffs, having recovered judgments for large sums against the defendants, sought to set off such sums, pro tanto, against certain costs adjudged to be paid by the plaintiffs to the defendants, but the solicitors for the defendants asserted a lien for their costs upon the judgment for these costs recovered by their clients against the plaintiffs. The defendants themselves were worthless, but there was another source from which it was probable that the defendants' solicitors would obtain payment of their costs:—Held, that this was not enough: if the solicitors had a certainty of being able to recover their costs from another source, the set-off could be ordered, because the lien would then be unnecessary; but it being merely a probability, the set-off could not be ordered without its operating to the prejudice of the solicitor's lien, for, should that source fail, the lien could not be replaced: and, therefore, under rule 1165, the set-off should not be ordered. *Molsons Bank* v. *Cooper*, 18 P. R. 396.

Statutory Set-off of Excess of Costs.]—Held, that the plaintiff's attorney, having advanced to the plaintiff the amount of the verdict, could have no lien so as to deprive the defendant of the benefit of 13 & 14 Vict. c. 53, s. 78, enabling him to set off the excess of his costs above division court costs against the plaintiff's costs. *Cameron* v. *Campbell*, 12 U. C. R. 159; *S. C.*, 1 P. R. 170.

See Ross v. *McLay*, 7 P. R. 97, *ante* (SET-OFF.)

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6. *Settlement of Action by Client.*

Collusion to Defeat Lien—*Notice—When Court will Interfere to Protect Solicitor.*]—If, after notice by plaintiff's attorney to defendant, a bonâ fide settlement, or without notice a collusive settlement, be made by defendant with plaintiff, the court will interfere to prevent the attorney being unjustly deprived of his costs. *Langle* v. *Fetterley*, 5 U. C. R. 628.

Where the defendant, an attorney, settled with the plaintiff after a fi. fa. had been put in the sheriff's hands, which the defendant must have known the plaintiff's attorney had issued almost wholly for costs, the court ordered the plaintiff's attorney's costs included in the execution to be referred for taxation, and the defendant to pay the sum to the plaintiff's attorney, with the costs of the application. *Griggs* v. *Meyers*, 6 U. C. R. 532.

Collusion to deprive the attorney of his costs must be clearly made out to entitle him to proceed for them. Here the plaintiff informed his attorney that he intended to settle with defendant, and said that he would see the costs paid. No objection was made, nor any notice given to defendant not to pay the plaintiff; but several months after the settlement, the plaintiff being insolvent, the attorney issued a fi. fa. for his costs:—Held, that the writ must be set aside. *Brown* v. *Conant*, 2 P. R. 208.

See, also, *Plant* v. *Stone*, 9 U. C. R. 458.

Defendant, having settled conclusively with the plaintiff, was ordered to pay the plaintiff's attorney his costs, and an application afterwards made to revise the taxation of such costs was refused. *Connors* v. *Squires*, 2 P. R. 149.

In shewing cause against a rule to set aside a verdict, which was not moved on affidavit, the plaintiff's attorney irregularly filed an affidavit that the plaintiff owed him £80 when he instituted the suit, which it was agreed should be paid out of the money collected; that the plaintiff was insolvent: and that he had no doubt the defendant and he had colluded to deprive deponent of his claim and costs:—Semble, that, if these facts had been shewn on a proper application, the court might have protected the attorney in his costs, but that they could not have interfered with respect to his interest in the claim. *Shipman* v. *Henderson*, 21 U. C. R. 447.

Where a suit is commenced and carried on under instructions from a person who tells the attorney that he is agent for the plaintiff, but the attorney takes no trouble to ascertain the truth of this, and proceeds without any communication with the plaintiff, the attorney will not be protected as to his costs where a settlement is made between the parties which has the effect of depriving him of his lien, but will be left to an action against the plaintiff. *Smith* v. *Thompson*, 5 P. R. 156.

The plaintiff and defendants, without the knowledge of defendants' solicitor, compromised a suit for foreclosure, in which the usual decree of reference had been made, defendants releasing their equity of redemption for $200, which was paid by plaintiff to them:—Held, that there was no fund recovered by defendants' solicitor, and that no lien for his costs had ever existed. *Brownscomb* v. *Tully*, *Re Fairbairn*, 3 Ch. Ch. 71.

A settlement of an alimony action after judgment for permanent alimony, upon which writs of execution were placed in the sheriff's hands, was effected between the parties without the intervention of the solicitors on the record. To carry out the settlement a third solicitor was instructed to withdraw the writs from the sheriff's hands, which he did without paying the costs of the plaintiff's solicitor. There was no collusion or actual fraud between the plaintiff and defendant proved:—Held, that the plaintiff's solicitor had control of the writs in the sheriff's hands to the extent of his unpaid taxable costs, and that he was entitled to have the writs replaced or new writs placed in the sheriff's hands, at the expense of the solicitor who withdrew them and the plaintiff, or to an order directly against the defendant for payment of his unpaid taxable costs, and for the costs of the motion against the plaintiff and the solicitor who withdrew the writs. *Friedrick* v. *Friedrick*, 4 C. L. T. 450.

Where a compromise of the action has been effected between the parties without the intervention of the solicitors, in order to entitle the plaintiff's solicitor to enforce his lien for costs upon the fruits of the litigation, by means of an order upon the defendant, collusion must be shewn, or the act complained of must have been done after notice from the solicitor complaining. And where the parties made such a compromise, and the plaintiff's

solicitor gave notice to the defendant's solicitor after the agreement but before payment of the money agreed upon:—Held, that this was sufficient notice. *Sancidge* v. *Ireland*, 14 P. R. 29.

It appeared that the solicitor for the execution creditor had a lien for his costs upon the judgment obtained by his client, and also an assignment of the judgment, whereof the garnishor and garnishee both had notice:—Held, that the garnishor and garnishee should not have settled the amount garnished between themselves; and that the solicitor should have intervened, and had the attaching order set aside by disclosing the assignment to himself of the debt attached. *Genge* v. *Freeman*, 14 P. R. 330.

It is competent for a client to settle his action behind the back of his solicitor, notwithstanding that the solicitor has given notice to the client and to the opposite party not to settle except with the solicitor's consent. The equitable interference of the court cannot be invoked on behalf of a solicitor in an action settled in such a manner, unless there are fruits arising from such settlement upon which the solicitor's lien can attach; for there is no lien on the action. Upon such a settlement, unless where collusion between the parties to defraud the plaintiff's solicitor of his costs is clearly shewn, a defendant will not be ordered to pay the costs of the plaintiff's solicitors. *Bellamy* v. *Connolly*, 15 P. R. 87.

After judgment had been recovered by the plaintiff against the defendants for $550 damages and for costs, and while an appeal was pending, the plaintiff and defendants, without the knowledge of the plaintiff's solicitors, made an agreement for settlement of the action upon the plaintiff being taken into the defendants' employment and paid $150 in full of damages and costs. The plaintiff's solicitors asserted a lien for their costs, which were unpaid, and gave notice thereof to the defendants before any money was actually paid over to the plaintiff:—Held, that the compromise made was not a collusive one, and the solicitors were therefore not entitled to an order upon the defendants for the payment of their costs; but, such costs amounting to more than $150, that they were entitled to have that sum, for which the action was compromised, and which was to be treated as the fruits of the litigation, paid over to them in respect of their lien. Held, also, that a question arising between the plaintiff and his solicitors, as to whether they were entitled to taxed costs as between solicitor and client, or to a percentage upon the amount recovered, could not be determined upon the motion to enforce payment by the defendants of the plaintiff's solicitors' costs, but had to be determined in another proceeding before the determination of such motion. *Walker* v. *Gurney-Tilden Co.*, 18 P. R. 274, 471.

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7. Other Cases.

Appeal from Order Enforcing Lien.]—An appeal does not lie to the court of appeal, unless by special leave, from an order of a divisional court made upon appeal from an order in chambers enforcing a solicitor's lien for costs. Leave to appeal from the decision of a divisional court (18 P. R. 274, *ante* 6) refused, that decision appearing to be in accordance with well-established practice. *Walker* v. *Gurney-Tilden Co.*, 18 P. R. 471.

Charging Order—*Recovery of Land—Rule 1129—Execution—Priorities.*]—An action having been begun on the 3rd June, 1886, judgment was obtained therein on the 27th October, 1896, declaring the plaintiffs' right to an interest in certain lands. An execution against the plaintiffs' lands was placed in the sheriff's hands on the 29th April, 1897. On the 1st September, 1897, con. rule 1129 was passed, by which the court was enabled to order that lands recovered by the exertions of a solicitor should be charged for his benefit:—Held, that the execution bound the plaintiffs' interest in the lands from the 29th April, 1897, and the subsequent enactment of the rule did not operate to divest this charge, or to postpone the claim of the execution creditors to the subsequently acquired equity of the solicitors in respect of their costs of the action. *Taylor* v. *Robinson*, 19 P. R. 31.

——— *Rule 1129—Judgment—Assignment—Implied Notice.*]—A judgment debt is "property" within the meaning of rule 1129. On an assignment of a judgment the assignee must be taken to have notice of the solicitor's lien for the costs incurred in obtaining judgment, and the implied notice would be notice within the rule. Cole v. Eley, [1894] 2 Q. B. 180, followed. *Orford* v. *Fleming*, 18 C. L. T. Occ. N. 142, 241.

On Documents—*Delivery—Undertaking.*]—Where a solicitor refused to carry on a suit unless money was advanced, or to deliver up the papers to a new solicitor until his costs in the suit were paid, the court ordered a taxation, and directed the papers to be delivered up to the new solicitor upon his undertaking to hold them subject to the lien, if any, of the former solicitor, and to redeliver them within ten days after he ceased to have occasion for them for the purposes of the suit. *Ley* v. *Brown*, 1 Ch. Ch. 179.

——— *Production of.*]—The rule that a solicitor is bound to produce documents subject to his lien, does not apply when the person asking for their production is the party to pay the amount claimed. *Moodie* v. *Thomas*, 1 Ch. Ch. 19.

See Crooks v. *Crooks*, 1 Gr. 57.

IX. PRIVILEGES.

Arrest—*Contempt.*]—An attorney has no privilege from arrest on attachment for contempt of court. *Re McIntyre*, 2 P. R. 74.

——— *Term.*]—An attorney coming to court in term on professional business which has been disposed of, is not privileged from arrest in execution. *Stroubridge* v. *Davis*, M. T. 2 Vict.

County Courts.]—County court Judges cannot allow attorneys who are not barristers to practise before them as advocates in county courts. *In re Brooke*, 10 L. J. 49.

District Courts.]—Attorneys, not being barristers, cannot, as of right, be heard as advocates in the district courts. *In re Lapenotiere*, 4 U. C. R. 492.

Division Courts.]—No person except a barrister or attorney duly qualified, is entitled to prosecute or defend suits in the division courts. *In re Judge of County of York*, 31 U. C. R. 267.

But see 35 Vict. c. 8 (O.)

Inquest.]—As to the right of an attorney to insist on taking part in proceedings at an inquest. *Agnew* v. *Stewart*, 21 U. C. R. 396.

Plea in Abatement — *Replication.*] — Where to a plea in abatement of privilege as an attorney, the plaintiff replied process issued against him and others, under 5 Wm. IV. c. 1 (restraining several actions on bills, notes, &c.), and that the others could not be served, &c., a demurrer to the replication was overruled. *Richmond* v. *Campbell*, M. T. 2 Vict.

Production of Documents—*Confidential Communications.*]—In an affidavit of a party on production of documents, a certain letter was described by its date and as being from a firm of solicitors to the deponent, who said that he objected to produce it, that it was a communication between solicitor and client, and was privileged:—Held, doubting, but following Hamelyn v. White, 6 P. R. 143, that the statement was sufficient to protect the document from production. In the same affidavit two other letters were described by their dates and as being from a solicitor to a firm of solicitors, and a copy of a letter written in answer to one of them was similarly described. These documents, the affidavit stated, were in the possession of the solicitors for the deponent and others in another action, and he objected to produce them and claimed privilege for them "on the ground that they are communications between solicitor and client and between my solicitors and others in the course of their conducting my business:"—Held, that these letters not being written to or by the deponent, there was no reasonable intendment that the deponent was the "client" referred to, nor that they were necessarily confidential because they were written by the deponent's solicitors to other persons in the course of their conducting his business; and the opposite party was entitled to a better affidavit on production, in which the deponent might set up other grounds of protection. It is irregular to go into the merits upon an application for a better affidavit. Morris v. Edwards, 23 Q. B. D. 287, followed. *Hoffman* v. *Crerar*, 17 P. R. 404.

Witness—*Advocate.*]—An attorney cannot act at a trial both as an advocate and a witness. *Benedict* v. *Boulton*, 4 U. C. R. 96. See *Cameron* v. *Forsyth*, 4 U. C. R. 189.

——— *Attorney for Party—Order to Leave Court-room—Examination of Witness—Conduct of Attorney.*]—*Re South Oxford Election*, H. E. C. 243.

Witness to Deed.]—Held, that where a solicitor or counsel of one of the parties to a suit has put his name as a witness to a deed between the parties, he ceases, in respect of the execution of the instrument, to be clothed with the character of a solicitor or counsel, and is bound to disclose all that passed at the time relating to such execution. Robson v. Kemp, 5 Esp. 52, and Crawcour v. Salter, 18 Ch. D. 30, followed. *Magee* v. *The Queen*, 2 Ex. C. R. 304.

X. Proceedings against and Liability of.

1. *Acting without Authority.*

(a) *Liability.*

Appearance.]—See Practice—Practice at Law before the Judicature Act, II. 2.

——— *Costs.*]—Where a defendant swore that no process had been served on him, and that an attorney had appeared for him without authority, the court ordered that the attorney should file an affidavit accounting for his entry of appearance. *Weir* v. *Hervey*, H. T. 4 Vict.

And the court in the following term set the proceedings aside, and ordered the attorney to pay all costs. *S. C.*, 1 U. C. R. 430.

——— *Ejectment—Action for Wrongful Appearance—Pleading — Malice.*]—Plaintiff sued defendant for having caused an appearance to be entered for the defendants in an ejectment, brought by plaintiff against them, for land assigned to plaintiff under process issued in an action of dower against this defendant, alleging that he had done so wilfully, wrongfully, and without the consent, knowledge, or authority of the defendants, but not charging malice or want of reasonable or probable cause:—Held, on demurrer, that the declaration was bad on this ground. Semble, that defendant and his attorney would, on such a declaration, be liable to the defendants in the ejectment suit; and that (the defendants therein being worthless) he would also be liable to the plaintiff for the costs of that suit, on a summary application to the court made therein. *Fisher* v. *Holden*, 17 C. P. 395.

——— *Ejectment—Tenant.*] — Defendant being tenant was served with a writ of ejectment, which he handed to H., his landlord, and H. took it to his attorney, who, instead of getting leave for H. to defend, entered an appearance in defendant's name without his authority. A verdict having been obtained against defendant, the Judge refused to interfere, but left him to his remedy against his landlord and the attorney. *Moran* v. *Schermerhorn*, 2 P. R. 261.

———*Remedy—Solvency of Attorney—Removal of Appearance—Collusion.*]—Where an attorney without authority appears for defendant, the court will not set aside the proceedings if the attorney is solvent, but will leave the defendant to his remedy by summary application against the attorney. If the attorney be insolvent, the court may relieve defendant on equitable terms, if he has a defence on the merits. Where, however, it appears that the suit instituted against the defendant is brought by collusion between plaintiff and defendant to enable defendant to cheat his creditors, a Judge will not interfere summarily to remove the appearance, and thus assist the parties in the perpetration of a fraud. *Warely* v. *Poapst*, 7 L. J. 294.

Bond—*Execution.*]—The court refused an order to an attorney to pay the costs of a suit on a bond to the limits, where he had signed the name of one of the obligors and executed the bond on his behalf on a mere parol authority. *Leonard* v. *Glendennan*, Dra. 232.

Bringing Action—*Assignor of Chose in Action — Indemnity.*] — Where an attorney without the knowledge or consent of plaintiff brought an action in his name, relying upon an assignment of choses in action from the plaintiff to the client of the attorney, and the right of the attorney under the assignment so to use plaintiff's name was very doubtful, an order was made to stay the proceedings until the attorney or his client should indemnify the plaintiff against costs. *Ellison* v. *Ellison*, 9 L. J. 245.

——— *Costs.*] — Where an attorney had used the plaintiff's name without his consent, he was ordered to repay the plaintiff the costs which he had paid to defendant on failure of the suit. *Henderson* v. *McMahon*, 12 U. C. R. 288.

Where proceedings had been stayed until the attorney filed his warrant to prosecute, and the warrant was not filed, the attorney was ordered to pay defendant's costs of defence, and of staying proceedings. *Smith* v. *Turnbull*, 1 P. R. 88; *Shaw* v. *Ormiston*, 2 P. R. 152.

Where the plaintiff's solicitors made a person plaintiff without being instructed by him, his name was, at his instance, struck out of the proceedings in the cause as a plaintiff, with costs to be paid by the solicitors. *Miller* v. *Hill*, 4 C. L. J. 78.

——— *Dower—Costs.*]—Where a solicitor in chancery purchased a widow's right to dower in all the lands of which her husband was seised during her coverture, taking from her an assignment thereof, and a power of attorney to use her name in suing therefor, and six years after the death of her husband, and several years after the purchase, filed a bill in her name to have dower assigned to her in a particular portion of her late husband's lands, not noticing the sale to himself, the court, on the application of the widow, ordered the bill to be taken off the files, with costs to be paid by the solicitor. *Meyers* v. *Lake*, 1 Gr. 305.

——— *Wrongful Act—Non-existent Plaintiffs—Malice—Want of Reasonable Cause.*]—Actions brought in the name of a road company against the present plaintiffs were dismissed with costs, on the ground that the company had never been incorporated according to law. The present actions were brought against four of the corporators of the company, three of them composing the firm of solicitors who had conducted the former actions on behalf of the supposed company, and all four having expressly authorized the bringing of the former actions, seeking to recover the costs of such former actions, execution therefor against the company having been returned nulla bonâ: — Held, that, in the absence of malice and want of reasonable and probable cause in bringing the former actions, the present actions were not maintainable against the defendants as corporators or as solicitors bringing actions on behalf of the plaintiffs who had no legal existence. *Platt* v. *Waddell*, *Townsend* v. *Waddell*, 18 O. R. 539.

——— *Wrongful Act—Pleading—Malice—Special Damage.*] — Action for damages against solicitors for, as alleged in the statement of claim, "wrongfully and unlawfully without any instructions or retainer," issuing a writ of summons against the plaintiff in the name of a third party, by reason of which the plaintiff was injured in his occupation as a builder, suffered in his credit and reputation, and was hindered in the performance of his contracts, and had to borrow money at a higher interest than he would otherwise have had to do, and other creditors were induced to sue him, whose accounts he had to compromise and settle at great loss:—Held, on demurrer, that neither malice and want of reasonable and probable cause, nor special damage, both of which are necessary in such an action, were sufficiently alleged. Semble, that an allegation that by reason of the proceedings complained of the plaintiff was put into insolvency or bankruptcy, if such a thing were possible in this country, might be a sufficient allegation of special damage. *Mitchell* v. *McMurrich*, 22 O. R. 712.

See ante IV. 1.

Demand in Insolvency — *Misconduct — Malice—Summary Procedure—Costs.*] — L. & A., partners, dissolved partnership, it being understood that L. should pay the debts, &c. There had been ill-feeling and litigation between them, in which the attorney had acted for L. The attorney, being authorized to act for R. W. & Co., creditors of L. & A. for a sum under $500, applied to L. for information as to other creditors of the firm, whose names he might use in order to put L. & A. in insolvency. L. told him to use the names of K. & D. of Rochester, U. S., stating that they would agree to what he, L., said. On the 3rd May, 1873, the attorney served a demand on A. in the names of R. W. & Co. and K. & D., requiring them to make an assignment in insolvency, and on the same day he wrote to K. & D. asking for their sanction. They made no answer; and A., having gone to Rochester and settled their claim, applied to set aside the demand. The attorney thereupon abandoned the proceedings and paid A.'s costs. On a motion to strike the attorney off the rolls for this, on affidavits attributing his conduct to malice:—Held, under the circumstances, malice being expressly denied, that the rule should be discharged; but, as the attorney had been indiscreet, he was directed to pay the costs of the application. *In re Attorney*, 34 U. C. R. 246.

Discharging Debtor from Custody—*Damages.*]—In an action against an attorney for discharging a debtor in custody on a ca. sa. without any authority from the plaintiffs, the damages are discretionary, and it is not incumbent on the jury to give the whole amount of the debt. *Bradbury* v. *Jarvis*, 1 U. C. R. 301.

(b) *Production of Authority.*

Necessity for — *Settlement of Action — Proceeding for Costs.*] — A plaintiff and defendant having settled between themselves without paying the costs, the court refused to make the attorney produce his warrant in an action instituted against the bail to recover those costs. *Shankland* v. *Scantlebury*, Tay. 251.

——— *Stay of Proceedings—Costs.*]—Upon defendant's application in the suit, proceedings will be stayed till the plaintiff's attorney files his warrant to prosecute. *Robe* v. *Reid*, 1 C. L. Ch. 98.

And where in such a case proceedings had been stayed on defendant's application, and the warrant was not filed, the attorney was ordered to pay the defendant's costs of defence and of staying proceedings. *Smith* v. *Turnbull*, 1 P. R. 88; *Shaw* v. *Ormiston*, 2 P. R. 152.

——— *In Equity.*]—A defendant in equity has no right to call upon the plaintiff's solicitor to produce his authority for using a plaintiff's name; and particularly where no improper conduct in using such name is positively alleged and verified. *Chisholm* v. *Sheldon*, 1 Gr. 294.

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2. *Negligence.*

(a) *As a Defence to a Claim for Costs.*

Delaying Trial of Action—*Benefit to Client—Pleading.*]—In an action by an attorney for his costs, the jury having found for defendant:—Held, under the facts set out in the case, that the evidence did not support the verdict, for the defendant had obtained a judgment against M., which might yet produce the debt, and it could not be said that the plaintiff's services had by his negligence become wholly worthless to defendant. A new trial was therefore granted. Semble, that if defendant had lost all benefit from his action by its not having been tried in 1855, the court would not have interfered, for the attorney, in refusing to issue new subpœnas under the circumstance stated, might be considered to have taken upon himself the risk of consequences. In an action by an attorney for his costs, negligence may set up as a defence under the general issue. *Vidal* v. *Donald*, 20 U. C. R. 507.

Omission of Party to Action—*Benefit to Client—Summary Order for Taxation.*]—A mortgagee instructed his solicitor to proceed on the mortgage. The solicitor omitted to make J., the owner of the equity of redemption in a portion of the property, a party to the suit. The remaining portion having been sold under a decree in that suit, the client was benefited to some extent by the proceedings therein, although his remedy against J. was gone. In taxing the solicitor's bill under a common order obtained by the client, the master allowed the costs of these proceedings; and on appeal to the court this was upheld. The master, under such an order, has no authority to institute an inquiry as to loss sustained by the client through the alleged negligence of his solicitor; and the costs of such inquiry cannot be charged to the solicitor. *Thomson* v. *Milliken*, 15 Gr. 197.

Omission to Examine Instrument — *Useless Suit—Bona Fides.*] — A solicitor before commencing a suit should examine the instrument on which it proceeds; or, in case of its loss, should use diligence in resorting to the means of information open to him, and to which he is referred by the client. Where this duty had been omitted, and the instrument had in consequence been set forth so incorrectly in the bill that the proceedings were useless and had to be abandoned after decree, the solicitor (though he had acted in good faith) was held not entitled against his client to the cost of the suit. *Roe* v. *Stanton*, 17 Gr. 389.

Proceedings Occasioned by Fault.]—On a motion to have the costs of an interpleader issue paid out of moneys in court, costs of the motion were refused, and the solicitor was not allowed to charge his client any costs, as the motion was rendered necessary by his fault or oversight. *Macdonald* v. *Carrodi*, 1 Ch. Ch. 145.

Proceedings Occasioned by Mistake —*Pleading.*]—Where services charged for by an attorney were required only in consequence of his own mistake or neglect, which a careful person would not have been likely to fall into, and not arising from an error in judgment in a matter affording room for doubt or difficulty, he cannot recover; and such a defence is available under the general issue. *Burnham* v. *Burns*, 21 U. C. R. 349.

Summary Order for Taxation — *Disallowance of Bill.*]—On the common order by a client to tax his solicitor's bill, the master may consider alleged negligence of the solicitor as having occasioned the suit or rendered it useless, and therefore a ground for disallowing the whole bill, or as affecting and a ground for disallowing parts. *Thomson* v. *Milliken*, 13 Gr. 104.

See In re Toms and Moore, 2 Ch. Ch. 381; *In re A. B.*, 8 C. L. J. 21; *Lynch* v. *Wilson*, 3 P. R. 169; *Scanlan* v. *McDonough*, 10 C. P. 104; *Re Kerr, Akers, and Bull*, 29 Gr. 188, *post* (b); *O'Donohoe* v. *Whitty*, 2 O. R. 424, 20 C. L. J. 146, *post* (b).

(b) *Conduct of Causes and other Proceedings.*

Delay in Issuing Execution—*Loss of Priority—Conflict of Duty and Interest.*]—The plaintiff, in his second count, stated that, having retained the defendants to prosecute an action against one G. for a debt, they took a confession of judgment, and delayed to issue execution thereon for some months, whereby the plaintiff was damnified. Third count, for money had and received. The evidence went to shew that between the time when the plaintiff was entitled to execution, and when it was issued, a writ of one B. against G. was placed in the sheriff's hands, and settled. It was also shewn that G. had, during the same period, made chattel mortgages on his property, of which defendants were aware. One of the defendants, on being called, stated that G. having recovered a judgment against one K., garnishee proceedings were instituted in the suit of plaintiff against G., and of defendants against G., and J. & L. against G., in respect of K.'s debt; and that orders under garnishment proceedings were made in all these suits against K., but by mistake of one of the defendants' clerks the plaintiff's execution was placed first in the sheriff's hands. The lands of K. were duly advertised by the sheriff in the suit of G. against K., and in the garnishment proceedings, and subsequently he was instructed by defendants to withdraw the advertisement and take no further steps, as K. had settled the amount due. The plaintiff's writ on the garnishee order against K.'s lands was returned expired, during the currency thereof, no instructions having been given to the sheriff. A receipt for $20, signed by defendants, was put in, intituled in the suits of plaintiff against G. and defendants against G.—K. garnishee. A verdict having been found for plaintiff on both counts:—Held, that there was evidence to go to the jury to shew that, if defendants had issued execution as soon as the plaintiff was entitled thereto, he might have recovered his debt; and, the defendants

knowing that G. was disposing of his property by chattel mortgage, &c., it was a breach of their duty not to issue plaintiff's execution. (2) That, as defendants obtained and had the benefit of the settlement of K.'s debt, and as it was admitted that the plaintiff's writ had priority, it was the duty of defendants to see that he did not lose his priority; and if their duty conflicted with their interest, they should not be allowed to sacrifice the former to the latter. *Sweetman* v. *Lemon*, 13 C. P. 534.

Delay in Issuing Order — *Constructive Abandonment—Advice of Counsel.*] — Where an attorney, being employed to get a judgment of non pros. signed against the plaintiff set aside, applied through his town agent for an order for that purpose, which was granted on the 16th June, but the agent neglected to take out the order until the 22nd October following, in consequence of which delay the order was set aside and the judgment allowed to stand:—Held, that this was negligence for which the attorney was responsible, and that it was no defence that he acted under the advice of counsel. *Herr* v. *Toms*, 32 U. C. R. 423.

Failure to Instruct Counsel.]—A. retained B., an attorney, in Kingston, to defend him in a suit to be tried at Perth, and before the trial A. went to Kingston, where B. told him that he could not go to Perth in this one suit, but that C., a barrister at Perth, would attend to it, and that A. had better see him. A. made no objection, but went to Perth, and instructed C., who conducted the suit at the trial. A nominal verdict was given against A. No complaint was made that C. mismanaged the cause in any way:—Held, that B. was not liable for negligence at the suit of A., in not himself making up a brief and delivering it to C. *Kenny* v. *Armstrong*, 4 U. C. R. 196.

——— *Faulty Conduct of Trial—Solicitor as Counsel.*]—The plaintiff sued an attorney for negligence in conducting a suit for him, alleging that defendant pleaded an improper defence, neglected to subpœna witnesses, or to instruct counsel, but acted as counsel himself, and did not apply for an amendment required, or offer to prove payment. Defendant pleaded as to the allegation that he did not instruct counsel, but acted as such himself, that he was a barrister, and that the plaintiff never objected to his so acting; and he demurred to the allegation that he did not while so acting apply to amend, or offer to prove payment, on the ground that for his conduct as counsel no action would lie. Plaintiff demurred to the plea as no answer:—Held, that the plaintiff was entitled to judgment, for the defendant by acting as counsel himself could not escape liability for neglecting as an attorney to give proper instructions. Quære, whether, considering the union of the professions in this Province, and the right of counsel in some cases to recover fees, the same exemption from liability can be claimed here as in England, even when the same person does not act in both capacities. *Leslie* v. *Ball*, 22 U. C. R. 512.

Failure to Obtain Confession of Judgment.] — Case against attorneys employed by the plaintiffs, for not taking a confession of judgment from L., their debtor. Plea, that after the retainer, and before the alleged default of defendants, the plaintiffs, without the consent of defendants, with other creditors, made an arrangement with L., by which he assigned all his effects to B., one of the plaintiffs, and another person, to be disposed of in paying such creditors as should concur in this: — Held, on demurrer, plea good. Held, also, that in the declaration the retainer of defendants and the damage sustained by the plaintiffs were sufficiently stated. *Benner* v. *Burton*, 13 U. C. R. 387.

Failure to Obtain Price of Land—*Sale under Execution—Discharge of Sheriff.*]—Declaration, that the plaintiff employed R. & J., the defendants, as attorneys, for reward, to prosecute a certain action against one W.; that judgment was recovered, and the plaintiff then retained defendants to issue execution; that the lands of W. were sold under such execution by the sheriff to J., one of the defendants, yet that defendants did not require J. to pay the purchase money to the sheriff, although at their request the sheriff conveyed the land to him; but, as such attorneys, discharged the sheriff from said money, which had not been paid to the plaintiff:—Held, that a good cause of action was shewn. *Phillips* v. *Dempsey*, 18 U. C. R. 177.

Failure to Procure Attendance of Witnesses.] — Plaintiff obtained a verdict against attorneys for negligence, in not having procured the attendance of witnesses stated to be material at a trial between plaintiff and another, in which plaintiff failed. It did not appear, however, that the evidence of such witnesses would have produced a different result, and defendants' leading counsel at the trial in question had decided upon proceeding without such evidence. On these grounds a new trial was granted. *Wade* v. *Ball*, 20 C. P. 302.

Failure to Search Release of Judgment — *Issue of Execution—Interference by Client—Damages.*] — The plaintiff employed defendant to ascertain whether an old judgment obtained by him against one W. had been released, and if not, to issue execution. Defendant issued the execution without having made a sufficient search, though the plaintiff had in fact released the judgment, whereby the plaintiff was subjected to an action for damages at the suit of W. Before the sheriff had seized, he informed the plaintiff that W. asserted that the judgment was released, and plaintiff told him to go on with the levy:—Held, that these instructions by plaintiff were not necessarily a discharge of defendant, but were only a matter in mitigation of damages. *O'Beirne* v. *Wilson*, 6 C. P. 366.

Failure to Urge Dishonest Defence.]—Semble, that an attorney would not be liable for culpable negligence, in not urging for his client the defence that the agreement sued upon was made on a Sunday, as it is no part of his professional duty to take all dishonest advantages. *Vail* v. *Duggan*, 7 U. C. R. 568.

See, also, *Shaw* v. *Nickerson*, 7 U. C. R. 541.

Faulty Conduct of Motion—*Damages.*]—Where an attorney was retained to apply to release a sheriff from an attachment, and the jury found him in fault in conducting the application:—Held, that he was liable to nominal damages, although the special damage laid was not proved. *McLeod* v. *Boulton*, 3 U. C. R. 84.

See Doan v. *Warren*, 11 C. P. 423.

Irregular Proceedings——*Discharge of Defendant for—Proof of Negligence.*]—B., an

attorney, was employed to prosecute a suit against M., who was arrested and discharged without bail, and the writ of capias and all proceedings set aside for irregularity. Upon an action against B. for negligence:—Held, that the production of the order of the Judge setting aside the capias was not sufficient evidence to sustain the action; but that the negligence must be gross, and evidence of it must be given. *Chapman* v. *Boultbee*, 13 C. P. 372.

Irregular Service of Notice of Mortgage Sale — *Costs of Service — Burden of Proof.*] — Where F., a solicitor, on behalf of his client served a notice of sale under a mortgage made pursuant to the Act respecting short forms, R. S. O. 1877 c. 104, at what he believed, after diligent inquiry, was the last place of residence of the mortgagor in this Province, and did so on the instructions of his client, who was fully advised as to the inquiries and their result, and bonâ fide deemed such services sufficient:—Held, that F. was entitled, as against his client, to tax the costs of the proceedings under the power of sale, although it appeared that the mortgagor really was, at the time of such service, within this Province. R. S. O. 1877 c. 104 permits substitutional service at the residence, though the mortgagor may be within the jurisdiction. But, even if such is not the proper construction of the statute, it is a matter so doubtful that the solicitor who bonâ fide acted on that view of the statute should not lose his costs of so effecting service. Where services are rendered by a solicitor at the instance of a client, possessing the like knowledge of the matters of fact as the solicitor, the onus is on the client to establish negligence, ignorance, or want of skill, by reason of which alone and entirely the services have been utterly worthless, if he resist the taxation of costs incurred by such services. *O'Donohoe* v. *Whitty*, 2 O. R. 424, 20 C. L. J. 146.

See Gall v. *Collins*, 12 P. R. 413.

Loss of Instrument Sued on—*Failure to Account for—Costs—Terms.*]—A note having been given to an attorney to collect, he commenced a suit upon it, which was afterwards referred, and the note sent to Cobourg where the arbitrators met; no award was made, and the note was not afterwards to be found. The attorney then proceeded in the action, and on the trial, the note not being produced, or evidence given to prove its loss, a verdict was taken for the plaintiff, subject to the opinion of the court, who directed a new trial on payment of costs; but, as the costs were not paid, the rule for a nonsuit was made absolute:—Held, that the attorney was liable as well for negligence in not producing the note, or not having evidence prepared to account for its absence, as for the damages and costs incurred by the plaintiff by reason of the nonsuit. In this case the court discharged the rule for a new trial, upon the plaintiff's attorney undertaking that the plaintiff should give the attorney authority to proceed on the note in his (the plaintiff's) name, on the former undertaking to indemnify the latter against the costs of such action. *Grover* v. *Gamble*, 6 O. S. 561.

Mismanagement of Defence — *False Advice—Collusion—Retainer.*]—C., who was in active practice as a lawyer, and the author of several useful legal treatises, had obtained a mortgage on a valuable leasehold estate, and having taken such proceedings as resulted in a forfeiture of the mortgagor's term, procured from the owner of the property a renewal of the lease to himself. The mortgagors instituted proceedings to redeem, but C., asserting that he was absolute owner of the interest, instructed solicitors to defend the suit. They expressed to C. some doubt as to his right to resist the claim of the mortgagors, whereupon he, with one of the solicitors, went to a counsel of note, who, without having time to give the case full consideration, orally advised them that the suit should be defended. C. drafted his answer, his solicitors adding one clause. Counsel retained for the hearing told C. he would undoubtedly fail in the litigation, and subsequently the usual decree for redemption was pronounced, C. being ordered to pay such costs as had been occasioned by his resisting redemption. It was alleged against the solicitors that they had advised C. that he would be entitled to costs in any event; that they had refused to consider or submit to him an offer to pay the mortgage money and costs on the ground, as they alleged, that C. claimed about three times the sum offered; that they had colluded with the mortgagors' solicitor in having proceedings instituted, which they had wrongly advised him to defend; and that he had a good defence, but the same had been negligently managed. There was a written retainer which did not express any special arrangement as to costs or the terms on which the defence was to be conducted. The court, being of opinion that C. had failed to make good his charges against the solicitors, affirmed an order reversing the finding of the taxing officer that the solicitors were not entitled to recover the costs of the litigation. Although in a simple case of a distinct assertion and a distinct denial of a fact at the time of a client retaining a solicitor, which thus forms a part of a contract, it may be a proper rule to say that in such a case the solicitor has himself to blame when any difficulty arises, as he might have protected himself by having his retainer in writing, there is not any authority for extending that rule to facts arising after the retainer and during the progress of the litigation. In any event the rule applies only where it is simply oath against oath, not where there is other evidence direct or circumstantial in support of the solicitor's. *Re Kerr, Akers, and Bull*, 29 Gr. 188.

Neglect to Sue on Note—*Instructions—Security.*] — Where a promissory note was given to an attorney to get the amount of it secured, and the attorney subsequently said he would pay the amount in a few days, and an action was afterwards brought against him for negligence in not suing on the note, with a count for money had and received: — Held, that neither count was supported by the evidence. *Brennan* v. *Boulton*, 3 U. C. R. 72.

See Re Hardy, Poole v. *Poole*, 3 Ch. Ch. 179.

(c) Investigating Titles.

Purchase of Land—*Tax Sale.*]—Plaintiff in 1854 employed defendant to examine the title to certain lands, and took a deed. Afterwards it was discovered that in 1851 a portion had been sold for taxes, but when the plaintiff purchased he had still a year to redeem. In 1857 the sheriff made a deed to the purchaser:

—Held, that the defendant was not liable. *Ross* v. *Strathy*, 16 U. C. R. 430.

See Peters v. *Weller*, 30 U. C. R. 4, *post* (d).

(d) *Investment of Money upon Insufficient Security.*

Damages—*Costs.*]—A solicitor, intrusted with moneys to invest, did so on property of insufficient value, and his client, shortly after the loan, desired him to realize the amount advanced, which the solicitor endeavoured to do by getting the owner to effect another loan from a building society. He desired his client to release his mortgage for the purpose, undertaking to obtain security on chattel property for any deficiency before acting on the release. The society refused to advance more than $800, which it was stipulated should be paid to the client, thus leaving a balance due him of about $150. The solicitor procured from the mortgagor a chattel mortgage on cattle, &c., variously valued at from $100 to $130; such security being made out in the name of the client, and only requiring his affidavit of bona fides to have it registered. This the client refused to accept, and instituted proceedings against his solicitor for the surplus of his claim; and judgment for $177 was given against the latter. On appeal, the court, being of opinion that the plaintiff had of his own wrong lost the benefit of the chattel mortgage, reduced the judgment by $117, thus limiting the verdict to $60, with division court costs, but refused to either party costs of the appeal. *O'Callaghan* v. *Bergin*, 11 A. R. 594.

Evidence of Instructions—*Damages.*]—In an action against solicitors for investing money on insufficient security, one of the defendants, having made an entry or memorandum of his instructions in the presence of the plaintiff and H., offered it as evidence of the transaction:—Held, that it was properly rejected. A new trial was granted in this case, on the ground of excessive damages. *Phelps* v. *Wilson*, 13 C. P. 38.

Partner of Solicitor—*Liability of.*]—R., a practising solicitor, was retained by the plaintiff to manage her business affairs, and he obtained from her and invested large sums of money in mortgage securities. A year afterwards R. entered into partnership with the defendant W., and the firm carried on business as solicitors and conveyancers and had in their hands several estates to manage. It was agreed when this partnership was formed that W. should have no interest in the plaintiff's business, which continued to be managed entirely by R., but the entries in connection therewith were made in the books of the firm, moneys received on the plaintiff's account were deposited with the firm's moneys, and from time to time reinvested by the firm, or paid to the plaintiff or to R. by cheques of the firm, and charges paid by borrowers went into the profits of the firm. Losses occurred owing to the insufficient value of some of the mortgaged properties:—Held, affirming the judgment in 15 O. R. 662, that under the circumstances, particularly because of the money having been actually received by the firm, and again paid out by them to the borrowers, both partners were liable for the negligence complained of. During the partnership, the plaintiff, acting on R.'s advice, allowed him to invest moneys in the purchase of lands in Dakota, it being agreed that he was to pay her interest on the moneys so invested, and that any profits were to be divided between the plaintiff and R. W. had no knowledge of this transaction. The moneys so invested were lost:—Held, reversing the judgment in 15 O. R. 662, that this was a transaction clearly outside the scope of the partnership business, and that W. was not liable. *Thompson* v. *Robinson*, 16 A. R. 175.

Want of Care — *Value—Title.*]—Where an attorney received money to invest in real estate security:—Held, that he was liable for the want of reasonable care as regarded the value of the security, not merely in the examination of the title. *Peters* v. *Weller*, 30 U. C. R. 4.

See Taylor v. *Magrath*, 10 O. R. 669.

(e) *Registering Instruments.*

Judgment.]—A solicitor is liable in damages to his client for neglecting to obey instructions to register a judgment and thereby precluding the client from recovering the amount of his judgment debt. *Hett* v. *Pun Pong*, 18 S. C. R. 290.

Mortgage — *Discharge pendente Lite — Damages.*]—An attorney, having been employed to register a mortgage of £250, withheld the mortgage till he recovered a judgment of £16 against the mortgagor, under which the land mortgaged was subsequently sold:—Held, that an action for such neglect, being substantially for a breach of contract, was maintainable without shewing actual damage, and a nonsuit therefore could not be entered. While the case was pending, the plaintiff, upon payment of $300, discharged the mortgage on registry, and thereby prevented the court from doing substantial justice; a new trial was therefore ordered to decide as to the mala or bona fides in obtaining the discharge. Quære, would not the amount of the judgment with interest, costs, &c., be the measure of damages? *Doan* v. *Warren*, 11 C. P. 423.

——— *Neglect of Client to Furnish Fees—Accord by Stranger.*] — Declaration for neglecting to register a mortgage for ten months, and until the mortgagor had executed a subsequent mortgage to other persons, which was recorded before that to the plaintiff. Defendants pleaded, (1) that the registrar was by law entitled to certain fees before recording any deed, as the plaintiff well knew; that he never furnished them with any money to pay the same; "and so the defendants say that the said mortgage was not registered by the registrar or by the defendants for the default of the plaintiff in not providing the defendants or said registrar with any sum of money to pay the said registrar the fees allowed to him by law for registering the said mortgage." (2) That after breach the plaintiff accepted from D. another mortgage on other land of D., as security to the plaintiff for £750, in full satisfaction and discharge of defendants' promise, and all damages accrued to the plaintiff from the breach thereof:—Held, on demurrer, second plea good, it being no objection that the accord was by a third person, a stranger to the action. The court being equally divided, no judgment was given on the demurrer to

the first plea. *Lynch* v. *Wilson*, 22 U. C. R. 226.

See Darling v. *Weller*, 22 U. C. R. 363, *post* XI.

(f) *Other Cases.*

Assignment in Insolvency.]—Under 8 Vict. c. 48, the right to sue an attorney for negligence vests in the assignee of an insolvent plaintiff. *Alexander* v. *A. B. and C. D.*, 5 U. C. R. 329.

Assignment of Claim for Negligence.]—A claim by a client for negligence against a firm of solicitors in directing the distribution of moneys in the sheriff's hands was assigned by him to another, and by the latter to the plaintiff:—Held, that the claim did not, by virtue of R. S. O. 1887 c. 122, s. 7 (O.), pass to the plaintiff so as to enable him to maintain an action therefor in his own name; but in any event no negligence was proved. On appeal to a divisional court the judgment was affirmed on the ground of the absence of any proof of negligence. *Laidlaw* v. *O'Connor*, 23 O. R. 696.

Pleading.]—A declaration is sufficient in stating generally that by defendant's negligence the plaintiff lost his cause. *Vail* v. *Duggan*, 7 U. C. R. 568.

See Benner v. *Burton*, 13 U. C. R. 387.

3. *Sheriff—Liability to.*

For Fees.]—An attorney is liable to the sheriff for fees on executing writs, and for services rendered for him in causes of his clients, without any special undertaking. *Jarvis* v. *Washburn*, Dra. 163; *Fraser* v. *Fellowes*, 7 L. J. 131.

For Poundage.]—But not for poundage upon an execution which the attorney has placed in his hands to be executed. *Corbett* v. *McKenzie*, 6 U. C. R. 605.

Upon Undertaking — *Bail.*]—H. having been arrested, his attorney gave the sheriff an undertaking to put in bail, which was not done. On the application for an order to compel the attorney to pay the debt and costs:—Held, that the facts set out in the case formed no excuse. *In re Baby* v. *O'Connor*, 2 P. R. 203.

——— *Indemnity.*]—Sheriffs recommended to take precise written engagements from attorneys when they mean to hold them liable in cases they have nothing to do with except professionally, though the court, where the attorney has orally agreed to indemnify, if the agreement is admitted, will enforce it. *In re Corbett* v. *O'Reilly*, 8 U. C. R. 130.

4. *Summary Proceedings.*

(a) *For Contempt of Court.*

Insulting Language — *Master's Office—Punishment—Apology—Costs.*] — If a solicitor, who is also a barrister, while in a master's office use improper or insulting language to another solicitor while acting in the conduct of proceedings under a reference, he will be held guilty of contempt of court, and upon a certificate of the facts from the master, the court may preclude the offending party from again appearing before the court or in any of the offices of the several masters of the court. *Nicholls* v. *McDonald*, 4 L. J. 259.

Upon the making of a suitable apology, and upon payment of costs, the offending party may be allowed to appear before the court as if such order had not been made. *Ib.* See, also, 15 C. L. J. 303.

See In re O'Brien, Regina ex rel. Felitz v. *Howland*, 16 S. C. R. 197, 14 A. R. 184, 11 O. R. 633; *Pritchard* v. *Pritchard*, 18 O. R. 173; *In re Herrey*, M. T. 5 Vict., R. & J. Dig. 309, *post* (f).

(b) *For not Paying over Moneys — Attachment or Committal.*

District Court — *Action in.*]—An attorney of the Queen's bench practising in a district court, may be attached for not paying over money received for his client. *Carruthers* v. ———, Tay. 243.

Enforcing Order for Payment — *Absence of Fraud.*] — The proper proceeding against an attorney for mere non-payment of money pursuant to a rule of court, where there are no special circumstances shewing fraud or dishonesty, is by judgment and execution under C. S. U. C. c. 24, s. 15, and not by motion to strike him off the rolls, nor by attachment. Under the Imperial Act 32 & 33 Vict. c. 62, s. 4, s.-s. 4, attorneys ordered to pay money in that character are excepted from the general rule and may be attached as before. There is no such exception in our Act. *Re Campbell*, 32 U. C. R. 444.

Lapse of Rule.]—Where a rule nisi for an attachment for non-payment of money had lapsed, the court refused to renew the rule without a fresh affidavit. *Roy* v. *DeLay*, Tay. 9.

Loss of Money — *Accident.*]—An attachment was refused to compel an attorney to pay over money which had in fact been forwarded, but lost by accident. *Radcliffe* v. *Small*, Tay. 308.

Money Received as Agent.]—The court will not attach an attorney for not paying over money received by him as agent, and not in his professional character; but if from the circumstances it appear that he is not trustworthy, he may be struck off the roll. *In re O'Reilly*, 1 U. C. R. 392; *S. C.*, 2 P. R. 198.

See Re Carroll, 2 Ch. Ch. 323, *post* (c); *Re Walker*, *ib.* 324.

Mot'on for Attachment—*Requirements—Demand—Affidavit.*]—Where a rule required that the money should be paid within a month after service, an attachment was refused, no copy of the affidavit of the execution of the power of attorney under which the money had been demanded having been served, and the affidavit of non-payment stating only non-payment within the month, but not after. *Brewster* v. *McEwen*, E. T. 3 Vict.

Payment out of Court—*Order for Repayment—Disobedience—Contempt.*]—A solicitor in an action had obtained an order for the payment out to him of certain moneys in court, and upon such order obtained the moneys. Subsequently an order was obtained rescinding the above order and directing the solicitor to forthwith repay the said moneys into court, and to pay the costs of the application. On his non-compliance therewith a motion was made for his committal:—Held, that the order for committal should go, for what was sought by the motion was the punishment of the solicitor for his contempt in disobeying the order of the court; and that con. rule 867 had no application. *Pritchard* v. *Pritchard*, 18 O. R. 173, 178.

Time for Granting Rule.]—A rule nisi for such an attachment should not be granted on the last day of the term, but if so granted it may be acted upon afterwards. *In re O'Reilly*, 1 U. C. R. 392, 2 P. R. 198.

(c) *For not Paying over Moneys—Order for Payment.*

Agent of Solicitor — *Demand upon — Time for Correspondence.*] — Thompson v. Billing, 11 M. & W. 361, remarked upon; and the practice therein allowed as to proceeding on a demand of money from the town agent for a country attorney without giving time for correspondence between them, thought to be unreasonable. *In re Robertson*, 5 P. R. 132.

Aid of Garnishment.]—The court will not order an attorney to pay over money which has been attached in his hands as the property of an absconding debtor. *Clark* v. *Stover*, T. T. 3 & 4 Vict.

Costs—*Rent—Set-off.*]—A. being indebted for costs to an attorney who owed him for rent, it was agreed to set off the rent against the costs. A. afterwards sued in a division court for the rent, but was defeated, and he then obtained a rule nisi on the attorney to pay over the net amount. The rule was discharged with costs. *Elliott* v. *Baines*, 1 P. R. 64.

Enforcing Order—*Judgment and Execution—Absence of Fraud.*]—See *Re Campbell*, 32 U. C. R. 444.

Fees of Commissioner—*Receipt from Client—Non-payment.*]—A solicitor included in his bill of costs rendered to his client the fees of a commissioner appointed to take evidence, and received payment of such bill, but neglected to pay the commissioner's fees. On the summary application of the commissioner he was ordered to pay over the fees within a month, and in default to be struck off the rolls. *Anon.*, 12 C. L. J. 204.

Forum—*Partnership—Survivors—Parties.*]—The referee in chambers has no power to exercise summary jurisdiction over solicitors. Such jurisdiction can only be exercised on an application to the court. Semble, when one member of a firm of solicitors has died, the summary jurisdiction of the court can no longer be exercised over the survivors, because such an application may necessitate the taking of the partnership accounts, and the representatives of the deceased partner are necessary parties. *Re L. and M.*, 6 P. R. 21.

Interest—*Investment—Statement of Solicitor.*]—When an attorney received money belonging to a client before it was due, and the client swore that he would not have taken it but for the attorney's assurance that he had an investment ready for it, and that the attorney afterwards told him that it was invested on mortgage with funds of his own:—Held, in the absence of explanation by the attorney, that he must be assumed to have invested it as he stated, and was chargeable with interest at six per cent. *Re Attorney*, 7 P. R. 321.

Loan to Solicitor—*Evidence of—Relief from Order—Forum.*]—The fact as to whether moneys collected by an attorney had been afterwards lent to him by the client was disputed; but an undertaking was produced, signed by the attorney, to the effect that he held the moneys for investment:—Held, that if the transaction was afterwards turned into a loan to the attorney, he must be prepared with the clearest evidence of the change in the relation, otherwise the usual order against the attorney must be made; and in this case the evidence was held to be insufficient. Where an order directing a reference to the master has been made in chambers, in such a case, and the reference completed under it, an application for relief therefrom must be made to the court. *In re Attorney*, 8 P. R. 102.

——— *Undertaking.*]—Quære, as to the effect of lending to an attorney money in his hands for his clients. Where the fact of such loan is disputed, an undertaking signed by the attorney to hold the money as of a certain day, consenting to an order to pay it over, will be enforced against him, and the usual order will be made. *In re Harrison* v. *A. and B.*, 6 L. J. 91.

Money Received as Agent.]—A solicitor is liable to account for moneys or securities on summary application, although they may have come to his hands as an agent for the owner, and not strictly as solicitor or attorney, or involve any duty as such in the holding or possession of them. *Re Carroll*, 2 Ch. Ch. 323.

See, also, *Re Walker*, 2 Ch. Ch. 324; *In re O'Reilly*, 1 U. C. R. 392, 2 P. R. 198, *ante* (b).

——— *Loan to Solicitor.*]—Money given to an attorney was held, upon the affidavits set out in the case, notwithstanding his denial, to have been received by him in his capacity as attorney to invest, not as a broker or agent; and not to have been lent personally to the attorney. *In re Attorney*, 7 P. R. 174.

Money Received from Client—*Money and Costs Lost through Solicitor.*] — The court of chancery will order solicitors to pay over moneys of clients in their hands. Where, therefore, it was shewn that a client had paid his solicitors $1,800 to carry out an agreement to purchase entered into by him, which they untruly informed him they had paid into court, they were ordered to pay the amount in ten days. It being shewn, also, that a bill for specific performance filed by them as his solicitors to enforce said agreement, had been dismissed with costs for want of prosecution, owing to the default of said solicitors, the costs so paid were not included in the above-mentioned order, but the client was

left to his action. So also with respect to the money paid to the vendor and lost by the negligence of said solicitors, and money paid to them on account of their own costs. *In re Toms and Moore*, 2 Ch. Ch. 381.

Money Received in Proceedings not in Court.]—A Judge in chambers may interfere summarily against the attorney, by ordering him to render an account of and pay over such moneys, although there is no litigious business or suit in court by or in which the money was received. *In re Attorney*, 7 P. R. 174.

Overpayment — *Refund.*]—An attorney received from his client a note for £50, costs in three suits. The client being sued for this note in the name of one W., apparently a nominal plaintiff, paid £20 and gave a confession for the balance. The bills were afterwards taxed at £24, and the court then ordered the attorney to refund the amount overpaid. *Ex parte Colborn*, 1 P. R. 208.

Partner of Solicitor.]—Mortgages were delivered to a solicitor by his brother for collection, and the money collected. A dispute arose as to whether such solicitor was alone responsible to his brother, or whether the solicitor's partner was responsible also. On petition of the client for payment, the court refused to make an order against the partner, holding that the petitioner should be left to sue. *In re Toms and Moore*, 3 Ch. Ch. 41.

See Re McCaughey and Walsh, 3 O. R. 425, and *Re Ross, Cameron, and Mallon*, 16 P. R. 482, *post* (d).

Privity — *Agent of Solicitor — Division Court.*]—Where T., having a claim in the division court against a resident of Belleville, sent it to McM., an attorney in Toronto, for collection, who sent it to A. & B., attorneys in Belleville, and the clerk of the latter collected $20 on account and sued for the remainder in a division court, and afterwards B. arranged with a third party for the payment of the balance, it was held that T. could not make a summary application against A. & B. for the payment of the money, but that McM. must apply. *Taylor* v. *A. & B.*, 1 C. L. J. 300.

Rule Nisi—*Misnomer in.*]—A rule nisi having been obtained on an attorney to pay over to Charles Edward Hatherley a sum of money, it was objected that the name was not Charles Edward, but Charles Edmund:—Held, that the objection must prevail. *In re Latham*, 1 P. R. 91.

See Pritchard v. *Pritchard*, 18 O. R. 173, *ante* (b); *McLean* v. *Grant*, 20 Gr. 76, *post* (g).

(d) *For not Paying over Moneys—Striking off Roll.*

Costs.]—Ordered that a solicitor should be struck off the roll unless by a named day he should pay an amount found by the report of a taxing officer to be in his hands, the moneys of a client, together with the costs of the taxation and of the motion to strike him off the roll. *Re Knowles*, 16 P. R. 408.

Partner of Solicitor.]—To justify an order to strike a solicitor off the rolls there must be personal misconduct; it is not enough to shew that his partner has been guilty of fraudulent conduct, from which a constructive liability to pay money may perhaps arise. The court is not in the habit of exercising even the lesser jurisdiction of ordering payment in a summary manner against a solicitor to whom personally no blame is attributable, though he may be responsible for his partner's acts. St. Aubyn v. Smart, L. R. 3 Ch. 646, distinguished. *Re McCaughey and Walsh*, 3 O. R. 425.

——— *Disputed Account.*]—Upon a summary application by a client for an order for payment over by three solicitors of moneys of hers alleged to be in their hands as a firm, and in default for an order striking them off the roll:—Held, that no professional misconduct being suggested against two of them, one of whom had left the firm before, and the other of whom was ignorant of, the receipt of a large sum of money by the third, the summary order asked for could not be made against the two, although they might be liable in an action. Re Toms and Moore, 3 Ch. Ch. 41, and Re McCaughey and Walsh, 3 O. R. 425, followed. And, it appearing that the third solicitor had a sum of money in his hands against which he alleged that he had a claim for costs, an order was made for delivery and taxation of bills of costs and for an accounting, and for payment by him of the balance, if any, found due. But, as he denied that any balance was due:—Held, that it would be unfair to add to the order a provision that in default of payment his name should be struck off the roll. Re Bridgeman, 16 P. R. 232, distinguished. *Re Ross, Cameron, and Mallon*, 16 P. R. 482.

Procedure — *Forum—Costs.*]—Where a client applies to strike the name of a solicitor off the roll for misconduct in neglecting to pay over the client's money in his hands as solicitor, the first application should be made to a Judge in court, whereupon, in a proper case, an order will be made requiring the solicitor to pay over the money by a named day, and in default that his name be struck off. Upon default, no further application is necessary, except an application to have the roll brought into court for the purpose of having the name struck off, and this should be on notice to the solicitor. Ruling of a taxing officer that costs of the first application should be taxed as of a chambers motion only, reversed on appeal. *Re Bridgman*, 16 P. R. 232.

Restoration to Roll—*Practice.*]—On the presentation of a petition to restore a solicitor to the rolls, who had been struck off by an order of the 1st September, 1874, for nonpayment over of a client's money, evidence was required as to his good conduct since the making of the order, and notice to the Law Society of the application, and on this being complied with he was restored, but the order was not rescinded. *Re Macnamara*, 9 P. R. 497.

Waiver of Right—*Issue of Execution—Misconduct.*]—Upon the taxation of solicitors' costs against their client, it was shewn that large sums of money belonging to their client had reached their hands, and after deducting the amount of the costs a considerable balance remained due to the client, for which he had, under the order of taxation, issued an execu-

tion, but the sheriff had been able to realize only a small portion of the debt; and thereupon a motion was made to strike the solicitors off the roll in default of payment of the amount remaining due. The court, however, in view of the fact that the client had treated the claim as a debt from the solicitors to himself, and proceeded to a sale of all that he could seize under execution, was of the opinion that he could not fall back on a right which he had had and might have exercised, unless, in addition to the non-payment of the money, misconduct on the part of the solicitors could be shewn that would warrant the interference of the court; and refused the application with costs. *Re Fletcher*, 28 Gr. 413.

See In re O'Reilly, 1 U. C. R. 392, 2 P. R. 198, *ante* (b); *Anon.*, 12 C. L. J. 204, *ante* (c); *Honan* v. *Bar of Montreal*, 30 S. C. R. 1.

(e) *For Other Misconduct—Attachment.*

Illegal Charges.]—Where an attorney of the Queen's bench practising in an inferior court has charged and the Judge has allowed costs clearly not sanctioned by law, the Queen's bench will punish by fine or attachment. *Rex* v. *Whitehead*, Tay. 476.

Indictable Offence — *Affidavits.*] — The court will not proceed summarily on a complaint of matters for which (if the charge were true) the attorney might be indicted; especially where the affidavits are contradictory. *Re Patterson* v. *Miller*, 1 U. C. R. 256.

Malpractice.]—The court will not attach on a charge of malpractice, where the alleged conduct has been merely inadvertent, and the party complaining has a remedy by action. *In re Stuart*, 5 O. S. 70.

(f) *For Other Misconduct—Striking off Roll.*

Absence while under Articles—*False Certificate—Costs.*]—Application to strike an attorney off the rolls who had been admitted two years, for being two years absent while under articles, and for an attachment against his master for having improperly granted a certificate of actual service. Both rules refused on the ground of delay, but the master made to pay the costs of the application. *In re Holland*, 6 O. S. 441.

Insulting the Court.]—An attorney, who had been ordered to pay the costs of setting aside proceedings in an action in which he had acted without authority, afterwards wrote a highly improper and unjustifiable letter to the chief justice, impugning his motives in the judgment which he had given and stating that he was actuated by personal and private feelings of dislike towards him. The court directed that a rule nisi should issue to strike him off the rolls; and no proper nor sufficient apology having been made, the rule was afterwards made absolute. *In re Hervey*, M. T. 5 Vict.

Malicious Conduct.]—See *In re Attorney*, 34 U. C. R. 246.

Malpractice — *Professional Character—Costs.*]—C., a solicitor, held a mortgage against B., which he agreed to release and take a mortgage on another lot conveyed on exchange of lots by W. to B., all the conveyances being prepared by C. C. never did discharge the first mortgage, although B. paid the full amount thereof and obtained a discharge of the second mortgage. Several years afterwards, and after the death of W., his representatives were called upon by the representatives of one J., to whom the first mortgage had been assigned, to pay the same, and, in a suit brought thereon, the lands so conveyed by B. to W. were ordered to be sold. On a proceeding to strike C. off the roll of solicitors for malpractice:—Held, that C. in the transactions acted professionally for W. and B.; his being the holder of the mortgage from B. was an accident which did not affect the professional character in which he acted. (2) That, whether he was acting professionally or not in the matter, he was, being a solicitor, amenable to the summary jurisdiction of the court; and, under the circumstances, an order was made to strike him off the roll of solicitors, and pay the costs of the proceedings against him for that purpose. *In re Currie, Gilleland* v. *Wadsworth*, 25 Gr. 328.

Procedure on Application.]—A certificate of the clerk of the court, on which an application under the rule of court is made to have the attorney struck off the rolls in another court, should shew the ground on which he was struck off. The application should also be for a rule to shew cause, and should not be made on the last day of term. *In re Tremayne*, 14 C. P. 257.

Procuring Money to Influence Jury.]—It was charged against T., a solicitor, that one W., being about to be tried for a criminal offence, was induced by T., as her solicitor, to pay him $200 for the purpose of influencing the jury. The court, upon the facts stated in the report, being satisfied that the charge was proved, an order was made striking him off the rolls. The petitioner having made a prima facie case, and being unable from want of means to proceed with the application, a solicitor was appointed by the court to take the matter up. *Re Titus*, 5 O. R. 87.

(g) *For Other Misconduct—Other Proceedings.*

Censure—*Defeating Attaching Order.*]—An attorney, knowing the issue of an attaching order, advising his client how to defeat it, censured. *Carr* v. *Baycroft*, 4 L. J. 209.

Injunction — *Mortgage — Execution — Costs.*]—The solicitor of a mortgagee in a suit of foreclosure, after a decree of absolute foreclosure, purchased the mortgagor's interest in the premises; the decree so pronounced was subsequently set aside, and a decree nisi directed to be drawn up directing, inter alia, a sale of the mortgaged premises, and that all judgment creditors should be served with the decree and made parties to the suit; notwithstanding this, however, the solicitor, who was also a judgment creditor of the mortgagee, proceeded upon his judgment and was about to sell the mortgaged premises under execution. The court, upon a motion made in the cause, restrained the solicitor from proceeding with

his execution, and ordered him to pay the costs of the application. *Goodwin* v. *Williams*, 5 Gr. 178.

Investigation of Conduct—*Suspicion.*]—The court will sua sponte, where the circumstances appear to warrant it, take notice of the conduct of solicitors, and investigate matters in which their acts seem open to suspicion. *In re Toms, In re Cameron*, 3 Ch. Ch. 204. See *In re Solicitor*, 27 Gr. 77, *post* (h).

Order for Costs—*Bond.*]—The court refused to order an attorney to pay the costs of a suit on a bond to the limits, where he had signed the name of one of the obligors, and executed the bond on his behalf, on a mere parol authority. *Leonard* v. *Glendennan*, Dra. 232.

Striking out Plea — *Statute of Limitations.*]—Semble, that the court may prevent an attorney pleading the Statute of Limitations to defeat a client's just claim; but not his executors. *Dougall* v. *Cline*, 6 U. C. R. 546.

Suit in Equity — *Decree for Payment—Costs—Fraudulent Conduct.*]—The plaintiff, being owner of land, after having created a mortgage thereon, emigrated to Australia, and subsequently remitted money to his agents in this country with which to pay off the incumbrance; but, instead of doing so, they applied the money to their own use. Subsequently the holder of the mortgage, to whom it had been assigned, instituted proceedings in this court to foreclose, to which suit an answer was put in on behalf of the plaintiff, but without his knowledge or consent, admitting the allegations of the bill, and that the full amount of principal and interest was due; whereupon a final order of foreclosure was, in due course, obtained, and the plaintiff in that suit conveyed to the defendant A., for the consideration of $1,002, the value of the property; and on the same day the defendants M. & S., as attorneys of the plaintiff, conveyed the premises to A., who was ignorant of any fraudulent practices in the matter. The plaintiff, having returned to this country, and ascertained the frauds which had been practised upon him, filed a bill against his agents and the purchaser, A.:—Held, that the plaintiff, so far as the purchaser was concerned, was bound by the statement in his answer, and was not entitled to relief as against him; that the fact of the purchaser having heard before his purchase that the plaintiff had remitted money to pay the mortgage was not sufficient to charge him with notice that the foreclosure was wrongful; but, in view of the fraudulent conduct of the attorneys, the court made a decree against them for the amount realized on the sale of the land, and directed them to pay the costs of the suit, including the costs of the purchaser. *McLean* v. *Grant*, 20 Gr. 76.

Suspension by Bar Council—*Engaging in Trade and Commerce—Retaining Money of Client — Discipline — Inquiry — Procedure —Prohibition.*]—See *Honan* v. *Bar of Montreal*, 30 S. C. R. 1.

See Corbett v. *Wallbridge*, 2 C. L. J. 331; *Hands* v. *Law Society of Upper Canada*, 16 O. R. 625, 17 O. R. 300, 17 A. R. 41.

See ante VI. 1 (a).

(h) *Rule to Answer Affidavits.*

Absence of Retainer—*Application for Account.*] — Upon an application to compel attorneys to deliver a bill for payments and charges in relation to a certain lot of land, and to answer the affidavits filed in support of the rule, it appeared that there was no retainer of the attorneys, or either of them, as such:—Held, that the court, therefore, could not grant the first part of the rule; and that courts will not call upon attorneys to answer affidavits upon an application such as this, the course to be pursued being to dispose of that which relates to the suit, and then, if the circumstances warrant it, to move to strike the attorney off the roll. The rule was therefore discharged. *In re Keys and Smith*, 13 C. P. 262.

Evidence as to Relationship—*Misconduct—Delay—Preference — Costs.*]—On an application against an attorney to answer the matters in affidavits, the court, upon the affidavits, was not satisfied that the relation of attorney and client ever subsisted between the attorney and the applicants, though he had acted as attorney for a firm of which one of them was a member, nor that there was such professional misconduct as to require further action; there had been also a long delay in making the application, which was not satisfactorily accounted for; and the rule, therefore, was discharged. It appeared, however, that while acting as attorney for the assignee in insolvency of the firm, he had attempted as a creditor of the firm to secure a preference for himself. Such conduct was strongly censured, and the rule under the circumstances discharged without costs. The authorities and practice as to such applications reviewed. *In re Attorney*, 39 U. C. R. 171.

Order of Court ex Mero Motu.]—Where at the hearing matters are brought to the notice of the court which affect the character of one of the parties, a solicitor, the court will, of its own motion, and without being applied to by any other party, call upon such solicitor to shew cause why he should not be called upon to answer these matters. *In re Solicitor*, 27 Gr. 77. See *In re Toms, In re Cameron*, 3 Ch. Ch. 204, *ante* (g).

Untrue Statements — *Disbursements.*]—The attorney in this case was called upon to answer affidavits charging him with untrue statements as to disbursements for payments to and procuring money for witnesses. The court, under the special circumstances stated in the case, discharged the rule, but ordered the attorney to pay the plaintiff's costs of the application. *In re S., In re McLean* v. *Campbell*, 14 C. P. 323.

(i) *To Enforce Undertaking.*

Next Friend — *Costs—Affidavits.*] — A party alleged that he was induced by the plaintiff's solicitor to allow his name to be used as "next friend," on the assurance that he would not be rendered liable to costs. This the solicitor denied. It was considered that such a fact could not be established by ex parte affidavits. *Burgess* v. *Muma*, 2 Ch. Ch. 43.

Non-professional Capacity — *Surety—Indemnity.*]—The court will not summarily compel a solicitor to perform an agreement

or undertaking, merely because he is a solicitor; if it was not given by him in his professional connection with the suit or matter, the party to whom it is given will be left to his action. Where M., a solicitor, unsuccessfully prosecuted a petition against the applicant at his own expense, in the name of one H., agreeing to indemnify H. against costs, M.'s interest being merely as surety on a bond for H., a summary application to make M. pay the costs of the petition was refused. *Wilson* v. *Beatty, Re Donovan and Morphy*, 12 A. R. 252.

Stay of Action.]—Where a declaration in ejectment had been served on a wrong party, and the plaintiff's attorney wrote to the attorney of the person who ought to have been served, that if he would go to trial no action for mesne profits should be brought against his client, if the plaintiff should be successful—the court stayed such an action afterwards brought by the attorney, and ordered the attorney to pay the costs. *Stephenson* v. *McCombe*, 1 U. C. R. 456.

See In re Attorney, 8 P. R. 102; *In re Harrison* v. *A. & B.*, 8 L. J. 91.

5. *Other Cases.*

Action by Bailiff's Assistant—*Indemnity.*]—The attorney for an execution creditor, who indemnified the bailiff who executed the fi. fa., is not responsible over to an assistant whom the bailiff employed, for damages recovered against such assistant by a person who claimed the goods seized. *Eadus* v. *Dougall*, 14 C. P. 452.

Action by Client—*Amount Received—Set-off—Malicious Arrest.*]—A plaintiff's attorney, acting as plaintiff's agent, and arresting a defendant on his own affidavit, on a verdict being rendered against him for a malicious arrest, cannot deduct the amount of the verdict against himself from the amount received by him from the plaintiff. *In re Boulton, Renaud* v. *Brown*, 1 P. R. 68.

——— *Defence—Fraud.*]—It is no defence in an action against an attorney for money received by him on account of his client, that the judgment on which the money was paid was obtained through fraud of such client. *Williams* v. *King*, E. T. 1 Wm. IV.

——— *Erroneous Opinion.*]—An attorney is not responsible as for a fraudulent breach of duty, for an erroneous opinion on a will. *Alexander* v. *Small*, 2 U. C. R. 298.

Action by Executors of Client — *Defence.*]—One W., suing in his individual capacity, obtained a judgment against M., and the defendant (his attorney) after W.'s death received the money. W. was the administrator of A., and this judgment was for rent of A.'s land. W.'s executors having sued defendant for the money so received, persons interested in A.'s estate notified him not to pay:—Held, that, having received the money as W.'s attorney, he could not resist payment to his executors. *Charteris* v. *Miller*, 14 U. C. R. 62.

Action by Judgment Debtor — *Excess.*]—Held, that the second count of the declaration, charging defendants, as attorneys, with having entered judgment and levied on plaintiff for the full amount of a claim, without deducting a payment made, and the third count, charging a levy on other goods after enough had been seized, were both good in substance. *Reid* v. *Ball*, 15 U. C. R. 568.

Bill of Complaint — *Creditors—Preference—Sale — Administration — Lien — Petition—Intituling.*]—W. C., having filed a bill to administer the estate of his father, obtained an injunction enjoining several judgment creditors who had placed executions against lands of the deceased in the hands of the sheriff, from proceeding thereon until a decree for administering the estate could be obtained. After this, W. C., by the advice of his solicitor, sold part of the estate, and the greater portion of the purchase money was retained by the solicitor, upon which he claimed to have a lien for his costs. A decree was afterwards obtained in the cause, making the injunction perpetual, after which the solicitor advised the conveyance of a large portion of the estate to his (the solicitor's) partner, upon certain trusts, whereby the eldest judgment creditor was entirely excluded from all benefit. The agent of the solicitor advised a conveyance of another portion of the estate to one of the creditors, and obtained from this creditor a power of attorney to sell, under which he contracted to sell several portions of the lands so conveyed and received moneys on account thereof, which he had also applied to his own use, with the exception of certain parts paid to his client. One of the defendants, upon these facts, filed a petition under the 163rd order, praying that it might be referred to the master to inquire and report if the sales had been beneficial to the estate; and if the master should be of that opinion, then that the proper parties might be ordered to pay the amounts received into court:—Held, that the proper order to make would be for a reference to inquire and report; and if the sales were adopted, then that the money remaining in the hands of the solicitors should be forthwith paid in, without prejudice to the creditor's rights to get rid of the contracts. Held, also, that, had the petition given notice to the parties that that relief would be asked, sufficient appeared on the affidavits to warrant the court in making an order for immediate payment, pending the inquiry before the master, and that the solicitors could not claim any lien for costs. Held, also, that sufficient was not shewn to enable the court to pronounce any judgment as to the liability of the principal for the acts of his agent. The affidavits and petition were intituled in the cause, omitting any mention of the solicitors:—Held, that the intituling was sufficient. Semble, that where from the nature of the facts upon which a petition to the court is founded, they cannot be sworn to, it is not sufficient to make use of the short form given in the 163rd order, but that such facts should be stated in the petition, so that the respondents may be made aware to what extent and on what grounds relief is sought against them. *Crooks* v. *Crooks*, 1 Gr. 57.

——— *Demand of Plea—Judgment—Irregularity—Motion—Time.*]—A demand of plea in an action against an attorney must still be served in term, or within four days afterwards, notwithstanding the 10th of the new rules, and he cannot be compelled to plead in vacation to a bill and a demand of plea served in the same vacation. But while a bill and demand of

plea were served in vacation, and interlocutory judgment was signed and notice of assessment given on 21st September for the assizes to be held on the 10th October, and the attorney did not move in chambers against the proceedings, but gave notice of his intention to move in court in the following term on the 11th October, and moved accordingly, it was held that his application was too late, and his rule was discharged. *Haigh* v. *Boulton*, 1 U. C. R. 340.

——— *Irregularity.*] — Where a bill had been filed against an attorney in the office of an outer district, and proceedings had thereupon to verdict and judgment, the court refused to set them aside for irregularity. *Mitchell* v. *Tenbrook*, Tay, 168.

——— *Irregularity—Costs.*]—When all the proceedings against an attorney subsequent to filing the bill had been set aside, and the plaintiff afterwards proceeded without serving a copy of the bill anew, the court set aside the subsequent proceedings for irregularity, but without costs, thinking the objection had little merit in it. *Fraser* v. *Boulton*, 3 O. S. 19.

——— *Time to Plead.*]—Where a bill was filed against an attorney in vacation, he had four days in the next term to plead. *Macanady* v. *Foster*, Dra. 479.

Costs — *Opposite Party—Undertaking.*]—An attorney will not be ordered to pay costs due by his client to the opposite party, unless he has positively engaged to do so. *Ross* v. *Calder*, 3 U. C. R. 180.

District Court—*Issue.*]—Under 8 Vict. c. 13, s. 51, a writ may go to a district court to try an issue in which an attorney is a defendant. *Martin* v. *Gwynne*, 5 U. C. R. 245.

Penalty — *Action for—Conviction.*]—To subject a person to the penalty of 22 Geo. II. c. 46, for suing out process, &c., the attorney allowing his name to be used must first be convicted. *Rex* v. *Bidwell*, Tay. 487.

Solicitor's Clerk—*Counsel Fees.*]—H., a barrister and attorney, agreed with D., an attorney, to render D. his services at D.'s office, without confining himself to any particular branch of the business, at a weekly salary. During such employment he acted as counsel at the hearing of two chancery suits, and in a common law suit, and some arbitrations, and after his employment had been terminated by D. he sued him for the counsel fees in these matters:—Held, that D. was not liable, the presumption being that the services sued for were performed under H.'s employment. *Gordon* v. *Adams*, 43 U. C. R. 203.

——— *Notice of Trial.*]—A managing clerk in an office has power to bind his principal by accepting a notice of trial as of an earlier date than it was actually delivered, unless the principal promptly repudiate the acceptance, and give notice thereof to the opposite party. *Orr* v. *Stabback*, T. T. 3 & 4 Vict.

XI. Retainer.

Absence of.]—See *ante* IV. 1.

Appointment by Court — *Class Suit—Liability—Ratification.*]—During a reference in an administration suit the master appointed the solicitor for one of the unsecured creditors of the estate in question to represent the general body of unsecured creditors. The Imperial Bank were unsecured creditors of the estate; they sent in a claim to the administrator in answer to the statutory advertisement for creditors, but did not prove their claim before the master. The nomination of the one solicitor for the unsecured creditors was an ex parte proceeding, of which the bank were not notified till a year afterwards:—Held, that, in the absence of contract or of an order of the master made under conditions contemplated by G. O. 218, the solicitor could not recover from the Imperial Bank any portion of the costs incurred on behalf of the unsecured creditors. Held, also, that the doctrine of ratification by silence or inaction did not apply to a case like this. Hall v. Laver, 1 Ha. 571, followed. *Re Monteith, Merchants Bank* v. *Monteith*, 12 P. R. 288.

——— *Winding-up.*] — It is preferable to have the proceedings under an order for winding up a company under 45 Vict. c. 23 (D.), conducted by solicitors who are totally unconnected with the company to be wound up. *Re Joseph Hall Mfg. Co.*, 10 P. R. 485.

In a proceeding for the winding-up of a company, a solicitor who is acting for claimants whose claims must be contested by the liquidators, cannot obtain the sanction of the court to his acting also as solicitor for the liquidators. Nor will the court sanction the appointment of a special solicitor to act for the liquidators in the matter of the contested claim. The winding-up must be prosecuted by one disinterested solicitor, whose services will not be divided by the assertion of antagonistic claims. *Re Stark Co.*, 15 P. R. 471. See, also, *Re Drury Nickel Co.*, 16 P. R. 525.

By Assignee in Insolvency — *Personal Liability—Evidence.*]—The defendant's testator was a sheriff and official assignee under the Insolvent Act of 1875. The plaintiff was solicitor for the City Bank, and also for one B., upon whose petition one G. F. was placed in insolvency. The official assignee became creditors' assignee. At the first meeting of creditors, B. being chairman, the plaintiff, representing the City Bank, whose claim amounted to nearly the whole indebtedness, moved a resolution to sell certain goods of the insolvent, that the assignee should take the necessary proceedings to realize the assets, and recover certain property alleged to belong to the insolvent, and for that purpose to retain counsel, if necessary. B. became inspector of the estate, and consulted with the plaintiff, and on his advice instructed the assignee to defend and bring actions. The assignee was obliged to pay costs and damages in an action brought against him to recover goods wrongfully taken by him; and he also paid the plaintiff some costs, whereby the assets of the estate were exhausted, and a small sum in addition paid by the assignee out of his own funds. The defendant's testator was subsequently removed from the office of assignee, and a new assignee appointed, whereupon he presented a petition to the insolvent court, in which he alleged that he had retained the plaintiff, and had been put to great expense in bringing and defending suits as assignee, and had become liable to pay large sums of money in respect thereof, and prayed payment by the new assignee, which was refused. The plaintiff delivered his bills to the defendant's testator in

his lifetime. After the death of the testator the plaintiff wrote a letter to one of his sons about the costs, in which, in relating the facts, he stated that he was attorney for the bank. The plaintiff now sued the personal representative for his unpaid costs of the proceedings carried on by him. The trial Judge found that the retainer was not a personal one by the assignee, but that the plaintiff had acted for the benefit of the creditors, and was in fact their solicitor:—Held, affirming the judgment, that it was a question to be determined on the evidence whether the retainer was a personal one by the assignee, or whether he was acting merely on the instructions of creditors; that upon the evidence the plaintiff was solicitor for the creditors and not for the assignee personally; and, notwithstanding the admission contained in the assignee's petition, he had not incurred any personal liability for the costs. *Butterfield* v. *Wells*, 4 O. R. 168.

By Company—*Authority of Manager.*]—The general manager of a company had authority to do acts which occasionally required legal advice:—Held, that he had implied authority to retain a solicitor whenever, in his judgment, it was prudent to do so, but that such authority ceased on the suspension of the company. *Clarke* v. *Union Fire Ins. Co., Caston's Case*, 10 P. R. 339.

——— *Necessity for Seal.*]—Where the directors of a company have power to appoint officers and agents and dismiss them at pleasure:—Held, that their appointment of a solicitor need not be under the corporate seal. *Clarke* v. *Union Fire Ins. Co., Caston's Case*, 10 P. R. 339.

By Corporation — *Necessity for Seal—School Board — Resolution — Good Faith—Costs.*]—See *Barrie Public School Board* v. *Town of Barrie*, 19 P. R. 33.

Joint or Several Retainer—*Severance of Defence—Apportionment of Costs.*]—Notwithstanding that the retainer of a solicitor by two persons is in form a joint one, the court will look into the facts of the case to discover the real nature of the transaction, and will determine the rights of the solicitor and clients accordingly; such a retainer does not necessarily make the persons signing it joint debtors to the solicitor to whom it was given, but may be taken distributively. And, upon the facts of this case, the client whom the solicitor sought to charge with the whole costs of the defence to an action conducted up to a certain stage jointly on behalf of this client and another, two of the defendants in the action, and afterwards on behalf of this client alone, and by a new solicitor on behalf of the other, was held liable for only one-half of the joint costs during the time that the two clients were represented by the same solicitor, but thereafter for the whole of the costs reasonably and properly incurred by such solicitor. *Re Cameron and Lee*, 18 P. R. 176.

Partnership — *Death of Partner—Continuation.*]—If a firm, consisting of two or more partners, are retained, and one die, it will be assumed that the retainer continues to the surviving partner or partners. *Alchin* v. *Buffalo and Lake Huron R. W. Co.*, 2 Ch. Ch. 45; *Dougall* v. *Ockerman*, 9 U. C. R. 354.

Sufficiency — *Evidence.*]—Held, that the evidence of defendant's retainer, set out in the report of this case, was clearly sufficient. *Herr* v. *Toms*, 32 U. C. R. 423.

Termination of—*Discontinuance — New Action.*]—Where a solicitor had instructions to defend a suit, which was discontinued and a new one for the same cause of action was commenced:—Held, that the original retainer to defend continued in the new suit. *Clarke* v. *Union Fire Ins. Co., Caston's Case*, 10 P. R. 339.

——— *Judgment — Subsequent Proceedings.*]—It is no part of an attorney's duty, under the ordinary retainer, to issue an execution and collect the money; his authority ceases with the judgment. Where, therefore, the plaintiff laid as a breach of the defendant's undertaking to prosecute an action, &c., that he delayed to issue execution, without averring any special retainer to do so:—Held, declaration bad on general demurrer. *Searson* v. *Small*, 5 U. C. R. 259.

Under the ordinary retainer to collect a debt, an attorney is not bound to re-register the judgment which has been obtained by him and put on record:—Held, that the evidence in this case shewed no special retainer for that purpose. Semble, that the common retainer imposes no duty to pursue any collateral remedies, such as to register the judgment in the first instance, or to examine the defendant, or to attach debts due to him. *Darling* v. *Weller*, 22 U. C. R. 363.

A solicitor retained to collect a debt is not entitled to interplead without a further retainer for that purpose, but being so retained he has the ordinary rights of solicitors as in other contested cases. *Hackett* v. *Bible*, 12 P. R. 482.

A retainer to prosecute an action does not terminate when the judgment is obtained, but makes it the duty of the attorney or solicitor, without further instruction, to proceed after judgment and endeavour to obtain the fruits of the recovery, including the making it by registration a charge on the lands of the judgment debtor. *Hett* v. *Pun Pong*, 18 S. C. R. 290.

See Re Kerr, Akers, and Bull, 29 Gr. 188; *Millar* v. *Cline, Re Millar*, 12 P. R. 155; *Re Fraser*, 13 P. R. 409.

XII. Miscellaneous Cases.

Absconding Debtor—*Property in Hands of Solicitor—Delivery to Sheriff.*]—See *Buntin* v. *Williams*, 16 P. R. 43.

Arbitrator — *Solicitor Acting as—Interest.*]—See *Township of Burford* v. *Chambers*, 25 O. R. 663.

Deposit of Client's Money by Solicitor to his Own Credit — *Liability of Bank.*]—See *Bailey* v. *Jellett*, 9 A. R. 187.

Employer's Liability Policy—*Condition as to Employment of Solicitor.*]—See *Wythe* v. *Manufacturers' Accident Ins. Co.*, 26 O. R. 153.

Fraud — *Assignment of Mortgage—Liability.*]—The plaintiff, for the purpose of raising a portion of the purchase money on a contemplated purchase of property, mortgaged lands then owned by him to the defendant C.,

the money being received by a solicitor who acted for both parties. The purchase not having been carried out, the plaintiff desired to have the mortgage discharged, whereupon the solicitor, who had misappropriated the moneys, paid the mortgagee and fraudulently procured from her an assignment of the mortgage to himself, which he assigned to the defendant P., who advanced the money thereon in good faith and without any knowledge of the fraud:—Held, that the plaintiff was entitled to a reconveyance of the property released from the mortgage, and that the loss must be sustained by the defendant P., who took nothing under the assignment to him, for, the mortgage being paid off, the solicitor acquired no beneficial interest, being at most but a trustee of the legal estate, and could pass no better title to his assignee. *McCormick* v. *Cockburn*, 31 O. R. 436.

——— *Limitation of Actions — Trustee Limitation Act.*]—Executors, relying in good faith on the statement of their testator's solicitor that he had in his hands securities sufficient to answer a fund which they were directed by the will to invest for an annuitant, distributed the estate. Subsequently it was found that before the testator's death the solicitor had misappropriated the money given to him by the testator to invest, and had, in fact, at the time of the representation, no securities or money in his hands:—Held, that the executors were protected by the Trustee Limitation Act, R. S. O. 1897 c. 129, s. 32. Held, also, that payments made from time to time by the solicitor to the annuitant, ostensibly as of interest received by him from the fund, did not keep alive the right of action against the executors. Judgment in 30 O. R. 532 reversed. *Clark* v. *Bellamy*, 27 A. R. 435.

Judgment Debtor—*Examination of Solicitor as Transferee — Employee.*]—The solicitor of a judgment debtor who had absconded transferred property of the judgment debtor to a purchaser under a power of attorney, and received the consideration money, $4,000:—Held, that the solicitor was a person to whom a transfer of the debtor's property and effects to the extent of $4,000 had been made, for the possession of that sum had been transferred to him by the debtor, and the solicitor was liable to examination under 49 Vict. c. 16, s. 12 (O.) The solicitor was also an employee of the judgment debtor within the meaning of the section. *Gowans* v. *Barnet*, 12 P. R. 330.

Knowledge of Solicitor — *How Far Binding on Client.*]—See *Real Estate Investment Co.* v. *Metropolitan Building Society*, 3 O. R. 476; *Brown* v. *Sweet*, 7 A. R. 725; *Johnston* v. *Johnston*, 9 P. R. 259.

——— *Insolvency—Fraudulent Preferences —Chattel Mortgage—Advances of Money.*]—See *Burns* v. *Wilson*, 28 S. C. R. 207; *Gibbons* v. *Wilson*, 17 A. R. 1.

Letters Written by—*Admissibility of.*] — See *McBride* v. *Hamilton Provident and Loan Society*, 29 O. R. 161.

Partnership — *Promissory Note — Firm Name—Mutual Authority.*] — In an action against B. & S., a firm of solicitors, on promissory notes indorsed by B. in the name of the firm, it was proved that on other occasions S. had indorsed in the same manner, and, as the witness believed, with B.'s knowledge, but it did not appear what the consideration was for the indorsements sued on, or that S. knew of them:—Held, sufficient evidence to go to the jury of a mutual authority; and a verdict having been found for the plaintiff, the court refused to interfere. *Workman* v. *McKinstry*, 21 U. C. R. 622.

The plaintiff, knowing that the defendants were a firm of solicitors, advanced to one A. money upon a joint note signed by him and by one of the defendants in the firm's name, without the knowledge or consent of his partner. No usage or general mutual authority to sign notes in the name of the firm was proved, and it was admitted that the plaintiff had no knowledge of the transactions relied upon to shew such authority:—Held, that the plaintiff could not recover against both defendants, but that the defendant who signed the note was liable. *Wilson* v. *Brown*, 6 A. R. 411.

Payment into Court—*Deposit—Default —Effect of.*]—Where the plaintiff's solicitor made default in payment into court of the ten per cent. paid to him at the time of sale, under the conditions of sale:—Held, that the other parties entitled to the purchase money should not suffer thereby, but that the plaintiff's share should be charged with the deficiency. *Mulkins* v. *Clarke*, 11 P. R. 350.

Scrivener's Business.]—Semble, that in this Province the business which is called "scrivener's business" is part of the ordinary business of a solicitor. *Thompson* v. *Robinson*, 15 O. R. 662.

Service of Papers — *Districts.*] — The rules of court of Michaelmas Term, 4 Geo. IV., respecting the service of pleadings and papers in a cause on an attorney residing out of the district in which the action is brought, apply equally to all districts, and to the attorneys for both parties in the cause. *Clemow* v. *Her Majesty's Ordnance*, 5 U. C. R. 458.

Slander of Title—*Liability of Solicitor for.*]—See *Ontario Industrial Loan and Investment Co.* v. *Lindsey*, 4 O. R. 473, 3 O. R. 66.

Surety.]—A practising attorney may be a surety in an election petition. *Re Hamilton Election*, 10 C. L. J. 170.

The rule that a solicitor for a party will not be accepted by the court as a bondsman for such party is still in force. The rule was applied to the case of the committee of the person and estate of a lunatic giving a bond for the due performance of her duties as such committee and offering her two solicitors as sureties. *Re Gibson*, 13 P. R. 359.

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I. Generally.

Discretion—*Conduct.*] — The exercise of the jurisdiction to order specific performance of a contract is a matter of judicial discretion, to be governed, as far as possible, by fixed rules and principles, but more elastic than in the administration of other judicial remedies. In the exercise of the remedy much regard is shewn to the conduct of the person seeking relief. *Harris* v. *Robinson*, 21 S. C. R. 390.

Executory Agreement — *Execution in Part.*] — According to the principles upon which a court of equity acts in enforcing such contracts and agreements as are properly the subject of its jurisdiction, it will always execute the whole or such parts of the agreement as remain executory; but, if the parties have before action carried out any of the terms of the contract, such executed portions will not be disturbed. *Peck* v. *Powell*, 11 S. C. R. 494.

Good Faith—*Nature of Bargain.*] — The court must see its way clearly before decreeing specific performance, and it must be satisfied of the integrity and good faith of the parties seeking its special interference. Where incapacity and inadequacy go hand in hand, the court may refuse to enforce a contract, although the purchaser was guilty of no greater fault than making a hard and unconscientious bargain. *Gough* v. *Bench*, 6 O. R. 699.

New Rights—*Construction of Contract.*] —The court, in adapting itself to the exigencies of mankind as they arise, will deal with new subjects so as best to effectuate the intentions of the parties, and will not allow rules and principles applicable to a different state of circumstances, to interfere with the exercise of its jurisdiction when it can be usefully exercised; and where money has been expended upon the faith of an agreement, which otherwise the court might not have enforced, it will not entertain objections to the form of the contract when it can execute it, and in doing so will construe the agreement liberally. *Ledyard* v. *McLean*, 10 Gr. 139.

Oral Agreement — *Executed Consideration.*]—The court will enforce an oral agreement, although it is to do an act which is not to be performed within a year from the time of making the agreement, where the consideration therefor has been executed. *Halleran* v. *Moon*, 28 Gr. 319.

Origin of Action — *Discretion* — *Conduct.*] — The origin both of the action for specific performance and of the action for relief against re-entry for non-payment of rent is in the equitable jurisdiction of the court; the compelling performance in the one and the granting relief in the other is in the judicial discretion of the court; and in each the court has regard to the conduct of the party seeking to compel such performance or to obtain such relief. *Coventry* v. *McLean*, 22 O. R. 1.

Pleading.]—"Not guilty by statute" cannot be pleaded to an action for specific performance of a contract; and the defence of "not guilty" irrespective of statutory authority is not admissible under the Judicature Act. *Town of Peterborough* v. *Midland R. W. Co.*, 12 P. R. 127.

II. Agreements between Lessor and Lessee.

1. *Agreement for a Lease.*

Injury to Property—*Reason for Non-performance.*]—An agreement by letter was entered into to take a lease for years of a house, and that the rent agreed upon should be increased according to the amount which might be expended by the owner in improvements. The party entered into possession, and paid rent according to the stipulations in the letters. The municipal authorities afterwards constructed a bridge near the property, which the tenant asserted injuriously affected his occupation:—Held, notwithstanding, that defendant was bound to accept a lease in the terms agreed upon. *Dennison* v. *Kennedy*, 7 Gr. 342.

Purchase with Notice — *Ejectment* — *Performance of Services.*] — Where, under a parol agreement for a lease made between defendant and plaintiff for ten years, on the terms of the plaintiff clearing or paying a rental either in clearing or in money, the plaintiff entered into possession, and after he had cleared a certain number of acres defendant sold the lot, and the purchaser ejected the plaintiff:—Held, that the plaintiff could not recover under the agreement, not being in writing; nor under the common counts for the value of his services, for the clearing of the land was not the primary service for which the lease was, after the performance of the work, to be given as a mode of compensation; but the lease was the primary thing contracted for, and the work was reserved as a rent from year to year. Semble, that the plaintiff's remedy, if any, was by suit for specific performance of the agreement against the purchaser, who had purchased with notice of the plaintiff being in possession. *Draper* v. *Holborn*, 24 C. P. 122.

Res Judicata—*Injunction—Cross-suit.*]—An agreement for a lease provided for the building of a barn by the tenant. The assignee of the owner, considering that a barn which the tenant had begun was not such as the agreement required, filed a bill for an injunction, and for specific performance of the agreement, generally. The answer insisted that the barn was such as defendant undertook to build. The court, being of opinion that the injunction was the real object of the suit, and that the plaintiff was not entitled to an injunction, dismissed the bill:—Held, that this decree was no bar to a subsequent suit by the tenant for a specific performance of the agreement for a lease. *Simmons* v. *Campbell*, 17 Gr. 612.

Reservation—*Notice.*]—The owner of an oil well lot, on which was also situate a blacksmith's shop, which was known not to be the property of the owner of the land, agreed to lease the oil well and lot for a term of years without any express reservation of the blacksmith's shop. The intended lessee insisted on obtaining a lease without such reservation, but his bill for that purpose was dismissed with costs. *Morris* v. *Kemp*, 13 Gr. 487.

Short Term — *Remedy at Law.*] — The court will not entertain a bill for specific performance of a contract for a lease of real estate for a year; and where a tenant in

possession contracted to assign his possession, and with it his right to a renewal of his term for a year, the court refused specific performance, the remedy at law being sufficient. *Mara* v. *Fitzgerald*, 19 Gr. 52.

Trustees—*Notice.*]—Where two of four trustees agreed for the lease of certain property to the plaintiff, but without the knowledge of the other two, to whom notice of the agreement could not be imputed, specific performance was refused. *McKelvey* v. *Rourke*, 15 Gr. 380.

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2. *Lease with Right of Purchase.*

Condition Precedent — *Performance of Terms.*]—Where, by the terms of a covenant to sell, the option to purchase is entirely with the covenantee upon certain specified terms, the contract rests upon a wholly different footing from an ordinary contract for sale and purchase of land; and the party entitled to the option must shew that he has performed all the terms, upon which alone he is entitled to exercise that option. A lessee with a right of purchase neglected to pay the rent and perform the conditions specified, and his landlord wrote stating that the lease was void, and offering him other terms. Twenty months after such letter the lessee filed a bill to enforce the contract in the lease, or for a conveyance on the terms set forth in the letter, which the tenant alleged he had accepted, but the evidence wholly failed to establish that fact. The court dismissed the bill with costs. *Forbes* v. *Connolly*, 5 Gr. 657.

——— *Performance of Terms — Notice — Cross-action — Covenant.*] — The owner of vacant land leased part of it for nine months at a nominal rent. The lessees covenanted to sink, during the term, a test well to the depth of 1,000 feet, for oil; and it was provided that at any time during the term the lessees should have the option of purchasing, and the lessor should convey to them, on request, any five acres of the demised land at $12 a lot; and that at the end of the term they might purchase the residue at the same price. The machinery broke after they had reached a depth of 530 feet, and they were in consequence unable to complete the well during the term, though they expended as much as, but for the accident, the well would have cost to complete; and the work had enabled the lessor to sell a large number of his other village lots at advanced prices. There was no charge of any want of good faith or diligence or skill on the part of the lessees. They gave notice, before the end of the term, that they would take the five acres:—Held, that the lessees were entitled to a specific performance of the covenant as to the five acres, notwithstanding the non-completion of the well to the stipulated depth; without prejudice to any action by the lessor on the covenant. *Hunt* v. *Spencer*, 13 Gr. 225.

Construction of Agreement—*Absolute or Conditional Right.*]—A lease contained an agreement that "the said lessor hereby agrees to give to the said lessee the first privilege of purchasing the said premises at any time within four years from the date hereof, at the price of $1,000, payable in five yearly instalments:"—Held, that there was an absolute agreement to sell, which the lessee had a right to enforce at any time within the period named, and not a qualified agreement to sell on the terms mentioned, only in case the lessor desired to sell. *Casey* v. *Hanlon*, 22 Gr. 445.

Laches — *Tender.*] — A lease was made, with a right to purchase at a price fixed, being such a sum as the rent reserved would form the interest of. The lessee paid no principal or interest, abandoned the possession, and left for the United States, and the lessor, being unable to ascertain the lessee's residence so as to put an end to the contract, obtained possession by writ of hab. fac. poss. in ejectment brought upon a vacant possession. The lessee, after a third instalment of interest fell due, caused a tender to be made of it, which was refused, and about a year afterwards filed a bill to enforce specific performance of the contract. The laches of the plaintiff was held such as to disentitle him to relief, and the bill was dismissed with costs. *Young* v. *Bown*, 6 Gr. 402.

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3. *Other Cases.*

Covenant to Build—*Selection of Site—Injunction.*]—A lease provided that the lessee (defendant) should erect a barn of certain specified dimensions, but was silent as to the exact location or site of the barn. The lessee commenced to erect a barn on a site with which the lessor was dissatisfied, and thereupon filed a bill, alleging that such a site was unsuitable, and that it had been selected by defendant from improper motives; that another site had been agreed on between them; and that the building itself was faulty in its construction; and prayed an injunction against allowing the barn to remain in its present position; and by amendment sought to enforce specific performance. The evidence failed to establish the material allegations of the original bill:—Held, that by the terms of the lease the plaintiff had not the right of selecting the site of the barn; that it was not a proper case for specific performance, or to award damages in lieu thereof, but that the plaintiff must be left to his remedy at law. *Campbell* v. *Simmons*, 15 Gr. 506; *Simmons* v. *Campbell*, 17 Gr. 612.

Lease on Faith of Oral Agreement—*Right of Entry — Injunction.*]—Declaration, for breaking and entering the plaintiff's close, and cutting and carrying away the grain. Equitable plea, that the plaintiff held the land under an indenture of lease from defendant, on the negotiation for and execution of which it was orally agreed between them, and the true agreement was, that defendant should have the right to enter and harvest the crop then in the ground sowed by him; that when the lease was executed, a reservation of such right in it was suggested, but omitted on the plaintiff's assurance that it was unnecessary, as the agreement between them was well understood, and defendant would be allowed to take the crop: and that the entry, &c., in pursuance of such agreement, is the trespass complained of: — Held, plea good, for the independent oral agreement made in consideration of defendant signing the lease was good as an agreement, though defendant, by s. 4 of the Statute of Frauds, might be prevented from suing on it; and, as equity in such a case would decree specific performance, there was ground for a perpetual injunction against this action. Quære, whether

the plea was not also a justification at law, as under an agreement which was valid to protect the defendant, though he could not have enforced it by action. *McGinness* v. *Kennedy*, 29 U. C. R. 93.

Lease with Right of Renewal.] — Where the lessor covenants for a renewal of the term, or in default for payment of improvements, the option rests with the lessor either to renew or pay for the improvements; and the lessee cannot compel a specific performance of the contract to renew. *Hutchinson* v. *Boulton*, 3 Gr. 391.

III. Agreements for Easements.

Right of Way — *Perpetuity—Consideration—Evidence.*]—An agreement to grant an easement will not necessarily be for an easement in perpetuity. Specific performance of an agreement to grant an easement may be enforced in equity. An oral agreement was entered into between the owners of two adjoining half lots, that each should give a strip of equal width from his land for a lane from the public highway to the clearing which they should make upon their respective lots, the agreement not being expressly limited as to time. A rail fence accordingly was built by each on their respective sides of the lane, which they used in common for fifteen years, until the death of one of the parties. Upon a bill filed to restrain the defendant from closing up the portion of the lane situate on his land, it was proved that the greatest part of the lane was on defendant's land; and that there had been no expenditure on the plaintiff's land, or on the lane, upon the faith of this agreement:—Held, reversing the decree in 24 Gr. 573, that specific performance could not be enforced, as the site of the fence and the user of the included land could not be referable to the original agreement; but, even if the lane had been formed of equal portions of the land of each party, no agreement to keep it open in perpetuity could, under the circumstances, be presumed. Quære, whether the defendant's agreement could properly be said to be founded upon a valuable consideration. Leave to adduce further evidence refused, where the expense would be wholly disproportionate to the value of the subject matter in litigation. *Craig* v. *Craig*, 2 A. R. 583.

——— *Voluntary Oral Promise.*]—A person about to purchase land stipulated orally with another, who had been accustomed to use a road over it, that in the event of the purchase he would be allowed to continue the use thereof, but afterwards refused to carry out such agreement:—Held, that this promise was merely voluntary, and, as such, insufficient to found a bill for specific performance. *Barr* v. *Hatch*, 9 Gr. 312.

Right to Overflow Land—*Assignment of Bond.*]—The plaintiff purchased from one C. a mill privilege, with a right to overflow land belonging to defendant, and abstained at defendant's instance from obtaining from C. an assignment of a bond securing the right so to flood defendant's land. In a proceeding afterwards taken by plaintiff to compel defendant specifically to perform the contract contained in the bond:—Held, that the want of a formal assignment of the bond could not be raised as an objection to plaintiff's right to recover. *Ritchie* v. *Drain*, 25 Gr. 322.

See, also, *post* V. 5.

IV. Agreements for Sale of Chattels.

Peculiar Value—*Saw Logs—Diligence.*]—Saw logs cannot be said primâ facie to be of "peculiar value;" but they are more likely to be so than other chattels; and specific relief may be given with respect to them in more instances than almost any other sort of chattel property. The relief, however, must be applied for promptly. *Flint* v. *Corby*, 4 Gr. 45.

The court will decree specific performance of a contract for the manufacture and sale of saw logs, where they are capable of being identified and possess a peculiar value for the purchaser. *Stevenson* v. *Clarke*, 4 Gr. 540; *Fuller* v. *Richmond*, 2 Gr. 24; *S. C.*, 4 Gr. 657; *Farwell* v. *Walbridge*, 6 Gr. 634.

Vessel—*Delay—Changes—Depreciation — Partnership.*]—A steam vessel owned by the members of a limited partnership was registered in the name of the general partner. During his absence from this country the special partners agreed for the sale of the vessel, and gave their bond conditioned for the obtaining a sufficient transfer thereof to the purchasers within three months, and placed them in possession. Two years afterwards the vessel was sold under execution against the general partner, and was taken from the purchasers by replevin, the purchasers giving notice to the special partners, who took no steps to prevent the removal of the vessel. The purchasers thereupon sued the obligors, and recovered judgment against them, after which they filed a bill for specific performance of the contract, and an injunction to stay proceedings under the judgment. The court, considering the great changes which had taken place in the position of the parties, and the depreciation in value of the steamer, refused specific performance, and dismissed the bill with costs. *Cotton* v. *Corby*, 7 Gr. 50, 635.

V. Agreements for the Sale of and Relating to Land.

1. *Compensation or Abatement of Purchase Money.*

Alienation of Property — *Exchange — Chattels.*]—The plaintiff agreed in writing to sell to the defendant certain lands for $3,500, of which the defendant should pay $500 on the date of the agreement, to be represented, however, by two horses and two organs which he was to deliver to the plaintiff. The defendant, however, sold the organs and parted with one of the horses. On the plaintiff subsequently bringing this action for specific performance, the court ordered the defendant to pay $500 in lieu of the horses and organs. *Jones* v. *Dale*, 16 O. R. 717.

——— *Notice—Amount of Compensation—Inquiry.*]—Where a purchaser died after paying three-fourths of the purchase money, leaving an infant heir, who was entitled to a specific performance of the contract; and the

vendor, at the instance of the administratrix, conveyed the property, which had greatly increased in value, to a third person, and it afterwards passed into the hands of persons without notice:—Held, that the heir could sue the vendor in equity for compensation. With a view to fixing the amount of compensation, inquiry was directed as to the condition of the estate left by the deceased purchaser, and whether the plaintiff or the estate received the benefit of any part of the purchase money on the subsequent sale of the property. *Forsyth* v. *Johnson*, 14 Gr. 639.

Default of Possession — *Application — Forum.*] — A motion for compensation for want of possession in a specific performance suit, should be made in court and not in chambers. *O'Dea* v. *Sinnott*, 2 Ch. Ch. 446.

Deficiency in Property Sold.]—A parcel of land, surveyed and laid off into building lots, was offered for sale by auction, when M. purchased two of such lots at an aggregate sum of £70. The plan by which the property was sold, stated in the margin that it was drawn upon a scale of four chains to the inch; in reality the scale was three chains to the inch, but this was not discovered until after the conveyance had been executed, and the purchase money paid. The purchaser, M., filed a bill praying repayment of a proportionate amount, or a conveyance of a sufficient quantity of the adjoining land to make up the deficiency. The court, under the circumstances, considered that the plaintiff was not entitled to the relief asked, and dismissed the bill with costs; but semble, that if the conveyance had not been made, or the purchase money not fully paid, he would have been entitled to relief. *McCall* v. *Faithorne*, 10 Gr. 324.

The plaintiff sold to defendant a lot. The contract did not mention the number of acres; the conveyance stated it to be 200 acres, more or less; the covenants did not warrant the quantity. Part of the purchase money remained as a lien on the land, and many years afterwards, but before it was fully paid, the vendee discovered that there was a deficiency of 24 acres in the supposed contents of the lot:—Held, that he was not entitled to compensation from the plaintiff for deficiency as against the unpaid purchase money. *Follis* v. *Porter*, 11 Gr. 442.

The advertisement of sale of a farm described the property as being "96 acres cleared and cultivated, a good log house, and frame barn 69 by 32 on the premises; also, driving shed." Upon a survey of the property being made, it appeared that the quantity of cleared land was 74⅔ acres under cultivation and fenced in, and 12½ acres of pasture land, with some girdled trees standing, and a few logs lying upon it, which had never been cultivated, and could not be until the logs should be removed. The dimensions of the barn were 50 feet by 30, and there was no driving shed upon the property. On a bill filed by the vendors for specific performance of the contract:—Held, independently of a stipulation in the conditions of sale providing for errors in the advertisement, that these differences were such as entitled the purchaser to be compensated therefor; and the vendors, having disputed the purchaser's right to such compensation, were ordered to pay the costs of the suit. *Canada Permanent B. and S. Society* v. *Young*, 18 Gr. 566.

See Osborne v. *Farmers' and Mechanics' Building Society*, 5 Gr. 326; *Stammers* v. *O'Donohoe*, 28 Gr. 207, 8 A. R. 161, 11 S. C. R. 358; *Cleaver* v. *North of Scotland Canadian Mortgage Co.*, 27 Gr. 508; *Curran* v. *Little*, 8 Gr. 250; *Moorhouse* v. *Hewish*, 22 A. R. 172.

——— *Easement.*]—Where a purchase was made of 300 acres, "more or less," and upon a survey being made of the lands, they were found to contain only 244 acres:—Held, that this was such a difference as entitled the purchaser to compensation; and the fact that the lands were alleged to be of but comparatively small value, could not affect the right of the purchaser to an allowance for the deficiency. The purchase was of a mill site and mill. Subsequently it appeared that the vendor had previously sold the right to take water for the purpose of floating logs, which fact was not communicated to the purchaser on negotiating for such purchase:—Held, that this also was a subject for compensation. *Wardell* v. *Trenouth*, 24 Gr. 465.

Delay in Bringing Suit for Compensation — *Infancy.*] — There was a lapse of fourteen years after the vendor's conveyance, before the bill for compensation was filed, the heir having been a minor all this time:—Held, that the vendor having caused this delay by his own arrangement with the infant's relations, which deprived the infant of their protection, this lapse was no bar to the suit. *Forsyth* v. *Johnson*, 14 Gr. 639.

Delay in Conveying—*Exchange — Boot Money—Interest.*]—The plaintiff contracted to convey to defendant a lot in B., for which the plaintiff was to receive a lot in S., paying $150, with interest, in four annual instalments, as the difference in value. The plaintiff conveyed the lot in B. accordingly, but defendant did not convey the lot in S., his claim to the lot being under a contract with the Crown, there being default in paying the purchase money, and another person claiming to be entitled to the patent. Defendant ultimately, however, obtained the patent, though after several years:—Held, that the plaintiff was not entitled to a decree for the payment in money of the difference in the value of the two lots, but only to a conveyance of the S. lot, the time for his paying the $150 to count from the date of the decree. *Gray* v. *Keesor*, 16 Gr. 614; *S. C.*, 15 Gr. 205.

Dilapidations.]—A vendor who contracts for the sale of property of which he has not taken possession, is accountable to the purchaser for dilapidations by those in possession before the vendor takes possession from them. *Fisken* v. *Wride*, 11 Gr. 245. See *S. C.*, 7 Gr. 598.

A vendor in possession is, in general, responsible for dilapidations that take place, before he shews a good title, where they are such as a prudent owner, or his tenants, might have prevented. Where buildings are torn down after a contract for sale, and before the purchaser takes or was bound to take possession, the vendor is prima facie accountable for the loss. *S. C.*, 11 Gr. 245.

Dower Outstanding.]—A party agreeing to convey is bound to do so free from dower, or if the wife will not release, then to convey subject thereto, with an abatement in the purchase money. *Kendrew* v. *Shewan*, 4 Gr. 578; *VanNorman* v. *Beaupre*, 5 Gr. 599.

See, also, *Skinner* v. *Ainsworth*, 24 Gr. 148.

An owner of real estate who alone enters into an agreement to sell will be required to procure a bar of his wife's dower or abate the purchase money in the event of her refusal. Van Norman v. Beaupre, 5 Gr. 599, followed. *Loughead* v. *Stubbs*, 27 Gr. 387.

——— *Application — Forum.*] — An application by a purchaser in a suit for specific performance for abatement of purchase money, on the ground of outstanding dower, should be made in court, not in chambers. *Shinners* v. *Graham*, 1 Ch. Ch. 212.

Improvements—*Vendor Unable to Complete.*] — Semble, that the court can decree compensation for improvements where the vendor is unable to complete the title, but such a decree will not be made where specific performance can be compelled. Where the owner of an estate was present and permitted a third person to agree for the sale of his land, and the purchaser was let into possession, made improvements, and, being afterwards ejected by the owner of the property, filed a bill for payment of the value of those improvements, the court allowed a demurrer for want of equity. *Davis* v. *Snyder*, 1 Gr. 134.

Misconduct of Agents — *Delay.*] — A purchaser from the defendants at a public auction, filed a bill for specific performance, injunction, and compensation, alleging misconduct of the defendants' agents at the sale and otherwise, and consequent damage to him, which allegations were partly disproved by the evidence. However, as the delay in completing the title was owing in a great measure to defendants, the court made a decree for specific performance and injunction; but without costs or compensation. *Mossop* v. *Trust and Loan Co.*, 11 Gr. 204.

Misrepresentations—*Costs.*]— Although a vendor is allowed great latitude in the statements or exaggerations he may make as to the general qualities and capabilities of land he is about to offer for sale, still he will not be permitted to make direct misstatements and misrepresentations as to matters of fact which would naturally have the effect of inducing persons resident at a distance to bid for the property. Therefore, where an advertisement of property about to be sold described it as being "a farm of eighty-one and a quarter acres, twenty acres cleared and fenced," on the faith of which the plaintiff purchased, when in fact there was not any clearing or fencing made upon the premises, the court, in pronouncing a decree for specific performance at the instance of the purchaser, directed a reference to the master to make an allowance in respect of the matters misrepresented, and ordered the vendor to pay the costs of the suit. *Stammers* v. *O'Donohoe*, 28 Gr. 207; see *S. C.*, 8 A. R. 161, 11 S. C. R. 358.

Partnership Land—*Refusal of one Partner to Convey.*]—Where a contract is made by one partner for the sale of partnership lands, to which the other partner refuses to consent, the purchaser cannot insist upon taking the share in the lands of the contracting partner with a proportionate abatement in the price. Judgment in 22 O. R. 519 reversed. *Crain* v. *Rapple*, 20 A. R. 291.

See Carroll v. *Williams*, 1 O. R. 150; *Coates* v. *Coates*, 14 O. R. 195.

See, also, *post* 7.

2. Conditional Contract.

Church—*Condition as to Congregation—Contract becoming Absolute — Change of Faith.*]—The owner agreed to sell a site for a burial ground and church in connection with the Free Church of Scotland, if a congregation thereof could be brought together. A church was built thereon, and the congregation assembled and divine service was performed therein. Several years afterwards the great body of the congregation abandoned their connection with the Free Church; and they, in conjunction with the vendor, assumed to exclude such of the members as continued to adhere to the Free Church. On an information filed in the name of the attorney-general:—Held, that, although at first conditional, the contract, by reason of a congregation having assembled, had become absolute; and that, so long as even one member remained to claim the site and church on behalf of the Free Church, the right of that body continued, notwithstanding the change of opinion in the body of the members; and any further interference with such right was restrained, and specific performance of the contract decreed with costs. *Attorney-General* v. *Christie*, 13 Gr. 495.

Expenses of Sale—*Offer—Acceptance.*]—C. R. S., being the owner of certain leasehold property, wrote E. E. K., a land agent, a letter in these words: "Please call on J. J. R. He keeps a small shop . . He resides in my house on P. street, and has been wanting to purchase it for some time. Tell him if he gives me $235 cash at once I will send the papers to you for him, and he can pay over the money to you. Please write me by return mail." On the following day E. E. K. wrote J. J. R. as follows: "Mr. S. of Meaford wishes me to say that if you desire to purchase some property he owns on P. street, that if you give him $235 cash he will send the deeds to me and deliver them to you. Your early reply will very much oblige." About a month after an acceptance was indorsed on the latter letter in these words, "I hereby accept the above on the understanding that I pay no expenses," and it was signed by J. J. R. In an action for specific performance by J. J. R. against C. R. S.:—Held, that the letter from C. R. S. did not contain authority to E. E. K. to enter into a contract for the sale of the property. Held, also, that, even if there had been no question as to the authority of E. E. K., the insertion of the words "on the understanding that I pay no expenses" in the acceptance prevented it from being considered an acceptance of the offer said to be contained in the letter of E. E. K. *Ryan* v. *Sing*, 7 O. R. 266.

Fencing and Building.]—A vendee covenanted to fence the land forthwith, and to build a house within a limited time; and the vendor agreed to convey upon payment of the purchase money and the due fulfilment of all the vendee's other covenants. The vendee, without waiting for the time appointed for payment, and without either fencing or building, tendered the purchase money and interest, and his deed being refused he filed his bill for specific performance of the agreement to convey. The bill was dismissed with costs. *Allen* v. *Bown*, 4 Gr. 439.

Mortgage—*Discharge—Renewal of Lease—Ordnance Lands.*]—The plaintiff, lessee of

some ordnance lands, assigned his interest therein to defendant in 1847, the latter agreeing in consideration thereof to pay off an execution against plaintiff, and if the Ordnance department would give defendant a deed in fee of the lot or a lease renewable in perpetuity at the then rent, to release a mortgage he had against the plaintiff on other land. The department refused to do either, but eleven years afterwards sold the land to defendant at a price greatly exceeding the sum of which the rent would be the interest at six per cent. The bill was for the discharge of the mortgage, and the decree of the court below dismissing the bill was affirmed on appeal. *McKenzie* v. *Yielding*, 13 Gr. 259, 11 Gr. 406.

Railway—*Providing Crossings.*]—The owner of lands over which the Grand Trunk Railway would pass, offered to convey a portion thereof for a station house upon certain conditions, which offer was rejected. Afterwards he agreed in writing with the solicitor of the contractors to convey a quantity of land not to exceed ten acres, upon condition that the station should be placed upon it. He refused to convey unless the contractors would secure to him three crossings over the track, and brought ejectment to turn them out of possession of the land so agreed to be conveyed. The court decreed a specific performance of the agreement to convey, and stayed the ejectment, though defendant swore that the condition upon which he agreed to convey was that the crossings should be secured to him. *Jackson* v. *Jessup*, 5 Gr. 524.

——— *Providing Culvert.*]—The owner of land agreed to convey part to a railway company, the consideration for which was paid, on which to erect an embankment, on condition that the company would make a culvert through such embankment. The building of the railway passed into the hands of another company, who built the embankment, but made no culvert, they having had no notice of the condition. Upon a bill filed by him for the specific performance of the covenant to construct such culvert:—Held, that it would be a hardship to compel the company to build the culvert, the cost of which would be very great, and that the parties ought to be placed in the same position as before the agreement, in order that the company might proceed under the Railway Act; the court retaining the bill until such proceedings were taken, giving to each party liberty to apply, but, refusing either party any costs. *Hill* v. *Buffalo and Lake Huron R. W. Co.*, 10 Gr. 506.

Timber Limit—*Contemplated Reservation.*]—A., the lessee of a timber limit, had an interview with B. as to the sale to him of part of it. A. offered to take $400, and letters passed which amounted to a contract at law to sell at that price. A.'s offer, however, had been made in contemplation of a reservation and condition spoken of at the interview, but not mentioned in the letters:—Held, that the purchaser was not entitled to a specific performance, without the reservation and condition. *Needler* v. *Campbell*, 17 Gr. 592.

Title—*Approval of.*]—It was agreed by and between a vendor and purchaser, that so soon as a title satisfactory to the solicitors of the vendee could be afforded him, the vendee should purchase the land for $4,000 cash:—Held, that, in the absence of mala fides, the approval of the title by the solicitors of the vendee was a condition precedent to the right of the vendor to call for a specific performance of the agreement. *Boulton* v. *Bethune*, 21 Gr. 110. See *S. C., ib.* 478; *Dewitt* v. *Thomas*, 7 C. P. 565.

——— *Completion of—Offer—Acceptance.*]—On the 26th January, 1882, McI. wrote to H. as follows: "A. McI. agrees to take $35,000 for property known as McM. block. Terms—one-third cash, balance in one year at eight per cent. per annum. Open until Saturday 28th, noon." On the same day H. accepted this offer in the following terms: "I beg to accept your offer made this morning. I will accept the property known as McM. block, being the property on M. street, for $35,000, payable one-third cash on completion of title, and balance in one year at eight per cent. You will please have papers and abstract submitted by your solicitor to N. F. H., Esq., 22 D. block, as soon as possible, that I may get conveyance and give mortgage."—Held, that there was no binding unconditional acceptance of the offer of sale, and therefore no completed contract of sale between the parties. *McIntyre* v. *Hood*, 9 S. C. R. 556.

See Cameron v. *Wellington, Grey, and Bruce R. W. Co.*, 28 Gr. 327.

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3. *Damages where Specific Performance Refused.*

Purchase at Auction—*Absence of Memorandum.*]—An intending purchaser attended an auction sale of lands and bid off the property, but no memorandum or agreement was signed evidencing the contract. The purchaser having filed a bill for specific performance:—Held, not a case in which the court would, on refusing specific performance, direct an inquiry as to damages under 28 Vict. c. 17, and that the plaintiff should pay the costs of the suit. *O'Donnell* v. *Black*, 19 Gr. 620.

Vendor and Purchaser—*Rights under Agreement—Breach by Both Parties.*]—Under s. 32 of the A. J. Act of 1873, the court of chancery has cognizance of all the rights of all the parties arising out of an agreement; and if either is entitled to damages, the court ought to ascertain them. In this view, in a suit for specific performance, to which the plaintiff was found not entitled, a reference was directed to inquire as to damages sustained by the purchaser by reason of breach of the contract, and also as to damages sustained by the vendor by reason of breach of covenants in the instrument constituting the agreement. *Casey* v. *Hanlon*, 22 Gr. 445.

——— *Rights under Agreement—Fraud—Measure of Damages.*]—On a bill filed to rescind a contract for the sale of land, the defendants asked by way of cross-relief to have the same specifically performed. On a rehearing the court refused specific performance or rescission, but, having regard to the finding of the Judge at the trial, that no actual fraud had been proved against the defendant, the purchaser, though it appeared that to a certain extent he had overreached the plaintiff, an old woman, when making the contract, they ordered a reference, following Casey v. Hanlon, 22 Gr. 225, to ascertain the amount,

if any, of the defendant's damages. The master found defendant entitled to $11.05, his costs of investigating the title, but refused to allow him $1,000, which was the difference between the contract price and the value of the land; and on appeal the report was confirmed. *Gough* v. *Bench*, 9 P. R. 431.

See Stuart v. *McVicar*, 18 P. R. 250, *post* VIII.

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4. *Default, Delay, or Laches.*

(a) *In Carrying out Contract.*

Consideration — *Performance of Work—Request.*]—On a sale of land it was agreed that the purchaser might pay the price by doing certain chopping on other land of the vendor's. No time was fixed for this work. On a bill by the purchaser for specific performance:—Held, that he was not to be treated as in default, so as to lose his right to specific performance, without proof of having neglected to do the work after request. *Brand* v. *Martin*, 16 Gr. 566.

Time not of Essence—*Notice to End Contract.*]—Semble, that when one party to a contract (in which time is not of the essence) desires to put an end to the contract, in consequence of the laches of the other party thereto, the proper mode of doing so is to give notice that unless completed within a period to be fixed, the contract will be considered at an end. *O'Keefe* v. *Taylor*, 2 Gr. 95.

——— *Reasonable Time.*]—The purchaser under contract for sale of land is not entitled to a decree for specific performance by the vendor unless he has been prompt in the performance of the obligations devolving upon him and always ready to carry out the contract on his part within a reasonable time, even though time was not of its essence; nor when he has declared his inability to perform his share of the contract. *Wallace* v. *Hesslein*, 29 S. C. R. 171.

Time of Essence—*Endeavour to Perform Contract—Dies non—Tender.*]—In an action for specific performance, even when time is of the essence of the agreement, if the party in default has done what in him lay to perform the contract, the court may, in the exercise of its discretion, grant the relief claimed. And where, by such agreement, the conveyance was to be tendered by the plaintiff to the defendant and the transaction closed on the "first day of June," which fell on Sunday, when no tender was made, and the conduct of the defendant on the following day was such as to exclude a tender on that day, in an action for specific performance the plaintiff was held entitled to judgment. *Cudney* v. *Gives*, 20 O. R. 500.

——— *Excuse for Delay.*]—Where the agreement was that defendant should advance money on the purchase of the land, and that the plaintiff should have the right to repurchase the same by a certain day, upon payment of the amount so advanced, and interest, together with what was paid by defendant for improvements and insurance, and it was expressly stipulated that time should be of the essence of the contract:—Held, that, although the court, as a general rule, will hold a party to perform such a contract within the time limited, yet it may and will admit him to shew a good and valid reason for non-performance within such time, and in that case may order specific performance. *McSweeney* v. *Kay*, 15 Gr. 432.

——— *Presumption from Circumstances.*]—The defendant G. agreed to sell to the plaintiffs certain timber limits for $25,000, stipulating that they should have a certain named time to inspect the property and arrange for payment of the price. Subsequently, on the 20th August, the plaintiffs wrote excusing themselves for not having carried out the purchase and asking for an extension of time for their accepting or refusing "your limits—one or two weeks if possible." In answer, G. suggested that it was not necessary to make any extension of time for the acceptance of the offer by the plaintiffs, and that they should write stating they were satisfied with the timber, the quality and the price, and that they only wished the extension of time to make their financial arrangements, adding, "and if you do this you can consider this letter authority for the additional time." The plaintiffs wrote accordingly, and the further time asked for expired on the 10th September, but they failed fully to complete the purchase at the time named, and G. sold to the other defendant:—Held, that, looking at the nature of the property, the subject of the contract, time would, without any stipulation in respect thereof, he regarded as essential; and it was intended by the parties that it should be so, and understood by them that it was so; and the subsequent correspondence shewed it to have been expressly made so, and, therefore, that the plaintiffs were not entitled to a specific performance of the contract. *Crossfield* v. *Gould*, 9 A. R. 218.

——— *Presumption from Circumstances—Waiver of Condition.*]—Held, by the Queen's bench division, that although, where the property in a contract for the sale or exchange of lands is of a speculative character, the presumption is that time is of the essence of the agreement, such presumption may, as when a time is expressly fixed, be rebutted by the parties treating the contract as still subsisting after the time fixed for its completion. The court of appeal was divided in opinion. Held, by the supreme court of Canada, affirming in this respect the judgments below, that time was originally of the essence of the contract, but there was a waiver by the defendant of a compliance with the provision as to time by entering into negotiations as to the title after its expiration. *Robinson* v. *Harris*, 21 O. R. 43, 19 A. R. 134, 21 S. C. R. 390.

See McArthur v. *The Queen*, 10 O. R. 191; *Hayes* v. *Elmsley*, 21 O. R. 562, 19 A. R. 291, 23 S. C. R. 623; *Stevenson* v. *Davis*, 21 O. R. 642, 19 A. R. 591, 23 S. C. R. 629.

(b) *In Commencing Suit.*

Purchaser and Persons Claiming under him—*Possession—Payment—Sufficiency of Delay to Discentitle.*]—The vendor at the time of entering into the contract received one-fifth of the purchase money, the balance being payable in four annual instalments, and the vendee took possession and continued to occupy the land, but made no further payment, notwithstanding frequent applications.

About three years after the contract the vendor resold and conveyed the land to another person, who had notice, and the purchaser brought ejectment against the first vendee, who filed a bill for specific performance of the contract against the vendor and such second purchaser:—Held, that the delay was not sufficient to disentitle the plaintiff to the relief sought. Semble, that the peculiar condition of real property in this Province, and the peculiar practice which has grown up in relation to sales, may require a modification of English cases, with regard to the doctrine of laches as affecting the right to specific performance. *O'Keefe* v. *Taylor*, 2 Gr. 95.

Where the purchaser is not let into possession, what delay on his part in taking steps to enforce his contract will disentitle him to specific performance, considered. *Hook* v. *McQueen*, 2 Gr. 490, 4 Gr. 231.

In this country a much less delay will, in many cases, be sufficient to bar specific performance than would be sufficient in England. *S. C.*, 4 Gr. 231.

A person in possession of lands contracted, in 1848, for the purchase thereof, and about a year afterwards, having paid nothing, absconded from the Province, leaving his family in possession. In June, 1850, the owner obtained possession by ejectment, and in January, 1851, sold the property to another purchaser, who remained in possession until September, 1853, and laid out large sums in improvements, when the original vendee assigned his agreement to the plaintiff, who thereupon filed a bill for specific performance of the agreement. The court dismissed the bill with costs. *Van Wagner* v. *Terryberry*, 5 Gr. 324.

The vendor let the purchasers into possession, but some years afterwards, on default in payment of the purchase money, the vendor obtained possession by ejectment. Subsequently the purchase money was tendered and refused, and the purchasers took no steps for eighteen years to enforce their claim, during all which time the vendor remained in possession as owner; the property, during the interval, having increased very much in value. A bill filed by the purchasers, and subsequently revived by their representatives, was dismissed with costs. *Crawford* v. *Birdsall*, 8 Gr. 415.

In 1850 the owner of 100 acres of land, with the view, as was admitted, of retaining his son upon the property and settling him in life, agreed to convey to him in fee 50 acres, worth at least £150, upon payment of £50, in six years without interest, and executed a bond for that purpose. After this, the son went to work about the country, and resided some years in a distant part of the Province, sometimes returning when out of employment and residing with the other members of his father's family, and during such residence assisting in the usual work of the farm. Nothing was ever paid, although it was alleged that the son was entitled to a credit for services rendered. After about ten years the son filed a bill to enforce a specific performance of the contract evidenced by the bond, and obtained a decree. Upon appeal this decree was reversed, and the bill dismissed with costs, unless the plaintiff should within one month deliver up the bond to be cancelled; in that event the dismissal to be without costs. *Evans* v. *Evans*, 2 E. & A. 156.

The intestate contracted with defendant for the purchase of a village lot in Bothwell, and paid part of the purchase money. The vendor afterwards agreed to build on the premises, for which the purchaser was to pay by instalments, and the vendor was to hold possession and receive the rents meanwhile on account. The purchaser, having made default, died intestate, leaving no other means. The heirs having lain by for a number of years, until oil was discovered near Bothwell, and property had risen in value, their bill to enforce the purchase was dismissed with costs, on the ground of laches. *Walker* v. *Brown*, 14 Gr. 237.

In 1846 defendant contracted to sell a building lot in Toronto to the plaintiff's father (one of defendant's workmen) for $500, payable in eight annual instalments. The purchaser built two small houses on the lot, and died in 1856, intestate. The plaintiff, his only child, immediately afterwards enlisted and left Canada, leaving a power of attorney with one A. to manage his affairs; he was not quite of age at this time. In February, 1859, defendant brought ejectment, and A. in the following March filed a bill in plaintiff's name for specific performance of the contract. Defendant asserted that there was about $800 due thereon, and the claim appeared to be confirmed by a book produced by a bookkeeper of defendant, who was examined as a witness. The value of the property at the time was about $700. A., believing defendant's representations, agreed with him to dismiss the bill with costs, and gave up possession to defendant. Some years afterwards the plaintiff returned, and discovered that not one-half the amount so claimed by defendant was due at the time of dismissing the bill, and thereupon filed a bill for specific performance, and proved this state of the account from entries in the books of defendant and otherwise:—Held, in view of the misrepresentations of the defendant and the absence of the plaintiff, that the plaintiff's right to a decree was not barred by lapse of time. *Larkin* v. *Good*, 17 Gr. 585.

In a suit for specific performance of an agreement by the devisee of land to convey to P., it appeared that the agreement of sale to P. was executed in 1884, and the suit was not instituted until four years later. P. was in possession of the land during the interval:—Held, that, as the evidence clearly shewed that P. was only in possession as agent of the trustees under the will and caretaker of the land, and as by the terms of the agreement time was to be of the essence of the contract, the delay was a sufficient answer to the suit. *Porter* v. *Hale*, 23 S. C. R. 265.

Vendor's Heirs — *Possession—Doubtful Contract.*]—A contract in writing for the sale of land had not been acted on during the vendor's life. Possession was afterwards taken by the vendee, but no improvement made. In a suit for specific performance brought by the vendor's heirs against the vendee's heirs after the latter had come of age, the evidence given threw considerable doubt on the contract:—Held, that the doubt, coupled with the delay, was sufficient to prevent the contract being enforced. *Kelly* v. *Sweeten*, 17 Gr. 372.

(c) *In Prosecuting Suit.*

Excuse—*Poverty.*]—Quære, whether delay in the prosecution of a suit for specific performance may be a bar to relief at the hearing. There having been delay in bringing the suit, and great delay in prosecuting it, at the hearing a reference was directed to the master to inquire as to the cause of the latter delay. The master reported that the cause was the plaintiff's poverty. On further directions the bill was dismissed. *McMahon* v. *O'Neil*, 16 Gr. 579.

(d) *Other Laches.*

Abandoning Possession — *Subsequent Resumption — Estoppel — Ejectment—Equitable Defence.*]—In ejectment defendant set up an equitable defence, that he had been induced to work and serve the plaintiff and manage his affairs for many years, by plaintiff's representations, promise, and agreement to give him the land and the immediate possession thereof, as a reward therefor; that defendant was put into possession accordingly and worked the land and made improvements, &c.; that subsequently, in furtherance of such representations, &c., and in consideration of such work and services, plaintiff signed a written agreement to give defendant the land, thereby confirming him in possession; and defendant thereafter made improvements and was assessed and paid the taxes; that defendant had paid the full consideration and performed all conditions to entitle him to hold possession of the land and to all the plaintiff's rights therein. At the trial the equitable defence was proved, the agreement mentioned having been signed in 1865; but it was urged that because defendant, being out of possession, had in 1874 procured one E., the plaintiff's tenant, to give him possession, informing him of his claim, and had paid the plaintiff $70 rent due by E., he was estopped from denying the plaintiff's title; and further, that defendant, having been out of possession for nine years, was estopped by his laches:—Held, that under the Administration of Justice Act defendant was entitled to hold possession, and to have the agreement specifically performed, though before that Act he must have filed his bill for specific performance, and for an injunction restraining the ejectment; that neither the manner in which he obtained possession, nor his laches, could defeat his right to specific performance of the agreement, which had been fully executed on his part. The verdict for defendant was therefore ordered to stand, and a decree made for a perpetual injunction against the ejectment, and for a conveyance of the land. *Westgate* v. *Westgate*, 28 C. P. 283.

Enforcing Claim at Law.]—Mere delay of a party to enforce his claim at law, furnishes no ground for the court of chancery interfering with his legal right, although it might be a good answer were he seeking specific performance of the contract. *Allan* v. *Newman*, 13 Gr. 364.

Objecting to Title.]—See *Nason* v. *Armstrong*, 22 O. R. 542, 21 A. R. 183, 25 S. C. R. 283.

Repudiating Agreement for Fraud—*Delay as Ground for Enforcement.*]—See *Livingstone* v. *Acre*, *Wallace* v. *Acre*, 15 Gr. 610, *post* 7.

5. *Defects in Subject Matter of Contract.*

Sale for Particular Purpose — *Knowledge of Unfitness.*]—Defendant agreed for the purchase of a factory near a small stream, intending to carry on there his occupation of soap and candle manufacturer. Afterwards defendant discovered that he would not have a right to throw the refuse of his factory into the stream, and without this privilege the property would be useless for his intended purpose, of which the vendors were aware when making the contract:—Held, that the vendee was bound to complete the contract, although the vendors had not pointed out this fact at the time of the sale. *James* v. *Freeland*, 5 Gr. 302.

——— *Mill—Loss of Water Privilege.*]—Defendant agreed to purchase a piece of land, "with a water privilege attached," for the avowed purpose of erecting a mill on the land, and storing or booming the logs for his mill in the water adjoining:—Held, that this did not bind the vendor to retain the water in its then state for the purpose of securing to the defendant the benefit of such booming or storage; and, notwithstanding the loss of the water privilege by reason of one of the dams having fallen into decay, defendant was bound to perform the agreement. *Hickson* v. *Clarke*, 25 Gr. 173.

See Commercial Bank v. *McConnell*, 7 Gr. 323.

6. *Exchange of Lands.*

Land out of Ontario—*Jurisdiction.*]—The plaintiff, a resident of Buffalo, United States, agreed in writing with the defendant to exchange certain land situate in Buffalo for land of the defendant situate in Ontario; and brought this action for specific performance of the contract: — Held, that the plaintiff having brought his action in this court, thereby submitting to its jurisdiction, the court would decree specific performance. *Montgomery* v. *Ruppensburg*, 31 O. R. 433.

Powers of Executor.]—An executor or administrator cannot, having regard to R. S. O. c. 108, s. 9, and 54 Vict. c. 18, s. 2 (O.), make the lands of the testator or intestate the subject of speculation or exchange by him in the same manner as if the lands were his own. The court refused to decree specific performance of a contract by an executor to exchange lands of his testatrix for other lands, as the purpose of the exchange could not have been the payment of debts or the distribution of the estate, and it was shewn that the beneficiaries objected to the exchange, and it did not appear that the official guardian had been consulted. *Tenute* v. *Walsh*, 24 O. R. 309.

See McRae v. *Froom*, 17 Gr. 357; *Cudney* v. *Gives*, 20 O. R. 500; *Robinson* v. *Harris*, 21 O. R. 43, 19 A. R. 134, 21 S. C. R. 390; *St. Denis* v. *Higgins*, 24 O. R. 230; *Moorhouse* v. *Hewish*, 22 A. R. 172; *Gray* v. *Reesor*, 15 Gr. 205, 16 Gr. 614.

7. *Fraud or Misrepresentation.*

(*See ante* 1.)

Absence of Consideration—*Mental Incompetence—Purchasers for Value—Equities—Laches.*]—The defendant, a man of weak intellect, was fraudulently induced to execute a quit-claim deed of certain land without consideration. The land was afterwards conveyed to the plaintiffs for value, against whom, after more than fifteen years, defendant brought ejectment, and it was decided that the legal title had not passed by his deed. The plaintiffs thereupon filed a bill to reform defendant's deed, or, treating it as a contract only, for a specific performance thereof:—Held, (1) that, though the plaintiffs had equities as purchasers for value, yet defendant had an equity to set aside his deed; and that his equity being the elder, and having the legal title, the court could not give the plaintiffs relief; and (2) that, though the laches and acquiescence of the defendant might be a reason for refusing him relief if a plaintiff, still they were not a ground for granting the plaintiffs the relief sought; and the court dismissed the bill with costs. *Livingstone* v. *Acre, Wallace* v. *Acre*, 15 Gr. 610.

Advertisement — *Misrepresentations.*]—Property held by a building society in security was described in the advertisement for sale as rented for £72, and with forty acres of it a dense forest of pine. In reality it was rented for £50 only, and the pinery had no existence. The purchaser filed a bill for specific performance of the contract with an abatement of the price, and declined to accept performance without compensation. The court dismissed the bill, but without costs. *Osborne* v. *Farmers' and Mechanics' Building Society*, 5 Gr. 326.

By the advertisement of an intended sale of land in lots, it was stated: "The soil is well adapted for gardening purposes, and a considerable portion of the property is covered with a fine growth of pine and oak, which will yield a large quantity of cordwood, and the remainder is covered with an ornamental second growth of evergreen and various other kinds of trees." A purchaser at the sale, which took place upon the property, set up as a defence to a suit for specific performance, that this description was untrue:—Held, that these representations, having been in respect of matters which were objects of sense, and as to which an intending purchaser ought in prudence to have examined for himself, formed no ground for relief from the contract. *Crooks* v. *Davis*, 6 Gr. 317.

Contemplated Resale to Third Person — *False Representation as to.*]—The plaintiff negotiated with the defendants for the purchase of the lands in question, and at different times obtained from them writings giving him the option to purchase for $20,000. Defendants set up that these negotiations were had with the plaintiff, as their agent, with a view of effecting through him a sale to a society, at the same or a higher price to the defendants. After these options had been given to the plaintiff, he on the forenoon of the 17th February, 1882, agreed to sell to the society for $25,000, and afterwards on the same day he went to the defendants and offered to purchase for $19,500 in lieu of the $20,000 previously named. He was asked by the defendants whether the sale to the society was off, to which he replied that it was, and in the same conversation informed the defendants that he could not sell the property for $20,000, as a reason why he should get it for $19,500, for if sold to another, he, the plaintiff, would be entitled to a commission of $500; and the defendants thereupon agreed to sell to plaintiff for $19,500. Subsequently on the same day plaintiff entered into a contract in writing to sell to the society for $25,000:—Held, that, without reference to the question of agency to sell, the evidence shewed that a sale to the society was in contemplation of both parties and was the foundation of the transaction, and that the misrepresentation of the plaintiff in regard to the sale to the society, was such as disentitled him to a decree for specific performance. *Walmsley* v. *Griffith*, 10 A. R. 327.

Exorbitant Price—*Intoxication of Purchaser—Failure to Shew Fraud—Costs.*]—The vendee set up that he had been led into drink by the fraudulent contrivances of the vendor, and while intoxicated had been induced to sign the agreement, in which the price stipulated was most exorbitant. It was clearly shewn that the purchaser had executed the contract while intoxicated, and that the price was exorbitant, but the court exonerated the vendor from any fraud, and therefore refused defendant his costs on dismissing the bill for specific performance. *Schofield* v. *Tummonds*, 6 Gr. 568.

Failure to Prove Deceit.]—A vendor, having agreed to sell land, afterwards conveyed it to a third party, with notice, at an advanced price, alleging as a reason that he had been deceived in making the agreement. The court decreed specific performance: the statements in the answer having been contradicted by the person by whom defendant swore he had been misled. *Devine* v. *Griffin*, 4 Gr. 603.

"Puffing" at Auction Sale — *Failure to Prove Injury.*]—A sale by auction being about to take place, an intending purchaser was told by a person who had previously purchased a portion of the same property, that he intended buying more; that he expected the property would fetch about £70 or £80 an acre, and that he was prepared to go £100 per acre for what he intended to buy. It was shewn that, by an arrangement with the owner of the estate, this person was to have the lots desired by him at the same price as he had paid for his first purchase, no matter at what price they might be knocked down to him; and they were accordingly bid off by him at a rate much higher than that formerly paid by him:—Held, that this was not puffing, although it might mislead the intending purchaser, who swore that he relied on the opinion of this person, but, as he did not swear that he had been influenced by his example or the information thus given by him, the court decreed specific performance of the contract for the purchase of certain portions of the estate bid off by him at the auction. *Crooks* v. *Davis*, 6 Gr. 317.

Representations as to Value — *Exchange—Caveat Emptor.*]—A. and B. had each a wild lot, and negotiated for an exchange. A. asserted that his lot was worth $900; B., that his was worth $800. They ultimately agreed to exchange, B. to pay

$100 in money. Neither had any knowledge of the other's lot, but the truth was, that A.'s lot was worth $400 only:—Held, that the doctrine caveat emptor applied, and that A. was entitled to enforce the contract. *McRae* v. *Froom*, 17 Gr. 357.

See McLeod v. *Orton*, 17 Gr. 84; *Stammers* v. *O'Donohoe*, 28 Gr. 207, 8 A. R. 161, 11 S. C. R. 358; *Gough* v. *Beach*, 6 O. R. 699, *post* 9.

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8. *Inability of Purchaser to Perform Contract.*

Speculative Purchase.]—The court will not encourage speculative purchases. Where, therefore, it was shewn that a purchaser could not pay for the property, and, after several demands upon him to complete the purchase, the vendor sold to a third party with the knowledge of the original purchaser, who appeared to acquiesce in it; but afterwards, when, by reason of the construction of a railway, the land had increased very much in value, filed a bill for specific performance, the court dismissed the bill with costs. *Langstaffe* v. *Mansfield*, 4 Gr. 607.

Third Party—*Assignment of Security by.*]—By the contract the property was agreed to be paid for, in part, by an assignment of a mortgage,, to be obtained from a third party. Afterwards the purchaser alleged the refusal of the mortgagee to assign. The court refused to decree specific performance at the instance of the vendor, but directed an inquiry, whether or not the mortgagee was still willing and able to assign the mortgage. *Arnold* v. *Hull*, 7 Gr. 47.

See Wallace v. *Hesslein*, 29 S. C. R. 171, *ante* 4 (a).

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9. *Inadequate or Exorbitant Consideration.*

Ignorance of Rights—*Small Price.*]—A contract to be specifically performed must be equal, fair and certain in its terms, and founded on good consideration. Where, therefore, a woman, under the impression that she held a life interest in two acres, when she was entitled to the fee and also an annual allowance of £10, partly in cash and partly in produce, charged upon other lands, agreed to sell her interest in such two acres to the owner of the other lands, in consideration of his paying her the £10 all in cash, the court refused specific performance. *Earley* v. *McGill*, 11 Gr. 75.

Inequality of Parties—*Absence of Advice — Improvidence—Pleading.*]—The plaintiff, an old woman of eighty-six, sued for rescission of a contract for the sale of land, and the defendant by way of cross-relief asked for specific performance. The evidence shewed that at the time of contract there was inequality between the parties in that the plaintiff was not so well able to protect her own interests, as was the defendant to protect his; that she had capriciously and improvidently rejected the advice of her solicitor, who tried to persuade her to accept an offer more advantageous; that she was illiterate, and her capacity (weak at best) was affected by her extreme age, by her distress from want of money, and by drink; that the price offered by defendant was clearly inadequate; that, though it did not appear that the defendant was guilty of fraud, yet that probably the plaintiff did not clearly comprehend the terms of the bargain:—Held, that under these circumstances, though no sufficient reason existed for interfering with the decision of the Judge below in dismissing the plaintiff's bill, specific performance of the agreement should not have been decreed. Held, also, that, inasmuch as all the evidence that could throw light upon the case had, admittedly, been given, the fact that the issue of improvidence was not raised on the pleadings was immaterial. In such a case it is a mere matter of form to adapt the pleadings to the matters proved. *Gough* v. *Beach*, 6 O. R. 699.

Interest on Purchase Money—*Compounding.*]—Where, by a contract for sale of land, it was stipulated that, in the event of interest on the unpaid purchase money being unpaid at the end of each year, the same should be added to the principal, the court refused to decree specific performance by the vendor on payment of the principal and simple interest only, or except upon payment of the interest according to the agreement; and semble, that the vendee would in like manner have been bound to pay this amount, if the bill had been filed by the vendor, seeking to enforce the sale. *Henderson* v. *Dickson*, 9 Gr. 379.

Marriage—*Bond for Deed by Wife's Father.*]—The owner of land promised the plaintiff's father that if the plaintiff would marry the owner's daughter the owner would give the plaintiff fifty acres of land; and after the marriage he did execute a bond to him for a conveyance thereof, reciting the payment of $300 as the consideration therefor. The bond also contained a recital that the obligor desired that the land should go to the male issue of his daughter and her husband. The obligee having died, a suit to compel the specific performance of the agreement was filed by his infant heiress, to which the obligor set up the defence of want of consideration; as also a denial of having executed the bond. The court refused to allow a supplemental answer to be filed setting up a defence as to the estate agreed to be conveyed; and, being of opinion that there was an adequate consideration, made a decree for specific performance of the agreement with costs. *Boyd* v. *Shouldice*, 22 Gr. 1.

Purchase for Special Use—*Delay in Completion—Change of Circumstances—Large Price.*]—A person agreed to purchase for £200 a small piece of land, worth intrinsically not more than £7 10s., to use it as a millpond, and in order to protect himself against suits at the instance of the owner; but, owing to a dispute as to the metes and bounds of the land, no deed was ever executed until after the purchaser's mill was destroyed by fire, when the vendor tendered the deed, but the vendee, not then requiring the use of the land, declined to complete the agreement. The court refused to enforce the contract, and dismissed the bill of the vendor, filed for that purpose, with costs. *Blackwood* v. *Paul*, 4 Gr. 559; *S. C.*, 3 Gr. 394.

See Schofield v. *Tummonds*, 6 Gr. 568, *ante* 7.

10. *Incomplete Contract.*

Resale by Vendor before Completion—*Notice to Second Purchaser—Rights of Original Purchaser.*]—A lot of wild lands were sold on credit to plaintiff in April, 1845, and by a subsequent arrangement a deed and mortgage were to be executed in April, 1846. The parties then met, but separated in consequence of the vendor not producing his title deeds as he had promised. No further communication passed between them, and in August, 1846, the vendor resold to B., who was aware of the plaintiff's purchase, gave B. a deed and took a mortgage. In the same month, or the next, B. went into possession and made considerable improvements, and, as he asserted, with the knowledge of the plaintiff. No communication passed between the purchasers until February, 1847, when the plaintiff called on B. and told him that he meant to claim the property under his contract; in August following he filed a bill for specific performance. The cause was brought on for hearing in 1850, and specific performance was decreed, with costs. *McDonald* v. *Elder*, 1 Gr. 513.

A purchaser, when informed that the subject of his purchase has been resold, may, although his contract is not ripe for execution, institute a suit to recover possession; still it would seem that all that is necessary for him to do is to notify the second incumbrancer that he intends to insist upon his rights when the proper time arrives. Where a purchaser, in consequence of the resale, filed a bill for specific performance before his contract was ripe for execution, the court on that ground dismissed the bill without costs, prefacing the order of such dismissal with a declaration of the rights of the parties. *Towers* v. *Christie*, 6 Gr. 159.

See post 18 (b).

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11. *Infants—Rights of.*

Benefit of Infants—*Inquiry—Consent—Laches.*]—In a suit for specific performance, where there were infant defendants, the court held that the plaintiff's laches precluded him, but directed an inquiry as to whether it would be beneficial to the infants to affirm or annul the contract. If found beneficial to affirm it, the plaintiff might excuse his laches; but, semble, all the parties beneficially interested must consent to the inquiry. *Chevallier* v. *Strong*, 8 Gr. 320.

——— *Inquiry—Sale.*]—The holder of a mortgage on real estate and of a judgment against the mortgagor, agreed, after the death of the mortgagor, with his widow and two of the heirs, for the release, on certain terms, of the equity of redemption, and for the conveyance to him of another portion of the real estate in discharge of the mortgage and judgment debt. On a bill to enforce this agreement, it appeared that other children of the mortgagor, who were infants, were interested in the estate. The court refused the relief prayed, but directed a reference to the master to inquire if it would be more for the advantage of the infants to adopt the agreement, or that a sale of the estate should be made under the decree of the court. *McDougall* v. *Barron*, 9 Gr. 450.

Contract Made on Behalf of Infants—*Enforcement—Prayer for General Relief.*]—The widow and infant heirs of C. were entitled, subject to a mortgage to E. By agreement between the widow, E., and W., the premises were conveyed to W., upon an oral understanding that he should retain a part of the premises, equal in value to the sum due on E.'s mortgage, which he was to assume, and that he should convey the remainder of the land to the widow, for the benefit of herself and children. The conveyance to W. having been made, the widow and infant heirs filed their bill, seeking a specific performance of the agreement to convey the portion agreed on to them:—Held, following Graham v. Chalmers, 9 Gr. 239, that the specific relief sought could not be decreed, but that under the general prayer, and the case stated, the plaintiffs were entitled to some relief; and a demurrer was therefore overruled. *Clark* v. *Eby*, 11 Gr. 98. See *S. C.*, 13 Gr. 371.

Costs—*Infant Defendants—Heirs of Vendor.*]—A decree for specific performance against the infant heirs of vendors should be without costs. The same rule as to the costs of a solicitor appointed by the court guardian ad litem to infant defendants in suits for specific performance seems applicable as in mortgage cases; but where the purchase money has not been paid, the court will direct the payment of the guardian's costs from it. *Commander* v. *Gilrie*, 6 Gr. 473.

——— *Infant Plaintiffs—Heirs of Vendor.*]—The vendor had died before execution of the conveyances, and his infant heirs sued for specific performance of the contract, which defendants (the vendees) expressed their willingness to carry out but for the obstacle created by the death of the vendor leaving his heirs-at-law infants. The court decreed specific performance, but without costs to either party; the costs of the infants to be defrayed out of the balance of purchase money payable by the defendants. *Weihe* v. *Ferrie*, 10 Gr. 98.

Fraud of Infant — *Sale—Acquiescence after Majority—Estoppel.*]—D.'s father died in 1847. His will, purporting to devise all his real estate to his wife in fee, was not duly executed, and D. became entitled as heir-at-law. Three months before D. came of age he agreed with P. for the sale to him of the real estate for value. A conveyance to P. was prepared by D., and executed by his mother, the devisee under the father's will, D. being a witness to it. P. afterwards sold and conveyed his interest, and D. brought ejectment against the purchaser. D. had at various times acquiesced in the sale after he became of age:—Held, that D.'s conduct with reference to the sale to P. was fraudulent, and was to be considered as an assertion that his mother was entitled as devisee in fee, although he was then not of age; and that such conduct, and his subsequent acquiescence after his attaining majority, estopped him from denying the validity of the sale; and he was enjoined from proceeding with the ejectment, and ordered to convey to the plaintiff, the vendee of P. *Leary* v. *Rose*, 10 Gr. 346.

Heir of Purchaser—*Suit for Compensation—Delay during Minority.*]—Where a purchaser died after paying three-fourths of the purchase money, leaving an infant heir, who was entitled to a specific performance

of the contract; and the vendor, at the instance of the administratrix, conveyed the property, which had greatly increased in value, to a third person, and it afterwards passed into the hands of persons without notice:—Held, that the heir could sue the vendor in equity for compensation. There was a lapse of fourteen years after the vendor's conveyance before the bill for compensation was filed, the heir having been a minor all this time:—Held, that the vendor having caused this delay by his own arrangement with the infant's relations, which deprived the infant of their protection, this lapse of time was no bar to the suit. With a view to fixing the amount of compensation, inquiry was directed as to the condition of the estate left by the deceased purchaser, and whether the plaintiff or the estate received the benefit of any part of the purchase money on the subsequent sale of the property. *Forsyth* v. *Johnson*, 14 Gr. 639.

Sale of Infant's Estate—*Approval of Court—12 Vict. c. 62.*]—Where a contract for the sale of an infant's estate had been approved of by the court, it was held unnecessary for the purpose of obtaining a decree for specific performance, either to allege or prove that the sale was a proper one under 12 Vict. c. 62. *McDonald* v. *Garrett*, 8 Gr. 290.

Suit by Representatives of Vendor—*Infant Parties—Amendment.*]—Where, in a suit by personal representatives of a vendor for the specific performance of the contract of sale, an infant heir was joined as a co-plaintiff, the court refused to make a decree, although the bill had been taken pro confesso against the defendant, the purchaser, and ordered the case to stand over, with a view to the plaintiffs amending their bill, by making the infant a party defendant, in order that the contract might be established against him. *Hamilton* v. *Walker*, 12 Gr. 172.

See, also, *Dalton* v. *McBride*, 7 Gr. 288; *Van Wormer* v. *Harding*, 14 Gr. 167, *post* 15 (a); *Airey* v. *Mitchell*, 21 Gr. 239, 510, *post* 15 (a).

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12. *Interest.*

Purchase Money—*Arrears of Interest—Period—Possession—Charge.*]—In a suit for specific performance, even where a purchaser has taken possession of the premises, as a general rule he is only liable for arrears of interest for a period of six years prior to the filing of the bill. Where the purchaser dies, the rights of no incumbrancer intervening, the vendor is entitled to a charge on the land in the hands of the heirs for a period beyond the six years, in order to prevent circuity of action. *Airey* v. *Mitchell*, 21 Gr. 510, 239.

——— *Conveyance—Delay—Possession.*]—Under a contract of purchase of real estate providing that "if from any cause whatever" the purchase money was not paid at a specified time, interest should be paid from the date of the contract, the vendor is relieved from payment of such interest while the delay in payment is caused by the wilful default of the vendor in performing the obligations imposed upon him. A contract containing such provision also provided for the payment of the purchase money on delivery of the conveyance to be prepared by the vendor. A conveyance was tendered which the vendee would not accept, whereupon the vendor brought suit for rescission of the contract, which the court refused on the ground that the conveyance tendered was defective. He then refused to accept the purchase money unless interest from the date of the contract was paid. In an action by the vendee for specific performance:—Held, affirming the decisions in 19 A. R. 291, and 21 O. R. 562, that the vendee was not obliged to pay interest from the time the suit for rescission was begun, as until it was decided the vendor was asserting the failure of the contract, and insisting that he had ceased to be bound by it, and after the decision in that suit he was claiming interest to which he was not entitled, and in both cases the vendee was relieved from obligation to tender the purchase money. By the terms of the contract the vendor was to remain in possession until the purchase money was paid and receive the rents and profits:—Held, that up to the time the vendor became in default, the vendee, by his agreement, was precluded from claiming rents and profits, and was not entitled to them after that time, as he had been relieved from payment of interest, and the purchase money had not been paid. *Hayes* v. *Elmsley*, 23 S. C. R. 623.

——— *Conveyance—Default—Delay.*]—A person in possession of land under a contract for purchase by which he agreed to pay the purchase money as soon as the conveyance was ready for delivery, and interest thereon from the date of the contract, is not relieved from liability for such interest unless the vendor is in wilful default in carrying out his part of the agreement, and the purchase money is deposited by the vendee in a bank or other place of deposit in an account separate from his general current account. The vendor is not in wilful default where delay is caused by the necessity to perfect the title owing to some of the vendors being infants, nor by tendering a conveyance to which the vendee took exception but which was altered to his satisfaction while still in the hands of the vendors' agent as an escrow and before it was delivered. A provision that the purchase money is to be paid as soon as the conveyance is ready for delivery does not alter the rule that the conveyance should be prepared by the purchaser. Judgments in 19 A. R. 591 and 21 O. R. 642 reversed. *Stevenson* v. *Davis*, 23 S. C. R. 629.

See Gould v. *Hamilton*, 5 Gr. 192, *post* 13; *Gray* v. *Recsor*, 15 Gr. 205, 16 Gr. 614, *ante* 1; *Henderson* v. *Dickson*, 9 Gr. 379, *ante* 9.

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13. *Mistake or Misunderstanding.*

Bond for Conveyance—*Omissions and Defects—Possession.*]—A person contracted to sell land, whereupon the purchaser was let into possession, and the vendor executed a bond intended to be conditioned for the conveyance of the land as contracted for; but, by mistake, the number of the lot was omitted, and the bond was otherwise defective. On a bill being afterwards filed by the vendor against the heir-at-law of the purchaser, the court considered that the plaintiff was entitled to rely upon the parol agreement partly performed, and that the bond which had been executed might be used by him to aid in proving the terms of the contract in pursuance

of which the purchaser had taken possession. *O'Neal* v. *McMahon*, 2 Gr. 145.

Contract to Accept Mortgage—*Interest—Omission—Parol Evidence.*]—A vendor executed an agreement to convey certain premises and receive back a mortgage for part of the price payable by instalments, but omitted to say that the mortgage should be made payable with interest. In a suit brought to enforce specific performance of the agreement, and to compel the vendor to accept a mortgage without interest, parol evidence was admitted to shew that the real understanding of the parties was, that interest should be made payable by the mortgage. *Gould* v. *Hamilton*, 5 Gr. 192.

Contract to Exchange—*Misdescription of Lot.*]—The owner of the west half of a lot, supposing himself to own the east half, not the west half, contracted to exchange the east half for other lands, and conveyed it accordingly. He filed a bill to compel the other party to accept the west half, and perform the contract by conveying the lands agreed to be given for the east half, alleging mistake in the insertion of east instead of west. It appeared that the two halves were of about equal value, and that defendant had no personal knowledge of either; but, as the mistake was that of the plaintiff alone:—Held, that the west could not be substituted for the east half; and relief was refused. *Cottingham* v. *Boulton*, 6 Gr. 186.

Mutual Mistake—*Reservation of Minerals.*]—The defendants executed an agreement to sell certain lands to plaintiff, who entered into possession, made improvements, and paid the purchase money, whereupon a deed was delivered to him, which he refused to accept, as it reserved the minerals on the land, while the agreement was for an unconditional sale. In an action for specific performance of the agreement the defendants contended that in their conveyances the word "land" was always used as meaning land minus the minerals:—Held, reversing the judgment in 6 B. C. Rep. 228, that the contract for sale being expressed in unambiguous language, and H. having had no notice of any reservations, it could not be rescinded on the ground of mistake; and he was entitled to a decree for specific performance. (Leave to appeal to privy council granted.) *Hobbs* v. *Esquimalt and Nanaimo R. W. Co.*, 29 S. C. R. 450.

Provisions of Contract — *Misunderstanding—Bona Fides.*]—The court, when it is satisfied that there is a bonâ fide misunderstanding on the part of one of the parties to a contract as to the provisions of an agreement, will not decree specific performance of it. *McDonell* v. *McDonell*, 21 Gr. 342.

Terms of Contract—*Difference of Understanding—Cash or Credit.*]—R. wrote to O.: "I have considered the matter of our conversation, and offer you $800 for the property." O. replied: "I have your favour offering $800 for the property (describing it). I have concluded to accept your offer." The evidence shewed that at the prior conversation referred to in R.'s letter, R. was seeking to buy the property in question on terms of five or seven years' credit:—Held, that, as the acceptance by O. was as of a cash offer, while R. did not intend to make any such offer, the contract could not be specifically enforced, the parties differing in their understanding of it. *Omnium Securities Co.* v. *Richardson*, 7 O. R. 182, 185.

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14. *Pleading.*

Answer—*Statute of Frauds.*]—See *post* 18 (b).

——— *Submission to Decree—Interest.*]—In a suit to compel the acceptance of a mortgage for part of the purchase money, without interest, defendant in his answer thereto swore: "I have always said that I was ready and willing and have offered to complete the sale of the said property to the plaintiff, provided interest on the unpaid purchase money was included in the mortgage." And also: "I submit and insist that unless the plaintiff will consent to pay interest on the unpaid purchase money aforesaid, he is not entitled to any relief in this court." The court treated these statements as submitting to a decree for specific performance, with interest reserved by the mortgage, and made a decree accordingly. *Gould* v. *Hamilton*, 5 Gr. 192.

Bill—*Omission of Offer—Objection at Hearing.*]—In a suit for specific performance an objection that the bill does not contain an offer by the plaintiff to fulfil the agreement on his part, is too late when taken for the first time at the hearing; although effect would have been given to such objection if it had been taken by demurrer. *Wardell* v. *Trenouth*, 24 Gr. 465.

——— *Prayer—Foreclosure—Amendment.*]—A vendor sued upon the covenants of a bond and obtained judgment. He then filed a bill setting out the agreement, and praying foreclosure:—Held, that the bill was improperly framed, but that he might amend on payment of costs. Quære, was his action at law a waiver of his remedy by specific performance? *McAvoy* v. *Simpson*, 6 L. J. 94.

Statement of Claim—*Sufficiency of Contract — Demurrer—Parties.*]—Where a demurrer is raised to a statement of claim for specific performance on the ground of no sufficient agreement, it is enough if, in any aspect of the case, the plaintiff may be entitled to some relief. In this case it was held, on the statement of claim, that a concluded contract was shewn, and that defendant was liable. Misjoinder of parties is, since the Judicature Act, no longer a ground for demurrer. *Young* v. *Robertson*, 2 O. R. 434.

See Clark v. *Eby*, 11 Gr. 98, *ante* 11; *Gillatley* v. *White*, 18 Gr. 1; *Town of Peterborough* v. *Midland R. W. Co.*, 12 P. R. 127; *Stuart* v. *McVicar*, 18 P. R. 250; *Simmons* v. *Campbell*, 17 Gr. 612.

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15. *Practice.*

(a) *Costs.*

Conduct before Suit.]—The steps which the vendee, who desires specific performance of the contract, should take before filing a bill in order to entitle him to costs of the suit, considered. *Hutchison* v. *Rapelje*, 2 Gr. 533.

Defendants' Costs inter se — *Vendor and Second Purchaser—Dismissal of Bill.*]—Whatever may be the rule in England, the court of chancery in this Province has jurisdiction to make a defendant pay costs in a suit for specific performance, though the bill be dismissed, if the circumstances be such as to warrant doing this. Hence, in such a suit, brought by the purchasers of certain lands, against the vendors and a subsequent purchaser, where the Judge of first instance dismissed the action without costs, but gave the subsequent purchaser his costs against his co-defendants, although no issue was raised between the defendants:—Held, that he had jurisdiction to make the order, in his discretion, and having exercised such discretion, the court would not interfere. McMahon v. Barnes, Order Book No. 9, fol. 730 (not reported), followed. *Church* v. *Fuller*, 3 O. R. 417.

Defendants Severing—*Vendor and Second Purchaser.*]—In a suit for specific performance by a vendee against his vendor and a person to whom he had sold after agreeing to sell to the plaintiff, the defendants may sever in their defence, and employ separate solicitors, and each is entitled, on dismissal of the bill with costs, to tax a separate bill. *Barrett* v. *Campbell*, 7 P. R. 150.

Delay in Asserting Rights—*Defence—Rescission.*]—Where defendants set up a defence to a bill, which if tenable would have formed sufficient ground for their having taken steps to set aside the transaction which it was now sought to enforce, but they had not done so, although twelve years had elapsed since the act was done which they questioned, and which it was shewn they had all the while been aware of, the court ordered them to pay the costs of the suit. *Miller* v. *Ostrander*, 12 Gr. 349.

Heirs of Vendor—*Refusal to Convey—Personal Representatives.*] — A purchaser of real estate paid a portion of the purchase money during the lifetime of the vendor, and the balance to his personal representatives. The heirs-at-law were all of age, but they refused to convey to the purchaser, who filed a bill against the real and personal representatives for specific performance. The conduct of the personal representatives was shewn to have been correct, and the court, in making the decree asked, ordered the plaintiff to pay them their costs; but gave the plaintiff his costs of suit against the heirs-at-law; not against the estate of the vendor. *Addaman* v. *Stout*, 13 Gr. 692.

Infant Defendants—*Guardian—Rehearing.*]—On a rehearing the decree was affirmed, but the court, being of opinion that the guardian of the infant defendants, who reheard, was justified in raising the question for the determination of the full court, directed his costs to be paid out of the fund after satisfaction of the plaintiff's claim. *Airey* v. *Mitchell*, 21 Gr. 510, 239.

Infant Heirs of Vendor—*Personal Representative.*]—The vendor of real estate having died before the conveyance, leaving infant heirs, the purchaser proceeded at law to recover back the purchase money paid, partly to the vendor and partly to his administrators; whereupon a bill was filed by the representatives of the vendor, to restrain the action and for specific performance. The court made the decree, and ordered defendant to pay costs up to the hearing. *VanWormer* v. *Harding*, 14 Gr. 167.

See Commander v. *Gilrie*, 6 Gr. 473, *ante* 11; *Weihe* v. *Ferrie*, 10 Gr. 98, *ante* 11.

Objection to Jurisdiction—*Raising at Hearing.*]—Where a bill prayed specific performance of an agreement, and for an injunction against waste, and an account of waste committed, and the court thought the plaintiff's remedy, except as to the injunction, was at law, the decree was made without costs; the objection to the jurisdiction appearing by the bill, and not being raised until the hearing. *Raven* v. *Lovelass*, 11 Gr. 435.

Objection to Title — *Manner of Raising.*]—Although the plaintiff, the vendee, had not, by his conduct and delay, waived his right to object to the title, yet, as he had not raised the objection in the proper manner, he was entitled to no costs of his action for specific performance or rescission. *Nason* v. *Armstrong*, 22 O. R. 542, 21 A. R. 183, 25 S. C. R. 263.

——— *Subsequent Acceptance.*] — Before the time for the payment of their purchase money the vendees became dissatisfied with the title as it appeared on registry, and, without any communication with the vendor, filed a bill to rescind the contract, or to have it specifically performed, if the vendor could make a good title. On the hearing the plaintiff (the vendee) expressed his willingness to accept the title, and the court, with the consent of defendant, offered the plaintiff a decree for specific performance on payment of costs, or that the bill should be dismissed with costs. *Currah* v. *Rapelje*, 2 Gr. 542.

Out of Estate — *Vendor's Title under Will.*]—The rule which authorizes the payment out of the estate of the costs of all parties interested in obtaining the construction of a will, does not apply to a case where a purchaser refuses to complete his purchase of land from a person claiming title under such will. In such a case the purchaser, if the question is decided against him, will, as in ordinary cases, have to pay the costs of the litigation necessary for obtaining the decision of the court upon the question of title. *Smith* v. *Coleman*, 22 Gr. 507.

Prior Proceedings at Law — *Bar to Relief.*]—Where a vendor brought ejectment and turned the heirs of the purchaser out of possession, he was held to have disabled himself from coming to the court for specific performance, and could only do so in order to bind their interest in such a manner as to render the property saleable. Under such circumstances, the plaintiff having placed himself in a false position by reason of the proceedings at law, the court deprived him of his costs up to decree, but gave him his costs subsequent thereto. *Hawn* v. *Cashion*, 20 Gr. 518.

Scale of Costs—*Value of Land—Improvements.*]—A bill was filed for the specific performance of a contract for sale of land, for a sum less than $150. Before suit the plaintiff, the vendee, had entered upon the land, and made improvements upon it, which increased its value to more than $200:—Held, that the "subject matter involved" in the suit was more than $200, and that the plaintiff was

therefore entitled to costs according to the higher scale. *Kennedy* v. *Brown*, 6 P. R. 318.

——— *Value of Land—Injunction—Railway.*]—In a suit to enforce the specific performance of an agreement by a railway company for the purchase by them of the right of way over the plaintiff's lands, a decree was made for that purpose, and a reference directed to the master to ascertain the amount due by the defendants in respect of purchase money and interest; and also for damages for not constructing fences and crossings, as agreed upon, and to tax the plaintiff his costs. The master found due to the plaintiff for purchase money, &c., $187.24 only. It appeared that the defendants had constructed the fences and crossings after the institution of the suit, and that an interlocutory injunction had been obtained during its progress. Under these circumstances, the master taxed the plaintiff's costs on the higher scale:—Held, on appeal, that he was right. *Brough* v. *Brantford, Norfolk, and Port Burwell R. W. Co.*, 25 Gr. 43.

Successful Defendant — *Depriving of Costs.*]—Costs withheld from the defendant because he had misled the plaintiff as to his power to make the exchange, and declined to perform his contract on grounds some of which were untenable, and also alleged fraud which he failed to prove. *Teaute* v. *Walsh*, 24 O. R. 309.

Title—*Demand of Abstract—Other Issue—Result.*]—The general rule in England is, that where an abstract of title has been demanded, and the vendor only makes out a good title after bill filed by him, he will be ordered to pay the costs of the suit; but where the question really in issue between the vendor and purchaser was one other than of title and was decided against the purchaser, the court gave the vendor the costs of the suit, although a good title had not been shewn until after bill filed—no abstract having been demanded previously. *Haggart* v. *Quackenbush*, 14 Gr. 701.

——— *Master's Office—Misrepresentation—Other Issues—Result.*] — In a suit for specific performance, the defendant set up that the reason he had refused to complete the agreement was, that he had been induced to enter into it by certain misrepresentations of the plaintiff, which he entirely failed to prove. Although the master reported that a good title was first shewn in his office, the decree on further directions ordered the costs to be paid by the defendant, notwithstanding that the bill contained certain statements which, it was alleged, were not true, and had not been proved, the court being of opinion that such statements had not any material bearing upon the case, and that a suit would have been necessary without reference to the question of title. *Platt* v. *Blizzard*, 29 Gr. 46.

——— *Master's Office—Possessory Title—Knowledge of Purchaser.*]—In an action for specific performance by a vendor, whose title was, to the knowledge of the purchaser, a possessory one of long standing, in conformity with a family arrangement, ample proof thereof having been offered before action, the vendor was held entitled to his costs of action and of proving his title in the master's office. Games v. Bonnor, 33 W. R. 64, followed. Brady v. Walls, 17 Gr. 699, and Re Boustead and Warwick, 12 O. R. 488, specially referred to. *Dame* v. *Slater*, 21 O. R. 375.

——— *Objection to—False Answer.*] — Where a purchaser objected to the title offered, and refused to pay the balance of the purchase money, but remained in possession, and the vendor brought ejectment, falsely denying the payment of part of the purchase money, the purchaser was held entitled to the costs of a suit to restrain the ejectment, and compel specific performance, notwithstanding that the vendor made a good title when required by the court. *Healey* v. *Ward*, 8 Gr. 337.

——— *Objection to — Subsequent Admission.*]—Where a purchaser filed a bill alleging that his vendor could not make a good title, but at the hearing waived a reference as to title, admitting it to be good, the court ordered the plaintiff to pay costs. *Tisdale* v. *Shortis*, 10 Gr. 271.

(b) *In Master's Office.*

Objections to Title.]—When on a sale of lands the contract provided that the purchaser should be allowed ten days to make requisitions on title, and time was made of the essence of the contract, and the purchaser made certain objections within the ten days, and the answers not being satisfactory refused to complete, whereupon the vendor sued for specific performance and obtained the usual judgment:—Held, that the purchaser could not raise in the master's office fresh objections not raised within the ten days mentioned in the contract. *Imperial Bank of Canada* v. *Metcalfe*, 11 O. R. 467.

By an agreement for the sale of certain land, the vendor was to give a good marketable title of which the purchaser was to satisfy himself at his own expense, and was not to call for any abstract of title, deeds, or evidences of title other than those in the vendor's possession. Subsequently on a reference in a suit by the vendor for specific performance, the defendant filed three objections to the title having reference to a small portion of the land, which were answered by the plaintiff, and the reference was proceeding, when the defendant applied for and obtained from the master leave to file other objections:—Held, that the master had no jurisdiction to grant such leave, but on a subsequent application to the court the leave required was given on terms. *Clarke* v. *Langley*, 10 P. R. 268.

Settlement of Mortgage—*Terms—Refusal to Execute.*]—In a suit by a vendor for specific performance, where the vendor is ordered to execute a deed, and the vendee to execute a mortgage:—Semble, that it would be improper to insert a power of sale in such mortgage, and quære, if the deed merely contains qualified covenants, whether the mortgage should contain any others. Where a mortgage has been settled by a master, and the party ordered to execute it objects to its form, it is not a proper mode of raising such objections to refuse to execute such mortgage, and to execute a mortgage differing from the one settled. *McKay* v. *Reed*, 1 Ch. Ch. 208.

See Stammers v. *O'Donohoe*, 29 Gr. 64, *ante* 1; *Addaman* v. *Stout*, 13 Gr. 692, *post* (c).

(c) *Parties.*

Assignee of Lease—*Parties to Contract.*]—The general rule is, that only the parties to the contract should be parties to a suit for specific performance. The vendor, after contracting with the vendee, had leased with the right to purchase. It did not appear whether the option had been exercised, or the time for exercising it had arrived. The lease had been assigned, and defendant, the vendee, objected that the assignee should be a party to this suit: but the court overruled the objection. *Crooks* v. *Glenn*, 8 Gr. 239.

Assignee of Purchaser—*Costs.*]—A purchaser agreed, before conveyance, to assign his interest. In a suit by the vendor for specific performance, the assignee was made a defendant, and a decree was pronounced against him, with the costs occasioned by making him a party, in the event of his co-defendant (the purchaser) failing to pay the general costs of the suit, which were awarded against him. *Denison* v. *Fuller*, 10 Gr. 498.

Execution Debtor — *Suit against Sheriff.*] — Semble, that the court will entertain a bill to compel a sheriff to convey property sold under an execution; but the execution debtor must be made a party. *Witham* v. *Smith*, 5 Gr. 203.

Heir-at-Law of Purchaser—*Absentee.*]—The eldest son and heir-at-law of a person who had, in his lifetime, agreed to purchase land from the Canada Company, left this country without attempting to complete the purchase. The other children of the purchaser paid the balance of the purchase money, and sold the land in portions to three several purchasers. In a suit brought by these several purchasers against their vendors and the company, it appeared that the heir-at-law had not been heard of for upwards of twenty-five years. The court ordered the conveyance of the several portions to the purchasers, without requiring any administration of the estate of the heir-at-law, the company not objecting. *Burns* v. *Canada Co.*, 7 Gr. 587.

Heir-at-Law of Vendor—*Infant.*]—See *Hamilton* v. *Walker*, 12 Gr. 172, *ante* 11.

Husband and Wife—*Dowress.*]—When his wife joins with the owner of real estate in the contract of sale, and the purchaser institutes proceedings to compel specific performance thereof, the wife must be joined as a party defendant: and the fact that the bill alleges that her only interest is that of an inchoate dowress forms no ground for dispensing with her being so joined. *Loughead* v. *Stubbs*, 27 Gr. 387.

——— *Next Friend.*]—A husband and wife may jointly maintain one bill for specific performance of a covenant made by them for the sale of the land of the wife; but the wife must sue by her next friend. *Jessop* v. *McLean*, 15 Gr. 489.

——— *Next Friend—Amendment.*]—Where the vendors, the plaintiffs in an action for the specific performance of a contract for sale of land, were married women, and their husbands were joined as co-plaintiffs, and the defendant demurred ore tenus, on ground of misjoinder of parties, leave was given to amend by making the husbands defendants, or by adding next friends for the married women as co-plaintiffs. *Young* v. *Robertson*, 2 O. R. 434.

Personal Representative of Purchaser.]—In proceeding against the heir-at-law of a purchaser for specific performance or rescission of the contract, the personal representative of the deceased is a necessary party, even though an executor de son tort is a defendant, and though letters of administration had not been issued before the filing of the bill. *O'Neal* v. *McMahon*, 2 Gr. 145.

Quære, where it is clear that a purchaser has paid in full, whether, in a suit for specific performance against the heirs-at-law of the vendor, the personal representatives must be parties to the bill. Semble, sufficient to add them as parties in the master's office. *Addaman* v. *Stout*, 13 Gr. 692.

Third Parties—*Title.*]—In an action for specific performance by a vendor against a purchaser, the question raised by the defence, whether a third person has a title to the whole or part of the land, is not one which under con. rule 328 should be determined between the parties to the action, or either of them, and the third person; and an order cannot properly be made under that rule and con. rule 330 adding such third person as a defendant. Neither do con. rules 329, 331, or 332, apply in such a case. The consolidated rules as to third parties discussed. *Begg* v. *Ellison*, 14 P. R. 384.

Trustees — *Conveyance to Cestui que Trust.*]—A vendor devised his estate to trustees, and, on a division among the cestuis que trust, the trustees conveyed to one of them the sold property. These facts appeared on a bill by the purchaser against the grantee for specific performance. Defendants set up by answer that the executors and trustees were necessary parties. The objection was overruled. *Butler* v. *Church*, 18 Gr. 190.

(d) *Payment of Purchase Money.*

Decree—*Time for Payment—Costs—Set-off.*]—In decrees for specific performance of a contract for purchase, a time for payment should be limited, or in default the bill dismissed. And the decree should direct a set-off between the unpaid money and the costs. *McDonald* v. *Elder*, 3 Gr. 244.

——— *Time for Payment—Rescission.*]—There is no fixed rule in England as to the time to be given by a decree for paying purchase money before the vendor is entitled to a rescission of the contract for the default. *Tylee* v. *Landes*, 15 Gr. 99.

——— *Time for Payment—Rescission—Extension.*]—When the decree in a vendor's suit for specific performance directed payment in a month, the court, on a subsequent application to rescind the contract, gave defendant four weeks more to pay after service of the order; and ordered on default a rescission. *Carroll* v. *McDonald*, 15 Gr. 329.

——— *Time for Payment — Instalments—Payment into Court.*]—Where the time for the completion of a contract had not arrived,

some of the instalments of purchase money being not yet due:—Held, that under the circumstances, though there could not be a decree for specific performance, the purchaser was entitled to a declaration of right to specific performance, and an inquiry as to title; the overdue instalments of purchase money being paid into court. *Wardell* v. *Trenouth*, 24 Gr. 465.

——— *Undertaking — Payment of Instalments into Bank—Payment out.*]—W. contracted for the purchase of property, the price being payable by instalments; and the vendor was to give the vendee, W., a bond of indemnity in respect of a mortgage on the property not due. A decree was made, at the suit of the vendor, for specific performance, on the undertaking of the plaintiff, recited in the decree, to procure a release of the mortgage; and the overdue instalments were ordered to be paid into the bank subject to the further order of the court. On a question subsequently arising as to the effect of this undertaking:—Held, that the performance of the undertaking was not a condition precedent to the paying in of the money, but was to its being paid out. *Robson* v. *Wride*, 13 Gr. 419.

Payment into Court—*Reference—Title.*]—In a suit against the purchasers for specific performance, the court refused to order the purchase money into court pending a reference as to title. *Darby* v. *Greenlees*, 11 Gr. 351.

Production of Promissory Notes — *Condition Precedent.*] — Where promissory notes had been given in payment of the purchase money of land, and several years afterwards a bill was filed by a vendee of the original vendor against the heirs-at-law of the original purchaser:—Held, that the notes must be produced or satisfactorily accounted for before the purchase money would be ordered to be paid, even although a good title were shewn. *Crooks* v. *Glenn*, 8 Gr. 239.

Proof of Payment—*Reference—Leave to Apply.*]—Where the bill was filed against the heir-at-law for specific performance of his ancestor's contract, stating that all the purchase money had been paid, which was not proved at the hearing, the court referred it to the master to receive proof of payment, reserving leave to the personal representative to apply in case any part remained unpaid at the decease of the ancestor. *Farquharson* v. *Williamson*, 1 Gr. 93.

Rescission of Contract — *Application after Abortive Sale.*]—Where in a suit by a vendor for specific performance a decree for a sale has been made, with a proviso that if the sale prove abortive the contract is to be rescinded, and the sale proves abortive, and an application is made to rescind the contract, it must be shewn that the purchase money has not been paid. *Grange* v. *Conroy*, 1 Gr. 198.

Terms of Payment — *Amendment of Bill.*]—In a suit for specific performance, the evidence having clearly established the bargain as alleged by the plaintiff, though his bill omitted to state the terms and mode of payment as agreed upon, the court offered him the alternative of taking a decree for specific performance, with payment of purchase money in hand; or to amend his bill, setting up the exact terms of the bargain. *Gillatley* v. *White*, 18 Gr. 1.

(e) *Other Cases.*

Interlocutory Judgment — *Subsequent Delivery of Statement of Claim—Assessment of Damages.*]—See *Stuart* v. *McVicar*, 18 P. R. 250, *post* VIII.

Order for Possession.] — Order 32 of 1853, authorizing an order for delivery of possession, does not apply where the bill in a suit for specific performance is dismissed at the hearing. *Mavety* v. *Montgomery*, 1 Ch. Ch. 21.

General Order 464 applies only to mortgage cases, and not to suits for specific performance. An order for delivery of possession was refused. *Chisholm* v. *Allen*, 2 Ch. Ch. 411.

Service of Bill by Publication.] — Section 8 of G. O. IX., of June, 1853, does not apply to any cases other than those for foreclosure or specific performance of an agreement. *Bank of Montreal* v. *Hatch*, 1 Ch. Ch. 57.

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16. *Rescission of Contract.*

Conditional Rescission — *Re-establishment — Action at Law — Injunction.*] — In 1850 S. agreed in writing with M. to purchase 100 acres. S., having paid part of the purchase money, offered the remainder, and required his conveyance. M. then stated that he had no title, and offered to pay back the money, and allow S. to remain in quiet possession of the land. This was done, and the contract was given by S. to M., to be rescinded. M. then conveyed to his son, who, with knowledge of these facts, brought ejectment against S. At the trial the agreement was held to be an admission by S. of the title of the plaintiff at law, and the plaintiff had a verdict. On a bill for specific performance and to stay the action at law:—Held, that the rescission of the contract was only conditional, M. then undertaking not to disturb the plaintiff in possession; that the use made of the contract at the trial at law re-established it as against M. and his co-defendant; and that the plaintiff was entitled to specific performance, and to a perpetual injunction against the action at law. *Stuart* v. *McNab*, 10 Gr. 234.

Proposal for Abandonment—*Terms—Costs.*]—After contracting for the purchase of land, the vendee discovered a deficiency in the quantity sold, and insisted upon an abatement of price. After negotiations in respect of title as well as the deficiency, the purchaser proposed to waive the contract upon the vendor paying the costs incurred by the purchase, and interest on the purchase money from the time of the contract, which was acceded to by the vendor. After some weeks, a bill of charges was furnished to the vendor's solicitor, but he tendered the amount less three items, to which he objected, amounting in all to about £4 or £5. A few days afterwards he offered to pay the full amount of the costs, but this was also refused, and a bill was filed for specific performance:—Held, that there was no abandonment of the contract, and that the plaintiff was entitled to have it specially performed. *McDonald* v. *Jarvis*, 5 Gr. 568.

Treating Contract as at an End—*Conduct of Lessee.*]—A., having agreed to accept a lease of land, insisted pertinaciously upon a stipulation being in the lease which it was shewn he had no right to, and which he ultimately waived; but, having previously declared he would never accept a lease which did not agree with his interpretation of the contract, the owner of the land treated the agreement as at an end, and proceeded to erect a valuable building on it. A. thereupon filed a bill for specific performance of the agreement according to the interpretation of the lessor, and the court decreed it, but without costs. *Gray* v. *Springer*, 5 Gr. 242. But, on appeal, the decree was reversed, and the bill dismissed, with costs. *S. C.*, 7 Gr. 276.

See Grange v. *Conroy*, 1 Ch. Ch. 198; *Fisken* v. *Wride*, 7 Gr. 598; *Tylee* v. *Landes*, 15 Gr. 99; *Hobbs* v. *Esquimalt and Nanaimo R. W. Co.*, 29 S. C. R. 450.

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17. *Sales by Agents.*

Husband and Wife—*Pleading—Amendment.*]—In a suit by the purchaser for specific performance of an agreement for the sale of a married woman's land, the plaintiff was allowed to amend his bill after replication, by stating that her husband had signed the agreement as agent for his wife, without swearing that the amendment was true, although the wife had denied its truth under oath. *Jackson* v. *Robertson*, 7 P. R. 148.

Instructions to Agent — *Payment in Cash—Sale on Credit.*]—A. having authorized his agent to sell his estate for $500 cash, the agent accepted bills from the vendee, drawn on the vendee's agent in Europe, which bills the agent applied to his own use:—Held, that A. was not bound by such acts of his agent; that this was not a payment to A.; and that until he received the purchase money in cash, he was not bound to convey. *Brown* v. *Smart*, 1 E. & A. 148.

——— *Reservation of Timber—Neglect to Make—Remedy.*]—The owners of several lots of land employed an agent to sell them, and delivered to him blank agreements executed by them, leaving it necessary for the agent to insert only the name of the purchaser, the property sold, and the purchase money; at the same time orally instructing the agent to reserve all pine timber fit for saw logs. The agent sold one of the lots, and delivered to the purchaser one of the agreements, without any reservation of timber; and the vendors refused to adopt the sale without such reservation, and commenced felling timber upon the land. Upon a bill filed by the purchaser for a specific performance of the contract before the time limited for its completion, the court declared that the writing contained the true agreement between the parties, leaving the vendors to their remedy against their agent for breach of their instructions; and ordered defendants to pay the value of the timber removed by them, with the costs of the suit. *Jury* v. *Burrows*, 9 Gr. 367. Affirmed on rehearing, 16th February, 1864.

Revocation of Agent's Authority — *Death of Principal—Sales since Death.*]—A testator devised his real estate in trust for sale. Shortly after his death a friendly suit was instituted in chancery in England for administration of the estate. In this suit the trustee was a defendant, and an order was made for the appointment of a receiver to collect the assets in Canada, and sell the lands there. After the death of such receiver, the agents of the trustee in Canada, who had managed the estate for the deceased receiver, continued to collect the assets and make sales, with the knowledge and concurrence of the trustee and the parties in England:—Held, that such sales were not void, and would be enforced or not, as, in view of the circumstances, seemed to be proper. *Stickney* v. *Tylee*, 13 Gr. 193.

——— *Stipulation as to Deed.*]—The owner of land, in January, 1864, wrote to an agent requesting him to find "a purchaser" for it at $600 cash, or $800 on a specified credit. In December, 1865, the property having risen greatly in value, and the owner having received an offer for the timber, he wrote to the same agent informing him thereof, and asking his opinion as to what "he (the owner) should take for the lot altogether." In February, 1866, the agent, without further communication with the owner, contracted in writing to sell the property for $600, "to be paid on the execution of a good and full warranty deed, clear of all incumbrances." The court, considering that the letter of December, 1865, was a revocation of any authority to sell contained in that of January, 1864, refused to enforce the contract. Quære, whether the letter of January, 1864, gave power to sell; but if it did, the agent had no authority for agreeing to give a deed such as that stipulated for. *Anderson* v. *McBean*, 12 Gr. 463.

See Ryan v. *Sing*, 7 O. R. 266; *Walmsley* v. *Griffith*, 10 A. R. 327; *McCarthy* v. *Cooper*, 12 A. R. 284; *Harris* v. *Robinson*, 21 S. C. R. 390.

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18. *Statute of Frauds.*

(a) *Part Performance.*

Allegation in Bill—*Answer.*]—When the plaintiff, by his bill, sought to compel specific performance of a contract, which plainly appeared from the bill to have been created by parol, and relied on acts of part performance to take the case out of the statute:—Held, that the defendant need only claim the benefit of the statute, without alleging that there had not been a note in writing. *Townsley* v. *Charles*, 2 Gr. 313.

Evidence of Part Performance — *Intention.*]—Where a vendor files his bill for specific performance against a purchaser on a contract partly performed, the evidence of the contract must be clear and unmistakable, and the acts done must be such as cannot be referred to any other than the contract as alleged, nor done with any other intention than in part performance of such contract. *Sexton* v. *Shell*, 6 L. J. 94.

Exchange of Easements—*User.*]—A bill was filed by the owner of a mill, alleging an oral agreement with the proprietor of land adjoining, for the right to pen back a stream running through his land, which was used for driving the plaintiff's mill, in consideration of which he was to open up a road across his farm, for the use and convenience

of such land owner; but no writing was ever drawn up evidencing the agreement. The owner of the land instituted proceedings against the mill owner for damages by penning back the water, which overflowed a considerable portion of his land. The evidence being positive as to the agreement to permit the penning back of the water, and the road across the plaintiff's farm having been used by the proprietor of the land, and his vendee, the court decreed a specific performance of the parol agreement, but, under the circumstances, without costs. *Nicol* v. *Tackaberry*, 10 Gr. 109.

Execution of Deeds.] — A parol agreement in reference to land, partly performed by execution of deeds, was enforced. *Shennan* v. *Parsill*, 18 Gr. 8.

Payment of Purchase Money.]—Payment of the whole amount of purchase money, in pursuance of a parol contract for sale, will not operate as part performance to take the case out of the Statute of Frauds any more than payment of a portion of the price. *Johnson* v. *Canada Co.*, 5 Gr. 558.

——— *Joint Possession—Parent and Child.*] —A father and son lived together on the same farm, of which they obtained a lease in their joint names, the son having for several years, owing to the infirm state of his father's health, the entire management of the farm; and any moneys he received from the sale of the produce thereof, he was in the habit of handing over to his mother for safe keeping, thus forming, as it were, a common fund. Subsequently he effected a purchase of the farm in his own name, when he paid $1,000 on account of the purchase money, derived partly from private funds and partly from the fund held by the mother, and gave a mortgage with the usual covenants for the residue of purchase money, on which he subsequently made a payment of $1,520; $1,000 of which he borrowed from his wife, the balance being made up partly of funds of his own, partly of funds obtained from the common purse. The father claimed that the purchase had been made for his benefit and the benefit of the son and his brother, and filed a bill to enforce such claim; the son answered, denying having made the purchase in the manner alleged, and claiming to be the sole owner of the property, subject to the support of his father and mother out of the same:—Held, that, in the absence of any writing signed by the son, nothing was shewn to take the case out of the Statute of Frauds; and even if the defence of the statute were not set up, sufficient was not shewn to entitle the father to a decree on the ground of contract, or on the ground of a resulting trust in his favour, by reason of his being paid a portion of the purchase money. *Wilde* v. *Wilde*, 20 Gr. 521.

Possession.]—See *Crain* v. *Rapple*, 22 O. R. 519, 20 A. R. 291.

——— *Agent's Contract — Ratification.*] —A., by power of attorney, authorized his wife to sell and convey certain lands upon such terms as she should deem suitable, and immediately afterwards left the Province, and died abroad. The wife employed B., who sold to the plaintiff for a certain price, payable by instalments, with interest, upon payment whereof he was to receive a conveyance, and B. gave his own bond for a deed containing the terms of sale. The wife subsequently ratified the bargain, and B., with her consent, let the purchaser into possession:—Held, not a contract in writing, within the statute, but that sufficient appeared to authorize the decree of specific performance of a parol contract upon the terms of the bond, as being partly performed and within the terms of the authority. *Farquharson* v. *Williamson*, 1 Gr. 93.

——— *Agreement between Relatives—Services—Corroboration after Death.*]—The provision of the statute that requires corroborative evidence to be adduced, where one of the parties to an alleged contract is dead, is not that the evidence of the party setting up the claim must be corroborated in every particular; it is sufficient if independent support is given to the party's statements in so many instances that it raises in the mind of the court the conviction that such statements may be depended on even in respect of those matters in which there is no corroboration. C., the owner of real estate, promised his brother, A., that if he would abandon his intention of leaving this Province and remain and support their mother and sister, he (C.) would convey him a portion of the land on which A. was then residing and assisting in their support. In consequence of such request and promise, A. did remain and assumed the whole charge of the support of his mother and sister:—Held, that this was a sufficient part performance to take the case out of the Statute of Frauds. *McDonald* v. *McKinnon*, 26 Gr. 12.

——— *Character of Possession.*] — Continued possession by a tenant, coupled with acts inconsistent with tenancy, is sufficient part performance to let in parol evidence of a contract of sale. *Butler* v. *Church*, 16 Gr. 205.

——— *Character of Possession—Contradictory Evidence—Costs.*]—On an appeal from a decree for specific performance of a parol contract, it appeared that defendant denied any contract for sale, and alleged that the plaintiff was in possession as tenant merely; that the contract sworn to by the plaintiff's witnesses was not the contract alleged by the bill, and the evidence of there having been any contract was contradictory; and the Judge who pronounced the decree had intimated considerable doubt as to the evidence. The decree was reversed, and the bill ordered to be dismissed, but without costs. *Grant* v. *Brown*, 13 Gr. 256, 12 Gr. 52.

——— *Defect in Written Contract.*]—A person contracted to sell a piece of land; the purchaser was let into possession; and the vendor executed a bond intended to be conditioned for the conveyance of the land; but, by mistake, the number of the lot was omitted, and the bond was otherwise defective. On a bill filed by the vendor against the heir-at-law of the purchaser, the court considered that the plaintiff was entitled to rely upon the parol agreement partly performed, and that the bond might be used by him to aid in proving the terms of the contract. *O'Neal* v. *McMahon*, 2 Gr. 145.

——— *Guarantee—Lease—Delay.*]—An undertaking as surety must name the person to whom it is given. Where a guarantee did not sufficiently comply with the statute, but the transaction related to an interest in lands

for one year, and the principal had taken and retained possession under the contract:—Held, that the contract was binding on both principal and surety, on the ground of part performance. In such a case, some of the sureties, some weeks after possession was taken, refused to sign a formal lease. No proceedings were taken to enforce their undertaking until the year had expired, and the principal had given up possession, a defaulter in respect of his rent:—Held, that the delay was no bar to the suit. *County of Huron* v. *Kerr*, 15 Gr. 265.

——— *Improvements.*]—Where a person already in possession of property, contracted with the agent of the owner for purchase, and it was the intention of both parties that the purchaser should go on making improvements, and he did so, with the knowledge of the agent, without objection on his part, the improvements were held such an acting on the contract as would take the case out of the statute. *Jennings* v. *Robertson*, 3 Gr. 513.

——— *Improvements—Unexecuted Lease.*]—A contract was entered into for a lease, and the intended lessee on the faith thereof entered into possession, paid rent, and made improvements. Both parties died without executing any writing, and before any dispute as to the bargain arose. On a bill by the representatives of the intended lessee for specific performance, the parol evidence was not alone sufficient to establish clearly the terms of the transaction; but there was found among the papers of the intended lessor (a county court Judge) an unexecuted lease in his own hand-writing, which the court was satisfied contained the terms of the lease bargained for. A decree for specific performance was affirmed on appeal. *McFarlane* v. *Dickson*, 13 Gr. 263.

——— *Parent and Child—Promise—Devise.*]—The owner of real estate, who was old and enfeebled, had, to induce his son to relinquish his own farm and reside with and take care of the father during his life, promised the son to give him the farm upon which he (the father) was residing, and the son removed with his family to reside with the father. After remaining in the house for a few days, the son's wife and family, during his temporary absence, removed from the house of the father in consequence of disagreements with him, and before the son returned the father died. It was alleged that the father had made a will devising the property, but no trace of any will could be discovered, nor was there any satisfactory account given of it. A witness of the alleged will gave evidence of its execution by testator, but it was not shewn that there had been a second witness to it, nor were its provisions shewn:—Held, that there was not such an act of part performance as would take the case out of the statute. *Black* v. *Black*, 2 E. & A. 419, 9 Gr. 403.

——— *Parent and Child—Promise—Services.*]—On a motion for an injunction to stay ejectment brought by the devisees of plaintiff's father, the plaintiff's case was, that his father had orally agreed to give him the land for work which, after coming of age, he had done for his father; that two years afterwards the plaintiff, on his marriage, went into possession with his father's permission, but subsequently to his father having refused to give him a deed, or to part with the control of the property; and that the plaintiff remained in possession, to his own use, for eight years, when his father died, having devised the property to the defendants:—Held, that the plaintiff could not enforce the alleged agreement; and an injunction was refused. *McKay* v. *McKay*, 15 Gr. 371.

A father and son entered into mutual bonds, the father agreeing that just before his death he would convey his farm to the son in fee; and the son agreeing that he would, during his father's life, work the farm in a good and farmer-like manner; and would consult his father in all things reasonable. Quarrels took place; the son treated his father badly, though he did nothing which at law would be a breach of the condition of his bond; and ultimately the father left the farm, the son retaining possession until ejected at the father's suit:—Held, in a suit by the son against his father, that the contract should not be enforced against the father. *McDonald* v. *Rose*, 17 Gr. 657.

The father of the plaintiff died, leaving a widow and nine children, the plaintiff, the eldest son, being then sixteen years old, and he continued to reside with and work for his mother on a farm which she owned, for about six years, when, becoming dissatisfied with his position, he informed his mother thereof, and that he had determined to leave the farm and work for himself; whereupon his mother urged him to remain, work the farm, and assist her in bringing up the family, and she would give him the south half of the farm, and the other half to a younger brother, on condition of the plaintiff supporting her during her life. The plaintiff, in consequence, remained with the family, and erected a brick dwelling on the south half of the farm, of which house he agreed to give and did give his mother a certain part for the use of herself and a granddaughter, whose mother had died some years previously. The brothers and sisters of the plaintiff were all aware that the plaintiff claimed under this alleged agreement or promise, and the south half of the lot was always designated as his. The plaintiff continued to fulfil the terms stipulated for until the death of his mother, about seven years afterwards; but she died without having executed a deed to the plaintiff. Eighteen years afterwards, a brother of the plaintiff, having bought up the shares of four of the co-heirs, instituted proceedings in ejectment against the plaintiff, claiming to be absolutely entitled to five undivided ninths of the whole property. Thereupon the plaintiff filed a bill seeking to restrain such action, and to enforce a specific performance of the alleged agreement with the mother:—Held, that what had occurred could not be treated as an agreement to convey, but was at most to be looked upon only as a promise or expectation held out by the mother to the son to induce him to remain with her, and, as such, was not capable of being specifically enforced in equity. *Orr* v. *Orr*, 21 Gr. 397.

The plaintiff alleged that, having remained at home working for his father until he was of the age of twenty-five or twenty-six years, he then told him he must have wages, whereupon the father agreed that he would purchase a certain farm, and that, if plaintiff would remain at home and work until the land was paid for, he would convey the same to the

plaintiff; that the plaintiff accordingly remained with and worked for his father until the farm was fully paid for, and the father then put the plaintiff in possession. In answer to a bill for specific performance, the father positively denied the agreement alleged, although he admitted that he had bought the land intending to devise it to the plaintiff, and that he had executed a will so disposing of it, and alleged that he intended not to alter the disposition thereby made thereof. The court, under these circumstances, refused the relief prayed, and dismissed the bill with costs. The last case remarked upon and followed. *Jibb* v. *Jibb*, 24 Gr. 487.

The defendant in 1871 wrote to his son, who had left home to work for himself, that if he would return he would give him fifty acres of his farm and a share of the cattle and sheep when the plaintiff got married, but if he stayed away he would sacrifice his own and his father's interests. Upon receipt of the letter the plaintiff returned and remained on the farm working it with his father, except at certain times when he went to work for wages for himself. It was proved that the father had pointed out the fifty acres which he intended to give his son, and the son entered and erected a house thereon with his father's approval, and occupied it with his family, he having married in 1879:—Held, that the plaintiff was entitled to specific performance of this agreement. *Garson* v. *Garson*, 3 O. R. 439.

Services — *Buying in Title — Share of Land.*]—Defendants, who had some interest in gold lands, having discovered the owner of an outstanding title, employed the plaintiff to buy up the same; agreeing to give the plaintiff one-fourth of the land for his trouble, on his paying one-fourth of the consideration; and to reconvey to the owner of such title another one-fourth part. The title having been bought up, the defendants did reconvey the one-fourth to the owner, but refused to carry out the agreement with the plaintiff:—Held, that the agreement was such as this court would specifically enforce, there having been part performance. *Bogart* v. *Patterson*, 14 Gr. 624.

Staying Former Action—*Procuring Releases—Compensation.*] — A. brought an action against B. for the rents and profits of certain lands which had belonged to their father, who had died intestate, which lands B. had taken and held possession of for several years. On the action being entered for trial, an agreement of settlement was arrived at, by which the action was to be stayed upon B.'s granting and releasing to A. his interest in the lands, and on B. undertaking to obtain certain releases, &c. B.'s counsel appeared in court when the case was called for trial, and stated that it was settled, and an entry was made in the court minute book that the case was settled out of court. Subsequently B. required A. to procure certain releases, and, although these had not formed part of the settlement, A. agreed to do so, and at great trouble and expense procured the execution of the same ready to be delivered to B. Certain of the releases to be procured by B. were to be executed by married women and infants, which he was unable to procure. In an action to compel B. to carry out the settlement, B. set up as a defence the Statute of Frauds; and his inability to obtain the releases:—Held, that, the staying of the action was a sufficient part performance to take the case out of the Statute of Frauds. An option was given to A. to take a judgment for specific performance, with a reference as to compensation, if B. was unable to procure the releases; or a judgment for an account of the rents and profits, the subject of the former action. *Coates* v. *Coates*, 14 O. R. 195.

See, also, VENDOR AND PURCHASER, I. 4.

(b) *Pleading the Statute.*

Necessity for.]—Quære, whether where a defendant denies an alleged agreement of which a plaintiff seeks specific performance, defendant must claim the benefit of the statute in order to exclude parol evidence of the contract. *Butler* v. *Church*, 18 Gr. 190, 16 Gr. 205.

A party is entitled to set up the Statute of Frauds as a defence to a suit to enforce a parol agreement respecting an interest in land, although the statute has not been specially pleaded. *Wilde* v. *Wilde*, 20 Gr. 521.

See Townsley v. *Charles*, 2 Gr. 313, *ante* (a); *Cleaver* v. *North of Scotland Canadian Mortgage Co.*, 27 Gr. 508, *post* (c).

(c) *Sufficiency of Writing to Satisfy.*

Deed—*Execution by Vendor—Refusal to Deliver.*]—In pursuance of an oral agreement for the sale of lands, the purchase money being payable by instalments, to be secured by mortgage on these and other lands owned by the purchaser, a deed and mortgage were drawn up, which were signed and sealed by the vendor and mortgagor respectively—neither instrument referring to the other, and the deed expressing that the purchase money had been paid. The vendor and mortgagor took away the respective instruments signed by them, for the purpose, as alleged, of procuring the execution thereof by their respective wives. The vendor subsequently refused to perfect the transaction, and on a bill filed by the purchaser for specific performance:—Held, that the conveyance so executed by the vendor was a sufficient contract of sale within the statute: that the presumption on the face of such instrument was that the purchase money had been paid, which being admitted by the plaintiff to be incorrect, the purchaser was entitled to a decree for specific performance, paying the price in hand. *Gillatley* v. *White*, 18 Gr. 1.

Letters—*Incomplete Contract.*]—Upon a bill filed for specific performance:—Held, that the letters and correspondence amounted together to a complete contract for the sale by defendant to plaintiff of the lands in question: and held, upon a certain letter written by defendant to plaintiff's agent, that defendant was not bound to pay off the mortgage referred to out of the purchase money; that he was bound to transfer it to the A. property and any other property he had, if the mortgagees would consent to the exchange, and if they refused he was bound to indemnify the plaintiff against the mortgage. *Arnold* v. *McLean*, 4 Gr. 337.

Reversed, on appeal, the court holding that the letters shewed no complete contract, and the bill dismissed with costs. *S. C.*, 6 Gr. 242.

——— *Incomplete Contract—Evidence—Correspondence on Title—Conveyance.*]—A., whose wife owned a certain freehold property, wrote to B., the owner of a certain leasehold property, with reference to the said properties, as follows: "If you will assume my mortgage, and pay me in cash, $3,700, I will assume your mortgage of $5,000 on the leasehold;" and B. replied: "Your offer of this date, for the exchange of my property on King street for your property on St. George street, I will accept on your terms:"—Held, affirming the judgment in 2 O. R. 609, not a sufficient memorandum of the contract to satisfy the Statute of Frauds. Held, also, in an action by B. for specific performance of the above contract, that correspondence between the solicitors of the parties of date subsequent to the date of the above letters, as also the requisitions respecting titles which passed between the solicitors, were inadmissible in evidence. Held, further, that the fact that A.'s wife had signed a conveyance of the land in question to B., which conveyance had never been delivered, and did not, by recital or otherwise, set forth the contract relied on, could not assist B. in the action for specific performance. *McClung* v. *McCracken*, 3 O. R. 596.

Offer in Agent's Book—*Vendor not Named—Acceptance.*]—An offer to purchase land was written and signed by the defendant in an offer book kept by a firm of land agents who were authorized by the plaintiff to sell the land, and was orally accepted by the agents. The offer was not addressed to any one, but the book was marked on the back with the initials of the agents. Previous to this offer letters had been written between the defendant and the agents, in which an offer at a lower price was made and refused for the same land. After the second offer was accepted, the defendant's solicitors corresponded with the agents of the plaintiff about the title, referring in their first letter to the land which the defendant had purchased from the agents:—Held, that the initials on the book might be read into the offer to supply the name of the vendor, and that these, with the correspondence, constituted a sufficient agreement within the Statute of Frauds to bind the defendant. *Kennedy* v. *Oldham*, 15 O. R. 433.

Offer to Purchase—*Vendor not Named—Acceptance.*]—Where an offer, signed by the defendant, to exchange a stock of goods for land did not in any way designate the person to whom it was supposed to be made or for whom it was intended, and such person could not be ascertained without extrinsic parol evidence adding to the memorandum:—Held, not to be an agreement in writing within the statute so as to entitle the plaintiff to specific performance. Held, also, that an acceptance of the offer beneath the defendant's signature, signed by the plaintiff's assignor, did not cure the defect. *White* v. *Tomalin*, 19 O. R. 513. *See McIntosh* v. *Moynihan*, 18 A. R. 237.

Reference to Non-existent Survey—*Sketch — Parol Evidence to Explain.*]—An agreement for sale of lands referred to them as certain lots in "Stretton's Survey." No survey had in fact then been made, but a rough sketch of the proposed survey was in existence:—Held, that such sketch could not be considered as the survey referred to in the agreement; and, as parol evidence was necessary to shew the particulars as to size and position, without which such sketch was unintelligible, the court refused to enforce the agreement, but offered to make a decree, without costs, for performance of the agreement admitted by the answer or dismiss the bill without costs, the defendant having improperly denied the agreement alleged by the plaintiff, which was clearly established by the evidence, though incapable of being enforced owing to the defence of the Statute of Frauds. *Stretton* v. *Stretton*, 24 Gr. 20.

Terms—*Mortgage — Incomplete Written Agreement.*]—L. signed a document by which he agreed to sell certain property to W. for $42,500, and W. signed an agreement to purchase the same. The document signed by W. stated that the property was to be purchased "subject to the incumbrances thereon." With this exception, the papers were, in substance, the same, and each contained at the end this clause "terms and deeds, &c., to be arranged by the 1st May next." On the day that these papers were signed, L., on request of W.'s solicitor to have the terms of sale put in writing, added to the one signed by him the following: "Terms, $500 cash this day, $500 on delivery of the deed of the Parker property, $800 with interest every three months until the $6,500 are paid, when the deed of the entire property will be executed." The property mentioned in these documents was, with other property of L., mortgaged for $36,000. W. paid two sums of $500, and demanded a deed of the Parker property, which was refused. In an action against L. for specific performance of the above agreement, the defendant set up an oral agreement that, before a deed was given, the other property of L. was to be released from the mortgage, and also pleaded the Statute of Frauds:—Held, that there was no completed agreement in writing to satisfy the Statute of Frauds. *Williston* v. *Lawson*, 19 S. C. R. 673.

Unilateral Agreement — *Admissions in Answer—Statute not Pleaded.*]—Although the 4th section of the Statute of Frauds requires any agreement for the purchase or sale of land to be evidenced by a note or memorandum thereof to be signed by the party sought to be charged, yet where lands were sold by a trading corporation, under a power of sale contained in a mortgage, and the purchaser at such sale signed an agreement to purchase, and afterwards filed a bill seeking specific performance with compensation for the loss of crops which were advertised with the land, but actually belonged to third parties, and the defendants (the corporation) answered the bill admitting the fact of their being mortgagees, and proceeded with sundry statements such as, "when the plaintiff bid for and was declared the purchaser of the lands . . the sum bid by the plaintiff was a low price . . that the plaintiff was not in fact the real purchaser of the lands at the said sale . . that the company was not bound to put the plaintiff in possession, but never did any act to prevent her taking possession, and . . that possession was taken by the plaintiff," and the answer claimed no benefit from the statute, and did not deny having made the contract; neither did it raise any objection to the want of the corporate seal:—Held, that this sufficiently admitted the agreement to

sell, and, no protection of the statute having been claimed, that the plaintiff was entitled to a decree, with compensation for the loss of the crops, and with costs. *Cleaver* v. *North of Scotland Canadian Mortgage Co.*, 27 Gr. 508.

Variation of Written Contract — *Waiver of Right to Withdraw — Unsigned Memorandum.*]—A. made a contract with B. for the purchase of land, and both parties signed the contract. Some delay occurred in delivering an abstract, and A.'s solicitor wrote to B.'s solicitor, declining to complete the contract unless the abstract was delivered by a certain day. Subsequently, negotiations were entered into by the parties for a variation of the terms of payment, and two propositions, in writing, but unsigned, were made by A. for B.'s acceptance. B. accepted one of them, and so informed A. or his solicitor; but after a little time, A., on the advice of his solicitor, declined to carry out the contract as varied, relying upon the former letters. Upon a bill filed by B.:—Held, that the defendant could not rely upon the letters fixing a time for the delivery of the abstract, as by his subsequent dealing with the plaintiff he waived his right to withdraw from the contract. (2) That parol evidence could be admitted to connect the unsigned memorandum with the signed contract. (3) That there was sufficient evidence to shew that the proposition of the defendant had been accepted by the plaintiff. *Martin* v. *Reid*, 8 L. J. 186.

See Carroll v. *Williams*, 1 O. R. 150; *Barton* v. *McMillan*, 20 S. C. R. 404.

(d) *Other Cases.*

Absence of Writing—*Sheriff's Sale.*]—Where a sheriff had sold property under an execution at common law, but, before any deed was executed by him, a settlement was effected by the debtor with the execution creditor, who thereupon desired the sheriff to refrain from completing the sale, and the sheriff accordingly refused to convey the property to the purchaser at sheriff's sale, who thereupon filed a bill against the sheriff to compel him specifically to perform the alleged contract; but it appeared that no memorandum evidencing the sale had been made or signed by the sheriff:—Held, that the contract must be in writing under the statute. *Witham* v. *Smith*, 5 Gr. 203.

Conveyance on Faith of Promise.]—Lands were conveyed to W. upon the express understanding and promise that he would reconvey a certain portion thereof:—Held, that W. was bound to reconvey. *Clarke* v. *Eby*, 13 Gr. 371.

The plaintiff, having occasion to raise $3,000 to pay a society for a lot which he had leased and improved, and which was worth $4,200 cash, procured defendant to raise the money and to pay it to the society; whereupon the society conveyed the land to the plaintiff, and the plaintiff to defendant. The defendant a few days afterwards sold the lot for $4,200 cash, to a person with whom the plaintiff had been previously negotiating. Defendant admitted that, after the sale, he intended to give plaintiff the difference, less his own expenses, and $200 for his trouble. There was great inequality between the parties, and some evidence of confidence between them, and the negotiations between the two were private. The court inferred from the whole evidence that the intention had been expressed during the negotiation between the plaintiff and defendant, and that the plaintiff had conveyed on the strength of it:—Held, that it constituted an agreement which the court would enforce. *McLeod* v. *Orton*, 17 Gr. 84.

Parol Contract—*Merger in Written Contract — Amendment — Notice.*]—In 1858 a parol contract was entered into for sale of one acre of land, the consideration was paid, and the purchaser went into possession and built upon it. Afterwards, and in the same year, the vendor executed by way of security a life lease to another person of 50 acres, including the acre so sold. In 1860 a bond was executed by the vendor to the wife of the purchaser for conveyance of the acre to her. In 1862 the lessee for life purchased the 50 acres in fee, and the conveyance to him was duly registered; the bond for the acre was never registered. The purchaser of the acre having filed a bill for a specific performance of the parol contract, the court refused such relief, the parol contract having become merged in the written contract or bond; but offered the plaintiff, at the risk of costs, permission to amend by alleging the written contract, and to give further evidence to establish direct notice of the bond, reserving the question of costs until after the inquiry; if this refused, the bill to be dismissed without costs, defendant having falsely asserted his title under the lease to have been absolute, and not by way of security merely. *McCrumm* v. *Crawford*, 9 Gr. 337.

Trust — *Conveyance — Subsequent Oral Agreement—Judgment.*]—An attorney took a conveyance of certain property in trust for a client, but did not sign any writing acknowledging the trust. A parol agreement was subsequently entered into, that the attorney should accept the property in discharge of two notes which he held against the client:—Held, that this agreement was binding on the attorney, though not in writing. After the making of the agreement, the attorney put the two notes in suit, in the name of a third person, and obtained judgment by default:—Held, that the judgment was no bar to a suit by the client for specific performance of the agreement. *Fleming* v. *Duncan*, 17 Gr. 76.

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19. *Title.*

See, also, VENDOR AND PURCHASER.

(a) *Failure to Shew Title.*

Dismissal of Bill—*Return of Purchase Money—Lien—Costs.*] — Where a bill by a purchaser for specific performance is dismissed because a good title cannot be shewn, the court will order a sum paid on account of the purchase money to be returned to the purchaser, and, in default, give him a lien therefor on the estate agreed to be sold; but, unless the vendor has been guilty of fraud, the bill will be dismissed without costs. *Hurd* v. *Robertson*, 7 Gr. 142.

Portion of Land—*Knowledge of Defect by Purchaser — Payment — Abatement.*]—A. being the owner of fifty acres, the title to one

acre of which was defective, B., with knowledge of the defect, agreed to purchase the whole for a certain sum. B., with others, had at the same time an independent interest in the one acre, and obtained a decree ordering A. to convey it to him and the others. A. then filed a bill for specific performance of the contract with B.:—Held, that B. must pay the whole of the purchase money upon receiving a clear title to the remaining forty-nine acres. *Curran* v. *Little*, 8 Gr. 250.

Possession—*Bond for Purchase Money—Costs.*]—A purchaser executed a bond for payment of purchase money of land, and was let into possession; but having made default in payment and refused to accept the title, the vendor brought an action at law on the bond; whereupon the purchaser filed his bill for specific performance of the contract, if a good title could be shewn; or, if not, for an injunction restraining the action, and that the bond might be delivered up. Upon a reference, the vendor failed to shew a good title, and the court decreed the other branch of the prayer, but (the court being divided in opinion on the question of costs) without costs. *Morin* v. *Wilkinson*, 2 Gr. 157.

Want of Title—*Agreement for Vendor's Title—Misrepresentations.*] — Where the vendor sells only such title as he has, the purchaser will be compelled to complete his purchase, although the vendor does not shew a good title, or although the title appears to be not good. But where a vendor bound himself to convey only as good a title as he could obtain from his vendor, and it was shewn that neither of these parties had any title whatever, and that the vendor had misrepresented the state of the title, and had induced the purchaser to give the full value of the land, the court refused to enforce the agreement, but dismissed the bill without costs. *Leslie* v. *Preston*, 7 Gr. 434.

(b) *Objections to Title.*

Conditions of Sale—*Time.*]—See *Nason* v. *Armstrong*, 22 O. R. 542, 21 A. R. 183, 25 S. C. R. 263.

Conveyance to Vendor by Lunatic—*Notice.*]—Before the court will compel a purchaser to accept a title, it must be shewn to be reasonably clear and marketable, without doubt as to the evidence of it. Where, therefore, the deed to the vendor was executed on the 14th February, 1854, and in December of that year a commission of lunacy was issued against the grantor in that deed, under which it was found that he was insane, and had been so from the month of February or March previous, the court refused to enforce the contract. The vendor alleged as an answer to the objection of lunacy that it was shewn that he had purchased fairly, and without notice of the lunacy; but, as the fact that the vendor had purchased without such notice was one which from its nature was incapable of proof, and notice on some future occasion might be clearly shewn, the court allowed the objection and dismissed the vendor's bill with costs. *Francis* v. *St. Germain*, 6 Gr. 636.

Dower — *Abatement — Removal.*] — Although at law the right to dower is, during the life of the vendor, a nominal incumbrance only, the purchaser has a right in equity to compel its removal, or to have specific performance of the contract, with an abatement in the amount of the purchase money in respect of such incumbrance. *Van Norman* v. *Beaupre*, 5 Gr. 599; *Kendrew* v. *Sherwin*, 4 Gr. 578. See *Loughead* v. *Stubbs*, 27 Gr. 387.

——— *Fraud—Costs.*]—The court refused to enforce a contract for the sale of land until an outstanding claim for dower was removed; but, defendant in his answer having set up charges of fraud which were not established, withheld from him his costs of the suit. Chantler v. Ince, 7 Gr. 432, observed upon. Thompson v. Brunskill, 7 Gr. 542, approved of. *Gamble* v. *Gummerson*, 9 Gr. 193.

——— *Refusal to Bar — Setting apart Fund.*]—Where in a suit for specific performance the wife of the vendor refuses to join in the conveyance for the purpose of barring her dower, the proper mode of protecting the purchaser is, to set aside a sufficient portion of the purchase money to indemnify him against the claim for dower in the event of the wife subsequently becoming entitled thereto by surviving her husband; the interest during the joint lives of the vendor and his wife to be paid to him, and also the principal set aside on her decease. *Skinner* v. *Ainsworth*, 24 Gr. 148.

Incumbrance.]—A person, after contracting for the sale of land, mortgaged it, and then filed a bill for specific performance. The mortgage not being due, the court on the hearing directed an inquiry whether the plaintiff could make a good title free from incumbrance, and reserved further directions and costs. *McDougal* v. *Miller*, 15 Gr. 505.

——— *Dower — Demand of Abstract — Costs.*] — In a suit at the instance of a vendor of land for the specific performance of an agreement to sell, the defence raised was, that the land was to be conveyed free from incumbrances, but the same was subject to the dower of one M. and to a mortgage, and therefore that a good title could not be shewn. It was satisfactorily shewn that the dower had been sufficiently barred, and the report of the master stated that the price agreed to be paid for the land was $3,500; that $1,800 was due on the mortgage; that the purchaser had paid only $100 on account of his purchase; "and that the non-completion of the contract (was) attributable to the desire of the purchaser to recede from the contract." The defendant, down to the bringing of the decree into the master's office, had not demanded any abstract or made any objection to the title. The court, on further directions, made a decree ordering defendant to specifically carry out the agreement, and pay to the plaintiff the general costs of the cause. *Graham* v. *Stephens*, 27 Gr. 434.

Non-production of Deed—*Tax Certificate.*]—On an inquiry as to title the vendor was unable to produce one of the deeds, or to shew that a receipt was indorsed thereon for the purchase money, but the deed was more than sixty years old, and the memorial of it was produced: — Held, no objection to the completion of the contract. Held, also, that the non-production of a certificate of no taxes in arrear, was no objection to the title. *Thompson* v. *Milliken*, 9 Gr. 359.

Outstanding Equity.] — A supposed equity in a person who died in 1808, where the possession since that time has been enjoyed by another, claiming it as his own, and having a perfect legal title, is no ground for refusing to enforce an agreement in which the condition precedent was, that a party should "shew, make, and complete a perfect legal title," as, even if such equity existed, a court of equity would not enforce it under the circumstances. *Dewitt* v. *Thomas*, 10 Gr. 21. See, also, *Dewitt* v. *Thomas*, 7 C. P. 565.

Purchase en Bloc—*Closing up Streets—Want of Power.*]—Upon an agreement for sale of real estate laid out into building lots, the purchaser's agent signed a memorandum to the following effect: "The purchase is to cover the entire property of the C. estate, within the original boundaries, except that sold off, with appurtenances and privileges, so that the purchaser may make arrangements with the purchasers of lots to close the streets laid out, if desirable." The purchaser refused to complete the purchase, on the ground that without the power of shutting up one of the streets his object in the purchase would be frustrated, which object he had communicated to the agent of the vendors:—Held, notwithstanding, that the purchaser was bound to complete the contract. *Commercial Bank* v. *McConnell*, 7 Gr. 323.

Sale of Road Allowance—*Public User—Closing up.*]—The owner had permitted for many years a public road to be used across his land, which he subsequently agreed to sell. No by-law had been passed by the municipality for closing up this road, although a resolution of the council had been passed for the purpose:—Held, that a good title was not shewn. *Krousbien* v. *Gage*, 10 Gr. 572.

See Healey v. *Ward*, 8 Gr. 337, *ante* 15 (a); *Brown* v. *Pears*, 12 P. R. 396.

(c) *Payment into Court.*

In a suit against the purchasers for specific performance the court refused to order the purchase money into court, pending a reference as to title. *Tisdale* v. *Shortis*, 10 Gr. 271.

See Crooks v. *Glenn*, 8 Gr. 239, *post* (f); *Darby* v. *Greenless*, 11 Gr. 351, *ante* 15 (d).

(d) *Repudiation or Rescission for Want of Title.*

Time for Repudiating—*Knowledge of Want of Title — Conveyance from True Owner.*]—Where the plaintiff, at the time he entered into a contract with the defendant for the exchange of lands, had no title to the lands he proposed to exchange, which were, to the knowledge of the defendant at the time of the contract, vested in the plaintiff's wife:—Held, in an action for specific performance, that the defendant could not withdraw on the ground that the plaintiff had no title, at any rate before the time fixed for the completion of the exchange; and the plaintiff, having tendered a conveyance from his wife before action, was entitled to succeed; for the defendant, having entered into the contract knowing that it did not bind the estate, but only the person, of the plaintiff, must be taken to have relied from the beginning upon the promise of the plaintiff to procure the concurrence of the owner, and could not set up that the plaintiff was not the owner. Dictum of Kekewich, J., in Wylson v. Dunn, 34 Ch. D. 569, not followed. *St. Denis* v. *Higgins*, 24 O. R. 230.

——— *Notice of Rescission—Conduct.*]—H. and R. agreed to exchange land, and the agreement, which was in the form of a letter written by H. proposing the exchange, the terms of which R. accepted, provided that the matter was to be closed in ten days, if possible. R. at the time had no title to the property he was to transfer, but was negotiating for it. Nearly four months after the date of the agreement the matter was still unsettled, and a letter was written by H. to R.'s solicitor notifying him that unless something was done by the next morning the agreement would be null and void. Prior to this there had been several interviews between the parties and their solicitors, in which it was pointed out to R. that there were difficulties in the way of his getting a title to the land he proposed to transfer; that there was no registry of the contract which formed the title of the man who was to convey to him; and that the lands were subject to an annuity. R., however, took no active steps to get the difficulties removed until after the above letter was written, when he brought an action against the proposed vendor and obtained a decree declaring his title good. He then brought suit against H. for specific performance of the contract for exchange:—Held, reversing the judgments in 19 A. R. 134 and 21 O. R. 43, that the action could not be maintained; that R. not having title when the agreement was made, H. could rescind the contract without giving reasonable notice of his intention, as he would be bound to do if the title were merely imperfect; that the letter to the solicitor was sufficient to put an end to the bargain; and that, even if there had been no rescission, the conduct of R. in relation to the completion of the contract was such as to disentitle him to relief by way of specific performance. *Harris* v. *Robinson*, 21 S. C. R. 390.

——— *Trial—Reference.*]—A purchaser of land may, on discovering that the vendor has no title, repudiate on that ground; but attempted repudiation on another ground does not keep this right alive, if the vendor, at the proper time can make a good title. Where a purchaser, who, in an action by the vendor to compel specific performance, set up in his defence that the contract was void because of fraudulent misrepresentations as to value, attempted at the trial to repudiate also on the ground of want of title in the vendor, he having known of this want of title for some time, and having because of it obtained an order for security for costs, it was held that there could not then be repudiation on that ground, and that it would be sufficient for the vendor to shew title on the reference. Judgment in 19 O. R. 303 affirmed. *Paisley* v. *Wills*, 18 A. R. 210.

See Fisken v. *Wride*, 7 Gr. 598, 11 Gr. 245, *ante* 1.

(e) *Shewing Title after Suit Begun.*

Abstract—*Demand—Costs.*]—Held, in an action for specific performance, that shewing title is the manifestation on the abstract of all matters essential to a good title, and that, as the defendant had demanded no abstract before action, he could not complain that title was first shewn thereafter, and he was ordered to pay the costs thereof. Bridges v. Longman, 24 Beav. 27, cited and followed. *London and Canadian L. and A. Co.* v. *Graham*, 12 P. R. 657.

Unpatented Lands—*Purchase Money—Interest — Costs.*]—Plaintiff and defendant agreed to exchange lands, the plaintiff conveying 100 acres to B., upon which there was a mortgage for $1,300, and defendant agreeing to convey to the plaintiff whichever of two lots—one in T., the other in S.—he should select. In the event of his selecting the latter, it was to be assigned to him, subject to the payment of $150 in four equal annual instalments, with interest at seven per cent. The plaintiff selected the latter, but it appeared that defendant had not yet obtained a title thereto, although he was entitled to call for a patent from the Crown on making certain payments, and procured it the day the cause was heard. The court—as defendant had all along had a title to the lot, and was at the time able to carry out his agreement, and submitted to do so—directed that the contract should be completed by conveyance of the lot in S., and that the time for payment of the $150 should date from the hearing, from which time also the interest should be computed; but refused to give to either party the costs of the litigation. *Gray* v. *Recsor*, 15 Gr. 205; *S. C.*, 16 Gr. 614.

See ante 15 (b).

(f) *Waiver of Purchaser's Right to Have Good Title Shewn.*

Conditions of Sale—*Limiting Proof of Title.*]—A clause in the conditions of sale that the vendors shall only produce certain title deeds and an abstract of the register, and that the purchaser shall not be entitled to call for any other proof of title, does not exempt the vendors from shewing otherwise a good title. *Canada Permanent Building Society* v. *Wallis*, 8 Gr. 368.

Possession — *Clearing—Crops.*]—A purchaser, before the time appointed for the completion of a contract for the sale of land, and while the investigation was in progress, went upon and cleared a portion (about two or three acres) of the land sold, and sowed the same with turnip seed, which it was necessary to do at the time or lose the whole season; he did not, however, harvest the crop, but abandoned the possession entirely in consequence of objections to the title not being removed:—Held, no waiver of the purchaser's right to an inquiry as to title. *Mitcheltree* v. *Irwin*, 13 Gr. 537.

The mere taking possession by a purchaser is not necessarily a waiver of the right to an inquiry as to title. The court will not hold it to be so unless satisfied that it was the intention of the purchaser to take the land without such inquiry; or without its being made to appear that the conduct of the purchaser has been such that it would be unjust to the vendor under the circumstances to put him to prove his title. *S. C., ib.* 542.

——— *Delay—Payment into Court.*]—Possession and user of the premises do not deprive the vendee of his right to have a good title shewn; but where unreasonable delay has occurred in requiring title to be adduced, the court will order the purchase money to be paid into court, pending the investigation. *Crooks* v. *Glenn*, 8 Gr. 239.

——— *Improvements — Division of Property.*]—Where a contract for sale of building lots provided for immediate possession, and for the payment of the purchase money in eight annual instalments:—Held, that the erection of two workshops on the lots by the vendees was no waiver of their right to examine the title; nor was the division of the property between them, when they dissolved their partnership, nor the acceptance of a conveyance at another time of another lot said to depend on the same title. *Darby* v. *Greenlees*, 11 Gr. 351.

——— *Improvements—Want of Title—Onus.*]—In May, 1860, a purchase was made by parol of a lot of land, in addition to three other lots previously bought by the same purchaser from the same vendor. The purchaser went into possession and erected thereon a coach-house and stable, and the other portion of it was used as a lawn to the house which he had erected on the other lots, which had been duly conveyed to him. In 1860, and again in 1863, the purchaser repeatedly asked for a deed, offering to give the vendor his note for the purchase money, but which he refused to accept:—Held, that the purchaser, by his conduct, had waived his right to compel the vendor to make out a good title, but that he was at liberty to shew that the vendor had no title, in which case he would be entitled to get rid of his contract; the onus of proof under the circumstances being shifted. *Denison* v. *Fuller*, 10 Gr. 498.

——— *Repairs—Improvements.*]—The purchaser waives any objection to the title of the vendor if he takes possession of the property and exercises acts of ownership by making repairs and improvements. *Wallace* v. *Hesslein*, 29 S. C. R. 171.

See Tisdale v. *Shortis*, 10 Gr. 271, *ante* 15 (a).

20. *Uncertainty as to the Land.*

Appurtenances—*Mill Privileges—Costs.*]—Specific performance will not be decreed where the terms of the contract signed are uncertain, nor where it is plain that there was a misunderstanding. The intending purchaser wrote, "We will give you for your mill privilege in Laxton, with all the improvements, including the saw logs, and your claim on the land you applied for, viz., the north half of 6 in the 11th, and the north half of 7 in do., lots Nos. 6 and 7 in the 10th concession, $4,000," &c. In reality the premises mentioned comprised two mill privileges, but the vendor insisted that only one was embraced in this agreement, and filed a bill to enforce specific performance according to this construction; whilst defendant by his answer insisted that both were included in his offer to purchase. The court dismissed the bill,

but without costs; defendant insisting upon the case being heard by way of motion for decree, pursuant to a notice given by the plaintiff, from which he afterwards desired to withdraw. *McLaughlin* v. *Whiteside*, 7 Gr. 573.

Quantity — *Purchase — Possession — Fences—Payment.*]—One K. in 1835 purchased from defendant part of lot one, being a portion of a block of land owned by the latter, and two years afterwards agreed for the purchase of fifty feet additional land, and then erected his fences, enclosing on the north twenty-seven feet, on the west six feet, and on the south a quantity of land, which could not be defined, additional to the original purchase. Of the land so enclosed K., and those claiming under him, remained in undisputed possession for about ten years, with the knowledge of defendant, who acted as agent for some years in respect of this property, and was constantly in the habit of visiting it whilst the fences were in the course of erection. The plaintiff, having purchased this property from K., afterwards purchased from defendant the remainder of a lot situate on the south thereof, whereupon he removed the southern fence that had been erected by K., in order to put all the land into one parcel. On a plan of the property, made by defendant, a lane had been laid out on the south of the original purchase seventeen feet wide, and on the west another lane, six feet whereof were comprised within the limits of lot number one. K.'s fences enclosed the six feet on the west, and were supposed to have embraced the seventeen-feet lane on the south, which, together with the twenty-seven feet to the north, made in all fifty feet. The vendor subsequently sought to recover possession of the strips of land to the north and west, whereupon the plaintiff filed a bill to restrain the action at law, and for a conveyance of the land. No place could be assigned to the fifty feet, unless the twenty-seven feet and six feet formed part of it; and it having been established that the purchase money for the fifty feet had been paid, the court made the decree as prayed, with costs. *Howcutt* v. *Rees*, 3 Gr. 527.

——— *Selection.*]—R. gave a bond to B. to convey to B. a water privilege on lot 17, and to convey also so much land as he might require for the purpose of making a raceway or for erecting buildings on the lot, at the rate of £10 per acre:—Held, that the selection of such land must be made during the lifetime of both obligor and obligee. Quære, whether a bill would lie for the specific performance of such a contract. *Burnham* v. *Ramsay*, 32 U. C. R. 491.

Unascertained Portion—*Premature Action.*]—It having been ascertained that a railway company intended to have a station on the defendant's land, he contracted to sell to the plaintiff a quarter of an acre next to the railway station as soon as laid out. The company having afterwards located the station ground, but not the position thereon of the intended station house:—Held, that the plaintiff's parcel could not be ascertained until the locality of the station house was determined, and that until then a bill to enforce specific performance was premature. *Carroll* v. *Cascmore*, 20 Gr. 16.

See Stretton v. *Stretton*, 24 Gr. 20, *ante* 18 (c); *Ledyard* v. *McLean*, 10 Gr. 139, *ante* 1.

21. *Unpatented Lands.*

Registry Laws—*Prior Contract.*] — The Registry Acts do not apply to instruments executed previously to the grant from the Crown. Where, therefore, the locatee of land executed a bond to convey, and after the issuing of the patent sold and conveyed the property to a third party, who again sold and executed a conveyance to a purchaser for value, but before either had paid his purchase money, the holder of the bond, having registered the same, filed and served a bill for specific performance:—Held, that neither vendee was in a position to plead a purchase for value without notice, and that the plaintiff was entitled to specific performance with costs. *Casey* v. *Jordan*, 5 Gr. 467.

——— *Prior Contract—Notice.*]—A. bargained with B., the locatee of the Crown, for the purchase of an unpatented lot free from incumbrances, obtained a bond for a deed, and paid B. the full consideration. B. afterwards borrowed money on the lot from C., who took out the patent, and conveyed the lot to B., and received from him a mortgage, without notice of A.'s claim. After the loan had been agreed to, but before it was carried out, A. registered his bond. A bill by A. against C. for specific performance of the contract was dismissed with costs. *Holland* v. *Moore*, 12 Gr. 296.

Statutes—*18 Vict. c. 124—Chancery Act —Cause of Action—Possession.*]—18 Vict. c. 124 applies only to cases where the cause of suit arose before the passing of the Chancery Act (1837). The locatee of lands of the Crown, in 1824, contracted to sell a portion thereof, the consideration for which was paid, but he continued to hold possession of the lands until the year 1855, when the heirs of the bargainee filed a bill to enforce specific performance of the contract, the patent from the Crown having been issued in 1830. The court dismissed the bill. *Silcox* v. *Sells*, 6 Gr. 237.

Voluntary Agreement—*Purchaser for Value—Notice—Denial—Costs.*]—The locatee of lands from the Crown executed a bond in favour of one of his sons, for the conveyance of fifty acres, to procure his marriage with a particular person, which, however, never took place, and the son afterwards married another woman, having, in the meantime, been allowed to retain the bond. The father subsequently conveyed, for value, to another son, who had notice of the bond; and he having obtained the Crown patent for the land, a bill was filed to compel specific performance of the bond:—Held, that as against defendant, a purchaser for value, the bond was voluntary and could not be enforced; but defendant having by his answer untruly denied all knowledge of the existence of the bond, the court dismissed the bill, without costs, and without prejudice to filing another, if the plaintiff should be so advised. *Osborne* v. *Osborne*, 5 Gr. 619.

See Gray v. *Recsor*, 15 Gr. 205, *ante* 19 (e)

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22. *Vendor Proceeding at Law.*

Recovery of Possession—*Defence to Action for—Receipt of Purchase Money after*

Default—Waiver.]—In June, 1869, D. agreed to sell and convey to H. 278 acres of land for $2,780, payable by certain instalments, at certain specified times; the agreement signed by the parties expressing that time was "to be of the essence of the bargain." In January, 1871, H., by a similar instrument, agreed to sell to the plaintiff 100 acres for $1,000, to be paid to D., upon the terms contained in the said recited agreement; and the plaintiff then paid D. $60 on account. Both H. and the plaintiff were admitted into possession of their lands, on the execution of the respective agreements, and so continued until 1874. In February of that year both H. and the plaintiff were in arrear, nothing having been paid since 1871, and D. complained to H. of this, and of the manner in which the premises were managed, and it was then agreed between D. and H. that D. should bring an action of ejectment, H. agreeing to pay the costs thereof, and all arrears of purchase money, together with an increased rate of interest. Ejectment was accordingly brought by D. against H. and the plaintiff; but before the summons was served, or the plaintiff was aware of the proceeding, he paid $100 to the attorney of D., who indorsed a receipt for the amount on the agreement between H. and the plaintiff as a payment "on within agreement." H. took no steps to defend the ejectment, and D. recovered judgment therein, although the plaintiff appeared, and tried to defend for his 100 acres; and a writ of possession was issued, and delivered to the sheriff, with directions to give possession to H. for D., which was done accordingly, and H. was continued in possession under an arrangement for an extension of the time for payment of principal and interest. On a bill filed by the plaintiff against H. for specific performance:—Held, under these circumstances, that the receipt by D. of the $100 after default had waived the condition making time of the essence of the contract; but, by reason of having omitted to set up these facts in defence of the ejectment, or because, having so set them up, they did not form an answer to the proceeding, the court refused to open up the question after the adjudication at law, and dismissed the bill with costs. *Demorest* v. *Helme*, 22 Gr. 433.

——— *Subsequent Suit—Binding Rights of Purchaser—Costs.*]—Where under the terms of the contract the purchaser is let into possession, but on his default the vendor brings ejectment and turns him out, the vendor cannot afterwards obtain specific performance, but he has a right to come into this court, in order that either the contract may be specifically performed or the purchaser's rights so bound as to enable the vendor to dispose of the property. *O'Neal* v. *McMahon*, 2 Gr. 145.

Where a vendor brought ejectment, and turned the heirs of the purchaser out of possession, he was held to have disabled himself from coming to the court for specific performance, and could only do so in order to bind their interests in such a manner as to render the property saleable. Under such circumstances, the plaintiff having placed himself in a false position by reason of the proceedings at law, the court deprived him of his costs up to decree, but gave him his costs subsequent thereto. *Hawn* v. *Cashion*, 20 Gr. 518.

——— *Subsequent Suit—Failure to Prove Title—Costs.*]—Upon a contract for sale the purchaser was let into possession; the vendor, instead of complying with his vendee's demand for an abstract, brought ejectment, so as to compel payment of the purchase money; and the purchaser defended that action, and did not proceed in chancery until the vendor had recovered judgment. On investigating the title it was found to be bad. The court, although it gave the purchaser relief, so far as restraining the proceedings in ejectment, refused him his costs of his defence at law, but gave him his costs in chancery. *Winters* v. *Sutton*, 12 Gr. 113.

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23. *Other Cases.*

Appurtenances—*Water—Use of Dams.*]—A vendor agreed that the purchaser should have sufficient water to drive a saw mill and other machinery. In a suit by the vendor against the purchaser, the court decreed specific performance of the contract, treating the water and the use of the dams and booms as sold with the land; the decree to provide for this, with liberty to the parties to apply from time to time. *Hincks* v. *McKay*, 14 Gr. 233.

Arrest—*Purchaser.*]—A writ of arrest will not be granted against the purchaser in a suit for specific performance, unless it be shewn by affidavit that the vendor's lien is insufficient. *Nelson* v. *Dafoe*, 8 P. R. 332.

Consideration for Conveyance—*Personal Services—Other Enforceable Consideration.*]—The plaintiff H. being in possession of land belonging to defendant and entitled to retain it for another year, the defendant, to obtain immediate possession, agreed that in consideration thereof he would give another piece of land to the plaintiffs, husband and wife, for the life of the wife, the husband further agreeing that he would look after and take care of the former property whenever defendant was absent, and would, during winter, see to defendant's cattle and stock. Possession was accordingly delivered of the respective parcels, and the husband rendered some services, being all that was required of him. The defendant having afterwards brought ejectment against the plaintiffs:—Held, that the agreement was enforceable, notwithstanding the stipulation as to personal services to be rendered, which the court could not directly enforce; and an injunction was granted. *Hewitt* v. *Brown*, 16 Gr. 670.

Contract by Stranger—*Owner—Estoppel.*]—Where the owner of an estate stands by and allows a third person to appear as owner, and to enter into a contract as such, the owner will be decreed specifically to perform such contract. *Davis* v. *Snyder*, 1 Gr. 134.

See Leary v. *Rose*, 10 Gr. 346.

Crown — *Expropriation—Agreement for Compensation.*]—The defendants entered into a written agreement to sell and convey to the Crown, by a good and sufficient deed, a certain quantity of land, required for the purposes of the Cape Breton Railway, for the sum of $1,250. At the date of such agreement the centre line of the railway had been staked off through the defendants' property, and they were fully aware of the location of the right of way and the quantity of land to be taken from them for such purposes. Thereafter, and within one year from the date of

such agreement, the land in dispute was set out and ascertained, and a plan and description thereof duly deposited of record, in pursuance of the provisions of R. S. C. c. 39. Upon the defendants refusing to carry out their agreement, on the ground that the damages were greater than they anticipated, and the matter being brought into court on the information of the attorney-general, the court assessed the damages at the sum so agreed upon. Quære, is the Crown in such a case entitled to specific performance? *The Queen* v. *McKenzie*, 2 Ex. C. R. 198.

Deficiency — *Description* — "*More or Less.*"]—Where a city building lot was described in an agreement for exchange as having a depth of "130 feet more or less," and had in fact a depth of only 117 feet with a lane in the rear 12 feet wide, specific performance at the suit of the owner was, under the particular circumstances, refused. *Moorhouse* v. *Hewish*, 22 A. R. 172.

Foreign Lands — *Exchange* — *Plaintiff Submitting to Jurisdiction.*] — See *Montgomery* v. *Ruppersburg*, 31 O. R. 433.

Inability of Vendor to Convey—*Want of Privity—Mortgage—Priorities—Statute of Limitations—Improvements.*]—The bill was filed to enforce specific performance of an agreement to sell certain land, made by one R., since deceased. The original agreement was cancelled, and on the 22nd May, 1866, another agreement for sale, contained in a lease of the land from R. to the plaintiff, was substituted therefor. In November, 1865, when the original agreement was entered into, R., who held two mortgages on the land in question, thought he had obtained an absolute title thereto, by proceedings in a foreclosure suit on these mortgages. It afterwards, however, appeared that long prior to the first of these mortgages held by R., the mortgagor, T. H., had, by a voluntary deed, conveyed 50 acres of the land to his son, E. H. Subsequently to the first mortgage to R., and prior to the second mortgage, E. H. mortgaged the 50 acres to one A. E. H. was not made a party to the foreclosure suit, but A. was served with notice of the proceedings in the master's office, and not having appeared, he and the mortgagor were declared foreclosed. Soon after the above agreement for sale in September, 1866, R. filed a bill against T. H., E. H., and A. for the foreclosure of his two mortgages against all these defendants, when a decree was made declaring the deed to E. H. to be void against R., and that A.'s mortgage was subject to the first mortgage, but had priority over the second mortgage held by R., and he was directed to pay into court a certain sum as the price of redemption, which payment was made at the appointed time. It appeared that the plaintiff had actual notice, of E. H.'s outstanding equity of redemption before he made any improvements; and that he made them in reliance upon R. holding him harmless:—Held, that the plaintiff was not entitled to specific performance against the representatives of R., as they had no power to convey, nor against A., because there was no privity between him and the plaintiff, and no equity to make him bound by the agreement. Held, also, that the plaintiff was not entitled to a lien on the land for his improvements. Held, also, that the plaintiff had not acquired any rights by virtue of the Statute of Limitations, inasmuch as his possession was that of a tenant and was not exclusive of the mortgagor. *Russell* v. *Romaines*, 3 A. R. 635.

Insolvent Vendor — *Partnership.*]—The fact of the vendor being a partner in a mercantile firm who, since the execution of the contract, had made a composition with their creditors, is not an objection to the claim to specific performance. *Fisken* v. *Wride*, 7 Gr. 598.

Oil Lands—*Construction of Agreement—Working of Wells—Assignment of Contract—Parties.*]—The owner of land demised fifty acres for fourteen years at a nominal rent, for the purpose of boring for oil, and at the same time agreed to convey at any time a roadway from any wells the lessee might dig or bore to a certain road, and "also sufficient land for the working of such well or wells," the lessee agreeing to pay "$100 for the first well he might work for oil, and $50 per acre for the land necessary for working such oil well on said roadway," and "the sum of $50 for any oil well he shall work after the first one, and $25 per acre for any land necessary for working said well or wells and the roadway." The lessee, having divided a portion of the fifty acres into acre lots, having a frontage of from eighty to one hundred feet, sold his interest in one such acre to a third party, who opened a well, erected an oil refinery with the necessary tanks and works, and declared his option of purchasing within the time specified. The owner of the fee having sold his interest in the whole fifty acres, his vendee objected to convey the acre except upon terms not warranted by the agreement, and subsequently refused to convey more than in his opinion was absolutely necessary for working the well in its then state, the produce of which had become greatly diminished, and filed a bill asking to have the agreement construed, and an injunction against continuing the refinery, which occupied about one twenty-fourth of the acre. The court was of opinion that under the agreement the purchaser was not entitled to space for a refinery, but, it appearing that the sinking of another well within such acre would tend to injure the well already sunk, and that an acre was not too large for the purposes contemplated, refused the injunction asked for; and the purchaser by his answer having asked cross-relief by way of specific performance of the agreement, a decree was made accordingly; the deed to be prepared under such decree to provide for payment of the sums stipulated for in the event of the opening of any future wells upon such acre, but in such a case the party so claiming specific performance to be liable to pay for any other well or wells opened and worked upon the whole fifty acres, by other persons; the assignee in this respect standing in no better position than his assignor, the original lessee, and the contract not containing any stipulation or agreement for the laying off of the fifty acres into subdivisions. The master having required a list of all persons who had opened and worked wells upon the property with a view to making them parties in his office, and taking an account of what they owed respectively, in order that they might be bound thereby, and that the defendant might thus acquire a lien on their portions of the land for the sums so to be paid by defendant:—Held, on appeal from this direction, that such other purchasers were not proper parties; nor could the defendant thus

acquire any lien upon their property, or, in the absence of a request, any claim against the parties for repayment of the amounts advanced on their accounts, there being no legal liability on his part to make such payment. And quære, even if he could thus acquire such lien or claim, whether they would in that case have been proper parties. *Ledyard* v. *McLean*, 10 Gr. 139.

Omission of Part of Agreement from Writing—*Insertion in Decree.*]—In an action for specific performance of an agreement for the sale of lands, it appeared that the parties intentionally omitted from the writing a part of the agreement, as to the tenor of which both parties agreed; and the defendant asked to have this inserted in the judgment for specific performance, but the plaintiff objected:—Held, that, on the principle that he who comes into equity must do equity, it was proper that the omitted portion of the agreement should be inserted as claimed. *Jones* v. *Dale*, 16 O. R. 717.

Penalty — *Damages for Non-performance of Contract — Repudiation—Incumbrance.*]—Upon a contract for sale of an estate subject to a mortgage, it was stipulated that the vendor should execute a bond to indemnify the purchaser against the incumbrance, and a sum of £500 by way of liquidated damages for non-performance by either party was to be paid to the other. The court held that this did not enable either party to repudiate the contract upon paying £500; and in a suit by the vendor a reference as to title was directed, but without the usual declaration that the plaintiff was entitled to specific performance, reserving a right at the hearing on further directions to refuse specific performance, in the event of the vendor failing to effect or endeavouring to effect an arrangement with the mortgagees, which the vendor alleged he could make. *Fisken* v. *Wride*, 7 Gr. 598.

Repairs and Improvements — *Allowance for.*]—On taking an account of what was due to a plaintiff in possession, who claimed under a vendor of real estate in a specific performance suit, the master allowed certain repairs and improvements, some of which were made after the commencement of the suit. On further directions, the court expressed the opinion that the only repairs made after suit commenced, that could be allowed, were such as it was the plaintiff's duty to make in order to save the premises from deterioration. *Hawn* v. *Cushion*, 20 Gr. 518.

Restriction against Selling — *Special Act—Compliance with.*] — Land was devised to N. with a provision that he should not sell or mortgage it during his life, but might devise it to his children. N. having agreed to sell the land to V., it was held, upon a petition under the Vendors and Purchasers Act, that the will gave N. the land in fee with a valid restriction against selling or mortgaging: Re Northcote, 18 O. R. 107. N. then applied for a special Act, which was passed, giving him power, notwithstanding the restriction in the will, to sell the land, and directing that the purchase money should be paid to a trust company. Prior to the passing of this Act, N., in order to obtain a loan on the land, had made a lease of it to a third party, which lease was mortgaged, and N. afterwards assigned his reversion. In an action by V. for specific performance of the contract, N. set up that the contract was at an end when judgment was given upon the petition, and submitted that if performance were decreed, the amount due on the mortgage should be paid to him, and only the balance to the trust company:—Held, that it was not open to N. to attack the decision on the petition; but, even if it were, and that decision should be overruled, V. would be all the more entitled to specific performance; that the evidence shewed the lease granted by N. to have been merely colourable and an attempt to raise money on the lands by indirect means; and that there should be a decree for specific performance with a direction that the whole of the purchase money should be paid to the trust company. *Northcote* v. *Vigeon*, 22 S. C. R. 740.

Sheriff's Sale—*Equitable Interest.*]—The equitable interest of an assignee from the purchaser of a contract for the sale of lands, is exigible under a writ of fieri facias against the lands of such assignee, and the purchaser at a sheriff's sale of such interest is entitled to specific performance of the contract. Re Prittie and Crawford, 9 C. L. T. Occ. N. 45, declared to have been inadvertently decided or reported. *Ward* v. *Archer*, 24 O. R. 650.

Substituted Agreement—*Evidence—Reconveyance—Costs.*] — In a suit for specific performance it was shewn that the plaintiff had agreed to convey to the defendants certain lands, in consideration of his being paid one-third of the sum for which defendants should be enabled to sell the same. This agreement was subsequently cancelled on the defendants undertaking to pay plaintiff $2,000, one-half by a note, the other half by the conveyance of certain town lots at an ascertained valuation; and this second or substituted agreement the plaintiff sought to enforce. The defendants set up that, in consequence of their ascertaining that plaintiff had not a title to the land conveyed to them, a fresh agreement was entered into to the effect that the defendants should be at liberty to sell the land, and pay to plaintiff one-third of the net proceeds, which they asserted they had done. At the hearing the court, being satisfied that the defendants' account of the transaction was correct, refused the relief claimed, but offered the plaintiff a reconveyance on payment of costs, which the defendants assented to, or a decree upon the footing of the third or last mentioned agreement upon payment of costs; or rehearing, this decree was affirmed. *Rutherford* v. *Sing*, 29 Gr. 511.

Summary Procedure in Lieu of Action.]—If under R. S. O. 1877 c. 109, the court adjudicates upon a question of title between vendor and purchaser, and directs the purchaser to carry out the contract, and the purchaser then fails to carry out the contract, it is unnecessary to bring an action for specific performance of the contract, and the requisite relief may be had on notice of motion for payment of the purchase money or in default a resale. *Re Craig*, 10 P. R. 33.

Tenants in Tail—*Joint Tenancy—Partition—Statute of Limitations.*]—Specific performance will be decreed against a tenant in tail. A joint tenant in tail executed articles of agreement for a division of the property, and each went into possession and for thirty-six years continued to enjoy the portion allotted to him, when a bill was filed to enforce the agreement:—Held, that defendant could not

set up as a defence to such bill, that the plaintiff had by possession acquired a perfect title at law. *Graham* v. *Graham*, 6 Gr. 372.

VI. Agreements for Work or Services.

Construction of Railway—*Acceptance—Approval of Engineer—Delay—Inspection — Reference.*] — Two incorporated trading companies agreed, under seal, the one to construct certain works for the other, which on completion were to be inspected by engineers on behalf of each, whose finding was to be conclusive; and upon the engineers approving of the works, and reporting them as completed, they were to be accepted. The parties to perform the work having, as they alleged, completed it, notified the others thereof, calling upon them to appoint an engineer, as stipulated for, which request was not complied with, and subsequently a portion of the works contracted for (a bridge) was destroyed. On a bill filed to compel an acceptance of the works, the court thought that the delay of one of the contracting parties, until after such destruction, to name an engineer, as stipulated for by the agreement, did not preclude the other from obtaining an inspection of the works; but that such inspection and approval must, under the circumstances, be had by a reference to the master. *Great Western R. W. Co.* v. *Desjardins Canal Co.*, 9 Gr. 503.

Covenant to Repair.]—The action was brought in the chancery division to obtain specific performance of a covenant to repair, or for damages:—Held, that it was really a common law action, for specific performance of such a covenant could not be decreed. *Bingham* v. *Warner*, 10 P. R. 621.

Covenant to Supply Goods — *Demurrer.*]—Where the plaintiffs claimed specific performance of a contract to supply them with milk for a cheese factory upon certain terms, and in the alternative damages, and the defendant asked for rectification of the contract, a jury notice was struck out. Held, that where a party seeks equitable relief to which he is not entitled, the opposite party should, unless in a very clear case, demur, instead of attacking the pleading indirectly by asking to have a jury. Bingham v. Warner, 10 P. R. 621, commented on. *Fraser* v. *Johnston*, 12 P. R. 113.

Erection of Building — *Agreement to Give Covenant—Value of Building.*]—In an agreement for the sale of land from R. to P., the terms were inserted in these words: "Price $1,000, $200 cash, and balance in five yearly payments, interest at the rate of seven per cent., and covenant of P. to build house worth not less than $4,000, to be commenced in a year from date and finally completed in two years . . ." The $200 was paid down, and R.'s solicitor prepared and tendered the deed (in which was inserted a covenant to build) and the mortgage to P. for execution. P. refused to execute them, and R. brought an action for specific performance, which P. defended on the ground that the covenant to build was too vague and would not be enforced by the court:—Held, that the plaintiff was clearly entitled to the performance of the defendant's agreement to give a covenant to build a house of certain value within a specified time. Wood v. Silcock, 50 L. T. N. S. 251, distinguished. *Robertson* v. *Patterson*, 10 O. R. 267.

——— *Equitable Grounds for Relief.*]—Equity does not, as a general rule, enforce specifically a contract between a landholder and a builder for the erection of a house or the like; but specific performance of agreements to execute works is enforced where the plaintiff shews a sufficient ground of equity to entitle him to that relief. A bill alleged that the plaintiff contracted with defendants to lease to them certain lands, and to erect thereon for their use a stone building according to plans and specifications furnished by defendants; that accordingly the plaintiff had expended $4,000 on the building, under defendants' superintendence and according to plans furnished by them; that he had done everything which defendants had directed; and that defendants had accepted the building and taken possession of part of it; but it appeared that the machinery was not completed in all respects: — Held, that the allegations of the bill, if proved, would entitle the plaintiff to relief. *Colton* v. *Rookledge*, 19 Gr. 121.

Parent and Child—*Services on Farm—Agreement to Convey.*]—See *ante* V. 18 (a); *post* VII.

Railway Stations—*Maintenance—Covenant.*]—In consideration of a bonus granted by the plaintiffs to the defendants, the latter agreed (1) to bring their railway from Ingersoll to some point on the line of the Canada Southern Railway not more than half a mile east of the present passenger station of the Canada Southern Railway at St. Thomas, and (2) to run all their passenger trains to and from a small station on Church street. The defendants performed the first part of the agreement, and also the second, so long as the Canada Southern R. W. Co. permitted the use of their line from the point of junction to the small station on Church street; but, on the refusal of the other company to continue this privilege, the defendants discontinued the performance of this part of their agreement:—Held, affirming the judgment in 7 O. R. 332, distinguishing Lytton v. Great Western R. W. Co., 2 K. & J. 394, and Wallace v. Great Western R. W. Co., 3 A. R. 44, that this was not a case in which the defendants should be directed specifically to perform their contract as to the Church street station, but that the plaintiffs were entitled to a reference as to damages for breach thereof. *City of St. Thomas* v. *Credit Valley R. W. Co.*, 12 A. R. 273.

In consideration of a bonus granted by the plaintiffs, the Wellington, Grey, and Bruce R. W. Co. covenanted "to erect and maintain a permanent freight and passenger station" at G. Shortly afterwards the road was leased, with notice of this agreement, to the defendants, who discontinued G. as a regular station, merely stopping there when there were any passengers to be let down or taken up:—Held, affirming the decree in 25 Gr. 86, that the mere erection of station buildings was not a fulfilment of the covenant, and that the municipality was entitled to have it specifically performed. The decree, which enjoined the defendants from allowing any of their ordinary freight, accommodation, express, or mail trains, other than special trains, to pass without stopping for the purpose of taking

up and setting down passengers, was varied by limiting it to such trains as are usually stopped at ordinary stations. *Township of Wallace* v. *Great Western R. W. Co.*, 3 A. R. 44.

See, also, RAILWAY, I. 2 (b), XV. 2 (b).

Remedy at Law.] — The owner of land granted to a railway company the privilege of crossing his property, in consideration of which the company agreed, amongst other things, to pay him $100 a year, to carry flour for him on certain favourable terms, and "to bottom out his present mill race from its present unfinished point;" — Held, that the court should not decree a specific performance of, or damages for breach of, such a contract, but leave the plaintiff to sue on it at law. *Dickson* v. *Covert*, 17 Gr. 321.

The plaintiffs contracted with defendant that he should clear for them, in a husbandman-like manner, certain swamp lands which they owned, and that he should take the timber as compensation. Defendant cut down and removed the timber, but did not clear up the land. The plaintiffs thereupon filed a bill for specific performance. A demurrer thereto was allowed, the work in question being the sole object of the suit, and the remedy at law being adequate. *Ashton* v. *Pryne*, 19 Gr. 56.

Work which Court cannot Superintend — *Covenant of Railway Company to Construct Station.*]—See *Bickford* v. *Town of Chatham*, 10 O. R. 257, 14 A. R. 32, 16 S. C. R. 235.

——— *Injunction—Declaration of Right.*] —The plaintiffs wished to force the defendants to keep their cars running over the whole of their line of railway, during the whole of each year, in accordance with the terms of the agreement between them set out in the schedule to 56 Vict. c. 91 (O.):—Held, that the agreement was one of which the court would not decree specific performance, because such a decree would necessarily direct and enforce the working of the defendants' railway under the agreement in question, in all its minutiæ, for all time to come. Bickford v. Town of Chatham, 16 S. C. R. 235, followed. Fortescue v. Lostwithiel and Fowey R. W. Co., [1894] 3 Ch. 621, not followed. To grant an injunction restraining the defendants from ceasing to operate the part of their line in question would be to grant a judgment for specific performance in an indirect form. Davis v. Foreman, [1894] 3 Ch. 654, followed. Nor was there any object in making a declaration of right under s. 52, s.-s. 5, of the Judicature Act, 1895, where the terms of the contract were plain and were confirmed by statute, and the only difficulty was that of enforcing them. *City of Kingston* v. *Kingston, Portsmouth, and Cataraqui Electric R. W. Co.*, 28 O. R. 399, 25 A. R. 462.

——— *Parties to Suit—Insolvent Assignor.*]—A railway company entered into a contract for the construction of their road, which was to be completed and in perfect running order by the 1st January, 1875; and to be paid for partly in cash and municipal bonds, partly in bonds or debentures of the company, and partly in guaranteed shares or stock of the company; and the contractors entered upon the construction of the work, but owing to financial difficulties they were obliged to suspend in 1873, and in August, 1874, they made a deed of composition with their creditors, and J. was appointed the official assignee. After the time appointed for the completion of the work, the assignee and the contractors filed a bill in their joint names against the railway company, asking that the contract might be performed by the company, offering on their own part to perform it, and seeking to restrain the company from entering into any new contract for the work with any other person, and from making, signing, or issuing any stock or bonds of the company, until the stock or bonds to which the plaintiffs were entitled were issued to the assignee. A demurrer for want of equity and for misjoinder of plaintiffs was allowed; the rule of the court being that it will not decree the specific performance of works which the court is unable to superintend; and that an insolvent or bankrupt cannot be joined as a co-plaintiff with his assignee. *Johnson* v. *Montreal and City of Ottawa Junction R. W. Co.*, 22 Gr. 290.

See Bogart v. *Patterson*, 14 Gr. 624, *ante* V. 18 (a).

VII. AGREEMENTS TO BEQUEATH PROPERTY.

Adopted Child—*Agreement with Father — Services of Child — Right of Action.*] — When a father enters into a contract whereby he parts with the custody and control of his child with a bonâ fide intention of advancing the welfare of the child, there is nothing in such a contract illegal or contrary to public policy, and although, where such a contract is executory on both sides, the court cannot decree specific performance by reason of the want of mutuality, yet where the contract has been faithfully performed, so far as the father and child are concerned, so that their status has become altered, the court will if possible enforce in specie the performance of the contract by the other party to it. Where the parents of the plaintiff agreed with H. and his wife to give up to them their daughter, the plaintiff, then six years old, to bring up as their own, and make her sole heiress of their property at their death, and when it appeared that the agreement was bonâ fide intended by the father for the ultimate benefit of the plaintiff, and that the plaintiff had remained with H. and his wife for twenty years, rendering them efficient service, and it appeared H. intended her to have his property, and regarded the agreement as binding, so that he considered it unnecessary to make a will:—Held, that the agreement could be enforced against H.'s representative, and that it must be decreed accordingly. Held, also, that, inasmuch as, if the parents of the plaintiff had brought a suit upon the agreement in this case and recovered, they would be trustees for the proceeds for her, the plaintiff might maintain the suit in her own name. *Roberts* v. *Hall*, 1 O. R. 388.

Grandchild—*Consideration — Services — Uncertain Contract — Implied Contract — Wages.*]—Where a contract on the part of a testator, founded upon a valuable and sufficient consideration, that he will leave by his will to the other contracting party a sum of money as a legacy, is clearly made out, the representatives of the testator may be compelled to make good his obligation. But where the testator, the grandfather of the plaintiff,

promising that if she would remain with him until his death or her marriage, which ever event should first happen, he would provide for her during that time, and would make the same provision for her by will as he should make for his own daughters, took her from the home of her parents at the age of twelve, adopted her, and maintained her, while she worked for him, for nine years, but, although he made his daughters residuary devisees, left the plaintiff nothing by his will, and paid her nothing for her services, and she sued his executors for specific performance of the contract or promise and in the alternative for wages:—Held, that the case did not fall within the rule: the promise made and the consideration for it being both of too uncertain a character to entitle the plaintiff to come to the court for specific performance; but that the circumstances gave rise to an implied contract for the payment of wages, and took the case out of the ordinary rule that children are not to look for wages from their parents, or those in loco parentis, in the absence of special contract, whilst they form part of the household. *Walker* v. *Boughner*, 18 O. R. 448.

S., a girl of fourteen, lived with her grandfather, who promised her that if she would remain with him until he died, or until she was married, he would provide for her by his will as amply as for his daughters. She lived with him until she was twenty-five, when she married. The grandfather died shortly after, leaving her by his will a much smaller sum than his daughters received, and she brought an action against the executors for specific performance of the agreement to provide for her as amply as for his daughters, or, in the alternative, for payment for her services during the eleven years. On the trial of the action it was proved that S., while living with her grandfather, had performed such services as tending cattle, doing field work, managing a reaping machine, and breaking in and driving wild and ungovernable horses:—Held, affirming the decision in 21 A. R. 542, that the alleged agreement to provide for S. by will was not one of which the court could decree specific performance. Held, further, that S. was entitled to remuneration for her services, and $1,000 was not too much to allow her. *McGugan* v. *Smith*, 21 S. C. R. 263.

Stranger—*Evidence of Promise—Remuneration for Maintenance—Implied Promise—Arrears—Statute of Limitations.*]—The plaintiff sought to recover from the executors of the will of a deceased person the whole of his estate, upon the strength of an oral agreement which she alleged was made between her and the deceased. Her evidence was that he said: "You give me a home as long as I live, and when I die you have what is left:" to which she answered "all right:" and he then said, "That is an agreement." The same story was repeated by the daughter and son-in-law of the plaintiff, who said they were present when the agreement was made. Two other witnesses swore that the deceased told them that he had agreed to leave the plaintiff his property when he died. He was maintained by her for eight years after the alleged agreement was made, but made his will in favour of other persons:—Held, that, apart from the Statute of Frauds, the evidence was not such as the court could act upon by decreeing specific performance of the alleged agreement in substitution for the actual will of the deceased, duly executed, and admitted to probate without objection from the plaintiff or any one else. Such an agreement must be supported by evidence leaving upon the mind of the court as little doubt as if a properly executed will had been produced and proved before it. Held, however, that the plaintiff was entitled, under the circumstances, to remuneration for the board, lodging, and care of the deceased for six years, as upon an implied promise to pay a reasonable sum per annum. Such a promise was not a special promise to pay at death, and did not give the plaintiff a right to recover more than six years' arrears. *Cross* v. *Cleary*, 29 O. R. 542.

See Smith v. *Smith*, 29 O. R. 309, 26 A. R. 397.

VIII. Other Agreements.

Alimony Agreement—*Sums Paid as Interim Alimony—Costs—Set-off.*]—In May, 1875, a deed of separation was executed between defendant and plaintiff, husband and wife, by which defendant was to pay the plaintiff $100 a year, quarterly, as maintenance. Afterwards in September, 1875, the plaintiff objecting to the security offered, filed a bill for alimony, and defendant served a notice agreeing to allow her $100 a year, quarterly, for interim alimony. The plaintiff accepted the notice, and defendant paid this alimony until May, 1876, when a decree was made for specific performance of the agreement, but the plaintiff was ordered to pay defendant's costs:—Held, that the plaintiff must give credit for the sums paid as interim alimony; and executions issued for the whole sum, payable under the agreement, were set aside; the costs payable by plaintiff were also ordered to be set off against the allowance, though such set-off was not asked for in the notice of motion. *Maxwell* v. *Maxwell*, 7 P. R. 63.

Award—*Compensation for Land.*]—Held, that the plaintiff was entitled to specific performance of an award giving him damages for his lands taken by the defendants; that the sum awarded was not so excessive as to shew any fraudulent or improper conduct on the part of the arbitrators; and quære, whether, if shewn, it would be a defence in such a proceeding. *Norvall* v. *Canada Southern R. W. Co.*, 5 A. R. 13.

——— *Compensation for Land—Realty or Personalty.*]—P., being the owner of certain lands, was served by a railway company with notice of expropriation and tendered a sum of money for right of way and damage, which he refused. Subsequently, on the application of the company, and with the consent of P.'s solicitor, the county Judge made an order fixing the amount of security to be given for damages, and the price of the land, and giving the company possession upon their paying the amount of security into a bank to the joint credit of P. and the company. The money was paid in pursuant thereto. An arbitration was then proceeded with, and the compensation to be paid for the value of the land taken and the damage to the remainder was fixed by the award in separate sums. Proceedings and appeals as to the costs kept the matter open, and the money remained to the credit of the joint account until P. died, after making his

will, by which he devised all his real estate to a trustee, and appointed the plaintiff executor. The defendants were appointed trustees in place of the trustee named in the will. Upon a special case for the opinion of the court as to whether the plaintiff as executor of the personal estate or the defendants as trustees of the testator's land, was or were entitled to the sums awarded or any part thereof:—Held, that notice to treat having been given, and a claim made by the land owner, and refused by the company, and the money having been paid into court and possession taken by the company, these circumstances, under the authority of Nash v. Worcester Improvement Commissioners, 1 Jur. N.S. 973, would entitle the land owner to have specific performance against the company, and that therefore the land was converted into money, and the plaintiff as executor was entitled to the sums awarded. *Hoskin* v. *Toronto General Trust Co.*, 12 O. R. 480.

Compromise of Suit — *Answer — Cross-relief.*]—A compromise of a suit having been entered into before answer, defendant may set up the compromise in his answer, and pray, by way of cross-relief, that it be specifically performed; and if plaintiff does not diligently proceed with the suit, defendant is entitled to move to dismiss for want of prosecution. *Small* v. *Union Permanent Building Society*, 6 P. R. 206.

——— *Husband and Wife — Separation Deed.*]—Held, that a married woman can not only bring an action against her husband in her own name, but she can also compromise it, or deal with it as she pleases, just as any other suitor can; and if the plaintiff and defendant have agreed to certain terms of settlement of such a suit, such contract can be enforced against the defendant, by the plaintiff suing in her own name without a next friend. And so in the present case, where, by way of compromise of such a suit, the parties to it agreed that the plaintiff should execute a proper deed of separation containing certain covenants by her, in return for which the defendant should convey to the plaintiff certain lands and pay certain moneys:—Held, that the plaintiff was entitled to specific performance of this agreement; that it was not the separation which was being enforced, but the performance by the defendant of his contract. *Vardon* v. *Vardon*, 6 O. R. 719.

Covenant — *Indemnity — Default Judgment.*]—To an action by a legatee against the executors and residuary devisees of a testator, alleging an express agreement by all to pay interest upon a legacy, which by law was not recoverable, the executors pleaded, and judgment was given in their favour; but judgment went against the residuary devisees by default, and they afterwards filed a bill against the executors, claiming specific performance of a covenant by the executors to indemnify against the claim of such legatee:—Held, that their own default having been the cause of judgment passing against them, there was no ground for the residuary devisees coming into equity for indemnity. *Crooks* v. *Torrance*, 8 Gr. 220; *S. C.*, 6 Gr. 518.

——— *Restraint of Trade—Time.*]—On the removal to other premises of the plaintiff, to whom the defendant had sold the goodwill of the business as an innkeeper, the owner of the property induced defendant to accept a new lease and to resume business, and agreed to save defendant harmless in respect of his obligation to the plaintiff not to carry on business there. The new lease was made on the 1st October, and between that date and the 17th November defendant provided new furniture. The plaintiff had some knowledge of the defendant's intention to resume business, and of his proceedings for that purpose. On the 19th November the plaintiff filed a bill to enforce defendant's obligation:—Held, that the lapse of time was not such as to be any defence. *Mossop* v. *Mason*, 17 Gr. 360, 18 Gr. 453.

Delivery of Promissory Notes — *Remedy at Law.*]—The purchaser of land paid a certain sum, gave a mortgage on other property of his for another portion, and for the balance four notes were to be given, made by the purchaser and "such other person as would render them saleable without indorsement by the vendor." One only of the notes was delivered:—Held, that specific performance could not be obtained, the agreement for delivery of the notes being such as the court of chancery could not execute, and the remedy being at law for breach of the contract. *DeGear* v. *Smith*, 11 Gr. 570.

Judgment—*Agreement to Assign—Damages—Interlocutory Judgment—Statement of Claim.*]—The writ of summons was indorsed with a claim for specific performance of an agreement to assign a judgment "and for damages for breach of the said agreement." The defendant not appearing, interlocutory judgment was signed against him on the 16th April, 1898, for damages to be assessed. On the 12th May following a statement of claim was delivered, and on the 16th May the damages were assessed by a Judge of the high court at a sittings for the trial of actions:—Held, that the interlocutory judgment was irregular; the plaintiffs, upon default of appearance, should have delivered a statement of claim, and, if no defence delivered, proceeded to judgment by motion. Held, also, that the plaintiffs had no right to treat the statement of claim delivered by them as nugatory, and proceed to assessment of damages on the writ of summons as forming the record. Semble, that the plaintiffs could properly claim specific performance, and, in the alternative, damages for breach of the agreement. *Stuart* v. *McVicar*, 18 P. R. 250.

Order in Council.] — The court cannot enforce against the Crown specific performance of an order in council. *Simpson* v. *Grant*, 5 Gr. 267.

Patent Rights—*Interest in Partnership.*] See *Powell* v. *Peck*. *Peck* v. *Powell*, 26 Gr. 322, 8 A. R. 498, 11 S. C. R. 494.

Railway Pass—*Consideration for Conveyance of Land.*]—The rector of Woodstock filed a bill against the Great Western R. W. Co. for specific performance of an alleged contract for a free pass for himself and his successors, as the consideration for certain rectory land conveyed by him to the company. The court of appeal, not being satisfied with the evidence of the alleged contract, and also deeming the contract to be open to various objections, reversed the decree, and ordered the bill to be dismissed with costs. *Bettridge* v. *Great Western R. W. Co.*, 3 E. & A. 58.

Railway Working Arrangement—*Confirmation — Bondholders.*]—Held, that the votes of registered bondholders of a railway having been rejected, the arrangement made in this case, though confirmed by two-thirds of the actual shareholders present, or represented, was nevertheless not properly confirmed within the meaning of the statute, and an action to compel specific performance of the agreement was dismissed. *Hendrie* v. *Grand Trunk R. W. Co., Grand Trunk R. W. Co.* v. *Toronto, Grey, and Bruce R. W. Co.*, 2 O. R. 441.

Sale of Stock—*Deficiency in Number of Shares—Effect on Vendor's Right to Specific Performance.*] — See *Canada Life Assurance Co.* v. *Peel General Manufacturing Co.*, 26 Gr. 477.

Security—*Agreement to Give—Insolvency—Lien.*]—The plaintiff, a bookkeeper and accountant, entered into the following agreement with the firm of R. & Co., in the form of a letter addressed to himself: "In consideration of you advancing us the sum of $3,000, we agree to give you collateral security, and to pay you interest on the same at the rate of eight per cent. per annum." The plaintiff advanced money for the benefit of the firm of R. & Co., but before he had received any security the firm made an assignment for the benefit of creditors. The plaintiff now sought to have it declared that he had a lien on the assets and effects of the firm, real and personal, and to have them assigned to him:—Held, that the agreement was incapable of specific performance by the court, for the reason that the terms were too vague and uncertain to be entertained. No kind of security was specified in the agreement, and parol evidence could not be given to supply the deficiency. The plaintiff was, however, entitled to have judgment at law against the firm of R. & Co. for $1,900 and interest and costs of action. DeGear v. Smith, 11 Gr. 570, followed. *Foster* v. *Russell*, 12 O. R. 136.

Statutes.]—See *Attorney-General* v. *International Bridge Co.*, 6 A. R. 537.

IX. Injunction in Connection with Specific Performance.

Alienation—*Restraining.*]—In a suit for the specific performance of an agreement for sale of lands, or to set aside a conveyance for fraud, the plaintiff is not of right entitled to injunction to restrain alienation, unless it is alleged by the bill and proved that the holder of the land threatens and intends to convey it. *Kerr* v. *Hillman*, 8 Gr. 285.

Building—*Restraining—Dismissal of Bill—Subsequent Suit — Bar.*] — An agreement for a lease provided for the building of a barn by the tenant. The assignee of the owner, considering that a barn which the tenant had begun to build was not such as the agreement required, filed a bill for an injunction, and for specific performance of the agreement generally. The answer insisted that the barn was such as defendant undertook to build. The court, being of opinion that the injunction was the real object of the suit, and that the plaintiff was not entitled to an injunction, dismissed the bill:—Held, that this decree was no bar to a subsequent suit by the tenant for specific performance of the agreement for a lease. *Simmons* v. *Campbell*, 17 Gr. 612.

See Morin v. *Wilkinson*, 2 Gr. 157; *Ledyard* v. *McLean*, 10 Gr. 139; *Hewitt* v. *Brown*, 16 Gr. 670; *City of Kingston* v. *Kingston, Portsmouth, and Cataraqui Electric R. W. Co.*, 28 O. R. 399, 25 A. R. 462, *ante* VI.

See Contract—Vendor and Purchaser.

SPECIFICATIONS.

See Patent for Invention, X.—Work and Labour, I. 3.

SPEEDY TRIALS ACT.

See Constitutional Law, II. 8—Criminal Law, VIII. 6.

STAKEHOLDER.

Interpleader.]—Where money was placed in defendants' hands by plaintiffs, in pursuance of an agreement between plaintiffs and A., to be paid over by defendants to A., in whole or in part, on his making up certain accounts and performing his agreement with plaintiffs, but plaintiffs sued defendants for the money before they had come to any decision as to A.'s claim, which they were to determine upon:—Held, that they were not entitled to an interpleader. *Cotton* v. *Cameron*, 2 P. R. 62.

——— *Costs.*]—A stakeholder allowed to retain, out of the moneys in his hands, a sum sufficient to cover his costs of an interpleader brought to try the right to the stakes. *Gillespie* v. *Robertson*, 14 C. L. J. 28.

Payment into Court.] — Although the rule of equity is, that money in the hands of a stakeholder held for others, whose rights are to be disposed of by the court, will usually be ordered into court, still it must be clear that some of the parties litigant are entitled to the fund or a portion of it. Where, therefore, the proceeds of a policy of insurance had been deposited with the attorney of a bank, to be held in trust for such bank, to pay off the liabilities to the bank of the party making such deposit, and were still in the hands of the attorney, and the depositor, without shewing what amount was due the bank, applied to have the money paid into court by the attorney, the court, under the circumstances, refused the application. *Corbett* v. *Meyers*, 10 Gr. 36.

Sum in Hand—*Costs.*]—Where a building society by their answer stated a sum of money to be in their hands as stakeholders, which was smaller than at the hearing they were willing to admit, the court refused them their costs of the suit. *Graham* v. *Toms*, 25 Gr. 184.

See Gaming, IV.—Interpleader.

STAMPS.

Deeds.]—Deeds executed in England, conveying land in this Province, do not require to be stamped under the provisions of the English Stamp Acts. *Murray* v. *VanBrocklin*, 1 Ch. Ch. 300.

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I. GENERALLY.

Code—*Reference to Earlier Law.*]—An appeal to earlier law and decisions for the purpose of interpreting the provisions of a statutory code, can only be justified on some special ground, such as the doubtful import or previously acquired technical meaning of the language used therein. *Robinson* v. *Canadian Pacific R. W. Co.*, [1892] A. C. 481.

Ejusdem Generis.]—When an Act of parliament begins with words which describe things of an inferior degree and concludes with general words, the latter shall not be extended to anything of a higher degree. *Williams* v. *Town of Cornwall*, 32 O. R. 255.

Expressio Unius — *Application.*]—See *Dain* v. *Gossage*, 6 P. R. 103; *Re Lincoln Election*, 2 A. R. 324.

Imperial Acts—*Decisions on.*]—The decision in Humberstone v. Henderson, 3 P. R. 40—that a plea that the land was not the plaintiff's raised the question of title to land, and that the plaintiff was therefore entitled to full costs without a certificate—being upon a point of practice, was adhered to, though placing a construction on our statute different from that put upon substantially similar language in the English Act. *Coulson* v. *O'Connell*, 29 C. P. 341.

Held, in so far as the Government Railways Act, 1881, re-enacts the provisions

of the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18 (Imp.), and the Railway Clauses Consolidation Act, 8 & 9 Vict. c. 20 (Imp.), where the latter statutes have been authoritatively construed by a court of appeal in England, such construction should be adopted by the courts in Canada. Trimble v. Hill, 5 App. Cas. 342, and City Bank v. Barrow, 5 App. Cas. 664, referred to. *Paradis* v. *The Queen*, 1 Ex. C. R. 191.

The phrase "injury done" in 31 Vict. c. 12, s. 40 (D.), is commensurate with and has the same intendment as the phrase "injuriously affected" in 8 & 9 Vict. c. 18, s. 68, the Imperial Lands Clauses Consolidation Act, and, in so far as the similarity extends, cases decided under the Imperial Act may be cited with authority in construing the Canadian statute. *McPherson* v. *The Queen*, 1 Ex. C. R. 53.

——— *Re-enactment by Colonial Legislature.*]—See *Lamb* v. *Cleveland*, 19 S. C. R. 78.

——— *Whether in Force in British Columbia.*]—See *Major* v. *McCraney*, 29 S. C. R. 182.

Language Used in Parliament.] — Quære, as to the admissibility, with a view to the construction of a statute, of the language used by the secretary of state for the colonies in introducing it in parliament. *Smiles* v. *Belford*, 1 A. R. 436.

——— *History of Fiscal Policy—Revenue Act—"Railway."*]—The word "railway" as used in (free) item 173 of the Tariff Act of 1887, 50 & 51 Vict. c. 39, does not include street railways. (2.) In construing a revenue Act regard should be had to the general fiscal policy of the country at the time the Act was passed. When that is a matter of history, reference must be had to the sources of such history, which are not only to be found in the Acts of parliament, but in the proceedings of parliament, and in the debates and discussions which take place there and elsewhere. This is a different matter from construing a particular clause or provision of the Act by reference to the intention of the mover or promoter of it expressed while the bill or the resolution on which it was founded was before the house, which cannot be done under the rules which govern the construction of statutes. *Toronto Railway Co.* v. *The Queen*, 4 Ex. C. R. 262.

New Rights—*Specific Remedies.*]—Where new rights are given by a statute with specific remedies for their enforcement, the remedy is confined to those specifically given. And where a wife obtained a magistrate's order under 51 Vict. c. 23, s. 2 (O.), for payment by her husband of a weekly sum for her support:—Held, that her remedies were limited to those given by the statute, and that an action in the division court for arrears of payments under the order could not be maintained against the husband. *Re Sims* v. *Kelly*, 20 O. R. 291.

Obsolete Act—*Non-user.*]—See *Marmora Foundry Co.* v. *Murray*, 1 C. P. 29.

Procedure Acts — *Conferring Jurisdiction.*]—Statutes regulating the practice and procedure of a court apply only to matters within its jurisdiction, and cannot be called in aid to give jurisdiction where it is in question. *Ahrens* v. *McGilligat*, 23 C. P. 171.

Permissive Statute—*Exercise of Powers under—Prejudice of Common Law Rights of Others.*]—See *Canadian Pacific R. W. Co.* v. *Parke*, [1899] A. C. 535.

Repugnant or Conflicting Clauses in Different Acts.]—See *In re Wilson*, 23 U. C. R. 301; *Regina* v. *Lake*, 7 P. R. 215; *The Queen* v. *The Beatrice*, 5 Ex. C. R. 9; *Ontario and Sault Ste. Marie R. W. Co.* v. *Canadian Pacific R. W. Co.*, 14 O. R. 432; *Turner* v. *Town of Brantford*, 13 C. P. 109; *Re Colenutt and Township of Colchester North*, 13 P. R. 253; *The W. J. Aikens*, 4 Ex. C. R. 7.

Repugnant or Conflicting Clauses in the Same Act.]—See *Dain* v. *Gossage*, 6 P. R. 103; *Boyle* v. *Ward*, 11 U. C. R. 416; *Regina* v. *Rose*, 27 O. R. 195; *McGill* v. *Municipal Council of Peterborough and Victoria*, 12 U. C. R. 44; *Kingan* v. *Hall*, 23 U. C. R. 503; *Bain* v. *Anderson*, 28 S. C. R. 481.

Statutory Remedy.]—As to when a right given by statute may be enforced by action, and when a particular remedy given by the statute excludes the right to sue. *Little* v. *Ince*, 3 C. P. 528; *County of Frontenac* v. *City of Kingston*, 30 U. C. R. 584; *S. C.*, 20 C. P. 49; *County of Wellington* v. *Township of Wilmot*, 17 U. C. R. 82; *Murray* v. *Dawson*, 17 C. P. 588; *Bronte Harbour Co.* v. *White*, 23 C. P. 164.

Strict or Liberal Construction—*Dedication of Land.*]—It is the duty of the court where it finds legislation intended to legalize the dedication of property to laudable public purposes, to construe the Act so as to enlarge rather than limit its operation. *Butland* v. *Gillespie*, 16 O. R. 486.

——— *Disqualification for Municipal Office—Liquor License.*]—The Act disqualifying a licensee for the sale of liquor from holding municipal office should be construed strictly, and should not be extended to the partner of a person lawfully holding a license in his own name. *Regina ex rel. Brine* v. *Booth*, 3 O. R. 144, 9 P. R. 452.

See Regina ex rel. Clancy v. *Conway*, 46 U. C. R. 85.

——— *Intoxicating Liquors.*]—R. S. O. 1887 c. 194, s. 122, which imposes a liability in certain eventualities on innkeepers who give liquor to persons who thereby become intoxicated, is a remedial measure, and should receive a liberal construction. *Trice* v. *Robinson*, 16 O. R. 433.

——— *Registrars' Fees.*]—The sections of R. S. O. 1877 c. 111, relating to registrars' fees, being in derogation of the rights of registrars as they previously existed under the common law, must be construed strictly. *Re Ingersoll, Gray* v. *Ingersoll*, 16 O. R. 194.

See post XI.

II. ALTERING AND AMENDING.

Application of Amending Act—*Addition of New Clause to Former Act.*]—Subsection 4 of s. 20 of the Railway Act, 1868, (D.), gives an action against certain railway

companies for neglect to carry goods, &c., but the Act does not apply to the Great Western R. W. Co., the defendants. By s. 5 of 34 Vict. c. 43 (D.), this sub-section "is hereby amended by adding thereto the following words: 'From which action the company shall not be relieved by any notice, condition, or declaration, if the damage arises from any negligence or omission of the company or of its servants';" and by s. 7, "the provisions of this Act" are made applicable to every railway company:—Held, that the sub-section of the earlier Act, as thus amended, did not apply to defendants; but that the effect of the later Act was merely to add the newly enacted words to the sub-section; and "the provisions of this Act," therefore, did not include the amendment. *Allan* v. *Great Western R. W. Co.*, 33 U. C. R. 483.

——— *Earlier Lease — Forfeiture—Computation of Time.*]—By R. S. N. S., 5th ser., c. 7, the lessee of mining areas in Nova Scotia was obliged to perform a certain amount of work thereon each year on pain of forfeiture of his lease, which, however, could only be effected through certain formalities. By an amendment in 1889 (52 Vict. c. 23), the lessee is permitted to pay in advance an annual rental in lieu of work, and by s.-s. (c) the owner of any leased area may, by duplicate agreement in writing with the commissioner of mines, avail himself of the provisions of such annual payment, and "such advance payments shall be construed to commence from the nearest recurring anniversary of the date of the lease." By s. 7 all leases are to contain the provisions of the Act respecting payment of rental and its refund in certain cases, and by s. 8 said s. 7 was to come into force in two months after the passing of the Act. Before the Act of 1889 was passed a lease was issued to E. dated 10th June, 1889, for twenty-one years from 21st May, 1889. On 1st June, 1891, a rental agreement under the amending Act was executed, under which E. paid the rent for his mining areas for three years, the last payment being in May, 1893. On 22nd May, 1894, the commissioner declared the lease forfeited for non-payment of rent for the following year, and issued a prospecting license to T. for the same areas. E. tendered the year's rent on 9th June, 1894, and an action was afterwards brought by the attorney-general, on relation of E., to set aside said license as having been illegally and improvidently granted:—Held, that the phrase "nearest recurring anniversary of the date of the lease," in s.-s. (c) of s. 1, Act of 1889, is equivalent to "next or next ensuing anniversary," and, the lease being dated on 10th June, no rent for 1894 was due on 22nd May of that year, at which date the lease was declared forfeited, and E.'s tender on 9th June was in time. Attorney-General v. Sheraton, 28 N. S. Reps. 492, approved and followed. Held, further, that, though the amending Act provided for forfeiture, without prior formalities, of the lease, in case of non-payment of rent, such provision did not apply to leases existing when the Act was passed, in cases where the holders executed the agreement to pay rent thereunder in lieu of work. The forfeiture of E.'s lease was, therefore, void for want of the formalities prescribed by the original Act. *Temple* v. *Attorney-General for Nova Scotia*, 27 S. C. R. 355.

Effect of—*Addition of New Sub-section—Proviso in Earlier Sub-section.*] — By the Municipal Act of 1866, 29 & 30 Vict. c. 51, s. 349, municipal corporations were authorized to pass by-laws to take stock in or aid railway companies, but by s.-s. 4 of that section, no corporation should subscribe for stock or incur any liability for these purposes, unless the by-law should receive the assent of the electors. By 34 Vict. c. 30, s. 6 (O.), a sub-section was directed to be added to s. 349, authorizing the corporations to pass by-laws for granting bonuses to any railway and to any persons establishing manufactures, and to issue debentures for raising money to meet such bonuses:—Held, that the additional sub-section could not be read as coming after s.-s. 4, so as to exempt by-laws under it from requiring the assent of the electors. *Regina* v. *County of Wentworth*, 22 C. P. 300.

——— *Time for Commencing Proceedings under Earlier Act—Railway Arbitration.*]—The mandamus nisi set out certain of the provisions of 18 Vict. c. 180, and 20 Vict. c. 146, by which the prosecutors claimed the right to have an arbitration to settle the amount of their claim against the Great Western R. W. Co., by the erection of a permanent bridge over the river Humber. The company returned to the writ, that the prosecutors had not commenced proceedings to entitle them to a reference within six months after the passing of the first Act. The prosecutors demurred, contending that the provisions of the first Act had been altered and extended by the second Act, and that they had done all that the second Act required of them to establish their claim to an arbitration:—Held, that, under 18 Vict. c. 180, the prosecutors would have been barred, not having commenced proceedings within six months after the passing of that Act; that 20 Vict. c. 146 having extended its provisions much beyond those of 18 Vict. c. 180, and extended the rights thereunder beyond those explained in s. 1 to be within the meaning of the words "private rights," the rights defined in 20 Vict. c. 146 were not restricted by the provisions of 18 Vict. to those only who had commenced proceedings within six months of the passing of the latter Act; that the notice required to be given within three months after the passing of 20 Vict. was the only condition precedent to the prosecutors' right to recover. *Regina* v. *Great Western R. W. Co.*, 14 C. P. 462.

III. Crown, When Binding on.

Attachment of Debts.]—The garnishee clauses of the C. L. P. Act do not extend to the Queen. The Crown cannot, therefore, proceed under them to attach a debt. *Regina* v. *Benson*, 2 P. R. 350.

Claimant — *Interpleader.*] — The Crown cannot be a claimant, within the meaning of the statute authorizing the settlement by interpleader of claims of goods taken under execution. *McGee* v. *Baines*, 3 L. J. 151.

Dominion Elections Act — *Travelling Expenses — Interpretation Act — Exception.*] —The information alleged an agreement with Her Majesty whereby, in consideration of the conveyance by the Intercolonial Railway of certain passengers between certain stations, the defendants agreed to pay Her Majesty, through the proper officers of that railway,

the fares or passage money of such passengers at the rate therein mentioned as agreed to between the defendants and such officers. The defendants, admitting the agreement as alleged, sought to avoid it by setting up as a defence that such passengers were carried on bons in blank signed by one of the defendants only:—Held, on demurrer to the plea, to be no answer to the breach of contract alleged. (2) The Crown is not bound by ss. 100 and 122 of the Dominion Elections Act, 1874. (3) Clause 46 of s. 7 of the Interpretation Act, R. S. C. c. 1, whereby it is provided that no provision or enactment in any Act shall affect in any manner or way whatsoever the rights of Her Majesty, her heirs or successors, unless it is expressly stated therein that Her Majesty shall be bound thereby, is not limited or qualified by an exception such as that mentioned in The Magdalen College Case, 11 Rep. 70*b*, "that the King is impliedly bound by statutes passed for the general good . . . or to prevent fraud, injury, or wrong." *The Queen* v. *Pouliot*, 2 Ex. C. R. 49.

Execution—*Exemption.*]—The statute 23 Vict. c. 25, exempting certain articles from seizure, does not bind the Crown. *Regina* v. *Davidson*, 21 U. C. R. 41.

Improvements under Mistake of Title.]—See *Commissioners of Queen Victoria Niagara Falls Park* v. *Colt*, 22 A. R. 1.

See Attorney-General v. *Walker*, 25 Gr. 233, *post* XX.

IV. Expressions in Statutes — Meaning of.

"And"—"*Or.*"]—Although, by the words of the provincial statute 51 Geo. III. c. 9, s. 6, against usury, contracts, bonds, &c., are declared void only when usurious interest is reserved and taken, yet the court will construe "and" to be "or," particularly as 7 Wm. IV. c. 5, s. 3, declares in the preamble "that by law all contracts and assurances whatever for payment of money made for an usurious consideration are utterly void;" and therefore a plea to an action on a promissory note, that the note was given to secure a debt and was for an usurious consideration for forbearance, was held good, although it did not state that the usurious interest was paid or received. *Boag* v. *Lewis*, 1 U. C. R. 357.

"As Soon as Possible."] — See *The Queen* v. *The Beatrice*, 5 Ex. C. R. 9.

"Herein Contained"—*Section or Statute.*]—Held, that the words "herein contained," in 16 Vict. c. 183, s. 11, must be applied only to the clause in which they occur, and not to the whole Act—that being in this case the reasonable, and in general the more obvious, though not the inevitable, construction. *McGill* v. *Counties of Peterborough and Victoria*, 12 U. C. R. 44.

"May"—"*Shall be Lawful.*"]—See *post* VII.

"Nearest Occurring Anniversary."] — See *Temple* v. *Attorney-General for Nova Scotia*, 27 S. C. R. 355, *ante* II.

"Section."] — The word "section" does not necessarily mean one of the divisions of an Act numbered as such, but may refer, if the context requires it, to any distinct enactment, of which there may be several included under one number. Consideration of conflicting clauses in the same Act. Application of the maxim, "Expressio unius est exclusio alterius." *Dain* v. *Gossage*, 6 P. R. 103.

V. Forms and Schedules.

1. *Generally.*

The court will not be punctilious in adhering to the letter of the statute where there is reasonable accuracy and no possible prejudice resulting from literal inaccuracy in the frame of a warrant to sell for arrears of taxes. *Fitzgerald* v. *Wilson*, 8 O. R. 559.

General remarks on forms prescribed by Acts of parliament. *Gemmill* v. *Garland*, 12 O. R. 139.

See S. C., sub nom. Garland v. *Gemmill*, 14 S. C. R. 321.

The question of the authority of schedules to Acts of parliament discussed. *Truax* v. *Dixon*, 17 O. R. 366.

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2. *Particular Cases.*

Administrator's Bond — *Surrogate Rules.*]—The Surrogate Courts Act, C. S. U. C. c. 16, requires a bond from administrators, "conditioned for the due collecting, getting in, and administering the personal estate of the deceased," and enacts that such bond shall be in the form prescribed by the rules and orders referred to in s. 18 of the Act. These rules were those made under the Surrogate Courts Act, 1858, which by the section referred to "are hereby continued:"—Held, that such rules being thus sanctioned by the legislature, a bond in accordance with the form prescribed by them must be held sufficient, though it was alleged not to comply with the statute. *Bell* v. *Mills*, 25 U. C. R. 508.

Affidavit—*Attachment — Division Court.*] —Semble, as there is a material difference between the enacting clause and the form of an affidavit given by the Act as to the conditions on which an attachment may issue from the division court, that the former must govern. *Boyle* v. *Ward*, 11 U. C. R. 416.

——— *Production of Documents — Chancery Orders.*]—Where an affidavit was a printed copy of the form in schedule K. to the orders, and referred to documents in the various schedules annexed, but no documents were set out in the schedules, the affidavit was directed to be taken off the files with costs. *Rogers* v. *Crookshank*, 4 C. L. J. 45.

Conviction — *Liquor License Act.*]—On demurrer to an avowry justifying under a conviction for selling spirituous liquors without license, and a distress warrant issued thereon: —Held, a sufficient answer to the objections suggested, that the conviction followed the form prescribed by C. S. C. 103, which was intended as a guide to magistrates and to prevent failure of justice from trivial objections. *Reid* v. *McWhinnie*, 27 U. C. R. 289.

——— *Temperance Act — Hard Labour—Conflict of Provisions.*]—The conviction and warrant of commitment imposed hard labour, in addition to imprisonment, which was not authorized by either the Temperance Act or 37 Vict. c. 32, for the first offence; but it was awarded for the first offence by the forms in the schedule of 40 Vict. c. 18, although there was no mention of it in any part of that statute, and s. 36 of that Act enacts that the forms in the schedules shall be sufficient in all cases thereby respectively provided for:—Held, that the imposition of hard labour was not warranted by its mere insertion in the schedules, but that the conviction and warrant could be amended by striking out these words under 40 Vict. c. 18, s. 23 (O.) *Regina* v. *Lake*, 7 P. R. 215.

Declaration — *Bills and Notes.*] — The form of declaration given in 3 Vict. c. 8 must be adopted with reference to the mode in which the several parties to the bill or note make themselves liable. *Bank of Upper Canada* v. *Gwynne*, 4 U. C. R. 145.

——— *Diversion of Water.*]—The form of declaration given in the C.L.P. Act, 1856, for diverting water from plaintiff's mill, is applicable only when the evidence will sustain the claim in that form. *Tucker* v. *Paren*, 7 C. P. 269.

Indictment—*Arson—Intent.*]—An indictment for arson is sufficient without alleging any intent, there being no such averment in the statutory form; but an intent to injure or defraud must be shewn on the trial. *Regina* v. *Cronin*, 36 U. C. R. 342.

Mistake in Schedule — *Seigneurie—Recognition—Prescription.*] — In an action of ejectment by the Crown, it appeared that the appellant company derived title through a grant made in 1661 by the French government, which gave no seigneurie over the land in dispute, but only a right to make establishments for hunting and fishing within certain limits; that an Ordonnance in 1733, together with the action of the French Crown thereunder, did not create or recognize any title in the heirs of the grantee to such seigneurie; that down to 1854 there was no evidence of either its creation or recognition by the British Crown; but that in 1854 the Canadian Act 18 Vict. c. 3 (amended by subsequent Acts) recognized that there was a seigneurie of Mingan, being part of the disputed land, the boundaries whereof were conclusively established by a schedule authorized by this Act:—Held, that the court below was right in dismissing the suit as regards the scheduled lands. If a mistake had been made, the legislature alone could correct it; a court of law must give effect to the enactment as it stands. The law of prescription did not apply. *Labrador Co.* v. *The Queen*, [1893] A. C. 104.

Mortgage — *Short Form—Covenants—Numbering.*]—Held, that the provisions and covenants were not deprived of the meaning given to them by the Act respecting short forms of mortgages, because they were not numbered as in the schedule to it. *Northey* v. *Trumenhiser*, 30 U. C. R. 426.

Recognizance — *Appeal — Quarter Sessions.*]—The form of recognizance to try an appeal to the quarter sessions given in the schedule to C. S. C. c. 103, is sufficient, though the condition differs in form from that provided for by c. 99, s. 117. *In re Wilson*, 23 U. C. R. 301.

Warrant for Tax Sale.] — See *Fitzgerald* v. *Wilson*, 8 O. R. 559.

VI. Imperative or Directory.

Assessment Act.]—Considerations as to what requirements of the Tax Acts are imperative, and what are merely directory. *Cotter* v. *Sutherland*, *Stephens* v. *Jacques*, 18 C. P. 357.

——— *Delivery of Roll to Collector.*]—Section 120 of the Assessment Act, R. S. O. 1887 c. 193, provides that the clerk shall deliver the roll to the collector on or before the 1st October, or such other day as may be prescribed by a by-law of the local municipality; but no by-law was passed, and the roll for 1886 was not delivered by the clerk to the defendant until about 1st January, 1887:—Held, that the provisions of s. 120 are directory, and not imperative; and the omission to deliver the roll within the prescribed time had not the effect of preventing the collector from proceeding to collect the taxes mentioned in the roll as soon as it was delivered to him, or of rendering such proceedings invalid. *Lewis* v. *Brady*, 17 O. R. 377.

By s. 119 of the Ontario Assessment Act, 55 Vict. c. 48, provision is made for the preparation every year by the clerk of the municipality of a "collector's roll," containing a statement of all assessments to be made for municipal purposes in the year, and s. 120 provides for a similar roll with respect to taxes payable to the treasurer of the Province. At the end of s. 120 is the following: "The clerk shall deliver the roll, certified under his hand, to the collector on or before the 1st October:"—Held, affirming the decision in 21 A. R. 379, that the provision as to delivery of the roll to the collector was imperative, and its non-delivery was a sufficient answer to a suit against the collector for failure to collect the taxes. Held, also, that such delivery was necessary in the case of the roll for municipal taxes provided for in the previous section as well as that for provincial taxes. *Town of Trenton* v. *Dyer*, 24 S. C. R. 474.

——— *Delivery of Roll to Treasurer—Arrears.*]—The provisions of s. 135 of the Ontario Assessment Act (R. S. O. 1887 c. 193) in respect to taxes on the roll being uncollectable, providing for what the account of the collector in regard to the same shall shew on delivery of the roll to the treasurer, and requiring the collector to furnish the clerk of the municipality with a copy of the account, are imperative. Judgments in 26 A. R. 459 and 30 O. R. 16 affirmed. *City of Toronto* v. *Caston*, 30 S. C. R. 390.

——— *Entries on Roll — Copies — Certificates.*]—The provisions of s. 121 of the Consolidated Assessment Act as to entering on the roll, by the clerk of the municipality, opposite to each lot or parcel all the rates or charges with which the same is chargeable, in separate columns for each rate, is imperative, and noncompliance therewith renders such roll a nullity. And where the amount of such rates or taxes for one year was entered on the roll in

one sum, and the roll was so transmitted to the treasurer of the county, a tax sale founded thereon was held invalid. The provision of s. 141 of the said Act, which requires a true copy of the lists returned by the assessors to the clerk to be furnished to the county treasurer, certified to by the clerk under the seal of the corporation, and that of s. 142, which requires an assessor's certificate to each list, are also imperative. The principle of the decision in Town of Trenton v. Dyer, 21 A. R. 579, followed. *Love* v. *Webster*, 26 O. R. 433.

——— *Tax Collector—Bond.*]—Section 60 of 13 & 14 Vict. c. 67, requiring the collector to give a bond, as required by by-law, is directory, and not so imperative as to make the collection of the taxes illegal where a bond from the collector's surety had been given to the treasurer instead of the town by its corporate name, and no by-law had been passed by the corporation under that section. *Judd* v. *Read*, 6 C. P. 362.

——— *Tax Sale — Duties of Assessor—Clerk.*] — The duties of an assessor and a township clerk under R. S. O. 1877 c. 180, ss. 109, 110, and 111 are imperative, not directory merely, and their performance is conditional to the validity of a tax sale. *Donovan* v. *Hogan*, 15 A. R. 432.

——— *Tax Sale—List of Lands Liable.*]—Where a township treasurer had neglected to furnish the clerk of the municipality with a list of lands liable to sale for taxes, and no such list or copy thereof was delivered to the assessor, as provided by s. 108 of R. S. O. 1877 c. 180, the court set the sale aside. *McKay* v. *Ferguson*, 26 Gr. 236.

By s. 128 of the Assessment Act, 32 Vict. c. 36 (O.), the warden is required to return one of the lists of the lands to be sold for taxes transmitted to him, &c., to the treasurer, with a warrant thereto annexed, under the hand of the warden and seal of the county, &c.:—Held, that the section was merely directory, and was sufficiently complied with by the list being embodied in the warrant, instead of being annexed thereto. *Church* v. *Fenton*, 28 C. P. 384.

See S. C., 4 A. R. 159, 5 S. C. R. 239.

——— *Tax Sale—Warrant—Patented and Unpatented Lands.*]—Held, that 16 Vict. c. 182, ss. 55 and 56, C. S. U. C. c. 55, requiring the county treasurer in his warrant for the sale of lands to distinguish those patented from those under lease or license of occupation, is compulsory; and that sales effected under a warrant omitting such particulars are void. *Hall* v. *Hill*, 2 E. & A. 569, 22 U. C. R. 578.

Boundary Line Commissioners—*Filing Decision.*]—Section 2 of 3 Vict. c. 11, which provides that every judgment and final decision of the boundary line commissioners shall be filed with the registrar of the county where such boundary shall be situate, is directory only, and the omission to file will not affect the validity of the judgment. *Regina* v. *Rose*, 12 U. C. R. 637.

Canada Temperance Act — *Previous Conviction.*]—The provisions of s. 115 of the Canada Temperance Act are directory only. *Regina* v. *Brown*, 16 O. R. 41.

Company—*Subscription Books.*]—Action for calls under 1 Wm. IV. c. 12, against defendant as a stockholder:—Held, that the said Act was not obsolete for non-user; and that the clause of the said Act requiring the books of subscription to be opened within two months is only directory. *Marmora Foundry Co.* v. *Murray*, 1 C. P. 29.

Customs Act — *Regulations — Order in Council—Drawback.*]—By the Customs Act, 1877, 40 Vict. c. 10, s. 125, clause 11, it was enacted, inter alia, that the governor in council might make regulations for granting a drawback of the whole or part of the duty paid on materials used in Canadian manufactures. In 1881, by an amendment made by 44 Vict. c. 11, s. 11, the governor in council was further empowered to make regulations for granting a certain specific sum in lieu of any such drawback. (See also the Customs Act, 1883, s. 230, clause 12, and R. S. C. c. 32, s. 245m.) By an order of the governor-general in council, dated the 15th May, 1880, it was provided as follows: "A drawback may be granted and paid by the minister of customs on materials used in the construction of ships or vessels built and registered in Canada, and built and exported from Canada under governor's pass, for sale and registry in any other country since the 1st January, 1880, at the rate of 70 cents per registered ton on iron kneed ships or vessels classed for 9 years, at the rate of 65 cents per registered ton on iron kneed ships or vessels classed for 7 years, and at the rate of 55 cents per registered ton on all ships or vessels not iron kneed." By an order in council of the 15th November, 1883, an addition was made to the rates stated "of ten cents per net registered ton on said vessels when built and registered subsequent to July, 1883:"—Held, that a petition of right would not lie upon a refusal by the controller of customs to grant a drawback in any particular case. Semble, that the provision in an order in council that the drawback "may be granted" should not be construed as an imperative direction; it not being a case in which the authority given by the use of the word "may" is coupled with a legal duty to exercise such authority. *Matton* v. *The Queen*, 5 Ex. C. R. 401.

Ditches and Watercourses Act—*Award—Appeal.*]—The provisions of s-s. 6 of s. 22 of 57 Vict. c. 55 (O.), the Ditches and Watercourses Act, 1894, which require the Judge of the county court to hear and determine an appeal from an award thereunder within two months after receiving notice thereof, are merely directory. *Re McFarlane* v. *Miller*, 26 O. R. 516.

Exchequer Court Act—*Duty of Judge of Supreme Court.*]—Where a petition of right has been demurred to and judgment obtained on such demurrer before a Judge of the supreme court, acting as Judge of the exchequer court, prior to 50 & 51 Vict. c. 16, it was held to be a case fully heard and determined, and not one coming within the class of cases referred to as being "partly heard" in s. 50 of that statute; and the Judge who heard the demurrer refused a motion to amend the petition, made after the passage of such Act, on the ground of want of jurisdiction. Semble, that the provision in s. 50 of the Exchequer Court Act, that "any matter which has been heard or partly heard or fixed or set down for hearing before any Judge of the supreme

court, acting as a Judge of the exchequer court, may be continued before such Judge to final judgment, who, for that purpose may exercise all the powers of the Judge of the exchequer court." is not to be construed as an imperative enactment, and does not impose the duty upon a Judge before whom a case was instituted before the Act was passed to continue to entertain the case until final judgment, nor does such provision oust the jurisdiction of the Judge of the exchequer court in respect of such matter. *Dunn* v. *The Queen*, 4 Ex. C. R. 68.

Inquest—*Consent of Crown Attorney.*]—Held, that the meaning of s. 12 (2) of R. S. O. 1897 c. 97 was that the coroner should not, without the consent of the Crown attorney, direct a post-mortem examination for the purpose of determining whether an inquest should be held, but only where the coroner had determined to hold an inquest and gave the direction as part of the proceedings incident to it; but if the provision should be read differently, it was at all events merely directory, and did not render an act done by a surgeon in good faith, under the direction of a coroner, unlawful because the coroner had neglected to obtain the prescribed consent, where the act would be lawful if the consent had been obtained. Semble, also, that if the verdict for the plaintiff had been allowed to stand, the amount of damages assessed, $600, was excessive. *Davidson* v. *Garrett*, 30 O. R. 653.

Joint Stock Companies Act—*Calls.*]—An otherwise valid transfer of shares allotted to the transferor, upon which he has not paid anything, no calls having been made at the time of transfer, is not invalid because the ten per centum upon allotted stock, directed by s. 45 of the Joint Stock Companies Act, R. S. O. 1887 c. 157, to be "called in and made payable within one year from the incorporation of the company," has not been paid. The last mentioned section is directory merely. *Ontario Investment Association* v. *Sippi*, 20 O. R. 440.

Justice of the Peace—*Adjournment.*]—Semble, that the provisions of s. 46 of 32 & 33 Vict. c. 31 (D.), that no adjournment shall be "for more than one week," are directory merely. Regina v. French, Regina v. Robertson, 13 O. R. 80, distinguished and not followed. *Regina* v. *Heffernan*, 13 O. R. 616.

Law Society—*Inquiry—Procedure.*]—R. S. O. 1887 c. 145, s. 36, giving power to the benchers of the Law Society of Upper Canada to examine witnesses under oath, is not imperative. *Hands* v. *Law Society of Upper Canada*, 16 O. R. 625, 17 A. R. 41.

Liquor License Act—*Time for Granting Licenses.*] — The New Brunswick Liquor License Act, 1887, provides that "all applications for license, other than in cities and incorporated towns, shall be presented at the annual meeting of the council of the municipality and shall then be taken into consideration, and in cities and incorporated towns, at a meeting to be held not later than the first day of April in each and every year." The interpretation clause provides that in the city of St. John the expression "council" means the mayor, who has the power given to a municipal council. It is also provided that when anything is required to be done at, on, or before a meeting of council, and no other date is fixed therefor, the mayor may fix the date for doing the same in the city of St. John:—Held, that the provision requiring licenses to be taken into consideration not later than the first day of April is directory only, and licenses granted in St. John are not invalid by reason of the same being granted after that date. *Danaher* v. *Peters, O'Regan* v. *Peters*, 17 S. C. R. 44.

Municipal Act — *By-law—Registration.*]—Section 351 of R. S. O. 1887 c. 184, which requires a by-law creating a debt by the issuing of debentures for a longer term than one year to be registered within a fortnight from the final passing thereof, is merely directory. *Re Farlinger and Village of Morrisburg*, 16 O. R. 722.

The provisions of s. 351 of the Municipal Act, R. S. O. 1887 c. 184, are imperative, and not merely directory; and if a local improvement by-law is not registered within two weeks after its final passing, a ratepayer may shew that it is invalid, and successfully resist payment of the local improvement tax. *Sweeny* v. *Corporation of Smith's Falls*, 22 A. R. 429.

——— *Local Improvement Debt—By-law.*]—See *Ward* v. *Town of Welland*, 31 O. R. 303.

Road Company—*Notice of Commencement of Work—Pleading.*]—The clause in 16 Vict. c. 190, s. 3, that "no company formed under this Act shall commence any work until thirty days after the directors have served a written notice upon the head of the municipality, in the jurisdiction of which such local or other work connected therewith is intended to pass or to be constructed," &c., is directory and not compulsory. And in this action against a road company by plaintiff for compelling him to pay toll on their line of road:—Held, on demurrer, that defendants were not obliged to plead the giving of notice directed by the statute, but that the plaintiff was obliged to reply the same if he wished to dispute the right of defendants to compel the payment of toll. *Couse* v. *Hannan*, 14 C. P. 26.

Ship—*Certificate of Ownership.*]—A certificate of ownership of a vessel under 8 Vict. c. 5, s. 2, is not invalid because the additions of the owners are omitted, the statute on that point being directory only. *Gildersleeve* v. *Corby*, 15 U. C. R. 150.

Telegraph Company—*Evidence of Debt—Signature.*]—The statute under which a telegraph company was incorporated, enacted that all evidences of debt issued by them should be issued and signed by the president and treasurer:—Semble, that this was directory merely, and that, even if the secretary, who signed in this case, was not the treasurer as well, it would be sufficient. *City Bank* v. *Cheney*, 15 U. C. R. 400.

Voters' List — *Certificate.*]—The list of voters required to be posted to various persons under 37 Vict. c. 4 (O.), was prepared and certified by the clerk of the municipality, ready for transmission on a certain day, but he died before that day came, and they were in fact transmitted by his successor without any alteration in the certificate. They were regular in every respect, with this exception:

—Held, that, as s. 3 of 37 Vict. c. 4 was only directory, and as the object of the statute was fulfilled to all intents and purposes, the list was sufficient to give jurisdiction to the county Judge to revise it. *In re Goderich Voters' Lists*, 6 P. R. 213.

——— *Description of Property.*] — The right of a voter, whose name has been entered on the voters' list, to exercise the franchise, is not destroyed under 32 Vict. c. 21, ss. 5, 7 (O.), by the want of a sufficient or any description of the real property on which his qualification depends. The provision requiring such description to be inserted is directory only, and does not make it essential to the right to vote; and this, notwithstanding the enactment in s.-s. 3 of s. 7, that the time therein mentioned should be directory only, the maxim expressio unius, &c., not being applicable. *Re Lincoln Election*, 2 A. R. 324.

See St. Michael's College v. *Merrick*, 1 A. R. 520; *Mitchell* v. *Mulholland*, 14 C. L. J. 55; *Shaw* v. *Crawford*, 4 A. R. 371.

VII. Imperative or Permissive.

Assessment Act — *Time*—"*May.*"]—By s. 52 of the Assessment Act, R. S. O. 1887 c. 193, where the assessment in cities, towns, &c., is made by virtue of a by-law passed under that section, in the latter part of the year, such assessment may be adopted by the council of the following year:—Held, that "may," as used here, is permissive only, and that the council of the following year are given the option of having a new assessment. Overwhelmingly strong reasons of convenience in favour of having one assessment instead of two might justify the court in giving to "may" the force of "must." *Re Dwyer and Town of Port Arthur*, 21 O. R. 175.

Canada Temperance Act—*Penalty—"May."*]—There having been numerous convictions of the respondent, with accumulated penalties amounting to $1,400, for having on various occasions sold intoxicating liquor, and thereby committed offences under the Canada Temperance Act of 1864, a certiorari was granted in one case by the superior court, on the ground that, by the true construction of s. 17, which provides that two or more offences by the same person may be included in the same complaint, a penalty of $100 was sufficient for all offences under the Act during the limitation period of three months prescribed by s. 15:—Held, that, in the absence of express words to that effect, s. 17 must be construed as permissive merely, and not imperative. *Wentworth* v. *Mathieu*, [1900] A. C. 212.

Interpretation Act—*Declaratory Section—"Shall."*]—The Interpretation Act, 31 Vict. c. 1, s. 6, s.-s. 2 (O.), enacting that the word "shall" is to be construed as imperative, does not introduce any new rule, but is declaratory only of that established by judicial decision. *Re Lincoln Election*, 2 A. R. 324.

Municipal Act—*By-law — Passing.*]—In s. 111 of the Manitoba Municipal Act, 1884, which provides that municipal corporations may pass by-laws in relation to matters therein enumerated, the word "may" is permissive only, and does not prohibit corporations from exercising their jurisdiction otherwise than by by-law. *Bernardin* v. *Municipality of North Dufferin*, 19 S. C. R. 581.

——— *Conveyance of Road Allowance.*]—The words "may convey," in 36 Vict. c. 48, s. 426, are compulsory. *Cameron* v. *Wait*, 3 A. R. 175.

Railway Subsidy—"*Shall be Lawful*"—*Crown—Discretion.*]—Where money is granted by the legislature, and its application is prescribed in such a way as to confer a discretion upon the Crown, no trust is imposed enforceable against the Crown by petition of right. The appellant railway company alleged by petition of right that, by virtue of 51 & 52 Vict. c. 91, the lieutenant-governor in council was authorized to grant 4,000 acres of land per mile for thirty miles of the Hereford railway; that by an order-in-council dated 6th August, 1888, the land subsidy was converted into a money subsidy, the 9th section of said c. 91, 51 & 52 Vict., enacting that "it shall be lawful," &c., to convert; that the company completed the construction of their line of railway, relying upon the said subsidy and order-in-council, and built the railway in accordance with the Act 51 & 52 Vict. c. 91, and the provisions of the Railway Act of Canada, 51 Vict. c. 29, and they claimed to be entitled to the sum of $49,000, balance due on said subsidy. The Crown demurred on the ground that the statute was permissive only, and by exception pleaded, inter alia, that the money had been paid by order-in-council to the sub-contractors for work necessary for the construction of the road; that the president had by letter agreed to accept an additional subsidy on an extension of their line of railway to settle difficulties, and signed a receipt for the balance of $6,500 due on account of the first subsidy. The petition of right was dismissed:—Held, that the statute and documents relied on did not create a liability on the part of the Crown to pay the money voted to the appellant company enforceable by petition of right; but, assuming it did, the letter and receipt signed by the president of the company did not discharge the Crown from such obligation to pay the subsidy, and payment by the Crown of the subcontractors' claim out of the subsidy money, without the consent of the company, was a misappropriation of the subsidy. *Hereford R. W. Co.* v. *The Queen*, 24 S. C. R. 1.

Water—*Diversion—Prejudice of Rights of Others.*]—Wherever, according to the sound construction of a statute, the legislature has authorized a proprietor to make a particular use of his land, and the authority given is in the strict sense of law permissive merely, and not imperative, the legislature must be held to have intended that the use sanctioned is not to be in prejudice of the common law right of others. Metropolitan Asylums District v. Hill, 6 App. Cas. 193, approved. The legislature of British Columbia authorized the defendants to irrigate their soil by the diversion of water from an adjacent stream, by conveying it over lands which did not belong to them, subject to provision for compensation:—Held, that the privilege was not meant to be imperative, nor intended to exclude all right of action by neighbouring proprietors for injury done to their lands, save in the case of negligence. *Canadian Pacific R. W. Co.* v. *Parke*, [1899] A. C. 535.

VIII. In Pari Materia.

Behring Sea Award Act, 1894—*Seal Fishery (North Pacific) Act, 1893.*]—Held, that the Seal Fishery (North Pacific) Act, 1893, and the Behring Sea Award Act, 1894, being statutes in pari materiâ, are to be read as one Act. McWilliams v. Adams, 1 Macq. H. L. 120, referred to. *The Queen* v. *The Shelby*, 5 Ex. C. R. 1.

By s. 1, s.-s. 2, of the Behring Sea Award Act, 1894, any ship employed in a contravention of any of the provisions of the Act shall be forfeited to Her Majesty as if an offence had been committed under s. 103 of the Merchants Shipping Act, 1854. Sub-section 3 enacts that the provisions of the Merchants Shipping Act, 1854, respecting official logs (including the penal clauses) shall apply to any vessel engaged in fur seal fishing. The penal clauses of s. 284 of the last mentioned Act merely subject the master to a penalty, in the nature of a fine, for not keeping an official log book, and do not attach any penalty or forfeiture in respect of the ship:—Held, following Churchill v. Crease, 5 Bing. 180, that, inasmuch as the particular provision of the Merchants Shipping Act, inflicting a fine only upon the master, was in seeming conflict with the general provisions of s.-s. 2 of s. 1 of the Behring Sea Award Act, 1894, imposing forfeiture for contravention of the latter Act, such provision of the last mentioned Act must be read as expressly excepting a contravention by omission to keep a log. Section 281 of the Merchants Shipping Act, 1854, enacts that every entry in an official log shall be made as soon as possible after the occurrence to which it relates:—Held, following Attwood v. Emery, 1 C. B. N. S. 110, that the words "as soon as possible" should be construed to mean "within a reasonable time;" and what is a reasonable time must depend upon the facts governing the particular case in which the question arises. *The Queen* v. *The Beatrice*, 5 Ex. C. R. 9.

IX. Interpretation Act.

Holidays—*Election Petition — Computation of Time.*]—The Interpretation Act of Ontario, 31 Vict. c. 1, s. 6, s.-s. 13, enacts that in construing it, or any Act of Ontario, certain days specified, including Good Friday and Easter Monday, shall be included in the word "holiday;" and the Controverted Elections Act of 1871, s. 52, enacts that in reckoning time for the purposes of that Act any day set apart by any Act of Ontario for a public holiday shall be excluded:—Held, that the effect of the Interpretation Act alone, independently of any other statute, was to make the days mentioned in it holidays; and if it were not so, that when the other statute used the word holiday, such days would by virtue of the Interpretation Act be included in it. Held, therefore, that, in reckoning the twenty-one days after the return allowed for presentation of a petition, Good Friday and Easter Monday must be excluded. The decision in chambers in this matter, 5 P. R. 394, affirmed as regards the computation of time. *Re West Toronto Election*, 31 U. C. R. 409.

Judge—*Division Court—New Trial.*]—A suit in a division court having been tried on the 18th July, before a deputy Judge duly appointed, on the 22nd defendant applied for a new trial, by which, under rule 52 of the division courts, proceedings were stayed. The Judge died on the 26th; the deputy Judge before whom the case had been tried did nothing in the matter; and the new Judge was not appointed until October. In January following he ordered a new trial:—Held, that he was authorized to do so, under s. 107 of the Division Courts Act, C. S. U. C. c. 19, and the Interpretation Act, C. S. C. c. 5, s. 6, s.-s. 23, taken together. *In re Appelbe and Baker*, 27 U. C. R. 486.

Judicial Notice of Public Acts—*Pleading.*]—Held, reversing the decision in 25 Gr. 463, that the demurring defendants were not restricted to the statements in the bill, of the Acts under which the company was incorporated, but that they could refer to the statutes as printed in the statute book. *Kiely* v. *Kiely*, 3 A. R. 438.

Upon a covenant to pay interest at 10 per cent. made while 16 Vict. c. 80 was in force, and before 22 Vict. c. 85:—Held, that, the court being bound to notice the statute, no more than six per cent. could be recovered, although non est factum only had been pleaded. *Girdlestone* v. *O'Reilly*, 21 U. C. R. 409.

Majority—*Infants—Sale of Land—Words Importing the Singular Number.*]—See *Re Harding*, 13 P. R. 112.

Mechanics' Liens—"*Person*"—*Partnership.*]—See *Bickerton* v. *Dakin*, 20 O. R. 192, 695.

"Persons Signing"—*Bill of Lading.*]—Semble, under the Interpretation Act, 31 Vict. c. 1, s. 7, s.-s. 9 (O.), the defendants, though a corporation, would be "persons signing" the bill of lading in this case, if signed by their authorized agent. *Royal Canadian Bank* v. *Grand Trunk R. W. Co.*, 23 C. P. 225.

See Re Lincoln Election, 2 A. R. 324; *Barned's Banking Co.* v. *Reynolds*, 40 U. C. R. 435; *Township of Morris* v. *County of Huron*, 26 O. R. 689, 27 O. R. 341; *The Queen* v. *Pouliot*, 2 Ex. C. R. 49; *Walker* v. *Walton*, 1 A. R. 579; *Fowler* v. *Vail*, 4 A. R. 267; *The Queen* v. *Sailing Ship "Troop" Co.*, 29 S. C. R. 662, *post* XVII. 1.

X. Operation on Contracts.

1. *Between Railway Companies.*

Union—*Statute Validating Deed—Rights of Others.*]—The Act authorizing the union of two incorporated companies declared that any deed the companies executed under the Act should be valid to "all intents and purposes in the same manner as if incorporated in the Act:"—Held, that this enabled the companies to bargain together in respect of the rights which each had, and to make such arrangements as their union rendered necessary; but gave them no legislative authority over the rights of other persons. *Cayley* v. *Cobourg, Peterborough, and Marmora R. W. and Mining Co.*, 14 Gr. 571.

Working Arrangement—*Acceptance by Statute—Recital.*]—Held, that 31 Vict. c. 19,

s. 6 (D.), not merely recited the fact of the agreement of 1864 between defendants and the Grand Trunk R. W. Co. being accepted, but that it legislated upon it as accepted and binding, in its enacting part: but, semble, that even if merely recital, it would be good primâ facie, though not conclusive, evidence of the fact. *McCallum* v. *Buffalo and Lake Huron R. W. Co.*, 19 C. P. 117.

See, also, *Holmes* v. *Grand Trunk R. W. Co.*, 27 U. C. R. 595.

——— *Confirmation by Statute—Liability on Bonds.*]—The Buffalo and Lake Huron R. W. Co., being liable upon certain bonds secured by mortgage, entered into an agreement with the Grand Trunk R. W. Co., confirmed by 29 & 30 Vict. c. 92 (C.), by which the latter company were to undertake the working of the former company's railway, the net receipts of the two companies to be divided between them in specified proportions:—Held, that the effect of 19 Vict. c. 21 was to make defendants liable upon the bonds given by the Buffalo, Brantford, and Goderich R. W. Co. as if originally given by defendants. Quære, as to the meaning of the proviso to s. 1 of 29 & 30 Vict. c. 92, confirming the agreement. *Town of Brantford* v. *Buffalo and Lake Huron R. W. Co.*, 29 U. C. R. 607.

——— *Division of Receipts—Confirmation by Statute—Acceptance by Shareholders—Recital of Acceptance in Private Statute—Proof of Acceptance.*] — See *VanNatter* v. *Buffalo and Lake Huron R. W. Co.*, 27 U. C. R. 581.

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2. *Between Railway Company and Individuals.*

Bonds—*Union of Companies — Confirmation by Statute.*]—A statute gave the bondholders of the Cobourg and Peterborough R. W. Co. an option to convert their bonds into stock, and enacted that this "converted bonded stock," and any new subscribed stock, should be preferential to the ordinary stock, and be entitled to dividends of eight per cent. per annum in priority to any dividend to the ordinary shareholders. By a subsequent Act the company was authorized to unite with another company, and it was declared that the two companies, and those who should become shareholders in the new company under the Acts relating to the Cobourg and Peterborough R. W. Co. and under the deed of union, should constitute the new company:—Held, that the union did not extinguish the right of the bondholders to elect. *Cayley* v. *Cobourg, Peterborough, and Marmora R. W. and Mining Co.*, 14 Gr. 571.

Debts of Insolvent Company—*Statute Regulating Distribution.*]—A railway company having become insolvent, an Act was passed estimating the claims of creditors for land taken by the company at $30,000, and the value of the whole railway property at $100,000, and directing that $30,000 should be applied on debts for land and the balance of the $100,000 divided pro ratâ among the other creditors. The $30,000 proved more than sufficient to pay the land debts in full, and the company claimed the balance: but held, that the other creditors were entitled to it. *In re Cobourg and Peterborough R. W. Co.*, 16 Gr. 571.

Lease of Railway — *Construction of Branch—Confirmation by Statute.*] — To obtain the means of constructing a branch line from Peterborough to Millbrook, the Port Hope, Lindsay, and Peterborough R. W. Co. agreed to lease their railway to T. and F., under the preamble to 27 Vict. c. 60, and the branch line was accordingly constructed by T. and F., and by defendants as their assignees:—Held, that the construction of the branch line under the authority of the company had been sanctioned by this Act, which had also confirmed to the lessees the right to maintain and use the road under the franchise of the company. *Hamilton* v. *Covert*, 16 C. P. 205.

Lien for Freight — *Absorption of Company by Statute.*]—Replevin for railway iron. It appeared that the iron had been imported from England by the Buffalo, Brantford, and Goderich R. W. Co., and was shipped from Kingston to Port Colborne, subject to ocean freight and the freight by schooner from Kingston. On arriving at Port Colborne, no one being ready to pay, the iron was left by the master in defendant's charge, to hold subject to the freight, and was piled on a piece of ground belonging to government, where other iron owned by the company was also lying, but separate from this. Afterwards the Buffalo and Lake Huron R. W. Co., the plaintiffs, bought out the old company under 19 Vict. c. 21, and arranged certain writs of fi. fa. under which the sheriff had seized this and the other iron; and they thereupon demanded the iron in question from defendant, who refused to give it up, claiming the ocean freight from Kingston, as well as demurrage, and some other charges not recoverable. The plaintiffs, however, refused to pay anything, and replevied:—Held, that the iron could not be considered as having been delivered to the old railway company, when landed: that 19 Vict. c. 21 did not take away the right of lien; nor could anything done by the sheriff have that effect. *Buffalo and Lake Huron R. W. Co.* v. *Gordon*, 16 U. C. R. 283.

See, also, *Buffalo and Lake Huron R. W. Co.* v. *Brooksbanks*, *ib.* 337.

Lien for Price of Land Sold—*Absorption of Company by Statute.*]—19 Vict. c. 21, incorporating the Buffalo and Lake Huron R. W. Co., with power to purchase the railway therein mentioned, did not deprive unpaid owners of any lien they had for the price of land theretofore sold to the old company. *Paterson* v. *Buffalo and Lake Huron R. W. Co.*, 17 Gr. 521.

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3. *Between Railway Company and Municipality.*

Bond—*Condition—Breach—Relief by Statute.*]—The Woodstock and Lake Erie Railway and Harbour Co. gave a bond to the town council of Woodstock, reciting that the council had agreed to lend them £25,000 to assist in constructing their railway, and conditioned that the company should not expend the loan, nor begin to construct their road, until the whole sum necessary to complete it from Woodstock to Port Dover, should be obtained:—Held, that there was nothing in 19 Vict. c. 74 to relieve defendants from liability for a previous breach of this condition. *Town of Woodstock* v. *Woodstock and Lake Erie R. W. and Harbour Co.*, 16 U. C. R. 146.

Liability of Municipality to Crown —*Release of Company by Statute.*]—Where a township municipality advanced a large sum of money to a railway company under the provisions of the Consolidated Municipal Loan Fund Act, and some of the stockholders of the company were afterwards released from their liability by an Act of the legislature, passed nearly eighteen months after the works on the road were stopped for want of funds, and new companies were formed under that and subsequent Acts of the legislature, which released the new corporations from the construction of the original line of road, until a new line had been constructed, and it appeared that there was no immediate prospect of such a result:—Held, that the municipality were not released from their liability to the Crown. *Norwich* v. *Attorney-General*, 2 E. & A. 541.

Mortgage — "*Other Property*" — *Validating Act—Chattels.*] — The Brockville and Ottawa R. W. Co., by indenture, mortgaged to a municipality to secure loans, the lands, roads, depots, wharves, stations, terminal and otherwise, tolls, revenues, and all other property of the said company now or during the existence of the said mortgage to be acquired. 20 Vict. c. 144, s. 5, recited these loans and declared the said mortgages valid; that the said intended railway and all stations, buildings, carriages, engines, and other property belonging to said railway, were thereby mortgaged to said municipalities according to the terms of said mortgages; and that the Chattel Mortgage Act should not apply to them:—Held, that, as the mortgages covered chattel as well as real property, the words "other property" in them were not restricted to real property, for the statute placed a legislative and different construction on the mortgage. *Counties of Lanark and Renfrew* v. *Cameron*, 9 C. P. 109.

See Dwyer v. *Town of Port Arthur*, 19 A. R. 555, 22 S. C. R. 241.

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4. Other Cases.

Between City and County Municipalities—*Maintenance of Court House and Gaol—Law Reform Act.*]—In consequence of the separation of the city of Toronto from the county of York for judicial purposes, a deed was executed between the respective corporations, in which the city covenanted to pay the county a certain annual sum for the use of the court house. The deed also contained other agreements as to the use of the gaol. This arrangement was to continue in force until twelve months' notice to determine it should be given. By the Law Reform Act, which came into force in February, 1869, the city was re-united to the county for judicial purposes, and on 21st March, 1869, the city gave the county the stipulated notice as to intended discontinuance of the use of the gaol, stating that as to the court house the action of the legislature had virtually terminated the provision respecting it, and that no further payment would therefore be made:—Held, that the city had been released from its covenant to pay for the court house by the Law Reform Act. *County of York* v. *City of Toronto*, 21 C. P. 95.

See, also, *Regina* v. *Law Society*, 20 C. P. 490.

Between Company and Shareholder — *Statute Increasing Powers — Release of Shareholder.*]—To an action for calls alleged to be due by defendant to the Canada Car and Manufacturing Company, the defendant pleaded, on equitable grounds, that he subscribed for the shares and became a shareholder in a company, called "The Canada Car Company," incorporated by letters patent for certain specified purposes, and not otherwise; that afterwards, and without the assent and against the will of defendant, that company applied to the Dominion legislature and obtained an Act constituting the shareholders therein a body corporate, under the name of the Canada Car and Manufacturing Company, the now plaintiffs; that by the said Act greater powers were conferred upon the plaintiffs than were possessed by the Canada Car Company, and the nature of the business was varied and extended, and the undertaking rendered more hazardous than was contemplated by the Canada Car Company or the defendant when he became a shareholder thereof; and that the defendant never agreed to become a shareholder of or invest his money in a company possessing the powers of the plaintiffs—whereby defendant is relieved from liability:—Held, plea clearly bad, for the Act was binding on all the shareholders, whether assenting or not to the application for it; and the court had no jurisdiction to relieve defendant from a liability which the statute expressly declared that he should continue to be subject to. *Canada Car and Manufacturing Co.* v. *Harris*, 24 C. P. 389.

XI. Penal Acts.

Construction.]—A penal statute is to be construed according to its spirit and the rule of natural justice, not according to its very letter. *Rex* v. *Mackintosh*, 2 O. S. 497.

——— *Doubt.*] — In penal statutes questions of doubt are to be construed favourably to the accused. *North Ontario Election (Prov.)*, *McCaskill* v. *Paxton*, H. E. C. 304.

Member of Parliament — *Appointment to Office—Change of Office—Failure to Resign Seat—Evasion of Statute.*]—Defendant, while a member of parliament, was appointed to the office of postmaster-general, and again re-elected for the same constituency. On the 29th July he resigned that office, and within a month was appointed president of the council, which office he resigned on the same day, and on the next day was re-appointed to his old office of postmaster-general: — Held, that this was authorized by 20 Vict. c. 22. The penalties imposed by that Act apply to members of the Assembly retaining their seats without re-election after acceptance of office, and not only to persons absolutely ineligible. The exemption contained in the seventh clause is not confined to one resignation and acceptance of office, but allows the change to be repeated, and the person may thus go back to the same office which he first resigned. It was stated in the pleadings that the ministry, of which defendant as postmaster-general was a member, all resigned office on the 25th July, and on the 2nd August were succeeded by the opposition, who resigned on the following day; that on the 6th the old ministry were re-appointed, but took different offices from those which they before held, and on the 7th

resigned again and were re-appointed to their old places; and it was alleged that the appointment to a different office in the first instance was colourable, and made only to enable defendant to resume his original appointment without going back for re-election:—Held, that, although such a proceeding was probably not contemplated by the Act, it was allowed by it that the court could not look at defendant's motives, or strain the construction of the statute so as to impose a penalty; and that whether the course taken was or was not consistent with the system of political government established in this Province, was a question which they could not take into consideration. *McDonell* v. *Smith*, 17 U. C. R. 310.

See, also, *Macdonell* v. *Macdonald*, 8 C. P. 479.

Municipal Elections—*Personation—Conviction—Repugnancy.*]—Where a clause in a statute prohibits a particular act and imposes a penalty for doing it, and a subsequent clause in the same statute imposes a different penalty for the same offence, which cannot be reconciled either as cumulative or alternative punishment, the former clause is repealed by the latter. This principle being applied to ss. 167 and 210 of the Consolidated Municipal Act, 1892, a person convicted of personation under the former clause was discharged as illegally convicted on a return to a habeas corpus. Robinson v. Emerson, 4 H. & C. 352, and Michell v. Brown, 1 E. & E. at p. 275, followed. *Regina* v. *Rose*, 27 O. R. 195.

See ASSESSMENT AND TAXES—PENALTIES AND PENAL ACTIONS.

XII. PRIVATE ACTS.

Character — *Recital.*] — As regards the character and construction of a private Act and the effect of a recital therein. See *City of Quebec* v. *Quebec Central R. W. Co.*, 10 S. C. R. 563, at p. 580 et seq.

Gas Company — *Act of Incorporation — Municipal By-law—Privilege—Confirmation—Parties to Contract.*]—In 1881 a municipal by-law of St. Hyacinthe granted to a company incorporated under a general Act (C. S. C. c. 65) the exclusive privilege for twenty-five years of manufacturing and selling gas in said city, and in 1882 said company obtained a special Act of incorporation (45 Vict. c. 79, Q.), s. 5 of which provided that "all the powers and privileges conferred upon the said company, as organized under the said general Act, either by the terms of the Act itself or by resolution, by-law, or agreement of the said city of St. Hyacinthe, are hereby reaffirmed and confirmed to the company as incorporated under the present Act, including their right to break up, &c., the streets . . . and in addition it shall be lawful for the company, in substitution for gas or in connection therewith, or in addition thereto, to manufacture, use, and sell electric, galvanic, or other artificial light, and to manufacture, store, and sell heat and motive power derived either from gas or otherwise . . . with the same privileges and subject to the same liabilities, as are applicable to the manufacture, use, and disposal of illuminating gas under the provisions of this Act:"—Held, that the above section did not give the company the exclusive right for twenty-five years to manufacture and sell electric light; that the right to make and sell electric light with the same privilege as was applicable to gas did not confer such monopoly, but gave a new privilege as to electricity entirely unconnected with the former purposes of the company; and that the word "privilege" there used could be referred to the right to break up streets, and should not, therefore, be construed to mean the exclusive privilege claimed. Held, also, that it was a private Act, notwithstanding that it contained a clause declaring it to be a public Act, and that the city was not a party nor in any way assented to it; and that in construing it the court would treat it as a contract between the promoters and the legislature, and apply the maxim verba fortius accipiuntur contra proferentem, especially where exorbitant powers are conferred. *Compagnie pour L'Eclairage au Gaz de St. Hyacinthe* v. *Compagnie des Pouvoirs Hydrauliques de St. Hyacinthe*, 25 S. C. R. 168.

Persons not Named.]—The rule in respect to private Acts of Parliament is, that the interests of persons not expressly named in them are not affected by the provisions thereof. *Re Goodhue, Tovey* v. *Goodhue, Goodhue* v. *Tovey*, 19 Gr. 366.

Railway Company — *Act of Incorporation—General Railway Act—Application of.*]—Where a company is incorporated by a special Act, and there are provisions in the special Act as well as in a general Act on the same subject which are inconsistent; if the special Act gives in itself a complete rule on the subject, the expression of that rule amounts to an exception of the subject matter of the rule out of the general Act. When the rule given by the special Act applies only to a portion of the subject, the special Act may apply to one portion and the general Act to the other. The probable intention of the legislature is important in considering a matter of such a character. By the General Railway Act, R. S. O. 1877 c. 165, which was by the plaintiffs' special Act incorporated therein except as varied by the latter, ten per cent. of the capital of the railway was by s.-s. 5 of s. 36 required to be expended within three years, and the railway was to be completed within ten years of the passing of the special Act, in default of which the corporate existence of the company ceased, and by s. 4 of the general Act, ss. 4 to 36 thereof inclusive were to apply to all railways authorized to be constructed by any special Act of the Province, and to be construed therewith as forming one Act:—Held, that s. 4 of the general Act did not apply to the plaintiffs, and that s. 23 of their special Act must be read in substitution for s.-s. 5 of s. 36 requiring the expenditure of ten per cent. of the capital within the three years. *Ontario and Sault Ste. Marie R. W. Co.* v. *Canadian Pacific R. W. Co.*, 14 O. R. 432.

——— *Act of Incorporation — Municipal Act — Bonus.*] — The Act incorporating a railway company contained provisions respecting bonuses granted to it by municipalities, not found in the Municipal Act:—Held, that such special Act was not restrictive of the Municipal Act, and it was only necessary that the provisions of the latter should be followed to pass a valid by-law granting such a bonus. *Bickford* v. *Town of Chatham*, 16 S. C. R. 235, 14 A. R. 32, 10 O. R. 257.

See Darling v. *Hitchcock*, 25 U. C. R. 463; *Ferrie* v. *Jones*, 5 U. C. R. 504; *Macklin* v. *Dowling*, 19 O. R. 441; *Van Natter* v. *Buffalo and Lake Huron R. W. Co.*, 27 U. C. R. 581.

XIII. PROSPECTIVE OR RETROSPECTIVE.

Arbitration and Award — *Reference.*]—Quære, whether 39 Vict. c. 28, s. 5 (O.), applies in any case to references entered into before its passage. *Nagle* v. *Latour*, 27 C. P. 137.

Assessment and Taxes.]—8 Vict. c. 22, directing the mode by which certain taxes are recoverable, is a declaratory Act, and therefore retrospective as well as prospective. *Doe d. Earl of Mountcashel* v. *Grover*, 4 U. C. R. 23.

——— *Tax Sale—29 Vict. c. 24, s. 57—Retrospective Operation.*]—See *Jones* v. *Cowden*, 34 U. C. R. 345, 36 U. C. R. 495.

Assignments and Preferences—*Pledge to Bank.*]—The plaintiff, a creditor of an insolvent, alleged that, in regard to certain pledges made by the latter to a bank, there had been no contemporaneous advances, and that the pledges were invalid under s. 75 of the Bank Act, 53 Vict. c. 31 (D.), and sought to obtain moneys received through disposal of the pledges in order to apply them in payment of creditors' claims, by virtue of the provisions of s. 1 of 58 Vict. c. 23 (O.):—Held, that the last named Act did not apply, because the money had been received by the bank before it was passed, and it was not retrospective. *Conn* v. *Smith*, 28 O. R. 629.

——— *Transfer of Chattel.*]—One Chamberlain, being in insolvent circumstances, and indebted to K. in $120, was pressed by him for payment, when he agreed to sell K. a horse for $110, in part payment; and about 15th August, 1885, delivered the horse in pursuance of such agreement. K. kept possession of and worked the horse for one day, and then he lent him to Chamberlain, who continued to use him in his business until the early part of October following, when he returned the horse to K., who thenceforward retained possession of him. On 31st October Chamberlain executed an assignment to the plaintiff in pursuance of 48 Vict. c. 26 (O.), respecting assignments for the benefit of creditors, which came into force on the 1st September, 1885. In an action against K. to recover the horse, on the ground of fraudulent preference:—Held, that the sale having been made before the Act came into force, the provisions thereof did not apply. Ings v. Bank of Prince Edward Island, 11 S. C. R. 265, followed. *Coats* v. *Kelly*, 15 A. R. 81.

——— *Transfer of Moneys.*]—Held, following Broddy v. Stuart, 7 C. L. T. Occ. N. 6, that 48 Vict. c. 26 (O.), is intra vires the provincial legislature. Where the plaintiff sought to invalidate certain payments of money made by an insolvent debtor within thirty days prior to his making an assignment under the said Act, but before it came into force:—Held, that the claim could not be sustained either upon the ground that the statute was retrospective, or upon the ground that what the plaintiff sought to obtain was defined and given by s. 3, s.-s. 3, of the statute. *Clarkson* v. *Ontario Bank*, 13 O. R. 666.

——— *Transfer of Securities.*]—The defendant, who was employed as financial manager of a firm, advanced to them a large sum of money, to be repaid on his giving six months' notice demanding payment, in default of which the firm covenanted to assign certain securities. This notice was given on 15th January, 1885, but, although repeated demands for payment were made by defendant, nothing was done until 19th December, 1885, when a transfer to him of certain securities was made by the firm, who within two months made an assignment under 48 Vict. c. 26 (O.), which came into force on 1st September, 1885. In an action by the assignee under that statute to recover back the amount realized from the securities:—Held, that, whether or not the firm were in insolvent circumstances at the time of the transfer of the securities, the statute was not retrospective so as to apply to a transfer made as this was in pursuance of a pre-existing binding agreement for valuable consideration, and valid under the then state of the law. Whether the effect of the statute is to alter the law in this respect, quære. *Clarkson* v. *Sterling*, 15 A. R. 234.

Conditional Sales — *Act Respecting.*] — See *Sawyer* v. *Pringle*, 20 O. R. 111.

Criminal Law—*Change by Criminal Code—Embezzlement before Code—Imperial Statutes.*]—The Imperial Act 20 & 21 Vict. c. 54, s. 12, provides that "nothing in this Act contained, nor any proceeding, conviction, or judgment to be had or taken thereon against any person under this Act, shall prevent, lessen, or impeach any remedy at law or in equity, which any party aggrieved by any offence against this Act might have had if this Act had not been passed; . . . and nothing in this Act contained shall affect or prejudice any agreement entered into, or security given by, any trustee, having for its object the restoration or repayment of any trust property misappropriated:"—Held, that the class of trustees referred to were those guilty of misappropriation of property held upon express trusts. Semble, that the section only covered agreements or securities given by the defaulting trustee himself. Quære, is the Act in force in British Columbia? If in force, it would not apply to a prosecution for an offence under R. S. C. c. 164 (the Larceny Act), s. 58. An action was brought on a covenant given for the purpose of stifling a prosecution for the embezzlement of partnership property under R. S. C. c. 164, s. 58, which was not re-enacted by the Criminal Code, 1892:—Held, that the alleged criminal act, having been committed before the code came into force, was not affected by its provisions, and the covenant could not be enforced. Further, the partnership property not having been held on an express trust, the civil remedy was not preserved by the Imperial Act. *Major* v. *McCraney*, 29 S. C. R. 182.

Crown—*Negligence—Act Giving Right of Action.*]—Held, that, even assuming that 50 & 51 Vict. c. 16 gives an action against the Crown for an injury to the person received on a public work resulting from negligence of which its officer or servant is guilty (upon which point the court expressed no opinion), such Act is not retroactive in its effect, and

gives no right of action for injuries received prior to the passing of the Act. *The Queen* v. *Martin*, 20 S. C. R. 240.

——— *Negligence—Limitation of Actions.*] —The court has no jurisdiction under the provisions of 50 & 51 Vict. c. 16 to give relief in respect of any claim which, prior to the passing of that Act, was not cognizable in the court, and which, at the time of the passing of that Act, was barred by any statute of limitations. The Queen v. Martin, 20 S. C. R. 240, followed. *Penny* v. *The Queen*, 4 Ex. C. R. 428.

Dower.]—The Dower Act of Ontario, 32 Vict. c. 7, s. 3, is retrospective in its effects. *Re Tate*, 5 C. L. J. 260.

Held, that 42 Vict. c. 22 (O.), "An Act to amend the law of dower," does not apply to mortgages made before it was passed. *Martindale* v. *Clarkson*, 6 A. R. 1.

Drainage Trials Act, 1891.] — See *Township of Caradoc* v. *Township of Metcalfe*, 21 O. R. 309.

Execution—*Issue of—Several Districts.*] —8 Vict. c. 13, s. 44, allowing executions to issue in a district other than that in which judgment was rendered, is retrospective as well as prospective. *Easton* v. *Longchamp*, 3 U. C. R. 475.

Imprisonment for Debt.] — 7 Vict. c. 31, abolishing imprisonment in execution for debt, applied to cases where judgment was obtained before it passed. *Bank of British North America* v. *Clarke*, 1 U. C. R. 1. Followed in *Bell* v. *Ley*, 1 U. C. R. 9.

Limitation of Actions—*Injury to Lands —Compensation.*]—Unless there is a clear declaration in the Act itself to that effect, or unless the surrounding circumstances render that construction inevitable, an Act should not be so construed as to interfere with vested rights. Section 16 of 54 Vict. c. 42 (O.), limiting the time for the enforcement of claims for compensation by persons injuriously affected by the exercise of municipal powers of expropriation, does not apply to a claim existing at the time of the passage of the Act. *In re Roden and City of Toronto*, 25 A. R. 12.

——— *Oral Promise.*]—The plaintiff sued, in 1849, on a debt which accrued more than six years before. A new trial was granted in 1850, but the second trial was delayed until 1852:—Held, that 13 & 14 Vict. c. 61, which came into operation in January, 1852, precluded him from recovering on an oral promise. The court, under the circumstances, allowed the defendant to claim the benefit of that statute, though he had not insisted upon it at the trial, but had objected to the sufficiency of the evidence on other grounds. *Grantham* v. *Powell*, 10 U. C. R. 306.

See, also, *Notman* v. *Crooks*, 10 U. C. R. 105; *Crooks* v. *Crooks*, 4 Gr. 615.

Marriage—*Irregularity — Confirmation— Deed—Feme Sole.*]—H. P., patentee of the land in question, was married to one G. by a Methodist minister, who had at that time no right to solemnize matrimony. She conveyed to M., but, being told that her marriage was illegal, executed the deed by the name of Pringle, as if she were sole, her husband Green being the witness. After the passing of 11 Geo. IV. c. 36, her heir brought ejectment, contending that that statute confirmed the marriage, so as to avoid her conveyance executed as a feme sole:—Held, that the Act had not such a retrospective effect as to destroy the deed. *Pringle* v. *Allan*, 18 U. C. R. 575.

Married Women's Property.]—Held, that the Married Woman's Property Act, 1884, 47 Vict. c. 19 (O.), is not retrospective. *Scott* v. *Wye*, 11 P. R. 93.

Municipal By-law—*Costs of Quashing.*] —14 & 15 Vict. c. 109, s. 35, providing that when a by-law has been quashed the municipality shall pay the costs, has not a retrospective operation, and the court therefore discharged a rule calling upon the defendants to pay the costs of an application on which a by-law had been quashed before the passing of that Act. *Brown* v. *County of York*, 9 U. C. R. 453.

——— *Ultra Vires—Subsequent Statute.*] —Held, that a by-law of the county of Perth, passed before 22 Vict. c. 7, authorizing county councils to raise moneys to assist persons to sow their land, &c., was not ratified thereby. Said statute is not retroactive, except in the case of the by-law of the county of Bruce, thereby specially provided for. *Campbell* v. *Township of Elma*, 13 C. P. 296.

——— *Validating Act — Subsequent Act Saving Pending Proceedings.*]—A motion to quash a municipal by-law was dismissed on the ground that it had been expressly validated by 54 Vict. c. 82, s. 14 (O.) While an appeal from the judgment was pending, 55 Vict. c. 90 (O.) was passed, s. 6 of which enacted that "nothing contained herein or in the Act passed in the 54th year of Her Majesty's reign, and chaptered 82, shall affect any action or proceeding now pending:"—Held, that the latter Act was declaratory or retrospective; its effect was to prevent the respondents from asserting that the by-law had been validated by the earlier Act, and therefore, the by-law being defective, the judgment must be reversed, though it was right when it was delivered. Quilter v. Mapleson, 47 L. T. N. S. 561, referred to. *In re Gillespie and City of Toronto*, 19 A. R. 713.

Municipal Corporations — *Opening up Highways — Lands of Private Persons.*] — Held, by the courts of Ontario, that s. 62 of R. S. O. 1887 c. 152, which provides that all allowances for streets surveyed in cities or any part thereof, which have been or may be surveyed and laid out and laid down on the plans thereof, and upon which lots of land fronting on such allowances have been or may be sold to purchasers, shall be public highways, is retroactive, and applies to streets laid out on plans made and registered before the passing of the Act. Held, by the supreme court of Canada, reversing the judgments below, that the right vested in a municipal corporation to convert into a public highway a road laid out by a private person on his property, can only be exercised in respect to private roads to the use of which the owners of property abutting thereon were entitled. *Gooderham* v. *City of Toronto*, 21 O. R. 120, 19 A. R. 641, 25 S. C. R. 246.

Notice of Action — *Public Officer.*]— Where an action was commenced after the passing of 14 & 15 Vict. c. 54, for a trespass committed before, against an officer protected by this Act, but not previously:—Held, that the statute would not apply, and that defendant was therefore not entitled to notice. *White* v. *Clark, Parsill* v. *Clark*, 11 U. C. R. 137.

See, also, *White* v. *Clark*, 10 U. C. R. 490.

16 Vict. c. 180:—Held, not retrospective so as to make the notice of action required by it applicable to causes of action accrued before the Act, or to compel the party injured to sue in case, and not in trespass. *Cusick* v. *McKae*, 11 U. C. R. 509.

Procedure—*Burden of Proof — Consideration for Conveyance.*]—Semble, that R. S. O. 1877 c. 109, s. 2, is retrospective so as to cast the onus of disproving the payment of the consideration on the party impeaching a conveyance as voluntary, even though the transaction took place prior to that enactment. *Sanders* v. *Malsburg*, 1 O. R. 178.

——— *Burden of Proof—Payment of Duties.*]—On an information under 27 & 28 Vict. c. 3, against defendant as a distiller for the non-payment of duties:—Held, that s.-s. 2 of s. 14 of 29 Vict. c. 3, throwing the proof of payment of duty on defendant, was properly treated as applicable, though passed after the period for which duties were claimed, for it related only to matter of evidence and procedure. *Attorney-General* v. *Halliday*, 26 U. C. R. 397.

See In re Chaffey, 30 U. C. R. 64.

——— *Costs of Mortgagee—Taxation.*]—42 Vict. c. 20, s. 11 (O.), authorizing the taxation of a mortgagee's costs by any party interested, without any order to tax, applies to mortgages executed before the passing of the Act. *Ferguson* v. *English and Scottish Investment Co.*, 8 P. R. 404.

——— *Notice of Appeal.*]—Semble, that s. 26 of R. S. O. 1877 c. 38, requiring notice of appeal within one month from the judgment complained of, would not apply where the judgment had been pronounced before the coming into operation of the Act. *Rose* v. *Hickey*, 7 P. R. 390.

——— *Pending Action—Leave to Appeal.*] —By paragraph 7 of the schedule to the Law Courts Act, 1896, s. 73 of the Judicature Act, 1895, was amended so as to enable a divisional court and the court of appeal, and any Judge thereof, to grant leave to appeal in cases where no absolute right to appeal exists, and where, under the law as it stood before the amendment, no such leave could have been obtained:—Held, that, being a matter of procedure, it applied to pending actions. Watton v. Watton, L. R. 1 P. & M. 227, followed. *Spence* v. *Grand Trunk R. W. Co.*, 17 P. R. 172.

Registration of Deeds.] — 4 Wm. IV. c. 1, s. 47, which dispenses with enrolment or registration of a deed of bargain and sale, applies to such deeds executed before as well as since that statute. *Doe Loucks* v. *Fisher*, 2 U. C. R. 470; *Rogers* v. *Barnum*, 5 O. S. 252.

See, also, *Doe d. Adkins* v. *Atkinson*, 4 O. S. 140.

Plaintiffs claimed certain land in the county of Hastings through A., whose ancestor in 1833 took by conveyance from B., who took by conveyance from the patentee. These two conveyances were defectively registered. Defendant claimed through the purchaser from the heir-at-law of B., whose deed was registered, as also that from the patentee to B. in 1857:—Held, that plaintiff's title, if considered unregistered, must prevail, but if defectively registered such defect was removed by subsequent re-entry of the deeds under 9 Vict. c. 12, and 10 & 11 Vict. c. 38, relating to this county; that this was retroactive; and the plaintiffs had therefore a good registered title. *Campbell* v. *Fox*, 17 C. P. 542. See *S. C.*, 26 U. C. R. 631.

Under C. S. U. C. c. 89, registration is notice of all instruments registered before, as well as since, registration was made notice. *Vance* v. *Cummings*, 13 Gr. 25.

Section 66 of the Registry Act, 1865, which enacts that "no equitable lien, charge, or interest affecting land shall be deemed valid in any court in this Province after this Act shall come into operation, as against a registered instrument executed by the same party, his heirs or assigns, and tacking shall not be allowed in any case to prevail against the provisions of this Act,"—is not retrospective. *McDonald* v. *McDonald*, 14 Gr. 133.

In ejectment it appeared that the patent issued in 1839, and the patentee conveyed to M. in the same year. The conveyances were never registered. M. conveyed to the plaintiff in 1869. Defendant claimed through his wife by a deed executed and registered in October, 1857, but which was held to be voluntary:—Held, that, if the defendant had been a purchaser for valuable consideration, he would have been entitled to succeed by reason of such priority, under 29 Vict. c. 24, which first made it necessary to register all instruments after the issue of the patent, although no deed had been already registered. Quære, whether s. 62 applies to cases where the patent has issued before its passing. *McCarthy* v. *Arbuckle*, 29 C. P. 529.

Sheriff's Poundage.] — Where a sheriff, before 7 Wm. IV. c. 3, s. 32, levied on a defendant's goods, he was entitled to poundage, although there was no sale afterwards, that Act not having a retrospective effect. *Commercial Bank* v. *VanNorman*, T. T., 3 & 4 Vict.

Sheriff's Sale of Lands—*Heirs of Mortgagor.*]—27 Vict c. 13, after reciting that doubts had arisen as to the meaning of ss. 257, 258 and 259, of the C. L. P. Act, enacted that "whenever the word 'mortgagor' occurs in the said sections, it shall be read and construed as if the words 'his heirs, executors, administrators, or assigns, or persons having the equity of redemption,' were inserted immediately after such word 'mortgagor;' "—Held, that the enactment was a declaratory one; and where lands subject to a mortgage were sold by the sheriff under execution in a suit against the executors of the mortgagor, and conveyed by the sheriff to the purchaser in October, 1858, the court held this sale validated by the statute, and that the heirs of the mortgagor could not impeach the same. Held, also, that 27 Vict. c. 15 did not affect the question. *McEvoy* v. *Clune*, 21 Gr. 515.

Ship—*Master's Lien—Admiralty Acts.*]—The master of a vessel registered at the port of Winnipeg, and trading upon Lake Winnipeg, had in 1888-1890 no lien upon the vessel for wages; and, even if such a lien were held to exist, there was in those years no court in Manitoba in which it could have been enforced; and it could not now be enforced under the Colonial Courts of Admiralty Act, 53 & 54 Vict. c. 27 (Imp.), or the Admiralty Act, 54 & 55 Vict. c. 29 (D.), because to give these statutes a retroactive effect in such a case would be an interference with the rights of the parties. *Bergman* v. *The Aurora*, 3 Ex. C. R. 228.

Summary Conviction — *Certiorari—Notice of Appeal.*]—Held, that, though not expressly so enacted, 49 Vict. c. 49 (D.) is retrospective in its operation, and applies to convictions whether made before or after the passing of the Act, and that under s. 7 the right to certiorari is taken away upon service of notice of appeal to the sessions, that being the first proceeding on an appeal from the conviction. *Regina* v. *Lynch*, 12 O. R. 372.

Supreme Court of Canada — *Appeal—New Right—Pending Action—Judgment on Day of Passing Amending Act.*]—A judgment was delivered by the superior court in review, in the Province of Quebec, on the same day on which the Act 54 & 55 Vict. c. 25 came into force, s. 3 of which provided for an appeal to the supreme court of Canada from such a judgment:—Held, that the appellants not having shewn that the judgment was delivered subsequent to the passing of the Act, the court had no jurisdiction. Quære, whether an appeal would lie from a judgment pronounced after the passing of the Act in an action already pending. *Hurtubise* v. *Desmarteau*, 19 S. C. R. 562.

——— *Appeal—New Right—Pending Action—Judgment after Passing of Amending Act.*]—In an action brought by the respondent against the appellant for $2,000, which was argued and taken en délibéré by the superior court in review on the 30th September, 1891, the day on which the Act 54 & 55 Vict. c. 25 was sanctioned, s. 3 of which gave a right to appeal to the supreme court of Canada, judgment was rendered a month later in favour of the respondent. On appeal to the supreme court of Canada:—Held, that the respondent's right could not be prejudiced by the delay of the court in rendering the judgment, which should be treated as having been given on the 30th September; and therefore no appeal lay. Hurtubise v. Desmarteau, 19 S. C. R. 562, followed. *Couture* v. *Bouchard*, 21 S. C. R. 281.

——— *Appeal—New Right—Pending Actions Standing for Judgment.*]—Held, that the right of appeal given by 54 & 55 Vict. c. 25 does not extend to cases standing for judgment in the superior court prior to the passing of the said Act. Couture v. Bouchard, 21 S. C. R. 281, followed. The statute is not applicable in cases already instituted or pending before the courts, no special words to that effect being used. *Williams* v. *Irvine*, 22 S. C. R. 108.

The statute 54 & 55 Vict. c. 25, s. 3, which provides that "whenever the right to appeal is dependent upon the amount in dispute, such amount shall be understood to be that demanded and not that recovered, if they are different," does not apply to cases in which the superior court has rendered judgment or to cases argued and standing for judgment (en délibéré) before that court, when the Act came into force. Williams v. Irvine, 22 S. C. R. 108, followed. *Cowen* v. *Evans*, *Mitchell* v. *Trenholme*, *Mills* v. *Limoges*, 22 S. C. R. 331.

See, also, SUPREME COURT OF CANADA, II.

Surveys.]—12 Vict. c. 35, s. 37 (C. S. U. C. c. 93, s. 28), which prescribes the rule for drawing the side lines in double-fronted concessions, applies to townships theretofore surveyed. *Marrs* v. *Davidson*, 26 U. C. R. 641.

Suspending Operation of Penal Act—*Vested Right of Action.*]—A bill of exchange drawn by the plaintiffs upon the Burford Canning Company (Limited) was addressed to "The Burford Canning Co.," and accepted by the drawees by the signature "The Burford Canning Co., Ltd." This was a few days after the royal assent had been given to the Ontario Act 60 Vict. c. 28, s. 22 of which provided that in the case of contracts by limited liability companies the word "limited" should be written or printed in full, a previous statute, 52 Vict. c. 26, s. 2, having made the directors liable for the amounts due upon such contracts where the word "limited" did not appear after the name of the company where it first occurred in the contract. The writ of summons in this action (against the directors) was issued on the very day on which the royal assent was given to the Act 61 Vict. c. 19, s. 4 of which suspended the operation of the Act of the previous session:—Held, that the use of the abbreviation "Ltd." was not a compliance with 52 Vict. c. 26, s. 2. Held, also, that no stay was created by 51 Vict. c. 19, s. 4, of any action but one brought under 60 Vict. c. 28, s. 22 (1), and the corresponding section of the revision of 1897, so that, upon this view of the effect of 52 Vict. c. 26, s. 2, the plaintiffs were entitled to recover. If, however, the use of the contraction "Ltd." was a compliance with the last-mentioned section, the plaintiffs were still entitled to recover, because the contract was made some days after the passing of 60 Vict. c. 28, s. 22, which required the unabbreviated word "limited" to be used; and the plaintiffs, upon the execution of the contract by the Burford Canning Company (Limited), became and remained entitled to look to the directors personally, and had a vested right of action, with which the "stay" clause, s. 4 of 61 Vict. c. 19, could not interfere, there being nothing in it which required the court to hold it to be retrospective. *Howell Lithographic Co.* v. *Brethour*, 30 O. R. 204.

Tariff Act—*Time of Taking Effect—Importation of Goods.*]—By 57 & 58 Vict. c. 33, s. 4, duties are to be levied upon certain specified goods "when such goods are imported into Canada:"—Held, that the importation as defined by s. 150 of the Customs Act, R. S. C. c. 32, is not complete until the vessel containing the goods arrives at the port at which they are to be landed. Section 4 of the Tariff Act, 1895 (58 & 59 Vict. c. 23), provided that "this Act shall be held to have come into force on the 3rd of May in the present year, 1895." It was not assented to until July:—Held, that the goods imported into Canada on the 4th May, 1895, were subject

to duty under said Act. *The Queen* v. *Canada Sugar Refining Co.*, 27 S. C. R. 395.

Toll-gate — *Act Prohibiting — Provision for Non-retroactivity—Repeal of.*]—A turnpike road company had been in existence for a number of years and had erected toll-gates and collected tolls therefor, when an Act was passed by the Quebec legislature, 52 Vict. c. 43, forbidding any such company to place a toll or other gate within the limits of a town or village without the consent of the corporation. Section 2 of said Act provided that "this Act shall have no retroactive effect," which section was repealed in the next session by 54 Vict. c. 36. After 52 Vict. c. 43 was passed, the company shifted one of its toll-gates to a point beyond the limits of the village, which limits were subsequently extended so as to bring said gate within them. The corporation took proceedings against the company, contending that the repeal of s. 2 of 52 Vict. c. 43 made that Act retroactive, and that the shifting of the toll-gate without the consent of the corporation was a violation of said Act:—Held, that, as a statute is never retroactive unless made so in express terms, s. 2 had no effect, and its repeal could not make it retroactive; that the shifting of the toll-gate was not a violation of the Act, which only applied to the erection of new gates; and that the extension of the limits of the village could not affect the pre-existing rights of the company. *Village of St. Joachim de la Point Claire* v. *Point Claire Turnpike Road Co.*, 24 S. C. R. 486.

Usury.]—Held, that 29 & 30 Vict. c. 10, s. 5, had not a retrospective operation, so as to enable a bank to recover upon usurious notes given before it was passed. *Commercial Bank of Canada* v. *Harris*, 26 U. C. R. 594.

The defence of usury having been pleaded and established in this case against the plaintiffs before 29 & 30 Vict. c. 10, s. 5, was not in any way affected by that Act. The distinction between vested rights and mere modes of procedure pointed out. *Bank of Montreal* v. *Scott*, 17 C. P. 358.

A security void at the time of its creation on the ground of usury is not rendered valid by 16 Vict. c. 80, passed at a subsequent date. Where, therefore, a mortgage had been made upon a usurious agreement:—Held, that a judgment creditor of the mortgagor was entitled to file a bill to redeem, upon paying the amount actually advanced before the expiration of the time appointed for payment. *Isherwood* v. *Dixon*, 5 Gr. 314.

Writ of Error—*Costs.*]—33 Vict. c. 7, s. 12 (O.) provides that "the law and practice as to writs of error, and the proceedings thereon, shall hereafter be the same as the law and practice now in force in England," and there error cannot be brought for any error in a judgment with respect to costs:—Held, that the statute was not retrospective, so as to affect a writ of error in respect of costs issued before its passing; for such a writ is a new action, and there is nothing in the statute shewing that it was intended to take away a vested right. *Pope* v. *Reilly*, 29 U. C. R. 495.

XIV. Public Acts.

Judicial Notice.]—The courts are bound to take judicial notice of every Public Act of the provincial legislature, though its operation may be locally limited. *Darling* v. *Hitchcock*, 25 U. C. R. 463.

What is a Public Act—*Bank Commissioners.*]—The statute 4 Geo. IV. c. 22, vesting the property of a particular bank in the hands of commissioners, with power to hear and determine claims made upon the bank by creditors, though stated in the preamble to be made "on behalf of a great portion of the inhabitants of the Province," was not considered a public statute. *Markland* v. *Bartlet*, Tay. 146.

See Kiely v. *Kiely*, 25 Gr. 463.

See, also, *ante* XII.

XV. Recitals.

Amending Act—*Parties Interested—Conclusiveness.*]—Semble, that when a statute amending an original statute recites that it has been granted upon the prayer of the parties interested in the original statute, it must be taken upon the recital as conclusive that each individual interested in the original statute was concurring in the passing of the amending statute. *City of Toronto and Lake Huron R. W. Co.* v. *Crookshank*, 4 U. C. R. 309.

Canada Company — *Charter.*] — Held, that the recitals in the Imperial statute 6 Geo. IV. c. 75 are sufficient proof of the charter of the Canada Company. *Woodhill* v. *Sullivan*, 14 C. P. 265.

XVI. Re-enactment or Consolidation.

Change in Language—*Variation of Liability—Application of.*]—Under 14 & 15 Vict. c. 51, s. 13, railway companies were required to erect and maintain fences on each side of the railway with openings, or gates, or bars therein, "and" farm crossings, &c., for the use of the adjoining proprietors; but on the consolidation of this Act in C. S. C. c. 66, s. 13, the clause was changed by requiring the company to erect and maintain fences, &c., "at" farm crossings:—Held, that the substitution of the word "at" in the Consolidated Act for the word "and" in the former Act, varied the liability of railway companies, and imposed no duty upon defendants (who were incorporated by 31 Vict. c. 41) to make farm crossings. *Brown* v. *Toronto and Nipissing R. W. Co.*, 26 C. P. 206.

See, also, *Canada Southern R. W. Co.* v. *Clouse*, 13 S. C. R. 139; *Vézina* v. *The Queen*, 17 S. C. R. 1; *Guay* v. *The Queen*, *ib.* 30.

Effect of—*Adoption of Judicial Construction.*]—Section 3 of 41 Vict. c. 6 (O.) declares that the legislature is not by that Act, or 40 Vict. c. 6 (O.), to be deemed to have adopted the construction which may by judicial construction or otherwise have been placed upon the language of any statutes included amongst the revised statutes:—Held, notwithstanding this enactment, that s. 192 of c. 50, R. S. O. 1877, being not only in words but in effect the same as s. 7 of 39 Vict. c. 28 (O.), repealed but re-enacted by it, must receive the

same construction as was placed upon the repealed enactment by Manufacturers and Merchants' Fire Insurance Co. v. Atwood, 28 C. P. 21; and therefore that there should be no rehearing by the court by way of appeal from the decision on an award made by a single Judge under the repealed enactment. *Crain* v. *Ottawa Collegiate Institute*, 43 U. C. R. 498.

——— *Adoption of Construction—Dominion Act.*]—The rule that when a statute has received a construction either from long practice or by judicial interpretation, and is afterwards re-enacted in the same terms, the legislature is deemed to have had that construction in view in the re-enactment, cannot apply to an Act of the Dominion, where different constructions are shewn to have obtained in some of the Provinces. *Davidson* v. *Ross*, 24 Gr. 22.

See, also, as to this rule, *Regina* v. *Whelan* 28 U. C. R. 27, 43; *Nicholls* v. *Cummings*, 1 S. C. R. 395, 420-1, 425.

Reference to Originals.]—In construing the consolidated statutes, the court may refer to the original enactments in order to assist in arriving at a right conclusion. *Whelan* v. *The Queen*, 28 U. C. R. 108.

See In re Brock and City of Toronto, 45 U. C. R. 53; *Frontenac License Commissioners* v. *County of Frontenac*, 14 O. R. 741; *Regina* v. *Durnion*, *ib.* 672; *Lamb* v. *Cleveland*, 19 S. C. R. 78.

XVII. Repeal and Disallowance.

1. *Application and Effect of Repealing Statutes.*

Assessment Act—*Tax Sale—Time for Impeaching.*]—By the Assessment Act of 1866, owners had four years to impeach a tax deed. By an Act passed in 1869, all actions for that purpose were stayed until after the following session; and by another Act of the same session all previous Assessment Acts were repealed, amended, and consolidated, with a reservation of rights had or acquired under the repealed Acts. By one of the clauses of the amended Act the limit appointed for bringing actions was two years:—Held, that an owner who had less than two years of his four remaining when the Acts of 1869 were passed, had like others two years thereafter to bring his suit. *Connor* v. *McPherson*, 18 Gr. 607.

——— *Tax Sale—Time for Redemption.*]—Semble, that the evidence in this case shewed that the redemption money had been paid, and within the three years required by 13 & 14 Vict. c. 67, namely, by 6th March, 1855, and that, although this was after the repeal of that Act, yet, under 29 Vict. c. 26, the payment was made good. *McDougall* v. *McMillan*, 25 C. P. 75.

——— *Warrant.*] — On the 1st January, 1867, certain Acts relating to assessment were repealed, "saving any rights, proceedings, or things legally had, acquired, or done under them:"—Quære, whether the right to issue a warrant under those Acts still existed. *Charlesworth* v. *Ward*, 31 U. C. R. 94.

Canada Temperance Act—*Effect of Revised Statutes.*]—The effect of the revision of the statutes of Canada, brought into force by royal proclamation, 1st March, 1887, though in form repealing the Act consolidated, is really to preserve them in unbroken continuity; and the adoption of the Canada Temperance Act by municipalities prior to that revision, has not been changed or interfered with by it. The alterations made in the phraseology of the Act by the revision are not vital, and do not materially change its character or effect. *Frontenac License Commissioners* v. *County of Frontenac*, 14 O. R. 741. See also *Regina* v. *Durnion*, *ib.* 672.

Common Law Procedure Act—*Arrest—Continuance of Section Authorizing.*]—8 Vict. c. 48, except s. 44, was continued in force by 18 Vict. c. 85, till the 1st July, 1856, and no longer. The C. L. P. Act, which came into force on the 21st August, 1856, enacted that from the time when it should take effect, s. 44 of 8 Vict. c. 48, should be repealed:—Held, that this s. 44 could not be considered as continued by the C. L. P. Act, though, no doubt, it was so intended, and therefore no arrest could take place under it after the 1st July. *Barrow* v. *Caprcol*, 2 P. R. 95.

Distribution of Estates—*Married Woman—Rights of Husband.*] — The legislature of New Brunswick, by 26 Geo. III. c. 11, ss. 14 and 17, re-enacted the Imperial Act 22 & 23 Car. II. c. 10 (Statute of Distributions), as explained by s. 25 of 29 Car. II. c. 3 (Statute of Frauds), which provided that nothing in the former Act should be construed to extend to estates of femes covertes dying intestate, but that their husbands should enjoy their personal estates as theretofore. When the statutes of New Brunswick were revised in 1854, the Act 26 Geo. III. c. 11 was re-enacted, but s. 17, corresponding to s. 25 of the Statute of Frauds, was omitted. In the administration of the estate of a feme coverte, her next of kin claimed the personalty on the ground that the husband's rights were swept away by this omission:—Held, that the personal property passed to the husband and not to the next of kin of the wife. *Lamb* v. *Cleveland*, 19 S. C. R. 78.

Indian — *Action for Debt.*]—A debt contracted by an Indian while C. S. C. c. 9 was in force, cannot be sued for under 32 & 33 Vict. c. 6, by which that Act is repealed. Quære, whether a judgment can be obtained against an Indian even under the latter Act. *McKinnon* v. *VanEvery*, 5 P. R. 284.

Indian Lands—*Act for Sale of—Timber Act—Order in Council.*]—The Act respecting Indian lands, 23 Vict. c. 151 (C.), authorized the governor in council to declare applicable thereto the Act respecting timber on public lands. An order in council was issued accordingly. Eight years afterwards another Act was passed, 31 Vict. c. 42 (D.), which contained a clause authorizing the governor in council to declare the Timber Act applicable to Indian lands, and to repeal any such order in council and substitute others, and another clause authorizing the governor in council to make regulations and impose penalties for the sale and protection of timber on Indian lands:—Held, that the Timber Act continued in force until revoked or altered by a new order in council. *Attorney-General* v. *Fowlds*, 18 Gr. 433.

Insolvent Act — *Pending Claim.*]—The appellants, in the matter of C. & Co., insolvents, had a claim upon a note made by C. & Co., payable to C., one of the firm, and by him indorsed to the appellants. They proved against the firm on the 3rd July, 1869, but afterwards withdrew it, and proved on the 11th January, 1870, under s. 60 of the Act of 1869, specifying and putting a value on the separate liability of C.:—Held, that the Act of 1869 could not apply, for the case was pending before it, and the question in dispute as to the right to prove was not a matter of procedure only, exempted from the exceptions in the repealing clause. *In re Chaffey, Merchants Bank of Canada v. Davidson*, 30 U. C. R. 64.

——— *Pending Prosecution under—Saving Clause.*]—The prisoners were indicted under s. 147 of the Insolvent Act, 1869, for having, within three months preceding the execution of an assignment in insolvency, pawned, pledged, and disposed of, otherwise than in the way of trade, certain goods which had remained unpaid for during the said three months. The indictment was found on the 23rd October, but the information had been laid and the prisoners arrested before 1st September, when the Insolvent Act of 1875 came into force. By s. 149 of the Act of 1875, the Act of 1869 was repealed, but there was a saving clause as regards proceedings commenced and pending thereunder, and as regards all contracts, acts, matters, and things made and done before such repeal, to which the said Act of 1869 would have applied:—Held, that the prosecution as well as the offence came within this saving clause, the laying of the information being the commencement of the prosecution, while the disposal was a contract, &c., done before such repeal. *Regina* v. *Kerr*, 26 C. P. 214.

——— *Repeal of Act of 1875.*]—See *Cooper* v. *Kirkpatrick*, 8 P. R. 248.

Landlord and Tenant—*Distress.*]—The Act 57 Vict. c. 43, which repeals s. 28, s.-s. 1, of R. S. O. 1887 c. 143, and substitutes a new section therefor, applies to leases made on or after 1st October, 1887, to which the repealed section, by s. 42 of R. S. O. c. 143, applied. *Carroll* v. *Beard*, 27 O. R. 349.

Married Women's Property Act—*Repeal of—Repealing Act.*]—Quære, as to the effect upon ss. 2, 3, and 4 of C. S. U. C. c. 85, an Act respecting the conveyance of real estate by married women, of the repeal, by 36 Vict. c. 18, of 34 Vict. c. 24, which repealed them. *Ogden* v. *McArthur*, 36 U. C. R. 246.

Mechanics' Lien—*Preservation of Lien—Saving Clause.*]—The plaintiffs registered a lien under the Mechanics' Lien Act of 1873, on the 14th August, 1874, for the price of machinery furnished on the 12th of the same month. The price was payable in instalments, the last of which fell due on the 4th May, 1875. A bill to enforce the lien was filed on the 7th July, 1875, being within the 90 days "from the expiry of the period of credit" prescribed by s. 4 of the Mechanics' Lien Act of 1873. Section 14 of the Mechanics' Lien Act of 1874, which came into force on the 21st December, 1875, enacted that "every lien shall absolutely cease to exist at the expiration of 30 days after the work shall have been completed, or the machinery furnished, unless in the meantime proceedings shall have been taken to realize the claim under this Act;" and s. 20 repealed all Acts inconsistent therewith:—Held, reversing the decision in 24 Gr. 269, that, even if the Act of 1874 repealed the Act of 1873, the plaintiffs' lien was saved by s.-s. 34 of s. 7 of the Interpretation Act, which provides that the "repeal of an Act at any time shall not affect any act done, or any right or right of action existing, accruing, accrued, or established . . . before the time when such repeal shall take effect." *Walker* v. *Walton*, 1 A. R. 579.

Merchants Shipping Act — *Distressed Seaman—Recovery of Expenses.*] — Section 213 of the Merchants Shipping Act, 1854, make the expenses of a seaman left in a foreign port and being relieved from distress under the Act, a charge upon the ship, and empowers the board of trade, in Her Majesty's name, to sue for and recover the same from the master of the ship or "owner thereof for the time being:"—Held, notwithstanding the provision in the Imperial Interpretation Act of 1889, that the repeal of an Act shall not affect any suit, proceeding, or remedy under the repealed Act, in proceedings under the Merchants Shipping Act of 1854 proof of ownership of a ship may be made according to the mode provided in the Merchants Shipping Act, 1894, by which the former Act is repealed. *The Queen* v. *Sailing Ship "Troop" Co.*, 29 S. C. R. 662.

Mining License—*Renewal—Privilege.*]—The appellants, having obtained a license, under R. S. N. S., 5th series, c. 7, s. 95, to work a certain coal mining area for two years, afterwards applied, under the same section, for a renewal thereof; but in the meantime the section had been repealed by an amending Act of 1889:—Held, that at the date of the application to renew, the power to grant it was gone; for, even if the amending Act were so construed as not to interfere with vested rights, the appellants possessed a privilege, and not an accrued right, in reference to the renewal sought. Main v. Stark, 15 App. Cas. 384, referred to. *Reynolds* v. *Attorney-General for Nova Scotia*, [1896] A. C. 240.

Municipal Act — *Amendment—Application to Revised Statutes — Local Improvements.*]—Section 464, s.-s. 2, of 36 Vict. c. 48 (O.), enacts that the council of every city, town, and incorporated village, shall have power to pass by-laws for assessing upon the real property to be immediately benefited by the making, &c., of any common sewer, &c., "on the petition of at least two-thirds in number and one-half in value of the owners of such real property, a special rate," &c. The sub-section is amended, so far as the same relates to the city of Toronto, by 40 Vict. c. 39, s. 2, by inserting after the words "owners of such real property" the words "or where the same is in the opinion of the said council necessary for sanitary or drainage purposes." 40 Vict. c. 6, respecting the revised statutes, passed in the same session, repealed 36 Vict. c. 48; and R. S. O. 1877 c. 174, s. 551, s.-s. 2, corresponds with the repealed s. 464, s.-s. 2:—Held, that under 40 Vict. c. 6, s. 10, R. S. O. 1877 was substituted for the repealed Acts, and the amending Act applied to R. S. O. 1877 c. 174. (2) The amendment in 40 Vict. c. 39 was a reference in a former Act remaining in force to an enactment repealed, and so a reference to the enactment in the revised statutes, corresponding to s. 464, s.-s. 2, with-

in s. 11 of 40 Vict. c. 6. (3) That the city of Toronto, therefore, could pass a by-law in 1879 to construct a sewer, when necessary in their opinion for sanitary or drainage purposes, without any petition therefor. *In re Brock and City of Toronto*, 45 U. C. R. 53.

——— *By-law — Necessity for Confirmation.*]—20 Vict. c. 69 requires a by-law authorizing the conveyance of a road allowance, before it can have any effect, to be confirmed by the county council within a year from its passing. Before such confirmation 22 Vict. c. 99 repealed that Act, saving all things done thereunder, and by it no confirmation of such a by-law was made requisite:—Semble, that the confirmation of this by-law was not dispensed with. *Winter* v. *Keown*, 22 U. C. R. 341.

——— *Pending Arbitration—Exception.*]—Section 14 of the Municipal Amendment Act, 1894, 57 Vict. c. 50 (O.), must be read with s. 8, s.-ss. 43 and 48, of the Interpretation Act, R. S. O. 1887 c. 1, and so read, rights of action accrued at the passing of the former Act are not affected thereby. On the 29th April, 1893, a township corporation obtained an award against a county corporation under s. 533a of the Consolidated Municipal Act, 1892, for part of the cost and maintenance of certain bridges expended by them, and, while an appeal against the award was before the court of appeal, 57 Vict. c. 50 (O.), repealing s. 533a, was passed:—Held, that there was no "arbitration pending" by reason of the appeal at the time of the passing of the repealing Act. The plaintiffs were held entitled, notwithstanding the repeal of s. 533a, to recover the proportionate amount paid or agreed to be paid by them, from the commencement of 1893 to the date of the passing of the repealing Act. Judgment in 26 O. R. 689 varied. *Township of Morris* v. *County of Huron*, 27 O. R. 341.

Penalty — *Pending Action for.*]—Before the passing of 16 Vict. c. 80, a qui tam action was commenced under 51 Geo. III. c. 9, s. 6, for taking an illegal rate of interest:—Held, that the suit could not be continued, for by the first mentioned Act the court had lost the power of giving judgment for the penalty; but, semble, that contracts prohibited by the former law must still be held void. *Jones q. t.* v. *Ketchum*, 11 U. C. R. 52.

Pleading — *Statutory Pleas—Repeal of Statute.*]—23 Vict. c. 24, s. 1, under which the defences pleaded in this case were permitted, and had been pleaded, being such defences as could have been pleaded to the original order, was repealed by 39 Vict. c. 7 (O.):—Held, that such repeal, under the Interpretation Act, 31 Vict. c. 1, s. 7, s.-s. 34 (O.), would not affect the pleas. *Barnes's Banking Co.* v. *Reynolds*, 40 U. C. R. 435.

——— *Statutory Pleas—Repeal of Statute —Foreign Judgment.*]—To an action on a foreign judgment commenced previous to the repeal by 39 Vict. c. 7 (O.), of 23 Vict. c. 24, s. 1 (which allowed the defendant to set up in the action on the judgment any defence which was or might have been set up to the original suit), the defendant, after the passing of the repealing Act, pleaded several pleas setting up such defences:—Held, that they could be pleaded, as the right to plead was an "existing right" within the meaning of s. 6, s.-s. 4, of the Interpretation Act, 31 Vict. c. 1 (O.) *Fowler* v. *Vail*, 4 A. R. 267.

——— *Substituted Sections.*]—36 Vict. c. 13 repeals ss. 11 and 12 of 31 Vict. c. 9 (D.), and substitutes others therefor:—Quære, whether these sections should be pleaded as part of the first Act generally, or stating specially that they are so by virtue of the last Act. Semble, the latter. *Edmund q. t.* v. *Hoey*, 35 U. C. R. 495.

Recognizance — *Forfeiture — Continuance of Proceedings.*]—Under 7 Vict. c. 31, the recognizance was not forfeited by the non-payment of the condemnation money on the recovery of judgment, unless the alternative condition was not complied with. The legislature having made no provision in the Act repealing 7 Vict. c. 31, for continuing the proceedings commenced under it, no proceeding can now be taken against bail under such recognizance. *Hardy* v. *Hall*, 2 U. C. R. 276.

——— *Notice—Default.*]—Since the repeal of that Act:—Held, that the recognizances taken under it are not binding, except where the debtor has been notified, and has made default while the Act was still in force. *Macdonald* v. *Weeks*, 3 U. C. R. 441.

Sale of Lands—*Order of Court—Completion of Sale—Saving Clause.*]—Where there was a material error in a confirmation deed of lands sold with the sanction of the court under C. S. U. C. c. 69, an application made after the repeal of that Act for an order authorizing the execution of a new deed was refused. 36 Vict. c. 36, s. 18, after repealing C. S. U. C. c. 69, and other Acts, contained the following words: "Saving any rights, proceedings, or things legally had, acquired, or done under the said Acts, or any of them:"—Held, that these words preserved to rights, proceedings, and things completely had, acquired, or done, the efficacy which they had under the Act repealed, but did not continue the operation of the repealed Act for the purpose of perfecting rights, proceedings, or things not completely had, acquired, or done. *Re United Presbyterian Congregation of London*, 6 P. R. 129.

Ship — *Collision — Rights — Common Error.*]—In a case of collision, it appeared that both vessels were carrying the lights prescribed by 14 & 15 Vict. c. 126, although that Act had been repealed three years before by 22 Vict. c. 19, which required other lights in different places:—Held, that, as the error was common, and neither therefore could have been misled by it, the case must be treated as if both were carrying the proper lights. *Irving* v. *Hagerman*, 22 U. C. R. 545.

Stamp Act.]—See *Caughill* v. *Clarke*, 9 P. R. 471.

Tax Sale—*Power to Complete.*]—13 & 14 Vict. c. 67 allows three years for redemption before the sheriff can convey under a sale for taxes. It was repealed by 16 Vict. c. 182, which came into force on the 1st January, 1854, except in so far as it might affect "any rates or taxes of the present year," 1853, "or any rates or taxes which have accrued and are actually due, or any remedy for the enforcement or recovery of such rates or taxes not otherwise provided for by this Act." The plaintiff purchased under 13 & 14 Vict., in 1852; so that he was not entitled to a convey-

ance until the Act had been repealed:—Held, that, as the exemption in the repealing clause gave no power to complete inchoate proceedings, the sheriff could not convey, although such a result was clearly not intended. *McDonald* v. *McDonnell*, 24 U. C. R. 424.

Certain land was sold for taxes in 1830, under 6 Geo. IV. c. 7, but owing to the loss of the certificate no deed was made by the sheriff until 1862. 13 & 14 Vict. c. 66, which was passed on the 10th August, 1850, and came into force on the 1st January, 1851, repealed 6 Geo. IV., except so far as it might affect any taxes which had accrued and were due, or any remedy for the enforcement or recovery of the same:—Held, that this exception did not continue the power of the sheriff to convey, and therefore that nothing passed by his deed. *Bryant* v. *Hill*, 23 U. C. R. 96. Followed in *Cotter* v. *Sutherland*, *Stevens* v. *Jaques*, 18 C. P. 357.

On the 18th December, 1852, the sheriff, acting under 13 & 14 Vict. c. 67, sold a lot of land for taxes, but did not execute a conveyance therefor until the 9th January, 1856, after the passing of 16 Vict. c. 182, which repealed the first-named Act:—Held, that the deed was invalid, as at the time it was executed the sheriff had not power to make a conveyance. *McDougall* v. *McMillan*, 25 C. P. 75.

Toll-gate — *Act Prohibiting — Provision for Non-retroactivity—Repeal of.*]—See *Village of St. Joachim de la Pointe Claire* v. *Pointe Claire Turnpike Road Co.*, 24 S. C. R. 486.

Tort — *Action against Crown — Public Works.*]—See *City of Quebec* v. *The Queen*, 24 S. C. R. 420.

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2. *Disallowance.*

Conviction — *Execution of Warrant.*]—Where an Act passed by the provincial legislature was subsequently disallowed, but while in force the plaintiff had been convicted under it by defendants, and a warrant was properly issued by defendants for his arrest and imprisonment, which, however, was not executed until after the disallowance of the Act was published in the Gazette:—Held, that, as the conviction and warrant were legal, the defendants could not be considered as trespassers. *Clapp* v. *Laurason*, 6 O. S. 319.

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3. *Indirect or Implied Repeal.*

Bail Bonds—*Earlier Section of Act—Implied Repeal.*]—Section 29 of C. S. U. C. c. 24, respecting bail bonds (taken from 22 Vict. c. 33), does not repeal s. 25 (taken from 19 Vict. c. 57), and the two are not so inconsistent as to be incapable of standing together, in some respects at least. The 25th governs where the bond was taken before the 4th May, 1859, the 29th after; and where the two are at variance the latter must prevail. *Kingan* v. *Hall*, 23 U. C. R. 503.

Common Law Procedure Act—*Capias.*]—Semble, that s. 34 of the C. L. P. Act, R.S.O. 1877 c. 50, s. 39, has not been repealed by rule 5, Ontario Judicature Act. *Cochrane Manufacturing Co.* v. *Lamon*, 11 P. R. 162.

Exchequer Court—*Jurisdiction — Repeal by Implication.*]—A seaman, the engineer of a tug, took proceedings in the exchequer court, admiralty side, on a claim for $136 wages, and arrested the ship. On the trial it was contended that the court had no jurisdiction to try a claim for less than $200, the owner being insolvent, the ship not being under arrest, and the case not referred to the court by a Judge, magistrate, or justice, pursuant to R. S. C. c. 75, s. 34, the Inland Waters Seamen's Act:—Held, that the Admiralty Act, 1891, conferred upon the exchequer court all the jurisdiction possessed by the high court, admiralty division, in England, as it stood on the 25th July, 1890, the date of the passing of the Colonial Courts of Admiralty Act, 1890, and that the admiralty court in Canada could now try any claim for seamen's wages, including claims below $200; and that s. 34 of R. S. C. c. 75 was repealed by implication (not having been expressly preserved) to the extent, at any rate, that it curtailed the jurisdiction of the admiralty court to entertain claims for seamen's wages below $200 in amount. Held, as to the costs of any such action, that they were in the discretion of the Judge trying the cause under rule 132 of the admiralty rules of the exchequer court of Canada. This was the practice and rule in England on the 25th July, 1890, and since. Tenant v. Ellis, 6 Q. B. D. 46. Rockett v. Clippingdale, [1891] 2 Q. B. 293, and The Saltburn [1892] P. 333, referred to. *The W. J. Aikens*, 4 Ex. C. R. 7.

Limitation of Actions—*Lord Campbell's Act—Municipal Act.*]—An action under C. S. C. c. 78, by the representatives of a deceased person killed by the neglect of defendants to repair a highway, must, under C. S. U. C. c. 54, s. 337, be brought within three months, notwithstanding the limitation of twelve months allowed by the first-mentioned statute. *Turner* v. *Town of Brantford*, 13 C. P. 109.

———*Lord Campbell's Act—Special Acts.*]—Action by an administratrix against defendants for digging and opening a drain in the city of Ottawa, and leaving it at night uncovered, whereby the deceased was injured and died:—Held, that the administratrix was limited to six months from the cause of action accruing within which to sue, that being the period limited by defendants' charter, 35 Vict. c. 80, s. 35 (O.), for, although, under C. S. C. c. 78, s. 4, this administratrix is allowed twelve months after the death of the deceased to bring her action, this does not apply where there is a special provision, as here, for a more limited period. *Cairns* v. *Ottawa Water Commissioners*, 25 C. P. 551.

Municipal Act—*Board of Health.*]—Section 67 of the Act by which municipal corporations were established in Nova Scotia, 42 Vict. c. 1, giving them "the appointment of health officers . . . . and a board of health," with the powers and authorities formerly vested in courts of sessions, does not repeal c. 29 of R. S. N. S., 4th ser., providing for the appointment of boards of health by the lieutenant-governor in council. *County of Cape Breton* v. *McKay*, 18 S. C. R. 639.

——— *"Effete" Section—Interest on Debentures.*]—Section 217 of 29 & 30 Vict. c. 51 has not been repealed, though marked effete in the schedule prefixed to and not re-enacted in 36 Vict. c. 48 (O.) *Scottish American Investment Co.* v. *Village of Elora*, 6 A. R. 628.

——— *Personation at Elections—Repugnant Sections.*]—Where a clause in a statute prohibits a particular act and imposes a penalty for doing it, and a subsequent clause in the same statute imposes a different penalty for the same offence, which cannot be reconciled either as cumulative or alternative punishment, the former clause is repealed by the latter. This principle being applied to ss. 167 and 210 of the Consolidated Municipal Act, 1892, a person convicted of personation under the former clause was discharged as illegally convicted on a return to a habeas corpus. Robinson v. Emerson, 4 H. & C. 352, and Michell v. Brown, 1 E. & E. at p. 275, followed. *Regina* v. *Rose*, 27 O. R. 195.

——— *Quashing By-law—Procedure.*]—The authority to proceed by rule or order nisi in quashing a by-law conferred by R. S. O. 1887 c. 184, s. 332, is inconsistent with con. rule 526, and must therefore be taken to be repealed, for by 51 Vict. c. 2, s. 4 (O.), it is declared that all enactments in the revised statutes inconsistent with the rules are repealed. It is, therefore, not proper to proceed by rule nisi. Re Peck and Ameliasburg, 12 P. R. 664, followed. Hewison v. Pembroke, 6 O. R. 170, distinguished. *Re Colcnutt and Township of Colchester North*, 13 P. R. 253.

Special Act—*Exclusion of General—Municipal Corporation — Appeal.*]—Section 439 of the Town Corporations Act (40 Vict. c. 29 (Q.)) not having been excluded from the charter of the city of Ste. Cunégonde (53 Vict. c. 70), is to be read as forming a part of it, and prohibits an appeal to the court of Queen's bench from a judgment of the superior court on a petition to quash a by-law presented under s. 310 of said charter. Where the court of Queen's bench has quashed such an appeal for want of jurisdiction, no appeal lies to the supreme court of Canada from its decision. *City of Ste. Cunégonde* v. *Gougeon*, 25 S. C. R. 78.

——— *Exclusion of General—Municipal Corporation—Railway.*]—The special rights and privileges conferred on the St. Catharines, Thorold, and Suspension Bridge Road Company, who had constructed their road over what had previously been a highway, under 12 Vict. c. 84, s. 22, do not take away the general powers possessed by the municipalities through which it passed, as to the removal of obstructions. *Regina* v. *Davis*, 24 C. P. 575.

——— *Exclusion of General—Negligence.*]—See *Cairns* v. *Ottawa Water Commissioners*, 25 C. P. 551.

——— *Exclusion of General—Survey.*]—23 Vict. c. 101 declares the mode in which the side lines of the first concession of Cumberland shall be run, and provides a method by which those injured by the change from the original plan of survey may obtain compensation:—Held, that the general statute, 20 Vict. c. 78, was thereby excluded, and that the defendant was confined to this method. *Smith* v. *Sparrow*, 21 U. C. R. 323.

See, also, as to the survey of this township, *Holmes* v. *McKechin*, 23 U. C. R. 52, 321.

——— *Repeal by General.*]—A special Act of parliament cannot be repealed by a general enactment, except when there is express reference to it. 20 Vict. c. 94, therefore, is not repealed by 29 & 30 Vict. c. 51, s. 428. *Regina ex rel. Arnold* v. *Wilkinson*, 5 P. R. 20.

See, also, *Pringle* v. *McDonald*, 10 U. C. R. 254; *Ward v. Midland R. W. Co.*, 35 U. C. R. 120.

A general later statute (and a fortiori a statute passed at the same time) does not abrogate an earlier special Act by mere implication. The law does not allow an interpretation that would have the effect of revoking or altering a special enactment by the construction of general words, where the terms of the special enactment may have their proper operation without such interpretation. *City of Vancouver* v. *Bailey*, 25 U. C. R. 62.

See Campbell v. *Northern R. W. Co.*, 26 Gr. 522; *Robertson* v. *Larocque*, 18 O. R. 469.

See, also, BANKRUPTCY AND INSOLVENCY.

XVIII. TIME OF TAKING EFFECT.

Portion of Day—*Chattel Mortgage.*]—Acts of parliament take effect in law from the earliest moment of the day on which they are passed, and the Act 54 Vict. c. 20, amending the Assignments Act, R. S. O. 1887 c. 124, to which the Royal assent was given at three o'clock in the afternoon, was therefore held to apply to a chattel mortgage executed and registered before twelve o'clock on the same day. *Cole* v. *Porteous*, 19 A. R. 111.

——— *Insolvent Act—Attachment—Execution.*]—Judicial proceedings and statutes take effect in law from the earliest period of the day upon which they are respectively originated and come into force. M. recovered a judgment and issued a fi. fa. goods against R. The writ was given to the sheriff at half-past ten and a levy made about 11 a.m. On the same day, but after the levy, C. sued out against R. an attachment in insolvency, which the sheriff received at 11.30 a.m. On the same day, also, the Insolvent Act of 1865 came into force (the Royal assent being given thereto on the same day, but not till the afternoon), by which in effect this execution, unless theretofore issued and delivered to the sheriff, was postponed to the attachment:—Held, that the fi. fa. could not be considered as having been so issued and delivered, and therefore, by virtue of the Act, the attachment prevailed over the execution. Semble, that the issuing of the attachment was a judicial act, and by it the property of the insolvent vested in the assignee by relation before it was seized under and before any lien attached by virtue of the execution. *Converse* v. *Michie*, 16 C. P. 167.

——— *Judgment.*]—See *Hurtubise* v. *Desmarteau*, 19 S. C. R. 562.

——— *Order of Court.*]—The fraction of a day is never taken into consideration in determining the operation of a statute. If an order is obtained under a statute which is repealed by another statute on the same day the order is made, the repealing statute will be held to operate from the first part of that day, and overrule the order. *Mitchell* v. *Dobson*, 3 L. J. 185.

See The Queen v. *Canada Sugar Refining Co.*, 27 S. C. R. 395, *ante* XIII.

——— *Fire Insurance.*] — The plaintiff's property was destroyed by fire the day the Ontario Insurance Act, 1887, came in force: —Held, that R. S. O. 1877 c. 161, in force at the time the insurance was effected, applied to the policy. *McIntyre* v. *East Williams Mutual Fire Ins. Co.*, 18 O. R. 79.

XIX. Titles, Headings, and Divisions.

[Headings of different portions of a statute may be looked to to determine the sense of a section ranged under them. Hammersmith and City R. W. Co. v. Brand, L. R. 4 H. L. 171. The consolidated statutes may be treated as one great Act, and the several chapters as being enactments which are to be construed collectively and with reference to one another, just as if they had been sections of one statute, instead of being separate Acts. Per Lord Westbury in *Boston* v. *Lelièvre*, L. R. 3 P. C. 162.]

Reference to, as Aids to Construction of Statutes.]—32 & 33 Vict. c. 23, s. 8 (D.), applies to all cases of perjury, not merely to "Perjuries in Insurance Cases," which is the heading under which ss. 4 to 12 are placed in the Act. *Regina* v. *Currie*, 31 U. C. R. 582.

The divisions of a statute, under which the clauses are arranged and classified, may be looked to as affording a key to the construction. *Lawrie* v. *Rathbun*, 38 U. C. R. 255.

In construing an obscure clause in an Act of Parliament, the court may look at the title for assistance. *Greene* v. *Provincial Ins. Co.*, 4 A. R. 521.

The headings of a statute may be referred to, to assist the construction of ambiguous provisions. *Donly* v. *Holmwood*, 4 A. R. 555.

Held, following Eastern Counties, &c., R. W. Co. v. Marriage, 9 H. L. C. 32, Lang v. Kerr, 3 App. Cas. 529, and Van Norman v. Grant, 27 Gr. 498, that both ss. 10 and 11 of R. S. O. 1877 c. 49, are to be governed by the heading immediately preceding s. 10; so that, where the interest sought to be reached by the creditor has not been concealed by a fraudulent conveyance, the Judge has no authority to give summary relief under s. 11. *Wood* v. *Hurl*, 28 Gr. 146.

See 50 Vict. c. 2, s. 1 (O.); *Peters* v. *Stoness*, 13 P. R. 235.

Remarks as to embracing in one Act several subjects which are not expressed in the title; and as to the effect of the title and preamble of a statute as guides to the construction. *Regina* v. *Washington*, 46 U. C. R. 221.

In construing an Act of parliament the title may be referred to in order to ascertain the intention of the legislature. The Act of the Nova Scotia legislature 50 Vict c. 23, vesting the title to highways and the lands over which the same pass in the Crown for a public highway, does not apply to the city of Halifax. *O'Connor* v. *Nova Scotia Telephone Co.*, 22 S. C. R. 276.

XX. Miscellaneous Cases.

Ca. Re.—*Notice to Appear.*]—Where, by the operation of provincial enactments, a plaintiff was unable to give a proper date to the notice at the foot of a ca. re., a general notice to appear on the first day of the term was held sufficient. *Brown* v. *Smith*, Tay. 187.

Clerk of the Peace—*Jury Act—Fees.*]—A municipal council, in 1850, assigned to a clerk of the peace a fixed salary for that year, "in lieu of all fees:"—Held, the Jury Act, 13 & 14 Vict. c. 55, having been subsequently passed, that he could still claim the fees allowed by the statutes for preparing the jury books for the following year. *Pringle* v. *McDonald*, 10 U. C. R. 254.

Crown—*Administration of Justice Act.*]—The Crown, though not named in the Administration of Justice Act, is entitled to avail itself of the benefit of its provisions to the same extent as a subject can do so. *Attorney-General* v. *Walker*, 25 Gr. 233.

Dual Version of Act—*Difference in Language—Municipal Corporation — Removal of Officers.*]—The charter of the city of Montreal, 1889, 52 Vict. c. 79, s. 79, gives power to the city council to appoint and remove such officers as it may deem necessary to carry into execution the powers vested in it by the charter, the French version of the Act stating that such powers may be exercised "à sa discrétion," while the English version has the words "at its pleasure:"—Held, that, notwithstanding the apparent difference between the two versions of the statute, it must be interpreted as one and the same enactment, and the city council was thereby given full and unlimited power, in cases where the engagement has been made indefinitely as to duration, to remove officers summarily and without previous notice, upon payment only of the amount of salary accrued to such officer up to the date of such dismissal. *Davis* v. *City of Montreal*, 27 S. C. R. 539.

Error in Transcribing Act.]—See *In re Central Bank of Canada, Yorke's Case*, 15 O. R. at p. 629.

Estates Tail—*Abolition of*—"*Valid Remainder.*"]—The revised statutes of Nova Scotia, 1851, 1st ser., c. 112, provided as follows: "All estates tail are abolished, and every estate which would hitherto have been adjudged a fee tail shall hereafter be adjudged a fee simple; and, if no valid remainder be limited thereon, shall be a fee simple absolute, and may be conveyed or devised by the tenant in tail, or otherwise shall descend to his heirs as a fee simple." In the revision of 1858 (R. S. N. S., 2nd ser., c. 112), the terms are identical. In 1864 (R. S. N. S. 3rd ser., c. 111) the provision was changed to the following: "All estates tail on which no valid remainder is limited are abolished, and every such estate shall hereafter be adjudged to be a fee simple absolute, and may be conveyed or devised by the tenant in tail, or otherwise shall descend to his heirs as a fee simple." This latter statute was repealed in 1865 (28 Vict. c. 2), when it was provided as follows: "All estates tail are abolished, and every estate which hitherto would have been adjudged a fee tail shall hereafter be adjudged a fee simple, and may be conveyed or devised or descend as such." Z., who died in 1859, by his will,

made in 1857, devised lands in Nova Scotia to his son, and, in default of lawful heirs, over to other relatives, in the course of descent from the first donee. On the death of Z., the son took possession of the property as devisee under the will, and held it until 1891, when he sold the lands in question in this suit to the appellant:—Held, that, notwithstanding the reference to "valid remainder" in the statute of 1851, all estates tail were thereby abolished, and further, that subsequent to that statute there could be no valid remainder expectant on an estate tail, as there could not be a valid estate tail to support such remainder. Held, further, that in the devise over to persons in the course of descent from the first devisee, in default of lawful issue, the words "lawful heirs," in the limitation over, are to be read as if they were "heirs of his body:" and that the estate of the first devisee was thus restricted to an estate tail, and was consequently, by the operation of the statute of 1851, converted into an estate in fee simple and could lawfully be conveyed by the first devisee. *Ernst* v. *Zwicker*, 27 S. C. R. 594.

Forfeiture—*Statutory Relief—Exception—Onus.*]—A statute was passed reversing the attainder of A. S., and taking away the forfeiture wrought thereby, so far as it might affect portions of his estate not already declared forfeited and sold under authority of law, and vesting such estate in those who could claim it if he had not been attainted; provided always, that nothing in the Act should affect any property sold or conveyed by the commissioners of forfeited estates, &c. In the preamble, it was recited that a part of the estate had been taken upon inquisition, and seized by the Crown:—Held, that the plaintiffs, claiming as devisees of A. S., must shew, as part of their case in the first instance, that the lands claimed were not part of those forfeited and sold. *Doe Stevens* v. *Clement*, 9 U. C. R. 650.

——— *Waiver.*]—Semble, that when an Act has become forfeited by non-fulfilment of some of its conditions, the legislature may waive the forfeiture, and by special enactment continue the existence of the Act. *City of Toronto and Lake Huron R. W. Co.* v. *Crookshank*, 4 U. C. R. 309.

See Marmora Foundry Co. v. *Murney*, 1 C. P. 29.

Gas Company—*Shutting off Supply—Default as to one House.*]—By the true construction of s. 20 of 12 Vict. c. 183 (C.), borrowed from the Imperial Gasworks Clauses Act, 1847, the Montreal Gas Company are authorized to cease supplying a person with gas at any of his houses on his neglect to pay their bill for any one of them. There is nothing in the section to limit the authority of the company to the particular building in respect of which there has been default, and such a limitation cannot be applied. Judgment in 28 S. C. R. 382 reversed. *Montreal Gas Co.* v. *Cadieux*, [1899] A. C. 589.

Indian Lands — *Proceedings of Commissioners—Exceptions in Statute.*]—In regard to lands in the occupation of the Indians, it is unnecessary in the proceedings of the commissioners, under 2 Vict. c. 15 and 12 Vict. c. 9, by express evidence to negative the exceptions specified in the latter of these statutes. *The Queen* v. *Strong*, 1 Gr. 392.

Insurance — *Action — Time — Enabling Statute.*]—The words of s. 148 (2) of the Ontario Insurance Act, 60 Vict. c. 36, "Notwithstanding any stipulation or agreement to the contrary, any action or proceeding against the insurer for the recovery of any claim under or by virtue of a contract of insurance of the person may be commenced at any time within the term of one year," have reference to a stipulation or agreement giving less time than one year for bringing the action. It is an enabling, not a disabling, enactment. *Styles* v. *Supreme Council of Royal Arcanum*, 29 O. R. 38.

Insurance Company—*Dominion Incorporation—Application of Provincial Act.*]—The Beaver Mutual Fire Assurance Association and the Toronto Mutual Fire Insurance Co. were severally incorporated under the general Mutual Act, C. S. U. C. c. 52, but by the Dominion Act, 32 & 33 Vict. c. 70, they were united under the defendants' name, and were declared to be a body corporate:—Held, that the Dominion Act 32 & 33 Vict. c. 70 must be deemed to be defendants' Act of incorporation, and that, therefore, the Ontario Act 36 Vict. c. 44, which was made applicable to companies incorporated under the Consolidated Act, or some special Act of the former Province of Canada or of Ontario, and appeared to authorize an assessment for prospective losses, did not apply to them. *Orr* v. *Beaver and Toronto Mutual Fire Ins. Co.*, 26 C. P. 141.

Municipal By-law — *Validating Act—Motion to Quash—Costs.*]—A rule nisi having been obtained to quash a by-law, the legislature by a statute declared the by-law valid, and the rule was afterwards argued on the various objections taken, in order to decide who should pay the costs of the application:—Semble, that in such cases the rule should not be argued; and it would be well to direct in the statute that the petitioners to confirm the by-law should pay all proper costs incurred in any application to quash it. *In re Holden and Town of Belleville*, 39 U. C. R. 88.

——— *Validating Act—Preamble—Pending Action—Costs.*]—In January, 1891, the defendants passed a by-law to raise $75,000 for street railway purposes, with a recital that it was necessary to raise that sum for the purpose of building a street railway connecting the municipality of Neebing with the municipality of Port Arthur. The by-law had been submitted to the electors, and had been carried by their votes, but no by-law had been passed under s. 504 of the Municipal Act actually authorizing the construction of the railway, nor had the approval of the lieutenant-governor in council been obtained; and the provisions of s. 505 of the Municipal Act had not been observed. This action was brought to restrain the municipality from constructing the street railway under this by-law, and on the 4th May, 1891, while the action was pending, an Act, 54 Vict. c. 78 (O.), was passed, the preamble of which recited, inter alia, that the corporation were desirous of constructing and operating an electric street railway at a cost estimated not to exceed $75,000; that they had, on the 5th January, 1891, passed a by-law authorizing the construction and operation of such a railway, and had petitioned that it might be confirmed and legalized. The Act then declared that the by-law referred to in the preamble, of which

a copy was set forth in the schedule to the Act, being the by-law in question, was legal and valid to all intents and purposes; and that, for all purposes affecting it, any and all amendments of the Municipal Act having force and effect on 1st August, 1891, should be deemed and taken as having been complied with, and as having been made and being in full force and effect prior to the passing of the by-law:—Held, by the court of appeal, that the validating Act had the effect of establishing the by-law as one not merely for raising money, but also as one for the construction of the road, and that it had made it valid for all purposes. Held, also, that the plaintiffs were entitled to the costs of the action down to the time of the passing of the Act, and, in addition, to the costs of a motion in Chambers for the disposal of the action, and that the defendants were entitled to the subsequent costs and to the costs of the appeal. Observations on the course taken by the legislature in passing Acts to validate proceedings which are under attack in a pending action, leaving the costs of the action to be disposed of by the court as if the Act had not passed. Held, by the supreme court of Canada, reversing the decision of the court of appeal, that the Act did not dispense with the requirements of ss. 504 and 505 of the Municipal Act requiring a by-law providing for the construction of the railway to be passed, but only confirmed the one that was passed as a money by-law. Held, also, that an erroneous recital in the preamble to the Act that the town council had passed a construction by-law had no effect on the question to be decided. *Dwyer v. Town of Port Arthur*, 19 A. R. 555, 22 S. C. R. 241.

Railway Act — *Canal Bridge—Statutory Sanction.*] — By the various Acts referring thereto, the erection of defendants' drawbridge over the Desjardins canal was sanctioned and recognized; and it must be assumed to have been lawfully erected, though the formalities required by ss. 136, 137, and 138 of the Railway Act may not have been complied with. *Desjardins Canal Co. v. Great Western R. W. Co.*, 27 U. C. R. 363.

Revenue Laws.] — *See Grinnell v. The Queen*, 16 S. C. R. 119; *Toronto R. W. Co. v. The Queen*, 4 Ex. C. R. 262, *ante* I. See also REVENUE.

Seduction—*Enabling Act.*] — R. S. O. 1887 c. 58, "An Act respecting the Action of Seduction," is only an enabling Act, enlarging the right to maintain the action, under circumstances which would not be sufficient at common law. *Gould v. Erskine*, 20 O. R. 347.

Tolls—*Timber—Regulations.*] — See *Merchants Bank of Canada v. The Queen*, 1 Ex. C. R. 1, *post* TOLLS.

Trustee — *Statute Vesting Lands in — Title.*]—1 Wm. IV. c. 26, vesting in a trustee certain lands belonging to the estate of the late Laurent Q. St. George, has not the effect of raising a presumption of title in the particular lands enumerated in the schedule, so as to relieve the trustee from the necessity of shewing title in the first instance. *Doe d. Baldwin v. Stone*, 5 U. C. R. 388.

Wharf—*Statutory Ratification.*] — Held, that, although the statute 10 Geo. IV. c. 11 did not expressly authorize the Cobourg Harbour Company to build a wharf in front of the street in question, the recognition of the right in subsequent statutes was sufficient. *Standly v. Perry*, 2 A. R. 195.

See CONSTITUTIONAL LAW — WORDS AND TERMS.

STATUTORY CONDITIONS.

See INSURANCE, III. 3, 4.

STATUTORY FINALITY.

See ASSESSMENT AND TAXES, X. 4 (c).

STAYING PROCEEDINGS.

See APPEAL, IX. 7—COSTS, V. 4—COURT OF APPEAL, II. 1—EJECTMENT, VII.—EXECUTION, VII.—EXECUTORS AND ADMINISTRATORS, I. 2 (b)—MORTGAGE, VIII. 5 (i)—PRACTICE—PRACTICE AT LAW BEFORE THE JUDICATURE ACT, XVIII., XIX. 5—PRACTICE IN EQUITY BEFORE THE JUDICATURE ACT, XXIII. — PRACTICE SINCE THE JUDICATURE ACT, XVI. —REPLEVIN, III. 1 (g)—SHERIFF, XIV. 4—TRIAL, XII.

STOCK.

Assessment of.]—See *Ex parte Lewin*, 11 S. C. R. 484.

Calls on Insurance Company Stock after Suspension of License.]—See *Union Fire Insurance Co. v. Fitzsimmons*, 32 C. P. 602; *Union Fire Insurance Co. v. Lyman*, 46 U. C. R. 471.

Gambling in.]—See *Regina v. Murphy*, 17 O. R. 201.

Locus of Bank Stock.]—See *Hughes v. Rees*, 5 O. R. 654.

Purchase of, on Margin.]—See BROKER.

Sale of, under Execution.]—See *Connecticut and Passumpsic River R. W. Co. v. Morris*, 14 S. C. R. 318.

See COMPANY—EXECUTION, VIII. 1—RAILWAY, XXIV.

STOLEN PROPERTY.

Letter of Credit—*Forged Indorsement—Bank — Liability.*] — The Bank of British North America in England received money there to be transmitted to B. in Upper Canada, and sent a letter of credit to B. to receive the money at a branch of the bank in Toronto. The letter was taken out of the post office in Canada (B. having in the meantime died), and B.'s name forged on the letter of credit,

and the money received by some person unknown:—Held, that B.'s executrix was entitled to recover the money from the bank in Toronto as money had and received to B.'s use. *Gissing* v. *Hopper*, 6 O. S. 505.

Money Stolen from Agent—*Liability—Neglect.*]—Plaintiff sued for money advanced by him to defendants to purchase wheat for him, alleging that they had not purchased or accounted. Defendants pleaded, in substance, that the money, while kept unmixed with their own as the plaintiff's money, was stolen from them by persons unknown, without any neglect on their part. At the trial a verdict was taken for plaintiff, subject to the opinion of the court whether the defendants were liable, with power to draw inferences of fact. The court declined to assume the functions of a jury in determining, upon evidence wholly circumstantial, whether the money had been stolen, and directed a new trial with costs to abide the event. Remarks as to such defence, and the facts required to sustain it. *Bickle* v. *Mathewson*, 26 U. C. R. 137. See also *Gore Bank* v. *Hodge*, 2 C. P. 359.

Municipal Debenture — *Holder for Value—Notice.*] — The fact that a certain municipal debenture had been stolen previously to its being regularly issued:—Held, no bar to the claim of a bonâ fide holder for valuable consideration without notice. *Trust and Loan Co.* v. *City of Hamilton*, 7 C. P. 98.

Purchaser from Thief — *Trover.*] — A. having stolen a horse sells it to B., and is afterwards tried and convicted of the felony. Upon trover brought against A. and B. for the horse:—Held, that the facts did not constitute a joint conversion, so as to maintain trover against the purchaser. *Edwards* v. *Kerr*, 13 C. P. 24.

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

Reward for Apprehension of Thief.] —See *In re Robinson*, 7 P. R. 239, *ante* REWARD.

Tracing Stolen Money—*Lien on Chattels Purchased.*] — If the court can trace money or property, however obtained from the true owner, into any other shape, it will intervene to secure it for the true owner by holding it to be his in equity, or by giving him a lien on it. Accordingly, where money was stolen, the owner was held entitled to a leasehold, furniture, and other chattels, purchased with the stolen money, and an injunction was granted to restrain parting therewith until the hearing. *Merchants' Express Co.* v. *Morton*, 15 Gr. 274.

STOP ORDER.

See PAYMENT, II. 2.

STOPPAGE IN TRANSITU.

See SALE OF GOODS, VI.

STOWAGE.

See SHIP, 1 (a).

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STREET RAILWAYS.

I. ASSESSMENT OF, 6752.

II. CONTRACTS WITH MUNICIPAL CORPORATIONS, 6753.

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V. OPERATION, 6763.

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I. ASSESSMENT OF.

Cars and Horses—*Special Tax.*]—By a by-law of the city of Montreal a tax of $2.50 was imposed upon each working horse in the city. By s. 16 of the appellants' charter it was stipulated that each car employed by the company should be licensed and numbered, &c., for which the company "shall pay, over and above all other taxes, the sum of $20 for each two-horse car, and $10 for each one-horse car:"—Held, that the company were liable for the tax of $2.50 on each and every one of their horses. *Montreal Street R. W. Co.* v. *City of Montreal*, 23 S. C. R. 259.

Highway Occupied by Railway.] — Held, reversing the judgment in 35 U. C. R. 264, that the Toronto Street Railway Company were not assessable for those portions of the streets occupied by them for the purposes of their railway, as being land within the meaning of the Assessment Act, 32 Vict. c. 36 (O.) *Toronto Street R. W. Co.* v. *Fleming*, 37 U. C. R. 116.

Rails, Poles, and Wires.] — The rails, poles, and wires of the Toronto Railway Company, used by them in operating their electric railway, and laid and erected in and upon the public highways of the city of Toronto, are subject to assessment under the Consolidated Assessment Act, 1892, 55 Vict. c. 48 (O.) Toronto Street R. W. Co. v. Fleming, 37 U.

C. R. 116, has been overruled by Consumers' Gas Co. v. Toronto, 27 S. C. R. 453. *In re Toronto R. W. Co. Assessment*, 25 A. R. 135.

See City of Toronto v. *Toronto Street R. W. Co.*, 23 S. C. R. 198, *post* II.

II. CONTRACTS WITH MUNICIPAL CORPORATIONS.

Kingston, Portsmouth, and Cataraqui Electric Railway Company—*Running Cars—Specific Performance — Injunction—Mandamus.*]—The court will not order specific performance of an agreement by an electric railway company to run its cars on certain streets at certain hours and with certain officers, as the court cannot oversee the carrying out of the judgment if granted. Nor will the court grant an injunction restraining the company from carrying out such an agreement to the extent to which they are willing to carry it out unless and until they carry it out in toto, as this would also involve the same minute supervision. Nor will the court direct in an action the issue of a writ of mandamus, where the duty to be fulfilled arises out of an agreement of this kind the performance of which in specie is not deemed enforceable by the court. Semble, a prerogative writ of mandamus cannot be granted in an action but only on motion (see Toronto Public School Board v. City of Toronto, 19 P. R. 329), but even if it can be granted in an action it will not be granted to enforce private rights arising under an agreement. Judgment in 28 O. R. 339 affirmed. *City of Kingston* v. *Kingston, Portsmouth, and Cataraqui Electric R. W. Co.*, 25 A. R. 462.

London Street Railway Company—*Repair of Streets—Accident—Liability over—Limitation of Actions.*]—By 36 Vict. c. 99 (O.), the London Street Railway Company were incorporated, by s. 13 of which the corporation of the city of London were authorized to enter into an agreement for the construction of the railway on such of the streets as might be agreed on, and for the paving, repairing, &c., of the same. By s. 14 the city were also empowered to pass by-laws to carry such agreement into effect, and containing all necessary provisions, &c., for the conduct of all parties concerned, including the company, and for enforcing obedience thereto. A by-law was passed by the city providing for the repair of certain portions of the street by the street railway company, who were to be liable for all damages occasioned to any person by reason of the construction, repair, or operation of the railway, or any part thereof, or by reason of the default in repairing the said portions of the streets, and that the city should be indemnified by the company for all liability in respect of such damage. An accident having happened to plaintiff by reason of said portions of said streets being out of repair, an action was brought by plaintiff against the city of London therefor. After action brought, and more than six months after the occurrence of the accident, on the application of the city of London, the street railway company were made parties defendant:—Held, that, notwithstanding the said legislation, by-law, and agreement, the city were liable under s. 531 of the Municipal Act, R. S. O. 1887 c. 184, to the plaintiff for the damage he had sustained: but that they had a remedy over against the street railway company. Held, also, following Anderson v. Canadian Pacific R. W. Co., 17 O. R. 747, that the six months' limitation clause in the Railway Act did not apply, the right of the city against the street railway company being one of contract. *Carty* v. *City of London*, 18 O. R. 122.

Quebec Street Railway Company — *Assumption of Ownership by Municipality—Notice.*]—The Quebec Street Railway Company were authorized under a by-law passed by the city of Quebec and an agreement executed in pursuance thereof, to construct and operate in certain streets of the city a street railway for a period of forty years, and it was also provided that at the expiration of twenty years from the 9th February, 1865, the corporation might, after a notice of six months to the company, to be given within twelve months immediately preceding the expiration of the said twenty years, assume the ownership of said railway upon payment, &c., of its value, to be determined by arbitration, together with ten per cent. additional:—Held, that the company were entitled to a full six months' notice prior to the 9th February, 1885, to be given within the twelve months preceding the 9th February, 1885, and therefore a notice given in November, 1884, to the company that the corporation would take possession of the railway in six months thereafter, was bad. *Quebec Street R. W. Co.* v. *City of Quebec*, 15 S. C. R. 164.

Toronto Street Railway Company—*Cars — By-law Regulating Operation of — Ultra Vires.*]—In 1861 an agreement was entered into between the plaintiffs and certain persons for the construction and operation of street railways in the city of Toronto, in which they agreed to construct the lines of road specified from time to time, and that they would at all times employ careful, sober, and civil agents, conductors, and drivers, to take charge of the cars upon the said railways, and that they and their agents, conductors, drivers, and servants would at all times . . operate the said railway, and cause the same to be worked under such regulations as the common council of the city of Toronto might deem necessary and requisite for the protection of the persons and property of the public, and provided such regulations should not infringe upon the privileges granted by the agreement. Subsequently the privileges so conferred upon those persons were assigned to the defendants, who continued to work several railways, and after some years introduced for use thereon smaller cars, drawn by one instead of two horses as had been done previously, and with only one man in charge instead of two as on the larger cars. In 1882 the council of the city passed a by-law (No. 1264) prohibiting the operation of any cars within the city limits without two men in charge, one as driver, the other as conductor. The defendants refused to conform to this by-law, and this action was brought to compel them to do so, the agreement of 1861 being relied on as warranting that relief:—Held, that the by-law in question was not within the terms of the agreement, and that it was therefore ultra vires. (2) That the by-law was also invalid, as it was an invasion of the domestic concerns of the company. *City of Toronto* v. *Toronto Street R. W. Co.*, 15 A. R. 30.

——— *Franchise—Property—Road-bed.*]—Held, by the court of appeal, that under the statutes and agreements affecting the Toronto Street Railway Company, the possibility of exercising the franchise beyond the period of thirty years therein mentioned, if the city should not take over the railway, is not "property" the value of which could be taken into consideration by the arbitrators in arriving at the amount payable by the city on assuming the ownership of the railway. Nor were the company entitled to any allowance for permanent pavements constructed by the city under an agreement by which the company, in lieu of constructing and maintaining such pavements, as provided by former agreements, paid the city an annual allowance for the use thereof. The company's rights in respect of the extensions of the railway made from time to time came to an end at the expiration of the thirty years mentioned in the original agreement. Judgment in 22 O. R. 374 affirmed. Held, by the judicial committee of the privy council, affirming the judgment of the court of appeal, that the Acts could not be construed as granting a perpetual privilege to use the streets for the purposes of the railway, but that the privilege thereby granted was limited to thirty years by the agreement and by-law. That limit of time applied, not merely to the original railway, but to the various extensions thereof authorized in pursuance of the same privilege. *In re City of Toronto and Toronto Street R. W. Co.*, 20 A. R. 125, [1893] A. C. 511.

——— *Permanent Pavements—Arbitration—Local Improvements—Assessment.*]—The company were incorporated in 1861, and their franchise was to last thirty years, at the expiration of which period the city corporation could assume the ownership of the railway and property on payment of the value thereof, to be determined by arbitration. The company were to keep the roadway between the rails and for eighteen inches outside each rail paved and macadamized and in good repair, using the same material as that on the remainder of the street, but, if a permanent pavement should be adopted by the corporation, the company were not bound to construct a like pavement between the rails, &c., but were only to pay the cost price of the same, not to exceed a specified sum per yard. The corporation laid upon certain streets traversed by the railway permanent pavements of cedar blocks, and issued debentures for the whole cost. A by-law was then passed, charging the company with their portion of such cost in the manner and for the period that adjacent owners were assessed under the Municipal Act for local improvements. The company paid the several rates assessed up to 1886, but refused to pay for subsequent years, on the ground that the cedar block pavement had proved to be by no means permanent, but defective and wholly insufficient for streets upon which the railway was operated. An action having been brought by the city for these rates, it was held that the company were only liable to pay for permanent roadways, and a reference was ordered to determine, among other things, whether or not the pavements laid by the city were permanent. This reference was not proceeded with, but an agreement was entered into by which all matters in dispute to the end of 1888 were settled, and thereafter the company were to pay a specific sum annually per mile in lieu of all claims on account of debentures maturing after that date, and "in lieu of the company's liability for construction, renewal, maintenance, and repair in respect of all the portions of streets occupied by the company's track so long as the franchise of the company to use the said streets now extends." The agreement provided that it was not to affect the rights of either party in respect to the arbitration to be had, if the city took over the railway, nor any matters not specifically dealt with therein, and it was not to have any operation "beyond the period over which the aforesaid franchise now extends." This agreement was ratified by an Act of the legislature passed in 1890, which also provided for the holding of the arbitration, which having been entered upon, the city claimed to be paid the rates imposed upon the company for construction of permanent pavements for which debentures had been issued payable after the termination of the franchise. The arbitrators refused to allow this claim:—Held, that it could not be allowed; that the agreement discharged the company from all liability in respect to construction, renewal, maintenance, and repair of the streets; and that the clause providing that the agreement should not affect the rights of the parties in respect to the arbitration, &c., must be considered to have been inserted ex majori cautelâ, and could not do away with the express contract to relieve the company from liability.—Held, further, that by an Act passed in 1877, and a by-law made in pursuance thereof, the company were only assessable as for local improvements which, by the Municipal Act, constitute a lien upon the property assessed, but not a personal liability upon the owners or occupiers after they have ceased to be such; therefore after the termination of the franchise the company would not be liable for these rates. *City of Toronto* v. *Toronto Street R. W. Co.*, 23 S. C. R. 198.

Winnipeg Street Railway Company—*Highways—Monopoly.*]—Where a municipal council granted to a railway company authority to construct, maintain, and operate railways in its streets, with the exclusive right to such portion of any street as should be occupied by the railway, but with the plain intent that the company should have no concern whatever with any portions of any street not in actual occupation by their rails:—Held, that a subsequent clause in the deed of grant, giving to the company the refusal, on terms, of other streets in the city for railway purposes, was insufficient to constitute, contrary to the plain meaning of the previous stipulations, a right of monopoly in any of the streets of the city. Quære, whether, if a monopoly had been conceded, it was ultra vires of the municipal council. *Winnipeg Street R. W. Co.* v. *Winnipeg Electric Street R. W. Co.*, [1894] A. C. 615.

See County of York v. *Toronto Gravel Road and Concrete Co.*, 11 A. R. 765, 12 S. C. R. 517.

See also *post* VI.

III. DEBENTURES.

Powers of Company—*Holder—Form—Promissory Notes.*]—Defendants, under 24 Vict. c. 83, issued their debentures, payable in 1887, to which were appended coupons for

interest, in the following form:—"$40. Coupon No. 1. $40. The Toronto Street Railway Company will pay to the holder thereof, on the 1st July, 1862, at the Bank of Upper Canada, Toronto, forty dollars, interest due that day on bond No. 3. Alex. Easton, President." In an action by the plaintiff, as holder of several of said debentures, to enforce payment of such interest, on motion for nonsuit, or to arrest judgment: — Held, that there was nothing on the face of the debentures to shew that in the issue thereof the company exceeded their powers, and that such an objection should have been raised by the pleadings. (2) That no evidence having been given to the contrary, it was to be presumed that the plaintiff was the person to whom the debentures in question were given, or for whom they were intended by the company, and therefore the judgment could not be arrested. (3) The debentures were not void because they were not made payable to any particular named individual or company. (4) That the plaintiff, before he could recover, must be proved to have been the original bearer and payee of the debentures sued upon, which were not assignable. (5) That the debentures or coupons could not be considered promissory notes, as the company had no power to make notes. *Geddes* v. *Toronto Street R. W. Co.*, 14 C. P. 513.

Suit to Enforce Payment — *Parties — Original Payee.*]—A bill being filed by the holder of debentures, issued by the defendants and payable to bearer, to enforce payment of the debentures, the company by answer objected that the person to whom the debentures were issued, was a necessary party to the suit, but did not name the person:—Held, that the company must be presumed to know who this person was, that there was no presumption that the plaintiff knew him; and that the person not being named in the answer, the objection could not be insisted on at the hearing. *Wood* v. *Toronto Street R. W. Co.*, 14 Gr. 409.

IV. Injury to Persons or Property.

Action—*Examination of Officers of Company.*]—In an action for damages for bodily injuries sustained by a pedestrian by reason of the negligent management and operation of a car of the defendants, an incorporated company:—Held, that the conductor and motorman of the car were officers of the company examinable for discovery; but, as the plaintiff had already examined the general manager, she must elect which of the above officers she would examine, under rule 439 (2). *Dawson* v. *London Street R. W. Co.*, 18 P. R. 223.

——— *Production of Documents — Privilege.*]—In an action for damages for personal injuries received by the plaintiff in a tramway car accident, as to which the conductor of the car had made a report to the defendants:—Held, that the portion of the report containing the names of the eye-witnesses of the accident was privileged from production. *Armstrong* v. *Toronto R. W. Co.*, 15 P. R. 208.

Licensee—*Improper Construction of Car.*]—The deceased, a boy selling newspapers, got on a street car at the rear end, and passed through the car to the front platform, where the driver was standing. He stepped to one side behind the driver, and fell off or disappeared from the car, there being no step on that side, and was killed by the car running over him. He had said just before that he was going on some distance further in the car, and the conductor at the time stated that he had reported the want of a step to the owners of the railway, but it had not been attended to. There was plenty of room in the car, but it was proved that passengers were always allowed to stand on the platform. It was not shewn that the deceased had either paid or been asked for his fare, but it appeared that newsboys were allowed to enter the cars to sell newspapers without being charged:—Held, that the deceased was lawfully on the car, and being so was entitled to be carried safely, whether he was a passenger for reward or not. Held, also, that there was evidence for the jury of negligence on the part of defendants in the absence of the step, and no such contributory negligence on the part of the deceased as should, as a matter of law, prevent the plaintiff's recovery. A nonsuit was therefore set aside. Upon appeal this decision was reversed, on the ground that unless the deceased was upon the cars as a passenger, on a contract of carriage express or implied, and not as a mere licensee or volunteer, he had no right of action against the defendants for the absence of the step, which was no breach of duty to him, but must take the car as he found it; and that upon the evidence he must be taken to have been a licensee only. *Blackmore* v. *Toronto Street R. W. Co.*, 38 U. C. R. 172.

——— *Wrongful Act of Servant—Scope of Employment.*]—A master is not liable for the wrongful act of a servant, though intended to promote the master's interest, if it is an act outside the scope of the servant's employment and authority, and is one which the master himself could not legally do. The defendants were held not liable where the motorman of one of their electric cars, who had no control over or authority to interfere with passengers or persons on the cars, pushed off the car, as the jury found, a newsboy who was getting on to sell a paper to a passenger. *Coll* v. *Toronto R. W. Co.*, 25 A. R. 55.

Passenger—*Attempting to Board Car—Contributory Negligence.*]—The plaintiff, in broad daylight, having hailed a westward bound tramway car, on the north track, crossed over from the south side of the street to get into it; the eastward bound car at the time was coming along on the south track at a fast trot, but was some 300 feet away to the west. The plaintiff was somewhat intoxicated. As he took hold of the westward bound car to board it, he fell, and the eastward bound car passed over his foot, which was on the rail. The jury found that there was no negligence on the part of the defendants, and that the plaintiff was guilty of contributory negligence, on which the trial Judge entered judgment for the defendants:—Held, that the attendant or surrounding circumstances were, in the absence of any explanatory evidence by the defendants, sufficient to raise the presumption that there was negligence on the part of those in charge of the eastward bound car, the consequence of which was the happening of the accident, and that there must be a new trial. *Forwood* v. *City of Toronto*, 22 O. R. 351.

——— *Contract to Carry—Want of Care and Skill.*]—In an action against the proprietors of a railway car drawn by horses, for an accident to the plaintiff by the carelessness of the driver, an averment that the contract was to carry safely, does not mean safely at all events, and it is sufficient to prove that the accident arose from the driver's want of care and skill. *Thompson* v. *Macklem*, 2 U. C. R. 300.

——— *Contributory Negligence.*] — The plaintiff, standing on the front platform of one of defendants' cars, which was crowded, was thrown off by a jolt and injured, but it did not appear whether, at the time of the accident, he was holding on to the iron rail on the platform or not:—Held, that the fact of the plaintiff not proving affirmatively that he was so holding on was not a ground for nonsuit. *Cornish* v. *Toronto Street R. W. Co.*, 23 C. P. 355.

——— *Damages for Injury—Misdirection—New Trial.*]—See *Hesse* v. *St. John R. W. Co.*, 30 S. C. R. 218.

——— *Expulsion from Car—Damages—Remoteness—Evidence as to Operation of Railway.*]—A passenger on a street railway having the right to be transferred from a car on one street line to that of another street line on the railway was refused such right by the conductor of the car to which he had the right to be transferred, and was forced to leave it:—Held, that he was entitled to recover damages occasioned by an illness caused by exposure to the cold in leaving the car, such damages not being too remote. The defendants, an incorporated company, were the successors of certain persons who had purchased the road, and, although no conveyance of the road to the defendants was proved, it was shewn that the persons working the railway at the time of the occurrence were in the defendants' employment, and that the car in question was in charge of their employees:—Held, sufficient evidence that the defendants were operating the road so as to render them liable to the plaintiff. *Grinsted* v. *Toronto R. W. Co.*, 24 O. R. 685.

Affirmed by the court of appeal, 21 A. R. 578, and by the supreme court of Canada, 24 S. C. R. 570.

——— *Expulsion from Car—Misconduct.*]—A passenger on a street railway having refused when requested by the conductor of the car to remove his feet from the cushion of the opposite seat, and used strong language to the conductor, was ejected from the car:—Held, that the conductor had a right to eject him. *Davis* v. *Ottawa Electric R. W. Co.*, 28 O. R. 654.

——— *Place of Danger—Invitation—Improper construction of Bridge—Negligence—Damages.*]—On an electric car on defendants' railway, there was a step or footboard running along the side of the car about a foot from the ground, leading to doors on each side of and at the centre and rear parts of the car, with a brass rail or rod about chest high running parallel with the footboard for persons standing thereon to hold on by, and electric buttons on the side of the car to communicate with the conductor. The plaintiff, seeing that the car was filling up rapidly, all the inside seats being occupied, and the rear platform crowded, jumped on the footboard, the car then having started. A short distance from where the plaintiff got on was a bridge, which the car had to cross, the approach thereto being on a curve, by reason of which the plaintiff was swayed out from the car, and as it entered on the bridge he was struck by one of the side-posts of the bridge and thrown off and injured, the space between the post and the side of the car being only fourteen inches:—Held, that an invitation to the plaintiff to stand on the footboard must be implied, and while there he was entitled to be carried safely, which the improper construction of the bridge prevented defendants doing, and which, therefore, constituted evidence of negligence. A verdict for the plaintiff was sustained, except as to the damages, $3,300, which were held to be excessive, and a new trial was directed unless the plaintiff consented to their being reduced to $2,000. The elements in assessing damages in cases of this kind considered. *Fraser* v. *London Street R. W. Co.*, 29 O. R. 411, 26 A. R. 383.

Servant—*Defect in Plant.*]—Action by a motorman in the employment of a street railway company, under the Workmen's Compensation for Injuries Act, to recover damages for injuries sustained by the plaintiff while coupling together a motor car and a trailer:—Held, by the court of appeal, that having car buffers of different lengths, so that in coupling the buffers overlap and afford no protection to the person effecting the coupling, is a "defect in the arrangement of the plant" within the meaning of the Workmen's Compensation for Injuries Act, 55 Vict. c. 30, s. 3 (O.) Held, by the supreme court of Canada, that negligence on the part of the company in not having proper appliances to prevent injury was clearly proved, and a new trial properly refused. *Bond* v. *Toronto R. W. Co.*, 22 A. R. 78, 24 S. C. R. 715.

——— *Negligence of Fellow Servant—Workmen's Compensation Act.*]—The motorman of a car running on an electric system is a "person who has charge or control" thereof within the meaning of s.-s. 5 of s. 3 of the Workmen's Compensation for Injuries Act, R. S. O. 1897 c. 160, and his employers are liable in damages to a fellow servant for injuries sustained while in discharge of his duty, owing to the motorman's negligence in passing too close to a waggon which is moving out of the way of the car. *Snell* v. *Toronto R. W. Co.*, 27 A. R. 151.

Traveller — *Contributory Negligence — Findings of Jury—New Trial.*]—On the trial of an action against a street railway company for damages in consequence of injuries received through the negligence of the company's servants, the jury answered four questions in a way that would justify a verdict for the plaintiff. To the fifth question, "could Rowan by the exercise of reasonable care and diligence have avoided the accident?" the answer was, "we believe that it could have been possible:"—Held, that this answer did not amount to a finding of negligence on the part of the plaintiff as a proximate cause of the accident which would disentitle him to a verdict. Held, further, that, as the other findings established negligence in the defendants which caused the accident, which amounted to a denial of contributory negligence; as there was no evidence of negligence on the plaintiff's part in the record; and as the court had before it all the

materials for finally determining the question in dispute; a new trial was not necessary. *Rogan* v. *Toronto R. W. Co.*, 29 S. C. R. 717.

——— *Infirm Person.*]—It is the duty of a motorman in charge of an electric car on a street railway to take special care to have the car sufficiently under control to enable him to avoid collision with aged and infirm persons on foot whose infirmities are plainly evident and who may be crossing the line of railway at a street crossing. *Haight* v. *Hamilton Street R. W. Co.*, 29 O. R. 279.

——— *Negligence of Motorman—Frightening Horses.*]—The plaintiff, who was driving a carriage with a pair of horses, stopped near a railway crossing to allow a train to pass. An electric car of the defendants coming in the opposite direction stopped on the other side of the railway crossing for the same reason. The plaintiff's horses were frightened by the train and became restive, and after the train passed the plaintiff waved his hand to the motorman of the electric car as a signal, as he contended, not to start the car. The horses were apparently under control and the motorman started the car, when the horses became frightened again and ran away:—Held, that the plaintiff's signal was ambiguous, and, as there was apparently no danger, the motorman could not be said to have been guilty of negligence, and therefore that the defendants were not liable. Judgment in 31 O. R. 309 reversed. *Myers* v. *Brantford Street R. W. Co.*, 27 A. R. 513.

——— *Obstruction of Street—Question of Fact—Jury.*]—An action was brought against the city of Toronto to recover damages for injuries sustained by the plaintiff, who was driving through the city, by reason of snow having been piled on the side of the street, and the street railway company was brought in as a third party. The evidence was that the snow from the sidewalks was placed on the roadway immediately adjoining by servants of the city, and snow from the railway tracks was placed by servants of the railway company upon the roadway immediately adjoining the track, without any permission from the city, thus raising the roadway next to the track, where the accident occurred, to a height of about twenty inches above the rails. The jury found that the disrepair of the street was the act of the railway company, which was therefore made liable over to the city for the damages assessed. The company contended on appeal that the verdict was perverse and contrary to evidence:—Held, that under the evidence given of the manner in which the snow from the track had been placed on the roadway immediately adjoining, the jury might reasonably be of opinion that if it had not been so placed there the accident would not have happened, and that this was the sole cause of the accident. *Toronto R. W. Co.* v. *City of Toronto*, 24 S. C. R. 589.

——— *Right of Way—Speed.*]—The right of way which street railway cars have over the portion of the street on which the rails are laid, is not an exclusive right or a right requiring vehicles or pedestrians at all hazards to get out of the way at their peril; and, notwithstanding the absence of any regulations as to speed, the cars must be run at such a rate as may be reasonable under the circumstances of each particular case. The plaintiff was sitting on a waggon which was being driven on that part of the street occupied by the rails, and while going down a steep incline, a motor car and trailer coming along behind, by reason of the motorman not having proper control of the car, and of the excessive speed thereof, the waggon was run into and the plaintiff injured:—Held, that the defendants were liable therefor. *Ewing* v. *Toronto R. W. Co.*, 24 O. R. 694.

Held, by the court of appeal, that the Toronto Railway Company have not, under their charter and their agreement with the city of Toronto, an exclusive right of way upon their tracks, or the right to run their cars at any rate of speed they please. Whilst their cars must not be wilfully impeded, they are bound to recognize the rights and necessities of public travel and so to regulate the speed that the cars may be quickly stopped, should occasion require it. Where, therefore, there was some evidence that an accident was the result of a car running at excessive speed, the judgment of the common pleas division, upholding a verdict against the company was affirmed. Held, by the supreme court of Canada, affirming the judgment of the court of appeal, that persons crossing the street railway tracks are entitled to assume that the cars running over them will be driven moderately and prudently, and if an accident happens through a car going at an excessive rate of speed, the street railway company are responsible. The driver of a cart struck by a car in crossing a track is not guilty of contributory negligence because he did not look to see if a car was approaching, if, in fact, it was far enough away to enable him to cross if it had been proceeding moderately and prudently. He can be in no worse position than if he had looked and seen that there was time to cross. *Gosnell* v. *Toronto R. W. Co.*, 21 A. R. 553, 24 S. C. R. 582.

——— *Speed—Contributory Negligence—Findings of Jury.*]—A cab driver was endeavouring to drive his cab across the track of an electric railway when it was struck by a car and damaged. In an action against the tramway company for damages it appeared that the accident occurred on part of a down grade several hundred feet long, and that the motorman after seeing the cab tried to stop the car with the brakes, and that proving ineffectual reversed the power, being then about a car length from the cab. The jury found that the car was running at too high a rate of speed, and that there was also negligence in the failure to reverse the current in time to avert the accident; that the driver was negligent in not looking out more sharply for the car, and that, notwithstanding such negligence on the part of the driver, the accident could have been averted by the exercise of reasonable care:—Held, affirming the judgment in 32 N. S. Rep. 117, that the last finding neutralized the effect of that of contributory negligence; that, as the car was on a down grade, and going at an excessive rate of speed, it was incumbent upon the servants of the company to exercise a very high degree of skill and care in order to control it if danger was threatened to any one on the highway; and that from the evidence given it was impossible to say that everything was done that reasonably should have been done to prevent damage from the excessive speed at which the car was being run. *Halifax Electric Tramway Co.* v. *Inglis*, 30 S. C. R. 256.

——— *Speed—Contributory Negligence—Proximate Cause.*]—Where the evidence of negligence and of contributory negligence are so interwoven that contributory negligence is brought out and established on the evidence of the plaintiff's witnesses, if there is no conflict on the facts in proof, the Judge may withdraw the question from the jury and direct a nonsuit. Wakelin v. London and South-Western R. W. Co., 12 App. Cas. at p. 52, referred to. In an action against a street railway company for negligence, it appeared that an electric car of the defendants was being run at a very rapid speed and that the gong was not sounded as the car approached a certain street, at the junction of which the plaintiff, who was driving a horse along the same street and in the same direction in which the car was going, turned in front of the car to cross the rails, when a wheel of his vehicle was struck by the car, and he was injured. It also appeared by the evidence of his own witnesses that he did not, before turning, look or listen to ascertain the position of the car, although he knew it was coming:—Held, that this was negligence on his part, and was the proximate cause of the disaster, for the defendants could not, by the exercise of reasonable or any degree of diligence or care, after this negligence of the plaintiff, have avoided the misfortune. Nonsuit affirmed. *Danger* v. *London Street R. W. Co.*, 30 O. R. 493.

Workman on Road—*Contributory Negligence.*]—A workman in the employment of a street railway company was injured by a car striking him while working on the track, and brought this action for damages. The company defended on the ground that he could have escaped if he had been reasonably careful in looking out for passing cars. The trial Judge dismissed the action, holding that the plaintiff was the cause of his own misfortune, and could not make the defendants liable. This judgment was affirmed by a divisional court, but reversed by the court of appeal, which ordered a new trial. The supreme court of Canada affirmed the decision of the court of appeal, and, on counsel for the company stating that a new trial was not desired, ordered judgment to be entered for the plaintiff for $500 damages, the amount assessed by the jury at the trial. *Hamilton Street R. W. Co.* v. *Moran*, 24 S. C. R. 717.

——— *Right of Way—Speed—Warning.*]—A car of the defendants' electric street railway was moving very quickly along a down grade on a street in a city, where the plaintiff, who was in the employment of the city corporation, was engaged in his duty of sweeping the roadbed. The motorman did not sound the gong on the car, as was customary, and ran into the plaintiff, injuring him:—Held, that, although the defendants had the right of way, the omission to sound the gong or give any warning of the approach of the car was actionable negligence. *Green* v. *Toronto R. W. Co.*, 26 O. R. 319.

——— *Six Months' Limitation—"By Reason of the Railway."*]—See *Kelly* v. *Ottawa Street R. W. Co.*, 3 A. R. 616.

See Carty v. *City of London*, 18 O. R. 122, *ante* II.

V. Operation.

Evidence of.]—See *Grinsted* v. *Toronto R. W. Co.*, 24 O. R. 683, *ante* IV.

Sunday — *Company—Lord's Day Act—"Conveying Travellers."*] — See *Attorney-General* v. *Hamilton Street R. W. Co.*, 27 O. R. 49, 24 A. R. 170.

——— *Injunction — Crown — Breach of Charter.*]—See *Attorney-General* v. *Niagara Falls, Wesley Park, and Clifton Tramway Co.*, 19 O. R. 624, 18 A. R. 453, *post* SUNDAY.

See City of Kingston, Portsmouth, and Cataraqui Electric R. W. Co., 28 O. R. 399, 25 A. R. 462.

VI. Statutory Requirements.

Height of Rails — *Change in Street Level.*] — Held, that defendants, having laid their rails as required by their charter, were not bound to alter or adapt them from time to time to changes in the level of the street; and therefore that they were not liable for an accident arising from the street having become worn down by traffic, so as to leave the rail, which remained as originally laid, several inches above the level. *Eddy* v. *Ottawa City Passenger R. W. Co.*, 31 U. C. R. 569.

——— *Enforcement of Contract—Suit by Municipal Corporation—Information—Parties—Nuisance — Abatement.*] — An Act having been passed authorizing the construction of a street railway, confirming a covenant entered into for the purpose with the municipal corporation, and providing that the rails should be laid flush with the streets, &c.:—Held, (1) that the rails must not only be flush when laid, but must be kept flush. (2) That to enforce the contract against the company a suit by the municipal corporation, the other party to the contract, was necessary. (3) That an information by the attorney-general to enforce the statutory restrictions was proper; and that, unless the parties concerned chose, by proper alterations and repairs, to comply with the requirements of the statute, the attorney-general was entitled to a decree for the removal of the rails as of a nuisance. (4) That the municipal corporation was a necessary party to the information. *Attorney-General* v. *Toronto Street R. W. Co.*, 14 Gr. 673.

Where, on an information by the attorney-general, the rails of a street railway were found by the court not to conform to the requirements of the statute authorizing the railway, the court granted a decree for the removal of the illegal rails; but gave time to the company, by proper alterations and repairs, to comply with the statute. *S. C.*, 15 Gr. 187.

—— *Indictment.*]—Defendants' Act of incorporation required that "the rails of their railway shall be laid flush with the streets and highways, and the railway track shall conform to the grades of the same, so as to offer the least possible impediment to the ordinary traffic of the said streets and highways:"—Held, that an omission to lay the rails flush with the street would be indictable, without shewing that any unnecessary impediment was offered to the traffic. *Regina* v. *Toronto Street R. W. Co.*, 24 U. C. R. 454.

——— *Nuisance—Injury to Animal.*]—The charter of a street railway company required the road between, and for two feet outside of, the rails to be kept constantly in good repair

and level with the rails. A horse crossing the track stepped on a grooved rail, and the caulk of his shoe caught in the groove, whereby he was injured. In an action by the owner against the company it appeared that the rail, at the place where the accident occurred, was above the level of the roadway: —Held, that, as the rail was above the road level, contrary to the requirements of the charter, it was a street obstruction unauthorized by statute, and, therefore, a nuisance, and the company was liable for the injury to the horse caused thereby. *Halifax Street R. W. Co.* v. *Joyce*, 22 S. C. R. 258.

See Attorney-General v. *Kiely*, 22 Gr. 458, *post* VII.

See also *ante* II.

VII. Miscellaneous Cases.

Bonus — *By-law — Petition — Voting.*]— Although, under 54 Vict. c. 42, s. 36 (O.), it is necessary, when aid is sought to be granted to a street railway by a portion of a municipality, that a majority in number representing one-half in value of the persons shewn by the last assessment roll to be the owners of real property in such portion should petition for the passing of the by-law, it is sufficient if the by-law is carried at the poll by a majority of those voting upon it. *Adamson* v. *Township of Etobicoke*, 22 O. R. 341.

Contract with Steamboat Owner— *Ultra Vires.*]—The defendants, a street railway company, entered into an agreement on the 29th December, 1874, before their road was in operation, with the Grand Trunk Railway Company, to carry freight for that company between the town of Sarnia and Point Edward; and in April, 1875, their road being still unfinished, they, in order to fulfil their contract, agreed with the plaintiff, a steamboat owner, for the transportation of merchandize by water between these points until their railway should be opened. The plaintiff performed the service, and the defendants received payment from the Grand Trunk Railway Company therefor. It was objected that defendants had no power to make the contract with the plaintiff, and that he therefore could not recover: — Held, that, to the extent to which the defendants had benefited by the plaintiff's services they were liable to him, and should not be allowed to raise the objection of ultra vires. *Clarke* v. *Sarnia Street R. W. Co.*, 42 U. C. R. 39.

Customs Duties—*Exemptions—Rails.*]— The exemption from duty in 50 & 51 Vict. c. 39, item 173, of "steel rails weighing not less than twenty-five pounds per lineal yard, for use on railway tracks," does not apply to rails to be used for street railways which are subject to duty as "rails for railways and tramways of any form" under item 88. *Toronto R. W. Co.* v. *The Queen*, 25 S. C. R. 24.

Election of Directors.] — See *Kiely* v. *Kiely*, 3 A. R. 438.

Junction of Electric Railway with Canadian Pacific Railway — *Laying Switch on Highway—Power to Authorize—Consent of Municipality—Order of Railway Committee of Privy Council—Expropriation of Right of Way.*]—The defendants were a company incorporated under statutes of the Province of Ontario, operating an electric railway upon Yonge street, between the town of Newmarket and the city of Toronto, with its southern terminus in the northern part of the city, a few yards north of the Canadian Pacific Railway lines. By order of the 23rd November, 1899, the railway committee of the privy council of Canada, reciting the consent of counsel on behalf of the corporation of the city of Toronto, approved of the defendants connecting their tracks with the tracks of the Canadian Pacific Railway by means of a switch, as shewn on a plan annexed to the order, and on the conditions imposed by the order:—Held, that the defendants had not the right, without the authority or consent of the city corporation, to occupy or expropriate or otherwise to force their way over a part of Yonge street within the limits of the city so as to enter the lands of the Canadian Pacific Railway Company and make the proposed junction. The order of the railway committee was to be regarded as dealing only with the mode of junction or union, and not as professing to expropriate a right of way over the highway. And the consent of counsel for the city corporation, when before the railway committee, was to be viewed in the same way. Section 173 of the Railway Act of Canada does not give the railway committee power to expropriate land or to deal with the right of property. The protection of the crossing or junction is the object of the committee, which has to approve of the place and mode thereof, and which is not concerned, so far as this section applies, with how the railways arrive at the point of union. Held, also, that the defendants had not, by virtue of any statute or agreement, viewing their road as a mere street railway, the right to expropriate the right of way; and, even if their road was a railway within the meaning of the Railway Act, s. 183 was not applicable, for the proposition here was not to carry the tracks "along an existing highway;" and they could not avail themselves of s. 187, for the provisions of law applicable to the taking of land by the company had not been complied with. The plaintiffs were therefore entitled, without derogation of the order of the railway committee, to an injunction restraining the defendants from effecting the proposed junction by the method shewn on the plan. By an agreement made between the plaintiffs and defendants, the defendants agreed that, upon receiving at any time twenty-four hours' notice from the plaintiffs' engineer, they would cease running their cars by electricity on the portion of Yonge street within the city limits:—Held, that, nothing having occurred to operate as a waiver by the plaintiffs of this term of the agreement, and the notice having been duly given, the plaintiffs were entitled to an injunction restraining the defendants from propelling their cars by electricity within the limits of the city. *City of Toronto* v. *Metropolitan R. W. Co.*, 31 O. R. 367.

Obstruction of Railway — *Liability of Wrongdoers.*]—The defendant J., owner of a frame tenement in Toronto, agreed with his co-defendant D. for the removal thereof to another part of the city, such removal to be made at D.'s own risk and without damage to that or any other property. Both defendants contemplated and intended that the house was to be drawn and moved along Sherbourne street for some distance. Under a by-law of the city, all persons were prohibited under a

penalty from moving any building into, along, or across any street without the written permission of the board of works. In this case no such permission was obtained, and in the course of hauling the building along the line of the track of the plaintiffs one of the sills was upset, thus preventing its further removal for two days, during which time the plaintiffs sustained loss by the non-receipt of fares and damage to their property:—Held, that J., as well as D., was liable for the loss so occasioned. Semble, that, as the plaintiffs had, by their charter, the superior right of user and occupation of the street, a duty was cast upon J. to see that proper precautions were taken to prevent injury arising from obstructing the railway by means of the building of which he was procuring the removal, and which could not from its size be removed along the street without obstructing the traffic. *Toronto Street R. W. Co.* v. *Dollery*, 12 A. R. 679.

Repair of Streets.]—See *Carty* v. *City of London*, 18 O. R. 122, *ante* II.

——— *Neglect of — Nuisance — Information.*]—In 1873 an injunction was granted restraining the Toronto Street Railway Company, on the ground of nuisance, from using their railway, unless by a day named the defendants should put the same in a good and sufficient state of repair, to the satisfaction of an engineer named, who, on the day appointed, reported the railway in such a state of repair as the decree in the cause required. Two years afterwards the said railway, as also other lines laid in the meantime by the said company, had, as was alleged, been allowed to get into such a state of disrepair as to become again a nuisance to the public, whereupon a petition was filed by the relators, alleging these facts, and claiming the benefit of the decree:—Held, that, as the decree had already been complied with, a new information must be filed to obtain the relief now asked. *Attorney-General* v. *Kiely*, 22 Gr. 458.

Stock — *Director — Qualifying Shares—Estoppel.*]—See *Kiely* v. *Smyth*, 27 Gr. 220, *ante* COMPANY, VII. 5.

Work for General Advantage of Canada—*Crossing Lines of Dominion Railways—Municipal By-law—Municipal Act.*]—See *Regina* v. *Toronto R. W. Co.*, 26 A. R. 491.

See ASSESSMENT AND TAXES.

STRIKING OUT PLEADINGS.

See PLEADING — PLEADING AT LAW BEFORE THE JUDICATURE ACT, IX. — PLEADING SINCE THE JUDICATURE ACT, XI.

SUB-AGENT.

See PARLIAMENT, I. 2 (b).

SUBMISSION.

See ARBITRATION AND AWARD, VIII.—MUNICIPAL CORPORATIONS, IV. 4.

SUBPOENA.

See EVIDENCE, XIV. 1 (c) — PRACTICE—PRACTICE IN EQUITY BEFORE THE JUDICATURE ACT, XXIV. — PRACTICE SINCE THE JUDICATURE ACT, XVIII.

SUBROGATION.

Conventional Subrogation — *Payment of Debts—Registration—Error.*]—No formal or express declaration of subrogation is required under Art. 1155, s. 2, C. C., when the debtor borrowing the sum of money declares in his deed of loan that it is for the purpose of paying his debts, and in the acquittance he declares that the payment has been made with the moneys furnished by the new creditor for that purpose. Where subrogation is given by the terms of a deed, the erroneous noting of the deed by the registrar as a discharge, and the granting by him of erroneous certificates, cannot prejudice the party subrogated. *Owens* v. *Bedell*, 19 S. C. R. 137.

Execution Creditor—*Setting aside First Mortgage—Priority over Second Mortgage—Costs.*]—As a general rule the doctrine of subrogation does not apply in favour of a party who has not paid money or given something in satisfaction or extinguishment of a security, claim, or demand, or partly so, or who has not paid something by way of getting in a security, or the like. The plaintiff, an execution creditor against lands, brought an action to set aside as fraudulent two mortgages of real estate made by his execution debtor, and succeeded as to the first, the action being dismissed as to the second mortgage. The lands were sold, but did not realize enough to pay the plaintiff and the second mortgagee. The plaintiff then claimed to be entitled by his diligence to priority for his execution over the second mortgage, to the extent of the mortgage so set aside as fraudulent:—Held, that he was not entitled to any such priority as to his execution, but that his costs as between solicitor and client over and above his costs as between party and party, and such of the latter costs as might not be realized from the defendants (other than the second mortgagee) were a first charge on the fund as in the nature of salvage. *Coursolles* v. *Fookes*, 16 O. R. 691.

Fire Insurance—*Rights of Mortgagee—Insurance Company — Subrogation Agreement.*]—See *McKay* v. *Norwich Union Ins. Co.*, 27 O. R. 251.

Payment of Mortgage — *Discharge.*]—Held, that the defendants were not entitled to be subrogated to the rights of a mortgagee in whose mortgage the plaintiffs' ancestress had joined as a granting party, but which had been paid off and discharged. *Marsh* v. *Webb*, 21 O. R. 281.

——— *Discharge — Mistake — Intervening Execution.*]—The plaintiff advanced money to the owner of real estate to pay off existing mortgages thereon, and took and registered a mortgage on the property for the amount, paid off the prior mortgages, and registered discharges of them, the defendant having all the time an execution against the lands of the mortgagor in the hands of the sheriff of the county in which the lands were situate, of

which the plaintiff was ignorant, his solicitors having neglected to search:—Held, that the plaintiff was entitled to be subrogated to the rights of the original mortgagees, and to priority over the defendant's execution, to the amount paid to discharge the prior mortgages, upon the ground of mistake, he having done what he did under the belief that he was obtaining a first charge; and that he was not disentitled to relief because by using ordinary care he might have discovered the mistake, the defendant not having been prejudiced thereby. *Brown* v. *McLean*, 18 O. R. 533.

——— *Discharge — Mistake—Intervening Lien—Registry Laws.*] — The plaintiff registered a lien against certain lands. On the day before such registration the defendant, an intending purchaser, had searched the registry and found only two incumbrances registered against the property. Shortly afterwards the defendant completed his purchase, and, having paid off the two incumbrances, registered discharges thereof with his deed of purchase, but, as he did not make a further search, he did not discover the plaintiff's lien:—Held, that the defendant was entitled to stand in the place of the incumbrancers whom he had paid off, and to priority over the plaintiff's lien. The Registry Act does not preclude inquiry as to whether there was knowledge in fact; and the court was not compelled as a conclusion of law to say that the defendant had notice of what he was doing, and so could not plead mistake. Brown v. McLean, 18 O. R. 533, specially considered. *Abell* v. *Morrison*, 19 O. R. 669.

——— *Discharge—Mistake—Second Mortgage—Estoppel by Conduct.*]—The plaintiff paid off a first mortgage on certain lands, and procured its discharge, taking a new mortgage to himself for the amount of the advance in ignorance of the fact of the existence of a second mortgage. Shortly afterwards, on ascertaining this fact, he notified the defendant, the holder, that he would pay it off, and the defendant, relying thereon, took no steps to enforce his security. Subsequently, on the property becoming depreciated and the mortgagor insolvent, the plaintiff brought an action to have it declared that he was entitled to stand in the position of first mortgagee:—Held, that the plaintiff by his acts and conduct had precluded himself from asserting such right. Brown v. McLean, 18 O. R. 533, and Abell v. Morrison, 19 O. R. 669, distinguished. *McLeod* v. *Wadland*, 25 O. R. 118.

Partnership — *Judicial Abandonment—Dissolution — Composition — Confusion of Rights.*] — A partner in a commercial firm which made a judicial abandonment was indebted to the firm at the time of the abandonment in a large amount overdrawn upon his personal account. Subsequently he made and carried out a composition with the creditors of the firm, and with the approval of the court the curator transferred to him, by an assignment in authentic form, "all the assets and estate generally of the said late firm, . . . as they existed at the time the said curator was appointed." At the same time the creditors discharge both him and his partners from all liability in respect of the partnership:—Held, that the effect of the judicial abandonment was to transfer to the curator not only the partnership estate, but also the separate estates of each partner, as well as the partners' individual rights as between themselves. Held, also, that the assignment of the estate by the curator and the discharge by the creditors, taken together, had the effect of releasing all the partners from the firm debts, but vested all the rights which had been transferred by the abandonment, in the transferee personally, and could not revive the individual rights of the partners as between themselves; and that, in consequence, any debt owing by the transferee to the partnership, as the time of the abandonment, became extinguished by confusion. *MacLean* v. *Stewart*, 25 S. C. R. 225.

See Jack v. *Jack*, 12 A. R. 476; *Purdom* v. *Nichol*, 16 O. R. 699, 15 A. R. 244, 15 S. C. R. 610; *Macdennan* v. *Gray*, 16 O. R. 321, 16 A. R. 224.

See INSURANCE, III. 12—MORTGAGE, VII. 10.

SUBSTITUTION.

See WILL, IV. 13 (c).

SUCCESSION DUTY.

See EXECUTORS AND ADMINISTRATORS, V. 4—REVENUE, IV.

SUMMARY PROCEDURE.

See EXECUTION, III. 3—FRAUD AND MISREPRESENTATION, III. 3 (f)—LACHES, VI. —LIEN, V. 10 — MUNICIPAL CORPORATIONS, XIX. 5 (i) — SOLICITOR, X. 4—WAY, V. 4.

SUNDAY.

I. CONTRACTS, 6770.

II. LORD'S DAY ACT, 6771.

III. MISCELLANEOUS CASES, 6773.

I. CONTRACTS.

Date of Payment.]—Where the day on which money is due under an agreement falls on Sunday:—Semble, that the payment must be made on Saturday. *Whittier* v. *McLennan*, 13 U. C. R. 638.

Date of Performance.] — In an action for specific performance, even when time is of the essence of the agreement, if the party in default has done what in him lay to perform the contract, the court may, in the exercise of its discretion, grant the relief claimed. And where, by such agreement, the conveyance was to be tendered by the plaintiff to the defendant and the transaction closed on the "first day of June," which fell on Sunday, when no tender was made, and the conduct of the defendant on the following day was such as to exclude a tender on that day, in an action for specific performance the plaintiff was held entitled to judgment. *Cudney* v. *Gives*, 20 O. R. 500.

Illegality—*Pleading.*]—In an action upon a contract for the purchase of a horse, the statement of defence alleged that on Sunday the 19th April the defendant drove out to the plaintiff's place for the purpose of exchanging a horse, and that on that occasion it was agreed, &c. (stating the defendant's version of the bargain):—Held, that this statement was not sufficient to raise the defence of illegality under the Lord's Day Act, but, as it was treated at the trial as tendering the proper issue, and as the jury found that a contract was made on a Sunday, the judgment for the plaintiff was set aside and a new trial granted, without costs, with leave to both parties to amend. *Crosson* v. *Bigley*, 12 A. R. 94.

——— *Unmeritorious Defence—Solicitor—Negligence.*]—Semble, that an attorney would not be liable for culpable negligence in not urging for his client the defence that the agreement upon which he was sued was made on a Sunday, as it is no part of his professional duty to take all dishonest advantages. *Vail* v. *Duggan*, 7 U. C. R. 568.

Ordinary Calling.]—To avoid a contract made on Sunday, under 29 Car. II. c. 7, it must be shewn that it was in the ordinary calling of the person making it. *Bethune* v. *Hamilton*, 6 O. S. 105.

Promissory Note.]—A note made on Sunday in payment of goods sold on that day is void as between the original parties, but not as against an indorsee for value, and without notice. *Houliston* v. *Parsons*, 9 U. C. R. 681; *Crombie* v. *Overholtzer*, 11 U. C. R. 55.

Sale — *Mortgage.*]—All sales of real and personal property made on Sunday are void. Semble, that mortgages would not be void. *Lai* v. *Stall*, 6 U. C. R. 506.

Security.]—The giving or taking in security on Sunday is not void as a buying or selling. *Wilt* v. *Lai*, 7 U. C. R. 535.

II. LORD'S DAY ACT.

Conviction—*Barber—Shaving.*]—The defendant, a barber, was convicted before a justice of the peace for exercising the worldly labour and work of his ordinary calling by shaving customers for hire at his shop on Sunday, contrary to the Lord's Day Act, C. S. U. C. c. 104. Upon certiorari motion was made to quash the conviction on the ground that shaving was an act of necessity within the exception of the Act:—Held, that a barber is a workman within the Act. (2) That shaving by a barber in the ordinary course of his business is a violation of the statute, and not a work of necessity or charity. Philips v. Innes, 4 Cl. & F. 234, approved. Quære, whether a barber in a hotel or boarding-house might not, by arrangement with the keeper, be deemed a servant, to do the work of shaving guests or the family on Sunday. *Regina* v. *Taylor*, 15 C. L. J. 362.

——— *Druggist — Sale of Goods — Medicine.*]—Defendant, a druggist in the city of Toronto, sold five cents' worth of peppermint lozenges at his shop on a Sunday. The purchaser did not ask for them as medicine, he had no doctor's certificate, and he was asked no questions. It was shewn that peppermint lozenges were generally kept and sold by druggists as medicine. Defendant having been convicted on this evidence under the "Act to prevent the profanation of the Lord's Day," C. S. U. C. c. 104, and fined $20 and costs, the conviction was removed by certiorari:—Held, that the finding of the magistrate as to whether the lozenges were or were not medicine was subject to review by the court. (2) That there was no evidence to sustain the conviction, for the article, sold as it was by a druggist, must be considered primâ facie a medicine, though it was not expressly asked for or sold as such, and the case was within the exception in the Act, "selling drugs and medicines." The conviction, therefore, was quashed. *Regina* v. *Howarth*, 33 U. C. R. 537.

——— *Ordinary Calling—Work of Necessity.*]—Defendant was convicted under 8 Vict. c. 45, for that he did, on Sunday, work at his ordinary calling, inasmuch as he and his men did make and haul in hay on the said day:—Held, that the conviction must be quashed, as not shewing any offence within the statute, for defendant was not alleged to be of, nor to have worked at, any particular calling. Semble, that it was also bad for not negativing the exception in the statute, by stating that the work done was not one of necessity. *Hespeler* v. *Shaw*, 16 U. C. R. 104.

——— *Owner of Steamboat — Carrying Travellers.*]—Defendant was held liable for plying with his steamboat on Sunday, between the city of Toronto and the peninsula, persons carried between those places not being "travellers" within the exception in the Act. *Regina* v. *Tinning*, 11 U. C. R. 636.

The defendants, owner and captain respectively of a steamboat, advertised that they would carry excursions on Sundays. A number of passengers left Buffalo, in the State of New York, on a Sunday morning, and proceeded by rail to Niagara, whence they were carried by the defendants' steamboat to Toronto and back the same day. The defendants having been convicted of an offence under R. S. O. 1877 c. 189:—Held, that the passengers were "travellers" within the meaning of the exception in s. 1 of the Act; that there is no distinction in such a case between travellers for pleasure and for business; and that the convictions were therefore bad. *Regina* v. *Daggett*, *Regina* v. *Fortier*, 1 O. R. 537.

——— *Public Cab Driver.*]—A cab driver, the servant of a livery stable keeper, is not within s. 2 of the Lord's Day Act, R. S. O. 1887 c. 203. Conviction quashed. *Regina* v. *Budway*, 8 C. L. T. Occ. N. 269.

A cab driver is not within any of the classes of persons enumerated in s. 1 of the Lord's Day Act, R. S. O. 1887 c. 203, and cannot be lawfully convicted thereunder for driving a cab on Sunday. Conviction of the defendant under the Act for unlawfully exercising the worldly business of his ordinary calling as a cab driver on the Lord's day:—Held, bad for uncertainty. *Regina* v. *Somers*, 24 O. R. 244.

——— *Public Servant of Crown.*]—R. S. O. 1877 c. 189, which forbids the profanation of the Lord's Day by persons carrying on their ordinary business, does not apply to persons in the public service of Her Majesty, and a

conviction of a government locktender on the Welland canal, for locking a vessel through the canal on Sunday, in obedience to the orders of his superiors, was quashed. *Regina* v. *Berriman*, 4 O. R. 282.

——— *Railway Servant.*]—The defendant was convicted of following his ordinary calling of foreman of the G. T. R. Co. elevator in superintending the unloading of grain from a vessel into the elevator on Sunday:—Held, that R. S. O. 1897 c. 246 does not apply to that railway, and as it did not apply to the employer it did not apply to the employee. Conviction quashed, with costs against the prosecutor. *Regina* v. *Reid*, 30 O. R. 732.

——— *Victualling House Keeper—Supplying Food—Ice Cream.*]—Supplying ice cream to the complainants, under the circumstances set out in the report, on a Sunday was the supplying a refreshment in the nature of a light meal in the ordinary course of the defendant's business as a victualling house keeper, and was not an offence against the Lord's Day Act, R. S. O. 1897 c. 246. A person carrying on the business of a victualling house keeper cannot make any distinction as to whom he supplies, or what he supplies, provided it is food or victuals; and ice cream is food. *Regina* v. *Albertie*, 20 C. L. T. Occ. N. 123.

Injunction — *Street Railway—Breach of Charter—Crown.*]—The defendants were incorporated by letters patent under the Street Railway Act, R. S. O. 1887 c. 171, which authorized them to construct and operate (on all days except Sunday) a street railway:—Held, that an action would not lie by the Crown to restrain the defendants from operating the road on Sunday, the restriction against their doing so being at most an implied one, and no substantial injury to the public, or any interference with proprietary rights, being shewn. Judgment in 19 O. R. 624 affirmed. *Attorney-General* v. *Niagara Falls, Wesley Park, and Clifton Tramway Co.*, 18 A. R. 453.

———*Street Railway — Company—"Conveying Travellers."*]—A company incorporated for the purpose of operating street cars does not come within the Lord's Day Act, R. S. O. 1887 c. 203, s. 1. Taking persons in street cars from point to point in a city is not "conveying travellers" within the meaning of the Act. Regina v. Tinning, 11 U. C. R. 636, and Regina v. Daggett, 1 O. R. 537, considered. Judgment in 27 O. R. 49 affirmed. *Attorney-General* v. *Hamilton Street R. W. Co.*, 24 A. R. 170.

See Regina v. *Barnes*, 45 U. C. R. 276, *post* III.; *Bethune* v. *Hamilton*, 6 O. S. 105, and *Crosson* v. *Bigley*, 12 A. R. 94, *ante* I.

III. MISCELLANEOUS CASES.

Affidavit of Debt—*Writ.*]—It is irregular to make an affidavit of debt or issue a writ on Sunday. *Hall* v. *Brush*, T. T. 3 & 4 Vict.

Amusements—*Imperial Act.*]—The Imperial Act 21 Geo. III. c. 49, prohibiting amusements and entertainments on the Lord's day, is in force in Ontario, and an application to quash a conviction thereunder for keeping a disorderly house known as the "Royal Opera House," opened and used for public entertainment and amusement on the Lord's day, was therefore refused. *Regina* v. *Barnes*, 45 U. C. R. 276.

Municipal By-law—*Park Preaching.*]—It is provided by R. S. O. 1887 c. 184, s. 504, s-s. 10, that the council of every city and town may pass by-laws for the management of the farm, park, garden, &c.:—Held, that the municipal council of a city had power under this enactment to pass a by-law providing that no person shall on the Sabbath day, in any public park, square, garden, &c., in the city, publicly preach, lecture, or declaim. Held, also, that the by-law violated no constitutional right, and was not unreasonable. Bailey v. Williamson, L. R. 8 Q. B. 118, followed. Held, also, that the by-law was not bad for uncertainty as to the day of the week indicated, by reason of the use of the term "Sabbath day." *Re Cribbin and City of Toronto*, 21 O. R. 325.

Inquest.]—A coroner's inquest held on Sunday is invalid. *In re Cooper and Cooper*, 5 P. R. 256.

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See MASTER AND SERVANT, VI. 4.

SUPERINTENDENT.

See SCHOOLS, COLLEGES, AND UNIVERSITIES, IV. 6.

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SUPREME COURT OF CANADA.

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I. Appeal—Grounds for Interference or Non-interference.

1. *Matters of Discretion.*

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

Costs.]—The making or refusing to make an order for the taxation of a bill of costs, upon the application of a third party, is a matter of discretion, and no appeal lies to this court. *McGugan* v. *McGugan*, 21 S. C. R. 267.

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

It is only when some fundamental principle of justice has been ignored or some other gross error appears that the supreme court will interfere with the discretion of provincial courts in awarding or withholding costs. *Smith* v. *St. John City R. W. Co.*, *Consolidated Electric Co.* v. *Atlantic Trust Co.*, *Consolidated Electric Co.* v. *Pratt*, 28 S. C. R. 603.

In order to avoid expense the supreme court of Canada will, when possible, quash an appeal involving a question of costs only, though there may be jurisdiction to entertain it. *Schlomann* v. *Bowker*, 30 S. C. R. 323.

New Trial.]—Under s. 22 of the Supreme and Exchequer Courts Act no appeal lies from the judgment of a court granting a new trial, on the ground that the verdict was against the weight of evidence, that being a matter of discretion. *Book* v. *Merchants Marine Ins. Co.*, 1 S. C. R. 110.

Setting aside Judgment by Default.]—After judgment has been entered by default in an action in the high court of justice, it is in the discretion of the master in chambers to grant or refuse an application by the defendant to have the proceedings reopened to allow him to defend, and an appeal to the supreme court from the decision of the court of last resort on such an application is prohibited by s. 27 of the Supreme and Exchequer Courts Act. Quære, is the judgment on such application a "final judgment" within the meaning of s. 24 (a) of the Act? *O'Donohoe* v. *Bourne*, 27 S. C. R. 654.

Stay of Proceedings.]—An order perpetually restraining the plaintiffs from proceeding is one made in the exercise of judicial discretion, as to which s. 27 of the Supreme Court Act does not allow an appeal. *Maritime Bank of the Dominion of Canada* v. *Stewart*, 20 S. C. R. 105.

Summary Judgment.]—An order allowing judgment to be entered by the plaintiffs on a specially indorsed writ is one made in the exercise of judicial discretion, as to which s. 27 of the Supreme Court Act does not allow an appeal. *Rural Municipality of Morris* v. *London and Canadian L. and A. Co.*, 19 S. C. R. 434.

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2. *Matters of Practice and Procedure.*

Costs.]—It is doubtful if a decision affirming the master's ruling on taxation of a solicitor's bill of costs, which relates wholly to the practice and procedure of the high court of justice for Ontario, and of an officer of that court in construing its rules and executing an order of reference made to him, is a proper subject of appeal to the supreme court. *O'Donohoe* v. *Beatty*, 19 S. C. R. 356.

After the rendering of a judgment by the court of Queen's bench refusing to quash a

by-law passed by the corporation of the village of Huntingdon, the by-law in question was repealed. On appeal to the supreme court of Canada:—Held, that the only matter in dispute between the parties being a mere question of costs, the court would not entertain the appeal: Supreme and Exchequer Courts Act, s. 24. *Moir* v. *Village of Huntingdon*, 19 S. C. R. 363.

Held, that, assuming this court had jurisdiction to entertain an appeal with respect to an order for taxation of a bill of costs applied for by a third party, it should not interfere with the decision of the provincial courts, which were the most competent tribunals to deal with such matters. *McGugan* v. *McGugan*, 21 S. C. R. 267.

——— *Only Matter in Dispute.*]—See *McKay* v. *Township of Hinchinbrooke*, 24 S. C. R. 55.

Discharge of Bail—*Delay.*]—An appeal from an order of the full court refusing to set aside an order for the discharge of bail on account of delay in entering up judgment, will not be entertained, as the matter is one of practice in the discretion of the court below. *Scammell* v. *James*, 16 S. C. R. 593.

Irregularity—*Case Improperly on Paper in Court below—Affidavits in Reply.*]—See *Jones* v. *Tuck*, 11 S. C. R. 197.

——— *Execution.*]—A judgment of the court of Queen's bench for Lower Canada (appeal side) held that a venditioni exponas issued by the superior court of Montreal, to which court the record in a contestation of an opposition had been removed from the superior court of the district of Iberville, under art. 188, C. C. P., was regular. On an appeal to the supreme court of Canada:—Held, that on a question of practice such as this the court would not interfere. Mayor of Montreal v. Brown, 2 App. Cas. 168, followed. *Arpin* v. *Merchants Bank of Canada*, 24 S. C. R. 142.

——— *Judgment.*]—It appeared by the procedure in the case that McD. and C. had been irregularly condemned jointly to pay the amount of the judgment. Yet, as McD. had pleaded to the merits of the action, and had taken up fait et cause for C. with his knowledge, and both courts below had held them jointly liable, the supreme court of Canada would not interfere in such a matter of practice and procedure. *Macdonald* v. *Ferdais*, 22 S. C. R. 260.

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

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

——— *Revocation of Judgment.*]—Where a grave injustice has been inflicted upon a party to a suit, the supreme court of Canada will interfere for the purpose of granting appropriate relief, although the question involved upon the appeal may be one of local practice only. Lambe v. Armstrong, 27 S. C. R. 390, followed. *Eastern Townships Bank* v. *Swan*, 29 S. C. R. 193.

See Kandick v. *Morrison*, 2 S. C. R. 12.

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3. *Questions of Fact.*

Award—*Value of Land.*]—See *The Queen* v. *Paradis*, *The Queen* v. *Beaulieu*, 16 S. C. R. 716; *Lemoine* v. *City of Montreal*, 23 S. C. R. 390; *The Queen* v. *Hubert*, 14 S. C. R. 737.

Concurrent Findings of Two Courts.]—The finding of two courts on a question of fact will not be interfered with by the supreme court. *Schwerszenski* v. *Vineberg*, 19 S. C. R. 243.

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

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

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

In an action where the defendants counterclaimed for damages caused by the defective construction of a boiler for their steamer, which had collapsed:—Held, that conclusive effect should not be given to the evidence of witnesses called as experts as to the cause of the collapse, who were not present at the time of the accident, whose evidence was not founded upon knowledge, but was mere matter of opinion, who gave no reasons and stated no facts to shew upon what their opinion was based; and where the result would be to condemn as defective in design and faulty in construction all boilers built after the same pattern, which the evidence shewed were in gen-

eral use. The judgment, therefore, allowing the counterclaim was set aside, though against the concurrent findings of two courts below. *William Hamilton Mfg. Co.* v. *Victoria Lumbering and Mfg. Co.*, 26 S. C. R. 96.

The supreme court of Canada will take questions of fact into consideration on appeal, and if it clearly appears that there has been an error in the admission or appreciation of evidence by the court below, their decisions may be reversed or varied. North British and Mercantile Ins. Co. v. Tourville, 25 S. C. R. 177, followed. *Lefaunteum* v. *Beaudoin*, 28 S. C. R. 89.

In an action by an employee to recover damages for injuries sustained, there was some evidence of neglect on the part of the employers which, in the opinion of both courts below, might have been the cause of the accident through which the injuries were sustained, and both courts found that the accident was due to the fault of the defendants either in neglecting to cover a dangerous part of a revolving shaft temporarily with boards or to disconnect the shaft or stop the whole machinery, while the plaintiff was required to work over or near the shaft:—Held, that, although the evidence on which the courts below based their findings of fact might appear weak, and there might be room for the inference that the primary cause of the injuries was the plaintiff's own imprudence, the supreme court of Canada would not, on appeal, reverse such concurrent findings of fact. *George Matthews Co.* v. *Bouchard*, 28 S. C. R. 580.

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

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

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

Election Petition—*Error.*]—Held, that the supreme court on appeal will not reverse on mere matters of fact the judgment of the Judge who tries an election petition, unless the matter of the evidence is of such a nature as to convey an irresistible conviction that the judgment is not only wrong, but is erroneous. *Montcalm Election, Magnan* v. *Dugas*, 9 S. C. R. 93.

See, also, *Berthier Election, Genereux* v. *Cuthbert*, 9 S. C. R. 102.

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

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

In an action against a railway company for damages for loss of property by fire alleged to have been occasioned by sparks from an engine or hot-box of a passing train, in which the court appealed from held that there was no sufficient proof that the fire occurred through the fault or negligence of the company, and it was not shewn that such finding was clearly wrong or erroneous, the supreme court would not interfere with the finding. *Seguac* v. *Central Vermont R. W. Co.*, 26 S. C. R. 641.

Jury—*Court — Judge's Charge.*]—Under rule 476 of the Judicature Act of Nova Scotia the court can take a case which has been passed upon by a jury into its own hands and dispose of it, if all the proper materials on which to decide are before it, but in this case the materials essential to the final disposition of the case were not before the court, and there must be a new trial. The supreme court, as an appellate court of the Dominion, should not approve of such strong observations being made by a Judge as were made in this case, in effect charging upon the defendants fraud not set out in the pleadings and not legitimately in issue in the cause. *Hardman* v. *Putnam*, 18 S. C. R. 714.

——— *Questions not Disposed of—Disregard of Findings—Motion for Judgment.*]—This case coming before the court below on motion for judgment under the order which governs the practice in such cases, and which is identical with English order 40, rule 10, of the orders of 1875, the court could give judgment finally determining all questions in dispute, although the jury might not have found on them all; but that rule does not enable a court to dispose of a case contrary to the finding of a jury. In case the court considers particular findings to be against evidence, all that can be done is to award a new trial, either generally or in part under the powers conferred by the rule similar to the English order 39, rule 40. The supreme court of Canada, giving the judgment that the court below ought to have given, was in this case in a position to give judgment upon the evidence at large, there being no findings by the jury interposing any obstacle to their so doing, and therefore a judgment should be entered against both defendants for $80,000 and costs. *Sewell* v. *British Columbia Towing and Transportation Co.*, 8 S. C. R. 527.

——— *Verdict Affirmed.*]—A jury having pronounced on the question of fact, and their verdict having been affirmed by the supreme court of New Brunswick, the supreme court declined to interfere with the finding. *Cassels* v. *Burns*, 14 S. C. R. 256.

——— *Withdrawal—Disposition by Court—Consent.*]—On the trial of an action against a railway company for injuries alleged to have been caused by negligence of the servants of the company in not giving proper notice of

the approach of a train at a crossing, whereby the plaintiff was struck by the engine and hurt, the case was withdrawn from the jury by consent of counsel for both parties and referred to the full court, with power to draw inferences of fact, and on the law and facts either to assess damages to the plaintiff or enter a judgment of nonsuit. On appeal from the decision of the full court assessing damages to the plaintiff:—Held, that, as by the practice of the supreme court of New Brunswick all matters of fact must be decided by the jury, and can only be entertained by the court by consent of parties, the full court, in considering the case pursuant to the agreement at the trial, acted as a quasi-arbitrator, and its decision was not open to review on appeal as it would have been if the judgment had been given in the regular course of judicial procedure in the court. Held, further, that if the merits of the case could be entertained on appeal, the judgment appealed from should be affirmed. *Canadian Pacific R. W. Co.* v. *Fleming*, 22 S. C. R. 33.

Nautical Question—*Balance of Testimony.*]—Where a disputed fact, involving nautical questions, is raised by an appeal from the judgment of the maritime court of Ontario, as in the case of a collision, the supreme court will not reverse the decree of the Judge of the court below, merely upon a balance of testimony. *The Picton, McCuaig* v. *Keith*, 4 S. C. R. 648.

Reversal of Judgment below—*Restoration of Original Finding.*]—On an appeal to the supreme court from a judgment of the exchequer court increasing the amount awarded by the official arbitrators to the claimant for expropriation of land for the Intercolonial Railway:—Held, reversing the judgment of the exchequer court and restoring the award of the official arbitrators, that to warrant an interference with an award of value necessarily largely speculative, an appellate court must be satisfied beyond all reasonable doubt that some wrong principle has been acted on or something overlooked which ought to have been considered by the official arbitrators, and upon the evidence in this case this court refused to interfere with the amount of compensation awarded by the official arbitrators. *The Queen* v. *Paradis*, *The Queen* v. *Beaulieu*, 16 S. C. R. 716.

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

Judgment of court below, holding that the evidence was not sufficient to rebut the presumption that upon a sale of goods to a merchant the price stated in the invoice was that agreed upon, reversed, upon the ground that the appeal depended on mere matters of fact, as to which an appellate court should not interfere. *Kearney* v. *Letellier*, 27 S. C. R. 1.

On a reference being made to the official arbitrators of certain claims made by one H. against the government for damages arising out of the enlargement of the Lachine canal, to land situated on said canal, the arbitrators awarded H. $9,216 in full and final settlement of all claims. On an appeal taken to the exchequer court by H. this amount was increased to $15,990, including $5,600 for damages caused to the land from 1877 to 1884, by leakage from the canal since its enlargement, and the Judge reserved the right to H. to claim for future damages from that date. On appeal to the supreme court of Canada:—Held, reversing the judgment of the exchequer court and confirming the award of the arbitrators, that it must be taken that the arbitrators dealt with every item of H.'s claim submitted to them and included in their award all past, present, and future damages, and that the evidence did not justify an increase of the amount awarded. *The Queen* v. *Hubert*, 14 S. C. R. 737.

See Cossette v. *Dun*, 18 S. C. R. 222, *post* II. 2 (c).

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4. *Other Cases.*

Court Equally Divided—*Effect of, as a Decision.*]—When the supreme court of Canada in a case in appeal is equally divided, so that the decision appealed against stands unreversed, the result of the case in the supreme court affects the actual parties to the litigation only, and the court, when a similar case is brought before it, is not bound by the result of the previous case. *Stanstead Election Case*, 20 S. C. R. 12.

Election Petition—*Preliminary Objections.*]—An extremely strong case should be shewn to induce the court to allow an appeal from the judgment of the court below on preliminary objections. *Shelburne Election (Dom.), Robertson* v. *Laurie*, 14 S. C. R. 258.

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

Ground not Taken in Court below—*Necessity for Amendment.*]—The respondent sued the appellants to recover damages alleged to have been sustained by reason of the obstruction of the river Miramichi by appellants' boom. The pleas were "not guilty" and "leave and license." On the trial counsel for the appellants proposed to add a plea, that the wrong complained of was occasioned by an extraordinary freshet. The counsel for the respondent objected on the ground that such plea might have been demurred to. The Judge refused the application, because he intended to admit the evidence under the plea of "not guilty." On appeal, the counsel for the appellants contended that the obstruction complained of was justified under 17 Vict. c. 10 (N. B.), incorporating the appellants:—Held, that the appellants, not having put in a plea of justification under the statute, or applied to the supreme court of New Brunswick in banco for leave to amend their pleas, could not rely on that ground before this court to reverse the decision of the court below. *South-West Boom Co.* v. *McMillan*, 3 S. C. R. 700.

——— *Right of Action.*]—Absolute want of legal right of action may be invoked by a defendant at any stage of a suit. Judgment in 3 Q. P. R. 1 overruled on the motifs, but

affirmed in its result. *McFarren* v. *Montreal Park and Island R. W. Co.*, 30 S. C. R. 410.

——— *Validity of Instrument.*]—Where the issues have been joined in a suit and judgment rendered upon pleadings admitting and relying upon a written instrument, an objection to the validity of the instrument taken for the first time on an appeal to the supreme court of Canada comes too late and cannot be entertained. *The Queen* v. *Poirier*, 30 S. C. R. 36.

Reference—*Report on Matters Extra.*]—The decision in 19 N. S. Rep. 341, confirming the report of a master on a reference, reversed on the ground that the master had exceeded his authority and reported on matters not referred to him. *Doull* v. *McIlreith*, 14 S. C. R. 739.

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

Winding-up Order—*Notice.*]—It is a substantial objection to a winding-up order appointing a liquidator to the estate of an insolvent company under 45 Vict. c. 23 (D.), that such order has been made without notice to the creditors contributories, shareholders, or members of the company, as required by s. 24 of the said Act, and an order so made was set aside and the petition therefor referred back to the Judge to be dealt with anew. *Shoolbred* v. *Union Fire Ins. Co.*, 14 S. C. R. 624.

II. APPEAL—JURISDICTION AND RIGHT.

1. *Acquiescence in Judgment.*

Abandonment in Intermediate Court.]—In an action in which the constitutionality of 36 Vict. c. 81 (Q.) was raised by the defendant, the attorney-general for the Province of Quebec intervened, and the judgment of the superior court having maintained the plaintiff's action and the attorney-general's intervention, the defendant appealed to the court of Queen's bench, but afterwards abandoned his appeal from the judgment on the intervention. On a further appeal to the supreme court of Canada from the judgment of the court of Queen's bench in the principal action, the defendant asserted the right to have the judgment of the superior court on the intervention reviewed:—Held, that the appeal to the court of Queen's bench from the judgment of the superior court on the intervention having been abandoned, the judgment on the intervention of the attorney-general could not be the subject of an appeal to this court. *Ball* v. *McCaffrey*, 20 S. C. R. 319.

Agreement of Solicitor.]—By a judgment of the court of Queen's bench, the defendant society was ordered to deliver up a certain number of its shares upon payment of a certain sum. Before the time for appealing expired, the attorney ad litem for the defendant delivered the shares to the plaintiff's attorney and stated that he would not appeal if the society were paid the amount directed to be paid. An appeal was subsequently taken before the plaintiff's attorney complied with the terms of the offer. On a motion to quash the appeal on the ground of acquiescence in the judgment:—Held, that the appeal would lie. *Société Canadienne-Française de Construction de Montreal* v. *Daveluy*, 20 S. C. R. 449.

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2. *Amount in Controversy.*

(a) *Exchequer Court Cases.*

Affidavits Establishing Amount — *Costs.*]—On a motion to quash an appeal, where the respondents filed affidavits stating that the amount in controversy was less than the amount fixed by the statute as necessary to give jurisdiction to the appellate court, and affidavits were also filed by the appellants shewing that the amount in controversy was sufficient to give jurisdiction under the statute, the motion to quash was dismissed, but the appellants were ordered to pay the costs, as the jurisdiction of the court to hear the appeal did not appear until the filing of the appellants' affidavits in answer to the motion. *Dreschel* v. *Auer Incandescent Light Mfg. Co.*, 28 S. C. R. 268.

(b) *Ontario Cases.*

Ontario Enactment — *Ultra Vires.*]—Section 43 of the Ontario Judicature Act, 1881, which provides that in cases where the amount in controversy is under $1,000 no appeal shall lie from the decision of the court of appeal to the supreme court of Canada, except by leave of a Judge of the former court, is ultra vires the legislature of Ontario and not binding on this court. Remarks on an order granting such leave on appellant undertaking to ask no costs of appeal. *Clarkson* v. *Ryan*, 17 S. C. R. 251.

Original Demand—*Amount Involved in Appeal.*]—Where the jurisdiction of the supreme court of Canada to entertain an appeal is doubtful, the court may assume jurisdiction when it has been decided that the appeal on the merits must be dismissed. Great Western R. W. Co. v. Braid, 1 Moo. P. C. N. S. 101, followed. By 60 & 61 Vict. c. 34, s. 1, s.-s. (c) (D.), no appeal lies from judgments of the court of appeal for Ontario unless the amount in controversy in the appeal exceeds $1,000, and by s.-s. (f), in case of difference it is the amount demanded, and not that recovered, which determines the amount in controversy:—Held, that to reconcile these two sub-sections, s.-s. (f) should probably be read as if it meant the amount demanded upon the appeal. To read it as meaning the amount demanded in the action, which is the construction the court has put upon R. S. C. c. 135, s. 29, relating to appeals from the Province of Quebec, would seem to be contrary to the intention of parliament. Laberge v. Equitable Life Assurance Society, 24 S. C. R. 59, distinguished. *Bain* v. *Anderson*, 28 S. C. R. 481.

Setting aside Second Mortgage — *Surplus over First Mortgage—Title to Land.*]—While an action to set aside a second mortgage for $2,200 was pending, the mortgaged lands were sold under a prior mortgage, and the first mortgagee, after satisfying his own claims, paid the whole surplus of the

proceeds of the sale, amounting to $270, to the defendant as subsequent incumbrancer. Judgment was afterwards rendered declaring the second mortgage void, and ordering the defendant to pay to the plaintiff, as assignee for the benefit of creditors, the amount of $270 so received by him thereunder, and this judgment was affirmed on appeal. Upon an application to allow an appeal bond on further appeal to the supreme court of Canada, objections were taken for want of jurisdiction under the clauses of the Act 60 & 61 Vict. c. 34, but they were overruled by a Judge of the court of appeal for Ontario, who held that an interest in real estate was in question, and the appeal was accordingly proceeded with, and the appeal case and factums printed and delivered. On motion to quash for want of jurisdiction when the appeal was called for hearing:—Held, that the case did not involve a question of title to real estate or any interest therein, but was merely a controversy in relation to an amount less than the sum or value of $1,000, and that the Act 60 & 61 Vict. c. 34 prohibited an appeal to the supreme court of Canada. *Jermyn* v. *Tew*, 28 S. C. R. 497.

Statute of Canada—*Application to Pending Cases.*]—The Act 60 & 61 Vict. c. 34 (D.), which restricts the right of appeal to the supreme court in cases from Ontario as therein specified, does not apply to a case in which the action was pending when the Act came into force, although the judgment directly appealed from may not have been pronounced until afterwards. *Hyde* v. *Lindsay*, 29 S. C. R. 99.

See Fisher v. *Fisher*, 28 S. C. R. 494.

(c) Quebec Cases.

Account—*Compensation.*] — The plaintiff, who had acted as agent for the late J. B. S., brought an action for $1,471.07 for a balance of account, as negotiorum gestor of J. B. S., against the defendants, executors of J. B. S. The defendants, in addition to a general denial, pleaded compensation for $3,416 and interest. The plaintiff replied that this sum was paid by a dation en paiement of certain immovables. The defendants answered that the transaction was not a giving in payment but a giving of a security. The court of Queen's bench, reversing the judgment of the superior court, held that the defendants had been paid by the dation en paiement of the immovables, and that the defendants owed a balance of $1,154 to the plaintiff:—Held, that the pecuniary interest of the defendants, affected by the judgment appealed from, was more than $2,000 over and above the plaintiff's claim, and therefore the case was appealable under R. S. C. c. 135, s. 29. *Hunt* v. *Taplin*, 24 S. C. R. 36.

Allowance — *Annuity.*] — An action for $200, being one instalment of an annuity payable under a will, was dismissed, and the plaintiff appealed:—Held, that the amount in controversy was only $200, although the judgment might affect future payments. *Rodier* v. *Lapierre*, 21 S. C. R. 69.

——— *Maintenance of Bastard.*]—In an action en declaration de paternité the plaintiff claimed an allowance of $15 per month until the child (then a minor aged four years and nine months) should attain the age of ten years, and for an allowance of $20 per month thereafter "until such time as the child should be able to support and provide for himself." The court below, following the decision in Lizotte v. Descheneau, 6 Leg. News 107, held that, under ordinary circumstances, such an allowance would cease at the age of fourteen years:—Held, that the demande must be understood to be for allowances only up to the time the child should attain the age of fourteen years and no further, so that, apart from the contingent character of the claim, the demande was for less than the sum or value of $2,000, and consequently the case was not appealable under the provisions of s. 29 of the Supreme and Exchequer Courts Act, even if an amount or value of more than $2,000 might become involved under certain contingencies as a consequence of the judgment of the court below. Rodier v. Lapierre, 21 S. C. R. 69, followed. *Macdonald* v. *Galivan*, 28 S. C. R. 258.

Award—*Interest—Costs.*] — In an action to set aside an award of $1,974.25, Strong and Taschereau, JJ., doubted the jurisdiction of the supreme court of Canada to hear an appeal from a decision of the court of Queen's bench, Lower Canada, because, to make up the appealable amount, either interest accrued after date of award or the costs taxed on the arbitration proceedings would have to be added. *Quebec, Montmorency, and Charlevoix R. W. Co.* v. *Mathieu*, 19 S. C. R. 426.

Bank Shares — *Actual Value.*] — Where the matter in controversy is bank shares, their actual value at the time of the institution of the action and not their par value will determine the right of appeal under s. 29 of the Supreme and Exchequer Courts Act, and the actual value of such shares may be shewn by affidavit. *Muir* v. *Carter, Holmes* v. *Carter*, 16 S. C. R. 473.

Damages — *Court of First Instance.*] — Where the plaintiff in an action for $10,000 damages obtains a judgment in the superior court for Lower Canada for $2,000, and the defendant appeals to the court of Queen's bench, where the judgment is reduced below said amount of $2,000, the case is appealable by the plaintiff to the supreme court, the value of the matter in controversy as regards him being the amount of the judgment of the superior court. The amount of damages awarded in his discretion by the Judge who tries the case in the court of first instance, should not be interfered with by a court of appeal, unless clearly unreasonable and unsupported by the evidence, or there be some error in law or fact, or partiality on the part of the Judge. Levi v. Reed, 6 S. C. R. 482, and Gingras v. Desilets, Cassels' Dig., 2nd ed., 212, followed. *Cossette* v. *Dun*, 18 S. C. R. 222.

——— *Demand — Amending Act.*] — The statute 54 & 55 Vict. c. 25, s. 3, which provides that "whenever the right to appeal is dependent upon the amount in dispute, such amount shall be understood to be that demanded, and not that recovered, if they are different," does not apply to cases in which the superior court has rendered judgment, or to cases argued and standing for judgment (en délibéré) before that court, when the Act came into force (30th September, 1891).

Williams v. Irvine, 22 S. C. R. 108, followed. In actions for damages claiming more than $2,000, the court of Queen's bench for Lower Canada, on appeal in one case, gave the plaintiff judgment for $800, reversing the judgment of the superior court, which had dismissed the actions, and in the other cases, on appeal by the defendants, affirmed the judgments of the superior court giving damages for an amount less than $2,000:—Held, following Monette v. Lefebvre, 16 S. C. R. 387, that no appeal would lie to the supreme court, in these cases, by the defendants, from the judgment of the court of Queen's bench, under s. 29 of c. 135, R. S. C. *Cowen* v. *Evans*, *Mitchell* v. *Trenholme*, *Mills* v. *Limoges*, 22 S. C. R. 331.

Disavowal of Attorney — *Petition — Amount of Judgment against Petitioner.*]—In an action brought in 1866 for the sum of $800 and interest at twelve and a half per cent. against two brothers, S. J. D. and W. McD. D., being the amount of a promissory note signed by them, one copy of the summons was served at the domicile of S. J. D. at Three Rivers, the other defendant, W. McD. D., then residing in the State of New York. On the return of the writ, the respondent filed an appearance as attorney for both defendants, and proceedings were suspended until 1874, when judgment was taken, and in December, 1880, upon the issue of an alias writ of execution, the appellant, having failed in an opposition to judgment, filed a petition in disavowal of the respondent. The disavowed attorney pleaded inter alia that he had been authorized to appear by a letter signed by S. J. D., and also prescription, ratification, and insufficiency of the allegations of the petition of disavowal. The petition in disavowal was dismissed. On appeal to the supreme court of Canada, the respondent moved to quash the appeal, on the ground that the matter in controversy did not amount to the sum of $2,000:—Held, that, as the judgment obtained against the appellant in March, 1874, on the appearance filed by the respondent, exceeded the amount of $2,000, the judgment on the petition for disavowal was appealable. *Dawson* v. *Dumont*, 20 S. C. R. 709.

Execution — *Proceeds of Sale—Right to Share — Interest of Appellants — Amending Act.*]—K. (plaintiff) contested an opposition afin de conserver for $24,000 filed by L. on the proceeds of a sale of property upon the execution by K. against H. & Co. of a judgment obtained by K. against H. & Co. for $1,129. The superior court dismissed L.'s opposition, but on appeal the court of Queen's bench maintained the opposition and ordered that L. be collocated au marc la livre on the sum of $930, being the amount of the proceeds of the sale:—Held, that the pecuniary interest of K. appealing from the judgment of the court of Queen's bench being under $2,000, the case was not appealable under R. S. C. c. 135, s. 29. Gendron v. McDougall, Cassels' Dig. 429, followed. Held, also, that s. 3 of 54 & 55 Vict. c. 25, providing for an appeal where the amount demanded is $2,000 or over, had no application to the present case. *Kinghorn* v. *Larue*, 22 S. C. R. 347.

Fraudulent Conveyance — *Amount of Attacking Creditor's Claim.*]—E. F. F. sold to G. for $8,000 land mortgaged for $7,000, with a right of remére for one year. A month later E. F. F. assigned, and J. F. et al., creditors of E. F. F. in $1,880, brought an action against G. to have the deed of sale of the land, which was valued at over $11,000, set aside as made in fraud of creditors. Upon appeal by J. F. et al. to the supreme court of Canada from the judgment of the court of Queen's bench for Lower Canada affirming a judgment dismissing the action:—Held, that, as the appellants' own claim was under $2,000, and they did not represent the creditors of E. F. F., the amount in controversy was insufficient to make the case appealable. *Platt* v. *Ferland*, 21 S. C. R. 32.

Incidental Demand.]—In an action for séparation de corps the plaintiff asked for delivery up of her property valued at $18,000:—Held, that this demand, being only incidental to the main cause of action, could not give the court jurisdiction. *Talbot* v. *Guilmartin*, 30 S. C. R. 482.

Interest — *Adding to Demand.*] — See *Dufresne* v. *Guévremont*, 26 S. C. R. 216.

Interest Barred by Prescription.] — Held, that, although the amount claimed in this case by the declaration was made to exceed $2,000 by including interest which had been barred by prescription, the appeal would lie. *Ayotte* v. *Boucher*, 9 S. C. R. 460.

Judgment not Establishing Amount —*Appeal by Defendant.*]—The supreme court has no jurisdiction under s. 29 of the Supreme and Exchequer Courts Act, upon an appeal by the defendant, where the amount in controversy has not been established by the judgment appealed from. *Ontario and Quebec R. W. Co.* v. *Marcheterre*, 17 S. C. R. 141.

Original Demand — *Amount of—Judgment.*]—By 38 Vict. c. 11, s. 17, no appeal shall be allowed from any judgment rendered in the Province of Quebec in any case wherein the sum or value in dispute does not amount to $2,000:—Held, that in determining the amount or value in dispute in cases of appeal by a defendant, the proper course is to look at the amount for which the declaration concludes, and not at the amount of the judgment. *Joyce* v. *Hart*, 1 S. C. R. 321.

L., appellant, sued R., the respondent, before the superior court at Arthabaska, in an action of damages claid at $10,000 for slander. The judgment of the superior court awarded to the appellant a sum of $1,000 for special and vindictive damages. R. appealed to the court of Queen's bench, and L., the present appellant, did not ask, by way of cross-appeal, for an increase of damages, but contended that the judgment for $1,000 should be confirmed. The court of Queen's bench partly concurred in the judgment of the superior court, but differed as to the amount, because L. had not proved special damages, and the amount awarded was reduced to $500, and costs of appeal were given against the present appellant. L. thereupon apealed to the supreme court:—Held, that L., the plaintiff, although respondent in the court below, and not seeking in that court by way of cross-appeal an increase of damages beyond the $1,000, was entitled to appeal, for, in determining the amount of the matter in controversy between the parties, the proper course was to look to the amount for which the declaration concluded, and not at the amount of the judgment. Joyce v. Hart, 1 S. C. R. 321, reviewed and approved. *Levi* v. *Reed*, 6 S. C. R. 482. But see the next case.

Where the plaintiff has acquiesced in the judgment of the court of first instance by not appealing from the same, the measure of value for determining his right of appeal under s. 29 of the Supreme and Exchequer Courts Act, is the amount awarded by the said judgment of the court of first instance, and not the amount claimed by his declaration. Levi v. Reed, 6 S. C. R. 482, overruled. Allan v. Platt, 13 App. Cas. 780, referred to as overruling Joyce v. Hart, 1 S. C. R. 321. *Mouette* v. *Lefebvre*, 16 S. C. R. 387.

——— *Amount of—Judgment — Amending Act.*]—By virtue of s.-s. 4 of s. 3 of c. 25 of 54 & 55 Vict., in determining the amount in dispute in cases in appeal to the supreme court of Canada, the proper course is to look at the amount demanded by the statement of claim, even though the actual amount in controversy in the court appealed from was less than $2,000. Thus, where the plaintiff obtained a judgment in the court of original jurisdiction for less than $2,000, and did not take a cross-appeal upon the defendants appealing to the intermediate court of appeal, where such judgment was reversed, he was entitled to appeal to this court. Levi v. Reed, 6 S. C. R. 482, approved and followed. *Laberge* v. *Equitable Life Assurance Society*, 24 S. C. R. 59.

——— *Court of Review.*]—Under 54 & 55 Vict. c. 25, s. 3, s.-s. 3, there is no appeal to the supreme court of Canada from a decision of the court of review which would not be appealable as of right to the privy council. Art. 2311, R. S. Q., which provides that "whenever the right to appeal is dependent upon the amount in dispute, such amount shall be understood to be that demanded and not that recovered, if they are different," applies to appeals to the privy council. Interest cannot be added to the sum demanded to raise it to the amount necessary to give a right of appeal. Stanton v. Home Ins. Co., 2 Leg. News 334, approved. *Dufresne* v. *Guevremont*, 26 S. C. R. 216.

In appeals to the supreme court of Canada from the court of review (which, by 54 & 55 Vict. c. 25, s. 3, s.-s. 3, must be appealable to the judicial committee of the privy council), the amount by which the right of appeal is to be determined is that demanded, and not that recovered, if they are different. Dufresne v. Guévremont, 26 S. C. R. 216, followed. *Citizens Light and Power Co.* v. *Parent*, 27 S. C. R. 316.

——— *Defence as to Part—Effect of.*]—A life insurance company deposited with the prothonotary of the superior court, under the Judicial Deposit Act of Quebec, the sum of $3,000, being the amount of a life policy issued by the company to one E. L., which by its terms had become payable to those entitled to the same, but to one-half of which sum rival claims were put in. The appellants, as collateral heirs of deceased, by a petition claimed the whole of the $3,000, and the respondent (mise-en-cause petitioner), the widow of the deceased, by a counter-petition claimed, as commune en biens, one-half; and, in her answer to the appellants' petition, prayed that in so far as it claimed any greater sum than one-half, it should be dismissed. After issue joined the superior court awarded one-half to the appellants, and the other half to the respondent. From this judgment the appellants appealed to the court of Queen's bench, and that court confirmed the judgment of the superior court. On appeal to the supreme court of Canada:—Held, that the sum or value of the matter in controversy between the parties being only $1,500, the case was not appealable: R. S. C. c. 135, s. 29. *Labelle* v. *Barbeau*, 16 S. C. R. 390.

——— *New Right of Appeal—Amending Act.*]—See *Couture* v. *Bouchard*, 21 S. C. R. 281.

——— *Question Raised by Plea—Incidental Issue.*] — Issues raised merely by pleas cannot have the effect of increasing the amount in controversy so as to give the supreme court of Canada jurisdiction to hear an appeal. *Standard Life Assurance Co.* v. *Trudeau*, 30 S. C. R. 308.

Pecuniary Interest of Appellant.] — L., having proved a claim of $920 against an insolvent estate, contested a claim for which respondents had been collocated against the same estate, amounting to $2,044.66. The contestation having been decided in favour of respondents, L. appealed to the supreme court:—Held, that, to determine whether or not there was a sufficient amount in controversy to give jurisdiction to the supreme court, the pecuniary interest of the appellant only could be taken into consideration, and his interest being under $2,000 the appeal would not lie, although the consequence of the appellant's contestation might result in bringing back to the insolvent estate a sum of over $2,000. *Lachance* v. *Société de Prêts et de Placements de Québec*, 26 S. C. R. 200.

Pecuniary Interest—*Value of Partner's Share.*]—An action was instituted by the respondent against the appellant for the partition and licitation of a cheese factory, &c., in order that the proceeds might be divided according to the rights of the parties, who had carried on business as partners. The judgment appealed from ordered the licitation of the factory and appurtenances. On a motion to quash the appeal, on the ground that the matter in controversy was under $2,000, the appellant in answer to the respondent's affidavit filed another affidavit shewing that the total value of the property was $3,000, but, it being admitted that the respondent (plaintiff) claimed but one-half interest in the property:—Held, that the matter in controversy, and claimed by the respondent, not amounting to the sum or value of $2,000, the appeal should be quashed with costs. *Hood* v. *Sangster*, 16 S. C. R. 723.

Proceeding for Withdrawal of Goods from Seizure—*Value of Goods.*]—An opposition afin de distraire, for the withdrawal of goods from seizure, is a "judicial proceeding," within the meaning of s. 29 of the Supreme and Exchequer Courts Act, and on an appeal to the supreme court of Canada from a judgment dismissing such opposition, the amount in controversy is the value of the goods sought to be withdrawn from seizure and not the amount demanded by the plaintiff's action, or for which the execution issued. Turcotte v. Dansereau, 26 S. C. R. 578, and McCorkill v. Knight, 3 S. C. R. 233, Cassels' Dig., 2nd ed., 694, followed. Champoux v. Lapierre, Cassels' Dig., 2nd ed., 426, and Gendron v. McDougall, ib. 429, discussed and distinguished. *King* v. *Dupuis*, 28 S. C. R. 388.

Proceeding to Vacate Judgment — *Amount of Judgment.*]—An opposition filed under the provisions of arts. 484 and 487 of the code of civil procedure of Lower Canada for the purpose of vacating a judgment entered by default, is a "judicial proceeding," within the meaning of s. 29 of the Supreme and Exchequer Courts Act, and where the appeal depends upon the amount in controversy, there is an appeal to the supreme court of Canada if the amount of principal and interest due at the time of the filing of the opposition under the judgment sought to be annulled, is of the sum or value of $2,000. *Turcotte* v. *Dansereau*, 26 S. C. R. 578.

Several Claims—*Divided Success.*] — C. brought an action against E., claiming: (1) that a certain building contract should be rescinded; (2) $1,000 damages; (3) $545 for value of bricks in possession of E., but belonging to C. The judgment of the superior court dismissed C.'s claim for $1,000, but granted the other conclusions. On appeal to the court of Queen's bench by E., the action was dismissed in 1893. C. then appealed to the supreme court:—Held, that the building for which the contract had been entered into having been completed, there remained but the question of costs and the claim for $545 in dispute between the parties, and that amount was not sufficient to give jurisdiction to the supreme court under R. S. C. c. 135, s. 29. *Cowen* v. *Evans*, 22 S. C. R. 328.

See Murray v. *Town of Westmount*, 27 S. C. R. 579, *post* 9.

(d) *Trifling Amount.*

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

(e) *Winding-up Act.*

Several Contributories—*Aggregate Liability.*]—In an appeal by the liquidator from the decision in 21 A. R. 646, reversing that in 24 O. R. 216, dismissing an appeal by several alleged contributories from the report placing them upon the list in winding-up proceedings, it was held that an appeal will lie to the supreme court of Canada in proceedings under the Winding-up Act only where the amount involved is $2,000 or over. In this case six persons were placed on the list, one for $1,000, and the others for $900 each, and all were released from liability by the decision of the court of appeal from which this appeal was brought:—Held, that the fact that the aggregate amount for which the respondents were sought to be made liable exceeded $2,000 did not give the court jurisdiction; but that the position was the same as if proceedings had been taken separately against each. *Stephens* v. *Gerth, In re Ontario Express and Transportation Co.*, 24 S. C. R. 716.

3. *Courts below.*

(a) *Matters Originating in Superior Court.*

County Court—*Drainage.*] — The appeal to the court of appeal was from the report of the drainage referee upon a reference to him of an action, which had been begun in a county court and been removed into the high court:—Held, that the action originated in the high court. Re Township of Raleigh and Township of Harwich, Cassels' Practice of the Supreme Court of Canada, 2nd ed., p. 22, distinguished. *Young* v. *Tucker*, 18 P. R. 449.

There is no appeal to the supreme court of Canada in a case in which the action was commenced in the county court and transferred by order to the high court of justice, in which all subsequent proceedings were carried on. Young v. Tucker, 18 P. R. 449, overruled. Leave to appeal cannot be granted under 60 & 61 Vict. c. 34, s. 1 (e), in a case not appealable under the general provisions of R. S. C. c. 135. *Tucker* v. *Young*, 30 S. C. R. 185.

Court of Revision — *North-West Territories.*]—By an ordinance of the North-West Territories an appeal lies from the decision of the court of revision for adjudicating upon assessments for school rates, to the district court of the school district; on such appeal being brought, the clerk of the court issues a summons, making the ratepayer plaintiff and the school trustees defendants, which summons is returnable at the next sitting of the court, when the appeal is heard. The district is now merged in the supreme court of the Territories:—Held, that an appeal will not lie from the judgment of the supreme court affirming a decision of the court of revision in such case, as the proceedings do not originate in a superior court: R. S. C. c. 135, s. 24. An appeal in such case will lie since the passing of 51 Vict. c. 37, s. 5, which allows an appeal from the decision of the supreme court of the Territories, although the matter may not have originated in a superior court. *Angus* v. *Calgary School Trustees*, 16 S. C. R. 716.

Judge in Chambers — *Petition—Appeal—Railway Act.*]—The College of Ste. Thérèse having petitioned for an order for payment to them of a sum of $4,000 deposited by the appellants as security for land taken for railway purposes, a Judge of the superior court in chambers, after formal answer and hearing of the parties, granted the order under the Railway Act, R. S. C. c. 109, s. 8, s.-s. 31. The railway company appealed against this order to the court of Queen's bench for Lower Canada, and that court affirmed the decision of the Judge of the superior court:—Held, that the order in question having been made by a Judge sitting in chambers, and, further, acting under the statute as persona designata, the proceedings had not originated in a superior court, within the meaning of s. 28 of the Supreme and Exchequer Courts Act, and the case was therefore not appealable. *Canadian Pacific R. W. Co.* v. *Little Seminary of Ste. Thérèse*, 16 S. C. R. 606.

——— *Petition—Appeal—Removal of Obstruction from Street.*]—By s. 454 of the charter of the city of Halifax, any person intending to erect a building upon or close to the line of the street must first cause such line to be located by the city engineer and obtain a certificate of the location; and, if a building is erected upon or close to the line without such certificate having been obtained, the supreme court, or a Judge thereof, may, on petition of the recorder, cause it to be re-

moved. On appeal from the decision of the supreme court of Nova Scotia, reversing the judgment of a Judge under this section, an objection was taken to the jurisdiction of the supreme court of Canada, on the ground that the petition having been presented to a Judge in chambers, the matter did not originate in a superior court: — Held, that the court had jurisdiction. Canadian Pacific R. W. Co. v. Little Seminary of Ste. Thérèse, 16 S. C. R. 606, and Virtue v. Hayes, 16 S. C. R. 721, distinguished. *City of Halifax* v. *Reeves*, 23 S. C. R. 340.

Local Judge in Admiralty—*Appeal.*]—Quære, as to the jurisdiction of the court to hear an appeal from the decision of a local Judge in admiralty. *Churchill* v. *McKay. The Quebec*, 20 S. C. R. 472.

Probate Court, Nova Scotia.]—Held, on a motion to quash, that an appeal will not lie to the supreme court of Canada in cases in which the court of original jurisdiction is not a superior court, and that the court of wills and probate for the county of Lunenburg, Nova Scotia, is not a superior court within the meaning of s. 17 of the Supreme and Exchequer Courts Act. *Beamish* v. *Kaulbach*, 3 S. C. R. 704.

(b) *Provincial Court of Last Resort.*

Ontario—*Board of County Court Judges —Assessment Appeal.*]—By 52 Vict. c. 37, s. 2, amending the Supreme and Exchequer Courts Act, an appeal lies in certain cases to the supreme court of Canada from courts "of last resort created under provincial legislation to adjudicate concerning the assessment of property for provincial or municipal purposes, in cases where the person or persons presiding over such court is or are appointed by provincial or municipal authority." By the Ontario Act 55 Vict. c. 48, as amended by 58 Vict. c. 47, an appeal lies from rulings of municipal courts of revision in matters of assessment to the county court Judge of the county court district where the property has been assessed. On an appeal from a decision of the county court Judges under the Ontario statutes: — Held, that if the county court Judges constituted a "court of last resort" within the meaning of 52 Vict. c. 37, s. 2, the persons presiding over such court were not appointed by provincial or municipal authority, and the appeal was not authorized by the said Act. Quære, is the decision of the county court Judges a "final judgment" within the meaning of 52 Vict. c. 37, s. 2? *City of Toronto* v. *Toronto R. W. Co.*, 27 S. C. R. 640.

——— *Divisional Court of High Court.*]—*See Farquharson* v. *Imperial Oil Co.*, 30 S. C. R. 188, *post* III.

Prince Edward Island—*Supreme Court of Judicature.*]—The court of last resort in Prince Edward Island from the judgment of which an appeal lies direct to the supreme court of Canada, is the supreme court of judicature in that Province. *Kelly* v. *Sullivan*, 1 S. C. R. 1.

Quebec—*Superior Court in Review.*]—An appeal does not lie from the court of review to the supreme court of Canada. *Macdonald* v. *Abbott*, 3 S. C. R. 278.

——— *Superior Court in Review—Mandamus.*]—The appeal in cases of mandamus under s. 23 of the Supreme and Exchequer Courts Act is restricted, by the application of s. 11, to the decisions of the "highest court of final resort" in the Province; and an appeal will not lie from any court of the Province of Quebec but the Queen's bench. *Banjou* v. *Marquis*, 3 S. C. R. 251.

——— *Superior Court in Review—Extension of Jurisdiction.*]—By s. 3 of the Supreme and Exchequer Courts Amending Act of 1891, an appeal may lie to the supreme court of Canada from the superior court in review, Province of Quebec, in cases which, by the law of that Province, are appealable direct to the judicial committee of the privy council. A judgment was delivered by the superior court in review at Montreal in favour of D., the respondent, on the same day on which the amending Act came into force. On an appeal to the supreme court of Canada taken by H. et al.:—Held, that the appellants not having shewn that the judgment was delivered subsequent to the passing of the amending Act, the court had no jurisdiction. Quære, whether an appeal will lie from a judgment pronounced after the passing of the amending Act in an action pending before the change of the law. *Hurtubise* v. *Desmarteau*, 19 S. C. R. 562.

In an action brought by the respondents against the appellant for $2,006, which was argued and taken en délibéré by the superior court sitting in review on the 30th September, 1891, the day on which the Act 54 & 55 Vict. c. 25, s. 3 (D.), giving a right to appeal from the superior court in review to the supreme court of Canada, was sanctioned, the judgment was rendered a month later in favour of the respondents. On appeal to the supreme court of Canada:—Held, that the respondents' right could not be prejudiced by the delay of the court in rendering judgment, which should be treated as having been given on the 30th September, when the case was taken en délibéré, and therefore the case was not appealable. Hurtubise v. Desmarteau, 19 S. C. R. 562, followed. *Couture* v. *Bouchard*, 21 S. C. R. 281.

By s. 3 of 54 & 55 Vict. c. 25 (D.), an appeal is given to the supreme court of Canada from the judgment of the superior court in review, "where and so long as no appeal lies from the judgment of that court when it confirms the judgment rendered in the court appealed from, which by the law of the Province of Quebec is appealable to the judicial committee of the privy council." The judgment in this case was delivered by the superior court on the 17th November, 1891, and was affirmed unanimously by the superior court in review on the 29th February, 1892, which latter judgment was by the law of the Province of Quebec appealable to the judicial committee. The statute 54 & 55 Vict. c. 25 was passed on the 30th September, 1891, but the plaintiff's action had been instituted on the 22nd November, 1890, and was standing for judgment before the superior court in the month of June, 1891, prior to the passing of 54 & 55 Vict. c. 25. On an appeal from the judgment of the superior court in review to the supreme court of Canada, the respondent moved to quash the appeal for want of jurisdiction:—Held, that the right of appeal given by 54 & 55 Vict. c. 25 does not extend

to cases standing for judgment in the superior court prior to the passing of the said Act. Couture v. Bouchard, 21 S. C. R. 281, followed. *Williams* v. *Irvine*, 22 S. C. R. 108.

54 & 55 Vict. c. 25 (D.) does not authorize an appeal to the supreme court of Canada from a decision of the court of review in a case where the judgment of the superior court is reversed and there is an appeal to the court of Queen's bench. Danjou v. Marquis, 3 S. C. R. 251, and Macdonald v. Abbott, 3 S. C. R. 278, followed. *Barrington* v. *City of Montreal*, 25 S. C. R. 202.

Where the superior court, sitting in review, has varied a judgment, on appeal from the superior court, by increasing the amount of damages, the judgment rendered in the court of first instance is not thereby confirmed so as to give an appeal direct from the judgment of the court of review to the supreme court of Canada under the provisions of s.-s. 3 of s. 3, c. 25 of 54 & 55 Vict. (D.), amending the Supreme and Exchequer Courts Act. *Simpson* v. *Pallister*, 29 S. C. R. 6.

Certain ratepayers of the city of Montreal having objections to one of the commissioners named in proceedings taken for the expropriation of land required for the improvement of a public street, in which they were interested, presented a petition to the superior court demanding his recusation. The petition was dismissed; on an appeal to the court of review, the judgment dismissing the petition was affirmed; and a further appeal was then taken to the supreme court of Canada. On motion to quash the appeal for want of jurisdiction:—Held, that no appeal de plano would lie from the judgment of the court of review to Her Majesty's privy council, and consequently there was no appeal therefrom to the supreme court of Canada under the provisions of 54 & 55 Vict. c. 25, s. 3, amending the Supreme and Exchequer Courts Act. *Ethier* v. *Ewing*, 29 S. C. R. 446.

See City of Ste. Cunégonde de Montreal v. *Gougeon*, 25 S. C. R. 78; *Dufresne* v. *Guéveremont*, 26 S. C. R. 216; *Citizens Light and Power Co.* v. *Parent*, 27 S. C. R. 316.

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4. *Criminal Proceedings.*

Certiorari—*Merchants Shipping Act.*]—An appeal lies to the supreme court of Canada from the judgment of a provincial court making absolute a rule nisi for a certiorari to bring up proceedings before a police magistrate under the Merchants Shipping Act with a view to having the judgment thereon quashed. *The Queen* v. *Sailing Ship "Troop" Co.*, 29 S. C. R. 662.

Contempt of Court.]—Contempt of court is a criminal proceeding, and unless it comes within s. 68 of the Supreme Court Act, an appeal does not lie to this court from a judgment in proceedings therefor. O'Shea v. O'Shea, 15 P. D. 59, followed. In re O'Brien, 16 S. C. R. 197, referred to. *Ellis* v. *The Queen*, 22 S. C. R. 7.

Crown Case Reserved — *Unanimous Judgment.*]—In Michaelmas Term, 1877, certain questions of law reserved, which arose on the trial of the appellants, were argued before the court of Queen's bench for Ontario, composed of the Chief Justice and one puisne Judge, and on the 4th February, 1878, the said court, composed of the same Judges, delivered judgment, affirming the conviction of the appellants for manslaughter. The court of Queen's bench for Ontario, when full, is composed of a Chief Justice and two puisne Judges. The appellants thereupon appealed to the supreme court under 38 Vict. c. 11, s. 40:—Held, that the affirmance of the conviction, although by only two Judges, was unanimous, and therefore no appeal lay. *Amer* v. *The Queen*, 2 S. C. R. 592.

Motion for Reserved Case.] — Where the court appealed from has affirmed the refusal to reserve a case moved for at a criminal trial on two grounds, and is unanimous as to one of such grounds, but not as to the other, the supreme court on appeal can only take into consideration the ground of motion in which there was dissent. *McIntosh* v. *The Queen*, 23 S. C. R. 180.

New Trial—"*Opinion.*"]—An appeal to the supreme court of Canada does not lie in cases where a new trial has been granted by the court of appeal under the provisions of the criminal code, 1892, ss. 742 to 750, inclusive. The word "opinion," as used in s.-s. 2 of s. 742 of the criminal code, 1892, must be construed as meaning a "decision" or "judgment" of the court of appeal in criminal cases. *Viau* v. *The Queen*, 29 S. C. R. 90.

Summary Convictions—*Habeas Corpus —Certiorari.*]—The only appellate power conferred on the supreme court in criminal cases is by s. 49 of the Supreme and Exchequer Courts Act, and it could not have been the intention of the legislature, while limiting appeals in criminal cases of the highest importance, to impose on the court the duty of revisal in matters of fact of all the summary convictions before police or other magistrates throughout the Dominion. Section 34 of the Supreme Court Amendment Act, 1876, does not in any case authorize the issue of a writ of certiorari to accompany a writ of habeas corpus granted by a Judge of the supreme court in chambers; and, as the proceedings before the court on habeas corpus arising out of a criminal charge are only by way of appeal from the decision of the Judge in chambers, the said section does not authorize the court to issue a writ of certiorari in such proceedings; to do so would be to assume appellate jurisdiction over the inferior court. *In re Trepanier*, 12 S. C. R. 111.

See In re Lazier, 29 S. C. R. 630.

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5. *Discretionary Orders.*

See ante I. 1.

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6. *Election Cases.*

Order Dismissing Petition — *Affidavit of Petitioner.*]—The appeal given to the supreme court of Canada by the Controverted Elections Act, R. S. C. c. 9, s. 50, from a decision on preliminary objections to an election petition, can only be taken in respect

to objections filed under s. 12 of the Act. No appeal lies from a judgment granting a motion to dismiss a petition on the ground that the affidavit of the petitioner was untrue. *Marquette Election Case*, 27 S. C. R. 219.

Preliminary Objections.]—See *Charlevoix Election, Brossard* v. *Langevin*, 2 S. C. R. 319.

The supreme court refused to entertain an appeal from the decision of a Judge in chambers granting a motion to have preliminary objections to an election petition struck out for not being filed in time. Such decision was not one on preliminary objections within s. 50 of the Controverted Elections Act, and, if it were, no judgment on the motion could put an end to the petition. *West Assiniboia Election Case*, 27 S. C. R. 215.

Ruling as to Mode of Trial.]—The ruling of the court below on an objection in proceedings on an election petition, viz., that the trial Judges could not proceed with the petition in this case, because the two petitions filed had not been bracketed by the prothonotary, as directed by s. 30 of c. 9, R. S. C., is not an appealable judgment or decision: R. S. C. c. 9, s. 50. *Vaudreuil Election Case*, 22 S. C. R. 1.

See North Ontario Election (Dom.), Wheeler v. *Gibbs*, 3 S. C. R. 374, *post* VI.

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7. *Final Judgments.*

Admission of Attorney.]—A judgment of the supreme court of Nova Scotia refusing to admit the appellant as an attorney is not a final judgment within the meaning of the Supreme Court Act. *In re Cahan*, 21 S. C. R. 100.

Contempt of Court—*Attachment for—Rule Absolute—Practice.*]—By a rule nisi of the supreme court of New Brunswick, E. was called upon to shew cause why an attachment should not issue against him, or he be committed for contempt of court, in publishing certain articles in a newspaper. On the return of the rule it was made absolute, and a writ of attachment was issued commanding the sheriff to have the body of E. before the court on a day named. By the practice in such cases in the said court it appeared that the attachment was issued merely in order to bring the party into court, where he might be ordered to answer interrogatories and by his answers purge, if he could, his contempt. If he were unable to do this, the court would pronounce sentence. E. appealed from the judgment making the rule absolute. On motion to quash the appeal:—Held, that the judgment appealed from was not a final judgment from which an appeal would lie under s. 24 (a) of the Supreme and Exchequer Courts Act, R. S. C. c. 135. *Ellis* v. *Baird*, 16 S. C. R. 147.

——— *Order Finding—Judicial Proceeding—Fine—Costs.*]—The decision of a provincial court in a case of constructive contempt is not a matter of discretion in which an appeal is prohibited by s. 27 of the Supreme and Exchequer Courts Act. The supreme court has jurisdiction to entertain such an appeal from the judgment of the court of appeal of the Province, not only under s. 24, s.-s. (a), of the Supreme and Exchequer Courts Act as a final judgment in an action or suit, but also under s.-s. (1) of s. 26 of the same Act, as a final judgment "in a matter or other judicial proceeding," within the meaning of said s. 26. The adjudication that the appellant, a solicitor and officer of the court, moved against in that quality, has been guilty of a contempt, is by itself an appealable judgment, although no sentence for the contempt has been pronounced by the court. When the party in contempt has been ordered to pay the costs of the application to commit, the court in effect inflicts a fine for the contempt. *In re O'Brien, Regina ex rel. Felitz* v. *Howland*, 16 S. C. R. 197.

——— *Sentence.*]—In proceedings for contempt of court by attachment, until sentence is pronounced there is no "final judgment" from which an appeal can be brought. *Ellis* v. *The Queen*, 22 S. C. R. 7.

Costs—*Taxation—Order for.*]—The court has no jurisdiction to entertain an appeal from a decision of the court of appeal upon appeal from an order for taxation of a solicitor's bill of costs, at the instance of a third party, such decision not being a final judgment within the meaning of the Supreme Court Act. *McGugan* v. *McGugan*, 21 S. C. R. 267.

——— *Taxation—Set-off.*]—In an action by a firm of solicitors to recover costs from clients, a reference was directed to a taxing officer, and, upon appeal from his report to the high court, a set-off claimed by one of the defendants of a sum paid by him to one of the plaintiffs for special services, was disallowed. This decision was affirmed by the court of appeal:—Semble, that the decision of the court of appeal was not a final judgment from which an appeal would lie to the supreme court of Canada. *McDougall* v. *Cameron, Bickford* v. *Cameron*, 21 S. C. R. 379.

Demurrer—*Order Setting aside as Frivolous.*]—An order setting aside a demurrer as frivolous and irregular under the Nova Scotia Practice Act (R. S. N. S., 4th ser., c. 94), is an order on a matter of practice, and not a final judgment appealable under s. 11 of the Supreme and Exchequer Courts Act. *Kandick* v. *Morrison*, 2 S. C. R. 12.

Demurrer to Part of Action—*Judicial Proceeding.*]—In an action instituted in the superior court of the Province of Quebec by the appellant against M. A. C. and nine other defendants, the respondents, three of the defendants, severally demurred to the appellant's action, except as regarded two lots of land, in which they acknowleged the appellant had an undivided share. The superior court sustained the demurrer, and, on appeal, the court of Queen's bench for Lower Canada affirmed the judgment. The appellant thereupon appealed to the supreme court, and respondents moved to quash the appeal, on the ground that the supreme court had no jurisdiction:—Held, that, as the judgment of the court of Queen's bench (the highest court of last resort having jurisdiction in the Province) finally determined and put an end to the appeal, which was a judicial proceeding within the meaning of s. 9 of the Supreme Court Amendment Act of 1879, such judgment was one from which an appeal would lie to the supreme

court of Canada; and, though an appeal cannot be taken from a court of first instance directly to the supreme court until there is a final judgment, yet, whenever a provincial court of appeal has jurisdiction, this court can entertain an appeal from its judgment finally disposing of the appeal, the case being in other respects a proper subject of appeal. *Chevalier* v. *Cuvillier*, 4 S. C. R. 605.

Held, that, although the judgment appealed from in this case was a judgment on a demurrer to part of the action only, it was a final judgment in a judicial proceeding, within the meaning of s. 3 of the Supreme Court Amendment Act of 1879. Chevalier v. Cuvillier, 4 S. C. R. 605, followed. *Shields* v. *Peak*, 8 S. C. R. 579.

Demurrer to Plea—*Allowance of—Judgment for Default of Plea.*]—An action was brought by respondent as indorsee of a promissory note made by appellants in favour of one J. A., and by him indorsed to respondent. The appellants pleaded that the amount of the note had been attached in their hands by one of A.'s judgment creditors and paid under the garnishee clauses of the Common Law Procedure Act of P. E. I., transcripts of sections 60 to 67, inclusive, of the English C. L. P. Act, 1854. To this plea respondent demurred on the ground that the debt was not one which could properly be attached, and on the 5th February, 1883, the supreme court gave judgment in favour of the respondent on the demurrer. No rule for judgment on the demurrer was taken out by the respondent. On the 19th March following, an order was obtained to ascertain amount of debt and damages for which final judgment was to be entered, and judgment was signed for the respondent on the 2nd May following. The appellants then appealed to the supreme court of Canada. On motion to quash for want of jurisdiction, it was contended on behalf of respondent that the appellants should have appealed from the judgment rendered on the demurrer on the 5th February, 1883, and within thirty days from that date: — Held, that the judgment entered on the 2nd May, 1883, was the "final judgment" in the case, and from it an appeal would lie to the supreme court. *Roblee* v. *Rankin*, 11 S. C. R. 137.

Demurrer to Replication — *Allowance of—Effect on Action.*]—The judgment of a provincial court allowing a demurrer to the plaintiff's replication to one of several pleas by the defendants, which does not operate to put an end to the whole or any part of the action or defence, is not a final judgment from which an appeal will lie to the supreme court of Canada. *Shaw* v. *Canadian Pacific R. W. Co.*, 16 S. C. R. 703.

Discharge from Arrest—*Petition for—Judicial Proceeding.*]—A writ of capias having been issued against McK. under the provisions of art. 798, C. C. P., he petitioned to be discharged under art. 819, C. C. P., and issue having been joined on the pleadings under art. 820, C. C. P., the petition was dismissed by the superior court. From that judgment McK. appealed to the court of Queen's bench for Lower Canada, and that court maintained the judgment of the superior court. Thereupon McK. appealed to the supreme court of Canada. On motion to quash for want of jurisdiction:—Held, that the judgment was a final judgment in a judicial proceeding within the meaning of s. 28, c. 135, R. S. C., and therefore appealable. Stanton v. Canada Atlantic R. W. Co., Cassels' Dig. 249, reviewed. *MacKinnon* v. *Keroack*, 15 S. C. R. 111.

Dismissal of Petition for Recusation of Commissioner.]—The judgment of the court of review affirming a judgment of the superior court dismissing a petition for the recusation of a commissioner for the expropriation of land, is not a final judgment within the meaning of s. 29 of the Supreme and Exchequer Courts Act. *Ethier* v. *Ewing*, 29 S. C. R. 446.

Dismissal of Plea of Prescription.]—A judgment affirming dismissal of a plea of prescription when other pleas remain on the record is not a final judgment from which an appeal lies to the supreme court of Canada. Hamel v. Hamel, 26 S. C. R. 17, approved and followed. *Griffith* v. *Harwood*, 30 S. C. R. 315.

Judgment Establishing Cross-demand—*Reference as to Damages.*]—St. L. claimed of S. $2,126.75, balance due on a building contract. S. denied the claim, and, by incidental demand, claimed $6,368 for damages resulting from defective work. The superior court, on 27th March, 1877, gave judgment in favour of St. L. for the whole amount of his claim, and dismissing S.'s incidental demand. This judgment was reversed by the court of review, on the 29th December, 1877. St. L. appealed to the court of Queen's bench, and on the 24th November, 1880, that court held that St. L. was entitled to the balance claimed by him, from which should be deducted the cost of rebuilding the defectively constructed work, and, in order to ascertain such cost, the case was remitted to the superior court. Experts were appointed to ascertain the damages, and, on their report, the superior court, on the 18th June, 1881, held that it was bound by the judgment of the court of Queen's bench, and, deducting the amount awarded by the experts from the balance claimed by St. L., gave judgment for the difference. The judgment was affirmed by the court of Queen's bench, on the 19th January, 1882:—Held, on appeal, that the judgment of the court of Queen's bench of the 24th November, 1880, was a final judgment on the merits, and that the superior court, when the case was remitted to it, rightly held that it was bound by that judgment, and that St. L. was entitled to the balance thereby found due to him. *Shaw* v. *St. Louis*, 8 S. C. R. 385.

New Trial.]—Where a new trial has been ordered upon the ground that the answer given by the jury to one of the questions is insufficient to enable the court to dispose of the interest of the parties on the findings of the jury as a whole, no appeal will lie from such order, which is not a final judgment, and cannot be held to come within the exceptions provided for by the Supreme and Exchequer Courts Act in relation to appeals in cases of new trials. See Supreme and Exchequer Courts Act, ss. 24 (g), 30, and 61. *Barrington* v. *Scottish Union and National Insurance Co.*, 18 S. C. R. 615.

In an action tried by a Judge and jury, the judgment of the superior court in review dismissed the plaintiffs' motion for judgment

and granted the defendants' motion to dismiss the action. On appeal to the court of Queen's bench, the judgment of the superior court was reversed, and the court set aside the assignment of facts to the jury and all subsequent proceedings, and, suo motu, ordered a venire de novo, on the ground that the assignment of facts was defective and insufficient, and the answers of the jury were insufficient and contradictory:—Held, that the order of the court of Queen's bench was not a final judgment, and did not come within the exceptions allowing an appeal in cases of new trials: and therefore the appeal would not lie. *Accident Insurance Co. of North America* v. *McLachlan*, 18 S. C. R. 627.

In an action brought to recover damages for the loss of certain glass delivered to the defendants for carriage, the Judge left to the jury the question of negligence only, reserving any other questions to be decided subsequently by himself. On the question submitted the jury disagreed. The defendants then moved a divisional court for judgment, but pending such motion the plaintiffs applied for and obtained an order of the court allowing them to amend the statement of claim by charging other grounds of negligence. The defendants submitted to such order and pleaded to such amendments, and new and material issues were thereby raised for determination. The action as so amended was entered for trial, but had not been tried when the divisional court pronounced judgment on the motion, dismissing the plaintiffs' action. On appeal to the court of appeal from the judgment of the divisional court, it was reversed and a new trial ordered. On appeal to the supreme court:—Held, that the judgment of the court of appeal ordering a new trial in this case was not a final judgment, nor did it come within any of the provisions of the Supreme Court Act authorizing an appeal from judgments not final. *Canadian Pacific R. W. Co.* v. *Cobban Mfg. Co.*, 22 S. C. R. 132.

Order Quashing Writ of Appeal.]—A judgment of the court of Queen's bench for Lower Canada quashing a writ of appeal, on the ground that such writ had been issued contrary to the provisions of art. 1116, C. C. P., is not "a final judgment," within the meaning of s. 28 of the Supreme and Exchequer Courts Act. Shaw v. St. Louis, 8 S. C. R. 385, distinguished. *Ontario and Quebec R. W. Co.* v. *Marcheterre*, 17 S. C. R. 141.

Petition for Leave to Intervene — *Judgment on.*]—No appeal lies to the supreme court from the judgment of the court of Queen's bench on a petition for leave to intervene in a cause, the proceedings being interlocutory only. *Hamel* v. *Hamel*, 26 S. C. R. 17.

Petition to Quash Seizure.]—A judgment of the court of Queen's bench for Lower Canada reversing a judgment of the superior court (which quashed on petition a seizure before judgment) and ordering that the hearing of the petition contesting the seizure should be proceeded with in the superior court at the same time as the hearing of the main action, is not a final judgment appealable to the supreme court: R. S. C. c. 135, ss. 24-28. *Molson* v. *Barnard*, 18 S. C. R. 622.

Revivor—*Legatee—Dispute as to Will—Judicial Proceeding.*]—The plaintiff in an action brought to set aside a deed of assignment died before the case was ready for judgment, and the respondent having petitioned to be allowed to continue the suit as legatee of the plaintiff under a will dated the 17th November, 1869, the appellant contested the continuance on the ground that this will had been revoked by a later will dated 17th January, 1885. The respondent replied that the last will was null and void, and upon that issue the court of Queen's bench for Lower Canada, reversing the judgment of the superior court, declared null and void the will of 17th January, 1885, and held the continuance of the original suit by the respondent to be admitted. The respondent moved to quash an appeal on the ground that the judgment appealed from was an interlocutory judgment:—Held, that the judgment was res judicata between the parties, and final on the petition for continuance of the suit, and therefore appealable to this court: R. S. C. c. 135, ss. 2 and 28. Shaw v. St. Louis, 8 S. C. R. 385, followed. *Baptist* v. *Baptist*, 21 S. C. R. 425.

Setting aside Judgment — *Petition — Dismissal.*] — Judgment was recovered in a suit brought to realize mechanics' liens, and C., the owner of the land on which the mechanics' work was done, applied by petition in the high court to have such judgment set aside as a cloud upon his title. On this petition an order was made allowing C. to come in and defend the action for lien, on terms, which not being complied with, the petition was dismissed, and the judgment dismissing it was affirmed by a divisional court and the court of appeal:—Held, that the judgment was not a final judgment within the meaning of s. 24 (a) of the Supreme and Exchequer Courts Act, or, if it was, it was a matter in the judicial discretion of the court, from which by s. 27 no appeal lies to this court. *Virtue* v. *Hayes, In re Clarke*, 16 S. C. R. 721.

Setting aside Judgment by Default.]—Quære, whether the order on appeal from an order in chambers granting or refusing an application by the defendant to set aside a judgment by default and let him in to defend, is a "final judgment" within the meaning of s. 24 (a) of the Act. *O'Donohoe* v. *Bourne*, 27 S. C. R. 654.

Stay of Proceedings.]—The defendants to an action in the high court of justice for Ontario were made bankrupt in England, and the plaintiffs filed a claim with the assignee in bankruptcy. The high court of justice in England made an order restraining the plaintiffs from proceeding with their action, and a like order was made by a high court Judge in Ontario, perpetually restraining the plaintiffs from proceeding, but reserving liberty to apply. This latter order was affirmed by a divisional court and the court of appeal, and the plaintiffs sought an appeal to the supreme court of Canada:—Held, that the judgment from which the appeal was sought was not a final judgment within the meaning of the Supreme Court Act. *Maritime Bank of the Dominion of Canada* v. *Stewart*, 20 S. C. R. 105.

Summary Judgment.]—An appeal does not lie from a decision of the court of Queen's bench (Man.) affirming the order of a Judge,

made on the return of a summons to shew cause, allowing judgment to be entered by the plaintiffs on a specially indorsed writ, which is not a "final judgment" within the meaning of the Supreme Court Act. *Rural Municipality of Morris* v. *London and Canadian L. and A. Co.*, 19 S. C. R. 434.

Trial by Jury—*Order for.*]—An order of the court of Queen's bench for Lower Canada affirming an order of the superior court by which an application of a party to have the issues tried by a jury is refused, is an interlocutory order, and no appeal lies therefrom to the supreme court of Canada under R. S. C. c. 135, and amending Acts. *Demers* v. *Bank of Montreal*, 27 S. C. R. 197.

Vendor and Purchaser — *Petition — Reference—Ruling as to Evidence.*]—Where a master, on a reference under the Vendor and Purchaser Act to settle the title under a written agreement for a lease, ruled that evidence might be given to shew what covenants the lease should contain, an appeal does not lie to the supreme court from the judgment affirming such ruling, it not being a final judgment, and the case not coming within the provisions of s. 24 (e) of the Supreme and Exchequer Courts Act relating to proceedings in equity. *Canadian Pacific R. W. Co.* v. *City of Toronto*, 30 S. C. R. 337.

Writ of Summons — *Setting aside.*] — Application was made to a Judge to set aside a writ of summons served out of the jurisdiction of the court, on the grounds that the cause of action arose in England and the defendant was not subject to the process of the court, and, if the court had jurisdiction, that the writ was not in proper form. The Judge refused the application, and his decision was affirmed by the full court:—Held, that the decision of the full court was not a final judgment in an action, suit, matter, or other judicial proceeding, within the meaning of the Supreme Court Act, and no appeal would lie from such decision to the supreme court of Canada. *Martin* v. *Moore*, 18 S. C. R. 634.

See Seath v. *Hagar*, 18 S. C. R. 715; *Langevin* v. *Commissaries d'Ecole pour la Municipalité de St. Marc*, 18 S. C. R. 599; *City of Toronto* v. *Toronto R. W. Co.*, 27 S. C. R. 640.

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8. *Future Rights.*

Annuity.]—B. R. claimed, under the will of C. S. R. and an Act of the legislature of the Province of Quebec, 54 Vict. c. 96, from A. L., testamentary executrix of the estate, the sum of $200, being for an instalment of the monthly allowance which A. L. was authorized to pay to each of the testator's daughters out of the revenues of his estate. The action was dismissed by the court of Queen's bench for Lower Canada; and on an appeal to the supreme court:—Held, that the amount in controversy being only $200, and there being no "future rights" of B. R. which might be bound within the meaning of those words in s. 29 (b) of the Supreme and Exchequer Courts Act, the case was not appealable. "Annual rents" in s.s. (b) means "ground rents" (rentes foncières) and not an annuity or any other like charges or obligations. *Rodier* v. *Lapierre*, 21 S. C. R. 69.

——— *Marriage Contract.*]—By R. S. C. c. 135, s. 29 (b), amended by 56 Vict. c. 29 (D.), an appeal will lie to the supreme court of Canada from the judgments of the courts of highest resort in the Province of Quebec, in cases where the amount in controversy is less than $2,000, if the matter relates to any title to lands or tenements, annual rents, and other matters or things where the rights in future might be bound: — Held, that the words "other matters or things" mean rights of property analogous to title to lands, &c., which are specifically mentioned, and not personal rights; that "title" means a vested right or title already acquired, though the enjoyment may be postponed; and that the right of a married woman to an annuity provided by her marriage contract in case she should become a widow, is not a right in future which would authorize an appeal in an action by her husband against her for séparation de corps, in which, if judgment went against her, the right to the annuity would be forfeited. *O'Dell* v. *Gregory*, 24 S. C. R. 661.

——— *Personal Alimentary Allowance.*]—Actions or proceedings respecting disputes as to mere personal alimentary pensions or allowances do not constitute controversies wherein rights in future may be bound within the meaning of s. 29 (b) of the Supreme and Exchequer Courts Act, as amended, which allows appeals to the supreme court of Canada from judgments rendered in the Province of Quebec in cases where the controversy relates to "annual rents or other matters or things where rights in future might be bound." Macfarlane v. Leclaire, 15 Moo. P. C. 181, distinguished. Sauvageau v. Gauthier, L. R. 5 P. C. 494, followed. *Banque du Peuple* v. *Trottier*, 28 S. C. R. 422.

Calls.]—A joint stock company sued the defendant B. for $1,000, being a call of ten per cent. on 100 shares of $100 each, alleged to have been subscribed by B. in the capital stock of the company, and prayed that the defendant be condemned to pay the said sum of $1,000 with costs. The defendant denied any liability, and prayed for the dismissal of the action. During the pendency of the suit, the company's business was ordered to be wound up under the Winding-up Act, 45 Vict. c. 23 (D.), and the liquidator was authorized to continue the suit. The superior court condemned the defendant to pay the amount claimed, but on appeal to the court of Queen's bench the action of the plaintiff company was dismissed. On appeal to the supreme court of Canada:—Held, that the appeal would not lie, the amount in controversy being under $2,000, and there being no future rights as specified in s.-s. (b) of s. 29, c. 135, R. S. C. which might be bound by the judgment. Gilbert v. Gilman, 16 S. C. R. 189, followed. *Dominion Salvage and Wrecking Co.* v. *Brown*, 20 S. C. R. 203.

Charge on Land—*Assessment for Drain.*] —On an appeal from a judgment of the court of Queen's bench for Lower Canada, in an action brought to recover $361.90, the amount of a special assessment for a drain along the property of the defendants, the respondent moved to quash for want of jurisdiction, on the ground that the matter in controversy was under $2,000, and did not come within any of the exceptions in s. 29 of the Supreme and Exchequer Courts Act:—Held, that the case

came within the words "such like matters or things where the rigats in future might be bound," in s. 29 (b), and was therefore appealable. *Ecclesiastiques de St. Sulpice de Montreal* v. *City of Montreal*, 16 S. C. R. 399.

——— *Local Improvements.*]—By a procès verbal by the municipal council of Ste. Anne du Bout de L'Isle, a portion of the road fronting the land of one R. was ordered to be improved by raising and widening it. Upon R.'s refusal to do the work, the council had it performed, paid $200 for it, and subsequently sued R. for the $200. The court of Queen's bench affirmed a judgment in favour of the municipal council for that amount. On appeal to the supreme court: — Held, that, although the amount in controversy did not amount to $2,000, yet, as it related to a charge on the appellant's land whereby his rights in future might be bound, the case was appealable: R. S. C. c. 135, s. 29. *Reburn* v. *Paroisse de Ste. Anne du Bout de L'Isle*, 15 S. C. R. 92.

——— *Obligation to Repair Highway.*]—In an action brought by the respondent corporation for the recovery of the sum of $262.14 paid out by it for macadam work on a piece of road fronting the appellants' lands, the work of macadamizing the road and keeping it in repair being imposed by a by-law of the municipal council of the respondents, the appellants pleaded the nullity of the by-law. On appeal to the supreme court of Canada from the judgment of the court of Queen's bench for Lower Canada dismissing the appellants' plea:—Held, that the appellants' obligation to keep the road in repair under the by-law not being "future rights" within the meaning of s. 29 (b), the case was not appealable. County of Verchères v. Village of Varennes, 19 S. C. R. 365, followed, and Reburn v. Paroisse de Ste. Anne du Bout de L'Isle, 15 S. C. R. 92, distinguished. *Dubois* v. *Corporation of Ste. Rose*, 21 S. C. R. 65.

Expropriation of Land—*Assessments—Local Improvements.*]—A by-law was passed for the widening of a portion of a street up to a certain homologated line, and for the necessary expropriations therefor. Assessments for the expropriations for certain years having been made whereby proprietors of a part of the street were relieved from contributing any proportion to the cost, thereby increasing the burden of assessment on the properties actually assessed, the owners of these properties brought an action to set aside the assessments. The court of Queen's bench affirmed a judgment dismissing the action. On an application for leave to appeal:—Held, that, as the effect of the judgment sought to be appealed from would be to increase the burden of assessment not only for the expropriations then made, but also for expropriations which would have to be made in the future, the judgment was one from which an appeal would lie, the matter in controversy coming within the meaning of the words "and other matters or things where the rights in future might be bound," contained in s.-s. (b) of s. 29, Supreme and Exchequer Courts Act, as amended by 56 Vict. c. 29, s. 1. *Stevenson* v. *City of Montreal*, 27 S. C. R. 187.

Fee of Office — *School-mistress.*] — A school-mistress by her action claimed $1,243 as fees due to her in virtue of s. 68, c. 15, C. S. L. C., which was collected by the school commissioners of the city of Three Rivers while she was employed by them. At the time of the action the plaintiff had ceased to be in their employ. The court of Queen's bench for Lower Canada, affirming the judgment of the superior court, dismissed the action. On a motion to the supreme court of Canada to allow a bond in appeal, the same having been refused by a Judge of the court below, the registrar of the supreme court, and a Judge in chambers, on the ground that the case was not appealable:—Held, that the matter in controversy did not relate to any office or fee of office within the meaning of s. 29 (b) of the Supreme and Exchequer Courts Act, R. S. C. c. 135. (2) Even assuming it did, no rights in future would be bound, and the amount in dispute being less than $2,000, the case was not appealable. (3) The words "where the rights in future might be bound" in s.-s. (b) of s. 29 govern all the preceding words "any fee of office, &c." Chagnon v. Normand, 16 S. C. R. 661, Gilbert v. Gilman, 16 S. C. R. 189, Bank of Toronto v. Curé, &c., de Ste. Vierge, 12 S. C. R. 25, referred to. *Larivière* v. *Three Rivers School Commissioners*, 23 S. C. R. 723.

Guardian of Infants.]—The supreme court of Canada has no jurisdiction to entertain an appeal from a judgment pronounced in a controversy in respect to the cancellation of the appointment of a tutrix to minor children. *Noel* v. *Chevrefils*, 30 S. C. R. 327.

Money Payment—*Future Instalments—Agreement—Condition.*]—In an action for $1,333.36, a balance of one of several money payments of $2,000 each, one whereof the defendants agreed to pay to the plaintiff every year so long as certain security given by the plaintiff for the defendants remained in the hands of the government, the defendants contended that the security had been released by the action of the government, and they were therefore not liable to pay the amount sued for, or any further instalments. The court of Queen's bench held that the security had not been released, and gave judgment for the amount claimed. The defendants applied to one of the Judges of that court and obtained leave to appeal, on the ground that if the judgment was well founded then future rights would be bound, and they had become liable for two other instalments of $2,000 each for which actions were pending:—Held, that the appeal would not lie, because, even if the future rights of the defendants were bound by the judgment, such future rights had no relation to any of the matters or things enumerated in s.-s. (b) of s. 29 of the Supreme and Exchequer Courts Act. The words "where the rights in future might be bound" in this sub-section are governed and qualified by the preceding words, and to make a case appealable when the amount in controversy is less than $2,000, not only must future rights be bound by the judgment, but the future rights so bound must relate to some one of the matters or things specified in the sub-section in question, viz.: to a fee of office, duty, rent, revenue, or sum of money payable to Her Majesty, or to some title to lands or tenements, or to annual rents out of lands or tenements, or to some like matters and things. *Gilbert* v. *Gilman*, 16 S. C. R. 189.

——— *Interests, Nature of.*] — The classes of matters which are made appealable to the

supreme court of Canada under the provisions of s. 29 (b) of the Supreme and Exchequer Courts Act, as amended by 56 Vict. c. 29, do not include future rights which are merely pecuniary in their nature and do not affect rights to or in real property or rights analogous to interests in real property. Rodier v. Lapierre, 21 S. C. R. 69, and O'Dell v. Gregory, 24 S. C. R. 661, followed. *Raphael v. Maclaren*, 27 S. C. R. 319.

——— *Maintenance of Bastard.*]—In an action en declaration de paternité the plaintiff claimed an allowance for the support of the child until he should be able to support himself:—Held, that the nature of the action and demande did not bring the case within the exception as to "future rights" mentioned in s. 29 of the Supreme and Exchequer Courts Act. O'Dell v. Gregory, 24 S. C. R. 661, Raphael v. Maclaren, 27 S. C. R. 319, followed. *Macdonald v. Galivan*, 28 S. C. R. 258.

Opposition to Writ of Possession—*Right of Way.*]—An opposition to a writ of possession issued in execution of a judgment allowing a right of way over the opposant's land does not raise a question of title to land nor bind future rights, and in such a case the supreme court of Canada has no jurisdiction to entertain an appeal. O'Dell v. Gregory, 24 S. C. R. 661, followed. Chamberland v. Fortier, 23 S. C. R. 371, and McGoey v. Leamy, 27 S. C. R. 193, distinguished. If the jurisdiction of the court is doubtful the appeal must be quashed. Langevin v. Commissaires d'Ecole de St. Marc, 18 S. C. R. 599, followed. *Cully v. Ferdais*, 30 S. C. R. 330.

Penalties for Bribery—*Recovery of—Statutory Effect—Disqualification for Crown Office.*]—To give the supreme court jurisdiction to hear an appeal in a case from the Province of Quebec by virtue of s. 29 (b) of the Supreme and Exchequer Courts Act (R. S. C. c. 135), the matter relating to a fee of office where the rights in future might be bound, must be the matter really in controversy in the suit in which the appeal is sought, and not something merely collateral thereto. This clause will not give jurisdiction in a case in which the action was brought to recover penalties for bribery under the Quebec Election Act (R. S. Q. art. 429), even assuming that the effect of the judgment may be to disqualify the appellant from holding office under the Crown for seven years. *Chagnon v. Normand*, 16 S. C. R. 661.

Separation of Husband and Wife.]—In an action by a wife for séparation de corps for ill treatment the declaration concluded by demanding that the husband be condemned to deliver up to the wife her property valued at $18,000. The judgment in the action decreed separation and ordered an account as to property:—Held, that no appeal would lie to the supreme court from the decree for separation. O'Dell v. Gregory, 24 S. C. R. 661, followed, *Talbot v. Guilmartin*, 30 S. C. R. 482.

Sheriff's Sale — *Vacating.*]—An appeal will lie to the supreme court under s. 29 (b) of the Supreme Court Act from the judgment in an action to vacate the sheriff's sale of an immovable. Dufresne v. Dixon, 16 S. C. R. 596, followed. *Lefcuntun v. Véronneau*, 22 S. C. R. 203.

Taxes.] — See *City of Sherbrooke v. McManamy*, 18 S. C. R. 594.

Title to Land.]—In an action brought before the superior court with seizure in recaption under arts. 857 and 887, C. C. P., and art. 1624, C. C., the defendant pleaded that he had held the property (valued at over $2,000) since the expiration of his lease, under some oral agreement of sale. The judgment appealed from, reversing the judgment of the court of review, held that the action ought to have been instituted in the circuit court. On appeal to the supreme court:—Held, that, as the case was originally instituted in the superior court, and upon the face of the proceedings the right to the possession and property of an immovable was involved, an appeal lay: Supreme and Exchequer Courts Act, s. 29 (b) and ss. 28 and 24. *Blackford v. McBain*, 19 S. C. R. 42. See, also, *S. C.*, 20 S. C. R. 269.

In a case of a dispute between adjoining proprietors of mining lands, where an encroachment was complained of, and it appeared that the limits of the respective properties had not been legally determined by a bornage, the court of Queen's bench held that an injunction would not lie to prevent the alleged encroachment, the proper remedy being an action en bornage. On appeal to the supreme court of Canada:—Held, that, as the matter in controversy did not put in issue any title to land where the rights in future might be bound, the case was not appealable: R. S. C. c. 135, s. 29 (b). *Emerald Phosphate Co. v. Anglo-Continental Guano Works*, 21 S. C. R. 422.

——— *Easement.*]—By a judgment of the court of Queen's bench for Lower Canada the defendants in the action were condemned to build and complete certain works and drains within a certain delay, in a lane separating the defendant's and plaintiff's properties on the west side of Peel street, Montreal, to prevent water from entering the plaintiff's house, which was on the slope below. The question of damages was reserved. On appeal to the supreme court of Canada:—Held, that the case was not appealable, there being no controversy as to $2,000 or over, and no title to lands or future rights in question, within the meaning of s. 29 (b) of the Supreme Court Act. The words "title to lands" in this subsection are only applicable to a case where a title to the property or a right to the title may be in question. The fact that a question of the right of servitude arises would not give jurisdiction. Wheeler v. Black, 14 S. C. R. 242, referred to. Gilbert v. Gilman, 16 S. C. R. 189, approved. *Wineberg v. Hampson*, 19 S. C. R. 369.

———*Easement—Amending Act.*]—In an action négatoire the plaintiff sought to have a servitude claimed by the defendant declared non-existent, and claimed $30 damages:—Held, that under 56 Vict. c. 29, s. 1, amending R. S. C. c. 135, s. 29 (b), the case was appealable, the question in controversy relating to matters where the rights in future might be bound. Wineberg v. Hampson, 19 S. C. R. 369, distinguished. *Chamberland v. Fortier*, 23 S. C. R. 371.

——— *Revendication—Boundary.*] — The parties executed a deed for the purpose of settling the boundary between contiguous lands of which they were respectively proprietors,

and thereby named a provincial surveyor as their referee to run the line. The line thus run being disputed, M. brought an action to have this line declared the true boundary, and to revendicate a disputed strip of land lying upon his side of the line so run by the surveyor: — Held, that under R. S. C. c. 135, s. 29 (b), as amended by 56 Vict. c. 29, s. 1, an appeal would lie to the supreme court of Canada, first, on the ground that the question involved was one relating to a title to lands, and secondly, on the ground that it involved matters or things where rights in future might be bound. Chamberland v. Fortier, 23 S. C. R. 371, approved. *McGoey* v. *Leamy*, 27 S. C. R. 193.

Toll—*Bridge—Statutory Privilege—Interference with.*]—By 38 Vict. c. 97 the plaintiffs were authorized to build and maintain a toll bridge on the river L'Assomption at a place called "Portage," and if the said bridge should by accident or otherwise be destroyed, become unsafe, or impassable, the said plaintiffs were bound to rebuild the said bridge within fifteen months next following the giving way of said bridge, under penalty of forfeiture of the advantages to them by this Act granted; and during any time that the said bridge should be unsafe or impassable, they were bound to maintain a ferry across the said river, for which they might recover the tolls. The bridge was accidentally carried away by ice, but rebuilt and opened for traffic within fifteen months. During the reconstruction, although plaintiffs maintained a ferry across the river, the defendant built a temporary bridge within the limits of the plaintiffs' franchise and allowed it to be used by persons crossing the river. The plaintiffs claimed $1,000 damages, and prayed that defendant be condemned to demolish the temporary bridge: —Held, (1) that, as the rights in future might be bound, the case was appealable under R. S. C. c. 135, s. 29 (b). (2) That the exclusive statutory privilege extended to the ferry, and while maintained by the plaintiffs the defendant had no right to build the temporary bridge, but, as the bridge had since been demolished, the court would merely award nominal damages and costs. *Galarneau* v. *Guilbault*, 16 S. C. R. 579.

Valuation Roll — *Validity—Contestation—Homologation.*]—Held, that a judgment in an action by a ratepayer contesting the validity of an homologated valuation roll is not a judgment appealable to the supreme court of Canada under s. 24 (g), and does not relate to future rights within the meaning of s. 29 (b), of the Supreme and Exchequer Courts Act. Held, also, that as the valuation roll sought to be set aside in this case had been duly homologated and not appealed against within the delay provided in art. 1061, M. C., the only matter in dispute between the parties was a mere question of costs, and therefore the court would not entertain the appeal. Moir v. Village of Huntingdon, 19 S. C. R. 363, followed. Webster v. City of Sherbrooke, 24 S. C. R. 52, distinguished. *McKay* v. *Township of Hinchinbrooke*, 24 S. C. R. 53.

See Waters v. *Manigault*, 30 S. C. R. 304, *post* 12.

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9. *Municipal By-laws.*

Action for Taxes—*Plea of Invalidity of By-law.*]—See *City of Sherbrooke* v. *McManamy*, 18 S. C. R. 594.

Action to Set aside.]—The municipality of the county of Verchères passed a by-law or procès-verbal defining who were to be liable for the rebuilding and maintenance of a certain bridge. The municipality of Varennes by their action prayed to have the by-law or procès-verbal in question set aside on the ground of certain irregularities. The action was maintained and the by-law set aside. On appeal to the supreme court of Canada:— Held, that the case was not appealable and did not come within s. 29 or s. 24 (g) of the Supreme and Exchequer Courts Act, no future rights within the meaning of the former section being in question, and the appeal not being from a rule or order of a court quashing or refusing to quash a by-law of a municipal corporation. *County of Verchères* v. *Village of Varennes*, 19 S. C. R. 365.

In virtue of a by-law passed at a meeting of the corporation of the city of Quebec, in the absence of the mayor, but presided over by a councillor elected to the chair, an annual tax of $800 was imposed on the Bell Telephone Company of Canada, and a tax of $1,000 on the Quebec Gas Company. In actions instituted by these companies for the purpose of annulling the by-law, the court of Queen's bench for Lower Canada reversed the judgment of the superior court and dismissed the actions, holding the tax valid. On appeal to the supreme court of Canada:—Held, that the cases were not appealable, the appellants not having taken out or been refused, after argument, a rule or order quashing the by-law in question within the terms of s. 24 (g) of the Supreme and Exchequer Courts Act providing for appeals in cases of municipal by-laws. County of Verchères v. Village of Varennes, 19 S. C. R. 365, and City of Sherbrooke v. McManamy, 18 S. C. R. 594, followed. *Bell Telephone Co.* v. *City of Quebec*, *Quebec Gas Co.* v. *City of Quebec*, 20 S. C. R. 230.

——— *Title to Land.*]—In an action to quash a by-law passed for the expropriation of land, the controversy relates to a title to lands, and an appeal lies to the supreme court of Canada, although the amount in controversy is less than $2,000. The judgment on the merits dismissed the appeal for the reasons stated in the judgment of the court below. (See Q. R. 6 Q. B. 345.) *Murray* v. *Town of Westmount*, 27 S. C. R. 579.

Petition to Quash.]—Proceedings were commenced in the superior court by petition to quash a by-law passed by the corporation of the city of Sherbrooke under s. 4389, R. S. P. Q., which gives the right to petition the superior court to annul a municipal by-law. The judgment appealed from, reversing the judgment of the superior court, held that the by-law was intra vires. On motion to quash an appeal to the supreme court of Canada:— Held, that the proceedings, being in the interest of the public, are equivalent to the motion or rule to quash of the English practice, and therefore the court had jurisdiction to entertain the appeal, under s.-s. (g) of s. 24, c. 135, R. S. C. City of Sherbrooke v. McManamy, 18 S. C. R. 594, and County of Verchères v. Village of Varennes, 19 S. C. R. 365, distinguished. *Webster* v. *City of Sherbrooke*, 24 S. C. R. 52.

——— *Judgment of Superior Court on—Appeal to Queen's Bench — Order Quashing Appeal from.*]—Section 439 of the Town Cor-

porations Act, 40 Vict. c. 29 (Q.), not having been excluded from the charter of the city of Ste. Cunégonde (53 Vict. c. 70), is to be read as forming a part of it, and prohibits an appeal to the court of Queen's bench from a judgment of the superior court on a petition to quash a by-law presented under s. 310 of said charter. Where the court of Queen's bench has quashed such an appeal for want of jurisdiction, no appeal lies to the supreme court of Canada from its decision. *City of Ste. Cunégonde de Montréal* v. *Gougeon*, 25 S. C. R. 78.

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10. *New Trials.*

Discretion.]—Under 38 Vict. c. 11 (D.), the supreme court has power to make any order or to give any judgment which the court below might or ought to have given, and amongst other things to order a new trial on the ground either of misdirection or the verdict being against the weight of evidence; and that power is not taken away by s. 22 in this case, in which the court below did not exercise any discretion as to the question of a new trial, and where the appeal from their judgment did not relate to that subject. *Connecticut Mutual Life Ins. Co. of Hartford* v. *Moore*, 6 App. Cas. 644, 6 S. C. R. 634.

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

The defendant in an action, against whom a verdict had passed at the trial, moved for a new trial before a divisional court on the grounds of misdirection, surprise, and the discovery of further evidence, and the motion was granted on the ground of misdirection (15 O. R. 544). The plaintiff appealed, and the court of appeal held that there was no misdirection, but that the order of the divisional court directing the case to be submitted to another jury should not be interfered with, the circumstances of the case being peculiar: —Held, that, as the judgment of the court of appeal did not proceed upon the ground that the trial Judge had not ruled according to law, no appeal would lie to the supreme court of Canada from its decision. In the factum of the respondents no objection was made to the jurisdiction of the supreme court, but it was urged that the appeal should not be entertained, and that the court should not interfere with the discretion in favour of a new trial exercised by the two lower courts, the circumstances, it was contended, being stronger than those in Eureka Woollen Mills Co. v. Moss, 11 S. C. R. 91. *O'Sullivan* v. *Lake*, 16 S. C. R. 636.

Trial without Jury.]—Section 24 (d) of the Supreme Court Act (R. S. C. c. 135), allowing an appeal "from the judgment on a motion for a new trial upon the ground that the Judge has not ruled according to law," is applicable to jury cases only. *Halifax Street R. W. Co.* v. *Joyce*, 17 S. C. R. 709.

See Sewell v. *British Columbia Towing and Transportation Co.*, 9 S. C. R. 527; *Miller* v. *Stephenson*, 16 S. C. R. 722; *Vaughan* v. *Richardson*, 17 S. C. R. 703; *Rowlands* v. *Canada Southern R. W. Co.*, 13 P. R. 93; *Barrington* v. *Scottish Union and National Ins. Co.*, 18 S. C. R. 615; *Accident Insurance Co. of North America* v. *McLachlan*, 18 S. C. R. 627; *Canadian Pacific R. W. Co.* v. *Cobban Mfg. Co.*, 22 S. C. R. 132.

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11. *Quebec Cases.*

Church Rate—*Assessment on Land.*]—A church rate, payable in two instalments of $165 each, was assessed on a certain property in the parish of the Nativity. The Bank of Toronto subsequently became proprietors of this land, and in an hypothecary action brought by respondents against them to enforce the payment of the first instalment of said church rate, the superior court at Montreal held the Bank of Toronto liable; the court of Queen's bench confirmed the judgment:—Held, on appeal to the supreme court of Canada, that the case did not come within any of the classes of cases mentioned in s. 8 of 42 Vict. c. 39 (Supreme Court Amendment Act, 1879), providing for appeals from the Province of Quebec, and was not appealable. *Bank of Toronto* v. *Curé, &c., de la Paroisse de la Nativité de la Sainte Vierge*, 12 S. C. R. 25.

Petition of Right.]—The provisions of the Supreme and Exchequer Courts Acts relating to appeals from Quebec, apply to cases arising under the Petition of Right Act of that Province, 46 Vict. c. 27 (Q.) *McGreevy* v. *The Queen*, 14 S. C. R. 735.

Prohibition.]—The provisions of s. 2 of 54 & 55 Vict. c. 25, giving the supreme court of Canada jurisdiction to hear appeals in matters of prohibition, apply to such appeals from the Province of Quebec as well as from all other parts of Canada. *Shannon* v. *Montreal Park and Island R. W. Co.*, 28 S. C. R. 374.

Quo Warranto.]—An appeal from a decision of the court of Queen's bench for Lower Canada (M. L. R. 2 Q. B. 482) was quashed on motion for want of jurisdiction, the proceedings being by quo warranto, as to which there is no appeal by the statute. *Walsh* v. *Heffernan*, 14 S. C. R. 738.

See Canadian Pacific R. W. Co. v. *Little Seminary of Ste. Thérèse*, 16 S. C. R. 606; *Ontario and Quebec R. W. Co.* v. *Marcheterre*, 17 S. C. R. 141.

See, also, *ante* 1, 2 (c), 3 (b), 6, 7, 8, 9; and *post* 12, 13.

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12. *Title to Land.*

Boundary—*Revendication.*]—An action to revendicate a strip of land upon which an encroachment was admitted to have taken place by the erection of a building extending beyond the boundary line, and for the demolition and removal of the walls and the eviction of the defendant, involves questions relating to a title to land, independently of the controversy as to bare ownership, and is appealable to the supreme court of Canada under the provisions of the Supreme and Exchequer Courts Act. *Delorme* v. *Cusson*, 28 S. C. R. 66.

Injunction—*Ditches and Watercourses.*] Proceedings to restrain the owner of land from

constructing a ditch thereon under the Ditches and Watercourses Act to prevent injury to adjoining property, do not involve any question of title to land or any interest therein, within the meaning of 60 & 61 Vict. c. 34, s. 1 (a), relating to appeals to the supreme court of Canada in Ontario cases. The fact that the adjoining land was to be taxed for benefit by construction of the ditch would not authorize an appeal under s.-s. (d), as relating to the taking of a duty or fee, nor as affecting future rights. *Waters* v. *Manigault*, 30 S. C. R. 304.

Servitude.] — Held, that, although the damages were no more than $25, an appeal lay, for the title to some interest in real estate came in question as the result of the judgment, which in effect decided that the defendant was not entitled to the servitude to which he contended that the plaintiffs' land was subject. *Young* v. *Tucker*, 18 P. R. 449. But see *Tucker* v. *Young*, 30 S. C. R. 185, *ante* 3.

See Jermyn v. *Tew*, 28 S. C. R. 497, *ante* 2 (b).

See ante 8, 9.

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13. *Other Cases.*

Commencement of Judicial Functions of Supreme Court.]—The supreme court of Canada has no jurisdiction when the judgment appealed from was signed or entered or pronounced previous to the 11th January, 1876, when by proclamation, issued by order of the governor in council, the provisions referred to in the latter part of s. 80 of 38 Vict. c. 11, and the judicial functions of the court, took effect and could be exercised. *Taylor* v. *The Queen*, 1 S. C. R. 65.

The court proposed to be appealed from, or any Judge thereof, cannot, under s. 26 of the Supreme and Exchequer Courts Act, allow an appeal when judgment had been signed, entered, or pronounced previous to the 11th January, 1876. *Ib.*

Exchequer Court — *Judge of—Power to Allow Appeal after Time Expired.*]—See *Woodburn* v. *The Queen*, 6 Ex. C. R. 69, 29 S. C. R. 112.

Insolvency—*Final Judgment in.*]—A final judgment of the court of Queen's bench for Lower Canada, upon a claim of a creditor filed with the assignee of an estate under the Insolvent Act of 1875, is not appealable to the supreme court of Canada, the right of appeal having been taken away by 40 Vict. c. 41, s. 28 (D.) Cushing v. Dupuy, 5 App. Cas. 409, followed. *Seath* v. *Hagar*, 18 S. C. R. 715.

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

Mandamus — *Interlocutory Judgment.*]—Interlocutory judgments upon proceedings for and upon a writ of mandamus are not appealable to the supreme court under s. 24 (g) of the Supreme and Exchequer Courts Act. The word "judgment" in that sub-section means the final judgment in the case. *Langevin* v. *Commissaires d'Ecole pour la Municipalité de St. Marc*, 18 S. C. R. 599.

Opinion of Provincial Court on Reference.]—The supreme court of Canada has no jurisdiction to entertain an appeal from the opinion of a provincial court upon a reference made by the lieutenant-governor in council, under a provincial statute authorizing him to refer to the court for hearing and consideration any matter which he may think fit, although the statute provides that such opinion shall be deemed a judgment of the court. *Union Colliery Co. of British Columbia* v. *Attorney-General for British Columbia*, 27 S. C. R. 637.

Precedence at Bar.]—An appeal from a ruling of the supreme court of Nova Scotia awarding rank and precedence at the bar to one K. will lie to the supreme court of Canada. *Lenoir* v. *Ritchie*, 3 S. C. R. 575.

Proceeding in Equity.]—See *Canadian Pacific R. W. Co.* v. *City of Toronto*, 30 S. C. R. 337.

Third Party Application.]—The order appealed from in this case, being a decision on an application by a third party to the court, was appealable under s. 11 of 38 Vict. c. 11. *Wilkins* v. *Geddes*, 3 S. C. R. 203.

Validity of Quebec Statute—*Municipal By-law—Taxes.*]—The plaintiffs sued the defendants to recover the sum of $150, being the amount of two business taxes, one of $100 as compounders and the other of $50 as wholesale dealers, under the authority of a municipal by-law. The defendants pleaded that the by-law was illegal and ultra vires of the municipal council, and also that the statute 47 Vict. c. 84 (Q.) was ultra vires of the legislature of the Province of Quebec. The superior court held that both the statute and by-law were intra vires, and condemned the defendants to pay the amount claimed. On an appeal to the court of Queen's bench by the defendants, that court confirmed the judgment of the superior court as regards the validity of the statute, but set aside the tax of $100 as not being authorized. The plaintiffs thereupon appealed to the supreme court, complaining of that part of the judgment which declared the business tax of $100 invalid. There was no cross-appeal. On motion to quash for want of jurisdiction:—Held, that the appeal would not lie, s. 24 (g) of the Supreme and Exchequer Courts Act not being applicable, and the case not coming within s. 29 of the Act, the amount being under $2,000, no future rights within the meaning of s. 29 being in controversy, nor any question as to the constitutionality of the Act of the legislature being raised. *City of Sherbrooke* v. *McManamy*, 18 S. C. R. 594.

——— *Pharmacy Act.*] — To an action claiming $325 as penalties for an offence against the Pharmacy Act, the pleas were: (1) General denial. (2) That the Act was ultra vires. In the courts below the action was dismissed for want of proof of the alleged offence:—Held, that an appeal would lie to

the supreme court; that if the court should hold that there was an error in the judgment which held the offence not proved, the respondent would be entitled to a decision on his plea of ultra vires, and the appeal would therefore lie under s. 29 (a) of the Supreme Court Act. *Association Pharmaceutique de Quebec* v. *Livernois*, 30 S. C. R. 400.

III. APPEAL—LEAVE.

Per Saltum.]—The Chief Justice of the supreme court, under s. 6 of the Supreme Court Amendment Act of 1879, allowed an appeal direct to the supreme court of Canada, it being known that there were then only two Judges on the bench in Manitoba, the plaintiff (Chief Justice) and another judge, from whose decree the appeal was brought. *Schultz* v. *Wood*, 6 S. C. R. 585.

A suit brought by respondents against D. as rector of St. James' Cathedral, Toronto, to have certain lands declared to be held by him not only for himself but also for the benefit of the other rectors in the city of Toronto, was decided at the trial in favour of the respondents, a decision which, on appeal to a divisional court, was upheld. Up to the time of the judgment rendered by the latter court the proceedings had been carried on in the name of D. by arrangement between him and the churchwardens of St. James' Cathedral, who contended that they had an interest separate from that of D. in the disposition of the lands and the revenues therefrom, and who had indemnified D. against costs. But, upon the churchwardens proposing to appeal to the court of appeal, D. refused to allow his name to be further used in the proceedings. The court of appeal, upon an application being made by the churchwardens for leave to appeal, refused to grant such appeal, holding that the churchwardens had no interest in the lands or revenues. The churchwardens thereupon applied to a Judge in chambers for leave to appeal per saltum to the supreme court of Canada, under s. 6 of the Supreme Court Act, 1879, from the judgment of the divisional court. The Judge held that the churchwardens had an interest at least which justified them in appealing. He would not, however, as a Judge in chambers, overrule the decision of the court of appeal, but granted leave to renew the application before the full court. On the motion coming before the full court, it was held that the appeal should be allowed, upon a proper indemnity being given by the churchwardens to D. against all possible costs, the court expressing no opinion on the merits of the case itself. *DuMoulin* v. *Langtry*, 13 S. C. R. 258.

Leave to appeal to privy council refused: 57 L. T. N. S. 317.

An appeal came before the supreme court, by consent, from a decision of the Judge in equity of New Brunswick, without an intermediate appeal to the supreme court of the Province, and, after argument, was dismissed, (9 S. C. R. 617.) The judgment of the supreme court was subsequently reversed by the privy council, and the case sent back to the Judge in equity to make a decree. The plaintiffs, being dissatisfied with the decree pronounced by the Judge in equity, applied, under R. S. C. c. 135, s. 26, for leave to appeal direct therefrom:—Held, that under the circumstances of the case such leave should be granted. *Lewin* v. *Howe*, 14 S. C. R. 722.

It is not sufficient ground for allowing an appeal direct from the decision of the trial Judge on further consideration or of a divisional court, that the court of appeal of the Province of Ontario had already, in a similar case before it, given a decision on the abstract question of law involved in the case in which the appeal was sought, though it might be sufficient if such decision had been given on the same state of facts and the same evidence. *Kyle* v. *Canada Co.*, *Hislop* v. *Township of McGillivray*, 15 S. C. R. 188.

Action to replevy from the defendant books which were in his possession as clerk of the plaintiffs, a municipal corporation, he having been dismissed from the office. He refused to give up the books, on the ground that his dismissal was illegal. Judgment was given for the plaintiffs at the trial, and affirmed by a divisional court, and an application by the defendant for special leave to appeal was refused by the court of appeal. The defendant then applied for leave to appeal per saltum to the supreme court of Canada. The motion was made to the registrar, who dismissed it; the defendant then appealed without success to a Judge in chambers; and finally to the full court:—Held, that he had failed to shew sufficient cause to justify the court in granting leave. *Bartram* v. *Village of London West*, 24 S. C. R. 705.

——— *Divisional Courts in Ontario.*]—Held, per Strong, C.J., and Gwynne, J., (Taschereau and Sedgewick, JJ., contra,) that under s. 26, s.-s. 3, of the Supreme and Exchequer Courts Act, leave to appeal direct from a judgment of a divisional court of the high court of justice for Ontario may be granted in cases where there is no right of appeal to the court of appeal. *Farquharson* v. *Imperial Oil Co.*, 30 S. C. R. 188.

Public Importance — *Insurance — Construction of Conditions.*]—An action in which less than the sum or value of $1,000 is in controversy, and wherein the decision involves questions as to the construction of the conditions indorsed upon a benevolent society's certificate of insurance and as to the application of the statute securing the benefit of life insurance to wives and children to such certificates, is not a matter of such public importance as would justify an order by the court granting special leave to appeal under the provisions of s. 1 (e) of 60 & 61 Vict. c. 34. *Fisher* v. *Fisher*, 28 S. C. R. 494.

Special Leave—*Case not otherwise Appealable.*]—Leave to appeal cannot be granted under 60 & 61 Vict. c. 34, s. 1 (e), in a case not appealable under the general provisions of R. S. C. c. 135. *Tucker* v. *Young*, 30 S. C. R. 185.

——— *Form of Order—Expiry of Time.*]—In an order granting special leave to appeal to the supreme court of Canada under the provisions of s. 42 of the Supreme and Exchequer Courts Act, after the expiration of the time limited by s. 40 of that Act, it is not necessary to set out the special circumstances under which such leave to appeal has been granted, nor to state that such leave was granted under special circumstances. *Bank of Montreal* v. *Demers*, 29 S. C. R. 435.

Winding-up Act — *Consent—Time.*]—After a case under the winding-up Act was argued, the appellant, with the consent of the respondent, obtained from a Judge of the court below an order to extend the time for bringing the appeal, and subsequently, before the time expired, he got an order from the registrar of the supreme court, sitting as a Judge in chambers, giving him leave to appeal in accordance with s. 76 of the Winding-up Act, and the order declared that all the proceedings had upon the appeal should be considered as taken subsequent to the order granting leave to appeal. *Ontario Bank* v. *Chaplin*, 20 S. C. R. 152.

IV. APPEAL—PRACTICE AND PROCEDURE.

1. *Appeal Case.*

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

Documents not Proved at Trial.]—A document which has not been proved nor produced at the trial, cannot be relied on or made part of the case in appeal. *Lionais* v. *Molsons Bank*, 10 S. C. R. 526.

A document not proved at the trial, but relied on in the court of Queen's bench for the first time, cannot be relied on or made part of the case in appeal. Montreal L. and M. Co. v. Fauteux, 3 S. C. R. 411, 433, and Lionais v. Molsons Bank, 10 S. C. R. 526, followed. *Exchange Bank of Canada* v. *Gilman*, 17 S. C. R. 108.

Factum — *Impertinence.*]—The plaintiff's factum, containing reflections on the Judge in equity and the full court of New Brunswick, was ordered to be taken off the files of the court as scandalous and impertinent. *Vernon* v. *Oliver*, 11 S. C. R. 156.
See O'Sullivan v. *Lake*, 16 S. C. R. 636.

See Providence Washington Ins. Co. v. *Gerow*, 14 S. C. R. 731, *post* 7; *In re Smart Infants*, 16 S. C. R. 396, *post* VI.

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2. *Costs.*

Divided Court.]—The Judges of the supreme court being equally divided in opinion, and the decision of the court below affirmed, the successful party was refused the costs of the appeal. But by 38 Vict. c. 11, s. 38, the supreme court being authorized, in its discretion, to order the payment of the costs of the appeal, the decision in this case will not necessarily prevent the majority of the court from ordering the payment of the costs of the appeal in other cases where there is an equal division of opinion among the Judges. *Liverpool and London and Globe Ins. Co.* v. *Wyld*, 1 S. C. R. 604.

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

Next Friend—*Indemnity.*]—An order was made indemnifying the next friend of the infant plaintiffs out of their money for the costs of an appeal to the supreme court of Canada, where the appeal was advised by more than one counsel, and one of the Judges of the court of appeal had dissented from the rest. *Cottingham* v. *Cottingham*, 11 P. R. 13.

Of Cross-appeal.] — See *Pilon* v. *Brunet*, 5 S. C. R. 318, *post* 3.

Quashing Appeal.]—As the appeal was quashed for want of jurisdiction the costs imposed were only costs of a motion to quash. *O'Sullivan* v. *Lake*, 16 S. C. R. 636; *Jermyn* v. *Tew*, 28 S. C. R. 497; *Griffith* v. *Harwood*, 30 S. C. R. 315.

See Lewin v. *Howe*, 14 S. C. R. 722, *post* 7.

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3. *Cross-appeals.*

Necessity for—*Increasing Amount of Award.*]—Under the Ontario Judicature Act, R. S. O. 1887 c. 44, ss. 47 and 48, the court of appeal has power to increase damages awarded to a respondent without a cross-appeal, and the supreme court has the like power under its rule No. 61. Though the court will not usually increase such damages without a cross-appeal, yet where the original proceedings were by arbitration under a statute providing that the court, on appeal from the award, shall pronounce such judgment as the arbitrators should have given, the statute is sufficient notice to an appellant of what the court may do, and a cross-appeal is not necessary. *Town of Toronto Junction* v. *Christie*, 25 S. C. R. 551.

Rules—*Compliance with.*]—A cross-appeal will be disregarded by the court when rules 62 and 63 of the supreme court rules have not been complied with. *Bulmer* v. *The Queen*, 23 S. C. R. 488.

Separate Appeals—*Costs.*]—An appellant in the court of Queen's bench, Quebec, who had partly succeeded, appealed to the supreme court on the ground that the judgment

was yet excessive. At the same time the respondent appealed on the ground that the judgment of the superior court ought to have been affirmed. This second appeal was treated by the court as a cross-appeal under the supreme court rules, and the respondent on the second appeal, having succeeded in getting the judgment reversed on the second point and confirmed on the first point, was allowed costs of a cross-appeal. *Pilon* v. *Brunet*, 5 S. C. R. 318.

See Laberge v. *Equitable Life Assurance Society*, 24 S. C. R. 59.

4. *Dismissal of Appeal.*

Application to Reinstate.]—Motion to reinstate an appeal which had been dismissed because no counsel appeared for the appellant when the case was called. The only ground stated for asking the indulgence of the court was that counsel had been present not long before the case was called, and had felt satisfied that it would not be reached that day, but that the cases before it had been unexpectedly disposed of. The court refused to reinstate the appeal and refused the motion with costs. *Foran* v. *Handley*, 24 S. C. R. 706.

5. *Motion to Quash Appeal.*

Doubtful Jurisdiction.]—If the jurisdiction of the court is doubtful, the appeal must be quashed. *Cully* v. *Ferdais*, 30 S. C. R. 330.

Necessity for Motion—*Costs.*]—An objection to the jurisdiction of the court should be taken at the earliest possible moment. If left until the case comes on for hearing and the appeal is quashed, the respondent may be allowed costs of a motion only. *Griffith* v. *Harwood*, 30 S. C. R. 315; *O'Sullivan* v. *Lake*, 16 S. C. R. 636.

——— *Extradition—Coram non Judice.*]—By s. 31 of the Supreme and Exchequer Courts Act (R. S. C. c. 135, s. 31), "no appeal shall be allowed in any case of proceedings for or upon a writ of habeas corpus arising out of any claim for extradition made under any treaty." On application to the court to fix a day for hearing a motion to quash such an appeal:—Held, that the matter was coram non judice and there was no necessity for a motion to quash. *In re Lazier*, 29 S. C. R. 360.

See Schlomann v. *Dowker*, 30 S. C. R. 323, *ante* I. 1.

6. *Parties to Appeal.*

Legal Representatives.]—It is too late to raise an objection for the first time on the argument before the supreme court that the legal representatives of the assured were not made parties to the cause. *Venner* v. *Sun Life Ins. Co.*, 17 S. C. R. 394.

Petition in Disavowal.]—Where a petition in disavowal has been served on all parties to the suit, and is only contested by the attorney whose authority is denied, the latter cannot on an appeal complain that all parties interested in the result are not parties to the appeal. *Dawson* v. *Dumont*, 20 S. C. R. 709.

See Scammell v. *James*, 16 S. C. R. 593, *post* V.

7. *Judgment.*

Motion to Vary—*Case on Appeal.*]—After judgment application was made to vary or reverse the judgment, on affidavits shewing that the question which the judgment decided should have been submitted to the jury, was submitted and answered:—Held, that the application was too late, as the court had to determine the appeal case transmitted, and the respondent had allowed the appeal to be argued and judgment rendered without taking any steps to have the case amended. *Providence Washington Ins. Co.* v. *Gerow*, 14 S. C. R. 731.

Reversal by Privy Council—*Enforcement—Costs.*]—Where the judgment of the supreme court of Canada has been reversed by the privy council, the proper manner of enforcing the judgment of the privy council is to obtain an order making it a rule of the supreme court of Canada. Where such judgment of the privy council was made a rule of court, the court ordered the repayment by one of the parties of costs received pursuant to the judgment so reversed. *Lewin* v. *Howe*, 14 S. C. R. 722.

Revocation—*Fraud.*] — Where judgment on a case in appeal has been rendered by the supreme court of Canada and certified to the proper officer of the court of original jurisdiction, the supreme court has no jurisdiction to entertain a petition (requête civile) for revocation of its judgment on the ground that the opposite party succeeded by the fraudulent concealment of evidence. *Durocher* v. *Durocher*, 27 S. C. R. 634.

Service.]—It is not necessary to serve a certificate of a judgment of the supreme court when the decree is not materially altered. *Grasett* v. *Carter*, 6 O. R. 584.

8. *Other Cases.*

Abatement of Action by Death of Plaintiff.]—See *White* v. *Parker*, 16 S. C. R. 699.

Election Appeal—*Consent to Reversal of Judgment.*]—The trial of two controverted Dominion election petitions was commenced more than six months after the filing of the petitions, no order having been made enlarging the time for the commencement of the trial. Upon the consent of the respondents, subject to their objection that the court had no jurisdiction, judgments were given voiding the elections for corrupt practices by agents. Upon the respondents' appeal to the supreme court of Canada, the petitioners filed a consent to the reversal of the judgments appealed from without costs, admitting that the objection was well taken. Upon the filing of an affidavit as to the facts stated in the consent, the appeal was allowed and the petitions dismissed without costs. *Bagot Election Case, Rouville Election Case*, 21 S. C. R. 28.

——— *Discontinuance.*]—Upon the trial of a controverted Dominion election petition the respondent was unseated by the judgment of the superior court, by reason of corrupt practices by agents, and appealed to the supreme court of Canada. When the case was called, no one appearing for the appellant, counsel for the petitioner stated that he had been served with a notice of discontinuance. The court ordered that the appeal be struck off the list. *L'Assomption Election Case*, 21 S. C. R. 29.

"Proceedings" — *Appeal — Agreement —Money in Court.*]—See *City of Toronto* v. *Toronto Street R. W. Co.*, 15 P. R. 358.

Staying Proceedings—*Prior Appeal to Privy Council.*]—Where the appellant had inscribed an appeal for hearing in the supreme court of Canada, after he had received notice of an appeal taken in the same matter by the respondent to the privy council, upon motion on behalf of the respondent the proceedings in the supreme court appeal were stayed with costs against the appellant pending the decision of the privy council upon the respondent's appeal. Eddy v. Eddy, Coutlee's Dig. 23, followed. *Bank of Montreal* v. *Demers*, 29 S. C. R. 435.

V. Appeal—Security.

Amount of Security.]—The court of appeal has no discretion to increase the amount of security on appeal to the supreme court of Canada, fixed by R. S. C. c. 135, s. 46, at $500, because of the number of respondents. *Archer* v. *Severn*, 12 P. R. 472.

Bond—*Action on — Taxation—Ascertainment.*]—See *Hager* v. *Jackson*, 16 P. R. 485.

——— *Condition.*]—The condition in a bond filed upon an appeal to the supreme court of Canada was to "pay such costs and damages as shall be awarded *in case the judgment shall be affirmed*:"—Held, that this was not in substance the same as the statutory condition to "pay such costs and damages as may be awarded against the appellant by the supreme court;" and the italicised words added a condition not required by the Supreme Court Act, and by which the respondents ought not to be hampered. *Davidson* v. *Fraser*, 17 P. R. 246.

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

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

A bond filed as security for costs of an appeal to the supreme court of Canada was disallowed on the ground of substantial error in the form—"by" instead of "binds" in the operative part. Jamieson v. London and Canadian L. and A. Co., 18 P. R. 413, followed. *Young* v. *Tucker*, 18 P. R. 449.

——— *Form — Objection — Waiver.*]—If objection is made to the form of a bond for security for costs on appeal to the supreme court, it should be by application in chambers to dismiss, and if not so made the objection will be held to be waived. *Whitman* v. *Union Bank of Halifax*, 16 S. C. R. 410.

——— *Parties—Condition.*]—In an appeal to the supreme court of Canada, although it is not necessary that the appellant should be a party to the appeal bond, if he is made a party and does not execute the bond, the respondent is entitled to have it disallowed. In an appeal bond, where the object was not only to secure payment of the costs which might be awarded by the supreme court of Canada under s. 46 of R. S. C. c. 135, but also under s. 47 (e) to procure a stay of execution of the judgment appealed from as to the costs thereby awarded against the appellant, the condition was "shall effectually prosecute the said appeal and pay such costs and damages as may be awarded against the appellant by the supreme court of Canada, and shall pay the amount *by the said mentioned judgment* directed to be paid, either as a debt or for damages or costs," &c.:—Held, that this did not cover the costs awarded against the appellant by the judgment appealed from. *Robinson* v. *Harris*, 14 P. R. 373.

——— *Surety—Officer of Court.*]—It is not a valid objection to a surety to a bond for security for costs to the supreme court of Canada that he is an officer of the court appealed from. *Wilkins* v. *Maclean*, 7 C. L. T. Occ. N. 5.

——— *Time for Filing.*]—There having been no delay in applying for leave to appeal, and the delay being caused by the act of the court:—Held, that the time for filing the bond must count from the granting of leave to appeal. *McCrae* v. *White*, 9 P. R. 288.

——— *To whom Given—Parties—Bail.*]—S. brought an action against J., and issued a writ of capias. Bail was given and special bail entered in due course, but the bail-piece was not filed, nor judgment entered against J., for some months after. On application to a Judge in chambers, an order was made for the discharge of the bail on account of delay in entering up judgment, and the full court refused to set aside such an order. An appeal was brought to the supreme court of Canada, intituled in the suit against J., from the judgment of the full court, and the bond for security for costs was given to J.:—Held, that, as the bail, the only parties really interested in the appeal, were not before the court, and were

not entitled to the benefit of the bond, the appeal must be quashed for want of proper security. *Scammell* v. *James*, 16 S. C. R. 593.

Deposit of Money — *Certificate of Prothonotary—Approval of Judge.*]—The following certificate was filed with the printed case, as complying with rule 6 of the supreme court rules: "We, the undersigned, joint prothonotary for the superior court of Lower Canada, now the Province of Quebec, do hereby certify that the said defendant has deposited in our office, on the twentieth day of November last, the sum of five hundred dollars, as security in appeal in this case, before the supreme court, according to section thirty-first of the Supreme Court Act, passed in the thirty-eighth year of Her Majesty, chapter second. Montreal, 17th January, 1878. Hubert, Honey, & Gendron, P. S. C.:"—Held, on motion to quash appeal, that the deposit of the sum of $500 in the hands of the prothonotary of the court below, made by appellant, without a certificate that it was made to the satisfaction of the court appealed from, or any of its Judges, was nugatory and ineffectual as security for the costs of appeal. *Macdonald* v. *Abbott*, 3 S. C. R. 278.

Necessity for Security—*Ex Parte Appeal.*]—An appeal was sought from the refusal of the supreme court of Nova Scotia to admit the appellant as an attorney of the court. There being no person interested in opposing the application or the appeal, no security for costs was given:—Held, that the court had no jurisdiction to hear the appeal. Except in cases specially provided for, no appeal can be heard by this court unless security for costs has been given as provided for by s. 46 of the Supreme and Exchequer Courts Act, R. S. C. c. 135. *In re Cahan*, 21 S. C. R. 100.

Stay of Proceedings—*Money in Court—Payment out—Solicitor's Undertaking.*]—See *Kelly* v. *Imperial Loan Co.*, 10 P. R. 499.

The plaintiff appealed to the court of appeal from a judgment of the high court dismissing their action with costs, and gave the security for the costs of appeal required by s. 71 of the Judicature Act, by paying $400 into court, and also gave the security required by rule 804 (4), in order to stay the execution of the judgment below for taxed costs, by paying $322.14 into court. Their appeal was dismissed with costs. Desiring to appeal to the supreme court of Canada, they paid $500 more into court, and this was allowed by a Judge of the court of appeal as security for the costs of the further appeal: — Held, that execution was stayed upon the judgments of the high court and court of appeal until the decision of the supreme court. Construction of ss. 46, 47 (e), and 48 of the Supreme and Exchequer Courts Act, R. S. C. c. 135. Semble, that payment out of the moneys in court to the defendant of his costs of the high court and court of appeal, upon the undertaking of his solicitors to repay in the event of the further appeal succeeding, could not properly be ordered. Kelly v. Imperial Loan Co., 10 P. R. 499, commented on. *Agricultural Insurance Co. of Watertown, N. Y.* v. *Sargent*, 16 P. R. 397.

The plaintiffs recovered judgment in the high court against the defendants for damages and costs. The defendants appealed to the court of appeal, paying $200 into court as security to the plaintiffs for the costs of such appeal, which was dismissed with costs. The defendants launched a further appeal to the supreme court of Canada, and gave the security required by s. 46 of the Supreme and Exchequer Courts Act, but no other security:—Held, that proceedings to enforce the plaintiffs' judgment in the high court were not stayed, either by force of s. 48 or otherwise. But the court was not bound to pay out immediately to the plaintiffs the sum of $200 paid in by the defendants, the judgment of the court of appeal being stayed pending the appeal to the supreme court, which might determine that the plaintiffs were not entitled to the costs of the court of appeal; and the money ought not to be paid to the plaintiffs, from whom it could never be recovered, and whose solicitors declined to take it upon the usual undertaking, but should remain in court pending the appeal. *Rombough* v. *Balch*, 19 P. R. 123.

See Citizens Ins. Co. v. *Parsons*, 32 C. P. 492; *Burgess* v. *Conway*, 11 P. R. 514; *Marsh* v. *Webb*, 15 P. R. 64; *News Printing Co.* v. *Macrae*, 26 S. C. R. 695, *post* VI.; *Draper* v. *Radenhurst*, 14 P. R. 376, *post* VI.

VI. APPEAL—TIME FOR.

Commencement of Time — *Entry or Pronouncing of Judgment.*]—Where any substantial matter remains to be determined on the settlement of the minutes before the registrar, the time for appealing to the supreme court of Canada will run from the entry of the judgment; otherwise it will run from the date on which the judgment is pronounced. In the Province of Quebec the time runs in every case from the pronouncing of the judgment. *O'Sullivan* v. *Harty*, 13 S. C. R. 431.

The thirty days' time allowed for appealing to the supreme court of Canada under s. 25 of the Supreme and Exchequer Courts Act commences to run on the issuing of the certificate of the court of appeal. *Walmsley* v. *Griffith*, 11 P. R. 147.

Where the court of appeal for Ontario reversed a judgment in favour of the plaintiff, and dismissed the action:—Held, that in such case no substantial question could remain to be settled before the entry of the judgment, and the time for appealing to the supreme court of Canada would therefore run from the pronouncing of the judgment. O'Sullivan v. Harty, 13 S. C. R. 431, distinguished. *Walmsley* v. *Griffith*, 13 S. C. R. 434.

Where, after the minutes of a case decided by the supreme court of British Columbia were settled, the plaintiffs moved before the full court to have the minutes varied, and they were varied by striking out certain declarations respecting the rights of the plaintiff C. and the defendant M. respectively, and also with respect to the costs payable by the plaintiff E.:—Held, that, there being substantial questions to be decided before the judgment could be entered, the time for appealing to the supreme court of Canada would run from the date of the entry of the judgment. O'Sullivan v. Harty, 13 S. C. R. 431, followed. *Martley* v. *Carson*, 13 S. C. R. 439.

Rule 269 of the rules of the maritime court of Ontario requires notice of appeal from a decision of that court to the supreme court of Canada to be given within fifteen days from the pronouncing of such decision. A judgment of the maritime court was handed by the surrogate to the registrar, but not in open court, on 31st August, and was not drawn up and entered by the registrar for some time after:—Held, that notice of appeal within fifteen days from the entry of such judgment was sufficient under the said rule. Quære, is such rule intra vires of the maritime court? *Robertson* v. *Wigle*, 15 S. C. R. 214.

On the trial of an action the plaintiffs obtained a verdict, which a divisional court set aside. The court of appeal allowed the appeal and restored the judgment at the trial, reducing the amount of damages by a certain specified sum:—Held, that nothing substantial remained to be settled by the minutes on entering the formal judgment of the court of appeal, and the time for appealing therefrom to the supreme court ran from the pronouncing and not from the entry of such judgment. O'Sullivan v. Harty, 13 S. C. R. 431, Walmsley v. Griffith, 13 S. C. R. 434, Martley v. Carson, 13 S. C. R. 439, followed. *News Printing Co.* v. *Macrae*, 26 S. C. R. 695.

On the trial of an action to set aside a chattel mortgage, the plaintiff obtained a declaration that the mortgage was void, and an order setting it aside without costs. This decision was reversed on appeal and the action dismissed with costs both in the court of appeal and the court below, by a judgment pronounced on the 7th November, 1895. The minutes had not been settled until some days afterwards, and at the time of the settlement the draft minutes were altered by the registrar of the court of appeal by refusing costs to one of the respondents and also by changing a direction therein as to the payment over of funds on deposit abiding the decision of the suit. On an application made more than sixty days from the pronouncing of the judgment, for the approval of security under s. 46 of the Supreme and Exchequer Courts Act:—Held, that nothing substantial remained to be settled by the minutes so as to take the case out of the general rule that the time for appealing runs from the pronouncing of the judgment, and that the application was too late. *Martin* v. *Sampson*, 26 S. C. R. 707.

Expiry of Time—*Filing of Appeal Case — Habeas Corpus — Jurisdiction.*]—For the purpose of an appeal to the supreme court of Canada in a habeas corpus case, the first step is the filing of the case in appeal with the registrar. Where notice of intention to appeal was given immediately after the judgment of the court of appeal in a habeas corpus proceeding, but the case in appeal was not filed until more than three months after such judgment:—Held, that the appeal was not brought within sixty days, and there was no jurisdiction to hear it. *In re Smart Infants*, 16 S. C. R. 396.

——— *Notice of Appeal—Special Case.*]—The judgment upon a "special case" intended by s. 41 of the Supreme and Exchequer Courts Act, R. S. C. c. 135, is a judgment on the kind of case well known by that name, and has no reference to the case which, by con. rule 413, is prepared for the purpose of the appeal to the court of appeal for Ontario. An objection to a bond on appeal from the court of appeal to the supreme court, in an action tried upon pleadings and oral evidence, and which came before the court of appeal in the usual way, that notice of appeal was not given within twenty days pursuant to s. 41, upon the ground that every appeal from the court of appeal is "upon a special case," was therefore overruled. *Draper* v. *Radenhurst*, 14 P. R. 376.

——— *Sunday—Special Circumstances.*]—Where the thirty days allowed for appealing from the court of appeal by 38 Vict. c. 11, s. 25, expired on a Sunday, without an order allowing the appeal:—Held, that this did not give the party wishing to appeal, the following day to procure his order, nor was it a "special circumstance" under s. 26. *Goyeau* v. *Great Western R. W. Co.*, 15 C. L. J. 107.

Extension of Time.]—The judgment of the court of appeal was delivered on the 5th March, 1889. On the 16th March the solicitors for the defendants wrote to their clients suggesting an appeal, but they received no instructions until the 2nd April, and took no step till the 3rd April. No explanation was offered of the delay or neglect except the production of a telegram to the solicitors from an officer of the defendants giving instructions to appeal, and suggesting that the matter had been overlooked by another officer. The Judges in the divisional court and court of appeal were unanimous in deciding against the defendants:—Held, that, under these circumstances, the time for giving the required notice should not be extended. *Rowlands* v. *Canada Southern R. W. Co.*, 13 P. R. 93.

——— *Dismissal of Appeal—Order in Chambers—Appeal from.*]—A party seeking to appeal obtained an extension of time for filing his case, but failed to take advantage of the indulgence so granted, whereupon, on the application of the respondent, the appeal was dismissed by a Judge in chambers. On motion to rescind the order dismissing the appeal:—Held, that, under the circumstances of the case, the court would not interfere by rescinding the Judge's order and restoring the appeal. *City of Winnipeg* v. *Wright*, 13 S. C. R. 441.

——— *Exchequer Court.*]—On the trial in the exchequer court in 1887 of an action against the Crown for breach of a contract to purchase paper from the suppliant, no defence was offered, and the case was sent to referees to ascertain the damages. In 1891 the report of the referees was brought before the court, and judgment was given against the Crown for the amount thereby found due. The Crown appealed to the supreme court, having obtained from the exchequer court an extension of the time for appeal limited by statute, and sought to impugn on such appeal the judgment pronounced in 1887:—Held, that the appeal must be restricted to the final judgment pronounced in 1891: that an appeal from the judgment given in 1887 could only be brought within thirty days thereafter, unless the time was extended as provided by the statute, and the extension of time granted by the exchequer court on its face only referred to an appeal from the judgment pronounced in 1891. *The Queen* v. *Clark*, 21 S. C. R. 656.

——— *Exchequer Court — Amendment — Jurisdiction.*] — An order of reference had been settled in such a way as to omit to reserve certain questions which the court expressly withheld for adjudication at a later stage of the case. Both parties had been represented on the settlement and had an opportunity of speaking to the minutes. The order was acquiesced in by the parties for a period of some eighteen months; the reference was executed; and the referee's report filed. After final judgment in the action, the Crown appealed to the supreme court. Subsequent to the lodging of such appeal, an application was made to the exchequer court to amend the order of reference so as to include the reservations mentioned, or, in the alternative, to have the time for appealing from such order extended. Under the circumstances, the court extended the time for appealing, but refused to amend the order of reference as settled. *Woodburn* v. *The Queen*, 6 Ex. C. R. 69.

Held, that the Judge of the exchequer court had authority to allow the appeal and it was properly before the supreme court. *The Queen* v. *Woodburn*, 29 S. C. R. 112.

——— *Exchequer Court — Grounds of Refusal — Solicitor's Affidavit.*] — Judgment against the suppliants was delivered on the 17th January, and the time allowed for leave to appeal by s. 51 of the Exchequer Court Act expired on the 17th February. On the 22nd April following, the suppliants applied for an extension of the time to appeal, on the ground that before judgment the suppliants' solicitor had been given instructions to appeal in the event of the judgment in the exchequer court going against them. There was no affidavit establishing this fact by the solicitor for the suppliants, but there was an affidavit made by an agent of the suppliants stating that he personally did not know of the judgment being delivered until the 27th March:—Held, that the knowledge of the solicitor must be taken to be the knowledge of the company: that notice to him was notice to the company; and that as between the suppliants and the respondent the matter should be disposed of upon the basis of what he knew and did, and not upon the knowledge or want of knowledge of the suppliants' manager or agent as to the state of the cause. *Alliance Assurance Co.* v. *The Queen*, 6 Ex. C. R. 126.

——— *Necessity for Notice of Appeal— "Allow an Appeal."*]—The supreme court of Canada has no jurisdiction to hear an appeal "from a judgment on a motion for a new trial on the ground that the Judge has not ruled accordingly to law," unless the notice required by s. 41 of the Supreme Court Act has been given. An order made by a Judge of the court appealed from giving defendants "leave to appeal to the supreme court of Canada, leaving it to plaintiffs to dispute the right of appeal in the supreme court," even if considered as an enlargement of the time for giving notice, will not give the court jurisdiction if no notice is given pursuant to such enlargement. The time for giving notice under s. 41 can be extended as well after as before the twenty days have elapsed. In s. 42 of the Act, providing that, under special circumstances, the court appealed from or a Judge thereof may "allow an appeal" although the time limited therefor by previous sections has expired, the expression "allow an appeal" means only that the court or Judge may settle the case and approve the security. *Vaughan* v. *Richardson*, 17 S. C. R. 703.

——— *Necessity for Notice of Appeal— New Trial.*]—The defendants appealed to the court of appeal from an order of a divisional court discharging an order nisi to enter judgment for the defendants or for a new trial, on the ground, among others, that the trial Judge should have withdrawn the case from the jury, or should have directed them otherwise than he did. The court of appeal dismissed the defendants' appeal, and the defendants sought to appeal from such dismissal to the supreme court of Canada:—Held, that the judgment of the court of appeal came within s. 24 (d) of the Supreme and Exchequer Courts Act, R. S. C. c. 135, as "a judgment upon a motion for a new trial upon the ground that the Judge has not ruled according to law;" and that the proposed appeal was governed by the necessity for the notice of appeal within twenty days prescribed by s. 41 of the Act. *Rowlands* v. *Canada Southern R. W. Co.*, 13 P. R. 93.

——— *Notice of Setting down—Election Case—Power of Trial Judge.*]—On a motion to quash the appeal on behalf of the respondent, on the ground that the appellant had not, within three days after the registrar of the court had set down the matter of the petition for hearing, given notice in writing to the respondent, or his attorney or agent, of such setting down, nor applied to and obtained from the Judge who tried the petition further time for giving such notice, as required by s. 48 of the Supreme and Exchequer Courts Act:—Held, that this provision in the statute was imperative; that the giving of such notice was a condition precedent to the exercise of any jurisdiction by the supreme court to hear the appeal; that the appellant having failed to comply with the statute, the court could not grant relief under rules 56 or 69; and that, therefore, the appeal could not be then heard, but must be struck off the list of appeals, with costs of the motion. Subsequent to this judgment, the appellant applied to the Judge who tried the petition, to extend the time for giving the notice, whereupon the said Judge granted the application and made an order, "extending the time for giving the prescribed notice till the 10th day of December then next." The case was again set down for hearing at the February session following, being the nearest convenient time, and notice of such setting down was duly given within the time mentioned in the order. The respondent thereupon moved to dismiss the appeal, on the ground that the appellant unduly delayed to prosecute his appeal, or failed to bring the same on for hearing at the next session, and that the Judge who tried the petition had no power to extend the time for giving such notice after the three days from the first setting down of the case for hearing by the registrar of this court:—Held, that the power of the Judge who tried the petition to make an order extending the time for giving such notice is a general and exclusive power to be exercised according to sound discretion, and the Judge having made such an order in this case, the appeal came properly before the court for hearing. *North Ontario Election (Dom.), Wheeler* v. *Gibbs*, 3 S. C. R. 374.

——— *Security after Time Expired— Vacation.*]—By s. 42 of the Supreme and Exchequer Courts Act, R. S. C. c. 135, a court

proposed to be appealed from or a Judge thereof may allow an appeal after the time prescribed therefor by s. 40 has expired, but an order by the court below or a Judge thereof extending the time will not authorize the supreme court or a Judge thereof to accept security after the 60 days have elapsed. The delay of 60 days for appealing to the supreme court prescribed by s. 40 of the Act, is not suspended during the vacation of the court established by its rules. *News Printing Co.* v. *Macrae*, 26 S. C. R. 695.

See McCrae v. *White*, 9 P. R. 288; *Ontario Bank* v. *Chaplin*, 20 S. C. R. 152; *Bank of Montreal* v. *Demers*, 29 S. C. R. 435.

VII. HABEAS CORPUS—JURISDICTION.

Concurrent or Appellate Jurisdiction.]—As regards habeas corpus in criminal matters, the supreme court has only concurrent jurisdiction with the Judges of the superior courts of the various Provinces, and not an appellate jurisdiction, and there is no necessity for an appeal from the judgment of any Judge or court, or any appellate court, because the prisoner can come direct to any Judge of the supreme court individually, and upon that Judge refusing the writ or remanding the prisoner, he could take his appeal to the full court. *In re Boucher*, Cassels' Dig. 325.

Power to Review Magistrate's Finding.]—Held, that the conviction having been regular, and made by a court in the unquestionable exercise of its authority and acting within its jurisdiction, the only objection being that the magistrate erred on the facts, and that the evidence did not justify the conclusion at which he arrived as to the guilt of the prisoner, the supreme court could not go behind the conviction and inquire into the merits of the case by the issue of a writ of habeas corpus, and thus constitute itself a court of appeal from the magistrate's claim. *In re Trepanier*, 12 S. C. R. 111.

Statutory Crime—*Murder.*]—The right to issue a writ of habeas corpus being limited by s. 51 of the Supreme and Exchequer Courts Act to "an inquiry into the cause of commitment in any criminal case under any Act of the parliament of Canada," such writ cannot be issued in a case of murder, which is a crime at common law. Quære, whether s. 51 is ultra vires. *In re Sproule*, 12 S. C. R. 140.

Warrant of Commitment—*Inquiry.*]—Held, that the jurisdiction of a Judge of the supreme court of Canada in matters of habeas corpus in criminal cases is limited to an inquiry into the cause of imprisonment as disclosed by the warrant of commitment. *Ex parte Macdonald*, 27 S. C. R. 683.

See In re Smart, 16 S. C. R. 396.

See, also, *ante* II. 4.

See HABEAS CORPUS—PAYMENT, II. 1.

SUPREME COURT OF JUDICATURE.

The supreme court of judicature is not properly a court, and ought more properly to have been called the supreme council of judicature. *Regina* v. *Bunting*, 7 O. R. 118.

See COURT OF APPEAL—HIGH COURT OF JUSTICE.

SURETY.

See COLLATERAL SECURITY—COSTS, VII. 2 (b)—DIVISION COURTS, IV. 2, V. 2—MUNICIPAL CORPORATIONS, XXIII. 2, XXIV. 2 (b)—PRINCIPAL AND SURETY—RECEIVER, VI.—REPLEVIN, III. 5—SHERIFF, XIV.

SURFACE WATER.

See WATER AND WATERCOURSES, VI. 1.

SURGEON.

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SURROGATE COURTS.

I. APPEALS FROM, 6830.

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I. APPEALS FROM.

Costs of Appeal—*Scale.*]—Costs of an appeal from the surrogate court to the court of appeal should be taxed on the scale of the

court appealed from, as provided by rule 28 of the court of appeal, and not on the scale of the county court appeals. *Regan* v. *Waters*, 10 P. R. 364.

Right of Appeal—*Order—Fixing Compensation.*]—By virtue of R. S. O. 1897 c. 59, s. 36, an appeal lies to a divisional court from an order of a surrogate court Judge allowing compensation to an executor under the Trustee Act, R. S. O. 1897 c. 129, s. 43. *In re Alexander*, 31 O. R. 167.

Time—*Security — Affidavit.*] — The plaintiffs, desiring to appeal to the court of appeal from an order of the Judge of a surrogate court, made on the 4th October, 1895, served notice of appeal on the fifteenth day thereafter, and on the same day deposited with the registrar of the surrogate court as security an unmarked cheque on a bank for $100, payable to the order of the registrar, who simply retained it in the office and never cashed it. No other security was given, and no affidavit of the amount of the property to be affected by the order was filed: — Held, that what was done was not such a compliance with the requirements of rule 57 of the surrogate rules of 1892 that the appeal was thereby lodged and brought within fifteen days, as required by s. 33 of the Surrogate Courts Act, R. S. O. 1887 c. 50; and the appeal was quashed with costs. *Re Wilson, Trusts Corporation of Ontario* v. *Irvine*, 17 P. R. 407.

II. Fees and Costs.

Application for Assignment of Bond—*Action on Bond.*]—The costs of an application, under s. 82 of the Surrogate Courts Act, C. S. U. C. c. 16, for an assignment of a probate bond in order to an action thereon at common law, cannot be taxed as costs in the action, but should be recovered as damages consequent on default. *Closson* v. *Post*, 6 L. J. 141.

Fees of Registrar and Judge—*Grant of Administration.*]—With regard to the fees to be charged on grant of letters of administration by the registrar and surrogate Judge, under C. S. U. C. c. 16, and the tariff: —Held, (1) that the registrar is not entitled to charge for the application, for he does not prepare it; his duty begins with receiving and filing it. (2) For all affidavits which should properly be made in his office he is entitled to charge, though he does not prepare them, and to administer the oath and charge for it; but he can make no charge for swearing the deponent unless he actually does so. Semble, that he cannot charge for the affidavit of the place of abode of the intestate, and of intestacy, under s. 32, for these affidavits may accompany the application. (3) He may charge for the bond, though the attorney may have prepared it. (4) The attendance of the Judge to sign his fiat for the grant is not a special attendance, under schedule B. of the statute. The Judge, therefore, is not entitled to the fee of $1 for such attendance, nor is the registrar entitled to a fee of ten cents on it, as for drawing a special order, nor to fifty cents for attending and entering it as an order on a special attendance. *In re Dallas and Registrar of Surrogate Court of Perth*, 29 U. C. R. 482.

Fees of Solicitors and Counsel—*Contentious and Non-contentious Matters.*]—Under the orders promulgated, in August, 1858, by the Judges appointed to frame rules under the Surrogate Courts Act, which are still in force, the fees payable to attorneys and counsel in contentious, as well as non-contentious, matters, are the same, as nearly as the case will allow, as those payable in suits and proceedings in the county courts. *Re O., a Solicitor*, 24 Gr. 529.

Fees of Solicitors—*Contentious Business—"Practice."*] — The Surrogate Courts Act, C. S. U. C. c. 16, s. 17, enacts that, unless otherwise provided, the practice of the surrogate court shall, so far as the circumstances of the case will admit, be according to the practice in Her Majesty's court of probate in England:—Held, that the word "practice" did not include costs, so as to introduce the tariff of the English court. Held, also, that in the absence of a tariff of fees for contentious business in the surrogate court, the costs of the solicitor must be taxed according to the tariff of the county court and according to the tariff of the court of chancery for any work done in that court. *Re Osler*, 7 P. R. 80.

Security for Costs—*Former Proceeding—Estate.*]—Certain proceedings in the surrogate court by the present plaintiff were determined in favour of the defendant, and judgment was given for him with costs to be paid out of the estate. The plaintiff then filed her bill, raising substantially the same questions as those tried in the surrogate court:—Held, that the plaintiff could not be ordered to give security for the costs of the present suit, under 29 & 30 Vict. c. 42, s. 1, for the costs of the former proceedings were not payable by her, but out of the estate. *Curtis* v. *McNabb*, 7 P. R. 246.

See, also, *ante* I. and *post* V.

III. Judge.

Conveyancing.] — Action against county court Judge for acting as conveyancer by preparing papers in surrogate court. *Allen* v. *Jarvis*, 32 U. C. R. 56.

Imprisonment for Debt.]—A Judge of the surrogate court for one of the counties of this Province is exempt, on grounds of public policy, from imprisonment for debt. *Michie* v. *Allen*, 7 U. C. R. 482.

Vacant Senior Judgeship — *Junior Judge.*]—A junior county court Judge who has heard the evidence and tried an issue in a surrogate court, while the officer of senior county court Judge is vacant, has the right to deliver judgment in such case after a new senior Judge has been appointed. *Speers* v. *Speers*, 28 O. R. 188.

IV. Jurisdiction.

Appointment of Guardian.] — The father of infants died intestate, and his widow, having obtained letters of administration, by her will appointed her sister, a married

woman, sole guardian of her two infant daughters. After her death the paternal grandfather of the infants applied to the Judge of the surrogate court to be appointed their guardian, and the Judge, in opposition to objections made by the sister, appointed the grandfather:—Held, that the court of chancery has jurisdiction to appoint guardians to infants notwithstanding the Surrogate Act (22 Vict. c. 93), but it will not do so on an appeal from the appointment made by that court. Re Stannard, 1 Ch. Ch. 15, approved of. *Re McQueen, McQueen* v. *McMillan*, 23 Gr. 191.

Succession Duty — *Property in Another Province—Testator's Domicile.*]—The Judge of a surrogate court has jurisdiction to determine whether a particular estate of which probate or administration is sought, is liable or not to pay succession duty and the amount of such duty; his decision being subject to appeal. Where a deceased person had his domicile, prior to and at the time of his death, in another Province, and the value of his property in Ontario is under $100,000, although his whole estate, including property in the Province of his domicile, exceeds $100,000, and his whole estate in this Province is by his will devised and bequeathed to his wife and children, the property in this Province is not liable to pay succession duty. *Re Renfrew*, 29 O. R. 565.

V. Removal of Cases into Superior Court.

Appeal from Order Made before Removal.]—Immediately upon the making of an order removing a cause or matter from a surrogate court into the high court, under s. 34 of the Surrogate Courts Act, R. S. O. 1897 c. 59, such cause or matter becomes an action in the high court, and ceases to be a cause or matter in the surrogate court; and therefore an appeal under s. 36 of the Act from an order made in the surrogate court before the removal, cannot be entertained, if launched after the removal. The practice to be followed is the practice prescribed in high court proceedings. *Justin* v. *Goodison*, 18 P. R. 174.

Costs—*Scale of.*]—In cases which by the Surrogate Court Act are proper to be removed to the court of chancery, the court will not restrict the parties to surrogate court costs. *In re Lee and Waterhouse*, 5 L. J. 256.

Where a suit in the surrogate court is by order removed into chancery, and that court directs any of the parties to receive their costs, the costs to which they are entitled are those allowed by the court of chancery tariff—not the costs of the probate court in England, or of the county courts here—no tariff of costs for contentious cases in the surrogate courts here having yet been established. *Re Harris, Harris* v. *Harris*, 24 Gr. 459.

In the case of an action transferred from a surrogate court to the high court of justice, the costs of the proceedings in the surrogate court previous to the transfer should be taxed on the scale provided by the rules of 1858, i.e., as nearly as possible on the county court scale. Re Harris, Harris v. Harris, 24 Gr. 459, and Re O., a Solicitor, 24 Gr. 529, explained and followed. *Peel* v. *Peel*, 11 P. R. 195.

An order transferring a cause or proceeding from a surrogate court into the high court contained a clause providing that in the event of the defendant, the applicant for the order, failing to establish his defence, his costs, if any were allowed him, should be on the surrogate court scale. By a consent judgment, which recited the pleadings and proceedings, and adjudged that the will which was disputed by the defendant was the last will of the testatrix, and should be admitted to probate, it was also adjudged that the costs of all parties should be paid out of the estate:—Held, upon appeal from taxation, that the defendant was bound by the order of transfer, and his costs should be taxed on the scale of the surrogate court. *Re Forster, Battisby* v. *Witherspoon*, 18 P. R. 65.

Grounds for—*Application for Administration—Discretion.*]—Upon an application by certain of the next of kin of an intestate, under s. 31 of the Surrogate Courts Act, R. S. O. 1887 c. 50, to remove from a surrogate court into the high court a cause in which a contention arose as to the grant of administration, it appeared that the widow and a trust company had petitioned for joint administration of the estate, which was a large one; that the next of kin opposed the petition; that neither widow nor next of kin could, unaided, supply the necessary security; and that there were no creditors:—Held, that the jurisdiction to award grant, being of a discretionary kind, could be better exercised by the surrogate Judge, and the cause should not be removed. The personal disqualification of a surrogate Judge to pass upon an application, by reason of his interest as a shareholder in a company applicant, is not a ground for removal to the high court; for he can call in the aid of a neighbouring county Judge. Where the assets are separable, administration may be granted quoad, i.e., to the widow as to one part, and to the next of kin as to another part, or there may be a joint grant to the widow and next of kin. *Re McLeod*, 16 P. R. 261.

VI. Miscellaneous Cases.

Ancillary Probate.]—A will executed by a person when domiciled in the Province of Quebec, before two notaries there, in accordance with the law of that Province, not acted upon or proved in any way before any court there, is not within the Act respecting Ancillary Probates and Letters of Administration, 51 Vict. c. 9 (O.). *In re Maclaren*, 22 A. R. 18.

Interference with Business of Court —*Administrator ad Litem.*]—It is not intended by con. rule 311 that the business of the surrogate court should in a large measure be transferred to the high court; the intention is, to provide for necessities arising in the progress of an action where representation of an estate is required in the action, and there has not been carelessness or negligence on the part of the party who may require the appointment to be made. Under the circumstances of this case an application for the appointment of an administrator ad litem was refused. Re Chambliss and Canada Life Assurance Co., 12 P. R. 649, distinguished. *Meir* v. *Wilson*, 13 P. R. 33.

Revocation of Letters of Administration.]—The high court of justice for Ontario has no jurisdiction to revoke the grant by a surrogate court of letters of administration. *McPherson* v. *Irvine*, 26 O. R. 438.

Subpœna to Registrar to Produce Will.]—An ex parte order under rule 31, T. T. 1856, will be granted in first instance, for a subpœna to issue to a registrar of the surrogate court, for the production of an original will, upon affidavit that said will is necessary to establish the case of the party applying, and that no notice has been given of his intention to use the probate or letters of administration cum test. annex. of same, and shewing good reason for not having given or giving such notice. *Sladden* v. *Smith*, 2 L. J. 233.

Trustees' Compensation.] — The old rule as to compensation of trustees has only been abrogated by the Surrogate Act so far as relates to trusts under wills. *Wilson* v. *Proudfoot*, 15 Gr. 103.

Where a suit for the administration of an estate is pending in the court of chancery, it is improper for the surrogate Judge to interfere by ordering the allowance of a commission to trustees or executors. *Cameron* v. *Bethune*, 15 Gr. 486.

See MANDAMUS, II. 1.

SURVEY.

See IMPROVEMENTS, I.—INSURANCE, VI. 2—PLANS AND SURVEYS.

SURVEYOR.

See PLANS AND SURVEYS.

SURVIVAL OF ACTION.

See EXECUTORS AND ADMINISTRATORS, VIII. 5.

SUSPENSION OF CIVIL RIGHTS.

See CRIMINAL LAW, IX. 3, X.

SWEARING.

See PUBLIC MORALS AND CONVENIENCE, IV.

SYNOD.

See CHURCH, I.

TACKING.

See MORTGAGE, XV. 3—REGISTRY LAWS, I. 5.

TAX COLLECTOR.

See ASSESSMENT AND TAXES, IV. — NOTICE OF ACTION, I.

TAX DEED.

See ASSESSMENT AND TAXES, X. 2—REGISTRY LAWS, I. 3 (e).

TAXATION.

See ASSESSMENT AND TAXES—CONSTITUTIONAL LAW, II. 24 — COSTS, VIII. — SOLICITOR, VI. 4.

TAXES.

See ASSESSMENT AND TAXES—CROWN, VIII. —LANDLORD AND TENANT, XXI.

TEACHERS.

See SCHOOLS, COLLEGES, AND UNIVERSITIES, IV. 7.

TELEGRAPH.

I. NEGLIGENCE IN THE TRANSMISSION OF MESSAGES, 6836.

II. MISCELLANEOUS CASES, 6838.

I. NEGLIGENCE IN THE TRANSMISSION OF MESSAGES.

Damages—*Expenses—Loss of Profits.*]—The plaintiff, a ship owner, having been induced by defendants' error in the transmission of a message to suppose he could obtain a cargo of 8,000 instead of 3,000 bushels of wheat from Chatham to Oswego, abandoned a contract for a cargo from Detroit, and sent his vessel to Chatham, whence it sailed with 3,000 bushels only:—Held, that the damages which naturally resulted from the defendants' breach of duty were the expenses of sending the vessel to Chatham and back, and that the plaintiff was not entitled to the profit he might have made from carrying the 8,000 bushels. *Lane* v. *Montreal Telegraph Co.*, 27 C. P. 23.

——— *Incomplete Contract — Evidence — Original Messages.*]—On the 1st September the plaintiff, living at Kingston, received a telegram from C., at Oswego: "Will give you eighty cents for rye," and on the next day he took to defendants' office the following reply: "Do accept you offer: ship to-morrow fifteen or twenty hundred." He paid defendants sixty cents, namely, thirty cents for sending the message to Ogdensburg, and thirty cents thence to Oswego. His answer was not received by C., who swore that, if it had been, the bargain would have been

closed at eighty cents; but that, after waiting for two or three days, the person for whom he was acting would not take it. The price fell on the 5th or 6th, and it appeared that the plaintiff might before that time have communicated with C. by letter. In an action for negligence in not transmitting the message:—Held, that no damage could be recovered, for, even if it had been received by C., there would have been no complete contract binding him to take the rye. Quære, whether any and what damages could otherwise have been recovered from defendants. When a contract is attempted to be made out through the telegraph, if that can be done at all, the messages signed by the parties must be produced, not the transcript taken from the wire. *Kinghorne* v. *Montreal Telegraph Co.*, 18 U. C. R. 60.

But see R. S. O. 1897 c. 73, s. 51.

Liability beyond the Line—*Damages.*]—Defendants owned a telegraph extending to Buffalo only, but in their printed handbills they advertised their line as "connecting with all the principal cities and towns in Canada and the United States," and they received the charge for transmission to places beyond their line. The plaintiff had some flour in the hands of N., his agent at New York, and about 3 p.m. on the 23rd November delivered to defendants at Hamilton the following message, addressed to N., paying the charge to New York: "Am disposed to realize—sell 1,500 barrels." In an action for negligence in transmitting and delivering this message at New York:—Held, that the only negligence shewn was in delivering the message at New York, and, if defendants were liable for that, they would not be answerable for loss caused by a fall in the market, but, under the evidence set out in the case, for nominal damages only. Defendants could not be held liable for delay beyond their own line, but were bound only to transmit the message to Buffalo, and hand it to the American company there, paying the charge to New York. *Stevenson* v. *Montreal Telegraph Co.*, 16 U. C. R. 530.

——— *Evidence of Non-receipt of Message—Conditions.*]—The plaintiff sent a telegram by defendants from Hamilton, addressed to one H., at New York, upon one of the blank forms furnished by defendants, which he had been accustomed to use. The terms, printed on the form, on which the company received the message, were—after stating that, to guard against mistakes, the sender of a message should order it to be repeated, that is, telegraphed back to the originating office, for which an additional charge would be made—that the company would not be liable for mistakes or delays in the delivery of unrepeated messages, beyond the amount received for sending them; "and the company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination." The plaintiff sued defendants, alleging that the message was never received, and that by defendants' neglect to deliver it he had lost the sale of certain wheat to which it related. The defendants' line terminated at Buffalo, where such messages were transferred to the Atlantic and Pacific Telegraph Co. H. having died, his clerk was called, who stated that he knew his business transactions; that this message had not been received by H.; and that he inquired of the Atlantic and Pacific Telegraph Co., and was told that they had not received it either:—Held, that the evidence was insufficient to shew the non-transmission of the message, and that some one from the office of the Atlantic and Pacific Co., or of the defendants, should have been called. (2) That if this had been shewn defendants would not be liable, for the terms on which they received the message protected them; and that such terms were not unreasonable, and the plaintiff must be taken to have been aware of them. (3) Semble, that the liability of telegraph companies cannot be treated as analogous to or co-extensive with that of a common carrier. *Baxter* v. *Dominion Telegraph Co.*, 37 U. C. R. 470.

Privity between Company and Sendee—*Principal and Agent.*] — Where one F., at Hamilton, delivered to defendants a message to be transmitted to the plaintiff at Wakefield, Mass., paying for the transmission, and defendants failed to deliver the same to the plaintiff:—Held, following Playford v. United Kingdom Electric Telegraph Co., L. R. 4 Q. B. 706, that defendants' liability arose only from contract; that, as the message was sent by F. on his own account, and not on behalf of the plaintiff, there was no privity between the plaintiff and defendants, and the plaintiff could not maintain an action against defendants for their negligence. *Feaver* v. *Montreal Telegraph Co.*, 23 C. P. 150.

A contract may be made, through the medium of an agent, with a telegraph company for the transmission of a message, and where the principal sustains loss through the negligence of the company, he may maintain an action against them therefor. The person to whom a telegram was sent by his agent was held entitled to sue the telegraph company for negligence in the transmission of it. *S. C.*, 24 C. P. 258.

II. MISCELLANEOUS CASES.

Arrangements with Railway Companies.]—See *Canadian Pacific R. W. Co.* v. *Western Union Telegraph Co.*, 17 S. C. R. 151.

Betting — *Telegraph Office—Conviction.*]—A bank, a telegraph office, and another office were simultaneously opened in a town. Moneys were deposited in the bank by various persons, who were given receipts therefor in the name of a person in the United States, which receipts were taken to the telegraph office, where information as to horse races being run in the United States was furnished to the holders of the receipts, who telegraphed instructions to the person there for whom the receipts were given, to place and who placed bets equivalent to the amounts deposited, on horses running in the races, and, on their winning, the amounts won were paid to the holders of the receipts at the third office by telegraphic instructions from the person making the bets in the United States:—Held, on the evidence and admissions to the above effect, that the defendant, who kept the telegraph office, was properly convicted of keeping a common betting house under ss. 197 and 198 of the criminal code. *Regina* v. *Osborne*, 27 O. R. 185.

Construction of Message.]—Quære, whether it is a misdirection to tell the jury that a telegraphic communication is to be taken most strongly against the sender. *Thorne* v. *Barwick*, 16 C. P. 369.

Forgery.]—The prisoner, at Woodstock, with intent to defraud, wrote out a telegraph message purporting to be sent by one C. at Hamilton, to McK. at Woodstock, authorizing McK. to furnish the prisoner with funds, which was delivered to McK., and upon the faith of it McK. indorsed a draft for $85 drawn by the prisoner on C., on which the prisoner obtained the money:—Held, that the prisoner was guilty of forgery. *Regina* v. *Stewart*, 25 C. P. 440.

Lease of Telegraph Lines—*Disturbance of Lessee's Use—Claim for Reduction of Rent—Quebec Law—Trespass—Trouble de Droit.*]—See *Great North-Western Telegraph Co.* v. *Montreal Telegraph Co.*, 20 S. C. R. 170.

TELEPHONE.

Assessment and Taxes—*Poles, Wires, Conduits, and Cables.*]—In assessing for purposes of taxation the poles, wires, conduits, and cables of a telephone company, the cost of construction, or the value as part of a going concern, is not the test: they must be valued, in the assessment division in which they happen to be, just as materials which, if sold or taken in payment of a just debt from a solvent debtor, would have to be removed and taken away by the purchaser or creditor. *In re Bell Telephone Co. and City of Hamilton*, 25 A. R. 351.

Damage by Wires.]—House being moved coming in contact with telephone wire across the street, which caused some bricks to fall on a passer-by and injure him. Liability. *Howard* v. *City of St. Thomas*, 19 O. R. 719.

Interference by Wires of Electric Light Company with Wires of Telephone Company.]—See *Bell Telephone Co.* v. *Belleville Electric Light Co.*, 12 O. R. 571.

Interference with Public Travel—*Poles on Street.*]—A telephone company having permission by its Act of incorporation to erect poles on the streets of towns and incorporated villages, so as not to interfere with the public right of travel, is not relieved from liability for damages when it plants the poles on the highway in such a way as to become an element of danger to the public, although, as required by the Act of incorporation, the poles are planted under the supervision of the municipality. *Bonn* v. *Bell Telephone Co.*, 30 O. R. 696.

Monopoly.]—A by-law passed by the city council ratified an agreement between the city and a telephone company, providing that no other person, firm, or company should, for five years, have any license or permission to use any of the public streets, &c., of the city for the purpose of carrying on any telephone business:—Held, that this by-law was in contravention of s. 286 of the Municipal Act, 55 Vict. c. 42 (O.), and was ultra vires of the council. *Re Robinson and City of St. Thomas*, 23 O. R. 489.

Navigation—*Interference with Submarine Cable—Notice.*]—By the regulation passed by the Quebec Harbour Commissioners in 1895, and subsequently approved by the governor in council and duly published, the commissioners prohibited vessels from casting anchor within a certain defined space of the waters of the harbour. Some time after this regulation had been made and published, the commissioners entered into a contract with the plaintiffs whereby the latter were empowered to lay their telephone cable along the bed of that part of the harbour where vessels had been prohibited from casting anchor. No marks or signs had been placed in the harbour to indicate where the cable was laid. The defendant vessel, in ignorance of the fact that the cable was there, entered upon the prohibited space, and cast anchor. Her anchor caught in the cable, and in the effort to disengage it the cable was broken:—Held, that she was liable in damages therefor. *Bell Telephone* v. *The Rapid*, 5 Ex. C. R. 413.

Service—*Contract.*]—The Bell Telephone Company carried on the business of executing orders by telephone for messenger boys, cabs, &c., which it sold to the Electric Despatch Company, agreeing among other things not to transmit or give, in any manner, directly or indirectly, any orders for messengers, cabs, &c., to any person or persons, company or corporation, except to the Electric Despatch Company. The Great North-Western Telegraph Company afterwards established a messenger service for the purposes of which the wires of the telephone company were used. In an action for breach of the agreement with the Electric Despatch Company and for an injunction to restrain the telephone company from allowing their wires to be used for giving orders for messengers, &c.:—Held, that the telephone company, being ignorant of the nature of communications sent over their wires by subscribers, did not "transmit" such orders within the meaning of the agreement; that the use of the wires by subscribers could not be restricted; and that the telephone company were under no obligation, even if it were possible to do so, to take measures to ascertain the nature of all communications with a view to preventing such orders being given. *Electric Despatch Co. of Toronto* v. *Bell Telephone Co. of Canada*, 20 S. C. R. 83. See *S. C.*, 17 O. R. 495, 501, 17 A. R. 202.

See Atkinson v. *City of Chatham*, 29 O. R. 518, 26 A. R. 521, 31 S. C. R. 61.

See TIMBER AND TREES, IV.

TEMPERANCE ACT, 1864.

See CONSTITUTIONAL LAW, II. 16—INTOXICATING LIQUORS, VI.

TENANT.

See LANDLORD AND TENANT.

TENANT AT WILL.

See ESTATE, II.—LIMITATION OF ACTIONS.

TENANT FOR LIFE.

Investment — *Loss — Apportionment — Remainderman.*]—Where a loss occurs under a mortgage of trust funds, the income of which is payable to a life tenant, the loss should be apportioned between the tenant for life and the remainderman by adding the amount actually realized from the security to the amount of interest theretofore received by the tenant for life and dividing the whole sum between the latter and the remainderman in the proportion in which they would have been entitled to share if the security had been paid in full, the tenant for life giving credit for the amounts already received. In re Foster, Lloyd v. Carr, 45 Ch. D. 629, followed. *In re Plumb*, 27 O. R. 601.

Permissive Waste—*Growth of Weeds.*]—An action for permissive waste will not lie against a tenant for life. In re Cartwright, 41 Ch. D. 532, followed. The spread of noxious weeds from natural causes, or by the action of cattle depasturing or eating hay or straw coming from the fields where the weeds were, and the failure to stop the growth thereof, is no evidence of waste, but only of ill-husbandry; and the fact that there is a statute, R. S. O. 1887 c. 202, for the prevention of the spread of noxious weeds, does not make any difference. *Patterson* v. *Central Canada L. and S. Co.*, 29 O. R. 134.

Renewal of Lease—*Carrying on Business on Premises—Profits — Account.*]—A widow was entitled under her husband's will to the use and enjoyment of all his property during her life. It was conceded that she was entitled to the enjoyment in specie of the personal estate. The testator owned a brickfield on leasehold land, which was a going concern at the time of his death. This and the plant in connection therewith the tenant for life took possession of, and went on with the working of it. She put other assets of the estate into this business and extended it, and when she died it was still a going concern. At her expiration of the term of her husband's lease, she obtained a new one, covering a larger area of land:—Held, that the widow, having elected to carry on the business on these premises, did so for the ultimate benefit of the estate. She was entitled to all the income, earnings, and profits derivable therefrom each year, in so far as she applied them to the maintenance of the family, or in the acquisition of other property, or in the paying off of mortgages; but whatever profits went into the business to increase it, and whatever plant, stock, and belongings of the business remained on the premises or elsewhere at her death, became the property of the husband's estate. An account against her executor was directed, and the scope of the inquiry defined. *Wakefield* v. *Wakefield*, 32 O. R. 36.

Rent—*Apportionment — Remainderman.*]—A tenant for life, who had leased the premises of which she was life tenant, died a few days after a half year's rent, which was payable in advance, became due. On the day of her death part of the rent was remitted to her and was received by her executor, to whom the balance was paid on the representation that he was entitled to it:—Held, that the rent was received by the executor for the use of those entitled to it, and was therefore apportionable between the executor and the remainderman, who had confirmed the possession of the tenant, and that the executor was entitled to an order for repayment by persons, third parties, claiming under the will to whom he had paid it. *Dennis* v. *Hoover*, 27 O. R. 376.

See Saunders v. *Breakie*, 5 O. R. 603, *post* TIMBER AND TREES, III.

See ESTATE, III.—IMPROVEMENTS, II.

TENANTS IN COMMON.

Account—*Action at Law — Bailiff—Coparceners.*]—An action for an account will not lie at common law between tenants in common or joint tenants, unless there has been an appointment of one by the other as bailiff. But under 5 Anne c. 16, it will lie against one tenant in common, or joint tenant, as bailiff, whenever he has entered and taken more than his just share of the profits, whether by appointment of his co-tenant or not. Semble, co-parceners cannot sue each other in an action of account. *Gregory* v. *Connolly*, 7 U. C. R. 590.

——— *Improvements—Allowances—Interest—Master's Office.*]—A tenant in common who holds possession of, manages, and receives the rent of, the common property, which is subject to an incumbrance, is entitled when called on for an account by his co-tenant, to be allowed for advances properly and reasonably made by him, for repairs and improvements, and for principal and interest on the incumbrance, with interest from the time the advances are made. The mode of taking the account and computing interest discussed. Where accounts are brought into the master's office by the accounting party, with the vouchers and the usual affidavit of verification, and no notice of objection is given, the accounts are taken to be sufficiently proved. Judgment in 17 P. R. 379 affirmed. *In re Curry, Curry* v. *Curry*, 25 A. R. 267.

——— *Profits of Land.*]—Where one of several tenants in common of a plaster bed, was in sole possession of the property, and had sold portions of the plaster, an account of his receipts therefrom was ordered in favour of his co-tenants. *Curtis* v. *Coleman*, 22 Gr. 561.

Contribution—*Costs of Action against Stranger.*]—Where costs were incurred by a tenant in common suing on behalf of himself and his co-tenants in restraining the committing of waste on the joint property by a stranger:—Held, that on its being shewn that the suit was necessary and proper, and that it resulted in benefit to the co-owners, they should share the expense in proportion to the advantage they had derived from the suit. *Gage* v. *Mulholland*, 16 Gr. 145.

Conversion of Chattel by Co-tenants—*Right of Action.*]—An action for conversion of his interest in a chattel lies by one tenant in common against his co-tenants in common if the chattel owned in common is destroyed by them, or so dealt with by them as, in effect, to put an end to his rights. In this case the removal of a brick making machine to a foreign country was held sufficient to support the right of action, the plaintiff's power of enforcing his rights in the

courts of this Province being thus interfered with. *McIntosh* v. *Port Huron Petrified Brick Co.*, 27 A. R. 262.

Crops—*Conversion — Trover.*]—H., by agreement with defendant, planted sixteen and a half acres of defendant's land with Indian corn and other crops, the agreement being that H. was to do all the work, and defendant to receive for his share as much Indian corn as should represent the portion of the land sown with sugar corn and potatoes, and one-third of the Indian corn, and that H. was to have the remainder. Subsequently, H., being indebted to the plaintiff on a note, sold his interest in the growing crop to the plaintiff, the price being allowed on the note. At a later period H. executed a bill of sale of the crop to the defendant, who afterwards claimed the entire crop as his own, and harvested it:—Held, that H. and defendant were tenants in common of the crop of Indian corn; that one tenant in common cannot maintain trespass or trover against his co-tenant for merely reaping and harvesting the crop; but he may, if his co-tenant has consumed the crop, or dealt with it so that he cannot retake it or pursue his remedies against the persons who have possession of it; and that, under the circumstances of the case, the court might assume after the verdict, in the absence of any question raised on the point, that such events had happened as entitled the plaintiff to maintain his action against the defendant for conversion. *Brady* v. *Arnold*, 19 C. P. 42.

See, also, *Culver* v. *Macklem*, 11 U. C. R. 513.

Entry by one Tenant in Common—*Effect of, as to Limitations Act.*]—See *Hartley* v. *Maycock*, 28 O. R. 508.

Injunction—*Crops — Infants — Possession—Trustee—Account.*]—Although the general rule is, that the mere fact of one tenant in common holding possession of the entire estate will not render him liable to a co-tenant, who might himself enter and enjoy the possession with the other, and the court will not in such a case interfere with the dealing of such co-tenant in regard to the property; still, where the co-tenant in possession was the mother of the other co-tenants, all of whom were infants at the time of her second marriage, the court, at the instance of one of the children who had attained majority, restrained the husband and wife from selling or disposing of the crops of the current year or the proceeds thereof, unless they undertook to bring into court one-third of such proceeds; but refused to interfere with the possession of the mother and her husband in respect of previous years; although as to such years the mother might have been accountable to her infant children as trustee for them. *Bates* v. *Martin*, 12 Gr. 490.

——— *Ship—Possession.*]—Where defendants, being part owners of a schooner and in sole possession, excluded therefrom the plaintiff, who was the other part owner, and the plaintiff did not allege that there had been any dispute as to the employment of the vessel, an injunction to restrain defendants' proceedings was refused. *Baker* v. *Casey*, 17 Gr. 195.

——— *Waste.*]—One tenant in common will be restrained at the suit of a co-tenant from digging earth for bricks on the joint property. *Dougall* v. *Foster*, 4 Gr. 319.

A tenant in common, upon satisfying the court that the cutting of the timber by his co-tenant operates to the destruction of the inheritance, is entitled to an injunction. *Proudfoot* v. *Bush*, 7 Gr. 518.

——— *Waste—Partition.*]—Although the general principle is, that one joint tenant will not be restrained from committing waste at the instance of his co-tenant, the rule is different where a bill has been already filed for a partition of the estate. *Lassert* v. *Salyerds*, 17 Gr. 109.

——— *Waste—Trustee.*]—Semble, no injunction will be granted between tenants in common, except in cases of actual destruction. But where a tenant in common of one moiety was trustee of the other under a will, and was felling timber for his own benefit in breach of his trust, he was enjoined from doing so. *Christie* v. *Saunders*, 2 Gr. 670.

Party Wall.]—M., owner of two warehouses, Nos. 5 and 7 (the dividing wall being necessary for the support of both), executed a deed with power of sale of No. 5, by way of marriage settlement on his daughter. M. having died, his executors executed a deed of confirmation to the purchaser of No. 5 from the trustees of the marriage settlement by a description which, it was contended by the purchaser, conveyed absolutely the freehold estate in the party wall and the land covered by it. An action being brought by the executors of M. to have it declared that the wall in question was a party wall:—Held, that upon the execution of the deed by way of marriage settlement of No. 5, the wall common to the two warehouses, Nos. 5 and 7, became a party wall of which the owners of the warehouses were tenants in common. *Lewis* v. *Allison*, 30 S. C. R. 173.

Title by Possession—*Acquisition of, by Tenants in Common.*]—See *Brock* v. *Benness*, 29 O. R. 468.

Vendor's Lien—*Performance of Agreement.*]—In the absence of agreement or circumstances operating to the contrary, a vendor's lien arises whenever land is conveyed in consideration of acts to be done by the grantee: the right is not limited to cases of conveyance for a money consideration. Where, therefore, upon the partition of a piece of land held by tenants in common, one grantee, as part of the consideration for his grant, covenanted to obtain for the other tenants in common a release of the contingent interest of two persons in the land conveyed to them, it was held that a lien attached upon the portion conveyed to him for the due performance of this covenant. *Ward* v. *Wilbur*, 25 A. R. 262.

See Handley v. *Archibald*, 30 S. C. R. 130; *Hartley* v. *Maycock*, 28 O. R. 508; *Munsie* v. *Lindsay*, 10 P. R. 173.

See ESTATE, VIII. 2—IMPROVEMENTS, II.—LIMITATION OF ACTIONS, II. 24—PARTITION—TROVER AND DETINUE, I. 1 (b)—WILL, IV. 11.

TENDER.

I. Of Money,

1. *Generally—Mode and Sufficiency of Tender*, 6845.
2. *Dispensing with Tender*, 6847.
3. *Effect of Tender*, 6848.
4. *Pleading*, 6848.

II. Of Other Things, 6850.

I. Of Money.

1. *Generally—Mode and Sufficiency of Tender.*

Conditional Tender.]—A tender to the holder of a mortgage (who claimed a larger sum) with a condition that the mortgage should be given up, was held bad, as a conditional tender. *Peers* v. *Allen*, 19 Gr. 98.

Demand of Receipt—*Refusal on other Grounds—Tender post Diem.*]—A person tendering money is entitled to require a receipt. Where on tendering mortgage money a receipt was required, and the plaintiff did not object on that ground, but gave a different reason for refusing to receive the money:—Held, that the tender was good. The tender was made on the 14th April, the day when the money fell due, and on the following day it was again tendered, and refused because a receipt was insisted upon:—Held, not to support the plea of tender on the 14th, for it was after the day; but that, to avoid the effect of the previous tender, the plaintiff should have demanded the exact sum before offered. *Lockridge* v. *Lacey*, 30 U. C. R. 494.

Lien—*Evidence — Waiver.*] — Defendant having an admitted lien upon a buggy for repairs, it was held, on the evidence set out in the case, that there was no sufficient evidence of a tender of the sum, or a waiver of it. *Lake* v. *Biggar*, 11 C. P. 170.

Non-production of Money.] — Tender held sufficient, though money not actually produced. *Long* v. *Long*, 17 Gr. 251.

——— *Readiness to Produce — Dispensing with.*]—In order to constitute a legal tender, the money must either be produced and shewn to the creditor, or its production expressly or impliedly dispensed with. Where, therefore, to prove a tender of a quarter's rent, for which the defendant had distrained, the evidence shewed that the tenant, after refusing to pay some charges and costs which the landlord claimed in addition to the rent, said to the landlord, "Here is the rent,"—which he had, and told the landlord he had, in his right hand in a desk—but did not produce it or shew it to the landlord, who said nothing and left the premises:—Held, that there was no evidence of a tender, or of a dispensation with a tender. *Matheson* v. *Kelly*, 24 C. P. 598.

——— *Readiness to Produce — Refusal to Accept.*]—G. and B. went on behalf of defendant to make a tender to plaintiff. Defendant had counted out the money to G., who gave it to B. G. told the plaintiff he had come to pay him that sum on behalf of defendant, naming it, but not holding the money exposed in his hand. The plaintiff twice refused it, as he said his demand was larger. B. had counted the money before he went there, and heard the tender and refusal, having the money ready to produce:—Held, that the tender was clearly sufficient. *Reynolds* v. *Allan*, 10 U. C. R. 350.

——— *Refusal to Receive — Costs.*] — A sheriff sent his clerk to plaintiff's attorney before action brought, saying that certain moneys collected on an execution in favour of plaintiff were ready to be paid. The clerk had not the money with him, nor did he offer to go for it; but the attorney said he would not receive it unless the costs of a rule on the sheriff to return the writ were also paid:—Held, that these facts would not sustain a plea of tender. *Thomson* v. *Hamilton*, 5 O. S. 111.

Offer by Letter before Suit — *Tender after Suit—Costs.*]—Held, following Powney v. Blomberg, 8 Jur. 748, that a letter by defendant's solicitor to the plaintiff's solicitor before suit, offering to pay the plaintiff's demand, was not a tender. A tender of the amount of a claim, after suit brought upon it, must include costs incurred up to the date of the tender. *Garforth* v. *Cairns*, 9 C. L. J. 212.

Production of Money—*Refusal to Name Amount.*]—A. sends a waggon to B. to make the wood work. B., having finished, sends the waggon in A.'s name to a blacksmith for the iron work, and gets it back. A. calls for the waggon. B. allows him to remove the box from his shop into the highway, but, on his returning to the shop to take out the remaining part, B. refuses to let it go till he is paid his bill. A. holds in his hands a quantity of notes, and offers to pay B. his demand if he will tell him what it is. B. will not name any sum, and insists upon detaining the waggon:—Held, that it was for the jury to determine whether B. had not had full opportunity of seeing that A. was tendering him a sum sufficient to meet his demand, and if they were satisfied that he had, then that the tender was good, though B. had refused to name the amount of his bill. *Milburn* v. *Milburn*, 4 U. C. R. 179.

——— *Refusal to Accept—Conflicting Evidence—Jury.*]—In proof of an alleged tender to the bailiff, the plaintiff said that he asked the bailiff for a bill of demands, with all costs, and he would pay him; that he, plaintiff, had then $87 in his hand, which was sufficient to pay the rent and costs, and said, "Here is your money;" but that the bailiff refused to receive it. This was denied by the bailiff; but the question was left to the jury, who found that there was a tender. The goods distrained were afterwards sold by the bailiff:—Held, that on the evidence the finding of the jury could not be interfered with, and there must be held to have been a tender to the bailiff; and that the landlord was responsible for the bailiff's act. Matheson v. Kelly, 24 C. P. 598, distinguished. *Howell* v. *Listowel Rink and Park Co.*, 13 O. R. 476.

Railway Fare—*Refusal to Pay — Subsequent Production of Money.*]—The plaintiff got upon the train without a ticket, and when asked for his fare declined paying then, as he said he had not made up his mind how far he should go. The conductor said he must decide, and afterwards, on his declining again on the same ground, stopped the train and put

him out, at a place about a mile and a quarter from the last station, and within half a mile of a house. The plaintiff at last tendered a $20 gold piece, telling the conductor to take his fare ($1.35) out of it:—Held, that the plaintiff had refused to pay his fare within the meaning of 14 & 15 Vict. c. 51, s. 21, s.-s. 6, and that the conductor was justified in what he did. *Fulton* v. *Grand Trunk R. W. Co.*, 17 U. C. R. 428.

Tender Accompanied by Protest.]—A tender of mortgage money with a statement that the party tendering did not consider the amount tendered due, and that the other would be compelled to repay the excess:—Held, not invalidated by this statement. *Peers* v. *Allen*, 19 Gr. 98.

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2. *Dispensing with Tender.*

Excessive Demand — *Excuse for Non-tender—Lien.*]—To an action of replevin for staves and shingles, defendant pleaded that the plaintiff had delivered to him certain timber to be made by him into flour barrels and shingles in the way of his trade; that he made part of the same into the staves and shingles sued for; and that, the plaintiff not having paid him, he detained them, claiming a lien for the price of his work. The plaintiff replied that these staves were part of a large quantity manufactured by defendant for the plaintiff; that the defendant had delivered part to the plaintiff, and had wrongfully disposed of others, and, when the plaintiff demanded the staves in question, refused to give them up until paid for the price of manufacturing all he had made, wherefore the plaintiff alleged that the lien was forfeited:—Held, on demurrer, replication bad, for, though the lien claimed was too large, the plaintiff was not thereby excused from a tender of the amount due upon the staves sued for. *Kendal* v. *Fitzgerald*, 21 U. C. R. 585.

Held, that the mere fact of a warehouseman who has a lien on goods for a certain sum for storage, claiming also to hold them for an untenable claim as due either to himself or a third person, does not dispense with a tender of the sum due, and amount to a conversion, unless the evidence fairly warrants the conclusion that such tender would be useless, as it would be refused; and that in this case the evidence set out was insufficient for that purpose. *Llado* v. *Morgan*, 23 C. P. 517.

Express or Implied Dispensation— *Lien.*]—Where the holder of goods detains them for different claims, as to one of which he has a lien and the other not, the owner must tender the proper amount, unless the holder either expressly or by fair implication dispenses with it. *Kendal* v. *Fitzgerald*, 21 U. C. R. 585; *Buffalo and Lake Huron R. W. Co.* v. *Gordon*, 16 U. C. R. 283; *McBride* v. *Bailey*, 6 C. P. 523.

Neglect to Furnish Statement.]—Defendant having neglected to furnish a statement of his claim in respect of the advances made by him in pursuance of the agreement between the parties, in consequence whereof the plaintiff was unable to tender the proper amount due, the plaintiff was held exonerated from making any tender. *McSweeny* v. *Kay*, 15 Gr. 432.

See Harper v. *Paterson*, 14 C. P. 538, *post* II.; *Thomson* v. *Hamilton*, 5 O. S. 111, *ante* 1; *Lake* v. *Biggar*, 11 C. P. 170, *ante* 1; *Matheson* v. *Kelly*, 24 C. P. 598, *ante* 1; *Western Assurance Co.* v. *McLean*, 29 U. C. R. 57, *post* 4.

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3. *Effect of Tender.*

Costs.]—When defendant had obeyed an order and tendered a sufficient sum for the costs thereof, which the plaintiff's solicitor declined to accept, the defendant was given his costs of motion less the sum tendered. *Franklin* v. *Bradley*, 2 Ch. Ch. 444.

Mortgage — *Interest—Costs.*]—Where a tender of debt and interest had been made to a mortgagee, pending actions on the mortgage, and the mortgagee's solicitor sent to the mortgagor's solicitor his bills of costs incurred in the suits, and the latter considered them too large, but offered to pay any amount which the master should tax, it was held that the mortgagee was entitled, as a matter of strict right, to go on with his actions notwithstanding such offer. *Nixon* v. *Hunter*, 17 Gr. 96.

——— *Interest.*]—In equity a tender by a mortgagor stops interest, unless the mortgagee shews that the money was afterwards used by the mortgagor, and a profit made of it. *Knapp* v. *Bower*, 17 Gr. 695.

Taxes — *Payment.*] — The defendant, as treasurer, returned the plaintiff's land as part of a tract on which taxes were unpaid. The plaintiff tendered the amount of taxes on his own portion, which defendant refused to accept, and the land was sold:—Held, that an action would not lie against the treasurer for not accepting the redemption money, the tender to and refusal by the latter being equivalent to payment; and that, therefore, the plaintiff had not lost his land. *Cunningham* v. *Markland*, 5 O. S. 645.

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4. *Pleading.*

Declaration for Unlawful Distress— *Averment of Tender—Necessity for.*] — The first count alleged that one H. held premises as tenant to defendants at a certain rent; that the plaintiff's goods being there, defendants wrongfully seized the same, as well as all the tenant's goods, as a distress for alleged arrears of rent, to wit, $401, then claimed by defendants, and afterwards sold the same for such arrears and costs, whereas only $38 was really due, for which one-fifth of the goods would have sufficed, and the tenant's goods alone would have been more than sufficient:—Held, under the authority of French v. Phillips, 1 H. & N. 454, that the count disclosed no cause of action, for, as a count for distraining for more than was due, it averred no tender of the proper sum, and though the plaintiff could make no tender, he could avail himself of one made by the tenant. *Huskinson* v. *Lawrence*, 25 U. C. R. 58.

Plea of Tender — *Foreign Promissory Notes—"Currency"—Equivalent.*] — To the first and second counts of a declaration on two notes, dated respectively 11th September and 29th November, 1860, for the respective sums of $500.24 and $388.85, payable six months

after date, defendant pleaded that the notes were signed and entered into in the State of Illinois, to be paid when due in United States currency, and alleged a tender by defendant before action of $606.12 of lawful money of Canada, which was at the time last aforesaid equal to plaintiffs' claim, and a refusal by plaintiff to accept same:—Held, on demurrer, plea bad: firstly, for alleging the amount tendered to have been equal to plaintiffs' claim on the day of tender, before action brought, instead of at the time of the maturity of the notes sued upon, with subsequent interest, &c.; and, secondly, for alleging that the amount tendered was equal to plaintiffs' claim, instead of "equal in value to a certain sum of the currency of the United States," &c., though, semble, this might be only ground of special demurrer. *White* v. *Baker*, 15 C. P. 292.

——— *Offer to Pay—Dispensing with Payment.*]—Declaration against a surety on a bond, conditioned that one L., the plaintiffs' agent, should, whenever requested, pay over to them all moneys received on their accounts, alleging various sums received and not paid. Plea, that L. paid over all sums received except $56.50, as to which, and the causes of action in respect thereof, L. was ready and willing and offered to pay and account for the same in accordance with the bond and condition, and the plaintiffs, notwithstanding, refused to accept from him the said sum, and by their own acts prevented him from paying over the same in accordance with said bond and condition:—Held, a good plea. *Western Assurance Co.* v. *McLean*, 29 U. C. R. 57.

——— *Trespass.*]—Where in trespass for taking staves the plaintiff recovered £20, where the law on some of the facts which were improperly elicited at the trial was doubtful, but it appeared that the plaintiff was entitled to recover something in that form of action, and the residue in another form, a new trial was refused, although a tender could have been pleaded to the amount of the whole claim if the action had been brought in another form. *Ballard* v. *Ransom*, 2 O. S. 70.

Plea of Tender and Refusal — *Readiness.*]—A plea of tender and refusal, and that defendant was always ready to pay at a particular place:—Held, sufficient. *Thompson* v. *Hamilton*, 5 O. S. 443.

Plea of Tender and Payment into Court.]—See *Hudon Cotton Co.* v. *Canada Shipping Co.*, 13 S. C. R. 401; *Davis* v. *National Assurance Co. of Ireland*, 16 P. R. 116.

Plea of Tender without Payment into Court—*Judicature Act.*]—This action was to recover money as compensation for land expropriated, and for other relief. Defendants pleaded a defence in denial, and also a tender of $400 and interest, but did not pay the amount into court:—Held, that the defence of tender without payment into court was a good defence under the O. J. Act, and a motion to strike out the defence, or to compel payment into court, or for judgment for the amount, with leave to proceed for a further amount, was refused. *Demorest* v. *Midland R. W. Co.*, 10 P. R. 640.

Replication of Tender—*Trover—Lien.*]—Trover for bills of exchange. Plea, a lien by agreement. Replication, a tender, without averring that the sum tendered was sufficient. Replication held bad. *Conger* v. *Hutchinson*, 6 O. S. 644.

See Lockridge v. *Lacey*, 30 U. C. R. 494, *ante* 1; *Tobey* v. *Wilson*, 43 U. C. R. 230.

II. Of Other Things.

Of Bank Notes.]—See *Conn* v. *Merchants Bank of Canada*, 30 C. P. 380.

Of Cognovit.]—A., having taken a likeness for B., agreed to take in payment therefor $20 in cash and a cognovit for $70, payable at a future date. After receipt of $20 and tender of the cognovit:—Held, that the agreement was a waiver of A.'s right to lien, but did not amount to an accord and satisfaction. *Dempsey* v. *Carson*, 11 C. P. 462.

Of Goods — *Damages — Offer pendente Lite.*]—Action for the value of 50 kegs of butter delivered by plaintiff to defendants to carry from G. to T. Defendants relied upon a tender of the butter to plaintiff, as preventing the recovery of more than nominal damages. The tender was made in writing by defendants' solicitor, two days before the assizes, offering for plaintiff's acceptance the 50 kegs of butter—which had been sold by plaintiff to M., and for which M. had recovered against the plaintiff—stating the same to be at T. at plaintiff's own risk:—Held, wholly illusory, and not to partake of any of the incidents of a legal tender; and that the plaintiff was entitled to recover the full value of the property. *Brill* v. *Grand Trunk R. W. Co.*, 20 C. P. 440.

Of Promissory Note.]—Where a plaintiff contracts to receive for work done at its completion a certain sum of money, and then agrees to accept from defendant the note of B. for the sum, he may sue for the money, if the note be not tendered at the time specified; a subsequent tender of the note and refusal will be no defence. *Fisher* v. *Ferris*, 6 U. C. R. 534.

Of Renewal Note and Interest.]—Action on a promissory note, to which defendants pleaded in substance that the plaintiff, who at the time held a note for the same amount, agreed, on certain conditions, to renew it from time to time for three years; that it was repeatedly renewed as agreed; and that, when the note sued on became due, a renewal note and the interest were tendered and refused, though the three years had not expired. At the trial it was shewn that previous renewals had been made by leaving the renewal note at the agency of the Bank of Montreal in Cobourg, paying the interest, and taking up the old note; and when the note now sued upon became due, a renewal note and the interest were tendered to M., the agent of the bank, who refused to accept the same, alleging he had no instructions. All the renewals, except one which was made with the plaintiff personally, were made at the bank:—Held, that the tender of the renewal note and interest to M., the agent of the Bank of Montreal, where the note was payable, was a sufficient tender, as all the other renewals were made there; that defendant was not bound to tender another renewal and the interest at the expiration of

three months from the last tender, as plaintiff had, by his refusal to accept the former tender, repudiated the agreement, and defendant was not informed that he would accept such renewal. *Harper* v. *Paterson*, 14 C. P. 538.

See DISTRESS, III. 3 (g)—LANDLORD AND TENANT, XXIII. 6—VENDOR AND PURCHASER, IV.—WORK AND LABOUR, I. 3.

TENDERED BALLOTS.

See PARLIAMENT, I. 13 (f).

TENURE OF OFFICE.

See MUNICIPAL CORPORATIONS, XXIII. 1.

TERMS.

See WORDS AND TERMS.

TERRITORIAL JURISDICTION.

See DIVISION COURTS, XI. 7.

TESTATUM ACT.

[The Testatum Writ Act, 8 Vict. c. 36, was repealed by 19 Vict. c. 43 (the C. L. P. Act, 1856), and the practice under it is obsolete.]

See Graham v. *Quinn*, 3 U. C. R. 183; *Parke* v. *Anderson*, 5 U. C. R. 2; *Houghton* v. *Hudson*, 1 P. R. 160; *Marmora Foundry Co.* v. *Miller*, 2 C. L. Ch. 102; *Patterson* v. *Calvin*, 1 U. C. R. 409; *Colquhoun* v. *Connell*, 1 U. C. R. 178.

THIRD PARTIES.

See INDEMNITY—PARTIES, V.

THREATS.

See DURESS.

THREE MILE LIMIT.

See SHIP, VII. 2.

TIMBER AND TREES.

I. CONTRACTS FOR SALE, CUTTING, OR MANUFACTURE OF TIMBER.

1. *Action for Price*, 6852.
2. *Breach of Contract*, 6853.
3. *Construction of Particular Contracts*, 6856.
4. *Property Passing*, 6857.
5. *Sale of Standing Timber*, 6861.
6. *Statute of Frauds—Parol Agreements*, 6863.
7. *Vendor's Lien*, 6865.
8. *Other Cases*, 6866.

II. CONVERSION INTO LUMBER, 6866.

III. RIGHT OF CERTAIN PERSONS TO CUT TIMBER, 6866.

IV. TREES—PROPERTY IN, 6868.

V. MISCELLANEOUS CASES, 6869.

I. CONTRACTS FOR SALE, CUTTING, OR MANUFACTURE OF TIMBER.

1. *Action for Price.*

Delivery—*Acceptance.*]—Where the plaintiff contracted under seal to deliver timber of certain specified dimensions, and it fell short of the size, but was accepted and used:—Held, that he might recover on the common counts. *White* v. *Manning*, 13 U. C. R. 640.

——— *Non-acceptance.*]—Where in an action for goods sold and delivered the plaintiff shewed a contract between defendant and himself for the sale and purchase of 21 sticks of timber at £2 10s. per thousand feet, and it was proved that the timber had been delivered at the place appointed by defendant, when the agents of the plaintiff and defendant inspected the whole and measured eight of the sticks, the value of which was paid into court, and defendant repudiated the rest, as not being of merchantable quality:—Held, that there was no acceptance of the residue, by which the plaintiff could recover as for goods sold, nor any binding agreement within the statute. *Grover* v. *Cameron*, 6 O. S. 196.

——— *Time for Payment.*]—A. was cutting timber on B.'s land; B. refused to allow him unless C., who was to get the timber when cut, should become answerable to B. for it; C. agreed to become so, and A. was permitted by B. to take away the timber. It was further agreed between B. and C., that upon the timber being passed at Bytown free from duties to the government—that is, passed as private timber—B. should be paid by C. the price the government would have paid for it had it been Crown timber:—Held, that upon this oral agreement B. could sue C. for goods sold and delivered, when the time arrived for passing the timber through Bytown. *McNab* v. *McGill*, 6 U. C. R. 142.

By agreement in writing I. agreed to sell and the V. H. L. Co. to purchase timber to be

delivered "free of charge where they now lie within ten days from the time the ice is advised as clear out of the harbour, so that the timber may be counted. . . . Settlement to be finally made inside of thirty days in cash, less two per cent. for the dimension timber which is at John's Island;"—Held, that the last clause did not give the purchasers thirty days after delivery for payment: that it provided for delivery by vendor and payment by purchasers within thirty days from the date of the contract: and that, if purchasers accepted the timber after the expiration of thirty days from such date, an event not provided for in the contract, an action for the price could be brought immediately after the acceptance. *Victoria Harbour Lumber Co.* v. *Irwin*, 24 S. C. R. 607.

Rate of Payment — *Measurement.*] — Where the plaintiff by writing agreed to furnish timber, to be paid for at a certain rate per foot, lineal measure:—Held, that he was entitled to recover such price per lineal foot according to the length of each stick, not according to the length of a bridge constructed of the timber, and for which it was obtained. *Brown* v. *Zimmerman*, 15 U. C. R. 563.

See Clarke v. *White*, 28 C. P. 293, 308 n., 3 S. C. R. 309, *post* 3; *Lapp* v. *Firstbrook*, 24 C. P. 239; *Georgian Bay Lumber Co.* v. *Thompson*, 35 U. C. R. 64.

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2. *Breach of Contract.*

Failure to Make Road—*Damages for—Overpayment of Price.*]—The plaintiff agreed to cut, draw, and deliver for defendants at a specified place 4,000 standard logs at 50 cents each; also, to make all branch roads, defendants agreeing to make the main road: "the defendants to provide the pine timber, which is to be cut on the lots mentioned in the schedule A. hereon indorsed." This schedule enumerated five lots, containing 1,800 acres:—Held, that the defendants were not bound to point out to the plaintiff the trees to be cut on the lots in question, but that it was sufficient that there were trees on these lots, as the jury found, enough to make 4,000 logs. The jury, in answer to questions, found that the plaintiff had cut and delivered only 690 logs, and had received $400, so that he was overpaid $100; but they found also that defendants did not make the main road in reasonable time to enable the plaintiff to get the logs out, by which the plaintiff had sustained $10 damages:—Held, that the plaintiff was entitled to a verdict for $10, notwithstanding that he had been overpaid. *Stubbs* v. *Johnston*, 38 U. C. R. 466.

Non-acceptance—*Condition Precedent—Inspection—Custom—Waiver.*] — Defendant agreed in writing to buy from the plaintiff certain quantities of different kinds of lumber specified, "culls all out, and all good merchantable lumber by G. F. or J. Sills's inspection." Plaintiff sued upon this agreement, alleging that all things were done, &c., necessary to entitle him to have the lumber accepted, yet that defendant, having accepted part, refused to accept the residue. It appeared that part of the lumber had been shipped by defendant's order to one P. at Buffalo, and there was evidence of a new agreement as to the inspection, but no inspection had been made. It was also proved, without objection, that according to the usage in such cases it is the purchaser's duty to procure the inspector. At the trial, the case being taken in defendant's absence, it was held that defendant was bound to procure inspection, and that the declaration should have been for not doing so; and, as an amendment was not accepted on the terms imposed, a verdict was entered for defendant:—Held, that under the contract the inspection by G. F. or J. Sills was a condition precedent to defendant's obligation to accept the lumber; but that defendant might waive this condition or agree to a different inspector. The court, however, refused to amend and enter a verdict for the plaintiff; but granted a new trial on payment of costs, to enable the plaintiff to amend, and to have the question as to such alleged waiver and substitution properly tried. *Aitcheson* v. *Cook*, 37 U. C. R. 490.

Non-delivery—*Condition Precedent—Inspection—Custom—Pleading.*] — The declaration was for breach of defendant's covenant to get out, make, manufacture, and deliver to the plaintiffs upon the canal at the Dundas basin, certain timber and masts, setting out the quality, description, and price, with an averment of the performance of all conditions precedent. Third plea, setting out in full the agreement, containing the covenant sued upon, namely, that defendant would get out, make, manufacture, and deliver to plaintiffs on or before 1st April, 1874, upon the bank of the canal at Dundas, at a convenient place for putting the same in the canal, certain descriptions of timber and masts, specified to be first-class in every particular, and subject to the inspection of a Quebec culler, payments to be made by plaintiffs from time to time as the work progressed, and the balance when the whole of the timber and masts were delivered at the canal; that the timber and masts so soon as made and manufactured should be marked with plaintiffs' trade mark, and become their property so soon as each stick was inspected, measured, and culled by the said culler. The plea then averred that by the usage and custom of the timber trade, in respect of which the said deed was made, and in which plaintiffs and defendant were engaged, and by the terms of the deed, it became the plaintiffs' duty to cause the said timber and masts to be inspected at the place where they were being cut, and before delivery by defendant at the canal basin at Dundas; and that the plaintiffs, though duly notified by the defendant to have the same so inspected, neglected to do so, whereby defendant, though ready and willing, was prevented from performing his covenant:—Held, bad, there being nothing to shew what the custom was from which defendant's duty arose, and no allegation that the timber and masts were ever manufactured and ready for inspection. Semble, that, even if this had been averred, such a custom or usage would have been inadmissible, its effect being inconsistent with the defendant's express covenant to deliver at the basin subject to inspection; and, even if such usage could prevail, defendant could have appointed a culler, so that the plaintiffs' neglect to do so could not be said to have prevented defendant's performance. *Hayes* v. *Nesbitt*, 25 C. P. 101.

——— *Condition Precedent—Payment—Pleading.*] — Declaration, that the plaintiff agreed to buy and defendant to sell 20,000 cubic feet of good merchantable board timber of the quality and manufacture therein men-

tioned, to be delivered, as in the agreement set out, not later than 10th May next ensuing, the plaintiff to pay at the rate of 12c. per cubic foot for timber so delivered, at the times and in the manner in the agreement set out; that the plaintiff, in pursuance thereof, paid $300 on account; and all conditions were fulfilled, &c., yet defendant did not deliver the said timber or any part thereof. Plea, on equitable grounds, setting out the agreement in full, shewing what the quality and manufacture were to be like, and when and where the delivery was to take place; also the mode of payment, namely, the $300 down, acknowledging the receipt thereof, and two-thirds as the timber should be delivered, when each 10,000 feet was hauled to the named points. The plea then averred a delivery at the proper places therefor, and of the proper quality and description, before the named day, of the first 10,000 feet, and a notification to plaintiff of the same, and of its being ready for delivery to him on payment of such two-thirds, and that in default of such payment the said timber would be resold. The plea further averred that during all that time defendant was ready and willing and offered to deliver to plaintiff the first 10,000 feet, and also the remaining 10,000 feet, but that the plaintiff, though he received due notice, refused, within a reasonable time thereafter, to accept and receive the said timber, and to pay the said two-thirds of the price or any part thereof, whereupon defendant after a reasonable time resold the timber:—Held, that the plea was a good answer as regards the first 10,000 feet, payment of the two-thirds price being a condition precedent to delivery; but no answer as regards the second 10,000 feet, and therefore bad as being pleaded to the whole: for it could not be read as alleging an offer then to deliver the second quantity, because that would have entitled defendant to the whole price, whereas non-payment of the two-thirds only was complained of, and the notice of resale only applied to the first 10,000 feet; nor could it be read as an offer and refusal to take the second 10,000 feet at all, or to go on with the contract, so as to discharge the defendant. Held, also, that a replication alleging a notification by defendant to plaintiff of his inability to deliver the 20,000 feet, and promising to return the $300 with expenses, but that defendant failed either to perform the contract or return the money, was bad. Held, also, that the declaration was defective for uncertainty; but that the defect was cured by the plea. *Reid* v. *Robertson*, 25 C. P. 568.

——— *Construction of Contract—Right of Action—Readiness to Accept—Time.*] — The defendant signed a writing in the following terms: "I, the undersigned, agree to deliver S. S. Mutton & Co., forty M. feet black ash, with mill culls out f. o. b. vessel on Cornwall canal, at $10 per M. feet, also ten M. feet soft elm at $10 per M. feet f. o. b. vessel on Cornwall canal, to be delivered in the month of June, 1881, the lumber now on stick and part seasoned;" and the plaintiffs signed a corresponding memorandum, agreeing to accept such lumber at the time specified:—Held, that the words "with mill culls out" applied to the ash only, not to the elm. Held, also, that the plaintiffs, not having had a vessel ready to receive the lumber in June, could not recover. Semble, that time was of the essence of the contract, and the defendant was not bound to deliver the lumber in September. *Mutton* v. *Dey*, 7 A. R. 455.

——— *Damages—Loss of Profits.*] — The plaintiff contracted to deliver timber to the defendant at St. Ignace, to be transported by him to Quebec for sale there. There was no market nearer to the place of delivery than Quebec. The plaintiff made default, and in an action for the price the defendant counterclaimed for damages for non-delivery of the timber:—Held, that the measure of damages was the value of the timber at Quebec, less the cost of transportation thereto from the point of delivery. *Hendrie* v. *Neelon*, 3 O. R. 603, 12 A. R. 41.

See McNeill v. *Haines*, 17 O. R. 479.

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3. *Construction of Particular Contracts.*

Lease with Right to Cut — *Effect of Surrender.*]—The owner of land with a saw mill thereon leased the mill with a right to cut timber during the lease; the lessee assigned the lease, and the assignee afterwards surrendered it to the proprietor of the freehold:—Held, that the right to cut timber was only commensurate with the lease itself, and the lease having been surrendered, the right of cutting timber was at an end, except for the use of the mill. *Stegman* v. *Fraser*, 6 Gr. 628.

Quality of Timber—*Payment of Price.*] —C., after having examined a lot, entered into an agreement with W., the owner, whereby the latter sold all the pine timber standing on the lot to C., "such as will make good merchantable waney-edged timber, suitable for his purpose, at the rate of $13 per hundred cubic feet," and C. paid to W. $1,000, "the balance to be paid for before the timber is removed from the lot." C. cut $651.17 worth of first-class timber, suitable for the Quebec market, which was all of that class to be found on the lot, and sued W. to recover back the balance of the $1,000, namely, $348.83:—Held, affirming the judgment in 28 C. P. 308 n., which reversed that in 28 C. P. 293, that the true construction of the contract was, that W. sold and granted to C. permission to enter upon his lot, and cut all the "good merchantable timber there growing, suitable for his purpose," and not merely "first-class timber;" that there was more than sufficient "good merchantable timber" still remaining on the lot to recover the balance of the $1,000: and that there was no evidence to shew that the contract had been rescinded. The payment of the $1,000 was an absolute payment, the plaintiff believing and representing to defendant that there was sufficient timber to recover that amount, if not more, on the faith of which representation defendant entered into the contract, which he otherwise would not have done, and if the plaintiff made an error, he, and not the defendant, must suffer the consequences. *Clarke* v. *White*, 3 S. C. R. 309.

Right to Fell Trees.]—The owner of real estate sold all the hemlock bark thereon: —Held, that the purchaser had a right to fell the trees. *Hatch* v. *Fick*, 5 Gr. 651.

Size of Trees.]—C. conveyed to H. certain land by a deed which contained the following reservation and covenant: "And the said party of the first part reserves to himself all the standing timber upon the said lands, excepting that which measures eight

inches through, and the said party of the second part covenants with the said party of the first part to give him five years from the date hereof to take the said timber off the said lands, with the right of entry upon said lands for the purpose of removing said timber;"—Held, that C. was entitled to all the timber over eight inches in diameter. *Corbett* v. *Harper*, 5 O. R. 93.

See Mutton v. *Dey*, 7 A. R. 455, *ante* 2.

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4. *Property Passing.*

Appropriation — *Marking* — *Custom* — *Evidence.*]—By an agreement under seal between plaintiff and B., B., in consideration of seven cents per foot, agreed to deliver to the plaintiff at Goderich harbour 14,000 cubic feet of good elm timber, to be of specified dimensions, and nothing but good sound rock elm; the plaintiff to draw it from the bush, and leave it on the bank of the river Maitland, and to pay at certain periods named. In trover for such timber, which defendant claimed under a purchase from B.:—Held, that the agreement did not prevent the plaintiff from shewing that the timber to be delivered belonged to him, and not to B. The fact that the timber was marked with B.'s mark was relied upon by the defendant to shew that it was not the plaintiff's:—Held, that the plaintiff might shew, in answer, that it was not uncommon for persons in charge of but not owning timber thus to mark it. *Little* v. *Foley*, 24 U. C. R. 177.

——— *Marking—Delivery of Part.*]—Upon an agreement between A. and B. "that certain timber should be marked for B. as made, and should be delivered as fast as made to his agent, and should be to all intents and purposes his property, to be held in security for his advances;"—Held, the timber having been all made for B., and marked for him, part of it delivered, and all brought out of the woods and taken possession of by B. and sold to C., who had actual possession for many weeks with the knowledge and apparent consent of A.—that such timber could not afterwards be seized by the sheriff as the property of A., merely because B. had not sent out an agent to receive the whole of it in the woods. *Dunning* v. *Gordon*, 4 U. C. R. 399.

——— *Marking — Measurement—Non-delivery—Lien for Advances.*]—M. agreed to manufacture for and supply to defendants certain timber, which he was to mark with defendants' name and deliver at one or two places on Sturgeon lake, to boom it securely, and complete the delivery by a day named. Defendants were to pay two-thirds of the contract price as the work proceeded, and the rest on completion of the contract. No rough, coarse, or cull timber was to be accepted, and the timber was to be measured by defendants when delivered, or from time to time, M. to have it measured by a culler if not satisfied with defendants' measurement, and the expenses thereof to be borne equally. The timber was made by M. from his own trees, and marked by him with defendants' name as made, and hauled to the lake and boomed there; but it had not been measured or accepted by defendants nor delivered to them, nor dealt with by them as their own. They had made advances from time to time, but there was a disputed balance claimed by M. Under these circumstances, M. put the men he had employed in manufacturing the timber in possession of it, as security for their wages. Defendants took it out of the possession of the plaintiff, one of the men, and the plaintiff brought trespass:—Held, that the property in the timber had not passed to the defendants, and that the plaintiff therefore could recover. But, semble, that in equity defendants would have a prior claim upon it to the extent of their advances. *Robertson* v. *Strickland*, 28 U. C. R. 221.

——— *Marking—Non-delivery — Injunction.*]—The plaintiff contracted with two of the defendants for the manufacture by them of 5,000 saw logs, to be delivered at the mouth of the river Trent, to be paid partly by instalments during the work, and the residue on delivery at the place designated; and at the same time, or immediately after, it was orally arranged that the logs, as manufactured, should be marked with plaintiff's initials, and delivered to him as a security for his advances, without prejudice to the agreement for their being conveyed to the river. The stipulated advances were made, and the logs as manufactured were so marked, but not otherwise delivered to plaintiff:—Held, that the manufacturers could not afterwards dispose of these logs to the prejudice of the plaintiff; and they having attempted to do so, to a third person, for value, but with notice of plaintiff's claim, an injunction was granted to prevent their removal by such person. *Fuller* v. *Richmond*, 2 Gr. 24.

——— *Non-delivery—Inspection—Terms of Contract.*]—By agreement under seal, dated 29th December, 1871, defendant agreed to deliver to plaintiffs, within four and a half months from date, 5,000 railway ties on the Midland railway track, at Lakefield, or between there and Peterborough, said ties to be stacked conveniently for loading and inspection; and a particular description of ties was specified as the only kind that would be received. The price of each was to be eighteen cents; twenty-five per cent. to be paid when 1,000 or over were delivered and estimated at Young's Point, on the Otonabee river; twenty-five per cent. more when the ties were delivered on the railway, and the balance within four weeks of the full completion of the contract, but not before the expiration of the time limited in the contract. The evidence shewed that defendant got out 5,280 ties in all; that the plaintiffs paid $240 to defendant, and $123.96 Crown dues; and that they received and took away 2,519 ties. A misunderstanding arose as to where the remainder of the ties, which had been brought to Lakefield, were to be culled and inspected, the plaintiffs wishing it at Port Hope, the defendant at Lakefield, and defendant refused to allow the ties to be shipped from Lakefield till paid for. The plaintiffs said they accepted them at Lakefield, subject to the culling, in which defendant was to take a part, and one W. swore that he counted and selected them at Young's Point, and reported on them to the plaintiffs before they advanced any money, but defendant appeared not to have been aware of this. Plaintiffs having replevied a quantity of the ties:—Held, that they could not recover; and the contract itself did not vest the ties in the plaintiffs, for they were not then in existence; that it contemplated an inspection, which had not taken place; and there was no other appropriation or delivery of these ties with an intention that

the plaintiffs should take them. *O'Neil* v. *McIlmoyle*, 34 U. C. R. 236.

Delivery—*Change of Possession.*]—One H. agreed to furnish B. with from 8,000 to 10,000 saw logs, to be paid for on delivery, and received a small sum on account. Afterwards H. agreed to get out logs for the plaintiffs, the money for them to be paid to one D., to whom H. was indebted. A large number were got out during the winter by H., and while on the ice he marked 1,040 with the plaintiffs' mark. When the ice broke up, all were floated down together and became mixed. The plaintiffs accepted and paid orders on them by H. in D.'s favour for £200 on account, and afterwards a delivery was made by H. to them of 1,040 logs, by delivering some in the name of that number out of the whole, which were still together. B., who had made large advances to H. on his agreement, then got execution on a judgment, which H. allowed to go by default, and under it seized all the logs:—Held, that the plaintiffs were entitled to recover in replevin for the 1,040 logs so sold and delivered to them; and that neither the Chattel Mortgage Act nor 22 Vict. c. 96, s. 19, would have applied to such sale, even if the jury had not found, as they did, that there was an actual and continued change of possession, so far as there could be under the circumstances, and that H. was not insolvent. *Middlebrook* v. *Thompson*, 19 U. C. R. 307.

To make valid against creditors of the vendor a sale of timber to be cut down by him, there must be an actual delivery to the purchaser after the timber is cut down, followed by an actual and continued change of possession, as in the case of other chattels. *McMillan* v. *McSherry*, 15 Gr. 133.

——— *Measurement — Ascertainment of Price.*]—The respondent entered into a contract in writing for the sale to the appellant of "a raft of timber now at Carouge, containing white and red pine, the quantity about 71,000 feet, to be delivered at Indian Cove Booms. Price for the whole, 7¾d. per foot; payment, one-third cash, one-third sixty and ninety days after date." Shortly before the contract was signed, the raft had been measured by a public officer called the supervisor of cullers, appointed under 8 & 9 Vict. c. 39, and the number of pieces of timber and the contents of each piece, were set down in a specification thereof, which made a total of 71,445 feet; and this specification was delivered by the respondent before the execution of the contract to the appellant, and sent by him to the place where the raft was to be delivered. The raft was towed to the Indian Cove Booms, the appointed place for delivery, where it arrived in the afternoon, and notice of its arrival was given to the servants of the appellant, who assisted in fastening the raft outside the booms. This was done at the instance of the appellant's servant, as from the state of the tide the raft could not be placed inside the boom. During the night a storm arose by which the raft was carried away, broken to pieces and dispersed, and a great portion of it lost. The appellant employed his servants in collecting as much of the wood as was saved, and that was put into the appellant's booms:—Held, that, as the respondent had ascertained the price of the raft by the measurement previously made, the specification of which was in the appellant's possession, and as the contract did not shew that any future measurement of the raft was necessary, no act then remained to be done by the respondent or by the appellant; and that the raft upon delivery at the Indian Cove Booms had wholly passed to the appellant, and the loss incurred must be borne by him. Judgment of the court of error and appeal, not reported, and judgment in 5 C. P. 318, affirmed. *Gilmour* v. *Supple*, 11 Moo. P. C. 551.

——— *Receiver — Replevin.*]—Plaintiffs contracted with V., who was in partnership with L., for the sale and delivery to the plaintiffs of a quantity of timber. Subsequently L. obtained a decree in chancery against V., which, after declaring them to have been partners in getting out the timber, directing an account, and restraining V. from removing or intermeddling with the timber, referred the suit to the master to appoint a receiver. Before this decree was acted upon by L., V. delivered the timber, as the jury found, to the plaintiffs, by whom, as they also found, it was accepted without objection on L.'s part, who in fact was present at the time. Some months after this a receiver was appointed under the decree in chancery, and at L.'s instance he took possession of the timber in question:—Held, that the receiver's act was wrongful, as the property in the timber had passed to plaintiffs before his appointment, and that they could therefore maintain replevin against him and L. for it. *Campbell* v. *Lepan*, 21 C. P. 363.

Non-payment — *Non-delivery.*] — The plaintiff agreed with one McG. for the purchase of a quantity of timber upon certain terms, but failed to pay the price agreed upon. McG. afterwards refused the money, and sold and delivered the timber to one C. Upon replevin brought:—Held, that no delivery having been made to plaintiff, he could not recover. *Henry* v. *Cook*, 8 C. P. 29.

Payment on Account—*Non-completion.*]—One C. sold timber to plaintiff, and received $20 on account, but it was to be culled and measured to complete the purchase, and the plaintiff did not do this, nor pay the balance; and C. therefore sold to defendant: — Held, that the property never passed to the plaintiff so as to prevent C. from selling again. *Paton* v. *Currie*, 19 U. C. R. 388.

Terms of Contract—*Acceptance of Bill.*]—The respondents, owners of timber lands in New Brunswick, granted C. & S. a license to cut lumber on twenty-five square miles. For securing the stumpage payable to respondents under the license (the terms of which are set out in the report), C. & S. gave to the respondents a draft upon J. & Co., which was accepted by J. & Co., and approved of by the respondents, but which was not paid at maturity. After giving the draft C. & S. sold the lumber to J. & Co., who knew the lumber was cut on the plaintiff's land under the said agreement. J. & Co. failed, and appellant, their assignee, took possession of the lumber and sold it:—Held, by three Judges (agreeing in the judgment of the court below), the remaining three Judges contra, that, upon the case as submitted, and by mere force of the terms of the agreement, the absolute property in the lumber in question did not pass to C. & S. immediately upon the receipt by the company of the accepted draft of C. & S. on J. & Co., and that the appellant was liable for the

actual payment of the stumpage. *McLeod* v. *New Brunswick R. W. Co.*, 5 S. C. R. 281.

See Rogers v. *Devitt*, 25 O. R. 84; *Hesselbacher* v. *Ballantyne*, 28 O. R. 182, 25 A. R. 36; *Pew* v. *Lawrence*, 27 C. P. 402.

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5. *Sale of Standing Timber.*

Chattels—*Right of Removal.*]—Under an agreement, dated 2nd October, 1880, the defendant sold to B. all the pine timber growing on certain lands, to be removed during the years 1880 and 1881. The timber was all cut into logs before the end of 1881, but a portion was not then removed:—Held that this was a sale of goods and chattels, and not an interest in land; and the timber so cut having become the plaintiff's property, he had the right to remove it after the expiration of the time mentioned; though, semble, the defendant might have a right of action for not removing it within the time. The defendant having refused to permit such removal, the plaintiff brought replevin, and was held entitled to succeed. *McGregor* v. *McNeil*, 32 C. P. 538.

Condition—*Right of Removal.*]—By deed, dated 4th April, 1884, made between J. and S. & L., J. agreed to sell and S. & L. to purchase all the merchantable pine, suitable for the purpose, standing, lying, and being on certain described property, for a sum which was then named and paid, "provided, however, that the said timber and logs shall be cut and removed off said lot on or before the 4th April, 1884." The defendant B. (claiming through S. & L.), after the expiration of the time agreed upon, removed logs which J. had cut after the 4th day of April, 1884, and for this J. brought this action and recovered a verdict for $125. B. moved against the verdict, on the ground that under the deed, and the assignment to him, he was the absolute owner of the timber, subject merely to such claim as the vendor might have against the vendees for breach of the covenant to remove the pine within the time named:—Held, that the agreement could not be construed as an absolute grant of the pine trees suitable for the business of the grantees, subject to a covenant by them to cut and remove the trees within ten years; but that it was a grant of the pine subject to the condition that the timber and logs should be cut and removed off the property on or before the 4th day of April, 1884. Held, also, that this condition applied as well to trees severed before as to those severed after the expiration of the term. *Johnston* v. *Shortreed*, 12 O. R. 633.

——— *Right of Removal—Evidence—Bills of Sale Act.*]—S. sold all the elm and soft maple trees on a certain lot to T.; and at the time of sale gave T. the following receipt: "Received from J. L. for T., the sum of $500, on account of elm and soft maple on," &c., the said lot, describing it. Parol evidence was admitted to shew, and the jury found, that "one of the conditions of the sale was that the timber was to be removed by T. within two years:"—Held, that the receipt was not the contract between the parties, but a mere acknowledgment of so much money; and therefore the parol evidence was properly admitted. Held, also, that the effect of the condition was, that T. was only to have the right to cut and remove the timber within the two years from the date of the agreement. Johnston v. Shortreed, 12 O. R. 633, followed. Semble, that a sale of growing timber does not come within the operation of the Bills of Sale and Chattel Mortgage Act. *Steinhoff* v. *McRae*, 13 O. R. 546.

Interest in Land—*Right of Removal—Conversion.*]—Where one sold and assigned to another all the pine timber he might choose to cut for twenty years with the right to make roads to get to and remove the same, and a covenant that the grantee might, without let or hindrance from anyone, cut and remove the timber:—Held, that the timber so sold, together with the rights imparted to the purchaser, were an interest in land and not chattel property. Where, having first granted such timber and rights to the plaintiff's assignor, the defendant five years afterwards sold the timber to another person, who forthwith proceeded to cut the same:—Held, that the defendant was responsible to the plaintiff in damages; and semble, that he would have been so, even if the timber sold were chattel property, for that the act of the defendant in selling to another person would in that case amount to a conversion of the property. *McNeill* v. *Haines*, 17 O. R. 479.

——— *Right of Removal—Parol License.*]—As a general rule, a contract for the sale of standing timber which is not to be severed immediately is a sale of an interest in land. Upon a parol sale of timber for valuable consideration, with a parol license to enter upon the land during such time as should be necessary for the purpose of cutting and removing the timber, the defendant during the period allowed by the contract continued to cut and remove, notwithstanding that he was notified not to do so:—Held, in an action of trespass and for damages for timber cut after the notice, that he was at liberty to shew, in justification of what he had done, the existence of the parol agreement, under which no right of revocation existed, and to shew the part performance as an answer to an objection founded on the Statute of Frauds. *Handy* v. *Carruthers*, 25 O. R. 279.

——— *Right of Removal—Vendor's Lien—Injunction.*]—By agreement in writing, dated 15th October, 1873, A. agreed to sell, and B. and C. agreed to purchase, all the merchantable white and red pine timber, suitable for their purposes, standing, lying, or being on certain premises owned by A., for the price or sum of $600, payable, $400 on date of agreement, and the balance in one year, with a provision that the timber should be cut and removed off the lands, on or before the 15th October, 1881. It was further provided that B. and C., their agents, representatives, or assigns, should have the right to enter upon the premises at all times during the period for which the agreement was to continue in force, for the purpose of cutting and removing said timber; and that if B. and C. should remove the whole of the timber off the land before the expiration of the year, they would pay the whole of the purchase money immediately after removing the said timber:—Held, that this was an agreement for the sale of an interest in land; that primâ facie the vendor was entitled to a lien for unpaid purchase money; and that the circumstance that the timber was purchased by B. and C. for the purpose of being cut down and used at their

mill as soon as possible, did not deprive the vendor of the right to the lien. Held, also, that the last proviso in the agreement, as to immediate payment of the purchase money in case of removal of all the timber before the arrival of the time for payment of the $200, did not operate to destroy the vendor's right to the lien. B. and C. did not pay the $200, and, after the expiration of one year from the date of the agreement, assigned it to the defendants, who had no actual notice that the $200 remained unpaid, but the agreement was registered against the lands:—Held, that the vendor was entitled to an injunction to prevent cutting and removing by the defendants until the $200 was paid. Marshall v. Green, 1 C. P. D. 35, commented upon and distinguished. *Summers* v. *Cook*, 28 Gr. 179.

Right of Removal—*Way — "Necessary."*]—The plaintiff was the owner of a farm of about a mile in breadth and five-sixths of a mile in length. About two-thirds of the farm was heavily wooded, and the rest of it was cleared and cultivated. The defendant became the purchaser of the trees and timber upon the land, under an agreement which provided among other things that the purchaser should at all times within three years have full liberty to enter upon the lands and to remove the trees and timber in such manner as he might think proper, not interfering with the enjoyment of the plaintiff save in so far as it might be necessary. To take timber from the centre of the wooded belt through the woodland to the roads instead of passing over the cleared land would have cost more than the timber was worth:—Held, that the word "necessary" was to be reasonably construed, and that this timber might be taken across the cleared land. *Stephens* v. *Gordon*, 19 A. R. 176. Affirmed, 22 S. C. R. 61.

See McMillan v. *Sherry*, 15 Gr. 133, *ante* 4.

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6. *Statute of Frauds—Parol Agreements.*

Bond — *License — Parol Revocation.*]—When in debt on bond conditioned that "the defendant, his heirs and assigns, should permit and suffer the plaintiff to cut down, take, and carry away all the firewood from certain lands, without hindrance or molestation," defendant pleaded that he always permitted, &c., and the plaintiff replied that, after the making of the bond, defendant conveyed the land in fee to a stranger, who would not permit the plaintiff to cut the wood, &c., and the defendant demurred to the replication—the court gave judgment for the demurrer, the replication having shewn no breach, the bond being in effect a license under seal, binding on defendant and his vendee, and not revocable by parol, and the plaintiff having shewn no obstruction. *Fowke* v. *Fothergill*, 4 O. S. 185.

Entry on Land — *Acquiescence.*]—On a sale of timber, the land on which the same was situate was not mentioned in the memorandum evidencing the agreement, but the purchaser entered upon the land intended, and, with the knowledge and acquiescence of the owner, continued to cut thereon for over a year:—Held, that this was sufficient, within the Statute of Frauds, to prevent the vendor afterwards disputing the right of the purchaser to cut the timber within the time limited for his so doing. *Lawrence* v. *Errington*, 21 Gr. 261.

Extension of Time for Removal—*Revocation.*]—The owner of land by a memorandum in writing sold the timber thereon, and when the time orally agreed upon for its removal had nearly expired, the vendor told his vendee that he might have another year within which to complete the cutting and removal of the timber:—Held, that the vendor was not at liberty afterwards to revoke such extension of time. *Lawrence* v. *Errington*, 21 Gr. 261.

Interest in Land—*Clearing—Timber in Payment.*]—An agreement to enter upon and clear land, and take the wood after it is cut down in payment of the labour, is not for an interest in lands within the Statute of Frauds. *Hamilton* v. *McDonell*, 5 O. S. 720.

——— *Felled Trees — Evidence.*] — The plaintiff agreed orally to sell timber to defendant, to be got out by him upon certain timber limits held by plaintiff from the Crown, for 20s. per thousand feet, payable on its arrival at Quebec. These limits had formerly belonged to plaintiff's husband, of whom she was administratrix, and it was agreed, defendant being a party to the arrangement, that half of the money should be applied towards payment of debts due by the intestate. A written agreement was then signed by plaintiff, intended to relate to the payment of her share only, by which she agreed to sell to defendant the right to cut the timber at 10s. per thousand feet:—Held, that evidence of the oral agreement was admissible, as the writing did not contain, and was not intended to contain, the whole agreement between the parties; and that the plaintiff therefore might recover the 20s. per thousand feet. Held, also, that the Statute of Frauds did not apply, the trees having been cut down and reduced to chattels. *Chamberlain* v. *Smith*, 21 U. C. R. 103.

——— *Made Timber—Consideration—Conversion.*] — Defendant, by deed dated 26th September, 1870, agreed to sell to the plaintiff all the merchantable timber, &c., on defendant's land which the plaintiff could make by the 1st May, 1871; any timber or logs left standing or cut after that date to be the property of defendant. The plaintiff made a large quantity of timber, and drew away some of it. On the 27th March, 1871, defendant orally gave him leave to let the balance of timber made by him remain on the lot till fall, if the plaintiff would not strip the lot too much; and the plaintiff cut only for a day or two after that. Subsequently, and after the 1st May, the plaintiff was forbidden to take such made timber off, by one K., who said he had bought it, and by defendant, who, as one witness said, claimed it as his own; and the plaintiff thereupon brought trover:—Held, that the made timber, which vested in the plaintiff as made, might properly be the subject of a parol contract with defendant, independently of the deed, and that the desistance of the plaintiff from stripping the lot before the 1st May was a sufficient consideration for the parol agreement. Held, also, that there was evidence from which a jury might infer conversion. *Hedley* v. *Scissons*, 33 U. C. R. 215.

Pledge of License—*Advances—Sale by Pledgee.*]—The plaintiff, being entitled, according to the usage of the Crown, to a license for certain timber limits, on 3rd December, 1863, took out a license in the name of J. N. & Co. and delivered the same to them upon an oral agreement for obtaining advances on the security thereof; J. N. & Co. procured these advances from a bank, and deposited the license by way of security. In December, 1864, the plaintiff took out a new license in the name of J. N. & Co., and they assigned the same to the bank as a further security. The plaintiff having made default, the bank sold the limits with the knowledge of and without any objection by the plaintiff: —Held, that, though there was no writing shewing the agreement between the plaintiff and any of the other parties, the sale was, under the facts proved, binding on him; and a bill impeaching it was dismissed with costs. *McDonald* v. *McKay*, 18 Gr. 98. See *S. C.*, 15 Gr. 391.

Sale of Land—*Reservation of Timber—Pleading.*]—Declaration, q. c. f., for cutting and removing trees, with a count in trover and the common counts. Pleas, leave and license, and a special equitable plea, setting up that defendant, being owner of the land, contracted by parol to sell it to the plaintiff, and that at the time of such contract, and of the conveyance of the land, by defendant, it was expressly agreed that defendant should have certain trees thereon, and be at liberty to cut and remove them, but that such reservation should not be, and it accordingly was not, inserted in the conveyance; and that the defendant entered and cut the trees, &c., which are the trespasses, &c. The defendant, as a witness at the trial, having proved the sale of the land, it was proposed to shew by him the agreement as set up in the equitable plea; —Held, that such evidence was improperly rejected, for that it was admissible both under the equitable plea and the plea of leave and license. Semble, that the equitable plea shewed a good defence, and that, at all events, the plaintiff having taken issue upon it, the defendant was entitled to have the issue tried. *Walter* v. *Dexter*, 34 U. C. R. 426.

Status of Defendant Asserting Agreement.]—The position of a defendant resisting a claim, is more favourably considered than that of a plaintiff endeavouring to enforce an agreement, the terms of which may not have been defined so as to clearly satisfy the requirements of the Statute of Frauds. *Lawrence* v. *Errington*, 21 Gr. 261.

See Grover v. *Cameron*, 6 O. S. 196, *ante* 1.

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7. *Vendor's Lien.*

Notice.]—W. S. agreed to transfer his timber limits to W. A. S. in case the latter should, within two years, pay off a mortgage to R. and other liabilities, and in case W. S. was obliged to pay any of such liabilities he was at liberty to sell such portion of said limits as would recoup him. At the same time W. S. wrote to R., authorizing him to transfer to W. A. S. said lands which he held as security, on payment of his claim. R. assigned his claim and the limits to B., who, by agreement with W. A. S. and the executors of W. S., continued to carry on the lumber business formerly owned by W. S. Certain of the liabilities of W. S. not having been paid, his estate claimed a vendor's lien on such limits, and relied on the letter to R., and on notice to an attorney who prepared the agreement with B. to establish notice of such lien in B.:—Held, affirming the judgment in 5 O. R. 1, that, even if such lien existed, B. could not be affected with notice of it. *Scott* v. *Benedict*, 14 S. C. R. 735.

See Summers v. *Cook*, 28 Gr. 179, *ante* 5.

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8. *Other Cases.*

Crown Timber.]—See CROWN, VII.

Delivery—*Alteration of Made Timber.*]—Defendants were taken by the plaintiff to a quantity of timber already made upon the ground, and contracted to draw it out and deliver it to the plaintiff on the bank of a river: —Held, that the timber cut in two by defendants to suit their convenience, without plaintiff's permission, and drawn out of the river in that altered state, was not delivered within the contract. *Reynolds* v. *Shuter*, 3 U. C. R. 377.

Guarantee by Bank Manager as to Culling Timber.] — See *Dobell* v. *Ontario Bank*, 3 O. R. 299, 9 A. R. 484.

Tolls — *Statutory Regulations.*] — See TOLLS.

Warranty.]—On a sale of "timber limits" held under licenses in pursuance of C. S. C. c. 23, a clause of simple warranty (garantie de tous troubles généralement quelconques) does not operate to protect the purchaser against eviction by a person claiming to be entitled under a prior license to a portion of the limits sold. *Buconda* v. *Dupuy*, 9 App. Cas. 150. Reversing *S. C.*, 6 S. C. R. 425.

II. CONVERSION INTO LUMBER.

Administrator — *Advice of Court.*]—An administrator was desirous of converting saw logs into lumber for the benefit of the estate he represented. An application under 29 Vict. c. 28, s. 31, was entertained, and an opinion of a Judge given in favour of the course suggested. *Re Caldwell*, 2 Ch. Ch. 150.

Mortgage.]—A mortgage on saw logs will bind the lumber into which they are sawn, but the mortgagee must prove that such lumber was made out of the logs mortgaged. *White* v. *Brown*, 12 U. C. R. 477.

III. RIGHT OF CERTAIN PERSONS TO CUT TIMBER.

Executrix.]—See *Stewart* v. *Fletcher*, 18 Gr. 21.

Mortgagee of Term — *Reversioner.*]—The mortgagee of a term for years being in possession, will, at the suit of the mortgagor, be restrained from felling timber, although he may have obtained the consent of the reversioner. Quære, whether the doctrine appli-

cable in England between termor and reversioner, in respect to felling timber, can prevail as to an estate here, the beneficial enjoyment of which is ordinarily obtained only through the destruction of the growing timber; and whether the doctrines of the common law, as to growing timber, can be applied in all their extent to forest land here. *Chisholm* v. *Sheldon*, 1 Gr. 318. See *Drake* v. *Wigle*, 22 C. P. 341, 24 C. P. 405, *post* WASTE.

Mortgagor.] — Although a mortgagor in possession will not be restrained from cutting timber for fuel, fencing, and repairs upon the premises, he will be restrained from felling trees for other purposes, if it does not clearly appear that the property will still remain of sufficient cash value to satisfy the mortgage debt. *Russ* v. *Mills*, 7 Gr. 145.

Where a mortgagor in possession was felling timber, the court, at the instance of a judgment creditor of the mortgagor, with an execution against lands in the hands of the sheriff, restrained future cutting by the mortgagor, it being shewn that the property was a scanty security for the claims of the mortgagees and the amount due the execution creditor. *Wason* v. *Carpenter*, 13 Gr. 329.

Occupant — *Authority from Owner — Vendee.*]—In a suit by the original owner of lands and his vendee (to whom no conveyance had been made), the court restrained an occupant of the land and a person to whom he had contracted to sell the timber, from cutting down the timber, such occupant having gone into possession under the owner; though it did not appear that such timber was of any particular value to plaintiffs, and though the affidavits were contradictory as to the occupant's authority from the owner to sell it. *Lawrence* v. *Judge*, 2 Gr. 301.

Purchaser.] — A purchaser, having entered into possession under his contract and failed to meet his payments, was restrained from committing waste, or removing timber already cut down. *Farrier* v. *Kerr*, 2 Gr. 668.

The owner of land agreed to sell the growing timber, and it was stipulated that the price should be paid by the purchaser's note, indorsed by a responsible person, renewable for half at maturity, the delivering of such note within ten days to be the completion of the consideration for said agreement:—Held, that this was only a mode of payment, and not substituted for it; and that upon failure of payment the vendor was entitled to restrain the felling of timber or the removal of any already cut. *Mitchell* v. *McGaffey*, 6 Gr. 361. See, also, *Walsh* v. *Brown*, 4 L. J. 68.

Where the owner of land sells the timber after a writ against his lands is placed in the sheriff's hands, and the purchaser cuts down and removes the timber before an injunction is obtained, he is accountable to the execution creditor for such timber. *Brown* v. *Sage*, 11 Gr. 239.

Held, under the circumstances of this case, that the vendor of standing timber was entitled to an injunction to prevent the cutting and removing of timber by the vendee until payment of the agreed price. *Summers* v. *Cook*, 28 Gr. 179.

Tenant for Life — *Husbandry.*] — See *Drake* v. *Wigle*, 22 C. P. 341, 24 C. P. 405, *post* WASTE.

Held, following Drake v. Wigle, 24 C. P. 405, that a tenant for life in this country may cut down timber in the proper course of good husbandry, in order to bring the proper proportion of the land under cultivation, and perhaps destroy such timber, but that he cannot cut down timber even for the same purpose, and sell it. *Saunders* v. *Breakie*, 5 O. R. 603.

Tenant in Common.]—A tenant in common occupying the common property is not chargeable with the value of timber cut by him on such property during his occupancy. *Munsie* v. *Lindsay*, 10 P. R. 173.

IV. TREES—PROPERTY IN.

Construction of Tree Planting Act.] —*See Connor* v. *Middagh*, *Hill* v. *Middagh*, 16 A. R. 356.

——— *Highway — Action — Damages.*]—Held, that the owner of land adjoining a highway has, under R. S. O. 1877 c. 187, such a special property in the shade and ornamental trees growing on such highway opposite to his land as to entitle him to maintain an action against a wrongdoer to recover damages for the cutting down or destroying such trees; and he is not restricted to the penalty given by s. 5. Held, also, that the Act refers to trees of natural growth as well as to those planted. In this case the damage consisted in the cutting down of some ten or twelve of the trees, for which the plaintiff was awarded $150:—Held, not excessive. *Douglas* v. *Fox*, 31 C. P. 140.

Highway—*Telephone.*]—The plaintiff was the owner of land in the city of Toronto fronting on a street which was an original road allowance. The defendants the Bell Telephone Company, with the assent, but without any express resolution or by-law, of the city, or any notice or compensation to the plaintiff, cut off branches overhanging the street from trees growing within the plaintiff's grounds, and also branches of trees growing in the street in front of the plaintiff's ground, alleging that the branches interfered with the use of the wires of a telephone system for police purposes, which they had contracted with the city to maintain. Section 3 of the Tree Planting Act, R. S. O. 1887 c. 201, had not been brought into force in Toronto:—Held, that s. 479 (20) of the Municipal Act, R. S. O. 1887 c. 184, applies only when s. 3 of the Tree Planting Act, R. S. O. 1887 c. 201, is in force, and that the plaintiff had no interest in or title to the trees growing in the street sufficient to enable him to complain of the cutting. Held, also, that, as the overhanging branches of the trees growing within the plaintiff's grounds were not a nuisance, and in no way interfered with the use of the highway, the defendants had no right to cut them. *Hodgins* v. *City of Toronto*, 19 A. R. 537.

That the ownership of lands adjoining a highway extends ad medium filum viæ is a presumption of law only, which may be rebutted, but the presumption will arise though the lands are described in a conveyance as bounded by or on the highway. In construing an

Act of parliament, the title may be referred to in order to ascertain the intention of the legislature. The Act of the Nova Scotia legislature 50 Vict. c. 23, vesting the title to highways and the lands over which the same pass in the Crown for a public highway, does not apply to the city of Halifax. The charter of the Nova Scotia Telephone Company authorizing the construction and working of lines of telephone along the sides of, and across and under, any public highway or street of the city of Halifax, provided that in working such lines the company should not cut down nor mutilate any trees:—Held, that the owner of private property in the city could maintain an action for damages against the company for injuring ornamental shade trees in the street in front of his property while constructing or working the telephone line, there being nothing in the evidence to rebut the presumption of ownership ad medium or to shew that the street had been laid out under a statute of the Province or dedicated to the public before the passing of any expropriation Act. *O'Connor* v. *Nova Scotia Telephone Co.*, 22 S. C. R. 276.

V. Miscellaneous Cases.

Advances on Timber—*Interest—Detention—Custom.*]—A merchant agreed, in writing, to advance money for the purpose of getting out timber to be forwarded to him at Quebec for sale; for which advances he was to be paid certain commissions. The timber was duly forwarded to him in the autumn; but, prices being low, he, with the assent of the other party, held the timber over till the following spring, and claimed interest on his advances from the 1st December until the sale of the timber, the case not being provided for by the agreement. It appeared that it had been customary in the trade to charge interest in such cases, where there was not any writing; but there was no evidence of such custom being known to the plaintiff:—Held, that in terest could not be charged. *De Hertel* v. *Supple*, 14 Gr. 421, 13 Gr. 648.

Carrier—*Liability for Timber—Insurance—Lien for Freight.*]—A lumberman, agreeing to carry lumber for hire at the request of the owner thereof, does not thereby become a common carrier or render himself bound to carry safe at all risks, the acts of God or the Queen's enemies excepted; and quære, whether he would be so liable even if it were shewn that he was in the habit of forwarding timber for any one who might choose to employ him to do so. Under such circumstances the person carrying the lumber is not bound, in the absence of any agreement on the point, to make good money paid by the owner for the purpose of insuring the property. In such a case the carrier will be entitled to a lien on the lumber carried by him for his freight and charges, which will be defeated, however, by procuring it to be taken in execution at his own suit. A lumberman had a lien on lumber for his freight, and C. wrote saying, "I wish you would advise your agents in Quebec to deliver to A. J. Coumbe the sawn stuff on your rafts. I am to pay the river freight, and will thank you to take Coumbe's draft on me here at 30 days for river freight, which I will pay:"—Held, that the effect of this letter was not such as to render C. liable to pay the freight until the lumberman had obtained Coumbe's draft for the amount thereof. *Re Coumbe*, 24 Gr. 519.

Collision of Boom with Ship—*Negligence—Liability.*]—See *Brace* v. *Union Forwarding Co.*, 32 U. C. R. 43.

Collision of Booms—*Negligence—Damages.*]—The plaintiff had a large quantity of logs boomed in a river, and while there a drive of about 5,000 logs, belonging to one C., came past without injuring the boom, which was strong and well constructed. Defendants had a large number of logs boomed above the plaintiffs', some of which were let down at night, and in the morning were found in a jam against the plaintiffs' boom. This jam was broken up, and more of defendants' logs were let down, soon after which the plaintiffs' boom was found broken, the plaintiffs not being present, and their logs gone. They went down the stream with defendants' logs, and some were afterwards found, but about 125,000 feet were lost, and there was evidence tending to shew that they had been taken by defendants' men to a point about twenty miles away. There was evidence, also, that defendants' conduct was unreasonable in making their drive when and as they did:—Held, that there was evidence for the jury that defendants had broken the plaintiffs' boom by the undue pressure of their logs; and that defendants were liable without proof that they had actually cut up the plaintiffs' logs; and a verdict for the plaintiffs was upheld. Held, also, there being no evidence that the plaintiffs could have purchased other logs at the time and place where the wrong was done, that they were entitled to recover the loss of profits, which the jury found they would have made out of the logs lost by defendants' misconduct. *Auger* v. *Cook*, 39 U. C. R. 537.

Death of Licensee—*Suit—Parties—Personal Representatives.*]—A bill was filed in respect to certain timber limits by two of the devisees and legatees of the original licensee thereof:—Held, that the suit ought to be by the personal representatives, and a demurrer to the bill, on the ground that it was not so constituted, was allowed. *Bennet* v. *O'Meara*, 15 Gr. 396.

Inter-provincial Rights — *Disputed Territory.*]—See *Regina* v. *Dunn*, 11 S. C. R. 385.

Pledge of Timber Limits to Bank—*Quebec Regulations as to Timber on Crown Lands.*]—See *Grant* v. *Banque Nationale*, 9 O. R. 411.

Railway Line Built through Lands under License from Ontario Government.]—See *McArthur* v. *Northern and Pacific Junction R. W. Co.*, 15 O. R. 733, 17 A. R. 86.

Removal of Timber — *Agent—Ratification—Replevin—Bond—Damages.*]—In an action on a replevin bond against principal and sureties, the breach assigned was the non-return of a portion of the timber replevied, for which the defendants in replevin, the now plaintiffs, obtained judgment. It appeared that the timber, when replevied, was on the banks of a river some distance above a point where it was intended to be shipped, and by directions of F., the plaintiff in replevin, it was put in the possession of one L., who was F.'s

general agent for looking after his land in that part of the country. L. authorized the defendant in replevin to take it down to the shipping point, where it was again taken possession of for F., by a person appointed by L. to receive it there, and shipped for F. L. had been forbidden by F. to permit this removal to the shipping point, but the defendant in replevin was not aware of it, and such removal was to the benefit of whoever might be the owner:—Held, that the receipt of the timber at the shipping point by F. was a ratification on his part of the removal, though such removal was in violation of his orders. Held, also, that it was proper left to the jury to say whether L., from the nature of the property and its situation, and being appointed agent to receive possession, had reasonable authority to arrange that it should be taken to the shipping point for the benefit of all concerned; and that they were fully warranted in finding that he had. Semble, that the plaintiff, though entitled to recover against F. the value of the timber at the shipping point, could, as against the sureties, recover only its value when replevied. *Patterson* v. *Fuller*, 32 U. C. R. 240.

Sale of Trees—*Agent—Account.*]—Held, that upon the evidence the defendant, who had acted as agent for the plaintiff in selling trees, could not be held liable on the common counts for the trees sold, but must be sued specially for not accounting. *Leslie* v. *Morrison*, 16 U. C. R. 318.

Saw Logs Driving Act—*Arbitration and Award.*]—When a person floating logs down a stream fails to break jams of such logs, as directed by s. 3 of the Saw Logs Driving Act, another person whose logs are obstructed by the jam has no right of action for damages, but is limited to the remedy given by the Act, namely, the breaking of the jam at the expense of the person whose logs have formed it. When an arbitrator awards one sum in respect of matters some of which are within and some without his jurisdiction, the award must be set aside. *Cockburn* v. *Imperial Lumber Co.*, 26 A. R. 19. Reversed, 30 S. C. R. 80.

Trover — *Rights of Patentee — Crown—Stranger—Possession.*]—The patent of A. C. in 1803 contained the clause, then usual, saving and reserving to the Crown all white pine trees:—Held, that, notwithstanding this reservation, the plaintiff, claiming under the patentee, could maintain trover against defendant for the white pine; for the soil in which they grew was his, and he was entitled to their shade as against a stranger. Held, also, that the evidence of possession, set out in the report, being such as an owner could be expected to have of wild land, would alone have been sufficient to entitle the plaintiff to maintain the action. *Casselman* v. *Hersey*, 32 U. C. R. 333.

Trover or Trespass — *Foreign Land—Title.*]—Trespass or trover will lie in Ontario for timber cut in the Province of Quebec (the declaration not charging any trespass to the realty), although it may be necessary in such action to try the title to the land on which it was cut. *McLaren* v. *Ryan*, 36 U. C. R. 307.

Will — *Direction as to Timber—Enforcement—Account.*]—A testator devised his farm to minor children, and directed that his executors should rent the same; that no timber should be cut except for the use of the premises; and that the executors should have full power to carry the will into effect:—Held, that it was the duty of the executors to prevent the executrix from cutting the timber for other purposes. Under the ordinary administration decree in respect of a testator's real and personal estate, the master may take an account of timber cut with which the defendants are chargeable. *Stewart* v. *Fletcher*, 18 Gr. 21.

See BANKS AND BANKING, III.—CONSTITUTIONAL LAW, II. 17 — INJUNCTION, I.—MORTGAGE, XII. 14 — REGISTRY LAWS, I. 3 (a)—REPLEVIN, I. 4—TOLLS—TRESPASS, II. 9 (b)—WATER AND WATERCOURSES, VII.—WAY, IV. II.

TIMBER LICENSE.

See CROWN, VII.—TIMBER AND TREES.

TIME.

I. DAYS.
1. *Commencement of Period*, 6872.
2. *First and Last Days Inclusive or Exclusive*, 6873.
3. *Fraction of a Day*, 6874.
4. *Sunday or Holiday*, 6875.
II. MONTHS, 6877.
III. WEEKS, 6879.
IV. YEARS, 6880.
V. MISCELLANEOUS CASES, 6881.

I. DAYS.

1. *Commencement of Period.*

Appeal from Order.]—See PRACTICE—PRACTICE AT LAW BEFORE THE JUDICATURE ACT, III. 1 (a)—PRACTICE IN EQUITY BEFORE THE JUDICATURE ACT, XVI. 1—PRACTICE SINCE THE JUDICATURE ACT, VIII. 2 (a), 4 (a), 6 (a).

Decree — *Proceeding on.*]—The fourteen days given to proceed on a decree count from the pronouncing, not the entering. *Emes* v. *Emes*, 2 Ch. Ch. 21.

Election Petition — *Filing.*]—See PARLIAMENT, I. 11 (h).

Notice of Assessment Appeal.] — See ASSESSMENT AND TAXES, I.

Pleading — *Order Extending Time.*] — When further time to plead is allowed by order, made after the original time for pleading has expired, the extra time is to be computed from the date of the order and not from the expiration of the original time allowed by law. *McDonald* v. *McEwan*, 6 P. R. 18.

2. *First and Last Days Inclusive or Exclusive.*

[See R. S. O. 1877 c. 50, s. 354; con. rule (1897) 342 et seq.—Rule No. 166 of T. T., 1856; con. rule (1897) 344.]

Action against Division Court Bailiff.]—In computing the time within which an action must be brought against a bailiff for something done in pursuance of the Division Courts Act, R. S. O. 1877 c. 47, s. 231, the day on which the fact was committed must be excluded. *Hanna* v. *Johnston*, 3 O. R. 100.

Execution — *Judgment by Default—Appearance.*]—The eight days from the last day for appearance mentioned in s. 60, C. L. P. Act, 1856, at the expiration of which execution may issue on a judgment signed on a specially indorsed writ, is exclusive of such last day. *Kerr* v. *Bowie*, 3 L. J. 110.

——— *Renewal—Division Courts.*]—By s. 141 of the Division Courts Act, C. S. U. C. c. 19, it is enacted that every execution "shall be returnable within thirty days from the date thereof;" — Held, that in computing such thirty days the day of issue is excluded, so that a writ issued on the 24th April was in force on the 24th May, and capable of being renewed on that day under 32 Vict. c. 23, s. 24 (O.), which, even if introducing the rule of the C. L. P. Act, s. 342, in computing the time for renewal of writs, so as to make both days inclusive, does not affect their original duration. *Clark* v. *Garrett*, 28 C. P. 75.

Judgment by Default—*Service of Declaration.*]—In computing the eight days allowed to plead by the C. L. P. Act, 1856, the first and last days are reckoned inclusive, unless the last day be a dies non. The day of service of a declaration is reckoned as one of the eight days for pleading. Therefore, when a declaration was served on Saturday the 10th October, and judgment for want of a plea signed on Monday the 19th:—Held, regular. *Ridout* v. *Orr*, 2 P. R. 321. See *Moore* v. *Grand Trunk R. W. Co.*, 2 P. R. 227; *Cameron* v. *Cameron*, 2 P. R. 259.

——— *Service of Writ.*]—Where a summons was served on the 12th, and judgment signed on the 22nd, for want of appearance:—Held, not too soon. *Ross* v. *Johnson*, 2 P. R. 230, 4 L. J. 21.

The writ of summons under the Ejectment Act requires the defendant to appear "within sixteen days after the service hereof." A summons was served on the 12th, and judgment signed on the 28th:—Held, too soon. *Scott* v. *Dickson*, 1 P. R. 366. Followed in *Montgomery* v. *Brown*, 2 C. L. J. 72.

Notice of Trial—*Solicitor's Agent.*] — The "two clear additional days to the time now allowed by law" for service on the agent of a country attorney, under 34 Vict. c. 12, s. 12, means the insertion of two days between the day of service and the day of the happening of the event to which the notice relates. A service of notice of trial on the Toronto agent of a country attorney on Saturday for Monday week, would be sufficient. *Nordheimer* v. *Shaw*, 6 P. R. 14.

Notice to Land Owner — *Railway — Warrant of Possession.*]—In the computation of the ten days' previous notice necessary to be given under 51 Vict. c. 29, s. 164 (D.), to obtain a warrant for the possession of land by a railway company, the day of the service of the notice and the day of the return must both be excluded. *Re Ontario Tanners' Supplies Co. and Ontario and Quebec R. W. Co.*, 12 P. R. 563.

Notice to Witness.]—A notice to attend as a witness, under C. S. U. C. c. 32, s. 15, served on the 25th October for the 1st November, is too late, not being "at least eight days." *Young* v. *O'Reilly*, 24 U. C. R. 172.

Noting Pleadings Closed.]—The last of the eight days within which the defendants should have delivered their statement of defence, as required by con. rule 371, was a Saturday, and on that day at twenty-five minutes past two in the afternoon, no statements of defence having then been filed, or served on the plaintiffs' solicitor, the officer entered a note that the pleadings were closed:—Held, that the officer had no power to close the pleadings until the end of the day, which would be three o'clock; and therefore the note was irregular, and should be set aside. Con. rules 7, 393, 398, 480, considered. *Lloyd* v. *Ward*, 13 P. R. 238.

Partition—*Notice.*]—A writ of partition cannot be ordered unless notice has been given forty clear days before the term; therefore, where the service was made on the 21st July, and the term began on the 30th August, it was held insufficient. *In re Loney*, 10 U. C. R. 305.

Setting Cause down for Hearing.]—In computing the time for setting down a cause the day on which it is set down, and the first day of hearing, are both excluded. Fourteen clear days should intervene. *Beard* v. *Grey*, 3 Ch. Ch. 104.

See post II., III., IV.

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3. *Fraction of a Day.*

Judicial Proceedings — *Statutes.*] — Judicial proceedings and Acts of the legislature take effect in law from the earliest period of the day on which they are respectively originated and come into force. *Converse* v. *Michie*, 16 C. P. 167.

Priorities — *Bond — Married Woman — Gift of Separate Property.*]—Subsequently to the coming into force of the Married Woman's Property Act, R. S. O. 1887 c. 132, a married woman, on the day of entering into a money bond, deposited in her own name in a savings bank a sum of money, which the evidence shewed had been given to her by her husband, but of which, as against him, she had the absolute disposal by his consent and wish:—Held, that this was sufficient on which to found a proprietary judgment against her, though it was not shewn that the bond was not executed at an earlier hour than that at which the money was deposited. *Sweetland* v. *Neville*, 21 O. R. 412.

——— *Execution — Commission in Bankruptcy.*]—A fi. fa. placed in the sheriff's hands before a commission of bankruptcy against the debtor was sealed, but on the same day on

which it was completed and delivered to the sheriff, has priority over the commission. *Beekman* v. *Jarvis*, 3 U. C. R. 280.

In determining the priority of writs, the court will look to the fraction of a day. *Ib.*

Statutes—*Repeal—Order of Court.*]—The fraction of a day is never taken into consideration in determining the operation of a statute. *Mitchell* v. *Dobson*, 3 L. J. 185.

If an order is obtained under a statute which is repealed by another statute on the same day the order is made, the repealing statute will be held to operate from the first part of that day, and overrule the order. *Ib.*

See STATUTES, IX., XVIII.

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4. *Sunday or Holiday.*

[*See* R. S. O. 1877 c. 1, s. 8, s.-s. 16; R. S. O. 1897 c. 1, s. 8, s.-s. 16; R. S. O. 1877 c. 50, s. 67; con. rule (1897) 345.]

Chattel Mortgage — *Filing of.*] — A chattel mortgage was duly executed on the 12th July, and filed on the 18th, the 17th having been a Sunday:—Held, that such registration was too late. R. S. O. 1877 c. 119 requiring the same to be effected within five days from the execution of the instrument; that Sunday counted as one of such five days; and that rule 457, O. J. Act, did not apply. *McLean* v. *Pinkerton*, 7 A. R. 490.

Demand of Annulment of Corporation Expenditure.]—It was enacted by s. 12 of 42 & 43 Vict. c. 53 (Q.) that any municipal elector might demand the annulment of the corporate appropriation for expenditure within three months from the date thereof, on the ground of illegality, but that thereafter the right was prescribed and the appropriation valid:—Held, that on the expiration of the three months (the last day being non-juridical) the elector's statutory right was at an end, and could not be extended by any procedure clause (see s. 3 of the Civil Procedure Code) which presupposed an existing right of action and regulated its exercise. *Dechêne* v. *City of Montreal*, [1894] A. C. 640.

Demurrage—*Custom.*]—In computing demurrage Sunday is to be reckoned as one of the days to be allowed for. "Days" mean the same as running days, or consecutive days, unless there be some particular custom. If the parties wish to exclude any days from the computation they must be expressed. *Gibbon* v. *Michael's Bay Lumber Co.*, 7 O. R. 746.

Election Petition—*Presentation of.*] — The Interpretation Act of Ontario, 31 Vict. c. 1, s. 6, s.-s. 13, enacts that in construing it or any other Act of Ontario certain days specified, including Good Friday and Easter Monday, shall be included in the word "holiday:" and the Controverted Elections Act of 1871, 34 Vict. c. 3, s. 52 (O.), enacts that in reckoning time for the purposes of that Act, any day set apart by any Act of Ontario for a public holiday shall be excluded:—Held, that the effect of the Interpretation Act alone, independently of any other statute, was to make the days mentioned in it holidays; and if this were not so, that when the other statute used the word "holiday," such days would by virtue of the Interpretation Act be included in it. Held, therefore, that in reckoning the twenty-one days after the return allowed for presentation of a petition, Good Friday and Easter Monday must be excluded. The decision in chambers in this matter, 5 P. R. 394, affirmed as regards the computation of time. *In re West Toronto Election, Armstrong* v. *Crooks*, 31 U. C. R. 469.

Examination of Parties — *Service of Appointment.*]—Rule 455, O. J. Act, applies to the chancery division of the high court of justice. The service of a copy of an appointment to examine on the plaintiff's solicitor on a Sunday for a Monday is insufficient. *Lovelace* v. *Harrington*, 10 P. R. 157.

Judgment by Default — *Service of Writ.*] — Summons in ejectment served on 15th February (not being leap year). Judgment signed in default of appearance on the 4th March, the 3rd March, the last of the sixteen days within which defendant had to appear, being Sunday:—Held, regular. *Cline* v. *Cawley*, 4 P. R. 87.

Money Due under Contract.] — Where the day on which money is due under an agreement falls on Sunday:—Semble, that the payment must be made on Saturday. *Whittier* v. *McLennan*, 13 U. C. R. 638.

Notice of Appeal — *Insolvency.*] — An order in insolvency was made on the 24th December, 1872. The fifth day thereafter fell on a Sunday:—Held, that service of notice of appeal on the Monday following was in time. *Hood* v. *Dodds*, 19 Gr. 639.

Notice of Motion.]—There must be two clear days between the service of a notice and the day for hearing the motion, and in the computation thereof Sunday is not to be reckoned. *In re Crooks*, 1 Ch. Ch. 304; overruling *Sprague* v. *Henderson*, *ib.* 213.

Where notice of motion had been given of an application to commit for not bringing in accounts in the master's office, and four days intervened between the service and the motion, one of which was Good Friday, during which the master's office had been closed, the secretary refused the application without costs. *Wilson* v. *Gould*, 2 Ch. Ch. 236.

Notice of Trial.]—Sundays and holidays are excluded in computing the five days' notice necessary in a short notice of trial. Short notice of trial served on Wednesday for Monday:—Held, bad. *O'Donnell* v. *O'Donnell*, 10 P. R. 264.

Notice to Revising Officer.]—The notice to the revising officer in this case was left with his clerk at his office during the absence from town of the revising officer on Monday the 28th June, and on his return, on the afternoon of that day, he was told what had been done, and that, if he did not consider that sufficient, the notice would be procured again and served on him personally, but he said what was done was sufficient:—Held, that the last day for service for the sittings for the final revision to be held 12th July was Sunday the 27th June, but that, under s. 2, s.-s. 2, of 48 & 49 Vict. c. 40 (D.), the time was extended, and S. had all the next day, and that the notice was well given on Monday. *Re Simmons and Dalton*, 12 O. R. 505.

Publication of Local Option By-law.] See *Brunker* v. *Township of Mariposa*, 22 O. R. 120.

Trial of Action — *Good Friday.*] — The evidence at the trial of this action not being concluded before the close of the day preceding Good Friday, the Judge, counsel consenting and the jury desiring it, adjourned the court to the following day, when he delivered his charge and received the verdict, on which he entered judgment:—Held, that it was competent for him to do so. The only day on which no judicial act can be done in this Province is the Lord's day, or Sunday. Other statutory holidays are not dies non juridici in this sense. *Foster* v. *Toronto R. W. Co.*, 31 O. R. 1.

II. MONTHS.

[*See* R. S. O. 1877 c. 1, s. 8, s.-s. 15; R. S. O. 1897 c. 1, s. 8, s.-s. 15.]

Application for Order pro Confesso.] —The six months after the service of the bill within which an order pro confesso may be obtained ex parte, are six calendar months. *Boulton* v. *McNaughton*, 1 Ch. Ch. 216.

Calls on Stock.]—Semble, that where an Act says "that no instalment of calls for stock shall be called for," except after the lapse of one calendar month from the time when the last instalment was called for, calls made for 1st May, June, July, and August, would be illegally made. *Gas Co.* v. *Russell*, 6 U. C. R. 567.

Where calls on stock were to be made "at periods of not less than three months' interval," and one call was made payable on the 10th August and another on the 10th November:—Held, that an interval of three months had not elapsed between the two calls, and that the second call was therefore bad. *Stadacona Fire and Life Ins. Co.* v. *Mackenzie*, 29 C. P. 10.

See National Ins. Co. v. *Egleson*, 29 Gr. 406; *Union Fire Ins. Co.* v. *Fitzsimmons*, 32 C. P. 602; *Union Fire Ins. Co.* v. *O'Gara*, *Union Fire Ins. Co.* v. *Shoolbred*, 4 O. R. 359.

Delivery of Attorney's Bill.] — The month required by 2 Geo. II. c. 23 for the delivery of an attorney's bill before the issuing of process, is a lunar and not a calendar month, and the day of the service of the bill is included. *Berry* v. *Andruss*, 3 O. S. 645.

Notice of Action.]—The notice required under 4 & 5 Vict. c. 26, s. 40, "one calendar month, at least," before action, means a clear month's notice, exclusive of the first and last days. *Dempsey* v. *Dougherty*, 7 U. C. R. 313.

Notice of action served on the 28th March, and writ sued out on 29th April:—Held, sufficient, as being at least one calendar month's notice. *McIntosh* v. *Vansteenburgh*, 8 U. C. R. 248.

Notice of Claim for Injury to Lands.] —Held, that a notice of claim for injury sustained by the erection of a bridge over a river, given on the 10th September, 1857, under 20 Vict. c. 146, which received the royal assent on the 10th June, 1857, and requires three months' notice of such claim to be given, was sufficient. *In re St. Andrew's Church Trustees and Great Western R. W. Co.*, 12 C. P. 399. See, also, *Regina ex rel. St. Andrew's Church Trustees* v. *Great Western R. W. Co.*, 14 C. P. 462.

Notice to Continue Tenancy.] — The plaintiff executed a lease to one J. A. B. for three years from the 9th March, 1860, "provided the lessee shall, within three months previous to the 9th day of March next, which will be in the year 1861, give a notice in writing—"otherwise the premises should be given up on the 9th March, 1861." Notice was given by the lessee between the 9th December, 1860, and the 9th March, 1861, of his intention to continue the lease for the full three years. Defendants contended that by the lease the notice should have been given previous to the commencement of the three months:—Held, that by the terms of the proviso the notice was to be given (as it had been) within three months prior to the 9th March, 1861. *Shipman* v. *Grant*, 12 C. P. 395.

Payment of Money—*Contract.*]—By the terms of an agreement dated the 20th September, money was to be paid within one month, and on the 21st October the money was tendered by the person who had to pay:—Held, sufficient, the day of the execution of the instrument being excluded. *Barnes* v. *Boomer*, 10 Gr. 532.

Redemption after Tax Sale.] — The time of redemption of land sold for taxes, under 6 Geo. IV. c. 7, being within twelve calendar months from the time of the sale, excludes the day on which the sale takes place; and the expression "from the time" may be held as either inclusive or exclusive of the day, according to the context in the statute and the bearing and object of its provisions. *Boulton* v. *Ruttan*, 2 O. S. 362.

The statute 6 Geo. IV. c. 7 gives the whole of the day in the subsequent year upon which the sales takes place to redeem. Where a sale took place upon the 7th October, 1840, and the money was not paid to redeem till the 8th October, 1841:—Held, too late. *Proudfoot* v. *Bush*, 12 C. P. 52.

Report of Drainage Referee—*Appeal —Vacation.*]—The rules applicable to appeals from the high court to the court of appeal are to be applied, as far as possible, to appeals from reports of the drainage referee under the Drainage Act, 57 Vict. c. 56 (O.), and the Christmas vacation is to be excluded in the computation of the month within which, by s. 106 of that Act, such an appeal is to be made. *Re Township of Raleigh and Township of Harwich*, 18 P. R. 73.

Summons to Void Municipal Election.]—A summons issued within a month after the formal acceptance of office by a candidate for mayor of a city by taking the statutory declarations of qualification and office is in time, notwithstanding that it issued more than six weeks after the election, and more than a month after a speech accepting office made by the respondent at a meeting of electors, and certain other acts of a similar character, less formal than the statutory declaration. *Regina ex rel. Felitz* v. *Howland*, 11 P. R. 264.

Trial of Election Petition.]—38 Vict. c. 10, s. 2 (D.), enacts that "the trial of every election petition shall be commenced within six months from the time when such petition has been presented, and shall be proceeded with de die in diem, until the trial is over, unless, on application supported by affidavit, it be shewn that the requirements of justice render it necessary that a postponement of the case should take place:"—Held, that the trial need not be commenced within six months in order to authorize a postponement, but that the commencement may be postponed beyond that time. Glengarry Election Case, 12 C. L. J. 117, not followed. *In re Addington Election, Waggoner* v. *Shibley*, 39 U. C. R. 131. See, also, *Kingston Election Case, Stewart* v. *Macdonald*, 39 U. C. R. 139.

See PARLIAMENT, I. 11 (D).

Vacating Office of Town Councillor—*Absence from Meetings.*]—The plaintiffs and others, councillors of the town of Petrolia, attended a meeting of the council on the 5th April. They were absent at the next meeting called for and held on the 31st May and thenceforward, without authorization, till the 7th July, when, at a meeting of the council, a resolution declaring their seats vacant and ordering a new election was put, and an amendment to refer the matter to the town solicitor was lost: whereupon the dissentients left the room, in consequence of which there was no quorum, when the original motion was put and carried:—Held, that the three months should be counted from the 31st May, being the first meeting that the plaintiff and the others had not attended; and that the resolution was therefore void, as well as on the ground that there was no quorum present when it was passed. *Mearns* v. *Town of Petrolia*, 28 Gr. 98.

Writ of Summons in Ejectment—*Service.*]—A writ of summons in ejectment is by C. S. U. C. c. 27, s. 3, to be in force for three months:—Held, that the day of the teste was to be reckoned, and that a writ issued on the 30th June is effete after midnight of the 29th September. In such case the copy and service of a writ will be set aside as irregular, but not the original writ. *Fitch* v. *Walker*, 7 P. R. 8.

See Nudell v. *Williams*, 15 C. P. 348; *Dechêne* v. *City of Montreal*, [1894] A. C. 640, *ante* I.

III. WEEKS.

Adjournment of Hearing—*Justice of the Peace.*]—Section 46 of the Canada Temperance Act provides that the hearing may be adjourned to a certain time and place, but no such adjournment shall be more than a week:—Held, that the week must be computed as seven days exclusive of the day of adjournment. *Regina* v. *Collins, Regina* v. *Goulais*, 14 O. R. 613.

Filing Pleading—*Notice of Trial.*]—A replication was filed on the 8th October, and the sittings of the court were held on the 30th:—Held, that the replication was filed three weeks before the commencement of the sittings. *Wilson* v. *Black*, 6 P. R. 130.

Notice of Additional Insurance.]—A policy avoided under s. 37 of 36 Vict. c. 44 (O.) for want of the assent of the company to an additional insurance in the manner prescribed, is revived under s. 38, and the company are deemed to have assented to the additional insurance, if after notice of such insurance the two weeks allowed by that section for the company to signify their dissent are allowed to elapse without such dissent:—Held, that in computing the two weeks the day of the receipt of the notice is excluded, so that where a notice was given on the 5th July, and the fire occurred on the 19th, the time had not expired. *McCrea* v. *Waterloo County Mutual Fire Ins. Co.*, 26 C. P. 431.

Publication of Notice—*Voting on By-law—Temperance Act, 1864.*]—Under the Temperance Act of 1864, 27 & 28 Vict. c. 18, a requisition for the by-law must be published by the clerk for four consecutive weeks in some newspaper published weekly or oftener within the municipality, with a notice that on some day within the week next after such four weeks, a poll would be taken. The notice in this case, first published on Thursday the 12th January, appointed Tuesday the 7th February for the poll:—Held, too soon, and the by-law was quashed. It was contended that the four weeks must be computed from the first day of the week in which the first publication takes place, not from the day of such publication:—Held, clearly not. *In re Coe and Township of Pickering*, 24 U. C. R. 439.

IV. YEARS.

[*See* R. S. O. 1877 c. 1, s. 8, s.-s. 15; R. S. O. 1897 c. 1, s. 8, s.-s. 15.]

Chattel Mortgage—*Renewal.*]—Where a mortgage was re-filed forty-seven days before a year from the first filing, it was held insufficient, the statute 12 Vict. c. 74 requiring that such re-filing shall take place "within thirty days next preceding" the expiration of one year. *Beaty* v. *Fowler*, 10 U. C. R. 382.

On the 18th July, 1851, one M. gave the plaintiff a mortgage on certain goods, which was duly registered on the following day. On the 16th July, 1852, he executed another mortgage, but to secure a smaller sum, the goods assigned being, with a few exceptions, the same as the first; this was registered on the 19th. On the same day, and before the registry, a fi. fa. against M. was placed in the sheriff's hands. There was not in the case of either assignment any actual delivery of goods:—Held, that the fi. fa. was entitled to prevail; that the first mortgage was waived by taking the second, and was therefore out of the question, though in any case it would have ceased to be in force after the 18th July, and the second filing would have been too late. *McMartin* v. *McDougall*, 10 U. C. R. 399.

Where the first filing of a chattel mortgage was on the 15th May, 1852, a re-filing on the 14th May, 1853, was clearly in time. *Armstrong* v. *Ausman*, 11 U. C. R. 498.

See BILLS OF SALE, VI.

Declaration.]—R. S. O. 1877 c. 50, s. 93, provides that a plaintiff shall be deemed out of court unless he declares within one year after the writ of summons is returnable.

The writ of summons was served on the 24th February, 1880, and the declaration was served on the 24th February, 1881:—Held, that the plaintiff should have declared on the 23rd February to have been within the statute. *Murchison* v. *Canada Farmers' Ins. Co.*, 8 P. R. 451.

Execution—*Renewal.*]—The day of the teste of a fi. fa. lands, which by the C. L. P. Act, C. S. U. C. c. 22, s. 249, is to remain in force for one year from the teste, is inclusive, so that a writ issued on the 16th May, 1861, expires on the 15th May, 1862, and a renewal on the 16th May, 1862, is too late. Held, that a writ which had issued on 27th July, 1861, and had been renewed on the 22nd July, 1862, was entitled to prevail over a writ issued on the 16th May, 1861, but not renewed till the 16th May, 1862. *Bank of Montreal* v. *Taylor*, 15 C. P. 107.

Liquor License Act — *By-law.*] — The words "in any year" in s. 20 of the Liquor License Act mean "calendar year," and not "license year," and a by-law under that section, limiting the number of licenses for the ensuing or any future year, must be passed in the months of January or February in any year. *Re Goulden and City of Ottawa*, 28 O. R. 387.

Option to Purchase.]—The lessee had the right of purchase, on his desiring to do so within the period of two years after the date of the commencement of the term, the 1st April, 1852. On the 1st April, 1854, the desire of purchasing was declared:—Held, in time. *Sutherland* v. *Buchanan*, 9 Gr. 135.

Sale of Timber—*Condition as to Removal.*]—One of the conditions of the sale was that the timber was to be removed by T. within two years:—Held, that the effect of the condition was that T. was only to have the right to cut and remove the timber within two years from the date of the agreement. Johnston v. Shortreed, 12 O. R. 633, followed. *Steinhoff* v. *McRae*, 13 O. R. 546.

School By-law.]—Sub-section 3 of s. 81 of the Public Schools Act, 54 Vict. c. 55 (O.), provides that by-laws passed under the said section for altering, &c., school sections, shall not be passed later than 1st May in the year, and shall not take effect before the 25th December next thereafter:—Held, that the word "year" as used therein means the calendar year commencing 1st January and ending 31st December, and that a by-law altering certain school sections passed on the 25th September was invalid. *In re Asphodel School Trustees and Humphries*, 24 O. R. 682.

V. Miscellaneous Cases.

Arrest—*Statement of Claim—Extension of Time.*]—There is power, after the expiration of the time appointed by rule 1044 for the delivery of the statement of claim, where a defendant is detained in custody under an order for arrest, to extend the time. The case is within rule 353, and the wording of rule 100 of the rules of Trinity term, 1856, has been altered from "shall have been given" to "is given" in rule 1044. Where the statement of claim was delivered two days after the month had expired, and the defendant moved for his discharge, an order was made validating it for all purposes, upon terms as to speedy trial and payment of costs. *Winch* v. *Travis*, 18 P. R. 102.

Bill of Exchange—*Authority—"Sight."*] —On the maturity of a bill of exchange the drawers thereof, thinking the acceptor would be unable to meet it, telegraphed him that if unable to meet it to draw on them for the amount:—Held, that no time being mentioned in the telegram an authority to draw at sight would be implied. *Bank of Montreal* v. *Thomas*, 16 O. R. 503.

"Forthwith" — *Reasonable Time.*] — Held, that the word "forthwith," contained in s. 4 of the Creditors Relief Act, R. S. O. 1887 c. 65, with reference to the entry by the sheriff of money levied under execution, must receive a strict construction, and means "without any delay." Even if equivalent to "within a reasonable time," a delay of fifteen days after the sale was held to be not reasonable. *Maxwell* v. *Scarfe*, 18 O. R. 529.

Reasonable Time.]—See *Adamson* v. *Yeager*, 10 A. R. 477; *Carvill* v. *Schofield*, 9 S. C. R. 370; *Bulmer* v. *Brumwell*, 13 A. R. 411; *Oldfield* v. *Dickson*, 18 O. R. 188.

Term—*Motion to Set aside Award.*]—An award must be moved against within the term following its publication, or within the period which such term formerly occupied. And when the term has been abolished, where an award was published on the 13th August, 1888, notice of appeal dated 7th September, 1888, but not served till 10th September, 1888:—Held, too late, and the appeal was dismissed. *Kean* v. *Edwards*, 12 P. R. 625.

A motion to set aside an award made under a voluntary submission must be made before the expiration of the term next after publication of the award, even if three months have not expired. In re Prittie and Toronto, 19 A. R. 503, considered. Construction of 52 Vict. c. 13 (O.), discussed. Remarks as to the necessity of revision of the legislation as to arbitrations. *In re Caughell and Brower*, 24 A. R. 142.

See Appeal, IX. 8—Arbitration and Award, VII.—Assessment and Taxes, III., X. 4 (b), 5—Bills of Sale, IV. 2. 5, VI. —Company, VII. 2—Contract, III. 3, IV. 2 —County Courts, IV. 2 (b)—Distress, III.—Execution, V. 2 (c), 3—Lien, V. II— Specific Performance, V. 4 — Supreme Court of Canada, VI.—Vendor and Purchaser, II. 3—Work and Labour, V. 7.

TITLE.

See Insurance, III. 4 (c)—Solicitor, X. 2 (c) — Specific Performance, V. 19— Vendor and Purchaser, III., VIII. 4.

TITLE TO LAND.

See County Courts, III. 5—Division Courts, XI. 8—Supreme Court of Canada, II. 12.

TOLL ROADS.

See WAY, VIII.

TOLLS.

Timber—*Regulations — Statutes.*]—Inasmuch as the provisions and enactments relating to tolls in 31 Vict. c. 12 are, in substance and effect, the same as those contained in C. S. C. c. 28, under which the regulations relating to timber passing through the slides were made, in virtue of the provisions of s. 71 of 31 Vict. c. 12, such regulations are in effect to be construed as having been made under the later statute. *Merchants Bank of Canada* v. *The Queen*, 1 EX. C. R. 1.

Timber Slide Companies Act—*Company — Forfeiture of Charter — Estoppel—Compliance with Statute—Res Judicata.*]—In an action against a river improvement company for repayment of tolls alleged to have been unlawfully collected, it was alleged that the dams, slides, &c., for which tolls were claimed, were not placed on the properties mentioned in the letters patent of the company; that the company did not comply with the statutory requirement that the works should be completed within two years from the date of incorporation whereby the corporate powers were forfeited; that false returns were made to the commissioner of Crown lands upon which the schedule of tolls was fixed; that the company by its works and improvements obstructed navigable waters contrary to the provisions of the Timber Slide Companies Act, and could not exact toll in respect of such works. By a consent judgment in a former action between the same parties it had been agreed that a valuator should be appointed by the commissioner of Crown lands, whose report was to be accepted in place of that provided for by the Timber Slide Companies Act, and to be acted upon by the commissioner in fixing the schedule of tolls:—Held, that the above grounds of impeachment were covered by the consent judgment and were res judicata. Held, further, that the plaintiffs having treated the company as a corporation, using the works and paying the tolls fixed by the commissioner, and having in the present action sued the company as a corporation, were precluded from impugning its legal existence by claiming that its corporate powers were forfeited. By R. S. O. 1887 c. 160, s. 54, it was provided that, if a company such as this did not complete its works within two years from the date of incorporation, it should forfeit all its corporate and other powers "unless further time is granted by the county or counties, district or districts, in or adjoining which the work is situate, or by the commissioner of public works:"—Semble, that the non-completion of the work within two years would not, ipso facto, forfeit the charter, but only afford grounds for proceedings by the attorney-general to have a forfeiture declared. Another ground of objection to the imposition of tolls was, that the commissioner, in acting on the report of the valuator appointed under the consent judgment, erroneously based the schedule of tolls upon the report as to expenditure instead of as to actual value, and the statement of claim asked that the schedule be set aside and a scale of tolls fixed:—Held, that under the statute the schedule could only be allowed or varied by the commissioner, and the court could not interfere, especially as no application for relief had been made to the commissioner. *Hardy Lumber Co.* v. *Pickerel River Improvement Co.*, 29 S. C. R. 211.

Toll Bridge—*Franchise of—Free Bridge—Interference by—Injunction.*]—By 44 & 45 Vict. (Q.) c. 90, s. 3, granting to the respondent a statutory privilege to construct a toll bridge across the Chaudière river in the parish of St. George, it was enacted that "so soon as the bridge shall be open to the use of the public as aforesaid, during thirty years no person shall erect, or cause to be erected, any bridge or bridges or works, or use or cause to be used any means of passage for the conveyance of any persons, vehicles, or cattle, for lucre or gain, across the said river, within the distance of one league above and one league below the bridge, which shall be measured along the banks of the river and following its windings; and any person or persons who shall build or cause to be built a toll bridge or toll bridges, or who shall use or cause to be used, for lucre or gain, any other means of passage across the said river for the conveyance of persons, vehicles, or cattle, within such limits, shall pay to the said David Roy three times the amount of the tolls imposed by the present Act, for the persons, cattle, or vehicles which shall thus pass over such bridge or bridges; and if any person or persons shall, at any time, for lucre or gain, convey across the river any person or persons, cattle or vehicles, within the above mentioned limits, such offender shall incur a penalty not exceeding ten dollars for each person, animal, or vehicle which shall have thus passed the said river; provided always, that nothing contained in the present Act shall be of a nature to prevent any persons, cattle, vehicles, or loads from crossing such river within the said limits by a ford or in a canoe or other vessel, without charge." After the bridge had been used for several years, the appellant municipality passed a by-law to erect a free bridge across the Chaudière river in close proximity to the toll bridge in existence; the respondent thereupon by petition for injunction prayed that the appellant municipality be restrained from proceeding to the erection of a bridge:—Held, that the erection of the free bridge would be an infringement of the respondent's franchise of a toll bridge, and the injunction should be granted. *Corporation of Aubert-Gallion* v. *Roy*, 21 S. C. R. 456.

Yukon Territory—*Franchise over Dominion Lands.*]—The executive government of the Yukon territory may lawfully authorize the construction of a toll tramway or waggon road over Dominion lands in the territory, and private persons using such road cannot refuse to pay the tolls exacted under such authority. *O'Brien* v. *Allen*, 30 S. C. R. 340.

See Galarneau v. *Guilbault*, 16 S. C. R. 579, *ante* FERRY.

See MUNICIPAL CORPORATIONS, XXVIII.—RAILWAY, XXV.—WAY, VIII.

TORT.

Action for—*Privity.*]—The plaintiff lent or hired his horse to S., who, while on a

journey, put it up at defendant's inn, and it was strangled in the stable there, owing, as the jury found, to the negligence of defendant's servant in tying it up in the stall:—Held, that the plaintiff might maintain an action for this tort, though the defendant's contract was with S. *Walker* v. *Sharpe*, 31 U. C. R. 340.

Agency.]—In torts the principle of agency does not apply; each wrongdoer is a principal. *Ontario Industrial L. and I. Co.* v. *Lindsey*, 4 O. R. 473.

Contract or Tort—*Division Courts.*]—The plaintiff sued in a division court for $90 as the value of his horse employed by the defendant, the injury complained of being that the defendant allowed the horse to be worked after he took sick, by which his death was occasioned:—Held, that this was an action for breach of contract in not taking proper care of the horse, not for a tort, and that the division court had jurisdiction. *O'Brien* v. *Irving*, 7 P. R. 308.

Crown—*Liability of.*]—See CROWN—PETITION OF RIGHT.

Death of Plaintiff — *Revivor.*] — P. brought an action against a conductor of the Intercolonial Railway for injuries received in attempting to board a train, and alleged to be caused by the negligence of the conductor in not bringing the train to a standstill. On the trial P. was nonsuited, and on motion to the full court the nonsuit was set aside and a new trial ordered. Between the verdict and the judgment ordering a new trial, P. died, and a suggestion of his death was entered on the record. On appeal to the supreme court of Canada from the order of the full court:—Held, that under Lord Campbell's Act, or the equivalent statute in New Brunswick (C. S. N. B. c. 86), an entirely new cause of action arose on the death of P., and the original action was entirely gone, and could not be revived. There being no cause before the court, the appeal was quashed without costs. *White* v. *Parker*, 16 S. C. R. 699.

Husband and Wife.]—Under R. S. O. 1877 c. 125, in an action for a tort committed by a wife during coverture the husband is not a proper party, but the wife must be sued alone. *Amer* v. *Rogers*, 31 C. P. 195. But see *Lee* v. *Hopkins*, 20 O. R. 666.

See Barker v. *Westover*, 5 O. R. 116; *Shaw* v. *McCreary*, 19 O. R. 39.

——— *Fraudulent Conveyance by Wife.*]—To a bill against a married woman to set aside a mortgage made to her, on the ground that the same was fraudulent as against creditors, the husband was made a party defendant:—Semble, that such a dealing on the part of a married woman was a "tort," for which she could be proceeded against as if unmarried. *McFarlane* v. *Murphy*, 21 Gr. 80.

Joint Tort-feasors—*Release to One.*]—Quære, is a release to or satisfaction from one of several joint tort-feasors a bar to an action against the others? *Grand Trunk R. W. Co.* v. *McMillan*, 16 S. C. R. 543.

Judgment for Tort—*Bar to Action on Covenant.*]—The plaintiff sued C., a division court bailiff, and his sureties, on their covenant; alleging a judgment recovered by himself against C., for selling his goods under execution, contrary to the orders of the plaintiff in the suit:—Held, declaration bad: for the plaintiff, having recovered judgment against C. for the tort, could not afterwards sue upon the covenant for the same cause. *Sloan* v. *Creasor*, 22 U. C. R. 127.

Non-performance of Joint Duty.]—Semble, that when the tort alleged is the non-performance of a joint duty (e.g., to repair a bridge), if the joint duty be not proved, the plaintiff must fail in toto, and cannot recover against one of the defendants on whom alone the duty is imposed. *Woods* v. *County of Wentworth*, 6 C. P. 101.

Preference—*Creditor.*]—A plaintiff suing for a tort is not a creditor within the meaning of the Ontario statutes as to preferences. *Ashley* v. *Brown*, 17 A. R. 500; *Gurofski* v. *Harris*, 27 O. R. 201.

See DAMAGES, X. 2—DIVISION COURTS, XI. —LIMITATION OF ACTIONS, IV. 8—MASTER AND SERVANT—NEGLIGENCE—NEW TRIAL—PRINCIPAL AND AGENT, V. 3—RAILWAY—TRESPASS—TROVER AND DETINUE.

TOWAGE.

See SHIP, XVIII.

TRADE AND COMMERCE.

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TRADE FIXTURES.

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TRADE MARKS AND NAMES.

I. GENERALLY, 6886.

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I. GENERALLY.

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

Foreign User.]—User of a trade mark in a foreign country is no justification for an infringement in the country where the action is brought. *Smith* v. *Fair*, 14 O. R. 729.

Infringement—*Profits—Account.*]— The account of profits in an action for infringement should not be confined to the period subsequent to registration, at any rate when the

infringement has not been innocent. *Smith* v. *Fair*, 14 O. R. 729.

Protection — *Misleading Representation.*] —The principle on which the court protects trade marks is, that it will not permit a person to sell his own goods as the goods of another; a person, therefore, will not be allowed to use names, marks, letters, or other indicia, by which he may pass off his own goods to purchasers as the manufacture of another person. *McCall* v. *Theal*, 28 Gr. 48.

——— *Prior User.*]—In an action to restrain the infringement of a trade mark registered under the Trade Mark and Design Act of 1889:—Held, following McCall v. Theal, 28 Gr. 48, that prior user can be given in evidence to invalidate the trade mark. *Partlo* v. *Todd*, 12 O. R. 171, 14 A. R. 444, 17 S. C. R. 196.

Quality—*Designation of—Name.*]— Property cannot be acquired in marks, &c., known to a particular trade as designating quality merely, and not, in themselves, indicating that the goods to which they are affixed are the manufacture of a particular person. Nor can property be acquired in an ordinary English word expressive of quality merely, though it might be in a foreign word or word of a dead language. *Partlo* v. *Todd*, 17 S. C. R. 196.

Right of User—*Universality—Exclusiveness.*]—The essential elements of a legal trade mark are: (1) the universality of right to its use, i.e., the right to use it in the world over as a representation of, or substitute for, the owner's signature; (2) exclusiveness of the right to use it. *Bush Mfg. Co.* v. *Hanson*, 2 Ex. C. R. 557.

Transferee—*Prior User.*]—First use is the prime essential of a trade mark, and a transferee must, at his peril, be sure of his title. *Groff* v. *Snow Drift Baking Powder Co.*, 2 Ex. C. R. 568.

II. INFRINGEMENT—PARTICULAR CASES.

Combination of Common Designations —*Device.*]—Words which are separately publici juris, such as "Red" and "Seal," when combined and applied to a specific manufacture may cease to be so, and may well be protected as trade marks. Single or more letters may also form a trade mark, and more especially when combined, woven, or introduced into a monogram. A common seal of wax to be used on a cigar box is a good trade mark within the terms of 42 Vict. c. 22 (D.), the Trade Mark and Design Act, 1879. *Smith* v. *Fair*, 14 O. R. 729.

Geographical Designation.] — The use of a geographical name in a secondary sense as part of the title identifying a mercantile journal, and not as merely descriptive of the place where the journal is published, will be protected. The use of the name "The Canada Bookseller and Stationer" was restrained as conflicting with the name "The Canadian Bookseller and Library Journal." Judgment in 27 O. R. 325 reversed. *Rose* v. *McLean Publishing Co.*, 24 A. R. 240.

——— *User — Registration.*] — The plaintiffs, proprietors for about twenty years of a commercial school, sought to restrain the defendant, also a proprietor of a similar institution, lately established, in the same place, from using the name "Belleville Business College," which, although generally used by the public in describing the plaintiffs' establishment, was not its registered name, and had never been adopted or appropriated by the plaintiffs themselves, who had carried on their business under different names, one of which was registered. After the defendant's advent some confusion arose in the post office as to letters addressed "Belleville Business College," but it did not appear that any students were lost to the plaintiffs by reason of the defendant's conduct:—Held, that, as there had been no actual user by the plaintiffs of the name claimed, user by the public was not sufficient to attach the designation to the business so as to make it equivalent to the plaintiffs' personal user thereof. Held, also, that the name in controversy being merely descriptive of the nature of the business and the locality of its operations, in the absence of evidence of user of the name by the plaintiffs, or that the name of the locality was so inseparably connected with their establishment that a secondary meaning was attributable to it, there was no ground for protecting the name. Thompson v. Montgomery, 41 Ch. D. 35, distinguished. No costs were given to the defendant, as he had sought by the use of the name to advantage himself in an unmeritorious way. *Robinson* v. *Bogle*, 18 O. R. 387.

Identical Shop Sign.]—The plaintiff carried on business in the city of L., having for his sign a figure of a gilt lion, and designating his place of business "The Golden Lion." Defendant for some years had conducted his business, and, having commenced on his own account in the same line of business, placed in front of his shop a figure somewhat similar to that used by plaintiff. The court restrained defendant from using as a sign this or any similar figure. *Walker* v. *Alley*, 13 Gr. 366.

Identity of Name.] — Plaintiffs sold liquid medicine in bottles, labelled "Perry Davis's Vegetable Painkiller." Defendant subsequently sold a similar kind of medicine in bottles, labelled "The Great Home Remedy, Kennedy's Painkiller." Plaintiffs claimed the word "Painkiller" alone as their trade mark. It was proved that plaintiffs' medicine was known and sold in the market by the name of "Painkiller," before defendant's was introduced, and that the trade would not be deceived by defendant's labels, although the general public might be. An injunction was granted restraining the use by defendant of the word "Painkiller" as a trade mark, with account of profits and costs. *Davis* v. *Kennedy*, 13 Gr. 523.

The words "Microbe Killer," regularly registered, constitute a valid trade mark. Injunction restraining its use granted. Davis v. Kennedy, 13 Gr. 523, followed. *Radam* v. *Shaw*, 28 O. R. 612.

——— *Addition of other Words.*]—The plaintiff had duly registered, as his trade mark in the manufacture of soap, the word "Imperial," with a star following it. Defendant put on his boxes the words "Imperial Bibasic Soap." An injunction was granted restraining him from using the word "Imperial." *Crawford* v. *Shuttock*, 13 Gr. 149.

——— *Common Designation.*]—Held, that the words "Gold Leaf" used in the plaintiff's trade mark distinguished the flour made by the plaintiff from that made by any other person, and, as such, was a proper subject of a trade mark within the language of s. 8 of the Act. Held, on the evidence, that "Gold Leaf" was a common brand for patent flour in use before the registration of the plaintiff's trade mark, and that the plaintiff had not the right to endeavour to attribute to that which he might manufacture a name which had been for years before a well-known and current name by which that article was defined, and that there must be judgment for defendant with costs. *Partlo* v. *Todd*, 12 O. R. 171, 14 A. R. 444, 17 S. C. R. 196.

——— *Prior User — Registration.*]—In the year 1885 the respondents, by their corporate title, registered a trade mark, consisting of a label with the name "Snow Flake Baking Powder" printed thereon, in the department of agriculture. Some four years after such registration by the respondents, the claimant applied to register the word-symbol "Snow Flake" as a trade mark for the same class of merchandize—stating that he knew of the respondents' registration, and alleging that it was invalid by reason of prior use by him and his predecessors in title. The evidence sustained the claimant's allegation:—Held, that the word-symbol in question had become the specific trade mark of the claimant by virtue of first use, and that the registration by the respondents must be cancelled. *Groff* v. *Snow Drift Baking Powder Co.*, 2 Ex. C. R. 568.

——— *Similarity of Appearance—Wrapper.*]—The plaintiff, a resident of New York, was engaged in the manufacture and sale of paper patterns, and under what he considered a permission from, or arrangement with, the proprietors of an illustrated paper called "Harper's Bazaar," styled such patterns "Bazaar Patterns," which words he registered in the United States and in Canada as his trade mark, and for the purpose of extending his business in this Province appointed the defendant his agent for their sale, who for some years acted in that capacity, and subsequently commenced a like business in his own name, calling his patterns by the same name, stating that they were manufactured by "A. M. Theal," while those of the plaintiff were stated to be those of "James McCall & Co.;" the defendant, however, using envelopes of the same colour and size, lettered and numbered in precisely the same way, the only perceptible difference being in the name of the alleged agent, which, to casual observers, would readily pass unnoticed. Thereupon the plaintiff filed a bill to restrain the defendant from using the name "Bazaar Patterns," or from otherwise inducing the public to believe that the patterns sold by him were those manufactured by the plaintiff. The court, under the circumstances, thought there was not any exclusive right on the part of the plaintiff to the use of that term; but restrained the defendant from using wrappers similar to those of the plaintiff, or in any other way acting in such a manner as to lead to the belief that the defendant was selling the goods of the plaintiff. The plaintiff, however, having failed in the main branch of the relief sought—the use of the word "Bazaar"—this relief was granted without costs. *McCall* v. *Theal*, 28 **Gr. 48.**

Personal Name — *Representation—Evidence.*]—The appellant company, being the transferee of the assets and goodwill of the dissolved Sabiston Lithographic and Publishing Company, sued to restrain the respondent from carrying on business under the name of that company, or any other name so framed as to lead to the belief that his business was in succession to that of the dissolved company:—Held, that the respondent had no right so to represent, but that there was no evidence that he had done so, and that the appellants were not entitled to an injunction against the mere use of the name. *Montreal Lithographing Co.* v. *Sabiston*, [1899] A. C. 610.

——— *Right to Use for Limited Period—Right after Expiry.*]—The proprietor of a firm name, not being merely his own name, who has sold the business with which it was connected, and with it the right to use the firm name for a limited period, cannot, after the expiry of the time, prevent the user of such name when he himself does not carry on or intend to carry on business under it. *Love* v. *Latimer*, 32 O. R. 231.

——— *Similar Business.*]—Hiram Piper and Noah Piper carried on business under the name of Hiram Piper & Brother. They afterwards dissolved partnership, and each carried on a like business in his own name. Subsequently Hiram assigned his business to the plaintiff, with authority to carry it on in Hiram's name, and then two sons of Noah Piper carried on a similar business next door, under the firm name H. Piper & Co. An injunction to restrain the use of that name was refused. *Aikins* v. *Piper*, 15 Gr. 581.

Similarity of Appearance—*Difference in Article.*]—A person professed to sell the secret of a preparation called "Jones's Patent Flour," and became bound not to disclose the secret to any other person in Canada, nor make use of it himself, except at the instance and for the benefit of his vendee. Notwithstanding, he afterwards commenced selling a similar article, done up in bags, bearing a general resemblance to those of his vendee, although differing in some minute particulars, and led persons purchasing it to believe that it was the same article. The court granted an injunction to restrain him from selling the same preparation, or any other preparation, done up in such a manner as to lead the public to suppose that it was the same article, and from representing it to be such, although it was sworn by the vendor that the preparations were not the same. *Whitney* v. *Hickling*, 5 Gr. 605.

Similarity of Device — *Imitation.*]—B. et al. manufactured and sold cakes of soap, having stamped thereon a registered trade mark, described as follows: A horse's head, above which were the words "The Imperial;" the words "Trade Mark," one on each side thereof; and underneath it the words "Laundry Bar." "J. Barsalou & Co., Montreal," was stamped on the reverse side. D. et al. manufactured cakes of soap similar in shape and general appearance to those of B. et al., having stamped thereon an imperfect unicorn's head, being a horse's head, with a stroke on the forehead to represent a horn. The words "Very Best" were stamped one on each side of the head, and the words "A. Bonin, 115 St. Dominique St., and "Laundry" over and under the head. At the trial the evidence

was contradictory, but it was shewn that B. et al.'s soap was known, asked for, and purchased by a great number of illiterate persons as the "horse's head soap:"—Held, that there was such an imitation of B. et al.'s trade mark as to mislead the public, and that they were therefore entitled to damages, and to an injunction to restrain D. et al. from using the device adopted by them. *Barsalou* v. *Darling*, 9 S. C. R. 677.

——— *Label—Imitation.*]—The plaintiffs filed a bill to restrain the use of a label, or of any other label resembling it. Defendant admitted that the label he had used was an infringement of paintiffs' trade mark, but said that he had discontinued its use before suit, on hearing that the plaintiffs complained of the label, and that after suit he informed the plaintiffs' solicitors of this discontinuance, disclaimed all right of using the label, and was ready to account for the profits he had made, and to pay costs of suit. The solicitors declined to discontinue the suit, and defendant having put in his answer, the plaintiffs brought the cause on for hearing upon bill and answer. Defendant not disputing that his label was an imitation of the plaintiffs', or that he was aware of the plaintiffs' property in their label, an injunction was granted, and defendant ordered to pay the costs of suit. *Radway* v. *Coleman*, 15 Gr. 50.

——— *Label—Prior User—Rectification of Register.*]—In the certificate of registration the plaintiffs' trade mark was described as consisting of "the representation of an anchor, with the letters 'J. D. K. & Z.,' or the words 'John DeKuyper & Son, Rotterdam,' &c., as per the annexed drawings and application." In the application the trade mark was stated to consist of a device or representation of an anchor inclined from right to left in combination with the letters "J. D. K. & Z." or the words "John DeKuyper, &c., Rotterdam," which, it was stated, might be branded or stamped upon barrels, kegs, cases, boxes, capsules, casks, labels, and other packages containing geneva sold by the plaintiffs. It was also stated in the application that on bottles was to be affixed a printed label, a copy or fac-simile of which was attached to the application, but there was no express claim of the label itself as a trade mark. This label was white and in the shape of a heart with an ornamental border of the same shape, and on the label was printed the device or representation of the anchor with the letters "J. D. K. & Z." and the words "John DeKuyper & Son, Rotterdam," and also the words "Genuine Hollands Geneva," which it was admitted were common to the trade. The defendants' trade mark was, in the certificate of registration, described as consisting of an eagle having at the feet "V. D. W. & Co.," above the eagle being written the words "Finest Hollands Geneva;" on each side were the two faces of a medal, underneath on a scroll the name of the firm "Van Dulken, Weiland, & Co." and the word "Schiedam;" and lastly, at the bottom, the two faces of a third medal; the whole on a label in the shape of a heart (le tout sur une étiquette en forme de cœur). The colour of the label was white:—Held, affirming the judgment in 4 Ex. C. R. 71, that the label did not form an essential feature of the plaintiffs' trade mark as registered, but that, in view of the plaintiffs' prior use of the white heart-shaped label in Canada, the defendants had no exclusive right to the use of the said label, and that the entry of registration of their trade mark should be so rectified as to make it clear that the heart-shaped label formed no part of such trade mark. *De Kuyper* v. *Van Dulken*, *Van Dulken* v. *De Kuyper*, 24 S. C. R. 114.

——— *Stamp.*]—A cigar manufacturer, to distinguish his cigars, called them "Cable Cigars," and afterwards adopted a method of stamping on each cigar, in bronze, an elliptical figure, with the name of "S. Davis," and the word "Cable" within the same. A rival firm, two years afterwards, adopted the same method, using a trade mark identical with this, except that they substituted their initials, "C.P.R.&C." for the other's name, and the word "Cigar" for the word "Cable." It was proved that persons had bought these cigars supposing them to be the cable stamped cigars:—Held, that the manufacturer of the cable cigar was entitled to an injunction to restrain the other persons from using the trade mark which they had so adopted. *Davis* v. *Reid*, 17 Gr. 69.

Similarity of Name—*Common Designation.*]—The plaintiff, having registered as a trade mark the words "Imperial Cough Drops," sued the defendant for infringement thereof by selling confectionery under the name "Imperial Cough Candy:"—Held, that, inasmuch as the evidence shewed that the word "Imperial" as a designation or mark for cough drops or candy was really public property, and a common brand or designation for candy long before the plaintiff's registration, the plaintiff had not the right to attribute to that which he might manufacture a name which had been for years before a well-known and current name by which that article was defined; and the action must be dismissed. Partlo v. Todd, 12 O. R. 171, followed. *Watson* v. *Westlake*, 12 O. R. 449.

——— *Misleading Representation.*]—G. carried on business in partnership with B., a part of the business being the sale of a series of copy books designed by B., to which was given the name "Beatty's Head-line Copy Book." The partnership was dissolved by B. retiring and receiving $10,000 for his interest in the business. After the dissolution B. made an agreement with the Canada Publishing Company to prepare a copy book for them, which copy book was prepared and styled "Beatty's New and Improved Head-line Copy Book," which the company sold in connection with their business. G. brought a suit against B. and the company for an injunction and an account, claiming that the sale of the last mentioned copy book was an infringement of his trade mark. He claimed an exclusive right to the use of the name "Beatty" in connection with his copy book, and alleged that he had paid a larger sum on the dissolution than he would have paid unless he was to have the exclusive sale of these copy books:—Held, affirming the judgments in 6 O. R. 68 and 11 A. R. 402, that defendants had no right to sell "Beatty's New and Improved Head-line Copy Book" in any form, or with any cover calculated to deceive purchasers into the belief that they were buying the books of the plaintiff. *Canada Publishing Co.* v. *Gage*, 11 S. C. R. 306.

The L. F. P. P. Co. published a newspaper called "The Commercial Traveller and Mercantile Journal," which was known as "The

Commercial Traveller," and registered under the Trade Mark and Design Act of 1879 as "The Commercial Travellers' Journal." The company sold the paper and goodwill to the plaintiff, and on the negotiations for the sale the plaintiff saw the defendant, who was then employed by the company as manager and editor, and who shewed him the assets of the paper, the printing contracts, &c., and recommended the purchase as a good investment. After the sale, the defendant, who had retained the mailing list of the subscribers to the paper, published a new paper called "The Traveller," and used the list to send copies of his paper to some of the persons whose names were contained therein. It was shewn in evidence that while defendant was in the employ of the company he often used the word "Traveller" as designating the paper then known as "The Commercial Traveller." In an action to restrain the defendant from infringing the plaintiff's trade mark:—Held, that the title of the paper published by the defendant was an infringement of the trade mark of the plaintiff, and that the subsequent publication by the defendant of a newspaper under the name of "The Traveller" was calculated to mislead persons, and induce them to believe the plaintiff's paper was the paper referred to. *Carey* v. *Goss*, 11 O. R. 619.

——— *Common Designation.*]—The plaintiffs sold sheets of paper saturated with fly-poison, under the name of "Wilson's Fly Poison Pad." These words were registered by them as a trade mark, and were printed on each sheet. The defendants also manufactured and sold fly paper poison in the form of pads, but printed upon them the words, "Lyman Bros. & Co. Lightning Fly Paper Poison," and upon the packages containing them the additional words, "6 pads in a package" or "3 pads in a package." The evidence shewed that sheets of fly paper poison had become known to the trade as "pads," but failed to shew that it was so identified with the plaintiffs' goods as to deceive the public into the belief that in purchasing pads they were getting the plaintiffs' goods:—Held, that the word "pads" had become so far publici juris, that the defendants, as manufacturers and vendors of fly poison, were entitled to describe as "pads" sheets of paper prepared by them, the general appearance of the sheets being different, and the defendants' name appearing prominently on them. *Wilson* v. *Lyman*, 25 A. R. 393.

III. Registration.

Assignment—*Cancellation of Prior Registration.*]—Where the respondents had obtained the right to use a certain trade mark in the Dominion of Canada only, and had registered the same, and claimants subsequently applied to register it as assignees under an unlimited assignment thereof, made before the date of the instrument under which the respondents claimed title, the prior registration was cancelled. *Bush Mfg. Co.* v. *Hanson*, 2 Ex. C. R. 557.

——— *Necessity for Registration.*]—Although s. 4 of the Trade Mark and Design Act of 1879, 42 Vict. c. 22 (D.), requires registration of the trade mark before the proprietor can bring an action, and s. 14 provides for registration of an assignment, the latter section does not enact that registration shall be necessary to give effect to such assignment. *Carey* v. *Goss*, 11 O. R. 619.

Effect of Registration—*Colour of Device—Right to Assign.*]—The Dominion Trade Mark and Design Act, 1879, defines "trade mark" in more general and comprehensive terms than the English Act of 1883, 46 Vict. c. 57, s. 64, and some care must be used in considering English decisions. Under the English Act a trade mark may be registered in any colour, and the registration confers on the registered owner the exclusive right to use the same in that or any other colour; and semble, our own Act has as extensive an application. There is no provision in our Trade Mark and Design Act, 1879, similar to s. 70 of 46 & 47 Vict. c. 57 (Imp.), which provides that a trade mark when registered shall be assigned and transmitted only in connection with the goodwill of the business concerned in the particular goods for which it has been registered. *Smith* v. *Fair*, 14 O. R. 729.

——— *Want of Title.*]—The fact of proprietorship or ownership is a condition precedent of the right to register a trade mark or to obtain any advantage under the Trade Mark and Design Act of 1879, and registration thereunder does not create or confer such status on an unqualified person, and his right thereto may be disallowed. *Partlo* v. *Todd*, 14 A. R. 444, 12 O. R. 171.

Jurisdiction of Exchequer Court—*Rectification of Register—Infringement.*]—The court has jurisdiction to rectify the register of trade marks in respect of entries made therein without sufficient cause, either before or subsequent to the 30th day of July, 1891, the date on which the Act 54 & 55 Vict. c. 35 (D.) came into force. Quære, whether the court has jurisdiction to give relief for the infringement of a trade mark where the cause of action arose out of acts done prior to the passage of 54 & 55 Vict. c. 26 (D.) *DeKuyper* v. *Van Dulken*, 3 Ex. C. R. 88.

——— *Rights of Property.*]—The questions which the court has jurisdiction to determine under the Act 53 Vict. c. 14 (D.) are such as relate to rights of property in trade marks, and not questions as to whether or not a trade mark ought not to be registered, or continued on the registry, because it is calculated to deceive the public, or for such other reasons as are mentioned in R. S. C. c. 63, s. 12. *The Queen* v. *Van Dulken*, 2 Ex. C. R. 304.

Necessity for Action before Registration—*Subsequent Action—Fraudulent Imitation.*]—The fact that a plaintiff has brought an action for infringement before registering his trade mark, which action has therefore proved abortive, does not prevent him from bringing another action after registering. Semble, the inability to sue for the infringement of a trade mark before registration only applies where the infringement has been done innocently, and not to the case of fraudulent imitation or forgery of trade marks. *Smith* v. *Fair*, 14 O. R. 729.

Prior User.]—By "prior user" the Trade Mark and Design Act, 1879, 42 Vict. c. 22, s. 6 (D.), means user before adoption by the registrant, not before registration. *Smith* v. *Fair*, 14 O. R. 729.

Resemblance between Marks—*Refusal to Register both—Grounds of.*]—The object of

s. 11 of the Act respecting Trade Marks and Industrial Designs, R. S. C. c. 63, as enacted in 54 & 55 Vict. c. 35 (D.), is to prevent the registration of a trade mark bearing such a resemblance to one already registered as to mislead the public, and to render it possible that goods bearing the trade mark proposed to be registered may be sold as the goods of the owner of the registered trade mark. The resemblance between the two trade marks, justifying a refusal by the minister of agriculture to register the second trade mark, or the court in declining to make an order for its registration, need not be so close as would be necessary to entitle the owner of the registered trade mark to obtain an injunction against the applicant in an action for infringement. It is the duty of the minister to refuse to register a trade mark when it is not clear that deception may not result from such registration. Eno v. Dunn, 15 App. Cas. 252, and In re Trade Mark of John Dewhurst & Son, Ltd., [1896] 2 Ch. 137, referred to. *In re Melchers and DeKuyper & Son*, 6 Ex. C. R. 83.

What May be Registered—*Rectification.*]—It is only a mark or symbol in which property can be acquired, and which will designate the article on which it is placed as the manufacture of the person claiming an exclusive right to its use, that can properly be registered as a trade mark under the Trade Mark and Design Act, 1879, 42 Vict. c. 22 (D.) Where the statute prescribes no means for rectification of a trade mark improperly registered, the courts may afford relief by way of defence to an action for infringement. *Partlo* v. *Todd*, 17 S. C. R. 196.

See Robinson v. *Bogle*, 18 O. R. 387, *ante* II.; *Groff* v. *Snow Drift Baking Powder Co.*, 2 Ex. C. R. 568, *ante* II.; *DeKuyper* v. *Van Dulken*, *Van Dulken* v. *DeKuyper*, 4 Ex. C. R. 71, 24 S. C. R. 114, *ante* II.

IV. MISCELLANEOUS CASES.

Security for Costs—*Action to Expunge from Register.*]—On an application by the plaintiffs to expunge the defendants' trade mark from the register, the defendants, resident out of the jurisdiction, applied for and obtained an order for security for costs against the plaintiffs, also resident out of the jurisdiction; plaintiffs thereupon applied for a similar order upon the ground that the matter was within the discretion of the court: —Held, that security should not be ordered against the defendants. *Wright* v. *Royal Baking Powder Co.*, 6 Ex. C. R. 143.

Trade Description—*False Application of —Criminal Code.*]—See *Regina* v. *T. Eaton Co.*, 31 O. R. 276.

TRADE NAMES.

See TRADE MARKS AND NAMES.

TRADE REGULATIONS.

See MUNICIPAL CORPORATIONS, XXIX.

TRADE UNIONS.

Combination in Restraint of Trade —*Strikes—Social Pressure.*]—Workmen who, in carrying out the regulations of a trade union forbidding them to work at a trade in company with non-union workmen, without threats, violence, intimidation, or other illegal means, take such measures as result in preventing a non-union workman from obtaining employment at his trade in establishments where union workmen are engaged, do not thereby incur liability to an action for damages. Judgment in Q. R. 6 Q. B. 65 affirmed. *Perrault* v. *Gauthier*, 28 S. C. R. 241.

Expulsion of Member — *Articles of Association—By-law in Restraint of Trade—Illegality — Militia Act.*] — The plaintiff, a musician and a member of the active militia of Canada and of the band of a militia regiment, became a member of the defendant association, a body incorporated under the Friendly Societies and Insurance Corporations Act, whose object was "to unite the instrumental portion of the musical profession for the better protection of its interests in general and the establishment of a minimum rate of prices to be charged by members of the said association for their professional services, and the enforcement of good faith and fair dealing between its members, and to assist members in sickness and death." After the plaintiff had become a member, the defendants adopted and added as part of one of their articles of association the following: "No member of this association shall play on any engagement with any person who is playing an instrument, unless such person can shew the card of this association in good standing. This by-law shall not apply to oratorio or symphony concerts, bands doing military duty, or amateurs. . ." After the passing of this by-law, the plaintiff and the other members of the regimental band to which he belonged played at a concert, in uniform, under the direction of the bandmaster, and with the permission of the commandant and officers of the regiment. For so playing (some of the band not being members of the association) a fine was imposed on the plaintiff by the executive committee of the defendants, and, in consequence of its not being paid within the time prescribed, he was expelled from membership: —Held, that, at the time the plaintiff joined the association, it was a legal society, its objects being of a friendly and provident nature: but the amendment was unreasonable and in restraint of trade, and for that reason, and also because contrary to the Queen's army regulations and the Militia Act of Canada, was illegal, and the plaintiff's expulsion was invalid, and he was entitled to an injunction and damages. Rigby v. Connol, 14 Ch. D. 482, Mineral Water Bottle, &c., Society v. Booth, 36 Ch. D. 465, Swaine v. Wilson, 24 Q. B. D. 252, and Chamberlain's Wharf, Limited v. Smith, [1900] 2 Ch. 605, considered. *Parker* v. *Toronto Musical Protective Association*, 32 O. R. 305.

——— *Fine—Deprivation of Benefits—Action—Bar — Defamation.*] — An action by a member of a trade union, having a monetary interest in its funds, against certain of his fellow-members for unlawfully imposing a fine upon him, and expelling him in default of payment, and depriving him of benefits, is within the prohibition of s. 4 of the Act re-

specting Trades Unions, R. S. C. c. 131, providing that the court is not to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for a breach of any agreement for the application of the funds of a trade union to provide benefits to members. Rigby v. Connol, 14 Ch. D. 428, followed. The alleged offence for which the fine was inflicted was the causing an extra apprentice to be brought into the yard in which the plaintiff and defendants were employed. The defendants, after being told by their employer that the plaintiff had nothing to do with bringing the apprentice in, wrote and caused to be published in their trade journal a statement that the strike ordered by the union when the apprentice was brought in would not have occurred but for the treachery of the plaintiff, who richly deserved the fine imposed:—Held, that the publication was not privileged. On appeal to a divisional court it was held that the evidence did not support the finding that the defendants knew that the words complained of were untrue, nor was there evidence of malice, and that in the absence thereof the communication was privileged; and the appeal was allowed. *Beaulieu v. Cochrane*, 29 O. R. 151, 598.

Injunction — *Intimidation of Operatives — Remedy of Masters — Resolution.*] — See *Hynes v. Fisher*, 4 O. R. 60, *ante* MASTER AND SERVANT, VII.

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TRAFFIC ARRANGEMENTS.

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TRESPASS.

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I. To Goods.

1. *Damages.*

Detention—*Chattel Mortgage—Value.*]—Chattel mortgage—Sale to plaintiff by mortgagor of horse mortgaged, with oral consent of mortgagee—Seizure by mortgagee and detention for four days before returning it:—Held, damages recoverable for the detention only, not the value of the horse. *Loucks* v. *McSloy*, 29 C. P. 54.

Expenses of Criminal Proceedings.]—Plaintiff sued defendant for money of which he had robbed him, and for the money he had spent in a criminal prosecution for the crime, and for damages for the trespass. The second count of the declaration was for trespass. The third count set out the robbery, the conviction, and that plaintiff had been put to expense in bringing defendant to justice, whereby the latter became liable to the former for the sums so expended:—Held, that, though the third count might be good in trespass, it was not so in assumpsit, and that either the second or third count must be struck out. Semble, that the plaintiff could not recover his expenses and outlay in this action. *Pettit* v. *Mills*, 6 P. R. 297.

Joint Trespass—*Excess as to One Defendant.*]—In joint trespass, each defendant is liable for the damage occasioned to the plaintiff by the joint act, and the court will not interfere because, as regards one, the verdict may be excessive. *Grantham* v. *Severs*, 25 U. C. R. 468.

Loss of Profits.]—The plaintiffs had a large quantity of logs boomed in a river, and while there a drive of about 5,000 logs, belonging to one C., came past without injuring the boom, which was strong and well constructed. Defendants had a large number of logs boomed above the plaintiffs', some of which were let down at night, and in the morning were found in a jam against the plaintiffs' boom. This jam was broken up, and more of the defendants' logs were let down, soon after which the plaintiffs' boom was found broken, the plaintiffs not being present, and their logs gone. They went down the stream with defendants' logs, and some were afterwards found, but about 125,000 feet were lost, and there was evidence tending to shew that they had been taken by defendants' men to a point about twenty miles away. There was evidence also that defendants' conduct was unreasonable in making their drive when and as they did:—Held, in trespass and trover for the logs, that there was evidence for the jury that defendants had broken the plaintiffs' boom by the undue pressure of their logs; and that defendants were liable without proof that they had actually used or cut up the plaintiffs' logs; and a verdict for the plaintiffs was upheld. Held, also, there being no evidence that the plaintiffs could have purchased other logs at the time when and place where the wrong was done, that they were entitled to recover the loss of profits, which the jury found they would have made out of the logs lost by defendants' misconduct. *Auger* v. *Cook*, 39 U. C. R. 537.

Value — *Excess over.*] — In trespass for taking timber, the court refused to disturb the verdict on the ground that the damages were beyond the value of the logs taken. *Flint* v. *Bird*, 11 U. C. R. 444.

——— *Excess over — Injury to Goods.*]—In the removal of the plaintiff's goods by the sheriff, the plaintiff's loom was taken down and injured, but the possession was restored to him with his other goods:—Held, that he was not entitled to damages for the loss of time and work consequent on his not having repaired the loom; and that the true measure of damages could not have exceeded the value of the article damaged at the time of the trespass, and compensation for any temporary inconvenience occasioned by its sudden removal. *Benson* v. *Connor*, 6 C. P. 356.

——— *Excess over — Interest — Special Damage.*]—In an ordinary action of trespass for taking goods, the measure of damages is the value of the goods when taken (which the jury may estimate liberally) and interest. It is only in a very peculiar case that such value can be exceeded; and the excess claimed must be stated as special damage. *Maxwell* v. *Crann*, 13 U. C. R. 253.

——— *Mode of Determining.*]—Defendants, division court bailiffs, were sued for selling under executions a horse which the plaintiff claimed as exempt under 23 Vict. c. 25. The horse was sold for $47.50; but the plaintiff swore it was worth $120, and the purchaser swore that he considered it worth $90:—Held, that the value of the horse was to be determined upon the whole evidence, and not only by the price it brought at the sale. *McMartin* v. *Hurlburt*, 2 A. R. 146.

——— *Verdict below — Plaintiff's Interest in Goods.*]—Defendant, being guardian in insolvency to the estate of one W., seized goods in plaintiff's possession exceeding $800 in value, which the plaintiff claimed under a purchase from W., made about two months before W. absconded. The circumstances attending the alleged purchase were very suspicious. The plaintiff had been working for W. as a labourer, having no capital, and he had given his notes for the purchase money, with an agreement to deposit all receipts from sales to the credit of such notes weekly, and that W. might retake the goods on default. It was sworn, too, that when the seizure was made he said they should at least allow him wages. The jury were told to find for defendant, if they considered the transaction to be fraudulent, but they found for the plaintiff, giving only $65:—Held, that, admitting defendant to be a mere wrongdoer, the jury, with a view to damages, might take into consideration the true nature of the plaintiff's interest; and a new trial was refused. *Long v. Monck*, 22 C. P. 387.

See May v. Howland, 19 U. C. R. 66; *Henry v. Mitchell*, 37 U. C. R. 217; *Jacobs v. Robb*, 10 U. C. R. 276, *post* 6 (b); *Mitchell v. McDuffy*, 31 C. P. 266, 649, *post* II. 2.

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2. *Evidence.*

Contributory Negligence—*Pleading.*]—In trespass for driving against plaintiff's horse, that the accident happened from plaintiff's negligence, or without any fault of defendant, could not be shewn under the general issue, but must have been pleaded specially. *Macdonald v. Monk*, 3 O. S. 20.

Jus Tertii—*Pleading.*]—Pleas: (1) Not guilty. (2) Goods not plaintiff's. Defendant desired to give evidence that the goods belonged to a third party, and that a fourth party had a right as landlord to follow and seize them, and that defendant, deriving his authority from such fourth party, was justified in having seized them:—Held, that the evidence was rightly rejected, and that the defence should be specially pleaded. *Tyson v. Little*, 8 U. C. R. 434.

Leave and License—*Standing by — Husband and Wife—Pleading.*] — The plaintiff went to British Columbia nine years before this action, leaving his wife here, to whom he wrote, and occasionally sent money. She procured defendant to indorse a note made by her for the price of furniture to carry on a boarding house (which she subsequently carried on with the plaintiff's knowledge), and executed to defendant a chattel mortgage under seal in her own name on said furniture. The rent of the house being in arrear, and part of the mortgage money overdue, the landlord distrained, and defendant enforced his mortgage; and the plaintiff's wife not dissenting, but rather assenting, the goods were sold off, and the balance, after the payment of rent and mortgage, was handed over to her. The plaintiff thereupon sued defendant in trespass and trover:—Semble, that the wife standing by and permitting the sale of the property under the mortgage was some evidence under the plea of leave and license. *Halfpenny v. Pennock*, 33 U. C. R. 229.

Production of Warrant — *Bailiff — Execution Creditor.*]—The fi. fa. and warrant to the bailiff must be proved, or its non-production accounted for, in order to charge the plaintiff in the execution with trespass committed by the bailiff. *Cameron v. Lount*, 4 U. C. R. 275.

See Auger v. Cook, 39 U. C. R. 537.

See post 4 (b).

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3. *Judgment in Trespass—Effect of.*

Right to Proceeds of Sale of Goods—*Attachment — Division Court Clerk.*] — The plaintiff and others took out attachments against an absconding debtor, and the goods seized being claimed, the plaintiff indemnified the bailiff, who sold, and paid over the money to defendant, the clerk of the division court. The claimants sued the plaintiff and the purchasers in trespass, and recovered from them the value of the goods, after which defendant distributed the money among the attaching creditors, of whom he himself was one, pro ratâ. The plaintiff thereupon sued defendant and his sureties as for money received to his use:—Held, that he could not recover, for the money was not received by defendant in his official capacity as the plaintiff's, and the recovery against the plaintiff, to which defendant was a stranger, could not make it his as against defendant, so as to support this action upon the statutory covenant. Quære, whether the plaintiff, having procured the money to be paid to the defendant as that of the attaching creditors, could afterwards claim it as his own. *Preston v. Widmot*, 23 U. C. R. 348.

Title to Goods—*Relation back.*]—Trespass for taking plaintiff's cattle. Plea, not possessed. It was proved that the cattle had belonged to the defendant, from whom the plaintiff had leased them with a farm, but the plaintiff had detained them after the term had expired, for which defendant had sued him and recovered damages to the value of the cattle after this action was brought:—Held, that the plaintiff could not treat this verdict as giving him a title to the cattle, by relation back, at the time this action was commenced. *Abrams v. Moon*, 1 U. C. R. 352.

Use and Occupation — *Bar.*]—Quære, whether a judgment in replevin could be a bar to an action for use and occupation. *Crooks v. Bowes*, 22 U. C. R. 219.

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4. *Pleading.*

(a) *Declarations.*

See Bacchus v. McCann, T. T. 3 & 4 Vict., R. & J. Dig. 3769; *Morrell v. Capron*, 1 U. C. L. Ch. 144; *Friesman v. Donelly*, 5 O. S. 16; *Hatch v. Holland*, 28 U. C. R. 215.

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(b) *Pleas.*

See Vail v. Noble, 2 U. C. R. 142; *Lossing v. Jennings*, 9 U. C. R. 406; *Lockhart v. Dixon*, H. T. 3 Vict., R. & J. Dig. 3768; *Cameron v. Lount*, 3 U. C. R. 453; *Fallis v. Claus*,

9 U. C. R. 272; *Scott* v. *Vance*, 9 U. C. R. 613; *Clute* v. *MacPherson*, 6 O. S. 646; *Hatch* v. *Holland*, 28 U. C. R. 213; *Barragan* v. *Sherwood*, 11 C. P. 119; *Hall* v. *Scarlett*, 1 C. P. 354; *Lambe* v. *Tecter*, 20 U. C. R. 82.

See ante 2.

(c) *Replications.*

See Thompson v. *Breakenridge*, 3 O. S. 170; *Abrams* v. *Moon*, 1 U. C. R. 377.

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5. *Right of Property and Possession—Status to Maintain Trespass.*

Bailee—*Rights against Wrongdoer.*]—The mare which had been injured by defendant's bull, for which the plaintiff sued, was in plaintiff's field at the time of the accident, and had been put there by his father, who said he had given it to the plaintiff:—Semble, that the right of property was immaterial, as the plaintiff, even if only a bailee, could recover its value in trespass or case against a wrongdoer. *Mason* v. *Morgan*, 24 U. C. R. 328.

Change by Work Done.]—Where stones were tortiously removed and severed from the land, and cut and shaped into mill stones:—Held, that the person who had so taken and worked them could not maintain trespass against the owner of such land, who had got them into his possession by directing the carriers of them to deliver them on his premises, as the property had not been changed by the work done to the stones. *Baker* v. *Flint*, 3 O. S. 89.

Crops—*Purchaser.*]—A person purchasing a crop of wheat at sheriff's sale may bring trespass against a person converting or injuring it, though he may never have received possession of the field. *Haydon* v. *Crawford*, 3 O. S. 583.

——— *Purchaser of Land — Person in Possession.*]—A., living abroad, sends to an agent here to purchase land for B., who was living in the Province, and to take the conveyance to himself (A.) This was done, and B. was put in possession of the land, and thenceforth used and cultivated it for his own benefit. At the time of purchase a crop of wheat was in the ground:—Held, that B., and not A., should sue in trespass for cutting and carrying away the wheat. Quære, did the property in the wheat pass to A. or B. *Campbell* v. *Cushman*, 4 U. C. R. 9.

Goods in Custody of Law—*Rights of Peace Officer.*] — When the plaintiff, a constable, had seized a horse under a distress warrant, and the horse escaped to a railway and was killed, owing to the defendants' neglect to fence:—Held, that the plaintiff had sufficient property in the horse to entitle him to sue. *Simpson* v. *Great Western R. W. Co.*, 17 U. C. R. 57.

Lease of Goods — *Reversioner.*] — A. having a reversionary interest in goods leased to B. The sheriff seized them under an execution against B., but did not sell or remove them. A. sued the sheriff for an alleged injury to his reversionary interest:—Held, that if any trespass was committed by the seizure, B. should sue, and not A. *Henderson* v. *Moodie*, 3 U. C. R. 348.

Mortgaged Goods — *Rights of Mortgagee.*]—B. assigned to the plaintiff certain household goods by a bill of sale, which contained a proviso for redemption on a day certain, with a covenant that in case of default in payment, or of B. attempting to dispose of the goods, the plaintiff might take possession and sell or retain them for his own use, but which contained no clause authorizing B. to remain in possession until default:—Held, that the plaintiff had sufficient right to possession of the goods to maintain trespass against the sheriff under a fi. fa. against B., the jury having found the mortgage to be bonâ fide. *Porter* v. *Flintoft*, 6 C. P. 335.

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

Timber—*Clearing Agreement.*]—The person clearing land under an agreement to enter upon and clear land, and take the wood after it is cut down in payment of the labour, may maintain trespass against the owner of the land for taking away the wood after it is cut down, although he has no possession in the land to enable him to maintain trespass q. c. f. *Hamilton* v. *McDonell*, 5 O. S. 720.

Vessel — *Seizure under Revenue Laws — Effect of.*]—On the 7th June defendant, a collector, seized the plaintiff's vessel for a breach of the revenue laws. The plaintiff petitioned the government, and on the 7th July received an answer from defendant informing him that the government had refused to interfere. On the 8th the plaintiff served a notice of claim:—Held, that the notice of claim required by s. 40 of 10 & 11 Vict. c. 31 to be given within one calendar month from the day of seizure, could not be waived by any representation of defendant to the plaintiff. (2) That no notice having been given within the time allowed, the vessel was thereby condemned; and that by the act of seizure the plaintiff was deprived of his right of property, and therefore unable to maintain trespass. *Dame* v. *Carberry*, 10 U. C. R. 374.

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6. *Seizure under Execution.*

(a) *Liability of Attorney.*

Interference—*Direction.*]—Where an attorney directed the sheriff not to give up the goods of A., seized under an attachment as the goods of B.:—Held, that he became a trespasser by such direction. *Radenhurst* v. *McLean*, 4 O. S. 281.

Irregularity of Proceedings.]—An attorney indorsing a writ of possession and fi.

fa. in ejectment, the proceedings on which were ultimately set aside for irregularity:—Held, liable for the trespass committed by the sheriff in executing the same. *Benson* v. *Connor*, 6 C. P. 356.

Issue of Execution after Satisfaction —*Joint Trespass.*]—Where, after a defendant had paid and satisfied a judgment recovered against him, the plaintiff's attorney, acting under the plaintiff's instructions, issued a fi. fa. under which defendant's goods were taken in execution:—Held, that the plaintiff and the attorney were jointly liable as trespassers; and that the mere fact of the attorney acting under his client's instructions, without setting up (even if it would be a defence) want of notice or knowledge of the judgment being satisfied, afforded him no protection. *Mooney* v. *Maughan*, 25 C. P. 244.

Non-interference — *Absence of Direction.*]—Defendant, a division court bailiff, refused on demand to give up the goods to the plaintiffs until he should consult the attorney, who told him to use his own judgment:—Held, that this did not make the attorney a wrongdoer and answerable for the bailiff's conduct. *Stewart* v. *Cowan*, 40 U. C. R. 346.

Where either the execution plaintiff or his attorney direct the seizure of particular goods, they are liable, but not where the writ is given to the officer to be acted upon in the usual course and with no special direction. *Phillips* v. *Findlay*, 27 U. C. R. 32. See also *McClevertie* v. *Massie*, 21 C. P. 516, *post* (b).

(b) *Liability of Execution Creditors and Others.*

Absence of Actual Seizure — *Equivalent.*] — A defendant against whose goods a sheriff had an execution (afterwards set aside for irregularity), drove to the sheriff's office and gave his deputy a list of his property as seized, but without any actual seizure:—Held, not sufficient to support trespass against the then plaintiff. *Hervey* v. *Alexander*, H. T. 2 Vict.

——— *Inventory—Caution.*]—If a stranger, having no legal process, goes to a defendant in execution and takes down in his presence a list of his goods, and tells him he must not remove them, and does nothing more, he cannot be sued in trespass. So, if a bailiff has so acted under a legal process, he may have bound the property as against other writs, but he cannot be sued in trespass, as he neither removed, detained, nor handled the goods. *Cameron* v. *Lount*, 4 U. C. R. 275.

Continuance of Wrongful Seizure — *Directions.*]—On the 6th February the attorneys for the execution defendant, who was sued with them, wrote to the bailiff instructing him not to seize a particular horse mentioned, and they contended that, as on receipt of this letter the bailiff should have given the horse up, they were not liable for its further detention. The evidence shewed that the horse seized was not the one mentioned in the letter:—Semble, that if it had been, defendants would still have been liable for the continuance of the wrongful seizure which they had authorized. *Henry* v. *Mitchell*, 37 U. C. R. 217.

Directions of Solicitor — *Liability of Creditor for—Evidence of Trespass.*]—In trespass for seizing goods it appeared that the defendants, who had a claim against one B., instructed their attorney to collect it, and that the attorney, having issued execution, handed it to the sheriff, informing him that B. lived at Paris, where he kept a fruit store. The deputy sheriff said it would be a good time "to make a haul" (being near Christmas), to which the attorney answered that it would; and the seizure was then made. The plaintiff having claimed the goods, the attorney told the sheriff to hold possession, as they wished to make inquiries, and the sheriff did so until an interpleader order issued:—Held, that the defendants were bound by the acts and directions of their attorney, and that there was sufficient evidence to go to the jury to connect them with the seizure. *Slaight* v. *West*, 25 U. C. R. 391.

Defendant issued an attachment in insolvency against one M., and obtained for H., his bookkeeper, a warrant as sheriff's bailiff, with which he despatched him to where M. carried on business, instructing him to see about the goods in his possession, and, as H. thought, telling his solicitors the goods were to be seized. H. accordingly went and seized the goods, which were at the time being sold at auction for plaintiff, who asserted that he had bought them from M. On his return H. informed defendant, who approved of what he had done. It also appeared that defendant's attorney had given the writ to the sheriff, with instructions to seize the goods:—Held, following the last case, that there was evidence to go to the jury of defendant's liability for the seizure. *McClevertie* v. *Massie*, 21 C. P. 516.

——— *Liability of Creditor for — Evidence of Trespass.*]—The defendants, who lived in Hamilton, had a claim against W. at Ingersoll, and, thinking he was carrying on business on his own account, issued a writ therefor, through their solicitors C. & B., which was served by C., who went to Ingersoll under special instructions from defendants to do so, and to take such steps as he and B. might think best to recover the claim. A judgment was afterwards obtained, and an execution against W.'s goods issued. The sheriff sent his officer to execute the writ, who was informed by W. that he had no goods, which the officer believed to be true, and so informed the sheriff, who accordingly notified C. & B. C. & B. refused to accept this, and wrote the sheriff in effect that he had improperly refrained from seizing the goods, acting on ex parte statements, and that he must take such action as would enable him to test the truth of the statements he had acted on. The sheriff then seized the goods and applied for an interpleader order. The goods were proved to be the plaintiff's. In an action to recover damages occasioned by the seizure:—Held, that the sheriff must be assumed to have seized, under the circumstances, under instructions from the defendants' solicitors, and, as the solicitors were acting under special instructions from the defendants to take such proceedings as they might think best, the defendants were liable to the plaintiff. Smith v. Keal, 9 Q. B. D. 340, distinguished. *Wilkinson* v. *Harvey*, 15 O. R. 346.

Fi. Fa. Good on its Face—*Acting under —Irregularity—Waiver.*]—Defendant obtain-

ed a conditional garnishee order against the plaintiff, which gave an opportunity to contest the claim, on payment of certain costs within a time fixed, after the lapse of which a fi. fa. issued, plaintiff not having availed himself of the condition. Both parties were present when the order was made, and there had previously been a good attaching order. No motion was made to set aside the fi. fa., which appeared good on its face, but plaintiff brought trespass against defendant for the seizure, as having been issued on a conditional and void order:—Quære, whether the order was void; but if so, semble, that the fi. fa. was at most irregular, and might have been set aside on motion. Held, therefore, that, as nothing appeared either on the face of the record or on the evidence making the writ a void process, defendant was protected by it, and trespass would not lie against him. *Kerns* v. *Phelan*, 19 C. P. 288.

Fi. Fa. Issued without Authority—*Valid Judgment.*] — Trespass will not lie against a person who without authority procures the issue of an execution on a judgment admitted to be valid and satisfied, and the seizure of the plaintiff's goods thereunder. To a declaration against L. and M., in trespass for taking plaintiff's goods, defendants pleaded that one C. recovered a judgment in the county court against the plaintiff, on which he, by defendant L. as his attorney, sued out a fi. fa., which was returned nulla bona, and that afterwards, the judgment remaining in force and unsatisfied, defendant L. instructed defendant M. to, and defendant M. did, issue an alias fi. fa., on which the plaintiff's goods were seized, which are the alleged trespasses. The plaintiff replied that defendant L., when he so instructed defendant M., was Judge of the county court, and had ceased to be C.'s attorney, and had no authority from C. to issue the alias fi. fa. Defendants rejoined that the alias fi. fa. at the time of the seizure was in full force, and not then or at any time annulled or set aside:—Held, that the rejoinder was good. *McQuade* v. *Lizars*, 39 U. C. R. 215.

Fi. Fa. Subsequently Set aside—*Sale—Damages.*]—A. gave to B. a cognovit, judgment to be entered immediately, but execution to issue only in certain events. On the 8th November B. put a fi. fa. into the sheriff's hands, and on the 18th A.'s goods were seized at his store, but he was allowed to retain them on giving security to the sheriff. After the seizure A. obtained a summons to set aside the fi. fa. for breach of faith, which was enlarged at B.'s request. On the 13th January, while the application was pending, B.'s attorney telegraphed to his agent at London not to let the sheriff close A.'s store. The sheriff then requested instructions from the agent what to do, but received none; afterwards this agent told him of reports that A. was selling the property, &c., and suggested a sale, and the sheriff accordingly sold a portion of the goods on the 16th and 17th January. On the 17th the sheriff received orders not to proceed, and immediately stopped the sale; he had no notice of the summons, which was made absolute on the 22nd January:—Held, under the facts, that the fi. fa. having been set aside, as obtained by B. on a judgment entered contrary to good faith, B. was liable to A. in trespass for all damages sustained from the sale as well as the seizure. *Jacobs* v. *Robb*, 10 U. C. R. 276.

Indemnity to Sheriff—*Evidence of Trespass.*]—A person who indemnifies the sheriff for seizing goods does not by that act become liable as a trespasser. *McLeod* v. *Fortune*, 19 U. C. R. 98.

Interpleader Order—*Protection to Sheriff—Justification as in Aid.*] — In trespass against the plaintiff in a writ of fi. fa. for taking, &c., the goods of this plaintiff, defendant justified in aid of the sheriff's officer under the writ, and at his request, and then shewed an interpleader order by which the present plaintiff, who had claimed the goods when seized, was barred from any claim to the goods against the sheriff or his officer, or any person acting under or in aid of them:—Held, that the order could not protect the execution creditor. *Park* v. *Taylor*, 1 C. P. 414.

——— *Protection to Sheriff—Liability of Creditor for Acts of Sheriff—Damages.*]—The goods of one L., having been seized under defendants' execution, were claimed by plaintiffs, and upon the sheriff's application a feigned issue was ordered, which protected the sheriff, but expressly excepted any claim of the execution plaintiffs or the claimants against each other. This issue having been decided in plaintiffs' favour, they sued the defendants (the execution creditors) for the acts of the sheriff in entering and excluding them for two months from possession of the foundry where the goods were, and for stopping the work and preventing them from selling some of the articles which were being manufactured. The jury gave $50 for the first cause of action, and $300 for the second:—Held, that the action would lie, and that the damages were not excessive. *May* v. *Howland*, 19 U. C. R. 66. See, also, *Cotton* v. *Stokes*, 10 U. C. R. 262.

Justification by Stranger under Execution Creditor—*Evidence of Joint Trespass.*]—Trespass for entering plaintiff's close and taking goods. Plea, justifying under a division court execution at the suit of H., and alleging a decision by the Judge in the execution creditor's favour, in an interpleader issue, the goods having been claimed by plaintiff. Defendant having declared that he owned the debt, and that the execution was issued at his instance, and having appeared for the execution creditor on the interpleader summons:—Held, sufficient evidence to go to the jury of his being a joint trespasser. *Oliphant* v. *Leslie*, 24 U. C. R. 398.

Ratification of Wrongful Seizure.]—Where a sheriff, acting under a valid writ as a servant of the court, seizes the wrong person's goods, a subsequent ratification by a person who, until such ratification, was a stranger to the taking, cannot alter the character of the original taking, and make such party a trespasser by relation. *Tilt* v. *Jarvis*, 7 C. P. 145.

Several Executions—*Evidence of Interference—Indemnity.*]—In an action against the sheriff and six others for seizing goods, the evidence as to four of the defendants was that they were creditors of the execution debtor, and joined in the indemnity bond to the sheriff, and that they told the bailiff to sell, and afterwards attended and bid at the sale:—Held, sufficient to charge them. *Gray* v. *Fortune*, 18 U. C. R. 253.

——— *Evidence of Interference—Joint Liability.*]—Held, upon the facts, that there was evidence to shew that there was one seizure and one sale under the direction and for the benefit of the two defendants, holding separate executions; and that they were therefor jointly liable. *Lough* v. *Coleman*, 29 U. C. R. 367.

Quære, whether, upon the evidence, the plaintiff could have recovered against defendants, five execution creditors and the bailiff, as for a joint trespass or conversion. *O'Callaghan* v. *Cowan*, 41 U. C. R. 272.

See Macklem v. *Durrant*, 32 U. C. R. 98, *post* TROVER AND DETINUE.

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7. *Other Acts of Trespass.*

Animal—*Injury to Another.*]—Trespass is maintainable against the owner of a bull which had broken into the plaintiff's close, and there killed his mare, defendant not being present or aware of the act. *Mason* v. *Morgan*, 24 U. C. R. 328; *Blacklock* v. *Millikan*, 3 C. P. 34.

Conditional Sale—*Default—Resumption of Possession—Acts of Servant—Joint Trespass.*]—Under a hire receipt of an organ sold by defendant R. to plaintiff's son, and signed by the latter, the defendant R. was authorized, on default of payment, to resume possession of the organ, and he and his agent were given full right and liberty to enter any house or premises where the organ might be, with authority to remove the same, without resorting to any legal process. Default having been made in payment of certain instalments due under the hire receipt, defendant R. sent his bookkeeper (the other defendant) and two assistants, with instructions to get the organ. The bookkeeper, taking the hire receipt as his authority, went to plaintiff's house, where the organ was, opened the house door and entered the hall, but, on his attempting to open the door of the room in which the organ was, the plaintiff's wife (the plaintiff and the son being absent) resisted his entrance, when a scuffle ensued and the plaintiff's wife was injured:—Held, that R. was responsible for the acts of his servant, the bookkeeper, for they were done by him in the discharge of what he believed to be his duty, and were within the general scope of his authority. Held, also, that the judgment against both R. and the bookkeeper was maintainable, for it was recovered against them as joint wrongdoers. Murphy v. City of Ottawa, 13 O. R. 334, distinguished. *Ferguson* v. *Roblin*, 17 O. R. 167.

Distress for Rent—*Sheep—Acts of Bailiff.*]—It is illegal to distrain sheep for rent when there are other goods upon the premises sufficient to satisfy the claim; and trespass was therefore held to lie against a landlord for the act of his bailiff in so distraining, it appearing that he had spoken of his making the sale, and had received the proceeds thereof, and no evidence being offered of his non-complicity therein. *Hope* v. *White*, 22 C. P. 5.

Distress for School Rates—*Collector—Notice of Action.*]—A collector of school rates who commits a trespass while acting under a warrant issued by a competent authority, is entitled to notice of action, and the action should be brought within six months. *Spry* v. *Mumby*, 11 C. P. 285.

Joint Trespass—*Husband and Wife.*]—Defendants were the widow of an intestate and her second husband. It was shewn that she had taken possession of and appropriated to her own use the intestate's property, and acts and declarations of both defendants established that they held it together after her second marriage:—Held, sufficient evidence of a joint taking. *Deal* v. *Potter*, 26 U. C. R. 578.

Lawful Removal of Dam—*Subsequent Conversion of Materials.*]—Pleas justifying the removal of a mill dam in order to float down logs. Plaintiffs replied that after the removal, &c., by defendants, they converted and disposed of the materials of the dam to their own use:—Held, that such wrongful conversion was an abuse of the authority in law under which the defendants acted, such as to render them trespassers ab initio. *Little* v. *Ince*, 3 C. P. 528.

Taking Timber—*Joint Trespass—Judgment—Evidence.*]—In a joint action of trespass one party may be acquitted and the other convicted. Judgment in such an action for taking timber by default had been signed against one of two defendants jointly charged, but the evidence established the tort against the other alone; whereupon the plaintiff entered a nolle prosequi as to the former, and took his verdict against the latter only:—Held, that this was the more prudent course, and, therefore, no ground for a new trial, which, however, was granted on other grounds. *Campbell* v. *Kemp*, 16 C. P. 244.

Vessel—*Seizure—Detention—Repairs.*]—The plaintiff took his vessel to defendant's ship yard at Oakville, to be repaired there by defendant, in accordance with a previous arrangement. The ways were occupied when she arrived, and the plaintiff went away, having said he did not wish her hauled up in his absence. Defendant nevertheless took her out, and it was proved that a day or two after that he said he would keep her on the ways against the plaintiff's will; but the repairs were proceeded with under the plaintiff's supervision, and were paid for by him:—Held, that there was no evidence to sustain a count in trespass for seizing and detaining the vessel. *Hood* v. *Cronkite*, 29 U. C. R. 98.

Wrongful Refusal to Give up Goods—*Joint Trespass.*]—In trespass and trover against five defendants for taking and converting a steam boiler, it appeared that one defendant, P., had nothing to do with the original taking, but that the boiler had been placed in his yard by the others, or by some of them, not acting in concert with him, and that he had afterwards refused to give it up to the plaintiff. At the trial, the plaintiff's counsel declined to elect, but went to the jury against all the defendants, claiming exemplary damages, and a general verdict was rendered. The court ordered a new trial without costs, and refused to allow the verdict to stand against P. alone. *Menton* v. *Lee*, 30 U. C. R. 281.

Wrongful Removal of Books—*Mandamus—Fraud.*]—The affidavits stated that M., who claimed the office of registrar, obtained a mandamus nisi directed to H. to

deliver up to him the books and papers; that he went to the office with two constables, in H.'s absence, and demanded them of his wife, reading what purported to be a peremptory mandamus as his authority, but refusing to allow her or her solicitor to examine it; and that he and the constables then took away the books, &c. Upon these affidavits the court granted a rule nisi for attachment against H., but refused it against the constables, there being nothing to shew that they were aware of the fraud. A rule for an order to M. to restore the books, &c., thus obtained, was refused, as H. might bring trespass, claiming a mandamus in the action. A writ of replevin had previously been refused. *In re McLay*, 24 U. C. R. 54.

See Marsh v. *Boulton*, 4 U. C. R. 354; *Auger* v. *Cook*, 39 U. C. R. 537, *ante* I.; *Campbell* v. *Reid*, 14 U. C. R. 305, *post* II.; *Schaffer* v. *Dumble*, 5 O. R. 716.

II. To Land.

1. *By and against Whom.*

See post 9.

(a) *Against.*

Contractor for Public Works—*Non-compliance with Statute.*]—The compulsory powers given to the government of Canada to expropriate lands required for any public work can only be exercised after compliance with the statute requiring the land to be set out by metes and bounds, and a plan or description filed; if these provisions are not complied with, and there is no order in council authorizing land to be taken when an order in council is necessary, a contractor with the Crown who enters upon the land to construct such public work thereon, is liable to the owner in trespass for such entry. *Kearney* v. *Oakes*, 18 S. C. R. 148.

Customer of Mill—*Interest in Work.*]—The plaintiff had workmen attending a steam mill. Defendant, being interested in getting saw logs cut up, entered and removed plaintiff's fireman and placed another man in his stead, and added several of his own workmen to those employed by the plaintiff. Owing to some mismanagement, the boiler burst:—Held, that there was evidence for the jury that defendant was a trespasser; and that whether he was responsible as such for the injury done to the boiler depended on the nature and extent of his influence, and how far he was implicated in the acts which caused the explosion. *Eligh* v. *Winters*, 5 C. P. 491.

Grantee of Easement—*Defeat of Grant by Non-registration—Continuance of Burden on Land—Successive Trespasses.*]—See *Ross* v. *Hunter*, 7 S. C. R. 289.

Innkeeper — *Apartment of Guest.*] — An innkeeper has the sole right to select the apartment for a guest, and, if he find it expedient, to change it and assign him another. He cannot be treated as a trespasser for entering to make the change. *Doyle* v. *Walker*, 26 U. C. R. 502.

Intending Purchaser—*Sheriff's Sale.*]—A sheriff having seized goods cannot lawfully sell them on defendant's premises without his permission, and any person going on the premises to purchase may be treated as a trespasser. *McMaster* v. *McPherson*, 6 O. S. 16.

Mortgagee of Chattels — *Liability for Deposit of, on Land—Continuing Trespass.*] —A mortgagee who has not taken actual possession, is not liable in trespass for any injury occasioned by the goods mortgaged. M. & Co., having wrongfully placed a quantity of stone on the plaintiff's land, afterwards mortgaged it with other property to defendant. Default had been made in payment, but defendant had not taken possession of or interfered in any way with the stone; when asked to remove it, however, he had refused, and forbidden the plaintiff to do so himself:—Held, that as mortgagee he was not liable to the plaintiff in trespass for allowing the stone to remain. *Campbell* v. *Reid*, 14 U. C. R. 305.

Municipal Corporation.] — Right to bring action for damages for trespass committed by municipality. *VanEgmond* v. *Town of Seaforth*, 6 O. R. 599.

Owner of Animal.]—Trespass q. c. f. will lie by the owner of a close against the owner of a pig which may break and enter and do damage. *Blacklock* v. *Millikan*, 3 C. P. 34. See, also, *Mason* v. *Morgan*, 23 U. C. R. 328.

Pathmaster—*Opening up Streets—Authority.*]—Defendant, a pathmaster, without any instructions from the municipal council, and in defiance of the plaintiff's warning, threw down the plaintiff's fences and ploughed up his land, in order to open up streets which were laid down on a plan of part of the plaintiff's land, made by a former owner, and found in the registry office; but it was not marked registered or filed, no sale was shewn to have been made according to it, and the streets had never been opened or used:—Held, that defendant was not acting within his jurisdiction, and was liable in trespass. *Crooks* v. *Williams*, 39 U. C. R. 530.

Person Authorized by Statute—*Abuse of Authority.*]—Where a statute gave power to certain persons to enter on lands near a bridge to quarry stone to repair the bridge, doing no unnecessary damage therein:—Held, that any abuse of power by excess was punishable in trespass. *Myers* v. *Howard*, 4 O. S. 113.

Trespass for destroying plaintiff's mill dam. Pleas justifying the removal of the dam in order to float down logs under 12 Vict. c. 87. The plaintiff replied that after the removal, &c., by defendants, they converted and disposed of the materials of the dam to their own uses:—Held, that such wrongful conversion was an abuse of the authority in law under which defendants acted, such as to render them trespassers ab initio. *Little* v. *Ince*, 3 C. P. 528.

Principal and Agent—*Joint Trespass.*] —See *Ferguson* v. *Roblin*, 17 O. R. 167.

Railway Company—*Assignees of—Right to Cut Timber.*]—Held, that the Crown timber licenses claimed by the plaintiff as licensee of the Ontario government were subject to the right of the Canada Central Railway Company, acquired before Confederation, to construct the road across the Crown lands over

which the licenses in question extended, and that the defendants, assignees of the railway company, were therefore not liable in trespass for entering upon and cutting timber on the said limits in prosecution of the work of building the said railway. *Foran* v. *McIntyre*, 45 U. C. R. 288.

(b) *By.*

Infant — *Next Friend.*]—The mother in possession of land belonging to the heir, a minor, may sue in trespass q. c. f., as the next friend of the minor. *Johnson* v. *McGillis*, 7 U. C. R. 309.

Owner of Equity of Redemption—*Mortgagee out of Possession.*]—Under the Nova Scotia Judicature Act the owner of the equity of redemption can maintain an action for trespass to mortgaged property and injury to the freehold, though after the trespass and before action brought he has parted with his equity. Mortgagees out of possession cannot, after their interest has ceased to exist, maintain an action for such trespass and injury committed while they held the title. *Brookfield* v. *Brown*, 22 S. C. R. 398.

Trustee.]—See *Brooke* v. *McLean*, 5 O. R. 269; *Adamson* v. *Adamson*, 7 A. R. 592. *post* 9 (c).

2. *Damages.*

Accrual after Action—*Crops.*]—In trespass to land, where the action was brought on the 7th May:—Held, that the plaintiff might recover to the extent of the ultimate injury resulting to the crop from the act complained of, as ascertained at the time of harvest. *Throop* v. *Fowler*, 15 U. C. R. 365.

Distress for Rent—*No Right to Distrain*—*Value of Goods.*]—The defendant leased certain land to the plaintiff for a term during which the latter was to make improvements, and at the expiration of the term the value of such improvements, as well as the amount of the rent, was to be fixed by arbitration. The defendant having distrained for rent:—Held, that there being no fixed rent agreed upon there was no right of distress, and the defendant was therefore merely a trespasser and liable in damages to the actual value of the goods, but not to double their value, as it was not a case within 2 W. & M., sess. 1, c. 5, s. 5, which refers to the wilful abuse of the power of distress. Semble, that, although there may be no rent in arrear until the same is fixed by arbitration, there cannot be said to be none due. *Mitchell* v. *McDuffy*, 31 C. P. 266, 649.

Excessive Damages.]—Where the damage consisted in cutting down some ten or twelve ornamental shade trees growing in the highway opposite the plaintiff's land, for which he was awarded $150:—Held, not excessive. *Douglas* v. *Fox*, 31 C. P. 140.

Interest of Tenant — *Estimate of Injury.*]—In an action of trespass to land, where the plaintiff is a tenant only, the duration of his term must be shewn, the measure of damages being the diminished value of his interest. The trespass complained of was removing a fence in May, 1866. The plaintiff's landlady swore that she leased the place to the plaintiff in November, 1865, and added, "plaintiff was my tenant when the rails were taken away, paying so much a year, taxes, and statute labour." There was no further evidence as to the nature of the lease or duration of the term:—Held, that the damages should not, as a matter of law, have been nominal only, but estimated on the injury the loss of the fence would cause to the plaintiff during the five or six months for which he then had a right to possession. *Fisher* v. *Grace*, 27 U. C. R. 158.

Nominal Damages — *New Trial.*] — In trespass to land the jury found for the plaintiff with only 1s. damages. The verdict was moved against for misdirection and smallness of damages: — Held, without deciding upon the correctness of the charge, that, if it had been unexceptionable and the verdict the same, the court would not have interfered; and, under s. 34 of the A. J. Act, 1874, they refused a new trial. *Smith* v. *Murphy*, 35 U. C. R. 569.

3. *Evidence.*

Executor—*Excess.*]—The assent of an executor to a legacy may be by implication as well as by express words: and where the testator devised his house to his wife for life, and also left her some personal property, and the executors in her absence entered the house to make an inventory of the property, and afterwards turned out her daughter and shut the house up:—Held, on trespass brought by the wife, that this was sufficient proof under the issue of excess. *Honsberger* v. *Honsberger*, 5 O. S. 479.

Judgment in Ejectment—*Variance.*]—In trespass for mesne profits brought by husband and wife, alleging a joint recovery, the recovery in ejectment was proved to have been on the demise of the wife alone:—Held, a fatal variance. *Ashton* v. *Keesar*, 5 O. S. 325.

In trespass for mesne profits, the variances set out in the case, between the judgment in ejectment pleaded and the one produced, were held fatal. *Garrion* v. *Woodruff*, 8 U. C. R. 328.

Occupation.]—Upon the plea of the close not being the close of the plaintiff, the plaintiff must prove an actual and immediate occupation of the locus in quo. *McNeil* v. *Train*, 5 U. C. R. 91.

Place — *Township.*] — In trespass q. c. f. and for destroying goods, the township in which the trespass is alleged to have been committed must be proved as laid. *Mattice* v. *Farr*, Tay. 218.

——— *Variance.*]—Where in trespass q. c. f. it appeared that the only injury complained of and proved was the destruction in part of a mill over the waters of a river, and not on the land in the declaration, a nonsuit was entered. *Canniffe* v. *Canniffe*, 1 U. C. R. 551.

Several Trespasses—*Joint Trespass.*]—If in trespass against several defendants the

plaintiff prove a joint trespass against all on one count, and then attempt but fail to prove a trespass against all on another count, he is still entitled to recover for the trespass first proved. *Watson* v. *Riordon*, 5 O. S. 322.

Time—*Continuando.*]—In trespass, where the entry is laid on a day certain with a continuando, the plaintiff, under "not guilty," is prevented from proving a trespass at an earlier period with a continuando, though he may waive the time laid, and recover for a single act of trespass at a more remote period. *Fairman* v. *Fairman*, 1 C. P. 435.

——— *Variance.*]—It is no objection to plaintiff's recovery that the only trespass proved was committed before the time laid in the declaration; and if there be any evidence of the identity of the premises, the court will not grant a new trial for want of sufficient evidence, when the damages are small and the justice of the case with the plaintiff. *Molloy* v. *Stansfield*, 2 U. C. R. 390.

Title and Possession.] — Where the plaintiffs at first relied upon a paper title, which turned out to be defective, they were afterwards allowed to give additional evidence of possession, and go to the jury upon that. *Boulton* v. *Shaw*, 10 U. C. R. 351.

Proof of a paper title is primâ facie sufficient to maintain trespass q. c. f. where the possession is vacant. *Ball* v. *Young*, 8 C. P. 231.

In trespass to land, under a plea that the land is not the plaintiff's, defendant is at liberty to shew title in himself or in another under whom he acted. *Gray* v. *Harding*, 21 U. C. R. 241.

Trespass q. c. f. Pleas, 3rd and 4th, that one E. W. was the owner of the locus in quo, and justifying by his authority and command. Upon the trial, the Judge having refused to admit evidence that E. W. had been in possession of the premises over twenty years, and that the defendant had obtained title through him, a new trial was ordered without costs. *McMillan* v. *McMillan*, 12 C. P. 158.

4. Injunction to Restrain.

See Grand Trunk R. W. Co. v. *Credit Valley R. W. Co.*, 27 Gr. 232; *Fenelon Falls* v. *Victoria R. W. Co.*, 29 Gr. 4.

5. Judgment in Trespass—Effect of.

Estoppel.]—A judgment in favour of the plaintiff in an action for trespass to lands, upon pleas (amongst others) of land not plaintiff's and liberum tenementum, is not a complete estoppel, preventing the defendant in another suit from questioning the plaintiff's title to any part of the lands. The judgment is only an estoppel with regard to the title of that portion of the land upon which it had been shewn that the defendant had trespassed. *Hunter* v. *Birney*, 27 Gr. 204.

6. Leave and License.

Ditches and Watercourses Act—*Invalid Award.*]—To an action for trespass on plaintiff's land, defendant pleaded justifying under an award by fence viewers, alleging that the plaintiff paid half the expense of the award as thereby directed, and that defendant, in pursuance of it, having first duly notified the plaintiff, entered on the plaintiff's land and opened the ditch there as directed by the award, doing no unnecessary damage:—Held, plea bad, as setting up a right which the award, being invalid, could not give; but that the facts might be found to support a plea of leave and license. *Dawson* v. *Murray*, 29 U. C. R. 464.

Fraud in Obtaining License—*Pleading.*]—Where in trespass defendant pleaded a license, which the plaintiff denied:—Held, that the plaintiff could not go into evidence that the license had been fraudulently obtained, but that the fraud should have been specially pleaded. *Slee* v. *Graham*, 2 U. C. R. 387.

Leave of Plaintiff's Daughter.]—The plaintiff declared in trespass, in the first count, complaining of breaking and entering his close and debauching his daughter, and in the second count for debauching his daughter only; and defendant pleaded to each count, as to all but the force and arms, &c., the leave and license of the daughter. The pleas were held bad, on demurrer. *Ross* v. *Merritt*, 2 U. C. R. 421.

Mortgage — *Growing Crops — Right of Entry—Conditional License—Default—Pleading.*]—Trespass to the south parts of lots 14 and 15, and taking and converting wheat and straw of the plaintiff. Plea, leave and license generally. In support of this plea, defendants proved a deed made by plaintiff, 20th February, 1846, whereby, in consideration of £28 received from defendant T., he bargained and sold to him, among other things specified, twenty acres of wheat then growing on the south part of lot 14, and in the plaintiff's possession. The plaintiff bargained and sold all the twenty acres of wheat, with the right of ingress and egress into and from lot 14, to harvest and remove the said twenty acres of wheat. Then followed a proviso, that if plaintiff should pay to T. £28 with interest, on a day named, the deed should be void. Plaintiff covenanted to pay the money, and it was stipulated that until default plaintiff might retain in his possession and use the goods and premises mortgaged, unless he should before the day of payment be sued by any other person, in which case T. might take and enjoy the said goods as his own:—Held, that defendants must fail under their general plea of leave and license, the deed giving no right of entry on lot 15. Semble, that if the license to enter on lot 14 gave a right to enter on lot 15 as being necessary to the privilege granted with respect to lot 14, the defendants should have in a special plea set forth the necessity. Held, that defendants must fail, also, because the license was not to enter and take the plaintiff's wheat, but to enter for the purpose of taking the defendants' wheat. Semble, also, plea bad, as the license proved was conditional and not absolute. There should have been a special plea shewing default in payment by plaintiff on day named. Semble, that the only right the deed gave the defendants, was to cut and carry away the wheat of the plaintiff; the defendants had no right to enter on the plaintiff's land and take the wheat away by force after it had been cut and stacked by plaintiff. *Lunn* v. *Turner*, 4 U. C. R. 282.

Part License.]—Where defendant pleads leave and license, he must prove a license co-extensive with the trespass, and the plaintiff need not new assign if the license was for part only. *Thompson* v. *Van Buskirk*, 14 U. C. R. 388.

Reservation of Right of Entry—*Parol Contract.*]—Declaration q. c. f. for cutting and removing trees, with a count in trover and the common counts. Pleas, leave and license; and a special equitable plea, setting up that the defendant, being owner of the land, contracted by parol to sell it to the plaintiff, and that at the time of such contract and of the conveyance of the land to defendant, it was expressly agreed that defendant should have certain trees thereon, and be at liberty to cut and remove them, but that such reservation should not be, and it accordingly was not, inserted in the conveyance; and that the defendant entered and cut the trees, &c., which are the trespasses, &c. Defendant, as a witness at trial, having proved the sale of the land, it was proposed to shew by him the agreement as set up in the equitable plea:—Held, that such evidence was improperly rejected, for that it was admissible both under the equitable plea and the plea of leave and license. *Walter* v. *Dexter*, 34 U. C. R. 426.

See McGinness v. *Kennedy*, 29 U. C. R. 93.

Several Trespasses—*Revocation in Interval between.*]—The declaration charged the trespasses, breaking down fences, &c., as committed on divers days and times. Defendant pleaded leave and license. It appeared that part of the fence was removed under a license, and the remainder after it had been revoked, the interval from the first to the last removal being two or three years:—Held, that the plaintiff was entitled to succeed, though it would have been otherwise if the declaration had only charged the trespasses as committed on the same day, for defendant could then have applied the license to the only trespass charged. *Marrs* v. *Davidson*, 26 U. C. R. 641.

Sheriff — *Sale of Goods—Revocation.*]—Where the sheriff had seized goods under a fi. fa. and allowed them to remain on defendant's premises, on the understanding that they should be sold there on a future day if the money were not paid before, the license thus given to enter on the premises and sell the goods accordingly cannot be revoked by defendant. *McGillis* v. *McMartin*, 1 U. C. R. 145.

Survey — *Agreement—Boundary in Dispute.*]—In trespass q. c. f. it appeared that, about 12 years before, one W., defendant's tenant, having moved the fence between plaintiff and defendant, an agreement in writing was entered into between W. and the plaintiff, that they would employ B., a surveyor, to establish the original line between lots one and two, and would be bound by it; and defendant, by a memorandum signed by him at the foot of this agreement, agreed to abide by it. The land in dispute was then in W.'s possession, and it was alleged that B. had not completed his survey:—Held, no evidence to support defendant's plea of leave and license. *Crosswaite* v. *Gage*, 32 U. C. R. 196.

See Munn v. *Galbraith*, 13 C. P. 75.

7. Other Justifications.

Agreement — *Entry to Take Crop—Statute of Frauds.*] — Declaration for breaking and entering the plaintiff's close and cutting and carrying away the grain. Plea, on equitable grounds, that the plaintiff held the land under an indenture of lease from defendant, on the negotiation for and execution of which it was orally agreed between them, and the true agreement was, that defendant should have the right to enter and harvest the crop then in the ground sowed by him; that when the lease was executed a reservation of such right in it was suggested, but omitted on the plaintiff's assurance that it was unnecessary, as the agreement between them was well understood, and defendant would be allowed to take the crop; and that the entry, &c., in pursuance of such agreement, is the trespass complained of:—Held, that the plea was good, for the independent oral agreement, made in consideration of defendant signing the lease, was good as an agreement, though defendant by s. 4 of the Statute of Frauds might be prevented from suing on it; and, as equity in such a case would decree specific performance, there was ground for a perpetual injunction against this action. Quære, whether the plea was not also a justification at law, as under an agreement which was valid to protect the defendant, though he could not have enforced it by action. *McGinness* v. *Kennedy*, 29 U. C. R. 93.

See also *Walter* v. *Dexter*, 34 U. C. R. 426.

Demise from Tenant in Common.]—In an action of trespass alleging the land to be the plaintiff's, and that defendant ejected the plaintiff and took all the issues and profits, defendant justified under a demise from one M., who, he alleged, was seised in fee as a tenant in common of the land. The plaintiff excepted to the plea:—Held, that the plea was good, as setting up title in a third party, for the plaintiff brought his action as owner of the whole, and not against defendant as cotenant. *Herr* v. *Weston*, 32 U. C. R. 402.

Entry for Removal of Building—*Estoppel—Fixture.*]—Declaration, for entering plaintiff's land and dwelling house thereon, and removing the house therefrom and converting it to defendant's use. Plea, to so much of the count as refers to the dwelling house, that before plaintiff became possessed and owner of the lot, defendants placed the said dwelling house thereon, so that it might thereafter be removed by them, not affixing it to the land; and defendants afterwards, and while the land was unenclosed and used as a common, and the house open and unoccupied, in the daytime, peacefully entered the lot and removed the dwelling house, the same being their property, and placed it on their own land, which are part of the trespasses complained of. Replication, that defendants should not be allowed to plead said plea, because they were entitled to an interest in said land and built the house on the land and occupied it, and afterwards, and before the trespasses, &c., by deed conveyed the land, with the appurtenances, to A., who conveyed to plaintiff:—Held, plea bad, as shewing no justification for the trespass admitted; replication good, by way of estoppel. *Cameron* v. *Hunter*, 34 U. C. R. 121.

Execution against Tenant—*Sale of Interest to Landlord.*] — Trespass for breaking

and entering plaintiff's house. Pleas: (2) that the house was not plaintiff's; (3) as to the breaking and entering, liberum tenementum; as to the expulsion, that the house was defendant's, and plaintiff and his family being there unlawfully, he expelled them, using no unnecessary force. Replication, that defendant had demised the premises to plaintiff for a term, under which plaintiff entered; and being so in possession defendant expelled him. Rejoinder, that the plaintiff's interest in the premises was sold under a fi. fa. against his goods, and purchased by defendant; and thereupon the sheriff by deed assigned the plaintiff's interest to defendant, and delivered possession of the premises to him; and because the plaintiff was unlawfully there at the said time when, &c., and refused to leave, the defendant ejected him, using no unnecessary force:—Held, a good rejoinder. *Stroud* v. *Kane*, 13 U. C. R. 459.

Execution against Tenant in Common —*Pleading.*]— Where, in trespass quare clausum fregit et de bonis asportatis, by one of two tenants in common, it was proved that the defendant entered upon the land under a writ of execution against the goods of the other tenant:—Held, that such entry could not be given in evidence under the general issue, but should be specially pleaded. *Neickirk* v. *Payne*, 6 O. S. 458.

Justices' Warrant — *Forcible Entry.*]— In trespass q. c. f. defendant pleaded that the plaintiff complained of a forcible entry and detainer under the statutes, and the justices summoned a jury and heard the complaint and made a warrant for restoring the plaintiff to his possession, and that this was the trespass complained of:—Held, bad. *Boulton* v. *Fitzgerald*, 1 U. C. R. 343.

Obstruction to Navigation — *Unavoidable Injury to Bridge—Several Trespasses—Pleading—Verdict.*]—The first count of the declaration alleged that defendant had wrongfully and injuriously cut away, removed, and destroyed a bridge belonging to plaintiffs. The second count alleged a highway between two townships, intercepted by a river, over which plaintiffs, in performance of their duty, had, at large cost, built and maintained a bridge, which defendant, contriving to injure plaintiffs, had wrongfully cut down, destroyed, removed, and carried away, thereby obstructing said highway; whereby plaintiffs had become liable to rebuild and had rebuilt the same, at large cost to themselves. Defendant pleaded to both counts, "not guilty," and a denial that the bridge was plaintiffs' property; and, for a third plea, to both counts, a justification, alleging that the said river was and had always been a navigable stream at the place, &c., for conveyance of logs and timber, and defendant, with others, had been accustomed to use it for such purpose; and during certain freshets defendant was, with others, so engaged, and was obliged to pass that part of the river crossed by the bridge, which obstructed the navigation, and prevented the passage of defendant's timber; and whilst the bridge so obstructed the navigation, and though the defendant used due care and skill, said timber ran against the same, and unavoidably cut, broke, and destroyed the same, which were the injuries and trespasses complained of. On these plaintiffs took issue. Defendant in effect succeeded upon his plea of justification, the jury having found a verdict for plaintiffs for $20, for the mere removal by defendant's servants of a pier and stone belonging to the bridge, on a day subsequent to the destruction of the bridge by the timber, which had been justified:—Held, that defendant, having pleaded the general issue to the first and second counts, and a denial of plaintiffs' property in the bridge, was not entitled to a nonsuit, as the issues on these pleas had been properly found for the plaintiffs. Held, also, that it was not necessary to new-assign the injury to the pier; for, there being two counts in the declaration, and the injury in question not being part of one continuing trespass, but a distinct act done at another time after the destruction of the bridge, evidence thereof might be given under, and the verdict therefor sustained on, the second count of the declaration. The evidence shewed that defendant's servants cut away a portion of the bridge on the first day that the timber collided with it, while the only cutting justified by the plea was that caused by the timber. Quære, whether the plea justified the whole trespass charged in the first count, for if not, semble, that the verdict might be sustained on that count; but quære, whether the first cutting away was so distinct an act of trespass as to have enabled plaintiffs to recover on that count, in the face of the finding of the jury as to the facts mentioned in the special plea. *Township of Thurlow* v. *Bogart*, 15 C. P. 601. See, also, *S. C., ib.* 9.

Prevention of Breach of Peace.]—To trespass for breaking and entering the plaintiff's house, defendant pleaded that the plaintiff was violently assaulting his (plaintiff's) wife and child, and that he entered to prevent the plaintiff committing the said breach of the peace:—Held, plea bad in substance. *Rockwell* v. *Murray*, 6 U. C. R. 412.

Right of Way—*Removal of Fence—Cattle Straying — Pleading.*] — Declaration, for breaking and entering the plaintiff's close, part of the east half of a lot in the township of Blanchard. Plea, that defendant leased the land to plaintiff, by a deed in which it was covenanted that defendant should have a road along the west side of the premises, extending from the highway at the south to defendant's land at the north; that at the time of the demise there was a fence on the east side of this road, which fence the plaintiff covenanted to keep in repair, but that he did not do so, whereby, and without defendant's default, defendant's cattle strayed from the road on to the plaintiff's land, which are the alleged trespasses. On this the plaintiff took issue:—Held, that the removal of the fence by plaintiff, as stated in the report, would primâ facie excuse a trespass extra viam, which the plea admitted, and that, if defendant's consent to such removal would prevent him from setting it up as a wrongful act, the consent should have been replied. Held, also, that, as it was necessary to take down the north fence to use the right of way, this act justified the single act of trespass charged, and the plaintiff should have new-assigned, if he relied upon excess in the quantity taken down, or in leaving the space open too long. The plaintiff, therefore, on the pleadings and evidence, was held not entitled to recover. *Pickard* v. *Wixon*, 24 U. C. R. 416. See, also, *S. C.*, 25 U. C. R. 307.

Search for Stolen Goods.]—Trespass q. c. f. upon the dwelling house of the plaintiff, without reasonable or probable cause, and un-

der a false and unfounded charge that the plaintiff had stolen property in his house, searching and ransacking same, and making disturbance, &c. Plea, that before the alleged trespasses, as to the alleged breaking and entering of plaintiff's dwelling house, certain goods of one W. were feloniously stolen by some person unknown, and were believed to be in said dwelling house, with plaintiff's knowledge that they were so stolen; and defendants having such belief, and the plaintiff having been seen in possession of same, defendants, at the request of said W. and in his aid, immediately after the theft of same, in the daytime, broke and entered the said house, the outer door being open, for the purpose of searching for said goods, and there in said house did search for and find said goods, which were then given up by plaintiff to defendants as goods of said W., which are the trespasses, &c.:—Held, plea good, it clearly appearing from it that the goods were stolen; that they were in plaintiff's house (being found there); and that they were taken by defendants at the owner's request and in his aid, immediately after the theft, the outer door of the house being open. *Rayson* v. *Graham*, 15 C. P. 36.

Statute — *Direction of Commissioner of Public Works—Drainage.*] — Declaration for trespass to plaintiff's land, and throwing down the fences, hauling earth, and stopping up the watercourses thereon. Plea, that before the commission of the alleged grievances the commissioner of public works for Ontario, under and in pursuance of 32 Vict. c. 28 (O.), had taken possession of said land, fences, and watercourses, the same being in his judgment necessary for the construction of a certain drain, being a public work within said Act; and thereupon said commissioner directed defendant to construct a drain to and past this land; and defendant in the construction of said drain entered upon said land so taken possession of, and in the necessary prosecution of said work threw down said fences, and deposited the earth from said ditch on the plaintiff's land, and filled up the watercourses thereon, the same being necessary for the construction of said drain, which are the alleged trespasses:—Held, a good plea: for it must be taken to mean that the commissioner had lawfully taken possession in accordance with the Act, having complied with all requisite preliminaries. *Bury* v. *Britton*, 32 U. C. R. 547.

——— *Rideau Canal Act.*]—If a defendant rest his defence on his acting under the Rideau Canal Act, he should be prepared to prove that the act he justifies was regularly done under the statute, and not rely merely on his being employed in the construction of the canal. *Phillips* v. *Redpath*, Dra. 68.

Surrender of Term—*Denial of Title.*]—Defendant in trespass failing to prove the surrender of a term of years from the plaintiff to himself upon an issue arising out of a plea of liberum tenementum, may nevertheless consistently hold a general verdict upon another issue denying the close to be the plaintiff's. *McNeil* v. *Train*, 5 U. C. R. 91.

Survey of Adjoining Lands.]—A surveyor sued in trespass cannot justify an entry upon the lands of one neighbour for the purpose of making a mere private survey for another neighbour. *Turnbull* v. *McNaught*, 14 C. P. 375.

Writ of Possession.]—Where in trespass q. c. f. defendant attempted to justify under a writ of possession under the old practice, the court held that the justification was not complete, without shewing that the plaintiff had been connected with the proceedings in ejectment. *Reeves* v. *Meyers*, 1 U. C. R. 462.

——— *New Assignment—Verdict.*]—Where in trespass q. c. f., defendant justified under a writ of possession, and the plaintiff new-assigned a trespass to other closes, to which the defendant pleaded not guilty, and at the trial only one trespass was proved:—Held, that the justification was sufficient; and the plaintiff having obtained a verdict, a new trial was granted. *Marsh* v. *Meyers*, E. T. 4 Vict. See, also, *Reeves* v. *Meyers*, 1 U. C. R. 462.

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8. *Pleading.*

See ante 3, 6, 7.

(a) *Declaration.*

[As to description of premises, see R. G. T. T. 1856, No. 18.]

See Henderson v. *Harper*, 1 U. C. R. 528; *Stanton* v. *Windeat*, 1 U. C. R. 30; *Loring* v. *Clement*, 1 C. L. Ch. 58; *Powell* v. *Currier*, 9 U. C. R. 352; *Armstrong* v. *Hamilton*, 1 C. L. Ch. 38; *Beatty* v. *McMasters*, T. T. 2 & 3 Vict., R. & J. Dig. 3776; *Church* v. *Foulds*, 9 U. C. R. 393, *post* 9 (b).

(b) *Pleas.*

Accord and Satisfaction—*Reference to Arbitration—Surplusage.*]—See *Hall* v. *Warner*, 2 U. C. R. 392.

Liberum Tenementum.]—See *Munn* v. *Galbraith*, 13 C. P. 75; *McNeil* v. *Train*, 5 U. C. R. 91, *ante* 7; *Dundas* v. *Arthur*, 14 U. C. R. 521, *post* 9 (c).

——— *Asportavit.*]—See *Wilcox* v. *Montgomery*, 5 O. S. 312.

——— *Bar to Part.*]—See *Ostrom* v. *O'Connor*, 3 O. S. 571.

——— *Dwelling House.*] — See *Vail* v. *Noble*, 2 U. C. R. 142; *Crosby* v. *Roesor*, *ib.* 183.

"Not Guilty"—*Dispute as to Boundary.*]—See *Ball* v. *Young*, 8 C. P. 231; *Manary* v. *Dash*, 23 U. C. R. 580; *Weaver* v. *Hendricks*, 37 U. C. R. 1; *Dark* v. *Hepburn*, 27 C. P. 357.

——— *"Not Plaintiff's Close"*—*Leave and License—Liberum Tenementum.*]—See *Munn* v. *Galbraith*, 13 C. P. 75.

"Not Plaintiff's Close"—*"Not Plaintiff's Chattels"—Plea to Part.*]—See *Lambe* v. *Teeter*, 20 U. C. R. 82.

"Not Possessed" — *"Not Plaintiff's Close."*] — See *Johnstone* v. *O'Dell*, 1 C. P. 395.

(c) *Replications.*

Crown—*Title of—Highway*]—In trespass q. c. f., to a plea of soil and freehold in the King, over which was a public allowance for road or highway, plaintiff replied that the soil and freehold were his and not that of the King, modo et formâ:—Held, that this replication put in issue the existence of a public allowance of which the soil and freehold were in the King. *Helliwell* v. *Eastwood*, 5 O. S. 104.

Demise—*Master and Servant.*]—As to the proper mode of pleading an alleged demise from the Toronto Club of certain rooms and apartments in the club house to a servant or steward of the club, who relied upon the said demise as giving him an exclusive possession upon which he could maintain trespass:—Semble, that under the demise as set forth in the replication, an action of trespass could not be sustained. If the servant had been improperly dismissed, he should have sued in assumpsit for a breach of contract, not in trespass for taking possession of his apartments. *Williams* v. *Herrick*, 5 U. C. R. 613.

Precludi non.]—Trespass q. c. f. Plea, as to the breaking and entering the south-east quarter of said lot, liberum tenementum as to that part. Replication, precludi non, because the trespasses sued for were committed in different parts of the close from that mentioned in the plea; without this, that the close in which, &c., in the declaration mentioned, was the freehold of defendant:—Held, replication bad. *Ross* v. *McConaghy*, 13 U. C. R. 444.

Re-affirmance of Declaration.]—To a declaration setting out the close by metes and bounds, defendant pleaded that the part of the close on which the trespass was committed was his close, and the plaintiff replied that the close mentioned in the declaration was his close, and not defendant's, as stated in the plea. Replication:—Held, good, on special demurrer. *Hiscott* v. *Cox*, 1 U. C. R. 489.

See Waddell v. *Corbett*, 25 U. C. R. 234, *post* (d).

(d) *Subsequent Pleadings—New Assignments.*

[*See* R. S. O. 1877 c. 50, ss. 123, 124; con. rule (1897) 284.]

Plea to New Assignment — *Right of Way—Variance.*]—Where in trespass q. c. f. the plaintiff set out the close by different abuttals in two counts, and defendant justified under a right of way; setting out the abuttals of the way in his plea, and the plaintiff new-assigned the trespasses in other and different parts of the closes, and out of the right of way; and defendant pleaded a right of way to the new assignment, setting it out as running between the closes mentioned in the declaration, but did not state that it was another and a different highway from that mentioned in the plea to the declaration, the plea to the new assignment was held bad on special demurrer. *Hodgkinson* v. *Donaldson*, 2 U. C. R. 539.

Prolixity — *Departure — Inconsistency.*]—Trespass q. c. f. Plaintiff declared for trespasses to his close, describing it. Defendant pleaded soil and freehold to the whole close. Plaintiff replied a demise of the whole to himself from defendant. Defendant, admitting the demise, rejoined leave and license from plaintiff to commit the trespasses complained of. Plaintiff traversed the alleged consent or leave, and new assigned trespasses on other occasions, and for other purposes, but adhered to the same close. Defendant again pleaded soil and freehold to the new assignment:—Held, on demurrer to such plea, that it was bad, as tending to endless prolixity, as being inconsistent with the previous pleadings, and as being a departure therefrom. *Brougham* v. *Balfour*, 3 C. P. 114.

Real Cause of Action.]—Trespass q. c. f. Pleas, by defendants C. and M., justifying under a writ of hab. fac. issued at the suit of defendant G. and delivered to C. as sheriff, who made a warrant to M. as his bailiff, under which M. entered and expelled the plaintiff. The plaintiff replied that defendant C., as sheriff, executed the writ himself, by entering and expelling the plaintiff, before giving the warrant to M.:—Held, replication bad, for that the plaintiff's proper course was to new-assign, so as to enable defendants to justify or deny the real cause of action. *Waddell* v. *Corbett*, 25 U. C. R. 234.

Several Trespasses — *Justification of All.*]—A new assignment of a different trespass from that justified, when the plea justifies all the trespasses complained of, is bad on special demurrer. *Cameron* v. *Lount*, 3 U. C. R. 453.

Single Trespass — *Amplification — Denial.*]—The effect of a new assignment where but one trespass has been complained of. Plaintiff must not in his replication amplify the cause of action declared on, nor can he deny the justification wholly, and at the same time reply excess. *Spalding* v. *Rogers*, 1 U. C. R. 135.

——— *Highway—Excess.*] — Plaintiff declares q. c. f., &c., and in a second count for assault and battery. Defendant pleads to the first count, a public highway across the close, and that the plaintiff having wrongfully shut up the same, he removed the obstruction. To the second count, public highway across plaintiff's close; and that defendant passing over the same was prevented by plaintiff, and molliter manus imposuit. Plaintiff replies to these pleas, traversing the highway as alleged, and then assigns for trespasses at other times, and for unnecessary damage. Defendant pleads not guilty to the new assignment:—Held, that defendant, having established a right of way, as alleged, and only one trespass being proved, which was committed in the said highway, and without excess, is entitled to a verdict. *Smith* v. *Ingoldsby*, 9 U. C. R. 207.

Time—*Single Trespass—Nonsuit.*] — Declaration in one count for breaking, &c., on the 20th November, 1845. Defendant justifying as assignee under a commission of bankruptcy against the plaintiff. Plaintiff new-assigns other trespasses committed on the said 20th November, 1845; to which defendant pleads "not guilty." At the trial the plaintiff proved but one trespass committed:—Held, that under the pleadings the plaintiff should be nonsuited. *Henderson* v. *Beckman*, 4 U. C. R. 150.

Time and Place—*Necessity for Stating.*]—It is not necessary in a new assignment in

trespass to state time and place; it is sufficient to allege that the trespasses complained of were committed at other and different times and on other and different occasions, than as in the plea mentioned. *McGillis* v. *Martin*, 6 O. S. 495.

See Marsh v. *Meyers*, E. T. 4 Vict., R. & J. Dig. 3782; *Pickard* v. *Wixon*, 24 U. C. R. 416; *Township of Thurlow* v. *Bogart*, 15 C. P. 601; *Thompson* v. *VanBuskirk*, 14 U. C. R. 388.

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9. *Title and Possession—Status to maintain Trespass.*

(a) *Erroneous or Disputed Boundary.*

Constructive Possession—*Part Actually Occupied.*]—Where there is no actual title or claim of title, the occupant is not constructively in possession of more land than his occupation covers, and to this occupation when suing in trespass he will be strictly limited. *Lake* v. *Briley*, 5 U. C. R. 136.

Trespass q. c. f., describing the locus in quo by metes and bounds and as part of "what has heretofore been known as lot 15, 1st concession, Delaware." Defendant proved no title. The plaintiff claimed by possession, and it appeared that more than twenty years ago, relying on a survey, he had fenced in a part of defendant's lot 14 in the broken front concession. This fence, if continued, would have included the part in question, but it had never been extended to any part of lot 14 in the 1st concession:—Held, that the plaintiff had no such possession of the locus in quo as would entitle him to recover. *Weld* v. *Scott*, 12 U. C. R. 537.

New Survey — *Consent to New Line — Evidence.*]—Plaintiff's and defendant's lands were separated by an old fence, which, though decayed and fallen, had remained from its erection, upwards of twenty years. The lines were properly run out by a surveyor, when it was ascertained that plaintiff's fence should be put some distance upon the land in defendant's possession, which defendant had agreed to, if he could obtain a corresponding quantity of land on the other side of the lot, which the owner on the trial swore he had consented to give to defendant. Plaintiff erected a portion of a fence along the new line, which defendant pulled down, and assaulted plaintiff and beat him:—Held, that there was evidence sufficient, if believed, to warrant a finding that plaintiff had entered with defendant's consent, and therefore plaintiff was lawfully on the locus in quo. *Curtiss* v. *Townsend*, 6 C. P. 255.

——— *General Entry—Sufficiency.*]—The lines having been run by a provincial land surveyor between plaintiff's and defendant's lot, it was found that defendant had encroached on a small portion of plaintiff's land, which he refused to give up:—Held, that the general entry of plaintiff on his lot, before the defendant had encroached thereon, was sufficient to entitle him to maintain this action, without proof of entry on the part in possession of defendant. *O'Hearn* v. *Donnelly*, 13 C. P. 513.

——— *Possession thereafter—Sufficiency.*]—Plaintiff and defendant owned adjoining lots with a fence between them, supposed to be on the true division line. A correct line was however run, and defendant found to be encroaching some acres on the plaintiff. The plaintiff took possession of the disputed piece, under a protest from the defendant, and cultivated it. When the crop was fit to cut, defendant entered and took it away:—Held, that the plaintiff had such a possession as would enable him to maintain trespass. *Gallagher* v. *Brown*, 3 U. C. R. 350.

——— *Title by Possession—Revocation of License.*]—The plaintiff and defendant, adjoining proprietors, on lots 18 and 17 respectively, and those through whom they claimed, had occupied up to 1867 according to the fence, which had been the boundary between them for thirty years. In that year a survey was made, by which the line was placed farther to the east. F., through whom the plaintiff claimed, then owned to the north of the plaintiff in lot 18, and one O., through whom the defendant claimed, owned the land opposite to them in lot 17. In 1868 F. moved his fence on to the new line. He said that O., in 1867, told the plaintiff he might occupy the strip between the old and the new line, and in 1868-9 the plaintiff cut grass on this strip. O. afterwards sold to one J., who occupied up to the old line, and sold to defendant. The plaintiff, in 1872, moved the fence to the new line, and defendant immediately replaced it, for which the plaintiff brought trespass:—Held, that he could not recover, for the defendant had acquired a title by possession, and O.'s permission to the plaintiff was at most a mere license, which was revoked by his sale to J., and never gave the plaintiff possession so as to entitle him to maintain trespass. *Cole* v. *Brunt*, 35 U. C. R. 103.

(b) *Trespass to Timber and Trees.*

Devisees—*Necessity for Entry.*]—A testator by his will directed his executors to pay all his debt, &c., out of his estate. Then followed specific devises of his estate to his wife, children, and nephews, and a direction to his executors to sell the chattels, excepting the household furniture bequeathed to his wife, and out of the proceeds to pay the debts and to invest the balance for the benefit of the wife and children. By a codicil he directed his executors, if necessary, to sell in the first place lot A, specifically devised as aforesaid, to pay off any debts or incumbrances against his estate; and in the event of such sale being insufficient to pay said debts, &c., then in the next place to sell and dispose of lot B, also so specifically devised. The executors, before disposing of lots A and B, sold to defendant the growing timber on lot C, a lot specifically devised to the plaintiffs, the defendant purchasing in good faith and on his solicitor's advice that the executors had the right to sell to pay debts; and defendant entered and cut down and carried away the timber. Subsequently the defendant purchased the land from the mortgagees thereof, the land having been mortgaged by testator. The plaintiffs, at the testator's decease, were under age, and did not become of age until after the trespass complained of, when they brought trespass against defendant, claiming as damages the value of the timber so cut. There was no entry or possession taken by plaintiffs before action commenced:—Held, that by reason of there being no such entry or possession the action was not maintainable. To entitle the plaintiff

to recover either at law or in equity, an entry upon the land by the plaintiff's must have been made at a time when they had a right to make such entry to carry the legal possession with it. *Baker* v. *Mills*, 11 O. R. 253.

Landlord—*Lease of Land without Reservation.*]—The plaintiff charged defendant with cutting down and carrying away trees. It appeared that the plaintiff had leased the land to C., making no reservation or mention of the trees:—Held, that on this declaration the plaintiff could not recover. *Roys* v. *Cramer*, 12 U. C. R. 165.

——— *Tenant Cutting Trees.*]—A landlord may maintain trespass against his tenant for the value of trees cut down and carried away by him, and which were not demised to him, though growing on the land which the tenant held. *Chestnut* v. *Day*, 6 O. S. 637.

Municipal Corporation—*Trees on Highway.*]—Held, that a township corporation, without having passed any by-law on the subject, could maintain trespass for cutting and carrying away trees growing upon government allowances for roads; for the power to pass by-laws for preserving or selling such trees gave them also a right to recover from a wrongdoer their value, which right might be exercised without any by-law. *Township of Burleigh* v. *Hales*, 27 U. C. R. 72.

Owner of Land—*Adjacent Land—Confusion of Property.*]—The plaintiff had cut timber on lot 24, which was his, and on lot 25, believing that he owned both lots; and all had been drawn away together by him to a lake about three miles distant. Defendants' agent took away a quantity, which had been cut on both lots, being forbidden by the plaintiff, who swore that he could have distinguished the timber cut on each lot by the marks, and told defendants' agent so, but that the agent said he would take it, no matter where it came from:—Held, in the court of Queen's bench, that defendants were liable in trespass for the timber cut on lot 24. The authorities as to confusion of property reviewed. On appeal this decision was reversed, and the defendants held not liable, on the ground that the plaintiff was a wrongdoer in taking the timber from lot 25, though under the belief that it was his own; that, upon the evidence, there was a confusion of property of substantially the same quality and value, which prima facie entitled defendant to take out of it his own proportion; and that, if the plaintiff could distinguish his own from the defendants', it was his duty to point it out, or offer to point it out to defendants, which he had not done, or shewn a sufficient excuse for omitting. *Lawrie* v. *Rathbun*, 38 U. C. R. 255.

——— *Necessary Averment.*]—When plaintiff declared in trespass, for that defendant on, &c., with force and arms, felled, &c., the trees, viz., 115 oak trees of the plaintiff's then growing and being in and upon certain lands in the county of Middlesex (not saying his own land), the court refused to arrest the judgment, on the ground that the plaintiff could not sue for cutting down growing trees as for an injury to chattels, but that the action should have been for trespass to real property, laying the destruction of the trees as aggravation. *McMillan* v. *Miller*, 7 U. C. R. 544.

Patentee—*Trees Cut before Patent.*]—In an action for cutting timber on the plaintiff's land, the plaintiff, to prove title, produced the patent to himself, giving no proof of any prior right by license of occupation or lease from the crown:—Held, that his title must be presumed to have begun only at the date of the patent, and that he could not recover damages for trees cut before that day. *Nicholson* v. *Page*, 27 U. C. R. 318.

Purchaser of Land — *Agreement — Entry.*]—The plaintiff contracted with one L. for the purchase of a lot of land, and paid part of the purchase money. The agreement between them contained these words: "It is understood that the said C. has now possession, full control, and enjoyment of the said premises from this time forward; and that, if any person be now occupying the said premises, the said C. is to have full control thereof in all respects the same as if occupied by original bargain with him; also, that said C. assumes the said L.'s situation in respect thereto in full." When this arrangement was made, one J. was living on the place by L.'s permission. The plaintiff went upon the land, and found several persons employed by defendant in cutting timber there; he informed them and J. of his purchase, and forbade further trespass. J. was also desired by him to go off the place, but refused. Defendant rested his defence upon J.'s right to sell him the timber, which was not sustained upon the evidence:—Held, that the plaintiff might maintain trespass against defendant or J. for anything done illegally after his entry, if not for all done after he had purchased. *Church* v. *Foulds*, 9 U. C. R. 393.

——— *Agreement — Entry—Constructive Possession—Interest of Vendor—Release.*]—On the 18th November, 1878, one Q., acting as agent for St. G., under a power of attorney which empowered him only to protect and lease St. G.'s lands, but not to sell, agreed with the plaintiff to sell him a wild lot, the purchase money to be paid by ten yearly instalments, and time to be of the essence of the agreement. The plaintiff paid only one instalment, which Q. said he forwarded to St. G., who ratified the agreement. Shortly after the agreement the plaintiff, with Q.'s permission, went on the lot and cut and removed some timber therefrom, and some two or three days afterwards went back and worked half a day underbrushing, but did no further clearing, except to cut timber for firewood. The defendants C. and S., under a mistake as to the plaintiff's boundary, trespassed on the land by cutting timber thereon, but on the boundaries being settled they offered plaintiff compensation, though C. said his offer was for the plaintiff's interest in the land. The plaintiff was in default with St. G. when the action was brought, but not when the trespasses were committed:—Held, that there was sufficient evidence of plaintiff's title as against St. G., for the evidence shewed a partly performed agreement which could have been enforced: and, even if the proof of St. G.'s title was defective, the admissions of the defendants C. and S., who were mere trespassers, were sufficient evidence of title to constitute plaintiff's acts of entry on the land constructive possession of it by him; and the onus was on the defendants of shewing either that St. G. had no title, or that any title acquired by the plaintiff under him had been lost. Held, also,

that although by the agreement time was of the essence thereof, and there was default made, there was no default when the trespasses were committed, and defendants not claiming under St. G. could not set up his right to avoid the agreement, but, as it was suggested that St. G. might also bring an action for the same trespasses, a release therefrom him was directed to be filed. With respect to two other defendants, P. S. and F., the verdict was set aside, for not only was there no evidence against them, but the record was defective in that an interlocutory judgment had been signed against them for non-appearance, without their having been declared against. *Johnston* v. *Christie*, 31 C. P. 358.

——— *Entry—Property in Trees.*]—Trespass q. c. f. and destroying fences, trees, and buildings. Pleas, "not guilty," and that the fences and buildings were not plaintiff's. The question being whether the plaintiff could maintain this possessory action before actual entry:—Held, that as to the fences and buildings the plaintiff could not succeed, but as to the land itself and the destruction of the trees he could, the defendants not having denied his property therein. *Jowett* v. *Haacke*, 14 C. P. 447.

——— *Revocation of License—Notice.*]—Defendant, in writing, agreed with plaintiff to take a certain saw mill according to the terms of a certain lease to the plaintiff, and with a provision that he was to take the pine off the land known as the S. lot first, as the said plaintiff was bound to take off the same. The plaintiff subsequently purchased the fee simple of the S. land:—Held, that the plaintiff was entitled to revoke any license implied by such agreement, and to maintain trespass against defendant for removing from the lot formerly owned by S., pine saw logs, after notice forbidding such removal. *Campbell* v. *Howland*, 7 C. P. 358.

Purchaser of Timber — *Clearing.*]—A person clearing land under an agreement to receive the wood in payment of his labour may maintain trespass against the owner of the land for taking away the wood after it is cut down, although he has no possession in the land to enable him to maintain trespass quare clausum fregit. *Hamilton* v. *McDonell*, 5 O. S. 720.

——— *Limited Rights.*]—Where a plaintiff has a right to cut down a limited number of trees upon land, and not the exclusive right to cut all the trees, he has not that possession of the land which will entitle him to bring trespass q. c. f. *Monahan* v. *Foley*, 4 U. C. R. 129.

——— *Privilege—Agreement.*]—The plaintiff had purchased from the Canada Company all the merchantable timber on a certain lot, and held a letter from them authorizing him to enter upon the land and mark whatever trees he might choose, and afterwards to cut and carry them away:—Held, that he could not sustain trespass qu. cl. fr. Quære, whether he could support an action on the case against a trespasser for interfering with his privilege, or would be compelled to look to the company, treating their letter as an agreement. *Perry* v. *Buck*, 12 U. C. R. 451.

See Mann v. *English*, 38 U. C. R. 240.

(c) *Other Cases.*

Agreement to Work on Shares—*Effect of.*]—Where the plaintiff and defendant being each possessed of a farm agreed to work them together and divide the profits arising from them at the end of the season, and before the harvest defendant was dispossessed of his farm by ejectment, and the plaintiff thereupon gave him notice that he would not divide his crops with him, notwithstanding which the defendant entered the plaintiff's farm and took away his share of the crop:—Held, that the plaintiff could not maintain trespass against him. *Wemp* v. *Mormon*, 2 U. C. R. 146.

Crown Grant — *Entry.*] — The King's grant enables the grantee to maintain trespass without actual entry. *Clench* v. *Hendricks*, Tay. 403. See, also, *Weaver* v. *Burgess*, 22 C. P. 104.

Crown Lands—*Entry on—Crops — Prior Wrongdoer.*] — Where A., the owner of land, encroached upon an adjoining lot of the Crown, and took three successive crops off it without any permission; and another person who had taken possession of the same land, also without license, about ten years before, and paid taxes and made clearings on it, warned off A. after he had taken the third crop, and then cropped the land himself:—Held, that A. had no property or possession to maintain trespass against him for that crop. *Killichan* v. *Robertson*, 6 O. S. 468.

——— *Possession—Privity — Stranger.*]—Quære, whether the defendant, a mere stranger, could set up the title in the Crown as against the plaintiffs' possession for forty years, with the privity of the Crown. Semble, that at all events the plaintiffs could have maintained trespass against him. *Juson* v. *Reynolds*, 34 U. C. R. 174.

Deed — *Condition — Legal Estate.*]—By deed between plaintiff and defendant H., H. agreed to allow the plaintiff the use of his grist and saw mills for five years, on condition that each party should pay half the repairs upon the mills for the term named; the saw mill and books to be under the control of H., and the grist mill chiefly under the control of plaintiff. The agreement then stated that H. allowed plaintiff the use of a dwelling house and barn near the mills, &c., and each party was to pay half the taxes "on the property above-named during the term of five years:"—Held, that under the instrument the plaintiff took a legal estate in the whole property for five years, subject to the rights to be exercised over it by H., as well as to the other conditions of the agreement; and that plaintiff could therefore maintain trespass against two others of the defendants who entered under H. and expelled plaintiff from the dwelling house. *Kellington* v. *Herring*, 17 C. P. 639.

Ejectment—*Judgment in—Effect of—Demise.*]—One F. rented the locus in quo from plaintiff previous to May, 1851, when he went out and defendant obtained possession. The plaintiff recovered in ejectment, in which the demise was laid on the 14th June, 1851, and entered his judgment in March, 1852. He then brought trespass qu. cl. fr., alleging the trespass to have been committed on the 5th July, 1851. The trespass proved was in May, 1851, while F. was in possession:—Held, that

the action was maintainable, for the recovery in ejectment entitled the plaintiff to treat defendant as a trespasser from the day of the demise. *Foster* v. *Foster*, 10 U. C. R. 607.

——— *Trespasses pending Action.*]—Trespass q. c. f. will not lie against a defendant for acts committed under the authority of the person in possession of and claiming the land during the time an action of ejectment by the plaintiff against such person was pending. *Street* v. *Crooks*, 6 C. P. 124.

Entry—*Acts Amounting to.*]—Actual occupation of land is not essential to give a right to maintain trespass by one who has the legal title. It is sufficient that he enter upon the land so as to put himself in legal possession of it:—Held, that putting up boards on the land stating that the land was for sale, was a sufficient entry upon the owner's part to vest the legal possession in him and to enable him to maintain an action of trespass. *Donovan* v. *Herbert*, 4 O. R. 635.

Evidence of Actual or Constructive Possession.]—Where the only evidence of possession was the entry by plaintiff upon, and his presence at the survey of, the land, the trespass to which had been previously committed, and was the cause of action, claiming it as his own, but shewing no title, the defendant also assisting in the survey and not objecting to plaintiff's right of possession, though asserting his own right to have committed the trespass complained of:—Held, that there was no evidence of either actual or constructive possession in plaintiff to entitle him to maintain trespass. *Greaves* v. *Hilliard*, 15 C. P. 326.

Exclusive Possession—*Necessity for—Assessment and Taxes—Fencing.*]—The plaintiff's husband, living close to the land in question, had for many years cut firewood and made sugar on it, and it had been assessed to him since 1843, but others had made similar use of it, though not to the same extent; it had never been enclosed, and the neighbours' cattle as well as his were accustomed to run over it. The plaintiff, a few days before this action, put up a fence on it, and some of the defendants thereupon put up another inside of it, and afterwards they all put up a fence along the limit between this and the next lot, thus shutting out the plaintiff and fencing in the part which she had enclosed:—Held, that the plaintiff (shewing no other title) had not such exclusive possession as would entitle her to maintain trespass. *Bailey* v. *McNeily*, 20 U. C. R. 451.

Infant—*Next Friend.*] — The mother in possession of land belonging to the heir, a minor, may sue in trespass as next friend of the minor. *Johnson* v. *McGillis*, 7 U. C. R. 309.

Landlord—*Possession of Tenant—Proof of.*]—In trespass qu. cl. fr., where the possession was disputed, defendant proved that the plaintiff's brother was in possession of the close to work it for plaintiff on shares:—Held, that the agreement did not conclusively establish the relation of landlord and tenant, and shew the brother entitled to the exclusive possession, so as to prevent the plaintiff from maintaining trespass. *Ducksteder* v. *Baird*, 5 U. C. R. 591.

——— *Trespass during Tenancy.*]—Where defendant, as agent of a third party, during the occupancy of a tenant of the plaintiff, put up a fence on the plaintiff's land, which continued there after the plaintiff resumed possession at the expiration of the tenancy:—Held, that the plaintiff could not bring trespass against defendant for the act done by him during the continuance of the lease. *Boulton* v. *Jarvis*, H. T. 6 Vict.

Licensee—*Crops—Interest in Land.*]—The plaintiff's father owning certain land mortgaged it to A., who filed a bill for foreclosure or sale. The mortgagor soon after the filing of the bill conveyed his equity of redemption to the plaintiff for a consideration expressed of $500, but he continued on the land with the plaintiff. The land was sold under a decree of the court to the plaintiff, who failed to pay, and afterwards the land was conveyed to F., the highest bidder, who, the plaintiff swore, purchased as trustee for the plaintiff. The plaintiff afterwards released his interest to S., who conveyed to defendant F. Some negotiations took place between the plaintiff and F. in May, and the plaintiff put in and harvested crops, which defendant D. seized, acting under a writ of possession issued from the court of chancery in the foreclosure suit, and assisted by F. and others:—Held, that upon the evidence there was no demise at will or otherwise to the plaintiff, but a mere license, determined by failure of the negotiations, and under which the plaintiff acquired no interest in the land or crops which would entitle him to maintain trespass, though he might be entitled to be paid for his work upon the land while the license continued. *Robinson* v. *Fee*, 42 U. C. R. 448.

Mortgagee—*Proviso for Possession—Default — Pleading.*] — Trespass to plaintiff's house. Pleas, (2) that the house was not the plaintiff's; (3) liberum tenementum of the defendant A., and entry of the other defendant by his command. The land had belonged to one C., who mortgaged in fee to one S. to secure a sum payable by instalments, with a proviso for possession by the mortgagor until default after three months' notice. C. conveyed to M. and M. to defendant J. A. No default had been made on the mortgage. The plaintiff had entered under an agent of S.:—Held, that the defendants were entitled to succeed on the second plea; and semble, upon the third also. *Dundas* v. *Arthur*, 14 U. C. R. 521.

Municipal Corporation — *Injury to Bridge.*]—The corporation of a county can maintain an action for damages to, or destruction of, a bridge lying within its limits. *County of Wellington* v. *Wilson*, 16 C. P. 124.

Navigable Stream—*Possession—Crown.*]—The river St. Lawrence above tide water is a navigable river, the bed of which is vested in the Crown. Held, also, that, although the possession of a pier built out in the river might entitle the plaintiffs to maintain trespass against a mere wrongdoer for an actual entry upon it, yet it would not draw to it possession of the bed of the river between the pier and the shore. *Dixson* v. *Snetsinger*, 23 C. P. 235.

Owner—*Person in Possession—Crops.*]—A., living abroad, sends to an agent in this Province to purchase a lot of land for B., who

is living in the Province, and to take the conveyance to himself, A. This is done, and B. is put in possession of the land, and thenceforth uses and cultivates it for his own benefit. At the time of purchase a crop of wheat was in the ground:—Held, that B., and not A., should sue in trespass for cutting and carrying away the wheat. Quære, did the property in the wheat belong to A. or B.? *Campbell* v. *Cushman*, 4 U. C. R. 9.

Possession Annale—*Art. 946, C. C. P., Quebec.*]—See *Gauthier* v. *Masson*, 27 S. C. R. 575.

Purchaser at Tax Sale — *Necessity for Actual Possession — Ejectment—Estoppel.*]—In trespass to land the plaintiff proved a good paper title through a sale for taxes, but he had never been in actual possession, and it was shewn that after the plaintiff obtained his deed defendant had cut timber on the land and built a shanty for his lumbermen, although the plaintiff went there and forbade him; and it appeared that the plaintiff had brought ejectment against him, but had not proceeded with it after defendant appeared. The defendant claimed under a deed from the heirs of the patentee, and it was sworn that, before defendant purchased, the plaintiff also wished to buy from them, saying that he thought his own title not good:—Held, that the plaintiff was sufficiently in possession to maintain trespass, and that he was not estopped by having brought ejectment, as being an admission of defendant's possession. *Heck* v. *Knapp*, 20 U. C. R. 360.

Resumption of Possession—*Consent—Occupation — Jury.*] — Where A. has once given peaceable possession of land to B., A., by re-entry without B.'s consent, cannot acquire possession to sustain trespass against B. To support an action of trespass, upon the plea of the close not being the close of the plaintiff, the plaintiff must prove an actual and immediate occupation of the locus in quo, and the question of possession is in fact for the jury. *McNeil* v. *Train*, 5 U. C. R. 91.

School Trustees — *School House.*]—Under 7 Vict. c. 29 s. 44, the trustees of the school (and not the school master) should sue for a trespass to the school house, unless, at least, it can be shewn that the trustees have given the school master a particular interest in the building beyond the mere liberty of occupying it during the day for the purpose of teaching. *Monaghan* v. *Ferguson*, 3 U. C. R. 484.

Successive Trespassers.]—Quære, as to the effect against the true owner of a succession of trespassers taking possession of deserted land at intervals, some of them before 4 Wm. IV. c. 1, and not claiming under each other. *Doe d. Baldwin* v. *Stone*, 5 U. C. R. 388.

Tenant—*Encroachment on Adjoining Land—Benefit of Landlord—Wrongdoer.*]—A lessee of a lot had for more than twenty years exercised acts of ownership over part of a lot adjoining, and claimed to have acquired title against his landlord, by possession, to the said part, and brought this action of trespass against the owner of the rest of the said adjoining lot: — Held, that his action must be dismissed, for, although a tenant taking in land adjacent to his own by encroachment must, as between himself and his landlord, be deemed primâ facie to take it as part of the demised land, yet that presumption will not prevail for the landlord's benefit against third persons. The result of the cases appears to be that where a person is in possession with the assent of the Crown, paying rent, or where a person is a purchaser, although the patent has not issued, such person can maintain trespass against a wrongdoer, but this was not the present plaintiff's position. Harper v. Charlesworth, 4 B. & C. 574, specially considered. *Brayca* v. *Rose*, 19 O. R. 433.

Trustee—*Cestui que Trust.*]—The owner of an equitable estate cannot, notwithstanding the Judicature Act, proceed against a trespasser in his own name. He is still bound to sue in the name of his trustee. *Adamson* v. *Adamson*, 7 A. R. 592.

Vendor in Possession.] — Trespass for pulling down a house. It appeared that the municipal corporation had purchased the house from plaintiff, and paid for it, but plaintiff remained in possession:—Held, that he was entitled to recover, notwithstanding the sale. *Glass* v. *Dobson*, 14 U. C. R. 419.

See Beatty v. *McMasters*, T. T. 2 & 3 Vict., R. & J. Dig. 3776; *McConaghy* v. *Denmark*, 4 S. C. R. 609; *Western Bank of Canada* v. *Greey*, 12 O. R. 68.

III. To Person.

1. *Assault and Battery.*

(a) *Action—When it will Lie.*

By Married Woman.]—In an action for assault brought by a married woman, the coverture, if not pleaded, forms no ground of objection to the verdict. *Soules* v. *Doan*, 39 U. C. R. 337.

Intention or Motive.]—Plaintiff and defendant were working together boring an oil well. Plaintiff was at the bottom, and defendant's brother had been at the top directing the ram used to drive down the pipe. He asked defendant to attend to it while he went away for a short time, and defendant, not knowing that plaintiff was below, let down the ram and injured the plaintiff's hand:—Held, that trespass would lie, defendant's intention being immaterial. *Anderson* v. *Stiver*, 26 U. C. R. 526.

(b) *Defences — Justification and Mitigation of Damages.*

Arrest for Criminal Offence.] — Trespass for assault on the plaintiff's son. Justification under the Criminal Act, 4 Vict. c. 26, ss. 20 and 28, the son having committed a malicious trespass on defendant's land. Averments necessary. See *Madden* v. *Farley*, 6 U. C. R. 210.

Challenge to Fight.]—Assault and battery. Plea, leave and license. Defendant contended that because the plaintiff had previously challenged him to fight, the plea was sustained, and the plaintiff should have replied an excess or unfair advantage if he relied

thereon:—Held, admitting the general principle, that it did not apply, for a challenge to fight at once could not primâ facie authorize the attack by defendant after some time with a club. *St. John* v. *Parr*, 7 C. P. 142.

Criminal Charge Pending.]—*See Taylor* v. *McCullough*, 8 O. R. 309.

Disturbance of Public Worship.]—Action for assault and battery against fourteen defendants. Special plea of justification, on the ground that plaintiff was committing a disturbance in church. 1 Wm. & M. c. 18, relating to disturbances in church, &c., is in force in this Province, and not superseded by C. S. U. C. c. 92. *Reid* v. *Inglis*, 12 C. P. 191.

Expulsion from Defendant's Premises.]—Though the motive and intention with which a defendant insisted on the plaintiff leaving his house cannot be inquired into on the traverse de injuriâ, yet the truth of the assertion that he assaulted him in order to make him depart, may be called in question. *Davis* v. *Lennon*, 8 U. C. R. 599.

Trespass for shooting at and wounding plaintiff with a pistol. Plea, justifying in defence of defendant's dwelling house, and to prevent plaintiff and others entering and assaulting him:—Held, bad, on demurrer, as shewing no defence, for before firing defendant should have warned the plaintiff to desist and depart, which was not averred. Semble, also, bad in point of form, for not shewing expressly whether defendant intended to admit the shooting or not. *Spires* v. *Barrick*, 14 U. C. R. 420.

Held, that if more force and violence be used than necessary to expel a person from a house, after he has refused to leave, the excess must be replied. *Glass* v. *O'Grady*, 17 C. P. 233; *Davis* v. *Lennon*, 8 U. C. R. 599.

But if a plaintiff relies on the fact that he was assaulted and beaten not for the purpose of expelling him from the house on his refusal to leave, as pleaded, then he may take issue on the plea. Though the plea be disproved as to the motive for the assault, the plaintiff cannot, nevertheless, under a mere joinder of issue on defendant's plea, recover, if the defendant did no more than he had a right to do to effect the removal; for the motive and intent of the assault are not in issue, so long as he had the justification in fact for what he did. Quære, whether a plaintiff can new-assign that the acts complained of were committed by defendant for other causes and purposes than those set forth and justified by the plea. Semble, that the replication of excess may be added by way of amendment at the trial, and if so by the court even after judgment in the cause. *Glass* v. *O'Grady*, 17 C. P. 233. *See Madden* v. *Farley*, 6 U. C. R. 210.

Incapacity of Mind.]—A tort-feasor cannot plead incapacity of mind in answer to an action for an assault. *Taggard* v. *Innes*, 12 C. P. 77.

Interfering to Preserve the Peace.]—Trespass against two for assault and battery, and wounding plaintiff and biting off his fingers. Pleas, by one defendant, as to the assaulting, battery, and ill-treating, "molliter manus imposuit" to preserve the peace, plaintiff and the other defendant being fighting. Pleas, by the other defendant, son assault demesne. First plea, held bad, molliter manus imposuit being no justification of the beating charged. Second plea good, for if there were any excess the plaintiff should have new-assigned. *Shore* v. *Shore*, 2 O. S. 65.

A number of persons, including the plaintiff and defendant, had formed a ring for the purpose of witnessing an expected fight between two persons, one of whom was plaintiff's nephew. The plaintiff, when going forward towards the combatants, was assaulted by defendant, who got into a fight with him and bit his hand severely. Defendant's counsel proposed to ask the plaintiff, on cross-examination, as to a number of fights in which he was said to have been concerned; but the Judge refused to allow this, the counsel being unable to state that it was intended for the purpose of testing the plaintiff's credibility. The evidence as to defendant's purpose in interfering with the plaintiff was contradictory, and the jury were told that if defendant's object was only to prevent the plaintiff from interfering with the fight, and not to prevent a breach of the peace, he was a wrongdoer:—Held, that the evidence was rightly rejected, and the direction right; and a verdict for the plaintiff was upheld. The erroneous exercise of discretion in refusing to allow questions irrelevant to the issue to be put on cross-examination, would be no ground for a new trial. *Hickey* v. *Fitzgerald*, 41 U. C. R. 303.

Moderate Correction.]—Where in trespass for wounding and kicking and for tearing the plaintiff's clothes, defendant justified as for a moderate correction of the plaintiff as his servant, the plea was held bad, as no answer to the wounding and tearing the clothes. *Mitchell* v. *Defries*, 2 U. C. R. 430.

Pleas not Justifying whole Cause of Action.]—Quære, whether, when a defendant is charged with arresting, bruising, beating, and ill-treating the plaintiff, the justification of the mere arrest will be sufficient. *Jones* v. *Ross*, 3 U. C. R. 328.

Semble, that to a declaration in trespass, for assaulting, seizing, and laying hold of the plaintiff, and pulling and dragging him about, a plea justifying the arrest by virtue of legal process, is no answer to the pulling and dragging about. *Beamer* v. *Darling*, 4 U. C. R. 211.

The plaintiff declared for an assault and battery, and beating, bruising, and wounding; and defendant justified the assault and battery by a plea of "molliter manus imposuit:"—Held, sufficient. *McLeod* v. *Bell*, 3 U. C. R. 61.

See Madden v. *Farley*, 6 U. C. R. 210.

Previous Conviction for Same Cause.] — A plea of conviction under the Petty Trespass Act to an action for assault and battery, is not supported by proof of a conviction for an assault alone. *Delong* v. *McDonell*, E. T. 2 Vict.

To an action for assault and battery, defendant pleaded that he had been convicted of the trespass complained of before a justice of the peace, and so released from this action. The plaintiff replied "nul tiel record" of the conviction:—Held, replication good. *Thompson* v. *Leslie*, 9 U. C. R. 369.

In an action for assault and battery defendants pleaded that, under C. S. C. c. 8, s. 7, they were convicted of the same assault by two justices, and on appeal to the sessions were acquitted, and the justices then presiding, upon request, gave each of them a certificate of such acquittal, in accordance with s. 42. Upon exception to the pleas:—Held, that the certificate must be obtained from the convicting justice on the first hearing of the case, and that this certificate, therefore, was no bar. 42 That the plea should allege that the party aggrieved prayed the magistrate to proceed summarily under the Act. *Westbrook* v. *Calaghan*, 12 C. P. 616.

See CRIMINAL LAW, IX. 3.

Provocation — *Slander — Mitigation of Damages.*]—In trespass for an assault and battery, the defendant offered to prove, in mitigation of damages, that the plaintiff had used very slanderous expressions concerning defendant's wife, during defendant's absence from home, which were repeated to defendant on his return, whereupon he, on the spur of the moment, went to plaintiff and assaulted him. This evidence was refused, and the jury gave a verdict with £140 damages. The court set aside the verdict, to give an opportunity to elicit the whole circumstances of the transaction. *Short* v. *Lewis*, 3 O. S. 385.

——— *Libel—Mitigation of Damages.*]—Held, in an action for assault, that libellous and abusive articles reflecting on defendants, published on the day of, and preceding, the assault, in a newspaper of which the plaintiff was the proprietor, were admissible in evidence in mitigation of damages. But where the verdict was for $50 only, and, though such evidence was rejected, the jury were fully informed by defendants' counsel that the assault was committed in consequence of these articles, and the court saw no reason to believe that defendants had been prejudiced by the ruling, a new trial was refused, but, under the circumstances, without costs in term to either party. *Percy* v. *Glasco*, 22 C. P. 521.

(c) *Other Cases.*

Declaration—*Amendment at Trial.*]—In an action for assault and battery plaintiff was allowed at the trial to amend his declaration, by adding that he thereby "became and was and is permanently injured:"—Held, that the amendment was proper. *Glass* v. *O'Grady*, 17 C. P. 233.

Incorporated Society — *Liability for Acts of Members.*]—The plaintiff, during his initiation as a member of the defendant lodge, in the presence of the principal officers and a number of members, constituting a full and perfect meeting, was injured through the rough usage of some of the members. It appeared that this and other proceedings were taken with the knowledge of all those who were present, and that somewhat similar proceedings had happened on the occasion of other initiations, and that they were allowed and not checked:—Held, that they must be taken to have been done with the consent of the corporate body, and that the defendants were liable in damages for the injuries sustained. *Kinver* v. *Phœnix Lodge, I. O. O. F.*, 7 O. R. 377.

New Trial.] — See *Hickey* v. *Fitzgerald*, 41 U. C. R. 303, *ante* (b).

——— *Perverse Verdict.*]—Where A., having been tried for feloniously shooting at B. and acquitted, was afterwards sued in trespass for the same act, and the jury found for defendant, though the trespass was proved, the court refused a new trial. *Day* v. *Hagerman*, 5 U. C. R. 451

——— *Public Officer — Action against.*] — See *Campbell* v. *Prince*, 5 A. R. 330.

Several Defendants—*Damages.*]—In an action for assault, in which the verdict was against two defendants, it was held that the second defendant was liable for damages equally with the first, though the principal injury was caused by the latter. *Dunham* v. *Powell*, 5 O. S. 675.

2. *Assault and False Imprisonment.*

(a) *Arrest on Civil Process—When Action Lies.*

Judgment for Costs—*Attorney.*]—Both defendant and his attorney, who obtained an order for imprisonment against the plaintiff for not attending to be examined on a judgment recovered for costs of defence only, and who justified under it, were held liable. *Hawkins* v. *Paterson*, 23 U. C. R. 197.

Lunatic—*Warrant for Arrest—False Representations.*]—Defendant, within one month after the plaintiff's escape from a lunatic asylum where he had been confined as a lunatic, with full knowledge of the plaintiff having recovered his sanity and really believing him to be sane, falsely represented to the medical superintendent of the asylum that the plaintiff was still insane, and had threatened to take one M.'s life, which was thereby in danger, and that the plaintiff's brothers had requested the defendant to procure his recapture; and the defendant thereupon obtained from the medical superintendent a warrant for his arrest, which he handed to a constable, and the plaintiff was arrested and reconveyed to the asylum, but after a medical examination the next day was discharged:—Held, that the plaintiff could recover in case for the malicious arrest, but that trespass would not lie, for the warrant having been bonâ fide issued by the medical superintendent, and being valid on the face of it, and authorized by 36 Vict. c. 31, s. 22 (O.), the defendant was protected by it. *Dobbyn* v. *Decow*, 25 C. P. 18.

Married Woman—*Knowledge of Coverture.*]—A married woman living on terms of separation from her husband, who was in Europe, was arrested for debt. It was not shewn that the creditor had any knowledge of her having a husband living:—Held, that, although the wife might be entitled to her discharge on application, such arrest would not support an action of trespass. *Rennet* v. *Woods*, 11 U. C. R. 29.

Order for Arrest—*Nullity—Notice—Attorney.*] — Held, affirming the decision in Bullen v. Moodie, 12 C. P. 126, that in proceeding to arrest and imprison a party for

the insufficiency of his answers on an examination as to his estate and effects, conducted before any other functionary than the Judge who orders the arrest, it is necessary that a summons to shew cause should in the first instance be issued. Held, also, affirming the same judgment, that the fact of the Judge who made the order to commit having authority to make such order, and that the same appeared to be regular on the face of it, was not a sufficient justification for the attorney of the party suing out such order, in an action brought against the attorney and his clients for assault and false imprisonment. *Ponton* v. *Bullen*, 2 E. & A. 379.

Warrant Founded on Void Assessment — *Municipal Corporation—Act of Servant.*] — 41 Vict. c. 9 (N. B.), intituled "An Act to widen and extend certain public streets in the city of St. John," authorized commissioners appointed by the governor in council to assess owners of the land who would be benefited by the widening of the streets, and in their report on the extension of Canterbury street the commissioners so appointed assessed the benefit to a certain lot at $419.46, and put in their report the name of the appellant (McS.) as the owner. The amount so assessed was to be paid to the corporation of the city, and, if not, it was the duty of the receiver of taxes appointed by the city corporation, to issue execution and levy the same. McS., although assessed, was not the owner of the lot. S., the receiver of taxes, in default, issued an execution, and for want of goods McS. was arrested and imprisoned until he paid the amount at the chamberlain's office in the city of St. John. The action was for arrest and false imprisonment, and for money had and received. The jury found a verdict for McS. on the first count against both defendants:—Held, that S., who issued the warrant founded upon a void assessment and caused the arrest to be made, was guilty of a trespass, and being at the time a servant of the corporation, under their control and specially appointed by them to collect and levy the amount so assessed, the maxim respondeat superior applied, and therefore the verdict in favour of McS. for $635.39, against both respondents on the first count, should stand. *McSorley* v. *Mayor, &c., of St. John*, 6 S. C. R. 531.

Writ not Set aside.]—Quære, whether trespass is maintainable when the arrest only is set aside, and the writ left untouched. *James* v. *Ellis*, 11 U. C. R. 449.

(b) *Arrest on Criminal Charge—When Action Lies.*

Constable—*Arrest before Indorsement of Warrant—Subsequent Detention.*] — A warrant for the arrest of the plaintiff, who had made default in paying a fine on conviction for an infraction of the liquor license law, was sent from an outlying county to a city. Before it was indorsed by a magistrate in the city, the plaintiff was arrested there by two of the defendants, the chief constable and a detective, and confined. Some hours after the arrest the warrant was properly indorsed and the detention of the plaintiff was continued until payment of the fine:—Held, that the only damages recoverable by the plaintiff were for the trespass, up to the time of the backing of the warrant. Held, also, that the plaintiff being illegally in custody under a criminal charge, his subsequent detention on a similar charge under a proper warrant was lawful. Distinction between subsequent civil and criminal proceedings in such cases pointed out. *Southwick* v. *Hare*, 24 O. R. 528.

——— *Excess—Handcuffing.*]—The plaintiff, a workman in the Central Prison, in the employment of a contractor therein, was detected conveying tobacco to a convict. The warden directed a constable to arrest him, which he did, and, though under no apprehension of an escape, handcuffed him, and led him through the public streets to the police station: — Held, that, although the offence was an indictable one, and the arrest legal, the handcuffing was not justifiable, and the constable was liable in trespass therefor, but no liability attached to the warden, as the evidence failed to shew that he was a party to it. *Hamilton* v. *Massie*, 18 O. R. 585.

Gaoler — *Warrant — Jurisdiction of Justices.*]—Where justices have a general jurisdiction over the subject matter upon which they have issued a warrant of commitment to the gaoler, though their proceedings be erroneous, the gaoler is not liable. Secus, if the proceedings be wholly void. Quære, where a magistrate has, under the Summary Punishment Act, committed a party unconditionally, when it should have been conditionally upon his not paying a fine, can his warrant be a justification to the gaoler? Semble, that under 24 Geo. II. c. 44, s. 6, a copy of the warrant, if delivered by the gaoler without shewing the original, and no objection made, will be sufficient. Semble, also, that if the original be demanded, its production will be good, though shewn after six days. *Fergusson* v. *Adams*, 5 U. C. R. 194.

Informant—*Interference.*] — It appeared that the defendant laid an information against the plaintiff for a felony, and asked for a warrant, but took no further steps, and had no conversation with the constable, who, upon a warrant handed him by the magistrate, arrested the plaintiff:—Held, that the mere laying an information or originating a suit or proceeding before a competent judicial authority, does not render the complainant liable in trespass for what is done, even if the proceedings should be erroneous or without jurisdiction. And, inasmuch as the defendant had had no conversation with and had not handed the constable the warrant, which was apparently granted by the magistrate in the exercise of his own judgment, the defendant was not responsible. *Smith* v. *Evans*, 13 C. P. 60.

The evidence in this case shewed that defendant, having obtained the issue of the warrant for defendant's arrest on a criminal charge, interfered personally in the arrest, telling the constable to have the plaintiff taken away, or right away:—Held, sufficient to support a verdict on the second count, in trespass. *Stephens* v. *Stephens*, 24 C. P. 424.

——— *Interference—Misnomer of Plaintiff in Warrant.*]—The plaintiff, C., who lived at Montreal, was arrested at Kingston, upon a warrant reciting that B. had been charged, &c., for that he, the said C., did, &c., and commanding the arrest of the said B. The

information was against B., the name of C. having been struck out. In an action for false imprisonment and malicious prosecution, it was proved that the plaintiff was known as C., but carried on business as B. & Co. At the trial it was objected that malicious prosecution would not lie, there having been no criminal offence charged. This was conceded, and, both sides agreeing that it must be trespass or nothing, it was left to the jury to say whether all or any of the defendants were guilty. The jury having found for the plaintiff:—Semble, that the defendants, having at the trial abandoned all defence under the proceedings before the magistrate, could not afterwards, in term, be permitted to urge that trespass would not lie, on the ground that there was an information and warrant, and defendants were not responsible for the magistrate's act in ordering the arrest; but held, that the information and warrant could afford no justification, for they were against B., not the plaintiff; and, though the plaintiff had entered his name as B. in the hotel where he was staying, there was nothing to shew that he had ever represented that to be his name, and he was known to the hotel-keeper and bar-keeper as C. Held, also, that there was evidence, sufficient to go to the jury, to connect all the defendants with the arrest on a charge of false pretences. *Campbell* v. *McDonell*, 27 U. C. R. 343.

——— *Interference — Warrant—Defective Information.*]—The defendant laid an information charging that the plaintiff "came to my house and sold me a promissory note for the amount of ninety dollars, purporting to be made against J. M. in favour of T. A., and I find out the said note to be a forgery." Upon this a warrant was issued reciting the offence in the same words, and the plaintiff was under it apprehended and brought before the justice of the peace who issued it, and by him committed for trial by a warrant reciting the offence in like terms. The plaintiff was tried for forging and uttering the note, and was acquitted:—Held, that the information sufficiently imported that the plaintiff had uttered the forged note, knowing it to be forged, to give the magistrate jurisdiction, and therefore the warrant was not void, and an action of trespass was not maintainable against the defendant, even upon evidence of his interference in the arrest. Semble, that if the offence were not sufficiently laid in the information to give the magistrate jurisdiction, and the warrant were void, an action for malicious prosecution would nevertheless lie. *Anderson* v. *Wilson*, 25 O. R. 91.

——— *Justice of the Peace—Interference—Refusal of Bail.*]—Where the defendant, a justice, had laid an information before another magistrate, by whom the plaintiff was arrested on a warrant which turned out to have been illegal or void, and imprisoned under it, the defendant and the other magistrate having refused to admit him to bail:—Held, in trespass by the plaintiff against defendant, charging him with the arrest and imprisonment, that, in the absence of any other evidence, the mere refusal by defendant to admit the plaintiff to bail was no evidence that the defendant authorized the illegal arrest and imprisonment of the plaintiff; and a nonsuit was ordered. *McKinley* v. *Munsie*, 15 C. P. 230.

Justice of the Peace—*Defective Information — Waiver — Conviction — Warrant — Variance.*]—The plaintiff, on an information against him under 37 Vict. c. 32 (O.), for selling liquor without a license, was brought before defendants, magistrates. It was proved that this was his second offence, though the information did not charge it as such. The plaintiff disputed the evidence as to the first conviction, but did not object to the information, and the magistrates convicted and adjudged him to be imprisoned for ten days, which they had power to do only for a second offence:—Held, that the plaintiff had waived the objection to the information, and that defendants were not liable in trespass. Held, also, that a variance between the conviction and the warrant for plaintiff's arrest, the former saying nothing as to hard labour and the latter providing for it, could not deprive the defendants of protection under C. S. U. C. c. 126. *Stoness* v. *Lake*, 40 U. C. R. 320.

——— *Quashing Conviction—Necessity for — Amendment.*] — Where an appeal was brought from a conviction imposing imprisonment with hard labour, which the magistrate had no power to award, and the sessions amended the record by striking out "hard labour:"—Held, that their assuming so to amend the conviction was not a quashing of the conviction, and therefore trespass would not lie against the justices. *McLellan* v. *McKinnon*, 1 O. R. 219.

——— *Quashing Conviction—Necessity for —Discharge from Custody—Reasonable and Probable Cause.*]—Held, that the discharge of the plaintiff from custody on habeas corpus was not a quashing of his conviction on a charge of unlawfully removing cordwood from an Indian reserve; and that the conviction remaining in force, and the defendant having had jurisdiction, the action, which was trespass for assault and imprisonment maliciously and without reasonable and probable cause, could not be maintained, but the action should have been on the case; but that, even if the form of action was right, there was no evidence of want of reasonable and probable cause. *Hunter* v. *Gilkison*, 7 O. R. 735.

——— *Constable — Arrest of Witness — Searching Person.*]—The plaintiff, a barrister, having been subpœnaed to give evidence for the prosecution in a criminal case before a police magistrate, attended at the time named; but, on the case being adjourned, did not then attend, and the case was further adjourned; the prosecutor forthwith laid an information on oath before the magistrate, that the witness was a material one, and that it was probable he would not attend to give evidence: upon which the magistrate issued a warrant under s. 62, R. S. C. c. 174, addressed to the chief constable or other police officers, &c., and to the keeper of the common gaol of the county and city, directing them to bring the witness before him on the date of the adjournment, some five days distant. The witness was forthwith arrested by two police officers, and brought to the office of one of the police inspectors, and on his refusing to answer the questions usually put to criminals, except those as to his name and address, the inspector ordered him to be searched, which was done, and his personal property and private memorandum book were taken from him, the latter being opened and read

by the inspector. He was then taken to the cells, where he remained some twenty minutes, when he was brought before the magistrate, and on his giving his personal undertaking to appear on the day named, he was liberated. In an action against the police magistrate and police inspector:—Held, by a divisional court, reversing the judgment of the Judge at the trial, that the magistrate, having jurisdiction by virtue of s. 62 of R. S. C. c. 174 to issue the warrant, incurred no liability, even though he might have erred as to the sufficiency of the evidence brought before him, and on which he acted. As to the liability of the inspector the court was evenly divided, and the judgment of the trial Judge in favour of the plaintiff was affirmed. Quere, whether s. 62 authorizes the issue of the warrant or its enforcement an unreasonable length of time before the day named for the attendance of the witness. Held, by the court of appeal, that where a police magistrate, acting within his jurisdiction under R. S. C. c 174, s. 62, issues his warrant for the arrest of a witness who has not appeared in obedience to a subpœna, he is not, in the absence of malice, liable in damages, even though he may have erred as to the sufficiency of the evidence to justify the arrest. Judgment of the court below on this point affirmed. In an action for false imprisonment judgment cannot be entered upon answers to questions submitted to the jury, and a finding, in answer to a question, of a certain amount of damages, is not equivalent to the general verdict, which must be given by them. The right of police to search or handcuff a person arrested on a warrant to compel attendance as a witness, and the duty of a constable on making the arrest, considered. Judgment of the court below on this point reversed. *Gordon* v. *Denison*, 24 O. R. 576, 22 A. R. 315.

Justice of the Peace and Informant —*Joint Tort—Arrest in Another County.*]—A general verdict on a declaration containing one count in trespass for false imprisonment, and another in case for malicious prosecution, is not bad in law. But in this case the court, being of opinion that there was only one joint cause of action against the defendants—that is, the arrest—restricted the verdict to that count:—Held, that a joint tort was sufficiently established against the defendants by evidence that one procured the warrant to be issued against the plaintiff on a charge of forgery, and the other issued it; that both knew that no charge had been made against plaintiff; and that the warrant was given by the one to the other for the arrest of plaintiff, who was accordingly arrested upon it, and that illegally. Held, also, that the effect of this evidence was not destroyed by the fact that the arrest was made in another county, and under the authority of another magistrate's indorsation upon the warrant; for that indorsation was not strictly the authority to arrest, but merely to execute the original warrant; and that the arrest was wrongful not from the indorsation, but from the antecedent illegal proceedings of the defendants; and that the defendant who issued the warrant was as much responsible as if the arrest had been made in his own county. Semble, (1) that if it had appeared that defendant who issued the warrant was liable in case only, and malice of some special kind, personal to himself, in which his co-defendant was not and could not be a partaker, had been proved, a joint action would not lie against both. (2) That one defendant might have been convicted in trespass and the other in case. *Friel* v. *Ferguson*, 15 C. P. 584.

See MALICIOUS PROCEDURE, I.

(c) *Damages and Costs.*

Justice of the Peace—*Nominal Damages.*]—Held, that, in any event, defendants, two magistrates, in this action for assault and false imprisonment, could not have been liable for plaintiff's suffering caused by the harsh regulations of the prison during his confinement; and that, having been proved to have been guilty of the offence for which he was convicted, he could have recovered only three cents and no costs, under C. S. U. C. c. 126, s. 17. *Stoness* v. *Lake*, 40 U. C. R. 320.

(d) *Evidence.*

Admissibility—*Facts Prior to Arrest—Judgment Discharging Plaintiff.*]—In trespass for false imprisonment, where the defendant justified under a ca. sa., and the plaintiff replied that it had been set aside before action brought, the Judge at nisi prius allowed the plaintiff to go into evidence of facts and circumstances previous to the arrest, with a view of shewing the oppressive conduct of the defendant in issuing the ca. sa.:—Held, upon a rule for a new trial, that such evidence was admissible as affecting the damages, though not the right of action. Held, also, that the counsel for the plaintiff had a right to read at the trial, from the original judgment of the court in discharging the plaintiff from arrest and setting aside the ca. sa., the grounds upon which the ca. sa. had been set aside. *Robertson* v. *Meyers*, 7 U. C. R. 423.

——— *Warrant — General Issue.*]—The sheriff, when sued in trespass for having arrested defendant under a warrant issued by the justices of the peace sitting in quarter sessions, may give this justification in evidence under the general issue. *Fraser* v. *Dickson*, 5 U. C. R. 231.

Sufficiency to Establish Interference —*Refusal to Admit Evidence—Discretion.*]—In an action for arresting the plaintiff, who had been imprisoned on a charge of stealing trees, the magistrate who ordered the arrest was not called, nor the constable, nor was the warrant produced; and it was not shewn positively who was the prosecutor. It was shewn only that defendant claimed the land on which the timber was cut by the plaintiff; that he was at the investigation before the magistrate, and wanted the plaintiff to settle; and that afterwards, as the plaintiff was about being taken to gaol, the proposition to settle was renewed, and when the plaintiff refused, defendant told the bailiff, who had the plaintiff in the waggon, to drive to gaol:—Held, not sufficient to charge defendant with the arrest, or with its continuance. Held, also, upon the facts, that the refusal to receive evidence of the constable and another, when tendered, was a matter in the discretion of the Judge; and that the nonsuit, which was upheld, was not shewn to have been against the plaintiff's consent. *Conway* v. *Shibly*, 39 U. C. R. 519.

Sufficiency to Shew Arrest—*Principal and Agent.*]—Plaintiff brought a suit in chancery against defendant, and T. S. and S. W., which was referred, and an award made against plaintiff for £120 to be paid S. W., and £154 to defendant. This award was made a rule of court by an ex parte order, and an attachment was issued by S. W. for both sums of money, defendant having previously assigned all his interest in the award to S. W., and given him a general power of attorney to collect the amount. The only evidence of the arrest and imprisonment was given by the sheriff, who swore that "the attachment was received in his office on the 31st January, 1859, and the plaintiff was arrested on that attachment on the 16th February, 1859, and committed to gaol." It further appeared that the attachment was indorsed by the solicitor of S. W. as his solicitor only:—Held, that, although there was no sufficient proof of an actual arrest, a jury might be warranted in deciding that the plaintiff was constructively (at least) arrested, by submitting to the process, and actually confined to gaol thereunder. (2) That the power of attorney given by defendant to S. W. being a general power to collect the money due on the award, and to do all acts relating thereto, he, S. W., must be presumed to have been acting for the defendant, who was therefore responsible for the arrest. *Wilson* v. *Brecker*, 11 C. P. 268.

(e) *Pleading.*

Declaration.]—In an action of trespass for an arrest under a ca. re. against the plaintiff arresting, there is no necessity to set out in the declaration the affidavit to arrest. *Beamer* v. *Darling*, 4 U. C. R. 211.

A declaration charging defendant with having caused the plaintiff to be assaulted and imprisoned, is good. *Robertson* v. *Cooley*, 7 U. C. R. 21; *Fergusson* v. *Adams*, 5 U. C. R. 194.

Plea of Justification on Charge of Crime.]—Plea of justification held bad, for want of direct and positive averment that a felony had been committed. *McKenzie* v. *Gibson*, 8 U. C. R. 100.

See, also, *McKellar* v. *McFarland*, 1 C. P. 457.

Plea of Justification on Suspicion of Crime—*Reasonable and Probable Cause.*]—Declaration in trespass, for assaulting the plaintiff and giving him into custody. Plea, that the plaintiff was defendant's clerk, and as such was in the habit of receiving money for the defendant; that a large sum of defendant's money which had come into plaintiff's hands was feloniously stolen by some person; that the plaintiff, though requested by defendant, would not account for the same; whereupon defendant, having good and probable cause of suspicion, and suspecting the plaintiff to have been guilty of the felony, gave him in charge to a constable to take him before a magistrate:—Held, no defence, for that no reasonable or probable cause was shewn either as regarded the action of defendant or of the constable. *Patterson* v. *Scott*, 18 U. C. R. 642.

Plea of Justification under Civil Process.]—A plea justifying under process which has been set aside for irregularity, on the terms of no action being brought, cannot be sustained. Defendant should apply to stay proceedings. *Ferris* v. *Dyer*, 4 O. S. 182.

In a plea justifying an arrest under mesne process of a district court, the cause of action should be averred to be within the jurisdiction, and the writ shewn to be returned. *Bigcraft* v. *Clarke*, 4 O. S. 132.

A plea justifying under a ca. re. should aver that an affidavit for a sum certain was made and filed to warrant the process. *Ferris* v. *Dyer*, 5 O. S. 5.

Plea of Justification under Search Warrant.]—The plaintiff declares against defendants for an assault, beating, bruising, and ill-treating, and for false imprisonment. A., one defendant, justifies, alleging that upon suspicion that defendant had stolen his goods, he laid his information before a justice of the peace of the Niagara district, who granted a warrant directed to the constable of Thorold in that district, authorizing him to search plaintiff's house at the township of Louth, in the said district, for the said goods; that B., another defendant, being the constable of Thorold in the said district, at the request of A., searched the house, found the goods, and arrested the plaintiff at Louth, and at the request of A. carried her before a magistrate. Demurrer to plea:—Held, plea bad, in assuming to answer the whole inquiry complained of, and yet not denying nor confessing and avoiding the arrest. *Jones* v. *Ross*, 3 U. C. R. 328.

Replication to Plea of Justification.]—Where defendant justified under a bailable writ, and the plaintiff replied that the arrest was set aside, without stating upon what grounds and without averring that the arrest so set aside was the same arrest under which defendant justified:—Held, replication bad. *Monforton* v. *Monforton*, 4 U. C. R. 338. See *Robertson* v. *Meyers*, 7 U. C. R. 423.

Defendant justified under a capias. Plaintiff replied that the writ was set aside, and the plaintiff discharged for the insufficiency of the affidavit to hold to bail. Defendant rejoined, denying that the writ was so set aside, or that it was void; and on this issue was joined. It appeared that the Judge's order was, that defendant should be discharged from custody and the arrest set aside, on account of the insufficiency of the affidavit:—Held, that on the issue raised the plaintiff must fail, for the arrest might be set aside and the writ still remain in force. *James* v. *Ellis*, 11 U. C. R. 449.

Defendants justified under a ca. sa., and the plaintiffs replied that the judgment on which the writ issued was for less than £10, exclusive of costs, "wherefore the said writ of ca. sa. was and is void:"—Held, unnecessary to aver that the writ was set aside, for it was shewn to have been illegal and void. *Ley* v. *Lowden*, 10 U. C. R. 380.

Defendants justified under an attachment for contempt against plaintiff, to which plaintiff replied that the rule on which said attachment issued was irregular, and that the court afterwards by rule, ordered that it and the rule on which it issued, and the arrest of

plaintiff thereon, should be set aside, as having been obtained ex parte:—Held, replication good, for that the attachment being set aside for irregularity was displaced ab initio, and afforded no protection to defendants. *Reid* v. *Jones*, 4 C. P. 424.

Plea of justification under a writ of ca. sa. Replication, that the said writ was ordered to be set aside: (1) because it did not issue within a year and a day after judgment; and (2) because the fi. fa. was not returned within a year and a day from its issuing:—Held, on special demurrer, that though good grounds to set aside the writ, they did not leave the defendants liable. *McCarthy* v. *Perry*, 9 U. C. R. 215.

(f) *Other Cases.*

Arrest by Person Assaulted.]—Where a man is himself assaulted by a person disturbing the peace in the public street, he may arrest the offender and take him to a peace officer to answer for the breach of the peace. It need not be averred or proved that the person was taken to the nearest justice. *Forrester* v. *Clarke*, 3 U. C. R. 151.

Gaoler—*Receiving Prisoner without Warrant.*]—The gaoler of a common gaol is bound to receive and detain, until released, a prisoner delivered into his custody by a constable on a charge of felony, without warrant, and may justify in an action for false imprisonment, without shewing what the particular felony was with which the plaintiff was charged. *McKellar* v. *McFarland*, 1 C. P. 457.

Identity of Causes of Action—*Malicious Prosecution—Case.*]—To an action of trespass for assault and false imprisonment, defendant pleaded a prior action pending for the same cause. It being admitted that the former action was on the case:—Held, that it was not for the same cause, and that the plea, therefore, was not proved. *Hunt* v. *McArthur*, 25 U. C. R. 90.

The plaintiff, in a previous action, sued in trespass for assault and false imprisonment, but was nonsuited, on the ground that her remedy, if any, was by action for malicious prosecution. She accordingly sued in the latter form of action. Defendant then moved to stay all proceedings until the costs in the first action should be paid, on the ground that this suit was brought for the same cause of action:—Held, that trespass for assault and false imprisonment and case for malicious prosecution are clearly not the same cause of action. Semble, that the jurisdiction to stay proceedings in cases of this kind should be sparingly used. *Doolan* v. *Martin*, 6 P. R. 319.

See BILLS OF SALE, VII. 1—CROWN, II. 6 (c), VII.—JUSTICE OF THE PEACE, II. 3—LANDLORD AND TENANT, I. 3, II. 2.

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See Pleading.

II. At Bar.

[*See* R. S. O. 1877 c. 39, ss. 33-35; con. rules (1897) 533-535.]

The court will not grant a trial at bar merely because the party applying for it is a barrister. *Doe d. Palmer* v. *Dickson*, T. T. 11 Geo. IV.

The court, under the circumstances of this case, refused to order a trial at bar. *Commercial Bank of Canada* v. *Great Western R. W. Co.*, 25 U. C. R. 335.

III. Conduct of Causes.

See Barrister-at-Law.

See also *post* V., XVI.

(1) *Addressing the Jury.*

[*See* C. L. P. Act—R. S. O. 1877 c. 50, s. 261; con. rule (1987) 548.]

Counsel for Stranger.]—A Judge at nisi prius has the power of allowing the counsel for another creditor to cross-examine the plaintiff's witnesses, and to address the jury against the plaintiff's case. *Lavis* v. *Baker*, 13 C. P. 506.

Illness of Junior Counsel—*Continuance of Address by Senior.*]—One of the prisoner's counsel at the trial, whilst he was addressing the jury at the close of the case, was suddenly seized with a fit, and incapacitated from proceeding any further. No adjournment, however, was applied for, but the other, who was the senior counsel, continued the address to the jury on the prisoner's behalf, without raising any objection that he was placed at a disadvantage by reason of his colleague's disability; it did not, moreover, appear that the prisoner had been prejudiced by the absence of the counsel alluded to:—Held, no ground for a new trial. *Regina* v. *Fick*, 16 C. P. 379.

Inflammatory Address.]—Where complaint is made that counsel at the trial has improperly inflamed the minds of the jurors by remarks addressed to them, objection must be lodged at the time the remarks are made, and the intervention of the trial Judge claimed; and where this has not been done, the court will not interfere upon appeal. *Sornberger* v. *Canadian Pacific R. W. Co.*, 24 A. R. 263.

Offer at Trial — *Influencing Amount of Verdict.*]—Where an offer was made by the defendants' counsel at the trial, which it was said was to be carried into effect without reference to the verdict, and the jury being influenced by the statement gave less damages than they might otherwise have done — the court, upon the refusal of the defendants to sanction that offer, set aside the verdict, but

with costs to abide the event, as no wilful intention to mislead the jury was imputed to the statement. *Watson* v. *Gas Light Co.*, 5 U. C. R. 244.

Order of Addresses.]—Under s. 157, C. L. P. Act, 1856, plaintiff's counsel has no right to address a jury a second time after the address of defendants' counsel unless the latter call witnesses. *Gibson* v. *Toronto Roads Co.*, 3 L. J. 11.

——— *Third Party.*] — In an action brought against a city corporation for damages for injuries resulting from a defective sidewalk, O. was added as a party defendant, under R. S. O. 1887 c. 184, s. 531, s.-s. 4, at the instance of the corporation, who asked a remedy over against him. O. delivered a defence denying the cause of action, and alleging that if there was any, it was through the neglect of the corporation. At the trial the Judge ruled that counsel for O. should address the jury before the counsel for the corporation, thus giving the latter the reply as against O.:—Held, that this ruling was correct. *Stillwray* v. *City of Toronto*, 20 O. R. 98.

Reading Former Judgment.] — In an action for false imprisonment under a ca. sa.:—Held, that the counsel for the plaintiff had a right to read at the trial, from the original judgment of the court in setting aside the ca. sa., the grounds upon which it had been set aside. *Robertson* v. *Meyers*, 7 U. C. R. 423

Reading Report of Case.] — Counsel may read a reported case to the jury, in order to shew the law, and for that purpose may refer to the facts; but he cannot go into facts to shew how a former jury treated the same or analogous facts, and thus argue as to what the verdict should be. *Dougherty* v. *Williams*, 32 U. C. R. 215.

Reference to Amount of Verdict and to Costs.]—Defendant's counsel told the jury that a verdict in favour of the plaintiff for any sum would carry costs:—Quære, as to the right to make such statement; but, semble, that the objections to a verdict for the plaintiff founded upon it, would apply equally to a verdict for defendant. *Carrick* v. *Johnston*, 26 U. C. R. 69.

Reference to Previous Verdicts.]—On the third trial of a case in which the verdict had been twice set aside as against the weight of evidence, the jury were urged by counsel to take the same course that former juries had done, and in effect to disregard the Judge's charge. A similar verdict having been again rendered, the Chief Justice concurred in a new trial on account of this appeal made to the jury, although he would otherwise have felt disposed to let the verdict stand. *Case* v. *Benway*, 18 U. C. R. 476.

It is no ground for setting aside a verdict that the counsel merely referred to the verdict on a former trial, expressing a hope that the jury would give the same verdict as had been given before, but desisting when the allusion was objected to, unless the Judge who tried the cause is satisfied that the matter was pressed unfairly and with the view of exercising an improper influence on the jury. *Moore* v. *Boyd*, 15 C. P. 513.

Refusing to Take Nonsuit — *Limiting Address.*] — Held, that on plaintiff's counsel declining to take a nonsuit, the Judge was right in directing the jury to find for defendants, as also in refusing him the right to address the jury on the whole case. *Storey* v. *Leach*, 22 C. P. 164.

Statement of Facts.] — Where in ejectment the plaintiff's counsel in opening his case stated it as a question of legitimacy, and that defendant claimed under a will, and the defence was conducted without the production of the will, as if the statement of the counsel had rendered that unnecessary:—Held, that it ought to have been produced. *Doe d. Breakey* v. *Breakey*, 2 U. C. R. 349.

A plaintiff is not bound by the inadvertent statement or admission of his counsel in opening his case, when promptly retracted. *Jannette* v. *Great Western R. W. Co.*, 4 C. P. 488.

2. *Evidence.*

Supplying Defects—*Discretion.*] — Except in case of fraud, the court will seldom interfere with the discretion of a Judge at nisi prius, in holding a plaintiff to the case which he has proved, after defects in his evidence have been pointed out. *Armour* v. *Phillips*, 4 U. C. R. 152.

Witnesses — *Contradicting* — *Reopening Case.*]—The court will not review the discretion of the Judge at the trial in receiving evidence to contradict a party's own witnesses as being adverse, nor in receiving evidence on the part of the defence after the close of the plaintiff's case, even though for the purpose of corroborating the defence. *Herbert* v. *Mercantile Fire Insurance Co.*, 43 U. C. R. 384.

——— *Cross-examination—Several Counsel.*]—As to right of different counsel representing defendants with common defence to cross-examine a witness separately. See *Walker* v. *McMillan*, 6 S. C. R. 241.

——— *Ordered out of Court.*]—Notice had been given on a previous day of the assizes, that parties to the record wishing to give evidence must not remain in court during the examination of the other witnesses; and the Judge rejected the evidence of a defendant for disobedience of such notice:—Held, that he had authority to do so. *Winter* v. *Mirer*, 10 U. C. R. 110. But it was held otherwise in *Strachan* v. *Jones*, 3 C. P. 253, and in *Macfarlane* v. *Martin*, 3 C. P. 64. See, also, *Mahoney* v. *Macdonell*, 9 O. R. 137; *Black* v. *Bease*, 12 O. R. 522.

[*See* con. rule (1897) 547.]

——— *Recall—Discretion.*] — At the trial the Judge having declined to allow a witness twice called in the progress of the suit to be recalled, or to wait for the possible arrival of another witness, the court refused to review the exercise of his discretion in so doing. *Gleason* v. *Williams*, 27 C. P. 93.

See, also, EVIDENCE.

3. *Right to Begin.*

Appeal as to.]—The court will not entertain an appeal from a county court upon

the question whether the plaintiff or defendant was entitled first to address the jury. *Hastings* v. *Earnest*, 7 U. C. R. 520.

Foreign Judgment.]—In an action on a foreign judgment, if the judgment is not impeached or denied, it is primâ facie evidence against the defendant. In an action on a judgment obtained by plaintiff against defendant in the United States, defendant pleaded: (1) that the judgment had been recovered for money alleged to have been paid by plaintiff for the use of the defendant, and that he was never indebted as alleged; (2) payment before judgment: — Held, that the onus probandi was upon defendant, who ought to have begun, and that, he having refused to do so, a verdict was properly entered for the plaintiff. *Manning* v. *Thompson*, 17 C. P. 606.

Insurance—*Admission.*]—In an action on a fire policy, the only plea was a further insurance effected by the plaintiff, without notice to defendants or indorsement on their policy, on which issue was taken; and at the trial defendants admitted that if they should fail to prove their defence the plaintiff would be entitled to a verdict for the full amount insured:—Held, that they were entitled to begin. *Jacobs* v. *Equitable Insurance Co.*, 19 U. C. R. 250.

Defendants admitted policy, proofs of death, probate, &c., and accepted burden of proof at the trial, and claimed the right to begin:—Held, the plaintiffs had the right to begin, notwithstanding such admissions. *Miller* v. *Confederation Life Assurance Co.*, 11 O. R. 120.

New Trial for Erroneous Ruling as to.]—A new trial will not be granted for a misdirection as to the right to begin, unless it appears that injustice may have been occasioned by it. *McDonald* v. *McHugh*, 12 U. C. R. 503.

Replevin.]—Replevin for a horse. Plea, that the horse was the horse of defendant and not of the plaintiff as alleged, and issue thereon:—Held, that the plaintiff was entitled to begin. *Neville* v. *Fox*, 28 U. C. R. 231.

See, also, EVIDENCE.

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4. *Right to Reply.*

Address to Jury—*New Matter.*]—Where the defendant read to the jury letters of his own addressed to the plaintiff's attorney, and commented upon them, the court refused on that ground to allow the plaintiff's counsel to reply. *Alderson* v. *Stewart*, 7 U. C. R. 297.

Evidence—*Fraud — Discretion.*] — The Judge at the trial nonsuited, because he thought the agreement had not been properly proved, but allowed the case to go to the jury on the issue of fraud, the onus of which was on the defendants, and for assessment of damages. The defendants' counsel cross-examined one of plaintiff's witnesses on the question of fraud, and the plaintiff re-examined him upon the cross-examination:—Held, that by reason of such re-examination the plaintiff was not deprived of his right of calling witnesses in reply to the defendants' evidence of fraud; at all events, this was a matter for the Judge at the trial, and also the plaintiff having had to open the case, the fact of the case going to the jury only on the issue of fraud and for the assessment of damages, did not deprive the plaintiff of the right to reply. *McDonald* v. *Murray*, 5 O. R. 559.

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5. *Other Cases.*

Agreement—*Verdict—Motion against.*]—In trespass for mesne profits, before the verdict was taken, the plaintiff's attorney and the defendant signed a paper, by which it was agreed that the costs in the suit should be left to be taxed by V., and the value of the mesne profits should be decided by him, "in case a verdict shall be given for the plaintiff:"—Held, that the words "in case a verdict shall be given for the plaintiff" left it open to defendant to contend against a verdict at the trial upon any grounds in law, or upon the merits. *Patterson* v. *Prince*, 7 U. C. R. 528.

Calling Witness after Verdict.]—After the jury had rendered their verdict, but before any other business, the Judge examined a witness to prove only that the cause was commenced before the late District Court Act, and therefore proper to be tried in the Queen's bench, and thereupon granted a certificate:—Held, properly granted. *Handcock* v. *Bethune*, 2 U. C. R. 386.

Case Hurriedly Tried — *New Trial.*]—Action for extra labour on an agreement to plaster defendant's house. The court, although not seeing that the verdict was against the evidence or weight of evidence, granted a new trial on the ground that the case was taken late at night, the defendant further shewing by affidavits that he had not time to go into his defence as fully as he would if time had permitted. *Gallina* v. *Colton*, 6 C. P. 247.

Compromise at Trial by Counsel — *Dissent of Client—Right to Repudiate before Verdict.*]—See *Brown* v. *Blackwell*, 26 C. P. 43.

Counsel — *Conflict.*] — Junior counsel are not at liberty to take positions in argument which conflict with the positions taken by their leaders. *International Bridge Co.* v. *Canada Southern R. W. Co.*, 7 A. R. 226. But see 19 C. L. J. 358.

——— *Objection to Charge.*]—The rule is the same in criminal as in civil cases, at any rate where the prisoner is defended by counsel, that any objection to the charge of the presiding Judge, either for nondirection or for misdirection, must be taken at the trial, and if not then taken it cannot be afterwards raised, especially where the evidence fully sustains the verdict. *Regina* v. *Fick*, 16 C. P. 379.

——— *Objection to Ruling.*] — Observations on the duty of counsel when dissatisfied with the ruling of the Judge at nisi prius. *Parsons* v. *Queen Ins. Co.*, 43 U. C. R. 271.

Nonsuit—*Defendant's Risk—Reversal in Appeal — Judgment for Plaintiff.*] — At the trial counsel for the defendants objected that there was no sufficient case made out upon

one branch of the plaintiff's claim, the rectification of an agreement. The plaintiff's counsel thereupon declined to argue the point until the evidence was closed, and the defendants then called one witness upon another point: as to the rectification, the Judge ruled that the plaintiff had made out no case, and as to the other points he decided in defendants' favour, and dismissed the bill with costs. Thereupon the plaintiff appealed, and the decree was reversed and the relief prayed for given to the plaintiff. On settling the certificate of judgment the solicitor for the defendants objected to that part of it which directed the taking of the accounts between the parties, and that credit should be given for $40,000, the value of the plant, &c., seeking to have the action remitted to the court below, in order to conclude the trial and take such evidence as the defendant might adduce in support of this defence, and moved the court to vary the certificate accordingly:—Held, that the defendants were bound by the course which they had elected to adopt, and the application was refused with costs. *Macdonald* v. *Worthington*, 7 A. R. 531.

——— *Plaintiff not Ready.*] — Where defendants' counsel was ready at the assizes, and the plaintiff's counsel not being prepared, the cause was struck out:—Held, that defendants were not entitled to costs for not proceeding to trial pursuant to notice, but their proper course was to have insisted upon a nonsuit. *Crofts* v. *McMaster*, 3 P. R. 121.

Witness — *Cross-examination — Several Defendants.*] — The defendants appeared by the same attorney, pleaded jointly by the same attorney, and their defence was, in substance, precisely the same, but they were represented at the trial by separate counsel. On examination of plaintiff's witness both counsel claimed the right to cross-examine the witness:—Held, that the Judge was right in allowing only one counsel to cross-examine the witness. *Walker* v. *McMillan*, 6 S. C. R. 241.

IV. Issue Book.

The C. L. P. Act, 1856, s. 154, having dispensed with the sealing and passing of the nisi prius record, the English practice, as to making up and delivering paper books and issue books, was introduced here by rule 33 of T. T. 1856. By C. S. U. C. c. 22, s. 203, it was provided that the record need not be sealed, but should be passed and signed as therein declared; and in consequence, by rule of court of H. T. 39 Vict., 1876, issue books were abolished. This rule will be found in 38 U. C. R. 524 and 26 C. P. 250. The following cases, relating to issue books while they were in use, are therefore only referred to:—*Commercial Bank* v. *Lee*, 6 L. J. 21; *Skelsey* v. *Manning*, 8 L. J. 166; *Reeves* v. *Eppes*, 16 C. P. 137; *Boulton* v. *Jones*, 10 L. J. 46; *Campbell* v. *Pettit*, 26 U. C. R. 507; *Welsh* v. *O'Brien*, 29 U. C. R. 474; *Walkem* v. *Donovan*, 5 P. R. 118; *Commercial Bank* v. *Harris*, *ib.* 214; *McDermott* v. *Elliott*, 9 C. L. J. 259; *Harris* v. *Peck*, 12 C. L. J. 279.

Abolition — *Ejectment — Jury Notice.*]—See *Harris* v. *Peck*, 7 P. R. 5.

Irregularity—*Waiver — Amendment.*] — See *Harrington* v. *Fall*, 15 C. P. 541. Followed in *Campbell* v. *Kemp*, 16 C. P. 244.

——— *Waiver—Delay.*]—See *McBean* v. *Duffy*, 4 P. R. 338; *Ross* v. *McLay*, 6 P. R. 14.

V. Jury.

See, also, *ante* III. and *post* XVI.

1. *Answers to Questions and Findings.*

Advisability of Putting Questions.] —The new system of calling upon juries to reply to specific questions considered, discussed, and questioned. *Canada Central R. W. Co.* v. *McLaren*, 8 A. R. 564.

Application of Evidence — *Judge's Charge.*] — An objection was taken to the charge, as being adverse: — Held, that the charge could not be complained of here, for to give effect to the objection would be to compel the Judge to submit the case to the jury, leaving them to apply the evidence without any assistance from him, which was not the practice in this Province. *Scougall* v. *Stapleton*, 32 O. R. 206.

In an action against McK. and M. for goods sold and delivered, the plaintiff swore that he had sold the goods to the defendants and on their credit, and his evidence was corroborated by the defendant McK. The defence shewed that the goods were charged in plaintiff's books to C. McK. & Co. (the defendant McK. being a member of both firms), and credited the same way in C. McK. & Co.'s books, and that the notes of C. McK. & Co. were taken in payment, and it was alleged that the sale of the goods was to C. McK. & Co. The trial Judge called the attention of the jury to the state of the entries in the books of the plaintiff and of C. McK. & Co., and to the taking of the notes, and to all the evidence relied on by the defence, and he left it entirely to the jury to say to whom credit was given for the goods: —Held, affirming the judgment in 27 N. B. Rep. 42, that the case was properly left to the jury; and a new trial was refused. *Miller* v. *Stephenson*, 16 S. C. R. 722.

Assent of Counsel to Question—*Objection—Estoppel.*]—It was objected that a false representation alleged by defendant had not been found to be false to the knowledge of the plaintiff company: — Held, that a question with regard to such representation, put to the jury, having been assented to by counsel on both sides as one the finding on which would be decisive, it was too late to take this objection; and the effect of the finding must be taken to be that the plaintiffs knew the representation to be false. *Star Kidney Pad Co.* v. *Greenwood*, 5 O. R. 28.

Contradictory Findings—*New Trial—Damages.*]—Where a jury found (1) that the death of the plaintiff's wife had been accelerated, but not to any appreciable extent, by taking a dose of tartar emetic negligently supplied by the defendants; (2) that the plaintiff had suffered no damage thereby, but that his minor child had incurred damages to the extent of $1,000:—Held, that the action must be dismissed, because the damages attributable to the defendants were, on these findings (which could not properly be disturbed), inappreciable and irrecoverable. The court below was in error in directing a new trial

on the assumption that the findings as to damages were contradictory and illogical. *Kerry* v. *England*, [1898] A. C. 742.

Duty to Answer Questions — *General Verdict.*]—R. S. O. 1877 c. 50, s. 264, makes it imperative upon the jury to answer questions submitted to them, and prohibits them from giving a general verdict instead. But the Judge, after having put questions, may, nevertheless, in his discretion receive a general verdict. *Furlong* v. *Carroll*, 7 A. R. 145.

Duty to Submit Questions.] — The Judge is not bound under the O. J. Act to submit questions in writing to the jury. *Lett* v. *St. Lawrence and Ottawa R. W. Co., Hinton* v. *St. Lawrence and Ottawa R. W. Co.*, 1 O. R. 545.

Equitable Issues—*Reversal of Finding.*] —There is nothing to prevent a Judge directing the jury to find on equitable issues. In this case, the jury having found for the defendants, the court, on the evidence, directed judgment to be entered for the plaintiff. *Rae* v. *McDonald*, 13 O. R. 352.

False Imprisonment—*General Verdict.*] —In an action for false imprisonment, judgment cannot be entered upon answers to questions submitted to the jury, and a finding, in answer to a question, of a certain amount of damages, is not equivalent to the general verdict which must be given by them. *Gordon* v. *Denison*, 22 A. R. 315.

General Verdict—*Findings Inconsistent with.*]—The court refused to quash a conviction under the Liquor License Act, affirmed on appeal on the ground among others that the general verdict of guilty was inconsistent with the answers of the jury to specific questions. *Regina* v. *Grainger*, 46 U. C. R. 382.

——— *Findings Inconsistent with—Recommendation.*]—In an action for wrongful dismissal the jury found: (1) that there was a final bargain between the parties; (2) that the plaintiff was to get $900 a year; and in answer to the question, "It being a condition of the bargain that the plaintiff's term of service should end if he was not fit to do the duties of a captain, was the plaintiff fit to do the duties of a captain?" (3) "It has not been satisfactorily shewn by the evidence;" and (4) the plaintiff was dismissed: and added as a rider the following: "Your jury, believing that the plaintiff did not receive proper aid in the discharge of his duty, would recommend a verdict for plaintiff of $100." The Judge entered a verdict for the defendant, and the plaintiff moved to set it aside. A divisional court being equally divided, the motion to set aside the verdict was dismissed; but the court of appeal directed the judgment entered for the defendant to be reversed, and judgment for $100 with county court costs to be entered for the plaintiff, unless the defendant elected to have a time named to take a new trial. *St. Denis* v. *Baxter*, 13 O. R. 41, 15 A. R. 387.

——— *Findings Inconsistent with — Nonsuit.*]—In an action on a policy for $1,800, upon goods which the insured at the time of insuring estimated at a cash value of $4,500, the jury were asked, among other questions, "Did T. (the insured) reasonably and actually believe that such stock in trade was then of the fair value of $4,500." They answered: "We cannot believe that he could think such a thing;" but said, when they handed in their answers, that they wished the verdict to be entered for $1,200, which they found to be the loss sustained:—Held, that on this finding defendants were entitled to succeed; and a nonsuit was ordered. *Newton* v. *Gore District Mutual Fire Ins. Co.*, 33 U. C. R. 92.

——— *Right to—Waiver—Malicious Prosecution.*] — By ss. 263, 264, of the C. L. P. Act, R. S. O. 1887 c. 50, except in certain actions, including malicious prosecution, the Judge may require the jury to answer questions; and "in such case the jury shall answer such questions, and shall not give any verdict;" and by s. 252, the parties in person, or by their attorney or counsel, may waive trial by jury. In an action for malicious prosecution, the trial Judge, without objection, left certain questions to the jury, which they answered, but added that their verdict was for the plaintiff. The Judge disregarded the general verdict and entered judgment, on the answers to the questions, for the defendant:—Held, that the parties must be assumed to have waived their right to a general verdict, and assented to judgment on the specific findings of fact; for, if they could waive trial by jury altogether, there was no reason why they could not agree to the course adopted in this case. The jury, therefore, in finding a general verdict, were doing what it was agreed they should not do, and what the parties and the court dispensed with their doing. *Gower* v. *Lusse*, 16 O. R. 88.

Inconclusive Findings — *Effect of.*] — The Judge at the trial, under 37 Vict. c. 7, s. 32 (O.), submitted certain questions to the jury, but they left one unanswered, which he deemed so material that he was not able to enter a verdict, and discharged the jury:—Held, that the court could not enter a nonsuit, under 34 Vict. c. 12, s. 10 (O.), and that s. 33 of 37 Vict. c. 7 would not apply, for there was no verdict to move against. The point being new, the rule was discharged without costs. *Armstrong* v. *Stewart*, 28 C. P. 45.

In an action for slander the jury returned a finding of no damage, but said they could not agree as to whether their verdict should be for the plaintiff or defendant: upon which the trial Judge directed judgment to be entered for the defendant, dismissing the action:—Held, that the finding of no damage did not dispose of the action, but that there should have been a finding on the charge of guilt; and a new trial was directed. Wills v. Carman, 14 A. R. 636, considered. *Bush* v. *McCormack*, 20 O. R. 497.

At the trial of an action for malicious prosecution, the jury, in answer to questions, made two findings in favour of the plaintiff, but found that he was entitled to no damages. The trial Judge expressed the opinion that no verdict could be entered for either party, and refused motions for judgment made by both. The plaintiff, treating the trial as void, gave a new notice of trial for a later sittings. A motion by the defendant to set aside this notice was refused by a local Judge and by a Judge of the high court on appeal. The plaintiff then entered the action for trial, but the presiding Judge refused to try it, holding that it was not properly before him. Upon appeal by the defendant from the order in chambers refusing to set aside the notice of trial, and

upon motion by the plaintiff by way of appeal from the ruling of the Judge at the second trial, or for leave to move against the finding of no damages at the first trial, notwithstanding that two sittings of the divisional court had passed since that finding:—Held, by the Queen's bench division, that, although no judgment could be entered for either party, the findings of fact remained, and neither party could ignore them and proceed to trial again as if they did not exist; the trial Judge could do nothing but order or refuse judgment upon them; it was for the divisional court to deal with the action and the findings, either by sending it down for a new trial or by ordering judgment for either party under rule 755; and, under all the circumstances of this case, the proper course was to give leave to move for a new trial notwithstanding the lapse of time, and upon that motion to set aside the whole of the findings and order a new trial. R. S. O. 1887 c. 44, s. 84, and rules 789 and 792, considered. Wills v. Carman, 14 A. R. 656, specially referred to. *Stevens* v. *Grout*, 16 P. R. 210. See the next case.

This action was tried with Stevens v. Grout, ante, and came before the common pleas division upon the same state of facts as that upon which that action came before the Queen's bench division:—Held, that the judgment of the trial Judge at the first trial was a judgment of the high court, and, as neither party moved against it, it was a binding adjudication that no verdict could be entered on the findings of the jury, and the Judge at the second trial should have proceeded to try the action; and a motion to the divisional court was not necessary. *McDermott* v. *Grout*, 16 P. R. 215.

At the trial of an action for negligence causing the death of a servant of the defendants, the jury, in answer to questions, found that the defendants were guilty of negligence which caused the accident, and assessed the plaintiffs' damages, but disagreed as to and did not answer a question put to them as to whether the deceased, with knowledge of the danger, voluntarily incurred the risks of the employment:—Held, that judgment could not, under these circumstances, be entered either for the plaintiffs or the defendants. Held, also, that as soon as a decision was given, to which both parties yielded, that no judgment could be given for either of them on the findings, there was an end of the trial, and either party was at liberty to give a new notice of trial and again to enter the action for trial, as upon a disagreement of the jury, without moving to set aside the findings and for a new trial. McDermott v. Grout, 16 P. R. 215, approved. Stevens v. Grout, ib. 210, overruled. *Faulknor* v. *Clifford*, 17 P. R. 363.

See Manitoba Free Press Co. v. *Martin*, 21 S. C. R. 518.

Inconsistent Findings.] — Held, that the trial Judge was within his right and duty in sending the jury back to reconsider their findings after pointing out their inconsistency. *Peuchen* v. *Imperial Bank*, 20 O. R. 325.

Indefinite Answer—*Sufficiency.*]—In an action against a railway company for injuries caused by a collision at a crossing, the jury in answer to the question, "If the plaintiffs had known that the train was coming, would they have stopped their horse further from the railway than they did," said "Yes:"—Held, that though this was not very definite, yet, taken with the evidence on which the jury acted, it was sufficient. *Rosenberger* v. *Grand Trunk R. W. Co.*, 32 C. P. 349.

Neglect to Answer Questions—*General Verdict—Indictment.*]—On an indictment for nuisance in obstructing a highway, judgment had been arrested, and a second trial had, in order to take the opinion of the jury on a particular question which the court thought material. The jury upon the second trial found a general verdict of acquittal without answering such question, which was submitted to them by the Judge. The indictment had not been removed by certiorari:—Held, therefore that the court could not interfere by staying the entry of judgment until a new indictment could be preferred. Semble, that the jury had a right to find generally as they did. *Regina* v. *Spence*, 12 U. C. R. 519.

Question for Jury — *Ascertainment of Sum.*]—It was not improper to leave to the jury the question whether the amount in this case was ascertained by the act of the parties. *Watson* v. *Severn*, 6 A. R. 559.

Question Put after Verdict.]—Where a question was not put to the jury until after they had rendered their verdict and answered the other questions submitted to them, and after the Judge had been moved for judgment upon those answers, but it was done while all the parties and their counsel were present and before the jury had left the court room:—Held, that the question had been properly put. *McLaren* v. *Canada Central R. W. Co.*, 32 C. P. 324.

Uncertain Finding.] — The jury were asked: "Did the defendant's house interfere injuriously with the light of the plaintiff's house?" They answered, "Yes, but not injuriously:"—Held, that in effect a question of law had been submitted to the jury, and that the finding was too uncertain to support a judgment for the defendant. *Carter* v. *Grasett*, 14 A. R. 685.

——— *Street Railways—Negligence.*]—See *Rowan* v. *Toronto R. W. Co.*, 29 S. C. R. 717.

See Webber v. *McLeod*, 16 O. R. 609; *Providence Washington Ins. Co.* v. *Gerow*, 14 S. C. R. 731.

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2. *Challenging Jurors.*

For Cause — *Waiver—Subsequent Objection—New Trial—Venue—Bias.*] — At the trial of an action the defendant's counsel challenged a juryman for cause. On the trial Judge stating that he did not think any cause was shewn, and that the counsel had better challenge peremptorily, the counsel did not claim the right to try the sufficiency of any cause against the impartiality of the juryman, but accepted the opinion of the Judge, and the juryman remained on the jury:—Held, that on a motion for a new trial an objection to the juryman could not be entertained. The action was tried at B., and a new trial was moved for at a place other than B., because the jury there were biassed against defendant:—Held, that this formed no ground for a new trial. *Wood* v. *McPherson*, 17 O. R. 163.

Peremptory Challenges — *Several Defendants—Objection—Waiver.*]—The defendants, having delivered separate defences and

being separately represented at the trial, claimed to be entitled under the Jurors Act, R. S. O. 1887 c. 52, s. 110, to four peremptory challenges each, which, though objected to by the plaintiff, was conceded by the Judge, and the defendants challenged six jurors between them, and the trial proceeded, resulting in a verdict for the defendants:—Held, upon motion by the plaintiff, that there had been mistrial, and the plaintiff was entitled to a new trial. Under the above section the defendants were only entitled to four peremptory challenges between them, and, inasmuch as the plaintiff took the objection at the time, he had not waived his right to complain by proceeding with the trial. *Empey* v. *Carscallen*, 24 O. R. 688.

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3. *Special Jury.*

Application for—*Time.*]—Where a defendant applies for a special jury, he must do so in time to permit of the jurors being summoned, otherwise the common jury will not be held to be superseded. *Clandinan* v. *Dickson*, 8 U. C. R. 281.

Costs — *Certificate for.*]—An application for a certificate for a special jury, must be made immediately after the trial. *Binkley* v. *Dejardine*, Tay. 177.

The trial Judge certified for the defendant's costs of a special jury summoned at his instance. *Farquhar* v. *Robertson*, 13 P. R. 156.

Striking—*Notice of—Time.*]—There must be four clear days' notice of striking a special jury; therefore a notice given after 11 a. m. on Saturday, for 11 a. m. on Tuesday, is not sufficient. *Bell* v. *Flintoft*, 3 U. C. R. 122.

[R. S. O. 1897 c. 61, s. 117, requires four full days.]

——— *Second Trial.*]—If a special jury be struck previous to an assize, and the cause is irregularly tried at that assize by a common jury, and the verdict afterwards set aside, it is irregular to try the cause a second time by a common jury, no new special jury being struck. *McMartin* v. *Powell*, T. T. 3 & 4 Vict.

——— *Time for—Number of Jurors.*]—A special jury cannot be struck after the commission day of the assizes; but it is no objection to such a jury that the sheriff has not summoned sixteen jurors, if a sufficient number attend to try the cause. Quære, should not a venire and distringas issue in such a case. *Morvey* v. *Maynard*, 4 O. S. 323.

See Salter v. *McLeod*, 10 L. J. 76.

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4. *Withdrawing Case from Jury.*

Division Court—*Facts not Disputed.*]—In a division court suit a jury was demanded and called, but the presiding Judge withdrew from their consideration everything except the amount of damages to be awarded, saying that there were no facts in the case disputed, the plaintiff's evidence being uncontradicted. The jury assessed the damages and judgment was entered for the plaintiff:—Held, that where the plaintiff furnishes evidence which the Judge thinks sufficient to support his case, the case cannot be withdrawn from the jury; the mere fact that the defendant does not call evidence to controvert the plaintiff's evidence does not conclude the matter, for the jury might refuse to credit the plaintiff, and properly find a verdict for the defendant. The Judge in this case exceeded his jurisdiction by assuming the functions of the jury; and the right to have the case submitted to the jury being an absolute statutory right, the violation of it was ground for prohibition. *Re Lewis* v. *Old*, 17 O. R. 610.

——— *Question of Law—Res Judicata.*]—When an issue arises on the plea of res judicata, the identity of the facts in the former case with those in the existing case is a matter for the jury when the trial is by a jury in a division court. In a case in a division court where the defence of res judicata had been raised, and in which a jury notice had been given, the Judge determined the case himself, and refused to allow it to be tried by a jury:—Held, that he had no jurisdiction to do so, and that a mandatory order must go to compel him to try the case in accordance with the practice of the court. *In re Cowan* v. *Affie*, 24 O. R. 358.

Malicious Prosecution — *Part of Charge.*]—In an action for malicious prosecution of a charge of theft of several articles, the trial Judge held that there was no reasonable and probable cause for charging the theft of some of the articles, and withdrew the case as to them from the jury, but held otherwise as to the other articles, and directed the jury that the fact that there was reasonable and probable cause to charge the theft of some of the articles only bore upon the question of damages; and the jury found a verdict for the plaintiff:—Held, that there was no misdirection. Johnstone v. Sutton, 1 T. R. 547, considered and distinguished. Reed v. Taylor, 4 Taunt. 616, followed. *Wilson* v. *Tennant*, 25 O. R. 339.

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

See NONSUIT.

5. *Other Cases.*

Case Triable only by Jury—*Trade-libel—Action on the Case.*]—An action for words written and published relating to articles of the plaintiffs' manufacture and the rights of the plaintiffs under certain letters patent by virtue of which they claimed a monopoly of the manufacture and sale of the articles, is not an action of defamation properly so called, but an action on the case for maliciously acting in such a way as to inflict loss upon the plaintiffs, and does not come within s. 106 of the Judicature Act, 1895, so as to be triable only by a jury, unless by consent. *Dickerson* v. *Radcliffe*, 17 P. R. 418.

Dispensing with Jury after Evidence Taken.]—The Judge at the trial of an action has the power to dispense with the jury after all the evidence has been taken, but the power should be sparingly exercised. *Marks* v. *Town of Windsor*, 17 O. R. 719. See *Adair* v. *Wade*, 9 O. R. 15; *Denmark* v. *McConaghey*, 29 C. P. 563.

Disregarding Findings of Jury—*Appellate Court.*]—The power conferred on the court by rule 615 to give judgment on the evidence before it, may be exercised though the result be to disregard the finding of a jury, but it must be used with great caution. *Clayton* v. *Patterson*, 32 O. R. 435.

——— *Trial Judge.*]—Where, in the course of the trial of an action before a Judge and jury, a motion for a nonsuit is made at the close of the plaintiff's case, and again at the close of the whole evidence, and the Judge adopts the course of taking a verdict, and of fully hearing and considering the motion, if necessary, after the verdict, the Judge may, in a proper case, nonsuit the plaintiff, notwithstanding a verdict of the jury in his favour. Perkins v. Dangerfield, 51 L. T. N. S. 535, and Connecticut Mutual Life Ins. Co. of Hartford v. Moore, 6 App. Cas. 644, distinguished. Floer v. Michigan Central R. W. Co., 27 A. R. 122, 127, specially referred to. *Macdonald* v. *Mail Printing Co.*, 32 O. R. 103.

Exposure of Body to Jury—*Evidence.*]—The plaintiff in an action for bodily injuries may exhibit them to the jury for the purpose of having the nature and extent of the damage explained by a medical witness. Review of American authorities on this subject. The exhibition of injuries which have been sustained by another person, for the purpose of contradicting evidence given on behalf of the plaintiff in such an action, is not permissible unless competent evidence is forthcoming to explain their nature; but, even with such evidence, quære. *Sornberger* v. *Canadian Pacific R. W. Co.*, 24 A. R. 263.

——— *New Trial—Misconduct of Juror.*]—In an action to recover damages for alleged malpractice the plaintiff is not entitled to shew to the jury the part of the body in question for the purpose of enabling them to judge as to its condition. Sornberger v. Canadian Pacific R. W. Co., 24 A. R. 263, approved and distinguished. Attempting to dissuade a witness from giving evidence is such misconduct on the part of a juror as would justify the granting of a new trial. *Laughlin* v. *Harvey*, 24 A. R. 438.

Failure to Agree—*Dismissal of Action.*]—When in an action tried with a jury the presiding Judge holds that there is evidence to submit to the jury and refuses a nonsuit, he cannot, upon the jury disagreeing, himself decide under rule 780 in the defendant's favour, upon his own view of the evidence. Judgment in 30 O. R. 635 affirmed. *Floer* v. *Michigan Central R. W. Co.*, 27 A. R. 122.

——— *Trial by Judge alone.*]—In an action of seduction no appearance was entered; the plaintiff then filed a statement of claim, to which no defence was made, and interlocutory judgment was signed, and notice of assessment of damages given. The defendant did not appear at the trial, and a jury was called, who disagreed as to the amount of damages, and were discharged. The Judge then tried the case himself without a jury, upon a fresh taking of evidence, and assessed the damages, and gave judgment for the plaintiffs. Semble, that under the O. J. Act and former practice, the Judge in such an action had no power to dispense with the jury. Quære, whether in any event, a jury having been called and disagreed, they could be dispensed with, and a retrial had without a new notice; but it was unnecessary to decide the point, as it was not satisfactorily established that the writ of summons had been served on the defendant; and he was therefore allowed to have a trial on the merits. *Adair* v. *Wade*, 9 O. R. 15.

See NONSUIT.

Fining Jurors—*Remission.*]—By a liberal construction of the Estreat Act, 7 Wm. IV. c. 10, the court will in certain cases relieve jurors from fines imposed on them at nisi prius, after the fine has been levied by the sheriff. *In re Cole*, 6 O. S. 425.

Incompetency of Jurors—*New Trial.*]—A new trial was ordered, upon payment of costs, where it was shewn that one of the jurors was not selected to be of the panel, that another was so deaf that he was not able to hear some of the most important evidence, and that a third was in such friendly relations with the defendants, an incorporated company, as should have induced him to decline to sit on the trial. *Cameron* v. *Ottawa Electric R. W. Co.*, 32 O. R. 24.

Influencing — *Newspaper Article—Objection—Waiver.*]—During the trial of an action for libel the defendants published in their newspaper a sensational article with reference thereto. The plaintiffs' solicitor was aware that the article had come to the hands of one or more of the jury, but did not bring the matter to the notice of the court, or take any action with respect to it, and proceeded with the trial to its close, when the jury brought in a verdict for the defendants. Upon a motion for a new trial upon the ground of improper conduct towards and undue influence upon the jury:—Held, that the objection was too late. *Tiffany* v. *McNee*, *Metcalf* v. *McNee*, 24 O. R. 551.

See NEW TRIAL.

Lunacy—*Mandate to Sheriff — Exhaustion.*]—On an application in lunacy, the court ordered the sheriff to empanel a jury for the then next sittings of the court. The matter was not proceeded with until the sittings succeeding the next; and the matter then coming on:—Held, that the panel was not properly

constituted; that the sheriff's authority to summon a jury was confined to the first sittings after the date of the order. *In re McNally*, 13 Gr. 463.

Omission to Swear Juror.]—The court will not grant a new trial because one of the jurors has not been sworn, where no injustice is done thereby. *Goose* v. *Grand Trunk R. W. Co.*, 17 O. R. 721.

Overholding Tenants — *Discharge of Jury—Authority for New Jury.*]—Held, that the fact of a jury being unable to agree, and so discharged, in an overholding tenancy case, does not determine the authority of the commissioner to summon a second jury. *In re Babcock*, 9 L. J. 185.

The fact of the jury having been discharged by consent of parties, does not prevent the writ being still proceeded upon. *Ib.*

Setting aside Verdict—*Determination of Action by Court.*]—Held, that this being a case which before the O. J. Act would have been in the sole jurisdiction of the court of chancery, to grant the relief asked, the divisional court could act without the intervention of a second jury; and, the evidence failing to establish the plaintiff's right to the relief asked for, the decree was set aside; but as to the damages, as they had not been moved against, they were not interfered with. *James* v. *Clement*, 13 O. R. 115.

Special Order Directing Trial by Jury.]—See *Thurlow* v. *Beck*, 9 P. R. 268; *Re Lewis, Jackson* v. *Scott*, 11 P. R. 107, *post* VI. 3.

Withdrawal of Juror.]—The withdrawal of a juror at a trial has the effect of concluding the suit, and, with it, of determining the whole cause of action. *Flake* v. *Clapp*, 8 P. R. 62.

Writs for Jury.]—See *Boulton* v. *Fitzgerald*, 1 U. C. R. 476.

VI. Jury Notice.

1. *Filing and Serving—Practice.*

Irregular Notice—*Trial Pursuant to—Verdict—Waiver of Objection.*]—An order directed the trial of an issue in an interpleader matter. The plaintiff served the issue, but did not serve with it a jury notice as required by R. S. O. 1877 c. 54, s. 4. He subsequently served a jury notice with the notice of trial. The defendant did not appear at the trial, and a verdict was rendered for the plaintiff, who afterwards obtained (on notice) in chambers an order for costs:—Held, affirming this order, that the verdict obtained on the trial by a jury was not a nullity, but only irregular, and not being moved against promptly should stand. *Lesson* v. *Lemon*, 9 P. R. 103.

Last Pleading—*Joinder on Replication.*]—A defendant can, under the Law Reform Act, 1868, s. 18, give a notice for a jury with a pleading which joins issue on a replication, taking issue on the defendant's plea. *Quebec Bank* v. *Gray*, 5 P. R. 31.

——— *Refiling.*]—Where joinder of issue had been filed before the Act came into force, the plaintiff was allowed to withdraw it, and file another with a notice requiring a jury. *Synge* v. *Aldwell*, 5 P. R. 94.

——— *Refiling—Leave—Notice of Motion.*]—The plaintiff omitted to file a jury notice with his last pleading, and applied ex parte for leave to withdraw the last pleading and refile it with a jury notice. The leave was granted:—Held, on appeal, that when the plaintiff came to the court to be relieved from his slip, he should have been called upon to shew that the case was one which should be tried by a jury, and that unless he had been able to do so the defendants should not have had their statutory right to have the case tried by a Judge without a jury taken away. Held, also, that notice of the motion should have been given to the defendant, in accordance with the spirit of rule 406, O. J. Act. The appeal was treated as a substantive motion for leave to file the jury notice, and the order was affirmed without costs. *Powell* v. *City of London Assurance Co.*, *Powell* v. *Quebec Ins. Co.*, 10 P. R. 520.

——— *Similiter.*]—With his joinder of issue, the plaintiff served notice of trial for the chancery sittings. Defendant afterwards served a similiter and jury notice:—Held, that the similiter and jury notice were good, and that the notice of trial must be set aside. *McLaren* v. *McCuaig*, 8 P. R. 54.

——— *Second Similiter.*]—The plaintiff joined issue upon defendant's pleas, and at the same time filed a similiter, without a jury notice, for the defendant. Afterwards the defendant filed a second similiter, and with it a jury notice:—Held, that the defendant should have filed a jury notice with his pleas; that the first similiter was good; and that the second was unnecessary, and must, together with the jury notice, be struck out as bad. *Hyde* v. *Casmea*, 8 P. R. 137.

Omission to File—*Order Curing.*]—Where a jury notice is served in due time, but by inadvertence is filed too late to comply with R. S. O. 1887 c. 44, s. 78 (2), there is power to make an order allowing it to stand as a good notice; and such an order should be made if the case is one proper to be tried by a jury. *Macrae* v. *News Printing Co.*, 16 P. R. 364.

Time for—"*Before the Sittings*"—*Postponement from Non-jury Sittings.*]—R. S. O. 1887 c. 44, s. 78, s.-s. 2, provides that a party to an action desiring to have it tried by a jury shall, "at least eight days before the sittings at which the action is to be tried," file and serve a notice therefor. R. S. O. 1887 c. 52, s. 148, provides that no record containing issues to be tried by a jury shall be entered for trial unless the fee of $5 required by that section be first paid. The trial having been postponed from a non-jury sittings, the plaintiff, before the following assizes, filed and served a jury notice:—Held, that con. rule (1888) 671 was not intended to overrule s. 148, but was only aimed at protecting litigants from being required to pay a new fee for entering their actions for trial a second time, and not to relieve them from the payment of any other usual fees. The plaintiff had the right to give the jury notice, paying the jury fee, and annexing the jury notice to the record at the time of setting down.

Bunbury v. *Manufacturers' Ins. Co.*, 13 P. R. 52.

——— *Computation of Days.*]—The plaintiffs having on the 31st October, 1890, served notice of trial for a non-jury sittings to be held on the 17th November, 1890, the defendant on the 10th November, 1890, served a jury notice:—Held, that this notice was bad; for it was not served at least eight days before the sittings at which the action was to be tried, as required by R. S. O. 1887 c. 44, s. 78 (2). *McBride* v. *Carroll*, 14 P. R. 70.

——— *Delivery of Defence.*] — Quære, whether a defendant can properly give a jury notice before delivery of his statement of defence. *Lauder* v. *Didmon*, 16 P. R. 74.

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2. *Striking out.*

(a) *As a Matter of Discretion.*

By Judge or Officer in Chambers before Trial.]—In general a jury notice will be struck out on the application of the defendants when the claim is for unliquidated damages against a corporation. *Nelles* v. *Grand Trunk R. W. Co.*, 13 C. L. J. 199. See *Morris* v. *City of Ottawa*, 13 C. L. J. 200.

Where the cause of action was one of a purely common law character, and none of the defences or replies presented issues of a merely equitable character, the order of a local master striking out the defendant's jury notice was reversed. If it were shewn that there was likely to be a great complexity of facts:—Semble, that such an element alone would not be a reason for dispensing with a jury in a common law action. *Bank of British North America* v. *Eddy*, 9 P. R. 468.

The action was for the amount of a bill for medical attendance; no equitable issue was raised, and it clearly appeared that the only matter in dispute was the amount of the bill:—Held, a proper case for a Judge in chambers, under R. S. O. 1877 c. 50, s. 255, to strike out the jury notice. *Pickup* v. *Kincaid*, 11 P. R. 445.

A Judge in chambers or the master in chambers has jurisdiction under s. 80 of the Judicature Act, R. S. O. 1887 c. 44, to strike out a jury notice where it has been regularly served; but the jurisdiction should not be exercised, because the exercise of it will hamper the discretion of the trial Judge. *Bristol and West of England Loan Co.* v. *Taylor*, 15 P. R. 310.

Since the passing of the rules of 4th January, 1894, providing for the holding of separate jury and non-jury sittings for the trial of actions, it is desirable to have the question whether an action is to be tried with or without a jury settled at as early a stage as possible. A Judge in chambers has full discretion under s. 80 of the Judicature Act, R. S. O. 1887 c. 44, to order that an action shall be tried without a jury, and that discretion is not lightly to be interfered with. And where a Judge in chambers reversed an order of a local Judge, and struck out a jury notice in an action for an injunction to abate a nuisance and for damages, his order was affirmed on appeal. Held, in chambers, that the action was one within the exclusive jurisdiction of the court of chancery before the Administration of Justice Act, 1873, and could be more conveniently tried without a jury. *Lauder* v. *Didmon*, 16 P. R. 74.

The Crown coming into the high court of justice is in the same position as the subject; and a Judge, on the application of the Crown, can make an order striking out a jury notice given by the defendants. Rule 364 applied. If before the trial the court or Judge has ordered that the action may be tried without a jury, the Judge presiding at the trial has no power to direct it to be tried by a jury. *The Queen* v. *Grant*, 17 P. R. 165.

A jury notice should not be struck out by a Judge in chambers, upon a motion made before the trial, simply upon the ground that the action can be more conveniently tried without a jury; that is a matter which should be left for the consideration of the Judge presiding when the action comes on for trial. *Hawke* v. *O'Neill*, 18 P. R. 164.

See Bank of Toronto v. *Keystone Fire Ins. Co.*, 18 P. R. 113; *Fox* v. *Fox*, 17 P. R. 61; *Conmee* v. *Canadian Pacific R. W. Co.*, *Canadian Pacific R. W. Co.* v. *Conmee*, 12 A. R. 744; *Toogood* v. *Hindmarsh*, 17 P. R. 446.

By Trial Judge—*Appeal.*]—The trial Judge has by s. 255 of the Common Law Procedure Act a discretion to try any case with or without a jury as he may think best, and his discretion will not be interfered with by a divisional court. *Brown* v. *Wood*, 12 P. R. 198.

——— *Transfer to Non-jury List.*]—An appeal by the defendants from an order of a Judge presiding at the Toronto jury sittings, striking out the jury notice served by the defendants, and transferring the action for trial to the Toronto non-jury sittings, was allowed, and the case was ordered to be reinstated on the list of actions for trial with a jury, and the jury notice restored; but this was not to interfere with the right of the Judge presiding at the trial to direct that the action should be tried without a jury. The Judge was not the Judge presiding at the trial of the action within the meaning of s. 110 of the Judicature Act, for he declared as soon as it was called that he would not try it, and then ceased to have any power over it. Nor could the order be supported as one made in chambers under s. 44 of the Judicature Act, for the order did not profess to have been made in chambers, nor did the Judge in making it profess to make it as a Judge sitting in chambers, nor was any foundation laid for it as for an order in chambers, but it was made by the Judge sua sponte. The duty of a Judge presiding at the trial of a cause in which a jury notice has been given, when he directs that it be tried without a jury, is to proceed at once with the trial of it. *Bank of Toronto* v. *Keystone Fire Ins. Co.*, 18 P. R. 113.

But see *Skae* v. *Moss*, 18 P. R. 119 n.

(b) *For Irregularity.*

Chancery Division—*Method of Trial Appropriate to—Change in Rules—Transfer*

of Cases.]—In an action for the recovery of land, in which the writ issued from the chancery division, the jury notice served by the defendants was struck out, and a motion to transfer the action to another division was refused. Bank of British North America v. Eddy, 9 P. R. 468, does not, since rule 545, O. J. Act, afford any general rule of practice. *Masse* v. *Masse*, 10 P. R. 574. Reversed, 11 P. R. 81.

In an action brought in the chancery division, on behalf of the plaintiff and other creditors, to set aside an alleged fraudulent transfer of notes, &c., made to the defendants by the debtor, and for an injunction to restrain the defendants from negotiating them, the defendants served a jury notice:—Held, that rule 545, O. J. Act, was not intended to, and does not, interfere with the power of transferring actions from one division of the high court to another, nor with the right to give a jury notice in a proper case, nor with the existing modes of trial of particular actions. *Pawson* v. *Merchants Bank of Canada*, 11 P. R. 72.

In an action for the price of goods sold and delivered, which was begun in the chancery division, the defendant's jury notice, which had been struck out, was restored, and the action was transferred to the Queen's bench division. Masse v. Masse, 10 P. R. 574, not followed, owing to the judgment of the court of appeal in Pawson v. Merchants Bank, 11 P. R. 72. *Herring* v. *Brooks*, 11 P. R. 15.

Conmee and McLennan became contractors for the construction of a section of the Canadian Pacific Railway. The agreement therefor stipulated that ninety per cent. of the work should be paid for during the progress thereof upon "the progress estimates" of the proper officer of the company, the remaining ten per cent. to be paid on the completion of the contract, at which time the company alleged that they had discovered that by means of fraud the contractors had procured from their engineer progress estimates for sums greatly in excess of the work done, and they claimed for overpayments about $600,000. The contractors on the 5th October, 1885, sued out process in the Queen's bench division to recover $200,000, the balance claimed by them as still due; and on the 31st of the same month the company sued out process in the chancery division against the contractors to enforce payment of the amount claimed to have been overpaid them. Issue was joined in the actions respectively on the 17th and 14th of November following. In the action in the chancery division the contractors gave notice for trial by a jury, which, on application by the company, was struck out. An order was also made refusing a motion by the contractors to stay proceedings in the chancery division action until the determination of the questions in the other action. Thereupon the contractors appealed, and their appeal was dismissed. The company moved for and obtained an order to stay all proceedings in the Queen's bench division action with liberty to the contractors to raise in the chancery division action by defence, set-off, counterclaim, or otherwise, all questions intended to be raised by them in the Queen's bench division action, which order was affirmed:—Held, reversing these orders (11 P. R. 149), that the court of appeal had jurisdiction to entertain the appeals, and that a trial with a jury was the primâ facie right of the contractors, whose action was the earlier one, and that the orders complained of were not such as rested in the mere discretion of the Judge. *Conmee* v. *Canadian Pacific R. W. Co.*, *Canadian Pacific R. W. Co.* v. *Conmee*, 12 A. R. 744.

See Bank of British North America v. *Eddy*, 9 P. R. 468, *ante* (a).

Equitable Issues.]—In ejectment where equitable issues are raised under R. S. O. 1877 c. 50, s. 257, the issues must be tried without a jury. *Bryan* v. *Mitchell*, 8 P. R. 302.

Where equitable issues are raised, a jury is not of right but of grace under s. 257 of the C. L. P. Act. And where, in an action, brought under an order of the court made in a former action, to try the plaintiff's right as against the now defendants to the possession of certain land recovered in that action, equitable issues were raised, and the case had been once tried before a jury, who had disagreed:—Held, that an order striking out the jury notice was properly made. Leave to appeal refused. *Adamson* v. *Adamson*, 12 P. R. 469.

See Shannon v. *Hastings Mutual Fire Ins. Co.*, 26 C. P. 380.

Where equitable issues are raised in a common law action, a jury notice is irregular under the Ontario Judicature Act, R. S. O. 1887 c. 44, s. 77, and rules 677 and 678, and will be struck out. *Baldwin* v. *McGuire*, 15 P. R. 305.

Equitable and Legal Issues.]—A local Judge has jurisdiction, in an action brought in his own county, where the solicitors for all parties reside in such county, by virtue of s. 185 (5) of the Judicature Act, 1895, to make an order under s. 114 striking out a jury notice as a matter of discretion; and he may do so sitting in chambers. And where the issues raised in an action of ejectment were mainly equitable, and it appeared to be a case in which the Judge at the trial would dispense with the jury:—Held, that the local Judge should have exercised his discretion and struck out the jury notice. Semble, that where there are both legal and equitable issues on the record, in the absence of an order under s. 114, a party has the right to have the legal issues tried by a jury. Baldwin v. McGuire, 15 P. R. 305, commented on. *Fox* v. *Fox*, 17 P. R. 161.

Where both legal and equitable issues are raised by the pleadings, a jury notice cannot be regarded as irregular. Baldwin v. McGuire, 15 P. R. 305, distinguished. Where it is apparent that an action should be tried without a jury, a Judge in chambers will strike out the jury notice as a matter of discretion. *Toogood* v. *Hindmarsh*, 17 P. R. 446.

See Bank of British North America v. *Eddy*, 9 P. R. 468; *Wright* v. *Sun Mutual Ins. Co.*, 29 C. P. 221; *Sawyer* v. *Robertson*, 19 P. R. 172.

——— *Separate Trial.*]—I. brought this action against S. in the chancery division claiming (1) foreclosure of certain mortgages, (2) upon an open account, (3) damages for breach of a contract; and S. sued I. in the Queen's bench division for damages arising out of the same contract, with which also I.'s other claims were connected. On a motion to strike out a jury notice, S. offered to let I. have judgment upon the mortgages and the open account, with a reference as to the amounts, sub-

ject to a defence which he raised as to a contract by I. to purchase the property covered by the mortgages. An order was made directing (1) the trial of an issue, at a sittings of the chancery division, as to the defence raised by S.; (2) that the claim for damages in this action should be tried by a jury at the same time and place as the cross-action; and (3) that I. should have judgment upon the mortgages and open account with a reference, which was to be stayed pending the trial of the issue directed. *Irwin* v. *Sperry*, 11 P. R. 229.

The action was brought (1) for the recovery of instalments of money due under a script contract; and (2) for a declaration of the plaintiff's right to specific performance of the part of the contract as to settlement duties, the time for performance not having yet arrived:—Held, a proper case in which to exercise the power under rule 256, O. J. A., of severing the action so as to have that part of it which was preliminary tried first, the defendants having a primâ facie right to a jury as to the main matter in controversy, the (1) claim; while the (2) claim could be better tried without the intervention of a jury. The defendants' jury notice, which had been struck out, was restored, and the whole action was left to the Judge at the trial to try partly with a jury, and partly without a jury, or altogether without a jury, as he might think advisable. *Temperance Colonization Society* v. *Evans*, 12 P. R. 48, 380.

The plaintiffs sued, as executors of McB., to recover from the defendant, a solicitor, money placed in his hands for investment, and notes and money received by him as solicitor, and agent for McB., and prayed that the defendant might be ordered to assign certain securities in his hands. The defendant set up by way of defence a certain agreement, under which he alleged that the plaintiffs were estopped from making their claim. The plaintiffs then amended their statement of claim, setting up fraud in procuring this agreement, and asked that it might be declared void, and be delivered up to be cancelled:—Held, the case came within ss. 257 and 258 of the C. L. P. Act, and that the legal issues should be tried by a jury, and the equitable issues by a Judge without a jury, unless the Judge at the trial, in the exercise of his discretion, chose to try the whole case without a jury: but that the defendant was not entitled as a matter of right to have the jury notice struck out. Temperance Colonization Society v. Evans, 12 P. R. 48, followed. *McMahon* v. *Lavery*, 12 P. R. 62.

An action for part of the price of a machine and to enforce a lien on land for such price, with a defence of breach of warranty in the defective condition of the machine, is not distinguishable from an ordinary mortgage action. Such an action would have been in the exclusive jurisdiction of the court of chancery before the Judicature Act, and a jury notice is therefore improper under s. 45, O. J. A. A separate trial by jury upon the issue raised as to the character of the machine should not be ordered in a case of this kind, where there is but one cause of action. Temperance Colonization Society v. Evans, 12 P. R. 48, and McMahon v. Lavery, 12 P. R. 62, distinguished. *Farran* v. *Hunter*, 12 P. R. 324.

Exclusive Jurisdiction of Court of Chancery.]—In cases in which, before the O. J. Act, the court of chancery had exclusive jurisdiction, a jury notice is irregular and will be struck out. *Gowanlock* v. *Mans*, 9 P. R. 270.

The action was brought in the chancery division to obtain specific performance of a covenant to repair, or for damages:—Held, that it was really a common law action, for specific performance of such a covenant could not be decreed, and the defendant was therefore entitled to the benefit of his jury notice. *Bingham* v. *Warner*, 10 P. R. 621.

The exclusive jurisdiction of the court of chancery in s. 45 of the O. J. Act, means its jurisdiction as exercised generally in dispensing equity, and not its exclusive as distinguished from its auxiliary jurisdiction. *Pawson* v. *Merchants Bank of Canada*, 11 P. R. 72.

Held, that an action brought by the plaintiff on behalf of himself and other creditors to set aside an alleged fraudulent transfer of notes, &c., made by the defendant, was such an action as would, before the O. J. Act, have been in the exclusive jurisdiction of the court of chancery, and therefore it fell within s. 45, and should be tried without a jury. The practice laid down in Bank of British North America v. Eddy, 9 P. R. 468, is still the proper practice. *Ib.*

Action by two ratepayers, on behalf of themselves and all other ratepayers of A., against all the members of the municipal council of A., charging that the defendants, acting fraudulently and in collusion with the treasurer of A., continued him in office after it had come to their knowledge that he was a defaulter, and allowed him to receive further moneys, causing loss to the municipality:—Held, that the law attaches the liability of trustees to municipal councillors, and that it was sufficient to charge them as such without using the word "trustee:" that the action was one in the former exclusive jurisdiction of the court of chancery, and a jury notice was therefore improper. *Morrow* v. *Connor*, 11 P. R. 423.

Where the plaintiffs claimed specific performance of a contract to supply them with milk for a cheese factory upon certain terms, and in the alternative damages, and the defendant asked for rectification of the contract, a jury notice was struck out. Where a party seeks equitable relief to which he is not entitled, the opposite party should, except in a very clear case, demur, and not attack the pleading indirectly by asking for a jury. Bingham v. Warner, 10 P. R. 621, commented on. *Fraser* v. *Johnston*, 12 P. R. 113.

This action was brought to rescind a contract for the sale of a vessel by the plaintiffs to the defendant, on the ground that the defendant had failed to perform his part of the contract, and for damages for breach of the contract and for injuries to the vessel, which had been delivered to the defendant, and to restrain the defendant from dealing with it, and for delivery up thereof:—Held, that this was an action over the subject matter of which, before the Administration of Justice Act, 1873, the court of chancery had exclusive jurisdiction, and a jury notice was therefore improper, under s. 77 of the Judicature Act, R. S. O. 1887 c. 44. *Toronto and Hamilton Navigation Co.* v. *Silcox*, 12 P. R. 622.

An action for an injunction and to establish a will and for the construction of the will and an account, is one that was peculiarly within the exclusive jurisdiction of the court of chancery prior to the Administration of Justice Act, 1873, and should, therefore, be tried without a jury, unless otherwise ordered, by virtue of s. 77 of the Judicature Act, R. S. O. 1887 c. 44; and a jury notice given in such an action will be struck out. Re Lewis, Jackson v. Scott, 11 P. R. 107, followed. *McGill* v. *McDonell*, 14 P. R. 483.

The plaintiffs' claim was to enforce a charge against the defendant's lands and for a personal order or judgment for immediate payment of the sum for which they asserted the charge:—Held, not such an action as would have been, before the Administration of Justice Act of 1873, within the exclusive jurisdiction of the court of chancery, within s. 103 of the Judicature Act, R. S. O. 1897 c. 51. There, being, therefore, legal and equitable issues raised and notice for a jury given, rule 551 applied, and the action should be entered for trial at a jury sittings. *Sawyer* v. *Robertson*, 19 P. R. 172.

See Lauder v. *Didmon*, 16 P. R. 74; *Farran* v. *Hunter*, 12 P. R. 324; *Thurlow* v. *Beck*, 9 P. R. 268; *Re Lewis, Jackson* v. *Scott*, 11 P. R. 107; *James* v. *Clement*, 13 O. R. 115.

Non-repair of Highway.]—In an action against a railway company and a city corporation to recover damages for injuries sustained by the plaintiffs by being upset upon a street in the city owing to the heaping up of snow upon the side of the roadway, the plaintiffs in their statement of claim alleged that the corporation had permitted this to be done, and had thereby allowed the street to be out of repair and dangerous for travel:—Held, that the action must be treated as one for non-repair of a street within the meaning of s. 5 of the Law Courts Act, 1896; and a jury notice was therefore irregular and should be struck out. It made no difference that the motion to strike out the jury notice was made by the railway company and not by the city corporation, as the latter appeared and supported the motion. *Barber* v. *Toronto R. W. Co.*, 17 P. R. 293.

——— *Bridge.*]—Section 104 of the Judicature Act, R. S. O. 1897 c. 51, providing that certain actions for damages against municipal corporations for non-repair shall be tried by a Judge without a jury, applies to such an action in respect to part of a highway formed by a bridge; and a jury notice was struck out as irregular. *Vennard* v. *Township of Bruce*, 19 C. L. T. Occ. N. 87.

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3. *Other Cases.*

Special Order Directing Trial by Jury.]—Held, that an action to set aside a conveyance could, previous to the O. J. Act, have been brought in the court of chancery only, and the defendant had therefore no right, as of course, to have the action tried by a jury. While under the old Chancery Act (R. S. O. 1877 c. 40, s. 99) the court might direct an action to be tried by a jury upon notice and for good cause, yet this could only be done by the court, and not by a Judge or master in chambers. *Thurlow* v. *Beck*, 9 P. R. 268.

The court of chancery had, before the O. J. Act, exclusive jurisdiction in actions to establish wills, and its power to direct a trial by jury (R. S. O. 1877 c. 40, s. 99) is continued in the high court under s. 45, O. J. Act. But the heir-at-law in such an action has not now in this Province an absolute right to a jury, and the court refused to direct one on the issues raised herein. *Re Lewis, Jackson* v. *Scott*, 11 P. R. 107.

Waiver of Jury Notice—*Consent—Indorsement on Record.*]—The Law Reform Act of 1868, s. 18, s.-s. 3, enacts that it shall be competent for the parties at a trial to consent that the notice for a jury shall be waived, and the case tried by the Judge, "and to indorse a memorandum of such consent on the record; and thereupon" the Judge shall try, &c. The plaintiff had given notice for a jury, but at the trial the counsel on both sides waived it, and requested the Judge to try the case, which he did, and found for the plaintiff; but no memorandum was indorsed. On objection by the plaintiff to the Judge's authority to try:—Held, that the record might be amended by the Judge's notes, which stated the waiver and consent, and the indorsement of the memorandum made nunc pro tunc. *Wycott* v. *Campbell*, 31 U. C. R. 584.

VII. Notice of Trial or Assessment.

1. *By Whom Given.*

(a) *Proviso and Notice by Defendant.*

[*See* C. L. P. Act, R. S. O. 1877 c. 50, s. 246; con. rule (1897) 530.]

Countermand.]—Where the plaintiff's attorney, at defendant's request, countermanded notice of trial, and defendant's attorney did not object, or afterwards move for judgment:—Held, that the case could not be taken down to trial by proviso at the following assizes. *Doe d. Davidson*, v. *Gleeson*, 9 U. C. R. 607.

Default of Plaintiff—*Abolition of Notice by Proviso.*] — Defendant having given notice of trial by proviso, claiming that the plaintiff had made default in not proceeding to trial within due time after a new trial ordered—the question whether there had been, under the circumstances, a default such as to enable the defendant to give this notice, considered, but not decided. *Summerville* v. *Joy*, 5 P. R. 144.

Quære, whether notice of trial by proviso has been abolished in this country. *Ib.*

Previous Notice.]—Defendant's attorney gave twenty days' notice of trial to the plaintiff, as under the C. L. P. Act of 1856, s. 151, and afterwards gave notice of trial by proviso for the same assizes, where the plaintiff not appearing was nonsuited:—Held, regular, for the first notice was not one intended by s. 151, and if it had been, defendants could still give the notice by proviso. *Carscallen* v. *Moodie*, 2 P. R. 254.

Remanet.]—After a cause had been made a remanet, defendant cannot rule the plaintiff to enter the issue, but his proper course is to take the cause down to trial by proviso. *Boulton* v. *Jarvis*, 1 U. C. R. 399.

Second Trial.] — The provision as to twenty days' notice by the defendant to the plaintiff to bring on a case for trial does not apply when the case has once been tried. *Camcron* v. *Milloy*, 8 C. L. J. 67.

(b) *Since the Judicature Act.*

"**Any Party.**"] — The words "either party," in rule 255, O. J. Act, mean "any party," and when an action is as to all the parties to it ripe for trial, one of several defendants may bring the case on under that rule by giving notice of trial to the plaintiff and his co-defendants. *McLean* v. *Thompson*, 9 P. R. 553.

Since the O. J. Act any one of the parties, plaintiffs or defendants, may give notice of trial. *Tinning* v. *Grand Trunk R. W. Co.*, 11 P. R. 438.

Conflicting Notices—*Earlier Sittings.*]—In an action in the chancery division in which no jury notice had been given, the defendant gave notice of trial for the assizes beginning on the 10th September, 1889, and the plaintiff for the chancery sittings beginning on the 4th November, 1889:—Held, that under con. rule (1888) 654, either party has the right to give notice of trial for the next sittings, whether an assize or a chancery sittings; and the plaintiff cannot take away that right from the defendant by giving notice of trial for a later sittings. The plaintiff's motion to set aside the defendant's notice of trial was therefore refused. Palmateer v. Webb, 7 C. L. T. Occ. N. 244, distinguished. *Shaw* v. *Crawford*, 13 P. R. 219.

2. *Countermand or Abandonment.*

Abandonment — *Costs.*]—Where one of several defendants gives notice of trial, and afterwards, becoming aware that the action is not at issue against the other defendants, abandons his notice, he cannot tax the costs of it against the opposite party. *Strachan* v. *Ruttan*, 15 P. R. 109.

Countermand.] — Where notice of trial has been given, it cannot be countermanded by either party. *Friendly* v. *Carter*, 9 P. R. 41.

See Doe d. Davidson v. *Gleeson*, 9 U. C. R. 607.

3. *Dismissal of Action for not Giving.*

See PRACTICE—PRACTICE SINCE THE JUDICATURE ACT, V. 2 (c).

4. *For What Sittings.*

Chancery Sittings.]—A notice of trial in an action brought in the Queen's bench or common pleas division, given for a special sittings for the trial of actions in the chancery division, is irregular, and will be set aside. *Grant* v. *Middleton*, 10 P. R. 585.

Jury Sittings — *Non-jury Sittings.*]—Where an action is to be tried without a jury, and two spring or autumn sittings have been appointed at the place of trial, one for the trial of actions with, and the other without, a jury, the plaintiff, although by s. 88 of the Judicature Act, 1895, he can have his action tried at the jury sittings, is not in default under rule 647 by reason of his not giving notice of trial therefor, where the non-jury sittings, for which he intends to give notice of trial, is to be held at a later date. *Leyburn* v. *Knoke*, *Leyburn* v. *Herbert*, 17 P. R. 410.

Next Sitting of the Court.] — The plaintiff gave notice of trial for the Toronto assizes, which was earlier than the chancery sittings, and the defendants gave notice of trial for the chancery sittings. The actions could properly have been tried at either. In consequence of the state of the assize docket it seemed probable that the actions would really be sooner tried if set down for the chancery sittings:—Held, that the assizes was, and the chancery sittings was not, "the next sitting of the court," and the defendants were, therefore, not within their right, under rule 654, in giving notice of trial for the latter. *Hogaboom* v. *Lunt*, *Hogaboom* v. *McDonald*, 14 P. R. 480.

Under rule 654 the defendant has a right to give notice of trial for the next sitting of the court, and, if such notice is regular, the plaintiff cannot interfere with such right by giving notice for a more distant sitting. It is the duty of a defendant, setting a case down for trial, to give notice of trial to all the other parties; and if some of them are defendants who have not appeared, and it is necessary to give them notice of motion for judgment, such notice should be for the same time and place as the notice of trial. *McGill* v. *McDonell*, 14 P. R. 483.

Semble, that a notice intituled in the Queen's bench, "for the next sittings of this court, to be held at, &c., on, &c.," was irregular. *De Blaquiere* v. *Cottle*, 4 P. R. 167.

See Shaw v. *Crawford*, 13 P. R. 219, *ante* 1 (b).

5. *Form of Notice.*

Intituling—*Ejectment—Nominal Defendant.*]—In ejectment against A. and B., by consent of plaintiff's attorney, an appearance was entered for S. as landlord, A. and B. not appearing. The notice of trial was intituled as against A. and B., and notice was served on plaintiff's attorney warning him that this would be objected to:—Held, that the notice was wrongly intituled. *Jones* v. *Seaton*, 26 U. C. R. 166.

——— *Omission in Style of Cause.*]—Where a defendant is not misled by a notice of trial, any trifling irregularity therein, as in this case the omission of the words "In the matter of partition between," before the plaintiff's and defendant's names, in the style of cause, will not entitle defendant to set aside the verdict; and irregularities of this kind should be objected to promptly, otherwise the court will not interfere. *Symonds* v. *Symonds*, 20 C. P. 271.

——— *Omission of a Defendant—Nullity.*]—A notice in a suit against two defendants, with the name of only one defendant therein, is a nullity. *Doe Read* v. *Peterson*, 1 P. R. 45.

Notice of Assessment.]—A notice of assessment will not be considered as a notice of trial. *Fortune* v. *McCoy*, Tay. 435.

Where there is an issue in fact and an issue in law, on which contingent damages are to be assessed, a notice of trial was held sufficient to enable the plaintiff to try the issue and assess damages. *Davis* v. *Davis*, 4 O. S. 322.

Notice of trial given instead of notice of assessment, is irregular. *Billings* v. *Reid*, 5 O. S. 73.

Where the notice is to try the issues and assess the damages, and there are in fact no issues, the notice as to the assessment is not therefore irregular. *Gamble* v. *Rees*, 7 U. C. R. 406.

After issue joined, and notice of trial served, the plaintiff applied to a Judge to strike out a plea. This was granted, but the Judge refused to order that the notice of trial, &c., should stand as good for the then altered state of the record. The plaintiff, notwithstanding, proceeded with his case, and altered his record to suit the state of the proceedings. The notice served was notice of trial, while the striking out of the plea required notice of assessment. The plaintiff having assessed damages: —Held, irregular. *Dickson* v. *Grimshawe*, 14 C. P. 273.

An issue book, where there were issues in fact and in law, and the latter had been decided in the plaintiff's favour, contained no notice of the judgment, and the usual venire only, and the notice of trial served with it was only to try the issues, not to assess damages:—Held, that the informality in the notice was immaterial, as defendant could not have been misled by it. *Welsh* v. *O'Brien*, 29 U. C. R. 474.

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6. *Irregularity.*

(a) *Issue not Joined or Pleadings not Closed.*

Amendment—*Vacation.*]—A party to an action has the right, notwithstanding the insertion in rule 484, by rule 1331, of the words "or of the Christmas vacation," to deliver a pleading during such vacation; and a notice of trial given therein is regular. Where a pleading is amended under an order giving leave to amend, rule 427 does not apply; and, under rule 392, when the amendments allowed by the order have been made or the time thereby limited for making them has elapsed, the pleadings are in the same position as to their being closed as they were in when the order was made. *Thompson* v. *Howson*, 16 P. R. 578.

Before Issue Joined — *Issue Book.*]—Held, following Ginger v. Pycroft, 5 D. & L. 554, that a notice of trial given before issue joined, except under Reg. Gen. 36, is irregular, and, following McBean v. Duffy, 4 P. R. 338, that the issue book must be delivered before or with the notice of trial. *Ross* v. *McLay*, 6 P. R. 14.

Counterclaim — *Joinder of Issue.*]—The plaintiff delivered a simple joinder of issue upon the statement of defence and counterclaim: —Held, that this closed the pleadings, and that notice of trial served with it was regular. *Hare* v. *Cawthrope*, 11 P. R. 353.

——— *Pleading in Answer.*]—A pleading delivered by the defendant to a counterclaim, in answer thereto, whether by the original plaintiff or by added defendants, which denies the allegations in the counterclaim, puts the plaintiff to the proof thereof, and submits that the counterclaim should be dismissed, is not a joinder of issue, but a statement of defence to the counterclaim; the plaintiff by counterclaim has by the rules three weeks to reply thereto; and the pleadings, at least quoad the counterclaim, are not closed until after the lapse of three weeks, or until the plaintiff by counterclaim has joined issue. Notice of trial set aside where given by the original plaintiffs after the lapse of four days from the delivery of such a pleading, no subsequent pleading having been delivered. Construction of rules 379-383. Hare v. Cawthrope, 11 P. R. 353, distinguished. Irwin v. Brown, 12 P. R. 639, overruled. Quære, whether "plaintiff" in rule 381 does not include a plaintiff by counterclaim. *Irwin* v. *Turner*, 16 P. R. 349.

Ejectment — *Issue after Appearance.*]—A writ in ejectment was served on the 15th August, 1881, and an appearance entered after the 22nd of the same month:—Held, that the plaintiff need not file a statement of claim, under the new practice, and that a notice of trial served immediately after the entry of the appearance was regular, the cause being then at issue. *Laidlaw* v. *Ashbaugh*, 9 P. R. 6.

Joinder of Issue—*Delivery on same Day as Defence.*]—Where an overdue statement of defence was filed on the last day for giving notice of trial for the assizes, and a joinder of issue and jury notice were filed by the plaintiff on the same day, but after the filing of the defence:—Held, that the service of notice of trial with the joinder and jury notice, on the same day, before the filing of the defence, was not an irregularity. *Broderick* v. *Broatch*, 12 P. R. 561.

On the last day for delivering the statement of defence, which was also the last day for giving notice of trial for a sittings of the court at which the plaintiff wished to go down, the plaintiff, without waiting for the statement of defence, delivered a joinder of issue and served notice of trial before two o'clock in the afternoon. Before three o'clock the same day the defendants delivered their defence. The defendants were in no default:—Held, that the notice of trial, being delivered before the close of the pleadings, was irregular under rule 654, and should be set aside. Broderick v. Broatch, 12 P. R. 561, distinguished. *McIlroy* v. *McIlroy*, 14 P. R. 264.

On the last day for delivering the statement of defence, which was also the last day for serving notice of trial, the defendants filed their defence, a few minutes before four o'clock, and served it at the office of the plaintiff's solicitor about the same time. The plaintiff immediately filed a joinder of issue, and then served it and also notice of trial, before four o'clock, on the clerk of the defendants' solicitor, in Osgoode Hall. On the same day, but before the defence was filed, the plaintiff also served the joinder and notice of trial at the office of the defendants' solicitor:—Held, that the notice of trial was irregular, for it could not be properly served until after the

close of the pleadings; and the service upon the clerk at Osgoode Hall was of no avail; it could only be effective, if at all, from the moment when it reached the solicitor himself. McIlroy v. McIlroy, 14 P. R. 264, followed in preference to Broderick v. Broatch, 12 P. R. 561. Held, also, that the issuing by the defendants of an order to produce at the same time that they filed their defence did not waive the irregularity of the notice of trial. *Hermann* v. *Mandarin Gold Mining Co. of Ontario*, 18 P. R. 34.

——— *Lapse of Time.*]—A cause is at issue where a joinder of issue has been delivered, or where three weeks have elapsed after statement of defence has been delivered. A notice of trial served before either of these events had happened:—Held, irregular and set aside. *Schneider* v. *Proctor*, 9 P. R. 11.

Notice Limiting Defence — *Delivery after Notice of Trial.*]—Where, immediately after appearance, the plaintiff served the issue book, together with the notice of trial, and subsequently, within four days after appearance, defendant gave notice limiting his defence, which notice did not appear upon the issue book or record:—Held, that the notice of trial was irregular, as the notice limiting the defence was regular, and should appear on the issue book, and be served with notice of trial. *Grimshaw* v. *White*, 12 C. P. 521.

Pending Appeal.]—Held, that a notice of trial, given pending a rehearing on the decision of a single Judge upon demurrer, is irregular, and will be set aside. *McMaster* v. *King*, 14 C. L. J. 79.

A notice of trial, given pending an appeal to a higher court, will be set aside for irregularity. *Goldie* v. *Date's Patent Steel Co.*, 7 P. R. 1.

Reopening — *Order Permitting Third Parties to Defend.*]—Where a third party notice had been served by the defendant before the close of the pleadings between the plaintiffs and defendant, but the action had been set down by the plaintiffs to be tried at Toronto without a jury and notice of trial given before the plaintiffs were aware that such third party notice had been served, and before notice of motion had been given by the defendant for an order giving directions as to the trial:—Held, that the order made upon such motion, which permitted the third parties to come in and defend, and directed that the issue between the defendant and the third parties should be tried at the same time as the action, reopened the pleadings, and they were not closed (the third parties having delivered a defence) until the expiration of the time for replying to that defence. The duty of the plaintiffs then was to draw up a new record of the pleadings, including in it the defence of the third parties, enter the case again for trial, and give notice of trial to the defendant and third parties, under rule 542. *Confederation Life Association* v. *Labatt*, 18 P. R. 238.

Replication Due.]—On the 22nd August, 1881, a replication had not been filed, but the suit was in such condition that it could then have been filed:—Held, that under the O. J. Act, rule 494, notice of trial might be given without filing a replication. *Sawyer* v. *Short*, 9 P. R. 85.

Replication in Denial.]—The reply in this action contained two paragraphs, the first denying certain allegations in the fourth paragraph of the defence, and the second joining issue upon the rest of the defence. Notice of trial was served with the reply. A motion to set aside the notice of trial was dismissed, because the affidavit filed in support of it did not state that no joinder was filed when the notice of trial was given. Semble, the joinder of issue referred to in rule 176, O. J. Act, is not a simple denial of a previous pleading. *Weller* v. *Proctor*, 10 P. R. 323.

Replication not in Denial.]—Plaintiff can only serve notice of trial with his replication where that replication is in denial of defendant's pleading. Where notice of trial was served with a replication confessing and avoiding the plea of defendants, it was set aside with costs. *Skelsey* v. *Manning*, 8 L. J. 166.

Reply and Demurrer.] — A reply delivered by the plaintiff joining issue upon the statement of defence, and further alleging that the facts set forth in the defence were no answer to the claim:—Held, a joinder of issue "simply, without adding any further or other pleading thereto," within the meaning of rules (1897) 262; and therefore that when it was delivered the pleadings were closed, and a notice of trial thereupon served was regular. *Gibson* v. *Nelson*, 19 P. R. 265.

Reply—*Vacation.*]—A pleading in reply, which was more than a simple rejoinder of issue, was served by the plaintiffs on the 30th June, 1896. No further or other pleading having been delivered, and no extension of time for further pleading having been granted, the plaintiffs, on the 4th September, 1896, between three and four in the afternoon, served a notice of trial for the 14th September, 1896:—Held, irregular. *Piper* v. *Benjamin*, 17 P. R. 267.

Statement of Claim—*Issue upon.*]—A defendant by simply taking issue upon the statement of claim closes the pleadings, and may then serve notice of trial. Hare v. Cawthrope, 11 P. R. 353, followed. *Malcolm* v. *Race*, 16 P. R. 339.

Statement of Defence—*Order Staying Proceedings—Chambers Motion—Reference to Trial Judge—Order — Judgment—Appeal.*]—On the 21st March, 1896, the defendant appeared, delivered a defence, and served an order for security for costs, which imposed a stay of proceedings. On the 2nd October, 1896, the plaintiff complied with the order by filing a bond, and on the 3rd October gave notice of trial:—Held, that the notice of trial was irregular, the pleadings not being closed when it was given. A motion made in chambers by the defendant to set aside the notice of trial was referred to the Judge at the trial, who dismissed it. The defendant thereupon withdrew, and the action was tried in his absence and judgment given for the plaintiff:—Held, that the Judge, when disposing of the motion, was sitting and acting as a Judge of assize, and that this and the trial of the cause might properly be deemed one proceeding; and one appeal, comprehending all, was sufficient. *Campau* v. *Randall*, 17 P. R. 325.

See Stewart v. *Sullivan*, 11 P. R. 529; *Garner* v. *Tune*, 12 P. R. 280.

(b) *Motion to Set aside Notice of Trial.*

Application of One Defendant — *Notice to the Other—Costs.*]—Where there were two defendants and notice of trial was given by the plaintiff to both, and set aside upon the application of one without notice to or knowledge of the other, who attended with his witnesses at the time and place named in the notice:—Held, that the defendant who moved against the notice of trial was not bound to give the other defendant notice of the motion; that it was the duty of the plaintiff, if he desired to protect himself, to notify that defendant that the notice had been set aside; and, therefore, the plaintiff should pay the costs of the day. *Knight* v. *Town of Ridgetown*, 14 P. R. 81.

Forum—*County Court Case—Assizes.*]—Where a county court case was ordered to be tried at the sittings of assize and nisi prius, a notice of trial given under the order, but not in accordance with the terms of the order, must be moved against in the county court. *Clark* v. *Clifford*, 14 C. L. J. 169, 7 P. R. 329.

Grounds for—*Venue—Mistake in Copy.*]—The fact of a different county being inserted as the venue in the copy of the declaration served, is no ground for setting aside notice of trial for the county inserted as the venue in the declaration filed. *Brown* v. *Blackwell*, 6 P. R. 165.

Time for Moving—*Before Trial.*]—Where notice of trial is irregular defendant is not bound to wait for a verdict and then move against it; his more proper course is to move to set aside the notice before trial. *Skelsey* v. *Manning*, 8 L. J. 166.

See McDermott v. *Elliott*, 6 P. R. 107.

(c) *Motion to Set aside Proceedings Founded on Irregular Notice.*

Notice of Intention to Move.]—Notice of intention to move, on the ground of irregularity in proceedings prior to the execution of a writ of inquiry, is required in England to be given two days before the execution of the writ of inquiry. A similar notice should be given in this Province not later than the first day of the assizes at which the damages are to be assessed. *Dougall* v. *Maclean*, 1 ra. 318.

Where the defendant had appeared by attorney, and the plaintiff after declaration signed interlocutory judgment, and served notice of assessment on defendant himself, and assessed damages:—Held, assessment irregular, and that it was not necessary that any notice should be given to the plaintiff of defendant's intention to move for such irregularity. *Bishop* v. *Lindsay*, 6 O. S. 264.

——— *Merits—Affidavit.*]—Where a notice of trial is not shewn to have been served, the verdict may be set aside without an affidavit of merits, or any notice of intention to move. *Consumers' Gas Co.* v. *Kissock*, 5 U. C. R. 542.

Short Notice—*Verdict—Costs.*]—A plaintiff having proceeded to trial without giving notice of trial in the proper time, presuming upon his having allowed the defendant to plead and demur without an order, the verdict was set aside with costs. *Lyman* v. *Snarr*, 9 C. P. 64.

Special Circumstances — *Verdict — Costs.*]—Under special circumstances stated, verdict for the plaintiff set aside for irregularity in not giving due notice of trial, but without costs. *Goula* v. *Carr*, 5 U. C. R. 586.

Time for Moving.]—When notice had been served too late, but the cause was entered, and referred by the Judge at nisi prius—no verdict being taken:—Held, that a motion to set aside the proceedings must be made within the first four days of the next term. *Allen* v. *Boice*, 3 P. R. 209.

See Grand River Navigation Co. v. *Wilkes*, 8 U. C. R. 249, *post* 9.

(d) *Signature of Attorney.*

Death—*New Attorney — Notice.*]—Where the attorney for plaintiff died after service of replication and before service of notice of trial, and a new attorney, signing himself plaintiff's attorney, gave notice of trial, without a notice of the appointment of a new attorney having been previously given, the notice of trial was set aside with costs. *Steel* v. *Manning*, 8 L. J. 167.

Partner of Attorney.]—Semble, that a notice of trial is not irregular because A., one of two partners, as attorneys, signs it as the plaintiffs' attorney, although B., the other partner, appeared as the attorney on the record, there having been no order to change the attorney. *Gamble* v. *Rees*, 7 U. C. R. 406.

A notice of trial signed by one of two partners of a firm of attorneys, though not by the partner who was the attorney for the plaintiff on the record, is not a nullity, but merely an irregularity which can be taken advantage of, if it is calculated to mislead. *Macaulay* v. *Phillips*, 6 P. R. 77.

(e) *Time and Place of Sittings—Error as to.*

(*See ante* 4.)

Description of Place — *Waiver.*]—Notice of trial in and "for the county of York," and not "united counties of York and Peel," is a mere irregularity, which may be waived. *Commercial Bank of Canada* v. *Lee*, 6 L. J. 21.

Wrong Date.]—Notice was given for the 21st September instead of October. The Judge, though thinking the notice irregular, declined to set it aside, preferring to let the parties proceed at their own risk. *De Blaquiere* v. *Cottle*, 4 P. R. 167.

The insertion of the 2nd September instead of the 2nd October, as the day of trial, in a notice of trial:—Held, not a sufficient ground for setting the same aside, as it could not mislead defendant's attorney. *Bank of Montreal* v. *Cameron*, 7 P. R. 188.

The plaintiffs on the 31st October, 1890, served notice of trial in these words: "Take notice of trial of this action at Osgoode Hall, at the chancery sittings, for the 17th day of October, 1890." A sittings of the high court for trials, to be held by a Judge of the chancery division, at Osgoode Hall, had been fixed for the 17th November, 1890:—Held, that the notice was sufficient; for it gave such notice as imparted knowledge. *McBride* v. *Carroll*, 14 P. R. 70.

———*Amendment.*]—Notice of trial was given by mistake for the 11th January, instead of 10th January. Defendant did not appear to have been misled:—Held, that the plaintiff might amend under the Administration of Justice Act, 1873. *Meehan* v. *Walsh*, 6 P. R. 294.

Wrong Place—*Amendment.*]—An irregular notice of trial may be amended nunc pro tunc, where it is shewn that the party served was not misled. Such amendment was made where the notice, not served till after the Belleville assizes, was for trial at Belleville, in and for the county of Prince Edward, on, &c., mentioning the day fixed for the assizes at Picton, in that county, where the venue was laid. *Walker* v. *Terry*, 7 P. R. 340.

See Gordon v. *Cleghorn*, 7 U. C. R. 171, *post* (f).

(f) *Waiver.*

Acceptance of Service — *Attorney's Clerk—Repudiation.*]—A managing clerk in an office has power to bind his principal by accepting a notice of trial as of an earlier date than it was actually delivered, unless the principal promptly repudiate the acceptance, and give notice thereof to the opposite party. *Orr* v. *Stabback*, T. T. 3 & 4 Vict.

Appearance at Trial — *Confession of Lease.*]—A Judge's order was obtained to amend the proceedings after the consent rule and plea had been filed (by adding three new demises), and no proceedings had been taken under the order until the commission day of the assizes—some months after the granting of the order—when the nisi prius record was passed with additional demises. The record was entered, and after the jury had been sworn, and the plaintiffs had given evidence, defendants objected to the amendment, and refused to confess lease, entry and ouster, except to the original demises, and a verdict was entered for the plaintiffs on the original demises only:—Held, that after defendants appearing and confessing the lease, &c., it was too late to object to the regularity of the notice of trial. *Doe d. Duff* v. *Dougall*, 2 C. P. 169.

Application to Stay Proceedings.]—Held, that a defendant complaining of an insufficient service of notice of trial in a cause pending in the superior court, but sent to a county court for trial under 23 Vict. c. 42, s. 4, may, without waiving the irregularity, apply within four days after the trial to the county Judge for a stay of proceedings till the fifth day of the following term of the superior courts of law. (2) That he may, within the like period, make a similar application to a Judge of one of the superior courts of law sitting in chambers. Quære, if he delay for seven days after the verdict without making an application of any kind, has he not thereby waived the irregularity? *Fisher* v. *Green*, 2 C. L. J. 14.

Delay in Moving.] — Plaintiff in ejectment, though an infant, sued in person. Defendant became aware of the infancy at the first trial, but took no objection until after the second trial, when a verdict was given against him for non-appearance. He then moved to set aside the proceeding on this ground, and for want of proper notice of trial. The notice, it appeared, had been indorsed on the issue book, but defendant's attorney swore he did not perceive it until too late to prepare for trial:—Held, that defendant was precluded by his delay, and the court refused to interfere. *Ham* v. *Egan*, 3 P. R. 16.

An application by an attorney resident in the country to set aside a notice of trial served on his Toronto agent as irregular, and made within eight days after such service:—Held, not too late. *Anderson* v. *Culver*, 10 L. J. 159, 3 P. R. 306.

The plaintiff on the 23rd May, when the pleadings were not closed, gave notice of trial for a sittings beginning on 10th June. The pleadings were closed on the 27th May, and notice of trial might then and up to the 31st May have been regularly given in good time for the 10th June. The defendant waited until the 5th June and then moved to set aside the notice of trial given on the 23rd May, as irregular:—Held, that the defendant had waived the irregularity by his laches. *Whitney* v. *Stark*, 13 P. R. 129.

Neglect to Move.]—Where there were several plaintiffs and defendants, and one of the plaintiffs and one of the defendants died, and their deaths were suggested on the record, but notice was given in the names of all the parties, as if they had been living, and defendants' attorney did not return the notice, nor express any intention of moving to set aside the proceedings for irregularity, the court refused to set aside the verdict. *Bell* v. *Graham*, 2 U. C. R. 37.

A notice naming Friday the 19th May, instead of Friday the 18th, is irregular; but, if defendant intend to rely upon it as such, he must give notice to that effect to the plaintiff before the trial, otherwise the irregularity will be cured. *Gordon* v. *Cleghorn*, 7 U. C. R. 171.

Notice to Proceed to Trial.]—A notice to proceed to trial, given by defendant under the statute, waives any objections to a notice of trial regularly given thereafter and pursuant thereto. *Becket* v. *Durand*, 6 L. J. 15.

Offer to Arbitrate.]—An offer by the defendant to refer the cause to arbitration, is not a waiver of an irregularity in the service of notice of trial. *Grand River Navigation Co.* v. *Wilkes*, 8 U. C. R. 249.

See Hermann v. *Mandarin Gold Mining Co. of Ontario*, 18 P. R. 34, *ante* (a); *Vrooman* v. *Shuert*, 2 P. R. 122, *post* 7 (a).

7. *Length of Notice.*

(a) *Generally.*

Agreement between Solicitors — *Late Service.*]—Plaintiff's and defendant's attorneys had an agreement between themselves by which papers in the suit should be sent by mail. The notice of trial was posted the day before the last for giving notice, but reached defendant's attorney one day too late. It was shewn that the practice of both attorneys had been to admit service as of the day of receipt:—Held, that the notice of trial must be set aside. Robson v. Arbuthnot, 3 P. R. 313, distinguished. *McDonough* v. *Alison*, 9 P. R. 4.

Computation of Time—*First and Last Days.*]—A declaration having been served on the 27th April, interlocutory judgment was signed on the 5th May, and notice of assessment given on the same day for the 12th. On the 12th, after the record had been entered, defendant gave notice of his intention to move against the verdict, if taken, for want of sufficient notice of assessment; but the plaintiff went on and assessed his damages:—Held, that under ss. 12 and 146 of the C. L. P. Act, the interlocutory judgment was signed too soon, and notice of assessment given too late; and that defendant had not precluded himself by laches from moving against these proceedings. *Vrooman* v. *Shuert*, 2 P. R. 122.

In computing the eight days for notice of trial or assessment, under s. 201, C. S. U. C. c. 22, the commission day of the assizes is to be included, and a notice on Monday for Monday is therefore good. Cuthbert v. Street, 6 L. J. 20, overruled. *Morell* v. *Wilmott*, 20 C. P. 378.

It had been previously held otherwise under the C. L. P. Act, 1856, s. 146. *Vrooman* v. *Shuert*, 2 P. R. 122; *Buffalo and Lake Huron R. W. Co.* v. *Brooksbanks*, *ib.* 126; *Callaghan* v. *Baines*, *ib.* 144; *Clark* v. *Waddell*, *ib.* 145; *Phillips* v. *Merritt*, *ib.* 233; *Cameron* v. *Cameron*, *ib.* 259.

——— *Service on Agent — Additional Days.*]—Held, that the "two clear additional days to the time now allowed by law" for service on the agent of a country attorney, means the addition of two days between the day of service and the day of the happening of the event to which the notice relates. A service of notice of trial on the Toronto agent of a country attorney on Saturday for Monday week would be sufficient. *Nordheimer* v. *Shaw*, 6 P. R. 14.

Lunacy Trial.]—Semble, an alleged lunatic should receive the same notice of a trial before the court as of an inquisition under the former practice. *Re McNulty*, 13 Gr. 463.

Notice before Writ of Trial.]—Notice of trial of a Queen's bench cause in a county court cannot be given by anticipation before the writ of trial has been obtained, and such notice is a nullity. *Riach* v. *Hall*, *Patterson* v. *Hall*, 11 U. C. R. 356; *Young* v. *Laird*, 2 P. R. 16.

Question between Co-defendants — *Order for Trial.*]—Rule 328 is applicable where a defendant claims indemnity or relief over against a co-defendant. And where such a claim was made against a co-defendant who had not appeared or defended the plaintiff's claim:—Held, that an order was properly made for the trial of the question between the co-defendants at the same time and place as the plaintiff's claim, notwithstanding that the time for pleading to the claim for relief over had not expired, and that it was at the date of the order too late to give the usual ten days' notice of trial. *Walker* v. *Dickson*, 14 P. R. 343.

Replevin.]—In an action of replevin ten days' notice of trial must be given, instead of eight days, as under the old practice. *Wallace* v. *Cowan*, 9 P. R. 144.

Rules Governing Time — *Interpretation.*]—The words "according to the present practice of the court of chancery," in rule 266, O. J. Act, are only intended to determine that the entry of the suit for trial is to be made with the proper officer of the chancery division, leaving the time of entry to be determined by the preceding rules 259 and 264, O. J. Act. Ten days' notice of trial is therefore sufficient in all cases coming within its terms. *Barker* v. *Furze*, 9 P. R. 83.

See Davies v. *Hubbard*, 10 P. R. 148.

(b) *Short Notice.*

Agreement to Accept.]—Where a defendant obtains time to plead on "the usual terms," he is bound to take short notice of trial. *Senior* v. *McEwen*, 2 U. C. R. 95.

Notice of trial having been served on defendants too late, and there being contradictory statements as to the agreement to take short notice, the court set aside a verdict, and granted a new trial. *Armstrong* v. *Beacon Life Insurance Co.*, 4 C. P. 547. See, also, *Smith* v. *Ask*, 5 U. C. R. 497.

The plaintiffs obtained a judgment on a specially indorsed writ, which was set aside by Judge's order. Defendant's attorney asked the plaintiff's attorney for a day or two to plead under the order—adding, "I will take any notice of trial." The assizes began on the 12th October. The plaintiffs served their declaration too late to compel pleas before the 13th, when they were served, but they entered their record and waited until the 7th November, near the end of the assizes, when they gave notice of trial for the 12th:—Held, that the letter did not oblige defendants to accept such a notice, and the verdict was set aside. *Provident Permanent Building and Investment Society* v. *McPherson*, 3 P. R. 96.

——— *Subsequent Notice of Assessment.*]—A person obtaining time to plead on condition of taking short notice of trial, is not compelled to take short notice of assessment. *Wright* v. *McPherson*, 3 U. C. R. 145.

But where an attorney had obtained extensions of the time to plead, agreeing to take short notice of trial, or any notice, or to go down to trial without notice, and short notice of assessment was served, the court would not set aside the verdict. *Williams* v. *Lee*, *Williams* v. *Vansittart*, 2 C. P. 157.

Computation of Time—*First and Last Days.*]—In computing the time for short notice of trial the first day was exclusive, and the last inclusive. *Love* v. *Armour*, T. T. 3 & 4 Vict.

But it has been held since that the first and last days are inclusive. *Williams* v. *Lee*, *Williams* v. *Vansittart*, 2 C. P. 157.

——— *Sunday.*]—Sundays and holidays are excluded in computing the five days' notice necessary in short notice of trial. Short notice of trial served on Wednesday for Monday:—Held, bad. *O'Donnell* v. *O'Donnell*, 10 P. R. 264.

Delay by Demurrer.] — Where defendants filed a sham demurrer, which was argued before a Judge at chambers, as a dilatory plea:—Held, that defendants were still entitled to short notice of trial, although there was not sufficient time to give it before the next assizes, owing to the delay occasioned by the demurrer. *Truscott* v. *Goldie*, 5 O. S. 138.

Necessity for—*State of Cause—Convenience.*]—The words "short notice of trial if necessary" have reference to the state of the cause, and not to the convenience of the parties, so as to authorize any unnecessary delay, even though that convenience may be as to their ability to procure evidence and prepare for trial. *McMurray* v. *Grand Trunk R. W. Co.*, 5 P. R. 272.

Power to Order—*Terms of Indulgence.*]—Held, that a county Judge has only power under the C. L. P. Act, ss. 109, 120, 34 Vict. c. 12, s. 4, to impose terms such as short notice of trial when the party applies for an indulgence, and has not power to make any substantive or unconditional order as to terms. *Tecumseth Salt Co.* v. *Platt*, 6 P. R. 251.

A defendant is entitled to the full ten days' notice of trial prescribed by con. rule (1888) 661, unless he has consented to take short notice of trial, or unless short notice can be directed as a term for granting an indulgence sought by a defendant; and there is no power to compel a defendant to take short notice. *Hamilton Provident and Loan Society* v. *McKim*, 13 P. R. 125.

The ten days prescribed by con. rule (1888) 661 for giving notice of trial cannot be shortened except by consent or when short notice of trial is imposed as a term in granting an indulgence. *Whitney* v. *Stark*, 13 P. R. 129.

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8. *Necessity for Notice of Trial.*

Cause Referred for Trial.]—An order referring a cause in the Queen's bench for trial to the next county court sittings, does not dispense with the necessity of notice of trial for that sittings. *Carruthers* v. *Rykert*, 7 L. J. 184.

Demurrer after Entry for Trial.]—Defendants were let in to plead on terms of pleading at once, and taking one day's notice of trial. Pleas were accordingly filed and served; and replications thereto, each concluding to the country, were filed and served, and similiters added by plaintiff, and two days' notice of trial given. The record was entered on the assize day, low on the docket, having been passed the day before; and on the following day defendants filed and served a demurrer to plaintiff's replication to one of defendants' pleas, which was entered on the record before the trial. Defendants moved to set aside the verdict for plaintiff, on the ground that they were entitled to notice of assessment:—Held, that they were not. *Spencer* v. *Ontario Marine and Fire Ins. Co.*, 4 C. P. 454.

Interpleader Issue.]—Notice of trial is essential in interpleader and feigned issues, as in ordinary cases. *Wilson* v. *Dewar*, 4 P. R. 13.

Pleading de Novo — *New Notice.*] — Where, after issue joined and notice of trial given, defendant has leave to plead de novo, the plaintiff cannot proceed to trial without a new notice. *McMillan* v. *Fergusson*, M. T. 2 Vict.

Remanet.]—A notice of trial is necessary however the cause may go down for trial, whether as a remanet, or put off from one assize to another by Judge's order, or taken down to trial by rule of court or Judge's order. *Macaulay* v. *Phillips*, 6 P. R. 77.

When a cause is postponed by the order of the Judge at the assizes, upon the defendant's application, it is a remanet, and no notice of trial for the next assizes is necessary, under the rules of 1875 (37 U. C. R. 528) and the O. J. Act. *Donovan* v. *Boultbee*, 10 P. R. 52.

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9. *Service.*

Absence of Attorney — *Leaving at Office.*]—Held, that the service of a notice of trial by putting the paper under the door of the attorney's office, the attorney swearing that he was absent from home at the time, and did not return till the day of the assizes, when he first heard of such service, was irregular; and that the verdict must be set aside, but without costs, as the attorney should not have absented himself on the eve of the assize. An application to set aside the verdict—not the notice of trial or the service—is correct. *Grand River Navigation Co.* v. *Wilkes*, 8 U. C. R. 249.

Service of notice of trial effected by leaving a copy of the same in the office of the defendant's solicitor before six o'clock, but after the solicitor and his clerks had left for the day, takes effect only from the time when the notice came to the knowledge of the solicitor. The practice laid down in Consumers' Gas Co. v. Kissock, 5 U. C. R. 542, and McCallum v. Provincial Ins. Co., 6 P. R. 101, held not to have been altered by the O. J. Act as to service upon a defendant's solicitor. *Davies* v. *Hubbard*, 10 P. R. 148.

Address—*Absence of.*]—A notice not addressed to the defendants' attorneys, but served upon their town agent, with information for whom it was intended:—Held, sufficient. *Senior* v. *McEwen*, 2 U. C. R. 95.

See McDonough v. *Alison*, 9 P. R. 4, *ante* 7 (a).

See, also, PRACTICE—PRACTICE AT LAW BEFORE THE JUDICATURE ACT, XV.

10. *Other Cases.*

Death of Party—*Revivor.*]—The original defendant dying pendente lite, the plaintiffs issued an order of revivor on the 22nd April, and served it on the defendants by order on the same day, and along with it a notice of trial for 5th May, at Cornwall. The defendants moved to set aside the notice of trial as irregular:—Held, that the order of revivor was in force from its service, and as it would be confirmed by the lapse of twelve days upon the 4th May, the notice of trial for the 5th May was regular. *New York Piano Co.* v. *Stevenson*, 10 P. R. 270.

Interlocutory Judgment — *Necessity for.*]—In an action commenced by a writ not specially indorsed, where the defendant does not plead to the declaration, the plaintiff must sign interlocutory judgment against the defendant before he is in a position to serve notice of trial and assessment of damages. *Fenwick* v. *Donohue*, 8 P. R. 116.

New Trial—*Payment of Costs—Condition Precedent.*]—Where a new trial is granted to a plaintiff on payment of costs, the payment is a condition precedent to the right to give notice of trial. In this case, where the costs were not paid, the court set aside the verdict, but under the circumstances without costs. *Stock* v. *Shewan*, 18 C. P. 185.

Service on Solicitor—*Delay in Advising Client.*]—In an action to recover a balance alleged to be due for erecting a mill, it appeared that on the 15th September defendant's attorney, who resided at Sydenham, received notice of trial for the 27th of the same month, and on the 17th wrote to inform the defendant, who resided fifty miles distant, the mail going only once a week, and who did not receive the letter till after the trial. Contradictory affidavits were made on both sides, and it appeared to the court on the defendant's affidavits, that it was not probable the verdict would be materially reduced:—Held, that, as a new trial could only be granted on payment of costs, the defendant would not be benefited thereby, and rule refused. *Harnden* v. *Anchor*, 6 C. P. 517.

Summons to Dismiss—*Stay of Proceedings.*]—A summons to dismiss an action for breach of an order to examine, generally implies a stay of proceedings; but where the Judge who granted the summons struck out the part relating to a stay, and the summons was afterwards enlarged without any mention of a stay, a notice of trial served while the summons was pending:—Held, to be regular. *Merchants Bank* v. *Pierson*, 8 P. R. 129.

VIII. Postponement of Trial or Hearing.

Application—*Forum.*]—An interpleader issue arising out of an action in the high court of justice was directed to be tried in a county court pursuant to 44 Vict. c. 7, s. 1 (O.):—Held, that a motion to postpone the trial of the issue should have been made in the county court. *London and Canadian Loan and Agency Co.* v. *Morphy*, 11 P. R. 86.

——— *Time for—Forum.*] — Applications to postpone trials in outer counties should not be entertained in chambers at Toronto, when the assizes are just coming on. *McKenzie* v. *Stewart*, 10 U. C. R. 634.

Costs.]—On putting off the trial of an information for penalties, at defendant's instance, the court will make the payment of costs a condition, in like manner as in civil cases. *Rex* v. *Ives*, Dra. 440.

A short time before the assizes at Kingston, defendant obtained from a Judge in chambers at Toronto a summons to put off the trial. The plaintiff's agent (the plaintiff being an attorney) was obliged to obtain delay, to communicate with his principal, who in the meantime incurred costs in preparing for trial. The order was afterwards granted on terms of paying only the costs of the application, and the defendant acted upon it by getting the trial postponed. Defendant had given no notice to the plaintiff of his intention to move. The court refused to alter the terms of the order, so as to compel the defendant to pay the plaintiff's costs of preparing for trial while in ignorance of it, though they were of opinion that it would have been more fair to have exacted the payment of such costs on granting the order. *McKenzie* v. *Stewart*, 10 U. C. R. 634.

Where a cause is withdrawn on account of the absence of a necessary witness for the plaintiff, and he shews that he has made diligent efforts to secure the attendance of such witness, who is residing within the jurisdiction, but fails to secure it, the costs of putting off the examination will, as a general rule, be costs in the cause. In all other cases the costs will be disposed of according to circumstances and in the discretion of the Judge. *Pattison* v. *McNab*, 12 Gr. 483.

Although, as a general rule, where a party has made diligent efforts to obtain the attendance of a witness within the jurisdiction, and has been unable to do so, the costs of postponing the hearing will be costs in the cause, still where the plaintiff ascertained on Sunday that a witness, who was his mother, was confined to her bed and unable to attend at the sittings which began on the Tuesday following, but failed to give notice of this fact to the defendant, a motion made by the plaintiff to postpone the hearing was granted only on his paying the costs. *McMillan* v. *McDonald*, 22 Gr. 362.

The costs of moving to postpone a trial on account of the absence of a material witness, will be costs in the cause, where the party moving has made diligent efforts, &c., to secure the attendance. *Brown* v. *Porter*, *Knox* v. *Porter*, 11 P. R. 250.

Costs of the Day.]—See *Hopkins* v. *Smith*, 9 P. R. 285; *Hogg* v. *Crabbe*, 12 P. R. 14; *Outwater* v. *Mullett*, 13 P. R. 509.

Grounds for.]—Where the ground of an application to put off a trial is the absence of a witness, it is not sufficient to shew that the witness is material, and may and probably will give important evidence, or to swear that his evidence will be material and necessary, without shewing that it will assist the case of the person making the application. *Kerr* v. *Grand Trunk R. W. Co.*, 4 P. R. 303.

The time for plaintiff to bring the issue joined on to trial will be extended under s. 151, C. L. P. Act, 1856, upon an affidavit that plaintiff cannot procure the attendance of a witness, without whose testimony he cannot safely proceed to trial. *O'Keefe* v. *O'Brien*, 2 L. J. 231.

It is no answer to an application to try a cause in a county court on the ground that no difficult questions of law will arise, to put in affidavits which are properly grounds for postponing the trial. *Mitchell* v. *Roberts*, 6 P. R. 106.

Held, that the inability properly to calculate the damage to the plaintiff from a personal injury, owing to a sufficient time not having elapsed from the receipt of the injury, is a sufficient ground for postponing the trial. *Speers* v. *Great Western R. W. Co.*, 6 P. R. 170.

The trial of an election petition should not be postponed without the appellant shewing very cogent and almost unanswerable grounds. In this case the reason given was that the lieutenant-governor of Ontario was a necessary and material witness, and that he could not properly leave Toronto during the sittings of the house of assembly:—Held, not a sufficient reason. *McDonald* v. *McNabb*, 12 C. L. J. 117.

Held, that when the original holder of a policy of insurance had been indicted for arson it would not be in the interests of justice to postpone a suit by the assignee of the policy until after the criminal trial. *Whitelaw* v. *National Insurance Co.*, *Whitelaw* v. *Phœnix Insurance Co.*, 13 C. L. J. 199.

The plaintiff brought an action against two townships for not repairing a road, and while it was pending before the court of appeal, he issued a writ against the defendants for the same cause, to prevent the Statute of Limitations running against him in case it should be held that the townships were not liable. A notice to proceed to trial having been served on the plaintiff, the time for trial was enlarged until after the decision of the court of appeal. *McHardy* v. *County of Perth*, 7 P. R. 101.

Necessity for Re-entry—*Fees.*]—The object of con. rule (1888) 670 is to enable a defendant to insist upon the trial of a case entered by the plaintiff being proceeded with, unless the court should give the plaintiff leave to withdraw it; and where, before a case entered for the assizes on the non-jury list was reached, the solicitors, without the assent of the court, agreed that the trial should be put off until the following assizes, and the clerk of the assize struck the case off the list:—Held, that what had taken place was not a withdrawal within the meaning of the rule, and that the action remained for trial, and under con. rule (1888) 671 might be set down for trial on notice, for any subsequent court, without payment of any further fee. *Bunbury* v. *Manufacturers' Insurance Co.*, 13 P. R. 53. See con. rules (1897) 343, 344.

Where the trial of a cause was postponed till the next assizes, defendants to pay the costs:—Held, that no second fee was payable to the deputy clerk of the Crown upon entry of the action for trial at the latter assizes, and that when so paid by plaintiff, such fee was not taxable against defendants. *Morton* v. *Grand Trunk R. W. Co.*, 10 P. R. 62.

W. (plaintiff) entered into negotiations with S. (defendant) to purchase a house which S. was then erecting. W. alleged that the agreement was, that he should take the land (two and a-half lots) at $400 a lot of fifty feet frontage, and the materials furnished and work done at its value. In August, 1874, a deed and mortgage were executed, the consideration being stated in both at $5,926. The mortgage was afterwards assigned to the M. and N. W. L. Company. W. alleged in his bill, that S., in violation of good faith, and taking advantage of W.'s ignorance of such matters, and the confidence he placed in S., inserted in the mortgage a larger sum than the balance due as a fair and reasonable market value of the lands, and of what he had done to the dwelling house and other premises, and he prayed an account. S. repudiated the allegation of fraud, and alleged that W. had every opportunity to satisfy himself, and did satisfy himself, as to the value of what he was getting; that he had told W. that he valued the land at $2,000, and that in no way had he sought to take advantage of W. S. was unable to be present at the hearing, and applied for a postponement, on the grounds set forth in an affidavit, that he was a material witness on his own behalf, and that it was not safe for him, in his state of health, to travel from Ottawa to Winnipeg. The trial Judge refused the postponement, on the ground that the court was only asked now to decree that the account should be opened and properly taken, and the amount ascertained, which would be done by the master if the court should so decide, and that S. would then have an opportunity of being present, and that he was not necessarily wanted at the hearing; and, as the result of the evidence, made a decree in accordance with the contentions of W., and directed an account to be taken:—Held, that, under the circumstances, the case ought not to have been proceeded with in the absence of S., and without allowing him the opportunity of giving his evidence. *Schultz* v. *Wood*, 6 S. C. R. 585.

——— *Terms—Costs.*]—Where the defendants, expecting that certain witnesses, whose evidence was material to the defence, would be called by the Crown, did not subpœna such witnesses, and they were not in court, an adjournment of the hearing was allowed after the Crown had rested, so that such witnesses might be subpœnaed by the defendants, upon terms that the Crown have costs of the day, and that the same be paid before the case be proceeded with on adjournment. *The Queen* v. *Black*, 6 Ex. C. R. 236.

Order for—*Abandonment—Costs.*]—The plaintiff gave notice of trial for 2nd October. On 23rd September the defendant obtained an order to postpone the trial on payment of costs:—Held, a conditional order, not staying the plaintiff's proceedings, and one which the defendant was at liberty to abandon without being liable to pay other than the costs of the application. *Allen* v. *Mathers*, 9 P. R. 477.

Power to Postpone — *Previous Direction.*]—Remarks as to the power of the Judge to order the postponement of the trial of an

interpleader issue, where the interpleader order directs it to be tried at a particular sitting. *Robinson* v. *Richardson*, 32 U. C. R. 344.

Terms of Postponement.]—In ordering the postponement of a trial the master in chambers has a discretion under con. rule 681 to impose terms. And where, upon the defendants' application to postpone the trial, the master so ordered upon their giving security for part of the amount sued for:—Held, that the term was properly imposed. *Bank of Hamilton* v. *Stark*, 13 P. R. 213.

IX. Record.

[*See* C. L. P. Act, R. S. O. 1877 c. 50, ss. 247-251; con. rules (1897) 538 (d), 539, 540.]

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1. *Altering.*

Effect of—*Verdict.*]—Where the clerk of assize refused to receive the record, because it had been altered after it had been passed at the Crown office, by the plaintiff adding a *similiter* to the defendant's plea and entering in the margin the venire facias, the court made a rule absolute for judgment as in case of a nonsuit. *Doe d. Wilcox* v. *Jacobs*, 5 U. C. R. 1.

Where a nisi prius record some days after it had been entered was withdrawn from the clerk of assize by the plaintiff's attorney, and altered without leave, by adding the venire, jurata, &c., the court set aside the verdict. *Russel* v. *Graham*, 7 U. C. R. 159.

The court will not set aside a verdict because an evident clerical defect has been supplied on the record that it has been entered. *Culbert* v. *Conger*, 7 U. C. R. 389.

In the nisi prius record the declaration appeared to have been against J. H. and A. H., his wife, but the words "his wife" were struck out with a pen, of which no explanation was given:—Held, no objection after verdict. *Hunter* v. *Hunter*, 25 U. C. R. 145.

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2. *Entering and Passing.*

[By the C. L. P. Act, R. S. O. 1877 c. 50, s. 248, the record shall be entered at any time during the five days next before the commission day of the assizes, and on said commission day before noon; but the Judge may permit a record in any suit to be entered after the time above limited, if, upon facts disclosed on affidavit or on the consent of both parties, he sees fit to do so. See con. rule (1897) 538.]

After the Commission Day—*Old Practice.*]—See *Hall* v. *Griswold*, 5 O. S. 136; *Henderson* v. *Hunt*, 6 U. C. R. 503.

Costs of Entry—*Settlement.*]—Where in a country cause a record was entered for trial before the commission day of the assizes, and afterwards settled before the commission day, the master, upon consulting the Chief Justice of the common pleas, refused to allow the costs of entering the record or counsel fee. *Hingston* v. *Whelan*, 8 L. J. 72.

Failure to Enter — *Change of Venue — Terms.*]—Where the record did not reach the assize town in time to be entered, the plaintiff, on shewing that due diligence had been used, and that if he did not get down to trial before the autumn assizes he would be in danger of losing his debt, was allowed to change the venue, so as to go to trial at the spring assizes, on payment of costs of the day, costs of the application, and any extra expense occasioned to defendant by the change. *Lucas* v. *Taylor*, 4 P. R. 99.

——— *Effect of—Agreement.*]—Where the plaintiff, having given notice of trial, did not enter his record with the clerk of assize in time, but defendant, notwithstanding, agreed to go to trial if he were ready, and after having detained the plaintiff's witnesses more than a week, at last determined not to go to trial, he was refused the costs of the day. *Doe d. Crawford* v. *Coppledike*, 4 O. S. 6.

False Record.] — Defendant having filed his pleas, the plaintiff, on going to pass his record and not finding them in the office, caused them to be entered on record from memory, and passed the record without the pleas being in the office, and tried the cause, no defence having been made. The court set aside the proceedings for irregularity. *McKinnon* v. *Johnson*, 3 O. S. 298.

Repassing and Resealing —*Remanet.*] —See *Lucas* v. *Peatman*, 7 U. C. R. 20.

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3. *Form of.*

Addition of Words not in Pleading—*Waiver.*]—See *Snow* v. *Johnson*, 1 P. R. 156.

Addition of Venire — *Judgment.*]— See *Harrington* v. *Fall*, 15 C. P. 541.

Date of Judgment on Demurrer — *Assessment of Damages.*] — See *Gamble* v. *Rees*, 7 U. C. R. 406.

Information for Intrusion.] — See *Attorney-General* v. *Harris*, 33 U. C. R. 94.

Issues in Law—*Omission of.*]—See *Grant* v. *Palmer*, 5 P. R. 301.

Nisi Prius Clause.]—See *Doe d. Murphy* v. *McGuire*, 7 U. C. R. 312.

Order Striking out Plea.]—See *Atkins* v. *Clark*, 6 O. S. 33.

Variance—*Amendment.*] — See *Lawrence* v. *Harday*, T. T. 3 & 4 Vict., R. & J. Dig. 83.

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4. *Seal.*

There was no necessity for the seal of the court to a record in an outer district. *Scott* v. *McGregor*, Tay. 88.

But it was otherwise in the home district. *McLean* v. *Noxon*, T. T. 5 & 6 Vict.

By the C. L. P. Act, R. S. O. 1877 c. 50, s. 247, in the superior courts the record of nisi prius need not be sealed. See con. rule (1897) 539.

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5. *Venire.*

[By the C. L. P. Act, R. S. O. 1877 c. 50, s. 251, in the record in any cause or action, no other venire is necessary than "Therefore," &c.]

See as to the former practice, *Beatty* v. *McMasters*, T. T. 2 & 3 Vict., R. & H. Dig. 378; *Hamilton* v. *McFarland*, M. T. 3 Vict. R. & H. Dig. 378; *Culbert* v. *Conger*, 7 U. C. R. 389; *Hawkins* v. *Patterson*, 15 U. C. R. 158; *Walkem* v. *Donovan*, 5 P. R. 118.

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6. *Other Cases.*

Conclusiveness.]—The court cannot look behind the record, unless where the application is to set aside the record itself. An objection, therefore, to the record as being improperly made up without proceedings to warrant it, cannot be entertained upon an application to set aside the assessment of damages. *Gamble* v. *Rees*, 7 U. C. R. 406.

Custody of Record—*Delivery up — Motion in Term.*] — A county court case had been tried at the assizes under the A. J. Act, 1874, s. 54. The plaintiff got a verdict, and the plaintiff's attorney obtained the record. Defendants' attorney applied for an order to deliver it up to the court of Queen's bench, to enable him to move against the verdict. The Judge in chambers held that he had no jurisdiction to make such order. The county court Judge made an order for the delivery of it to the clerk of that court, and stayed proceedings until next term. *Burley* v. *Milne*, 7 P. R. 100.

Destruction by Fire.]—A new nisi prius record was allowed to be made up, the original having been destroyed by fire. *White* v. *Hutchinson*, Tay. 305.

Indorsement of Points Reserved—*Judgment.*]—When points are reserved at a trial and indorsed on the record, but the Judge makes no entry thereof on his notes, the record must govern, and judgment cannot be entered until the points are disposed of. *Taylor* v. *Taylor*, 5 O. S. 489.

Venue.]—It is not irregular to state the venue in the nisi prius record without having stated it in any previous proceeding. *Regina* v. *Shipman*, 6 L. J. 19.

X. Referring Causes from one Court to Another.

1. *County Court to Superior Court.*

[Under the Law Reform Act, 1868, 32 Vict. c. 6, s. 17, and 37 Vict. c. 7, s. 56; R. S. O. 1877 c. 49, s. 32 et seq.; R. S. O. 1897 c. 51, s. 93 et seq.]

Motion to Arrest Judgment—*Forum.*] —Held, under the Law Reform Act, 1868, s. 17, s.-ss. 4 and 5, as amended by 33 Vict. c. 7 (O.), this being a county court case tried at the assizes, that the motion to arrest judgment was properly made in the superior court. *Edmunds* v. *Hoey*, 35 U. C. R. 495.

Notice of Trial — *Motion against — Forum.*]—Where a county court case has been directed to be tried at the assizes, an application to set aside the notice of trial must be made to the county court. *Clark* v. *Clifford*, 7 P. R. 329.

Partition — *Issue.*] — Issues in partition suits are within s. 17, s.-s 2. *Symonds* v. *Symonds*, 20 C. P. 271.

Separate Trial of Issues of Fact.]—In county court cases, where there are issues in law and in fact upon the same record, this Act does not authorize the issues in fact to be tried at the assizes; and where, after a trial under such circumstances, a case came before the court, on motion against the verdict, the court refused to pronounce judgment on the merits of the case, as coram non judice, but merely set aside the verdict without costs. *Pattypicce* v. *Mayville*, 21 C. P. 316.

Title to Land—*Jurisdiction.*]—Where a county court cause is entered for trial at the assizes under this Act, the jurisdiction is the same only as if it had been tried in the county court. Where in such a case, therefore, the title to land came in question, and a verdict was entered for defendant: — Held, that the proceedings were coram non judice, and the verdict was set aside. *Wetherall* v. *Garlow*, 30 U. C. R. 1.

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2. *Superior Court to County Court.*

(a) *By Writ of Trial or Inquiry.*

[By 8 Vict. c. 13, ss. 51-56, writs of trial and inquiry were authorized, under which actions depending in the superior court for any debt or demand not exceeding £25, or actions in which the amount was ascertained by the signature of defendants, or in which only damages were to be assessed, might be sent down for trial or assessment in the county court. These enactments were repealed by 20 Vict. c. 58, s. 19. See, also, C. S. U. C. c. 22, s. 326, and the statutes there referred to, by which county court suits might be brought in the superior courts, marking the papers "inferior jurisdiction." This section was repealed by 23 Vict. c. 42, s. 4, and a Judge's order required to authorize such trial. See R. S. O. 1897 c. 51, s. 92 (3), and rules 562, 565.]

Where the declaration claimed £75 for work and labour, but the bill of particulars only £19, the cause was brought within the limits of the Act and might be referred. *Martin* v. *Gwynne*, 5 U. C. R. 245.

A rule of court or Judge's order is not required for a writ of inquiry to a district court. A writ of inquiry to a district court after the cause had been made a remanet at nisi prius: —Held, regular. *Northcote* v. *Hodder*, 5 U. C. R. 635.

The affidavit on which an application is made for a writ of trial should shew where

the venue is laid. *Brett* v. *Smith*, 3 L. J. 10; *Lock* v. *Harris*, *ib.* 11.

An action on a guarantee is not within the meaning of 8 Vict. c. 13, s. 51. The statute only applies when the production of the document and proof of signature would be per se primâ facie evidence of indebtedness. *Montford* v. *McNaught*, 3 L. J. 15.

In an action on a guarantee a writ of trial may be obtained, if the defendant have no other objection than the mere fact of the action being on a guarantee. *Macpherson* v. *Graham*, 3 L. J. 184.

Preliminary or formal objections to the affidavits, where the application has been enlarged until the last day for obtaining such writ, should not in general be allowed to prevail after such enlargement. *Taylor* v. *McNeil*, 3 L. J. 131.

On applications for writs of trial, the affidavit must either shew what the pleas in the cause are, or the applicant must produce a copy of the pleadings. *Stock* v. *Crawford*, 3 L. J. 130.

On applications for writs of trial, when the parties are pressed for time, the Judge will in general make the summons absolute on return, instead of enlarging it, reserving leave to defendant to move to rescind it. *Prugen* v. *Kerby*, 3 L. J. 134.

The writ was not granted where difficult questions were likely to arise on the trial, and where the nature of the pleas pleaded admitted of such being the case. Nor when there was a dispute as to the nature or legal effect of the instrument sued on. *Shaw* v. *Davis*, 3 L. J. 131; *Lumley* v. *Rogers*, *ib.* 134.

But defendants merely pleading a plea which might involve difficult questions would be no objection, unless he shewed that it was seriously intended to rely on such pleas. *Taylor* v. *McNeil*, 3 L. J. 131.

For other decisions as to granting or refusing writs of trial, see *Bank of Montreal* v. *Burritt*, 3 U. C. R. 375; *Hunter* v. *Vernon*, 7 U. C. R. 532; *Moffatt* v. *McNab*, 1 C. L. Ch. 98; *King's College* v. *Gamble*, *ib.* 54; *Beatty* v. *Charrity*, 3 L. J. 32; *Wengal* v. *Huff*, *ib.* 133; *Muirhead* v. *McCracken*, *ib.* 131; *Riach* v. *Hall*, 11 U. C. R. 356; *Morland* v. *Webster*, 2 C. L. Ch. 52.

(b) Judge's Order under 23 Vict. c. 42, s. 4; R. S. O. 1877 c. 49, s. 31; R. S. O. 1897 c. 51, s. 92.

Held, that, to warrant a Judge of the superior courts in referring a cause for trial to a Judge of the county court, the writ must not only be issued from but venue laid in the county to which the reference for trial is required. Where a defence is one not merely for time, it may be doubtful, particularly if the amount is large, if a Judge would direct the trial of the issue before a county court Judge against the wish of the defendant. *Boulton* v. *Ruttan*, 7 L. J. 151.

Held, that the Judge of a county court has power to allow pleas to be added in cases sent down from the superior courts to be tried by him, as well as in actions commenced in his own court. *King* v. *Glassford*, 11 C. P. 490.

Where a record had been entered at an assize and made a remanet:—Held, that so long as the order for a remanet remained in force, the cause could not be sent to the county court for trial. *Adams* v. *Grier*, 3 P. R. 239.

(c) Under 32 Vict. c. 6, s. 17 (O.), the Law Reform Act, 1868; R. S. O. 1877 c. 49, s. 31 et seq.; R. S. O. 1897 c. 51, s. 92.

The entry required by s. 17, and schedule A., to "be made in the issue and subsequent proceedings" when it is desired to try a superior court case at a county court, was sufficient if made on the issue book in place of the venire facias. *Walkem* v. *Donovan*, 5 P. R. 118.

Under s. 18 Judges of the county courts can try cases brought down from superior courts without the intervention of a jury. *Cushman* v. *Reid*, 5 P. R. 121.

Under s. 17 no case can be taken down to a county court for trial unless the amount is ascertained by the signature of defendant—or "liquidated" in the same way. *McPherson* v. *McPherson*, 5 P. R. 240.

A note made in the United States and payable in American currency, is not an amount liquidated or ascertained by the signature of the defendant, so as to entitle the party suing upon it to avail himself of 32 Vict. c. 6, s. 17 (O.) *Cushman* v. *Reid*, 20 C. P. 147, 5 P. R. 121.

It is no answer to an application to try a cause in a county court, on the ground that no difficult questions of law will arise, to put in affidavits which are properly grounds for postponing the trial. *Mitchell* v. *Roberts*, 6 P. R. 106.

Held, in a case proper to be brought down to the county court by the Law Reform Act of 1868, and when the entry under Form A. is omitted from the issue book, but notice of trial is for the county court, that the omission is not properly a ground for setting aside the issue book and notice of trial, but that the plaintiff will be allowed to amend on payment of costs. *McDermott* v. *Elliott*, 6 P. R. 107.

XI. Separate Questions in Same Action.

Account—*Preliminary Trial of Right to.*] —Where the plaintiff claimed a declaration of the right of himself and all other persons insured in the temperance section of the defendant company to the profits earned by that section, payment thereof, and an account and apportionment thereof:—Held, that, upon the mere statement of the plaintiff in pleading that he was the holder of a policy entitling him to share in certain profits of the company, and without any proof of the statement, the court, in its discretion, should not require the company to produce and lay open to him all their books of account and the papers relating to them; but it was a proper case in

which to permit the defendants to apply under rule 655 for an order for a preliminary trial of the plaintiff's right to require an account, and to postpone discovery of the books until after such trial. *Graham* v. *Temperance and General Life Assurance Co. of North America*, 16 P. R. 536.

Different Causes of Action.]—Different causes of action included in the same declaration may be severed and tried separately. *Fitzsimmons* v. *McIntyre*, 5 P. R. 119.

——— *Question of Law — Preliminary Trial.*]—The writ of summons claimed damages against an incorporated company for wrongful dismissal and slander. The original statement of claim was confined to the former cause of action, but, after defence and before reply due, the plaintiff amended on præcipe by adding a claim for slander:—Held, that it was competent for the plaintiff to do so, under rule 300. Semble, that an incorporated company may be liable if slander is spoken by its servants or agents in direct obedience to its orders; and held, that, at all events, the pleading setting up slander should not be struck out summarily, but should be adjudicated on. Leave to the defendants to have the question of law first determined. The two causes of action were properly joined; but application might be made under rule 237 to direct the method of trial. *Rodger* v. *Noxon Co.*, 19 P. R. 327.

Dismissal of Action — *Evidence on One Branch only.*]—An action brought to enforce the performance by the defendants of a certain by-law passed by the plaintiffs, and also the performance of a duty imposed by the Railway Act, came on for trial without a jury, and the trial Judge decided to try the first branch of the case separately; and, after hearing evidence upon it, held that the by-law was not legally binding upon the defendants, and dismissed the action without hearing evidence on the second branch:—Held, that con. rule 655 must be read in conjunction with s. 52, s.-s. 12, of the Judicature Act, R. S. O. 1887 c. 44; and this case was not one calling for an application of the rule by directing separate trials of the questions raised. A new trial was therefore ordered. *Village of Fort Erie* v. *Fort Erie Ferry R. W. Co.*, 13 P. R. 144.

Indemnity—*Question between Co-defendants.*]—See *Walker* v. *Dickson*, 14 P. R. 343.

Issue in Fact — *Demurrer.*] — Remarks upon the inadvisability of trying an issue in fact first, where there is also a demurrer on the record. *Ross* v. *Tyson*, 19 C. P. 294.

Patent of Invention — *Infringement — Denial of Right.*]—In an action to restrain the defendants from selling a certain drug in violation of the rights of the plaintiffs under a patent, and of the terms upon which the drug was sold to the defendants, and for damages for selling in violation of such rights and terms, and for damages for a trade-libel, the defendants admitted that they bought the drug, but not from the plaintiffs, and were selling it by their agents, and upon their examination for discovery stated fully their mode of procedure in buying and selling, but in their pleading they denied the plaintiffs' patent right:—Held, that, there being a bonâ fide contest as to that right, the defendants should not, before the trial, be compelled to afford discovery of the details and particulars of such buying and selling, so as to disclose their and their customers' private business transactions. Such discovery should be deferred until after the plaintiffs should have established their right, even if a subsequent separate trial of the question of infringement should be necessary. *Dickerson* v. *Radcliffe*, 17 P. R. 586.

Settlement—*Validity.*]— The validity of a settlement of a pending action may be tried in such action, if pleaded in bar. In this case the Judge tried the question as to the settlement without the assistance of the jury, although the other questions in the action were left to the jury. *Johnson* v. *Grand Trunk R. W. Co.*, 25 O. R. 64, 21 A. R. 408.

In an action for damages for negligence, whereby the plaintiff was injured in alighting from a train, the defendants denied negligence and pleaded contributory negligence, and also a payment of $10 to the plaintiff before action and a receipt in writing signed by him therefor, "in lieu of all claims I might have against said company on account of any injury received . . . by reason of my stepping off a train . . . ; such act being of my own account, and not in consequence of any negligence or otherwise on behalf of such railway company or any of its employees." The plaintiff replied that if he signed the receipt, he was induced to do so by fraud and undue influence: — Held, by the Queen's bench division, that the issue raised by the document was not a distinct issue, but rather a matter of evidence upon the issues of negligence and contributory negligence, and should have been submitted to the jury, and not separately tried by the Judge. Held, by the court of appeal, reversing this decision, that the issue might properly be tried by the Judge, and need not necessarily be left to the jury. *Haist* v. *Grand Trunk R. W. Co.*, 26 O. R. 19, 22 A. R. 504.

The court has jurisdiction to stay proceedings in any action which has been compromised, where no terms of the compromise go beyond what is in controversy in the action. And where, in an action of slander, the plaintiff excused his non-prosecution by alleging that an agreement had been entered into between himself and the defendant by which the action was to be dropped and $10 costs to be paid by the defendant, which agreement was denied by the defendant, an order was made directing a summary trial, or the trial by an issue upon oral evidence, of the question of the validity of the settlement; if the result should be a valid settlement, proceedings to be stayed perpetually and costs paid by defendant; if settlement invalid, action to be dismissed with costs to defendant. *Rees* v. *Carruthers*, 17 P. R. 51.

An assignee for the benefit of creditors under a statutory assignment, having brought an action for damages for breach of a contract made by his assignor with the defendants, made a compromise settlement with the defendants, before the delivery of pleadings, while he was in gaol, and without reference to the inspectors or creditors. A new assignee appointed in his stead applied for an order directing the trial of an issue to determine whether the settlement was valid:—Held, that it was not necessary to bring another action

to vacate the settlement, and it was more convenient to revive the action in the name of the new assignee as plaintiff and let him continue it, leaving the defendants to move summarily to stay it, or to plead the settlement in bar, than to direct the trial of an issue. Rees v. Carruthers, 17 P. R. 51, distinguished. Johnson v. Grand Trunk R. W. Co., 25 O. R. 64, and Haist v. Grand Trunk R. W. Co., 22 A. R. 504, followed. *Davidson* v. *Merritton Wood and Pulp Co.*, 18 P. R. 139.

See Irwin v. *Sperry*, 11 P. R. 229; *Temperance Colonization Society* v. *Evans*, 12 P. R. 48, 380; *McMahon* v. *Lavery*, *ib.* 62; *Farran* v. *Hunter*, *ib.* 324, *ante* VI. 2 (b).

See PARTIES.

XII. STAY OF TRIAL.

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

The court may in a proper case stay the trial of an action pending an appeal to the court of appeal from an order directing a new trial, but only under special circumstances. It is not a ground for a stay that in the event of an appeal being successful the costs of the new trial will be thrown away, and that one party will be in danger of losing such costs, the other not being a person of means; and it is not desirable that the trial should be delayed, to the possible prejudice of a party by the loss of testimony. *Arnold* v. *Toronto R. W. Co.*, 16 P. R. 394.

A second trial of an action was stayed pending an appeal to the court of appeal from the order directing such trial, where the principal question upon the appeal was as to the proper method of trial, and the appellants had been diligent in prosecuting the appeal and there was no suggestion of any possible loss of testimony. Arnold v. Toronto R. W. Co., 16 P. R. 394, distinguished. *Haist* v. *Grand Trunk R. W. Co.*, 16 P. R. 448.

XIII. TRIAL JUDGE.

Consulting Experts.] — An action for damages caused by collision between two vessels was tried without a jury, and after the evidence had been taken, the trial Judge, with the consent of both parties, consulted two master mariners, and adopted as his own their opinion, based on a consideration of conflicting testimony as to the responsibility for the collision:—Held, that this was a delegation of the judicial functions; and a new trial was ordered. The scope of con. rule (1888) 207, as to calling in the assistance of experts, considered. *Wright* v. *Collier*, 19 A. R. 298.

Observations to Jury.] — The supreme court of Canada, as an appellate court for the Dominion, should not approve of such strong observations being made by a Judge as were made in this case, in effect charging upon the defendants fraud not set out in the pleadings, and not legitimately in issue in the cause. *Hardman* v. *Putnam*, 18 S. C. R. 714.

Power to Refer.]—The right of the trial Judge to refer the question of damages as a question arising in the action, under s. 101 of the Judicature Act, 1881, is indisputable, at all events as a matter of discretion and subject to review; and it is for the party objecting to the reference to shew that the discretion has been wrongly exercised. And where, in an action for damages for injury to the plaintiff's land, on the bank of a navigable river, and to his business as a boatman, by the acts of the three several defendants, who owned saw mills higher up on the stream, in throwing refuse into it, it appeared that the plaintiff's title to relief and the liability of the defendants had been established in a former action, and the trial Judge heard the case only so far as to satisfy himself that the plaintiff had established a primâ facie case on the question of damages, and directed a reference to assess and apportion them among the defendants, reserving further directions and costs:—Held, that there was no miscarriage, and the discretion of the trial Judge should not be overruled. *Ratté* v. *Booth*, 16 P. R. 185.

Refusal to Try Action—*State of Pleadings.*]—By their statement of claim the plaintiffs alleged themselves to be creditors for wages of two of the defendants, and they sought relief against the third defendant only as having obtained certain assets from the other two, either fraudulently or upon a trust to pay the plaintiffs' claims. In their reply they set up that they were creditors of the third defendant himself, upon the ground that he was really the person who hired them. There was no subsequent pleading:—Held, that the reply was a direct violation of con. rule (1888) 419; and that the trial Judge was within his right in refusing, in his discretion, to try the action until the issues were properly presented upon the pleadings, and in directing that the costs of the postponement should be borne by the plaintiffs. No opinion expressed as to whether a divisional court had power to review such a ruling. *Hurd* v. *Bostwick*, 16 P. R. 121.

See ante V., 4, 5; *post* XIV.

XIV. TRIAL WITHOUT A JURY.

(*See*, also, *ante* XIII.)

Appeal — *Judge's Decision on Facts.*] — Semble, that notwithstanding 32 Vict. c. 6, s. 18 (O.), a Judge's decision on facts is to be regarded differently from the finding of a jury. *Smith* v. *Hamilton*, 29 U. C. R. 394. See, also, *Scott* v. *Dent*, 38 U. C. R. 30.

——— *New Question — Evidence.*] — The legislature did not, by 33 Vict. c. 7, s. 6 (O.), intend the court, on motion against a verdict given by a Judge of the court in which the action is brought, to decide upon the evidence questions not discussed before or decided by the Judge at the trial. *Lawrie* v. *Rathbun*, 38 U. C. R. 255.

County Court—*Agreement of Parties.*]—On error from the county court, it appeared by the record that after issue joined a ven. fac. was awarded, and then the postea stated

an agreement by the parties to leave the case to the Judge, the decision to be looked upon as the verdict of a jury. Afterwards it was entered that "the said Judge has determined, and the court is of opinion and has ordered," that the defendant should pay to the plaintiff a sum named. Then followed an entry of judgment for that sum and costs:—Held, that the judgment was erroneous, for no verdict was directed or entered to support it. Quære, whether the Judge had power to direct a verdict. *Jones* v. *Smith*, 23 U. C. R. 485.

Dispensing with Jury during Progress of Trial — *Waiver of Objection.*]—Where the trial of a cause begins and is entered into with or without a jury, as the case may be, it must be finished in like manner, unless by consent of parties. In an action of trespass quare clausum fregit, the trial was commenced with a jury, but an objection of a technical character having been taken by defendants' counsel to the plaintiff's evidence of a title deed offered in rebuttal, the Judge granted an adjournment to enable him to cure the defect, discharged the jury, and afterwards resumed and finished the case without a jury. The defendants' counsel objected to the discharge of the jury, but continued to act in the case without further objection, and the plaintiff obtained a verdict:—Held, that the course pursued was unauthorized; but semble, that the defendants' counsel by proceeding with the defence, and taking his chance of a verdict, had waived the objection. *Denmark* v. *McConaghy*, 29 C. P. 563.

See Marks v. *Town of Windsor*, 17 O. R. 719; *Adair* v. *Wade*, 9 O. R. 15.

Equitable Issues.]—Under the Administration of Justice Act of 1873, s. 16, it is not incumbent on the Judge to try any equitable issues on the record himself, but he may direct them to be tried by a jury. *Shannon* v. *Hastings Mutual Fire Insurance Co.*, 26 C. P. 389.

See con. rule (1897) 551.

Issue from Court of Chancery.]—In the absence of an express direction by the court of chancery, the issue sent from that court to a court of law may be tried without a jury. *Wilson* v. *Wilson*, 3 A. R. 400.

Legal and Equitable Issues.]—Quære, whether when there are legal and equitable issues, the whole case is not properly triable without a jury; but the fact that such a case has been tried by a jury, is no ground for a new trial, where the verdict is unobjectionable upon the evidence. Quære, also, whether in such a case the Judge may not call a jury to try the legal issues. *Wright* v. *Sun Mutual Insurance Co.*, 29 C. P. 221, 236.

Order for—*Former Jury Trials.*]—Order made to send a case for trial by a Judge alone, under 36 Vict. c. 8, s. 18 (O.), in an action against a railway company for negligence in killing horses by a train at a road crossing, the jury having once disagreed, and on the second trial found a verdict for the plaintiff, which was set aside as contrary to law and evidence. *McGunnighal* v. *Grand Trunk R. W. Co.*, 6 P. R. 209.

——— *Powers of Officer of Court.*]—In an action for breach of warranty, and for false representation, on the sale of a steam vessel, as to her power and speed, the clerk of the Crown in chambers, acting under s. 18 of the A. J. Act of 1873, directed the case to be tried by a Judge without a jury. On motion in term to set aside such order:—Held, that the clerk had power to make it, and that the court would not interfere with the exercise of his discretion. *Bennett* v. *Tregent*, 25 C. P. 443.

Waiver of Jury Notice—*Indorsement on Record nunc pro tunc.*]—See *Wycott* v. *Campbell*, 31 U. C. R. 584.

See Cushman v. *Reid*, 5 P. R. 121; *Harris* v. *Peck*, 7 P. R. 5; *Williams* v. *Crow*, 10 A. R. 301.

See ante VI.

XV. Venue—Change of.

See, also, Pleading—Pleading at Law before the Judicature Act, IV. 6—Pleading in Equity before the Judicature Act, III. 7—Pleading since the Judicature Act, XII.

[*See* con. rule (1897) 529.]

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1. *Generally.*

Costs where Venue not Changed.]—Where the parties to a cause had produced and examined their witnesses at Toronto, all of whom resided at a distance therefrom, and in close proximity to one of the circuit towns, the court, while awarding the general costs of the cause to the defendant, refused him the costs of the attendance of his witnesses. *Ledyard* v. *McLean*, 10 Gr. 139.

Crown Cases.]—In proceedings at suit of the Crown the venue is never changed at the instance of the defendant unless the attorney-general consents. *Regina* v. *Shipman*, 6 L. J. 19.

Delay.]—The court grants a change of venue reluctantly where delay will be occasioned thereby. *Fisken* v. *Smith*, 2 Ch. Ch. 491.

Discretion — *Ordinary and Special Grounds.*]—It is within the discretion of a Judge either to change the venue or not on the ordinary grounds, as he thinks will further the ends of justice. Special grounds may be shewn why venue should not be changed on the ordinary application. *Crump* v. *Crew*, 4 L. J. 20.

Plaintiff Changing his own Venue.]—A plaintiff will not, in general, be allowed to change his own venue to a county in which he might have laid it in the first instance, nor in order to avoid the consequences of his own delay or laches. *Burton* v. *Nowlan*, 4 L. J. 20; *Mercer* v. *Voght*, 3 P. R. 94. See *Richardson* v. *Daniels*, 3 L. J. 205.

Transitory Actions — *Motion by either Party.*]—In all transitory actions the venue may be changed by either plaintiff or defendant, on his shewing to the court or Judge a reasonable ground therefor. *Mercer* v. *Voght*, 4 L. J. 47; *Bleakley* v. *Easton*, 9 L. J. 23.

2. *By Amendment.*

Mistake—*Local Venue.*]—In an action against a bailiff of a division court, the venue being local was by mistake laid in the wrong county, and the plaintiff discovering the mistake did not go to trial in pursuance of his notice. Cross-rules having been obtained, the plaintiff was allowed to amend by changing the venue, and the defendant's rule for judgment as in case of nonsuit was discharged, on a peremptory undertaking, and on payment of costs. *Ward* v. *Sexsmith*, 1 P. R. 382.

——— *Plea.*]—A venue may be changed by plaintiff if laid by mistake in the wrong county. The proper order is to amend the declaration by changing the venue. Such amendment may be made after plea. *Richardson* v. *Daniels*, 3 L. J. 205; *Mercer* v. *Voght*, 4 L. J. 47.

Formerly this could not be done. See *Vaughan* v. *Hubbs*, 1 C. L. Ch. 76.

See Bull v. *North British Canadian Investment Co.*, 10 P. R. 622, *ante* PLEADING, XII.

See, also, *Brown* v. *County of York*, 8 P. R. 139; *Segsworth* v. *McKinnon*, 19 P. R. 178.

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3. *Changing back.*

Special Circumstances.]—After the venue has been changed at the instance of defendant, the court will not, unless under very special circumstances, allow the plaintiff to amend his declaration so as to bring it back. *Smith* v. *Cotton*, 1 U. C. R. 397.

Undertaking.]—A venue once changed will seldom be changed back again, without a peremptory undertaking by the plaintiff. *Carrall* v. *Tyson*, 1 C. L. Ch. 48.

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4. *Grounds for.*

(a) *Cause of Action Arising Elsewhere.*

The venue will not be changed when there is no great preponderance of convenience, merely on the ground that the cause of action arose in the county to which it is sought to change the venue. The place where the cause of action arose is merely a circumstance in the discussion, and of no importance as compared with the preponderance of convenience. *Gilmour* v. *Strickland*, 6 P. R. 254.

When the place where the cause of action arose and the place of residence of the defendant and his witnesses concur, a change of venue will be ordered to such county, although the plaintiff's witnesses reside where the venue is laid. *Harper* v. *Smith*, 6 P. R. 9.

Where parties to the suit, their witnesses, and the attorney and counsel for the defendant, resided in the same county, being the county where the cause of action arose:—Held, that the venue should be changed to that county. In considering the question of convenience and expense the cost to the public of the administration of justice should be taken into account, so that as far as possible each county should bear the expense of trying cases in the county in which the cause of action arose. *Phippen* v. *McLeod*, 7 P. R. 377.

An action should be tried in the county where the cause of action arose. *Grey* v. *Siddall*, 12 P. R. 557.

Where the balance of convenience was in favour of the trial of an action at Pembroke rather than at Cornwall, where the plaintiffs laid the venue, it was changed to Pembroke. Held, that had the scales been more evenly balanced than they were, the fact that the cause of action arose in the county of Renfrew should decide the question in favour of Pembroke, the county town of Renfrew. *Croil* v. *Russell*, 14 P. R. 185.

Per Meredith, C.J.—It would be more satisfactory if the practice were that prima facie the action should be tried in the county where the cause of action arose, leaving the onus upon the plaintiff to shew a preponderance in favour of the place selected by him; but the contrary practice is well settled. *Standard Drain Pipe Co.* v. *Town of Fort William*, 16 P. R. 404.

(b) *Convenience and Saving Expense.*

Difference in Expense.]—Venue will not be changed on account of a trifling additional expense in trying the cause where the venue is laid. *Stewart* v. *Johnstone*, 4 L. J. 21.

Where the venue was laid at London, and it appeared that defendant, six of his witnesses, and one of plaintiff's witnesses, resided at Clinton, in the county of Huron, and that plaintiff and three of her witnesses resided at London (her other witnesses being at a distance, and one of them resident out of the Province), and that in procuring the attendance of the witnesses residing at Clinton and London there would be only a difference of $15 or $16 in favour of hearing the cause at Goderich, in the county of Huron:—Held, that this difference in expense was not sufficient to deprive the plaintiff of the right of having the cause heard at London, where the venue was laid. *Mooney* v. *Mooney*, 6 P. R. 267.

——— *Alimony—Inconvenience of Public Officers.*]—The venue was changed from Whitby to Toronto in an action for alimony, upon the application of the defendant, where there was not sufficient difference in expense to warrant the change in an ordinary case, because of the rule in alimony cases which imposes on the defendant the burden of advancing and paying all the disbursements on both sides in any event. The circumstances that two of the defendant's witnesses, who resided in Toronto, were public officers, and that their absence would be a public inconvenience, was also considered in determining the preponderance of convenience. *Fogg* v. *Fogg*, 12 P. R. 249.

Majority of Witnesses — *Parties.*]—Where the number of parties to a suit is greater on one side than the other, the majority cannot have the venue changed to the county in which they reside (not being that in which the cause of action arose), because

they are to be examined as witnesses on their own behalf. *Rose* v. *Cook*, 2 C. L. Ch. 204.

——— *Scrutiny—Affidavits—Disclosure of Evidence.*]—The plaintiff lived in Montreal and the defendant in Toronto; the plaintiff had twenty-six witnesses in Montreal, and the defendant twenty-eight in or near Toronto. On a motion to change the venue from Cornwall to Toronto, the master in chambers directed the parties to put in affidavits disclosing the names and the nature of the evidence of the witnesses, and upon these determined that the evidence of some of the Montreal witnesses would be irrelevant to the issues, while all the Toronto witnesses might be important, and changed the venue to Toronto. Upon appeal: —Held, that the conclusion of the master as to the evidence was correct, and his order for change of venue proper upon the affidavits before him; but semble, the direction to disclose the names and evidence of witnesses was improper; not having been appealed against, however, and having been complied with, it could not be disturbed. *Arpin* v. *Guinane*, 12 P. R. 364.

Personal Convenience of Parties and Witnesses.]—The venue should be selected with a due regard to the convenience of the suitors and of the witnesses, but if not so selected it will be changed. The circumstance that the master at the town to which the venue was sought to be changed was at one time concerned as an arbitrator between the parties, was held no sufficient reason for not taking the suit before a Judge there. *Mallory* v. *Mallory*, 2 Ch. Ch. 404.

When it is shewn that the convenience of witnesses would be better served by a change of venue, such change will be made without costs. *Chard* v. *Meyers*, 2 Ch. Ch. 391.

The court will not change the venue where a sheriff is defendant, on the ground that he cannot attend at the trial. *Brock* v. *McClean*, Tay. 235.

It is no ground for changing, that a person required as a witness at one assize will be an associate at another, and that from the distance he cannot attend both. *Smith* v. *Jackson*, M. T. 1 Vict.

See Standard Drain Pipe Co. v. *Town of Fort William*, 16 P. R. 404; *Berlin Piano Co.* v. *Truaisch*, 15 P. R. 68.

——— *Delay—Undertaking.*]—In a bill relating to property in Toronto, there not being sufficient time to get the cause down for hearing at the next ensuing Toronto sittings, the venue was laid at Whitby. After answer defendants moved to change the venue to Toronto, and filed affidavits stating that some of their witnesses were out of the jurisdiction, and the evidence of such witnesses could not be procured in time; that others were resident in Toronto engaged on defendants' railway there, and their attendance at Whitby would interfere with the working of the railway at Toronto. The court granted the motion, on defendants' undertaking to abide by such order as the court might make as to any damages which the delay caused by the change would occasion. *McMurray* v. *Grand Trunk R. W. Co.*, 3 Ch. Ch. 133.

Preponderance of Convenience.] — Where the cause of action arose and the defendant resided at Pembroke, and the writ in the action was issued at Pembroke, but the plaintiff advisedly proposed to have the action tried at Kingston, alleging that he could not obtain a fair trial from a jury at Pembroke, owing to the influence of the defendant in that county: —Held, that the defendant should not succeed in having the place of trial changed from Kingston to Pembroke, as upon the affidavits filed he did not shew such a preponderance of convenience in favour of Pembroke, as to warrant depriving plaintiff of his right to choose the venue. *Davis* v. *Murray*, 9 P. R. 222.

Upon appeal by the defendant, in an action alleging fraud in the adjustment of partnership accounts and for an account, from an order of a Judge affirming an order of a master refusing to change the venue from Toronto to Sault Ste. Marie, the court was divided in opinion; one Judge holding that the venue should be changed, because the action could be more fitly and conveniently tried at Sault Ste. Marie; and the other, that the defendant had not shewn so great a preponderance of convenience in favour of the change as was necessary under the authorities, especially in view of the previous refusals by the master and Judge. Peer v. North-West Transportation Co., 14 P. R. 381, referred to. *Madigan* v. *Ferland*, 17 P. R. 124.

——— *Appeal—New Material—Change of Circumstances.*]—The plaintiff's right to select the place of trial is not lightly to be interfered with, where it has not been vexatiously exercised. And where the defendants in moving to change the venue to the county where the cause of action arose did not shew a considerable preponderance of convenience in favour of the change, their application was refused; and the refusal was affirmed on appeal to a divisional court. Held, also, that the appeal must be dealt with on the facts as they were exhibited below, although, since the order was made, the trial had been postponed from the spring to the autumn; the court ought not to look at new material, nor listen to suggestions of possible changes, unless, in a proper case, to allow a new substantive application to be made. *Halliday* v. *Township of Stanley*, 16 P. R. 493.

——— *Cause of Action.*]—The question for decision on an application to change the place of trial is, where can the action most conveniently be tried? And where, in an action on a promissory note for the contract price of work done by the plaintiff in refitting a mill in the county of Middlesex, to which the defence was that the contract had never been carried out, the plaintiff had eight witnesses in Toronto or east of Toronto, and the defendant eight in Middlesex or west of Middlesex, upon the defendant's application to change the place of trial from Toronto to London:—Held, that London was the most convenient place for trial, and the venue was changed accordingly. *Grecy* v. *Siddall*, 12 P. R. 557.

In an action to establish a right of way over land in the county of Wentworth, the venue was changed from Brantford to Hamilton, it appearing that there was a slight preponderance of convenience in favour of Hamilton. Held, that the facts that the subject matter of the litigation was situate in the

county of Wentworth, and that a view by the jury might be necessary, were facts to be considered in fixing the place of trial. *Odell* v. *Mulholland*, 14 P. R. 180.

——— *Costs of Motion.*] — If the plaintiff lays the venue in a confessedly improper place he is liable to be visited with the costs of a motion to change the venue. The defendant and six of his witnesses lived in the county of Huron, and the plaintiff, an infirm person, sixty-five years of age and three of her witnesses, lived in the county of Oxford. It was alleged by defendant, and not denied by plaintiff, that the plaintiff had witnesses in the county of Huron. The venue was laid in Brantford:—Held, that the balance of convenience was in favour of the venue being at Goderich, in the county of Huron. *Martin* v. *Ross*, 6 P. R. 264.

——— *Cross-actions.*] — Where cross-actions with different venues, are consolidated, the place of trial will be ordered as the balance of convenience requires. *Gonce* v. *Leitch*, 11 P. R. 255.

——— *Difference in Expense.*]—The plaintiff is dominus litis and entitled to lay the venue where he pleases, subject to the rules of court. The court will not deprive the plaintiff of this right, unless there is a manifest preponderance of convenience in a trial at the place to which it is sought to be changed. If it be made to appear that there will be a great waste of costs in a trial where the venue is laid, and much saving of costs in trying it at a place to which it is sought to change the venue, the Judge may in his discretion make the order. In this case the Judge was not satisfied that there would be a waste of costs by reason of a trial in the county where the venue was laid, and so on that ground he declined to change the venue. *Moor* v. *Boyd*, 3 P. R. 374.

A defendant, when applying to change the venue on the ground of the preponderance of convenience and expense, should suggest in his affidavits the number of witnesses the plaintiff is likely to call, and where they reside. *Diamond* v. *Gray*, 5 P. R. 33.

The plaintiff lived and carried on business in Toronto, the defendants in Parkhill, near London. The action was brought upon a contract to purchase certain goods obtained by an agent of the plaintiff, who solicited the order in Parkhill, where the contract was signed. The goods were to be delivered by the plaintiff to the Grand Trunk Railway Company in Toronto. The defence set up fraud in obtaining the contract. The plaintiff proposed to have the action tried at Toronto. The defendants swore that they intended to call six witnesses; that the cause of action arose in Parkhill; and that the expense of a trial at Toronto would be greater by $30 than at London. The plaintiff swore that he intended to call six witnesses and give evidence himself; that four of the six lived in Toronto, one east of Toronto and one in Parkhill; and that the extra expenses of a trial at London would be about $25:—Held, that the cause of action arose in Toronto, and that there was no such preponderance of convenience in favour of London as would justify a change in the place of trial, following Noad v. Noad, 6 P. R. 48, Davis v. Murray, 9 P. R. 222, and Robertson v. Dagaueau, 3 C. L. T. 266. *Walton* v. *Wideman*, 10 P. R. 228.

In an action by a husband against his wife to enforce a charge on land, the cause of action arose at Hamilton, where also the parties and their respective solicitors and all the witnesses resided, but the plaintiff proposed to have the action tried at Toronto. The increase in expense of a trial at Toronto over one at Hamilton, was estimated by the defendant at between $50 and $75, and by the plaintiff at about $30:—Held, that there was an exceeding preponderance of convenience in favour of Hamilton, and it was ordered that the place of trial should be changed, unless the plaintiff at once paid into court $40 to meet the defendant's additional expense. *Serros* v. *Serros*, 11 P. R. 135.

Under the circumstances the preponderance of convenience and extra expense were insufficient to warrant a change. Shroder v. Myers, 34 W. R. 261, followed. *Ross* v. *Canadian Pacific R. W. Co.*, 12 P. R. 220.

Under the circumstances, the defendant would be put to an undue and disproportionate inconvenience and expense if the action were tried at the place proposed by the plaintiff; there was a very great preponderance of convenience in favour of a change. Shroder v. Myers, 34 W. R. 261, distinguished. *Nicholson* v. *Linton*, 12 P. R. 223.

The decided cases have not entirely forbidden a change of the place of trial. And where the cause of action arose in the county of Brant, the plaintiff and defendants resided therein, the defendants swore to thirteen material and necessary witnesses all residing in the county of Brant and convenient to Brantford, the county town, and it was not disputed by the plaintiff that, if he had to call any witnesses at all, they would be persons residing at or near Brantford: the place of trial was changed by order from Hamilton, which was named by the plaintiff, to Brantford:—Held, that, although the difference in expense was not considerable, the great preponderance of convenience to witnesses and parties was in favour of Brantford. *Brethour* v. *Brooke*, 15 P. R. 205.

The place of trial of an action will not be changed unless the defendant shews that some serious injury and injustice to his case will arise by trying it where the plaintiff proposes to have it tried. The question of injury is one of degree, in which the elements of expense and convenience are to be considered. And where the extra expense could not exceed $15, and the place proposed by the plaintiffs was not far from that proposed by the defendant, a motion to change the venue was refused. *Dowie* v. *Partlo*, 15 P. R. 313.

The injury on account of which the plaintiff sued was received by him in the defendants' building in the county of Huron, but the plaintiff afterwards went to live in the county of Wentworth, and named Hamilton as the place of trial:—Held, that the defendants' application to change the venue to Goderich could not be granted, the difference in expense not being more than $40, and the number of witnesses in Huron county not exceeding the number in Wentworth by more than four:—Held, by the court of appeal, refusing leave to appeal, that it was well settled practice that the plaintiff had the right to name the place of trial, and his choice would not be interfered with except on sub-

stantial grounds. *Campbell* v. *Doherty*, 18 P. R. 245.

——— *Discretion—Appeal.*]—The question of changing the venue is to a great extent a matter of discretion. Con. rule 653 has not made any substantial change in the practice; and an overwhelming preponderance of convenience in favour of a change is still necessary. Shroder v. Myers, 34 W. R. 261, Power v. Moore, 5 T. L. R. 586, and Bridcut v. Duncan, 7 T. L. R. 514, referred to. But where the venue had been changed by an order of the master in chambers, affirmed by a Judge in chambers and a divisional court, the court of appeal, though not satisfied that there was an overwhelming preponderance of convenience in favour of a change, refused to interfere with the discretion exercised, by granting leave to appeal. *Peer* v. *North-West Transportation Co.*, 14 P. R. 381.

——— *Onus — Personal Inconvenience of Witnesses.*]—The plaintiff has the right to select the place of trial of the action, and the onus is upon the defendant to shew that the preponderance of convenience is against the place so selected. The court will not, upon an application to change the venue, enter into an inquiry as to the personal inconvenience of witnesses. *Standard Drain Pipe Co.* v. *Town of Fort William*, 16 P. R. 404.

Upon a motion to change the venue it is necessary to shew an overwhelming preponderance of convenience in favour of the change. Peer v. North-West Transportation Co., 14 P. R. 381, followed. Where the defendant moved to change the place of trial from Berlin to Belleville, shewing that the saving of expense to him, if the case was tried at Belleville, would be about $40, and that there were two or three more witnesses at Belleville than at Berlin, and the cause of action arose at Belleville, the motion was refused. Held, that the question whether it would be personally more inconvenient for the plaintiffs' witnesses to go to Belleville than for the defendant's witnesses to go to Berlin, was not one that could be considered. *Berlin Piano Co.* v. *Truaisch*, 15 P. R. 68.

——— *Public Officers.*]—The locality of the cause of action is not much regarded in chancery as a ground for changing the venue. When the venue has once been laid, a very large preponderance of convenience must be shewn to change it, and, in investigating this, regard will be paid to the ability of witnesses to travel, and to the probability of a postponement of the hearing being the result of a change. Between private individuals it is impossible to say that one class of witnesses will be more injured than another class by absence from home. Between a private individual and a public officer this may be considered. *Noad* v. *Noad*, 6 P. R. 48.

———*Refusal to Determine—Apportionment of Costs.*]—Having regard to the difficulty of deciding upon contradictory affidavits whether it is proper in any case to order a change of the place of trial, and to the unsatisfactory nature of the practice and the conflicting decisions upon the question of change of venue, it is better to refuse applications for change of venue, and to leave the trial Judge to apportion the costs so as to do justice, if it appears to him that the expense has been increased by the plaintiff's choice of a place of trial. Roberts v. Jones and Willey v. Great Northern R. W. Co., [1891] 2 Q. B. 194, followed. *McArthur* v. *Michigan Central R. W. Co.*, 15 P. R. 77.

Public Officers—*Convenience of Public.*]—See *Noad* v. *Noad*, 6 P. R. 48; *Fogg* v. *Fogg*, 12 P. R. 249.

Residence of Party Abroad.]—In moving to change the venue the fact that one party lives out of the jurisdiction does not affect the equities between the parties. *Ansell* v. *Smith*, 6 P. R. 62.

Residence of Parties—*Cause of Action*—"*Good Cause.*"]—By s. 21 of 58 Vict. c. 13 (O.), it is provided that every action in the high court shall be tried in the county in which the cause of action arises, in case all the parties reside in that county, provided that, "for good cause shewn," a Judge may order the action to be tried in another county: —Held, that this applied to an action pending before it was passed; and that where the cause of action arose and all the parties resided in one county, a very strong case, which had not been made out, would have to be made before a trial in another county could be ordered. *Pollard* v. *Wright*, 16 P. R. 505.

See post 5.

(c) *Expediting Trial.*

Accident Preventing Trial.]—The occurrence of an accident preventing the trial of a cause where the venue is laid, (e. g., personal inability of the Judge) is a ground for changing the venue, in order to save delay, especially when prospective difficulty of obtaining witnesses, and the peculiar position of some of the parties to the suit, render the obtaining of justice much more expensive and troublesome, if not even doubtful, if trial deferred. *McDonell* v. *Provincial Ins. Co.*, 5 L. J. 186.

Danger of Losing Debt.]—In an action on a note, with the venue laid in Oxford, and non fecit pleaded, the plaintiff swore that unless he could try the case at the winter assizes in Toronto he would be very likely to lose his debt, and that from conversations with defendant he believed the plea was put in for time only. No affidavits were filed in answer: —Held, sufficient. *Mercer* v. *Vogt*, 3 P. R. 94. See, also, *Bleakley* v. *Easton*, 9 L. J. 23.

Where the record did not reach the assize town in time to be entered, the plaintiff, on shewing that due diligence had been used, and that if he did not get down to trial before the autumn assizes he would be in danger of losing his debt, was allowed to change the venue, so as to go to trial at the spring assizes, on payment of costs of the day, costs of the application, and any extra expense occasioned to defendant by the change. *Lucus* v. *Taylor*, 4 P. R. 99.

Illness of Witness—*Costs.*]—The place of trial of an action may be changed for the purpose of expediting the trial. And where the plaintiffs named Barrie as the place of trial, and the defendants had it changed to Toronto, and, through no fault of the parties, the action was not tried at the spring sittings

there, nor at Barrie under an alternative order, it was, on the application of the plaintiffs, changed to Bracebridge, where a summer sittings had been appointed, a witness for the plaintiffs being so dangerously ill that he might die at any moment, and there being no summer sittings at Toronto or Barrie. Costs were not given against the plaintiffs, as they were not in fault. Bleakley v. Easton, 9 L. J. 23, Mercer v. Vogt, 3 P. R. 94, and McDonell v. Provincial Ins. Co., 5 L. J. 186, specially referred to. *Mercer Co.* v. *Massey-Harris Co.*, 16 P. R. 171.

Plaintiff Guilty of Delay.]—The court will not change the venue to enable a plaintiff to speed his cause, especially if he has himself been guilty of delay. *James* v. *James*, 3 Ch. Ch. 58.

Previous Delay by Arbitration—*Convenience.*]—The venue was changed from Ottawa to Toronto to avoid a serious delay in trial after an abortive arbitration, where Toronto was as convenient a place as Ottawa for the defendants, and the plaintiffs had some witnesses at Toronto, they themselves residing at Montreal. *Cooper* v. *Central Ontario R. W. Co.*, 4 O. R. 280.

(d) *Securing Fair Trial.*

Class Prejudice—*Jury—Trial Judge.*]—The plaintiff was a settler in the district of Muskoka, and the defendant a timber licensee. The question of fact between them was whether certain timber was the property of the plaintiff or of the defendant. The defendant applied to have the venue changed from Muskoka on the ground that the jury would be largely drawn from the settler class, and that he believed he would not have a fair trial:—Held, that this was not a ground for change of venue, and any possible injustice to the defendant would be prevented by the trial Judge, who would have a discretion as to the mode of trial. *Unger* v. *Brennan*, 14 P. R. 294.

County Court Judge—*Action against.*]—Quære, whether the circumstance of defendant being a county Judge is not in itself sufficient to give a plaintiff the right to have the place of trial changed on grounds of public policy. *Anon.*, 4 P. R. 310.

Criminal Cause — *Fair Trial—Evidence as to.*]—Upon a motion made by the Crown under s. 651 of the criminal code to change the venue from the town of Napanee to some other place, for the trial of three persons charged with the offence of breaking a bank in the town of Napanee and stealing money therefrom, upon the ground that the sympathy felt for two of the accused in the town and in the county of Lennox and Addington, of which it is the county town, was such that a fair trial could not be had:—Held, that the rule that all causes should be tried in the county where the crime is supposed to have been committed ought never to be infringed unless it plainly appears that a fair and impartial trial cannot be had in that county; and mere apprehension, belief, and opinion are not to be relied on as evidence. And, under the circumstances appearing upon affidavits filed, the motion was refused. *Regina* v. *Ponton*, 18 P. R. 210.

——— *Fair Trial—Riot at Former Trial—Affidavits of Jurors.*]—Under s. 651 of the criminal code the venue for the trial of a person charged with an indictable offence may be changed to some place other than the county in which the offence is supposed to have been committed, if it appears to the satisfaction of the court or Judge that it is expedient to the ends of justice, by reason of anything which may interfere with a fair trial in that county; it is not a question as to the jury altogether. And where at a trial of the defendant, at which the jury disagreed, a crowd of persons congregated round the court house while the jury were deliberating, and endeavoured to intimidate the jurors and influence them in favour of the defendant, and afterwards made riotous demonstrations towards the Judge who presided at the trial, the venue was changed before the second trial. Where affidavits were filed by the Crown to shew that the conduct of the crowd must have influenced the jurors, affidavits of jurors denying that they were intimidated were received in answer. *Regina* v. *Ponton* (No. 2), 18 P. R. 429.

Evidence of Difficulty in Having Fair Trial.]—The suggestion that the defendant could not obtain a fair and impartial trial in the county was not made out in this case to the satisfaction of the Judge, and on that ground, as well as others mentioned in the case, he refused to change the venue. *Moor* v. *Boyd*, 3 P. R. 374.

Libel—*Newspaper—Convenience.*]—When, in an action for libel in a newspaper, the plaintiff lays the venue in a county distant from that in which the paper is published and the parties reside, so that the trial may be free from local influences, it will not be changed to the county in which the cause of action arose, merely because it would be more convenient and less expensive to try the case in the latter county. The obtaining of a fair trial must overbear every consideration of mere convenience. *Blackburn* v. *Cameron*, 5 P. R. 34.

Municipal Corporation — *Action by—Costs of Motion.*] — Where the venue is changed at the defendant's instance in an action brought by a municipal council in their own county, on the ground that all the inhabitants are interested in the suit, and an impartial trial cannot be had, defendant will be ordered to pay costs of the application, and, in any event, the extra mileage of plaintiffs' witnesses; and in the event of defendant succeeding, he shall not tax against plaintiff the extra mileage of his own witnesses. *Municipal Council of Ontario* v. *Cumberland*, 3 L. J. 11.

Newspaper Comment—*Delay in Applying.*]—In an action against an insurance company, it appeared that the plaintiffs' claim had been much discussed, and the conduct of the defendants severely remarked upon, in newspapers in the county and in the vicinity of the county in which the venue was laid:—Held, that this would have been a sufficient reason (upon the facts as proved) for granting a change of venue, if the application had been made more promptly; but, as the defendants had unnecessarily delayed for several weeks, and applied only a few days before the commission day of the assizes, the application was refused. *McDonagh* v. *Provincial Ins. Co.*, 2 C. L. J. 104.

Political Prejudice—*Previous Verdict—Member of Parliament.*]—The fact that the question for trial in an interpleader issue is the alleged insolvency of a member of parliament at the time of an alleged assignment of road stock, coupled with the circumstance that one of the parties to the suit contesting the question of insolvency is a political opponent of his, is not a ground for a change of venue, although it be shewn that a verdict was rendered which the court afterwards set aside; but rather a ground for the summoning of a special jury. *Salter* v. *McLeod*, 10 L. J. 76.

——— *Private Injury—Convenience.*]—An application to change the venue in an action for libel, to a county where the cause of action arose and the witnesses resided, whereby there would be a great saving of expense, was opposed on the ground that a fair trial could not be had in such county, owing to alleged prejudices against the plaintiff arising from political excitement occasioned by an election held there three years previously:—Held, that the venue must be changed, the action being for a private injury and not a matter of public interest, and the probabilities of the case being against the belief that a fair trial could not be obtained, as alleged; and the preponderance of convenience and expense being greatly in favour of the change. *Roche* v. *Patrick*, 5 P. R. 210.

Previous Verdict — *Bias.*]—The action was tried at Brantford, and a new trial was moved for at a place other than Brantford, because the jury there were biassed against the defendant:—Held, that this formed no ground for a new trial. *Wood* v. *McPherson*, 17 O. R. 163.

——— *Refusal of Judge to Try Action—Costs of Motion — Extra Expense.*] — The refusal, upon good grounds, of the Judge appointed to hold the assizes for a particular county to try a cause wherein the venue is laid in that county, is a ground for changing the venue, especially where the difficulty of obtaining witnesses to attend at the place where the venue is laid, coupled with the fact that three trials were had in that county, each of which resulted in favour of defendants, and in each of which the verdict was set aside by the court, renders the obtaining of a just verdict much more difficult than elsewhere. But in such a case plaintiffs applying for a change of venue will be ordered not only to pay the extra costs to which such defendants may be put by the change of place of trial, but, in the event of success, ordered not to tax against defendants the increased cost of having a trial in the place to which a change of venue is desired. *Ham* v. *Lasher*, 10 L. J. 74.

Sheriff — *Action against.*]—In an action wherein the sheriff is plaintiff or defendant, the opposite party, if he so desires, may have the action tried in the county adjoining that in which the sheriff resides. *Brannen* v. *Jarvis*, 8 P. R. 322.

See Mallory v. *Mallory*, 2 Ch. Ch. 404; *Davis* v. *Murray*, 9 P. R. 222.

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5. *In County Court Cases.*

Appeal — *Judge in Chambers—Court en Banc.*]—There is no appeal to the full court in term from an order of the clerk of the Crown and pleas, made on an application to change the venue in a county court case, under R. S. O. 1877 c. 50, s. 155, but the only appeal in such cases is to a Judge in chambers under s. 31 of the Act. Held, however, that if an appeal did lie to the full court, it might be made direct thereto without first going before a Judge in chambers. *Mahon* v. *Nicholls*, 31 C. P. 22.

Appeal—*Judge in Chambers — Divisional Court.*]—Held, that an appeal lay to a Judge in chambers from an order of the master in chambers under con. rule (1888) 1260, and that the venue in this case was properly changed to Napanee; and that, even if an appeal did not lie from the master in chambers to a Judge in chambers, the latter had the right as upon a substantive application to make the order which the master refused. As the appeal to the divisional court was dismissed upon the merits, no opinion was expressed as to whether such appeal lay. *Milligan* v. *Sills*, 13 P. R. 350.

Where an application is made to the master in chambers, under con. rule (1888) 1260, to change the place of trial in a county court action, no appeal lies from his order thereon to a Judge in chambers; and no appeal lies from the decision of a Judge in chambers to a divisional court. *McAllister* v. *Cole*, 16 P. R. 101.

Where in a county court action an application has been made to the master in chambers, under con. rule (1888) 1260, to change the place of trial, no appeal lies from his order; and a second application for the same purpose, not based upon any new state of facts arising since the first application was made, will not be entertained by a Judge in chambers. McAllister v. Cole, 16 P. R. 105, followed. Milligan v. Sills, 13 P. R. 350, not followed, with the concurrence of the Judges who decided it, pursuant to s. 9 (2) of the Law Courts Act, 1895. *Cameron* v. *Elliott*, 17 P. R. 415.

Costs—*Scale of—Appeal.*]—The costs of an application to the master in chambers, under con. rule (1897) 1219, to change the place of trial in a county court action, should be taxed on the county court scale, but the costs of an appeal in the same matter from the master's order to a Judge in chambers and of a further appeal to a divisional court should be taxed on the high court scale. *Re Hicks* v. *Mills*, 18 P. R. 123.

Difference in Expense — *Undertaking.*]—The plaintiff in a county court action laid his venue in Toronto. The master in chambers changed it. On appeal, a Judge discharged the master's order on the undertaking of the plaintiff to pay the extra expense ($25 to $30) of a trial at Toronto. *Brigham* v. *McKenzie*, 10 P. R. 406.

Issue Sent from High Court—*Transfer to another County Court—Jurisdiction.*]—In an action pending in the high court, an interpleader issue and all subsequent proceedings were transferred under 44 Vict. c. 7, s. 1 (O.) to the county court of Middlesex. By a subsequent order made on consent, the trial of such issue was withdrawn from Middlesex, and a special case was agreed on, and the venue changed from Middlesex to York, where the special case was argued:—Held, that in

strictness the appeal should be quashed. The transfer to the Middlesex county court was final, and there was no jurisdiction under the statute or otherwise to transfer the issue or any part of it, or to change the venue, to any other county court. The proceedings in the county court of York could therefore only be regarded as a summary trial by consent, from the judgment on which no appeal lay. *Coyne* v. *Lee*, 14 A. R. 503.

Jurisdiction of Master in Chambers.]—Semble, that the master in chambers has not jurisdiction to change a venue under R. S. O. 1877 c. 50, s. 155, as the rule of court passed 1st February, 1879, under the authority of 33 Vict. c. 11, delegates to the master only the jurisdiction the Judges of the superior courts then possessed in certain matters, and it was not till the passing of 35 Vict. c. 10 (O.), that superior court Judges had jurisdiction in such matters in county court actions. Nor has the master in chambers power under rule 420, O. J. Act, as that is limited to "actions and matters" in the high court, and a motion of this kind is neither a "matter" nor a "proceeding" (s. 91, O. J. Act) in the high court. *Brigham* v. *McKenzie*, 10 P. R. 406.

Motion—*Intituling of Papers.*]—Where a motion is made to a Judge of the high court or the master in chambers under rule 1260 to change the venue in a county court action, the papers should not be intituled in the high court of justice, but in the county court. *Ferguson* v. *Golding*, 15 P. R. 43.

Preponderance of Convenience—*Cause of Action.*]—In such cases the proper course is to follow, as laid down in the Act, the practice in force in the superior courts, and the mere fact of the cause of action having arisen in the county to which it is sought to change the venue, is not, of itself, sufficient to outweigh any actual preponderance of convenience arising from other causes in favour of retaining the venue where the plaintiff had laid it. *Mahon* v. *Nicholls*, 31 C. P. 22.

Upon motion to change the venue from Toronto to Napanee in a county court action, brought to recover $100 damages for breach of a contract by the defendant to sell a horse to the plaintiff, it appeared that the defendant resided in the county of Lennox and Addington and the plaintiff in Toronto, and that all the witnesses on both sides resided in Lennox and Addington except the plaintiff himself and one other in Toronto. The defendant swore that he required eleven witnesses at the trial. It was not clear where the cause of action arose, but the breach was probably where the defendant resided:—Held, that there was a very great preponderance of convenience in favour of having the action tried at Napanee, and the venue was accordingly changed. *Milligan* v. *Sills*, 13 P. R. 350.

The action was for damages for breach of contract, and the breach was at Pembroke, which the plaintiff named as the place of trial. The defendant moved to change it to Toronto:—Held, that the action would be more conveniently tried at Pembroke, and the plaintiff should be allowed to retain the venue there, although the defendant swore that he had a much larger number of witnesses at Toronto than the plaintiff had at Pembroke. *McAllister* v. *Cole*, 16 P. R. 105.

——— *Difference in Expense.*]—A motion to change the place of trial in a county court action from London to Toronto was refused under the following circumstances. The action was on a promissory note made and payable at Toronto. The plaintiff resided in Montreal, and his solicitor in London. The sole defence was, that the defendant was discharged from liability under the Insolvent Act. The defendant resided in Toronto, and swore that he intended to call two witnesses, the clerk of the county court at Toronto, and the assignee of the defendant, who also lived there. The plaintiff filed no affidavit on the motion. *Slater* v. *Purvis*, 10 P. R. 604.

Replevin.]—The venue in any action of replevin in a county court, except for goods distrained, may be changed to any other county under s. 155 of R. S. O. 1877 c. 50. *O'Donnell* v. *Duchenault*, 14 O. R. 1.

——— *Local Venue — Tax Collector.*]—A tax collector, sued for damages in respect of acts done by him in the execution of his duty, is entitled to the benefit of R. S. O. 1887 c. 73, and under s. 15 of that Act, and s. 4 of R. S. O. 1887 c. 55, a county court action against him for replevin of goods seized by him and for damages for malicious seizure, must be brought in the county where the seizure and alleged trespass took place. The consolidated rules (1888) as to venue do not override these statutory provisions. Legacy v. Pitcher, 10 O. R. 620, distinguished. Arscott v. Lilley, 14 A. R. 283, applied. *Howard* v. *Herrington*, 20 A. R. 175.

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6. *In Particular Actions.*

Bond — *Award.*] — The court will not change the venue in an action upon a bond conditioned for the performance of an award, without special grounds. *Lossing* v. *Horned*, Tay. 83.

Case against Carriers.]—In an action on the case against carriers, the venue cannot be changed on the common affidavit. *Ham* v. *McPherson*, M. T. 5 Vict.

Ejectment.]—In an action of ejectment the place of trial may be changed by order of a Judge. If the power to change is not given by rule 254, O. J. Act, it is not taken away thereby, and it previously existed under R. S. O. 1877 c. 51, s. 23. *Canadian Pacific R. W. Co.* v. *Manion*, 11 P. R. 247.

The indorsement on a writ of summons, issued in the district of Thunder Bay after the passing of 57 Vict. c. 32 (O.), shewed that the claim was for cancellation of a lease of a mining location in the district of Rainy River, for possession of the location, and for an injunction restraining the defendant from entering thereon:—Held, that the action was not one of ejectment within the meaning of con. rule (1888) 633, and therefore the venue was not local, and it was not necessary that the writ should be issued by the local registrar at Rat Portage under s. 3 of the Act. *Kendell* v. *Ernst*, 16 P. R. 167.

Local Action—*Adjoining County.*]—In a local action it is not obligatory upon the court or Judge to order the trial to be had in the next adjoining county only, if, in view of all

the circumstances of the case, a change to a county more remote is deemed more convenient or desirable. *Ham* v. *Lasher*, 10 L. J. 74.

Replevin.]—See *Howard* v. *Herrington*, 20 A. R. 175; *O'Donnell* v. *Duchenault*, 14 O. R. 1.

Trespass to Land.] — In trespass to realty situated in the county of Peel, the venue was laid in the county of the city of Toronto. An application to change the venue to the former county was refused. Quære, is the common affidavit sufficient in such case? *Perdue* v. *Township of Chinguacousy*, 2 C. L. J. 106.

See, also, *Smythe* v. *Tower*, 2 L. J. 183; *Carruthers* v. *Dickey*, 2 L. J. 185; *Paterson* v. *Smith*, 14 C. P. 525.

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7. *Motions to Change Venue and Appeals.*

Affidavits.]—See *Regina* v. *Ponton* (No. 2), 18 P. R. 429; *Attorney-General* v. *McLachlin*, 5 P. R. 63.

Appeal from Order Made at Trial—*Jurisdiction of Divisional Court—Res Judicata — Order ex Mero Motu.*] — The action came on for trial at the Toronto assizes, but the trial was postponed, and the trial Judge indorsed on the record: "Upon my own motion, I order that the place of trial in this cause be changed to the town of Belleville, and that this cause be tried at the next assizes there by a jury." A Judge in chambers had previously refused to change the place of trial to Belleville:—Held, that the question of place of trial was res judicata. Held, also, notwithstanding s. 28, s.-ss. 2 and 3, O. J. Act, 1881, that the divisional court had jurisdiction to hear an appeal from the order of the trial Judge, having regard to the language of rule 254, O. J. Act, and of the order itself. Semble, rule 254 does not give a Judge a right to interfere with the procedure in the action except at the instance of a party. *Bull* v. *North British Canadian Loan and Investment Co.*, 11 P. R. 83.

——— *Jurisdiction of Divisional Court—Convenience—Costs.*]—The master in chambers refused an application by the defendant to change the place of trial from Sarnia to Stratford, but gave leave to bring on an appeal from his order, or a substantive motion to change the place of trial, before the Judge holding the Sarnia assizes, who entertained the motion, and made an order changing the venue to Stratford. The order was drawn up as made by a Judge at the assizes, and was signed by the local registrar at Sarnia:—Held, that, having regard to rule 254, O. J. Act, and to the leave given and the character of the motion, the order was to be regarded as that of a Judge and not of the high court, and could therefore be reviewed by a divisional court. There is nothing to prevent a Judge sitting at the assizes hearing a chambers motion, if he is disposed for the purpose to treat the court room as his chambers. Such an application as this, however, should not be made at the trial on account of the inconvenience and detriment to the public interest arising from the delay of other business appropriate to the assizes, and on account of the injustice to parties to the cause who have prepared for trial. It is too late when the assizes have begun to consider the question of the balance of convenience; and, therefore, while the court did not see fit under the circumstances to restore the venue to Sarnia, they varied the order of the trial Judge by making the costs of the day at Sarnia, and of the several motions to change the venue, costs to the plaintiffs in any event. *Sarnia Agricultural Implement Mfg. Co.* v. *Perdue*, 11 P. R. 224.

Costs.]—See *Municipal Council of Ontario* v. *Cumberland*, 3 L. J. 11; *Ham* v. *Lasher*, 10 L. J. 74; *Martin* v. *Ross*, 6 P. R. 264.

Evidence on Motion.]—A party making affidavit to change the venue, and stating that certain parties are material and necessary witnesses, is not bound on cross-examination to state what evidence he expects from them, or to state facts tending to test the materiality of the proposed evidence. *Crombie* v. *Bell*, 3 Ch. Ch. 195.

Evidence on Motion or Appeal.]—See *Arpin* v. *Guinane*, 12 P. R. 364; *Halliday* v. *Township of Stanley*, 16 P. R. 493.

In County Court Cases.]—See *ante* 5.

Leave to Appeal—*Costs—Undertaking.*] —Leave to appeal to the court of appeal was asked by the plaintiff because it was of importance to him in other litigation to have the question of venue decided, and was granted upon his undertaking to pay the costs of both parties of the appeal. *Grecy* v. *Siddall*, 12 P. R. 557.

See Peer v. *North-West Transportation Co.*, 14 P. R. 381.

Necessity for Substantive Motion—*Certiorari.*]—A Judge has no power to change the venue by the order granting the writ of certiorari to remove a cause from the county court; it should be a substantive motion, when the plaintiff has shewn where he will lay his venue after the cause has been removed. *Paterson* v. *Smith*, 14 C. P. 525.

Time for Moving.]—The court will not change the venue on the application of the plaintiff after issue joined, unless a very special ground be laid for it. *Crooks* v. *House*, 3 O. S. 308.

An application on special grounds to change venue should not be made before plea pleaded. *Stewart* v. *Johnstone*, 4 L. J. 21.

Semble, that an application for change of venue before appearance entered is irregular. *Hood* v. *Cronkrite*, 4 P. R. 279.

Until after appearance a defendant has no attorney in the cause, and an affidavit by a person calling himself such was, therefore, held, insufficient to support an application to change the venue. *Attorney-General* v. *McLachlin*, 5 P. R. 63.

See McDonagh v. *Provincial Ins. Co.*, 2 C. L. J. 104.

Undertaking — *Evidence—Compliance.*] —The evidence given by the plaintiff in this case was held not a sufficient compliance with the usual undertaking on changing the venue. *Miller* v. *Darrow*, 10 U. C. R. 349.

8. *Order Changing Venue.*

Disregard of — *Service.*] — Though an order to change the venue has been granted and served, unless the venue be in fact changed by taking out the rule and making the alteration in the record, the plaintiff is at liberty to proceed to trial according to the original venue. *Hornby* v. *Hornby*, 3 U. C. R. 274; *McNair* v. *Sheldon*, Tay. 598.

On the 28th September an order was made to change the venue from Brant to Oxford. The rule was not taken out until the 9th October, and it was not served until the 13th The assizes for Brant were then in progress, and the case had been entered for trial there. The plaintiff continued it on the docket notwithstanding the order, but it was not tried, owing only to want of time. It was then entered again at Brant at the next assizes, and a verdict taken, defendant not appearing:—Held, that the plaintiff should not have gone to trial at Brant after service of the order; and the verdict was set aside, but without costs, as the defendant had been guilty of laches in not making the service sooner. *Cleghorn* v. *Carroll*, 14 U. C. R. 480.

Effect of—*Acting on—Divisions of Court —Costs.*]—An order was made by the master in chambers changing the place of trial from the assizes at Simcoe, for which notice had been given, to the chancery sittings at London. The Judge presiding at those sittings having refused to hear the case, as it belonged to a common law division:—Held, without determining whether the master's order was a proper one, that the plaintiff was justified in acting on it, and his costs occasioned by the abortive attempt at trial were allowed to him. *Schwob* v. *McGloughlin*, 9 P. R. 475.

XVI. VERDICT.

(See ante V.)

1. *Mistake or Inconsistency—Alteration or Amendment.*

Amendment of Verdict.]—Semble, that the Judge may amend a verdict with the assent of the jury at any time before they are discharged. *Jordan* v. *Marr*, 4 U. C. R. 53.

Held, that where by mistake a verdict for a certain amount is entered on the record, and the foreman of the jury, before the jury separate or leave the box, points out the error, the Judge is right in erasing the entry and making in lieu thereof another to which the jury have assented as being their verdict. *Moore* v. *Boyd*, 15 C. P. 513.

Conditional Verdict — *Costs — Alteration.*]—Where a jury found a verdict for the plaintiff and £5 damages, with a condition that each party should pay his own costs, and on the court having refused to receive this, they altered it to a verdict for defendant with the same condition, and subsequently, on that verdict being refused also, to an unconditional verdict for defendant, a new trial was granted without costs. *McKay* v. *Lyons*, 6 O. S. 507.

Dissent of Juryman—*Evidence of Formal Assent.*]—Application for leave to file a qui tam information against a Judge of a recorder's court, upon the ground that he had falsified the records of the court, and maliciously condemned the applicant as guilty of a felony upon a verdict of his peers, when, as alleged, no verdict whatever was found by the jury. The facts to support the application were, that the jury came into court to render their verdict, and the foreman pronounced a verdict of guilty. The counsel for the accused then questioned (not through the court) some of the jury as to the grounds of their verdict, when one of them stated that he did not concur in the verdict. The attention of the court was not drawn to this dissent, nor did it appear that the court was aware of it. A verdict of guilty was recorded by the presiding Judge; and when formally read to the jury by the clerk no objection was made. The court refused to allow the information. *Regina* v. *Ford*, 3 C. P. 209.

Entry of Verdict—*Irregularity.*]—The verdict not having been indorsed on an office copy of the order of interpleader, but on the record only, the supposed irregularity was held to be immaterial. *Gourlay* v. *Ingram*, 2 Ch. Ch. 309.

Granting New Trial.]—See NEW TRIAL.

Inconsistency — *Error — Misconduct.*]—The jury were told that the testimony of the prisoner's accomplices was not sufficiently corroborated to warrant a conviction, whereupon they came into court stating that they thought the prisoner guilty, but that he ought not to be convicted upon the evidence. They were then told that they ought to acquit, but after a short interval they returned a verdict of guilty. Before recording their finding, the presiding Judge recommended them not to convict on the evidence, saying, however, that they could do so if they thought proper; and they nevertheless adhered to their verdict:—Held, no ground for a new trial, for there was neither error nor misconduct in fact or in law, in either of which cases only the statute intended that the court might interfere by granting a new trial. *Regina* v. *Seddons*, 16 C. P. 389.

Rider to Verdict—*Effect of.*]—In an action against the defendant, as a surgeon, for negligence, the jury found for the plaintiff, but added to their verdict the following:—"We are of opinion that the defendant made a mistake in not calling in skilful assistance, but not wilfully or through inattention:"—Held, a mere expression of opinion, and that it did not nullify or affect the verdict. *Sheridan* v. *Pidgeon*, 10 O. R. 632.

Verdict of Judge—*Mistake—Treating as Judgment.*]—The Judge, at the trial in a county court, entered a verdict for the plaintiff, instead of directing judgment to be entered, and afterwards refused a rule nisi to set aside such verdict. Rule 405 of the O. J. Act, 1881, in effect forbids the granting of any rule to shew cause where the application is against the judgment of a Judge who tries a cause without a jury. Quære, as to the application of this rule to county courts by rule 490. Held, that the entry of the verdict might be treated as a direction to enter judgment, and was a decision from which an appeal would lie under rule 510. An objection to an appeal from the refusal of a Judge to grant such rule might be raised by motion

in chambers, but it was not obligatory to raise it in that manner. *Williams* v. *Crowe*, 10 A. R. 301.

See post 3.

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2. *Reservation of Leave to Move.*

Administration of Justice Act, 1874 —*Effect of.*]—37 Vict. c. 7, s. 33 (O.), (A. J. Act, 1874), does not empower a court to enter a nonsuit or verdict, except in cases where before the Act the court would have done so on leave reserved. Contra, where the trial is before a Judge without a jury; 33 Vict. c. 7, s. 6 (O.) *Hughes* v. *Canada Permanent L. and S. Society*, 39 U. C. R. 221. See *Armstrong* v. *Stewart*, 28 C. P. 45.

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

Application to Indictment Tried on Civil Side.]—Quære, whether after verdict for the Crown on an indictment tried on the civil side, the verdict can be entered for defendant on leave reserved. The proper course is to reserve a case under C. S. U. C. c. 112. *Regina* v. *Fitzgerald*, 39 U. C. R. 297.

Disagreement of Jury.]—When leave had been reserved to defendant to move to have a verdict entered for him on legal objections taken, and the jury not being able to agree were discharged, he could not make the motion. *McGuire* v. *Laing*, 19 U. C. R. 508. But see R. S. O. 1877 c. 50, s. 290.

Necessity for Consent.]—A rule nisi was made absolute to enter a verdict for plaintiff, although defendant had not assented to any leave being reserved to move. On appeal the court directed the rule absolute to be discharged, leaving it to the court below to dispose of the application for a new trial, the other alternative of the rule nisi. *Ball* v. *Sprung*, 24 U. C. R. 422.

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

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3. *Sealed Verdict.*

Necessity for Assent in Open Court—*Costs.*]—The trial of an action for slander having been concluded, the court adjourned at 6 p.m., both parties agreeing to a sealed verdict. A sealed envelope was left with the sheriff's officer for the Judge, with a paper enclosed, signed by all the jury, directing that the defendant should "pay the sum of $1 damages and the costs of the suit:"—Held, that on this being opened in court by the Judge next morning, the jury should have been called together, as the plaintiff's counsel required, to assent to the verdict, and have it recorded; and it having been simply indorsed on the record as written, a new trial was ordered without costs. Held, also, that the jury had no power to give costs by their verdict. *Campbell* v. *Linton*, 27 U. C. R. 563.

See Donaldson v. *Haley*, 13 C. P. 87; *Morse* v. *Thompson*, 19 C. P. 94.

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4. *Several Counts or Issues.*

Abandonment of Part.] — Where a plaintiff abandoned the special counts, and recovered upon counts within the competence of a district court, the court of Queen's bench ordered the verdict to be entered on those counts only. *Wentworth* v. *Hughes*, Tay. 178.

If a plaintiff at a trial abandons all the counts in his declaration but one, on which he obtains a verdict, the defendant is not entitled to a verdict on the other counts. *Gates* v. *Crooks*, Dra. 180.

Where in an action on the Statute of Maintenance, a verdict was taken upon four counts of the declaration for the plaintiff, and the defendant moved to arrest the judgment on the ground that some of the counts were bad, the court allowed the plaintiff to enter the verdict upon one count of the declaration, abandoning the rest. *Beasley* v. *Cahill*, 2 U. C. R. 320.

Election — *Change in.*] — Semble, that a party may apply his verdict to a different count from that on which he elected to take it at the trial, where the evidence given will support such count. *Ponton* v. *Moodie*, 7 U. C. R. 301.

——— *Consent — Trespass.*] — The fifth count was in trespass to plaintiff's goods. The sixth count was for illegal distress. To the fifth count defendant pleaded, "not guilty," that the goods were not plaintiff's, and that he seized and sold them to satisfy arrears of rent; and to the sixth count, the general issue by statute 11 Geo. II. c. 19, s. 2. At the trial the plaintiff's evidence shewed that the seizure and sale referred to was for a distress for rent. Defendant's counsel contended that, as only one seizure had been made, the plaintiff must elect on which count he would go to the jury. The Judge refused to compel plaintiff to elect, but said he would direct the jury that the evidence applied more to the sixth count than the fifth, after which the plaintiff's counsel, in addressing the jury, withdrew the sixth count from their consideration. The Judge charged the jury that the evidence given applied to the sixth count; and that they should find for defendant on the fifth count, charging them as if both counts were before them for their consideration. The jury found for plaintiff on the sixth count for $100, and a verdict for defendant on the fifth:—Held, that the plaintiff could not withdraw a particular count or issue from the consideration of the jury, without the consent of defendant, so as to prevent them giving a verdict on such count, and the jury in this case should have been directed to find for defendant on the sixth count, and the case left to them on the evidence on the fifth count. But, as substantial

justice was done by the finding, a rule for a new trial was refused on that ground, but granted to defendant, as he might have been misled by the ruling. *Ruthven* v. *Stinson*, 14 C. P. 181.

——— *Trespass—Case.*]—In an action against a magistrate for wrongful arrest and imprisonment, the first count being in trespass, the second in case:—Held, that, as only one wrong was complained of by plaintiff, he could not recover on the two separate counts, but must elect on which of them he would enter his verdict. *Haacke* v. *Adamson*, 14 C. P. 201.

Plaintiff having declared in one count for entering his close, and there destroying his mare, and in the other in case for keeping the bull which had done the injury, knowing his vice, &c., and having recovered a general verdict:—Held, that he was not bound to elect upon which count to take his verdict. Haacke v. Adamson, 14 C. P. 201, remarked upon. *Mason* v. *Morgan*, 24 U. C. R. 328.

The declaration contained three counts; the first, trespass for breaking and entering plaintiff's store and taking his goods; second, trespass to plaintiff's cattle, goods, &c.; third, case for distraining on plaintiff's premises, for rent due to defendant by plaintiff's immediate landlord, goods of much greater value than the amount of rent, &c.:—Held, that the plaintiff was not bound to elect at the trial upon which count he would go to the jury, although the three counts were founded on one and the same wrong. *Lynch* v. *Bickle*, 17 C. P. 549.

Entry on Wrong Count—*Alteration of Record.*]—Where a verdict has been erroneously entered on one count, the record may at any time afterwards, by leave of the Judge who tried the cause, be altered and the entry thereof made on another count. *Moore* v. *Boyd*, 15 C. P. 513.

Immaterial Issues.]—Where there are several issues raised, and the plaintiff has a verdict upon the whole record, it forms no good objection to his recovery that some of the issues should have been found for defendant, if there be sufficient without them to support the verdict, and they be not material. *Rowand* v. *Tyler*, 4 O. S. 257.

Joint Cause of Action—*Trespass—Case—Restriction of Verdict.*]—A general verdict on a declaration containing one count in trespass and another in case, is not bad in law. But in this case, the court, being of opinion that there was only one joint cause of action against the defendants—that is, the arrest—restricted the verdict to that count. Semble, (1) that if it had appeared that defendant who issued the warrant was liable in case only, and malice of some special kind personal to himself, in which his co-defendant was not and could not be a partaker, had been proved, a joint action would not lie against both. (2) That one defendant might have been convicted in trespass and the other in case. *Friel* v. *Ferguson*, 15 C. P. 584.

Justification—*General Issue.*]—A defendant succeeding on a plea of justification is not necessarily entitled to a verdict on the general issue. *Scott* v. *Vance*, 9 U. C. R. 613.

Liquidated Damages — *Actual Damages.*]—The plaintiff being entitled to recover on a count claiming liquidated damages:—Held, that there must be a verdict for the defendant on the other count, on which the jury had assessed the actual damage sustained. *McPhee* v. *Wilson*, 25 U. C. R. 169.

Money Counts — *Never Indebted—Payment—Distributive Pleas.*]—In an action on the common counts, the pleas of nunquam indebitatus and payment are distributive, and a verdict may be entered on these issues for so much of the amount sued for as the plaintiff fails to recover. Such a verdict may not be proper in every case. In this case the substantial question at the trial was the plaintiffs' right to a sum of $410, which the jury found for defendants, but the plaintiffs had a verdict for a sum of $20, which defendants never had disputed, and had, as they asserted, unintentionally omitted to pay. Under these circumstances a verdict was entered in defendants' favour for the residue. *Hope* v. *Stewart*, 35 U. C. R. 89.

Restriction to Good Counts.]—Semble, where one of several counts is defective, and a general verdict is rendered, an application to restrict the verdict to the good counts, when it depends on the application of the evidence to the different counts, should be made to the Judge who tried the cause. *Manning* v. *Rossin*, 3 C. P. 89.

Set-off—*Nonsuit.*]—Semble, that a defendant, though the plaintiff be nonsuited or have a verdict against him on the other issues, may have his set-off found and a verdict entered for it, for he has an independent right to judgment for his claim, which the plaintiff cannot defeat by nonsuit. *Parsons* v. *Crabb*, 31 U. C. R. 434.

Several Damages.]—Held, that, upon the evidence given in this case, a jury might assess several damages on each of the three counts; the first two being for assault and imprisonment on different days; and the third for malicious prosecution. *Appleton* v. *Lepper*, 20 C. P. 138.

——— *Entry of General Verdict.*]—Where there were several counts, for different causes of action, on which the jury gave separate damages, but the verdict was entered generally for the whole amount assessed, the court confirmed the finding as to the counts on which the plaintiff was entitled to recover, and directed a new trial as to the others. *Ainslie* v. *Ray*, 21 C. P. 152.

Trespass — *Pleas — Consistency.*]—A defendant in trespass failing upon an issue arising out of a plea of liberum tenementum, may nevertheless consistently hold a verdict upon another issue denying the close to be the plaintiff's. *McNeil* v. *Train*, 5 U. C. R. 91.

See Decrow v. *Tait*, 25 U. C. R. 188, *post* 7.

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5. *Several Defendants.*

Executors—*Verdict against One.*]—On a plea of ne unques executors by two, the plaintiff may have a verdict against one only. *Earl of Elgin* v. *Slawson*, 10 U. C. R. 289.

Joint Contract—*Nonsuit as to one Defendant.*]—The plaintiffs charged the defendants upon a joint contract. One defendant allowed judgment by default; the plaintiffs at the trial got a verdict against him, and elected to be nonsuited as to the others:—Held, that the plaintiffs, suing the defendants on a joint contract, could not have a verdict against one and be nonsuited as to the others, and that the verdict must be set aside. *Commercial Bank* v. *Hughes*, 3 U. C. R. 361.

Held, that a nonsuit as to some of the defendants in a joint action of assumpsit is a nonsuit as to all, and a verdict returned for some of the defendants is null and void. *S. C.*, 4 U. C. R. 167.

Joint Duty—*Non-performance.*]—Semble, that when a tort alleged is the non-performance of a joint duty, and the joint duty be not proved, the plaintiff must fail in toto. *Woods* v. *County of Wentworth*, 6 C. P. 101.

Negligence—*Carriers of Passengers.*]—In an action against four, the declaration stated that defendants were proprietors of a stage coach for carrying passengers; that they received the plaintiff as a passenger for reward; and by reason thereof it became and was their duty to use due care in conveying him; yet they, not regarding their duty, did not use due care, &c., but by reason of the carelessness and improper conduct of the defendants, by their servant, he was thrown off and injured, &c.:—Held, that upon this declaration a verdict might be given against three of the defendants, and for the other. *Gunn* v. *Dickson*, 10 U. C. R. 461.

Trespass—*Separate Damages.*] — Held, affirming the judgment in 25 U. C. R. 20, that it was no ground for a new trial in an action of trespass against two defendants, that the jury had found separate damages, $800 against one defendant, and $400 against the other. Quære, as to the proper mode of entering judgment on such verdict. *Clissold* v. *Machell*, 26 U. C. R. 422.

See Friel v. *Ferguson*, 15 C. P. 584, *ante* 4.

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6. *Subject to Opinion of Court.*

Entry of Judgment—*Motion to Set aside—Laches.*] — Where a verdict was rendered for the plaintiff in ejectment, subject to points reserved, and without any argument of the points, the plaintiff entered judgment and took possession of the land in dispute, the court refused to interfere and set the judgment aside after a lapse of more than two years. *Doe Myers* v. *Tolman*, 1 U. C. R. 520.

Necessity for Consent.]—A verdict cannot be taken subject to the opinion of the court without the consent of both parties. In this case the plaintiff sued on a replevin bond, given for a vessel, and the defendant pleaded that he had prosecuted the action without delay. The Judge directed the jury that on the evidence there was delay, and to find for the plaintiff, and he asked them to find separately the value of the vessel and its earnings. A verdict in accordance with this direction was then taken, subject to the opinion of the court as to the true measure of damages. Defendant's counsel, not having assented to this course, moved against the verdict, and declined to argue the case when set down on the paper by the plaintiff:—Held, that the verdict must be set aside, and that no judgment could be given on the special case. *Bletcher* v. *Burn*, 24 U. C. R. 124.

See Woodruff v. *Canada Guarantee Co.*, 8 P. R. 532.

Power of Court.] — See *Creighton* v. *Chittick*, 7 S. C. R. 348.

Question of Fact—*New Trial.*]—At the trial, a verdict was taken for the plaintiff, subject to the opinion of the court whether the defendants were liable, with power to draw inferences of fact. The court declined to assume the functions of a jury, in determining, upon evidence wholly circumstantial, whether money had been stolen, and directed a new trial with costs to abide the event. *Bickle* v. *Mathewson*, 26 U. C. R. 137.

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7. *Trial de Novo.*

General Verdict—*Defective Counts.*]—To a declaration containing six counts, each charging defendant with having accused the plaintiff of misappropriation of moneys intrusted to him as trustee, defendant pleaded not guilty, only; and the jury gave a general verdict for $400. On motion for a new trial, the substantial ground being that the verdict was general, while some of the counts were defective:—Held, that, if so, the proper course would not be a new trial but a trial de novo, which might be ordered on motion for a new trial; but held, that each count disclosed a sufficient cause of action, for each set forth a charge made by the defendant that the plaintiff had committed a misdemeanour, within C. S. U. C. c. 92, s. 51. *Decow* v. *Tait*, 25 U. C. R. 188.

See Owens v. *Purcell*, 11 U. C. R. 390; *Wills* v. *Carman*, 14 A. R. 656.

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8. *Other Cases.*

Agreement of Parties—*Verdict of Judge—Judgment.*]—On error from a county court, it appeared by the record that after issue joined a ven. fac. was awarded, and then the postea stated an agreement by the parties to leave the case to the Judge, the decision to be looked upon as the verdict of a jury. Afterwards it was entered that "the said Judge has determined, and the court is of the opinion and has ordered," that the defendant should pay to the plaintiff a sum named. Then followed an entry of judgment for that sum and costs:—Held, that the judgment was erroneous, for no verdict was directed or entered to support it. Quære, whether the Judge could direct a verdict. *Jones* v. *Smith*, 23 U. C. R. 485.

Commission Allowed by Jury without Evidence to Support Finding.]—See *Town of Welland* v. *Brown*, 4 O. R. 217.

Consent Verdict—*Repudiation.*]—By an oral agreement made by counsel at nisi prius, a verdict was to be entered for the plaintiff for a named amount, the defendant to pay in addition certain chancery costs arising out of the same transaction. Before, however,

the verdict was rendered, the defendant's counsel, on being informed by his client that he would not agree to pay these costs, repudiated the agreement, so far as such costs were concerned:—Held, that the defendant was entitled before the verdict was recovered to so repudiate, and having done so as to the chancery costs, the plaintiff, having taken his verdict with express notice of such repudiation, could not afterwards compel defendant to carry out that part of the agreement. *Brown* v. *Blackwell*, 26 C. P. 43.

See SOLICITOR, IV. 1.

Dispersal—*Waiver.*]—Where a jury were allowed to disperse without arriving at a verdict, but, on reassembling in the jury box next morning, were treated by Judge and counsel as the same jury, and being interrogated declared themselves agreed upon one of several issues in the action, but not upon the others, and the Judge recorded their verdict on the one issue, and discharged them:—Held, that all irregularities in regard to the dispersal over night had been waived, and the issue upon which the jury had agreed must upon any further prosecution of the litigation be regarded as having been fully disposed of by the verdict. *Coleman* v. *City of Toronto*, 23 O. R. 345.

Interest on Verdict.] — In an action against the sureties of an absconding assignee in insolvency, on the assignee's bond to the Queen under the statute, a verdict was entered at the trial for $800, subject to a legal question, which was afterwards decided in favour of the plaintiff. It was agreed by the parties that, in case of such a decision, the amount for which the verdict should be entered was $700:—Held, that the verdict was not for a debt or sum certain within R. S. O. 1877 c. 50, s. 269, and that it should not carry interest from its entry. *Woodruff* v. *Canada Guarantee Co.*, 8 P. R. 532.

Irregularity in Verdict—*Setting aside—Costs.*]—In this case the verdict, though irregularly obtained, was set aside without costs, as defendant's attorney had not raised the objection upon which the verdict was set aside until after it had been obtained, and his conduct was wanting in candour in not drawing attention to such objections to the procedure as he intended to insist upon until the day before the trial, although he might have done so some two months before. *Cushman* v. *Reid*, 20 C. P. 147.

Recommendation by Jury as to Costs.]—See *Walmsley* v. *Mitchell*, 5 O. R. 427; *Weaver* v. *Sawyer*, 16 A. R. 422; *Farquhar* v. *Robertson*, 13 P. R. 156; *Campbell* v. *Linton*, 27 U. C. R. 563.

Verdict on Opening — *Appeal—Demurrer.*]—There was a demurrer to the replication, and a verdict had been directed for defendant on the plaintiff's opening, from which the plaintiff appealed. Remarks as to the inconvenience of an appeal under such circumstances. *Sheriff* v. *McCoy*, 27 U. C. R. 597.

Verdict Subject to Reference—*Setting aside.*]—Where a formal verdict was entered at the trial, subject to a reference, upon which no award was made:—Held, that, reading s. 28 of the Judicature Act, 1881, with ss. 281 and 282 of R. S. O. 1877 c. 30, a single Judge in court had power to set aside the verdict. Hood v. Harbour Commissioners of Toronto, 33 U. C. R. 148, specially referred to. *Cooper* v. *Central Ontario R. W. Co.*, 4 O. R. 280. See *Moulson* v. *Eyre*, 5 U. C. R. 470; *Kelly* v. *Henderson*, 3 P. R. 198.

XVII. MISCELLANEOUS CASES.

Abortive Trial—*Costs.*]—Where a case is referred at nisi prius and again taken down to trial, the reference proving abortive, the party succeeding will be entitled to the costs of the former occasion. *McLellan* v. *London*, 1 U. C. R. 95.

Commission to Hold Assizes—*Powers of Lieutenant-Governor.*] — Semble, that the lieutenant-governor of Ontario, as well as the governor-general, has the power to issue commissions to hold courts of assize. *Regina* v. *Amer*, 42 U. C. R. 391.

Good Friday — *Dies non Juridicus.*] — The evidence at the trial of this action not being concluded before the close of the day preceding Good Friday, the Judge, counsel consenting and the jury desiring it, adjourned the court to the following day, when he delivered his charge and received the verdict, on which he entered judgment:—Held, that it was competent for him to do so. The only day on which no judicial act can be done in this Province is the Lord's day, or Sunday. Other statutory holidays are not dies non juridici in this sense. *Foster* v. *Toronto R. W. Co.*, 31 O. R. 1.

Jurisdiction — *Objection — Waiver.*] — Semble, that where objection has been taken to the jurisdiction of the court, and the party objecting thereto has afterwards proceeded to a trial upon the merits, he should be held to have waived proof of those preliminary conditions which give the court jurisdiction, if it shall appear subsequently, upon his moving against the verdict, that those conditions had in truth been complied with. *Regina* v. *Essery*, 7 P. R. 290.

Motion to Reopen Trial—*Affidavit.*]—An application was made after the hearing and argument of the cause, but before judgment, for the defendants to be allowed to file as part of the record certain affidavits to support their case by additional evidence in respect of a matter upon which evidence had been given by both sides. It was open to the defendants to have moved for leave for such purpose before the hearing was closed, but no leave was asked. It also appeared that the affidavits had been based upon some experiments which had not been made on behalf of the defendants until after the hearing:—Held, that the application must be refused. Humphrey v. The Queen and DeKuyper v. Van Dulken, Audette's Ex. C. Pr. 276, distinguished. *General Engineering Co. of Ontario* v. *Dominion Cotton Mills Co.*, 6 Ex. C. R. 306.

Motion to Set aside Proceedings—*Verdict pending—Pleading—Merits.*]—Where, pending a motion to set aside proceedings for irregularity, the defendant pleaded, in consequence of which the plaintiff proceeded to trial, the court refused to set aside the verdict, or otherwise to interfere, though no defence made, no actual merits being disclosed

on affidavit. *Simpson* v. *Mathison*, *Ward* v. *Ward*, 3 O. S. 305.

Objection First Taken at Trial — *Statement of Claim—Extension of Claim Made by Writ of Summons.*]—See *Bugbee* v. *Clergue*, 27 A. R. 96.

Remanet.]—See *Boulton* v. *Jarvis*, 1 U. C. R. 399; *Northcote* v. *Hodder*, 5 U. C. R. 635; *Adams* v. *Grier*, 3 P. R. 269.

Right to Trial of Issue.]—Where issue had been taken on an equitable plea, which it was contended shewed no defence:—Held, that, at all events, the plaintiff having taken issue upon it, the defendant was entitled to have the issue tried. *Walter* v. *Dexter*, 34 U. C. R. 426.

Speedy Trial—*Order for—Notice to Opposite Party—Procedure in Quebec—Appeal to Supreme Court of Canada.*] — See *Eastern Townships Bank* v. *Swan*, 29 S. C. R. 193.

Summary Trial — *Mechanics' Liens — Issue.*]—The question whether an issue as to a mechanic's lien should be summarily tried or not, rests largely if not entirely in the discretion of the Judge. *Re Moorehouse and Leak*, 13 O. R. 290.

See DIVISION COURTS, XIII. 3.

TRIAL AT BAR.

See TRIAL, II.

TRIAL DE NOVO.

See TRIAL, XVI. 7.

TROVER AND DETINUE.

I. ACTION—WHEN MAINTAINABLE,
1. *By and against Whom*,
(a) *Landlord and Tenant*, 7032.
(b) *Tenants in Common, Joint Tenants, and Co-owners*, 7032.
(c) *Other Persons*, 7033.
2. *For What Articles*,
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I. ACTION—WHEN MAINTAINABLE.

1. *By and against Whom.*

(a) *Landlord and Tenant.*

Removal of Shop Fittings.]—The tenant of a mortgagor holding under a lease for years, during his term attorned to the mortgagees, and after the term had expired continued to hold the premises from the mortgagees as a yearly tenant. When his tenancy ceased he claimed from them certain shelves and boxes with which he had fitted up a shop on the premises during his lease from the mortgagor, and which were not fixtures, and for which, upon the mortgagees' refusal to part with their possession, he brought trover:—Held, that the action was maintainable. *Denholm* v. *Commercial Bank*, 1 U. C. R. 369.

Rent—*Distress off Premises.*]—Part of the plaintiff's goods having been distrained for rent off the premises:—Held, that he might recover their value either in trespass or trover. *Huskinson* v. *Lawrence*, 26 U. C. R. 570.

(b) *Tenants in Common, Joint Tenants, and Co-owners.*

Crops—*Harvesting—Parting with Possession.*] — H., by agreement with defendant, planted sixteen and a half acres of defendant's land with Indian corn and other crops, the agreement being that H. was to do all the work, and defendant to receive for his share as much Indian corn as should represent the portion of the land sown with sugar corn and potatoes, and one-third of the Indian corn, and that H. was to have the remainder. Subsequently, H., being indebted to the plaintiff on a note, sold his interest in the growing crop to the plaintiff, the price being allowed on the note. At a later period H. executed a bill of sale of the crop to the defendant, who afterwards claimed the entire crop as his own, and harvested it:—Held, that H. and defendant were tenants in common of the crop of Indian corn; that one tenant in common cannot maintain trespass or trover against his co-tenant for merely reaping and harvesting the crop; but he may, if his co-tenant has consumed the crop, or dealt with it so that he cannot retake it or pursue his remedies against the persons who have possession of it; and that, under the circumstances of the case, the court might assume, after verdict for the plaintiff, in the absence of any question raised on the point, that such events had happened as entitled the plaintiff to maintain his action against the defendant for conversion. *Brady* v. *Arnold*, 19 C. P. 42. See, also, *Culver* v. *Macklem*, 11 U. C. R. 513.

Removal of Chattel to Foreign Country.]—An action for conversion of his interest in a chattel lies by one tenant in common against his co-tenants in common, if the chattel owned in common is destroyed by them, or so dealt with by them as, in effect, to put an end to his rights. In this case the removal of a brick-making machine to a foreign country was held sufficient to support the right of action, the plaintiff's power of enforcing his rights in the courts of this Province being thus interfered with. *McIntosh* v. *Port Huron Petrified Brick Co.*, 27 A. R. 262.

Sale—*Deprivation of Co-owner.*]—One tenant in common of chattels may maintain trover against the other for a sale of the property, where such sale is plainly intended not for the objects of the joint owners, such as to pay partnership debts, &c., but to deprive the other owner of all interest in the property or proceeds. The defendant, after the death of A., with whom he had worked and stocked a farm in partnership, sold the stock and crops on the farm, and threatened to go off with the money, unless the plaintiff (A.'s administratrix) would settle with him on his own terms. After action brought he applied part of the proceeds towards payment of the debts, but until then he had never pretended that the sale was made with that object. The court being left to draw inferences of fact:—Held, that such sale was a conversion, and that the plaintiff might maintain trover. *Rathwell* v. *Rathwell*, 26 U. C. R. 179.

A sale by one joint owner of property does not amount, as against his co-owner, to a conversion unless the property is destroyed by such sale or the co-owner is deprived of all beneficial interest. *Rourke* v. *Union Insurance Co.*, 23 S. C. R. 344.

——— *Market Overt.*]—One of two joint tenants of a chattel is not liable in trover at the suit of his co-tenant for a sale of his chattel not in market overt. *McNabb* v. *Howland*, 11 C. P. 434.

Sheriff—*Execution against Co-tenant.*]—A tenant in common of goods, which have been sold under an execution against his co-tenant, cannot maintain trover against the sheriff to recover the value of his share. *Ecclestone* v. *Jarvis*, 1 U. C. R. 370.

See Keith v. *McMurray*, 27 C. P. 428; *Doupe* v. *Stewart*, 28 U. C. R. 192, *post* (c).

(c) *Other Persons.*

Attaching Creditor—*Seizure — Claim—Notice — Demand.*] — Defendant, having a claim against one R., sued out an attachment from a division court, under which he directed the bailiff to seize certain goods in the house where R. was living with the plaintiff, and he was present when such seizure was made. The goods were placed by the bailiff in the custody of the clerk of the division court, in whose possession they continued until the bringing of this action:—Held, that, as the goods were seized in the possession of the defendant in the attachment, an action of detinue could not be maintained against this defendant, even admitting the goods to have been all the time under his absolute control, without shewing that the plaintiff had made him acquainted with her claim, and demanded to have them given up. *Clark* v. *Orr*, 11 U. C. R. 436.

Carriers—*Wrongful Delivery—Damages.*] —The plaintiffs, nurserymen in Toronto, sent by the Grand Trunk R. W. Co., 14 packages of trees, addressed to their own order, to Cobden, a station on defendants' line of railway, receiving the usual shipping note issued by the Grand Trunk Co. The goods were delivered by that company to defendants in the ordinary course, and carried to Cobden. They were intended for one S. there, who had agreed to purchase them from the plaintiffs, but the plaintiffs required payment from him before delivery. Several telegrams passed between S., the station master, and the plaintiffs; and the station master, being authorized by the plaintiffs to deliver only half of the packages to S., allowed him to take all, receiving from him the entire freight from Toronto:—Held, that the defendants were liable in trover for the packages thus wrongfully delivered, and that it made no difference that the contract to carry was with the Grand Trunk Co. only. It was insisted by the plaintiffs that S. was to pay them $1,000, including a former claim, before obtaining these trees, and that they had lost the same by defendants' wrongful delivery: — Held, that, upon the evidence, there was no ground for giving more than the value of the trees wrongfully delivered, and interest — the ordinary measure of damages. *Leslie* v. *Canada Central R. W. Co.*, 44 U. C. R. 21.

Collector of Taxes—*Seizure under Illegal Warrant—Person in Charge.*] — Replevin for horses. Pleas, justifying the taking under a warrant for school taxes, and alleging that they were delivered by the collector to defendant, an innkeeper, to take care of until the sale. Replication, setting out facts to shew the rate illegal, and averring that the plaintiff, after seizure of the goods, at the request of the collector and trustees, gave his note for a sum named (not saying that it was the amount due by him), payable to bearer, which was accepted in satisfaction of the taxes:—Held, replication bad: for the collector, acting under a warrant illegal on the face of it, would not be liable in trespass or trover, and therefore not in this action, nor the defendant for taking the horses from him to keep. *Spry* v. *McKenzie*, 18 U. C. R. 161.

Executor of Married Woman—*Will—Consent of Husband*]—In trover against defendant for the conversion of certain personal property bequeathed by testatrix, a married woman, to the plaintiff, in trust for her children, and appointing the plaintiff executor, the defendant claimed the property by gift inter vivos from testatrix, and on such gift being disproved, he, amongst other objections, urged that the will was invalid on the ground of the absence of the husband's consent. The testatrix, who was living apart from her husband, died in possession of the property; there was no plea on the record denying the plaintiff's status as executor; the husband had never interposed, nor did defendant defend under the husband's right:—Held, under these circumstances, that it was not open to the defendant to raise the objection. *Adams* v. *Corcoran*, 25 C. P. 524.

Municipal Corporation — *Liability for Acts of Collector of Taxes.*]—Section 126 of the Assessment Act, 32 Vict. c. 6 (O.), directs that when the county treasurer is satisfied that there is distress upon any lands of non-residents in arrear for taxes, he shall issue a warrant under his hand and seal to the collector of the municipality to levy. The warrant was tested "Given under my hand and seal, being the corporate seal;" and the seal bore the same form, emblem, legend, &c., as the county seal. The collector sold the plaintiff's goods under it, but it was not shewn to have been authorized by the county council, nor had they received the proceeds of the sale:—Held, that they were not liable in trespass or trover. *Snider* v. *County of Frontenac*, 30 U. C. R. 275.

Next Friend — *Estoppel.*] — In trover, where plaintiff sued by his mother as his next friend, the court held that the latter by allowing herself to be made guardian for bringing the suit, did not waive any right that she might have had to the goods sued for, and that the consent of the mother to become prochein ami was no legal estoppel on her. *Barker* v. *Tabor*, 5 O. S. 570.

Partner — *Work and Labour—Book.*] — The plaintiff, having compiled a book, caused it to be printed by a firm consisting of himself and defendant, on paper furnished by them; and defendant having refused to give up to him the copies thus printed, he brought trover:—Semble, that he could not recover, for the property belonged to the firm, and defendant had as much right to retain as the plaintiff to take it. *Doupe* v. *Stewart*, 28 U. C. R. 192.

Public Officer—*Seizure of Lumber—Tender.*]—Trover lies against a lock-keeper on the Rideau canal for refusing to deliver up lumber seized and detained by him under the provisions of the Rideau Canal Act (8 Geo. IV. c. 1), for obstructing the navigation, on a tender of the charges occasioned by such seizure and the removal of the obstruction. *Gould* v. *Jones*, 3 O. S. 53.

Purchaser — *Contract — Husband and Wife—Parties.*]—Where, in trover for goods, with a count for refusing to convey them, it appeared that the contract was made between the plaintiff and defendant, for the sale by the latter to the former, but the land on which the works and machinery were was conveyed to the plaintiff's wife, whose property was conveyed to the defendant as part consideration:—Held, that the plaintiff, and not his wife, was the proper person to sue. *Filschie* v. *Hogg*, 35 U. C. R. 94.

Purchaser at Sheriff's Sale—*Attorney for Execution Creditor — Joint Action.*] — A joint action of trover is maintainable against the purchaser of goods at sheriff's sale, and the attorney for the plaintiff, who indemnifies the sheriff for the sale, by a person whose goods have been illegally taken as the goods of the execution debtor. *Kirby* v. *Cahill*, 6 O. S. 510.

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2. *For What Articles.*

(a) *Deeds.*

Bond—*Seal—Damages.*] — Trover may be maintained against the obligor in a bond for securing the fidelity of a clerk, the obligor having torn off his seal, (and this although the bond might be considered as still subsisting and sufficient to sustain an action of debt,) and damage may be recovered against the obligor to the amount of the penalty. *Bank of Upper Canada* v. *Widmer*, 2 O. S. 222.

Debentures—*Condition — Non-fulfilment —Escrow.*]—Detinue for an indenture of bargain and sale. Pleas: (1) Non detinet. (2) That the deed was not the plaintiff's. The jury found that the indenture was delivered by one A. to the defendant, to be delivered to the plaintiff after A.'s death, on condition that he (the plaintiff) should keep A. until his death, and should pay his debts; and that the plaintiff had not maintained A., but after his death was ready to pay his debts:—Held, that the plaintiff could not recover; for the writing, being delivered to the defendant merely as an escrow, was not in fact a deed as described in the declaration, and the plaintiff had forfeited his right by a breach of one of the conditions. *Reynolds* v. *Waddell*, 12 U. C. R. 9.

Detention by Agent of Grantor.] — Detinue for a conveyance of land bought by the plaintiff from one G.:—Held, that, upon the facts and evidence set out in this case, defendant was not shewn to have been acting otherwise throughout than as the agent of G.; that the deed was in defendant's hands simply as G.'s agent, and the detention was not defendant's act; that if this question had been left to the jury they ought to have found for defendant; and a new trial was ordered. *Parker* v. *Stevens*, 12 C. P. 81.

Fee Simple—*Damages.*]—Trover may be brought for a deed passing a fee simple; but damages can only be given to the extent of the value of the land mentioned in the deed at the time of or subsequent to its conversion. *Burr* v. *Munro*, 6 O. S. 57.

Leases—*Title Deeds.*]—Trover as well as detinue may be maintained for leases or other title deeds. *Anderson* v. *Hamilton*, 4 U. C. R. 372.

Possession — *Wrongful Detention.*] — Trover for a deed: — Held, that defendant having shewn himself lawfully possessed, the plaintiff was bound to prove a wrongful detention. *Dowling* v. *Miller*, 9 U. C. R. 227.

(b) *Fixtures.*

Trover cannot be maintained for a fixture while annexed to the freehold. *Oates* v. *Cameron*, 7 U. C. R. 228.

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3. *Other Cases.*

Division Courts — *Jurisdiction in Detinue.*]—See *Lucas* v. *Elliott*, 9 L. J. 147.

Pledge—*Redemption — Further Detention —Seizure under Execution—Damages.*]—Detinue for a watch and chain. It appeared that defendant had obtained possession of the things by redeeming them, at plaintiff's request, from a person with whom they were pledged, and

that he had refused to give them up on payment of the money advanced, claiming a further sum due by the plaintiff for board. A verdict having been found for the full value of the articles, it was shewn upon affidavits that before the trial the defendant had obtained execution against the plaintiff for this sum in a division court, under which the bailiff, by the plaintiff's directions, had seized this watch and chain in the defendant's possession; and that, to prevent their being sold, the plaintiff had procured some one to advance the money on being allowed to retain them as security:—Held, that this action should not have been proceeded with, and a new trial was ordered, without costs, unless the plaintiff would reduce his verdict to nominal damages; and that he should in either case pay the costs of this application. *Johnson* v. *Lamb*, 13 U. C. R. 508.

Possession—*Parting with.*]—Detinue is maintainable though defendant had not the goods when action brought; it is sufficient if he once had, and improperly parted with them. *Mathers* v. *Lynch*, 28 U. C. R. 354.

Sale of Goods—*Servant—Want of Authority—Detention.*] — The plaintiff's servant, one O., being in charge of his horses, sold one, without the plaintiff's authority, to the defendant's wife, who had the management of defendant's business, receiving $20 in cash, and defendant's note for $55, payable to O. Afterwards, meeting O., the plaintiff got from him the note, and $17 in cash. The plaintiff demanded the horse from defendant's wife, and offered her the note and the $17, which, however, she did not take. He then brought detinue:—Held, that the plaintiff was entitled to recover; for that he was not bound to tender to defendant the note and the money he had received, nor could defendant retain the horse until he obtained them, at all events without giving notice that he would do so, after first demanding them. *Morton* v. *Stone*, 30 U. C. R. 158.

II. Conversion.

1. *Claim of Lien.*

Carriers — *Freight—Storage—Tender.*]—A cargo of coal was consigned to B., and the master of the vessel refused to deliver it unless the freight was prepaid, which B. in his turn refused, but offered to pay it ton by ton as delivered. By direction of the owner's agent the coal was taken out of the vessel and stored, whereupon B. tendered the amount of the freight and demanded it, but the agent still refused to deliver unless the cost of storage was paid. In trover against the master:—Held, that the refusal of the agent after tender of the full freight was a conversion of the cargo for which trover would lie. Held, also, that an action ex delicto for breach of duty in not delivering the coal according to the bill of lading would not lie. *Winchester* v. *Busby*, 16 S. C. R. 336.

Innkeeper — *Special Agreement.*]—The plaintiffs, owning a line of stages, entered into a special agreement with defendant, an innkeeper, for the stabling and feed of their horses. Some dispute arose as to the defendant's charges, and ascertaining that the plaintiffs intended to remove their horses to another inn he refused to let them go:—Held, that defendant had no right of lien, as the plaintiffs were not guests, but employed defendant in the character of a livery stable keeper, and under a special agreement which gave him no continuing right of possession. Held, also, that a conversion was sufficiently proved. *Dixon* v. *Dalby*, 11 U. C. R. 79.

Warehouseman — *Tender.*]—Held, that the mere fact of a warehouseman, who has a lien on goods for a certain sum for storage, claiming also to hold them for an untenable claim for money alleged to be due either to himself or a third person, does not dispense with a tender of the sum due, and amount to a conversion, unless the evidence fairly warrants the conclusion that such tender would be useless, as it would be refused; and that in this case the evidence was insufficient for that purpose. The plaintiffs denied that any claim for storage was made, while the defendants asserted the contrary:—Held, that, if not made when the goods were demanded, the defendants could not defeat the plaintiffs' claim in trover by afterwards setting it up. *Llado* v. *Morgan*, 23 C. P. 517.

See *Wilson* v. *MacNab*, 21 U. C. R. 493, *post* 5.

See, also, Tender.

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2. *Detention after Demand.*

Bona Fide Doubt—*Temporary Refusal—Reasonableness.*]—Plaintiffs had a large quantity of wheat in the warehouse of one T., for which they held his receipt, and defendants also held T.'s receipt for wheat in the same place, on which they had made advances; but there was not enough wheat to satisfy both. T., having left the country, gave R., defendants' agent, a letter to C., who was in charge of the warehouse, directing him to give R. possession of the warehouse and all grain in it belonging to him, T. On receiving this letter C. gave R. the key, went with him to the warehouse and pointed out T.'s wheat, and received back the key, agreeing to hold possession. On the same day R. again got the key to go into the place with one M., and again returned it to C., who said he considered he still had possession of the store, and that he would not have given up the wheat to the plaintiffs if R. had so directed him. Plaintiffs demanded their wheat from R., who, as they alleged, answered, "I won't do so at present," but almost immediately afterwards defendants' attorney served a written disclaimer on the plaintiffs, informing them that defendants disclaimed all possession of the storehouse and wheat therein. On the same day the plaintiffs brought trover:—Held, assuming the facts most favourably for the plaintiffs, that it should have been left to the jury to say whether R. entertained a bonâ fide doubt as to plaintiffs' right to the wheat, and whether a reasonable time had elapsed for clearing it up; and quære, whether the facts could legally suffice to establish a conversion. *Gilpin* v. *Royal Canadian Bank*, 27 U. C. R. 310.

Conditional Sale—*Illegal Detention.*]—An engine, boiler, and other machinery, were shipped by plaintiffs to the defendant E., under a written order to ship same to his address as

per sum agreed on, viz., $875; $225 to be allowed for E.'s portable engine and boiler, and $635 to be paid on shipment; but, if not settled for in cash or notes within twenty days, then the whole amount to become due. The order not to be countermanded, and until payment the machinery to be at E.'s risk, which he was to insure, and on demand was to assign the policy to the plaintiffs, and the title thereof was not to pass out of plaintiffs. E. agreeing not to sell or remove the same without the plaintiffs' consent in writing. On default in payment the plaintiffs could enter and take and remove the machinery, and E. agreed to deliver same to plaintiffs in like good order and condition as received, save ordinary wear and tear, and to pay expenses of removal. Any notes or other security given by E. for his indebtedness to be collateral thereto. The machinery was put up in a mill on premises leased, with right to purchase, by defendant D. to E.'s wife for one or five years from 11th March, 1883. E.'s wife died on the 23rd October, 1883, and by her will appointed E. sole executor, giving him power to sell or dispose of any property to which testatrix was or might be entitled. E. by deed of 27th April, 1885, demised and released to D. all the right, title, and interest in the premises as well of himself as also as executor, together with the mill built thereon, with the boiler and engine, &c., and on the same day D. leased the said premises, mill, and machinery, to E. for one year. After the execution of this lease D. mortgaged the land, mill, and machinery to the defendants the F. loan society. The defendant E. never paid any cash, but gave his promissory note at three months, which was renewed from time to time, but ultimately, E. having failed to pay same, the plaintiffs demanded the machinery, when D. notified plaintiffs not to remove same, as also did the society:—Held, that the effect of the transaction was, that the property was in the plaintiffs, and that they were entitled thereto; and that there was an illegal detention by the defendants D. and E. amounting to a conversion; and that the F. loan society, by having notified plaintiffs not to remove the machinery, were proper parties to the suit to give plaintiffs full relief; and that, unless defendants allowed plaintiffs to remove the machinery on demand, the plaintiffs were entitled to recover $650 with interest, being the price of the machinery; and that, upon removal of the engine and boiler, the sum of $60 for repairs should be paid by plaintiffs to D. to be repaid to plaintiffs by E. *Polson* v. *Degeer*, 12 O. R. 275.

Effect of Demand—*Agreement.*]—Defendant signed a memorandum, certifying that he had agreed to deliver to plaintiff certain furniture in his possession purchased by plaintiff of one L., part of which he was to finish as soon as possible:—Held, that on proof of demand and refusal the plaintiff was entitled to recover in trover. *White* v. *Batty*, 23 U. C. R. 487.

———*Promissory Notes.*]—Held, under the facts of this case, that trover and detinue would lie for the four notes in question, the evidence shewing that they were demanded from defendant and his solicitors, who refused to give them up, though they had been paid. *Walsh* v. *Brown*, 18 C. P. 60.

Evidence of Detention.]—The plaintiff was executor of H. D., widow of T. D., whose executor the defendant was. The plaintiff claimed a piano in the house lately occupied by the widow, of which the defendant had the key. At an interview between the plaintiff and defendant the latter claimed the piano, but said he was willing to leave the question of the ownership to a person to be named. The plaintiff left him, promising to write, and afterwards did write, saying he had decided to bring the matter before the proper court. Subsequently the plaintiff's solicitor wrote the defendant offering to release all demands, upon the defendant giving up all claim to the piano, to which the defendant's solicitor answered that he could not comply with the demand. The defendant commenced an action in which the title to the piano would come in question. The plaintiff's solicitor having again written to ask whether possession of the piano would be given, the defendant's solicitor wrote that it was perfectly safe where it was, and that the action commenced would decide the question. He also wrote that the plaintiff would not have to put the law in motion:—Held, in an action of replevin, assuming the piano to be the plaintiff's, that there was no evidence of trespass or conversion to support the affirmative of the issue, that the defendant did not take or detain the piano. *Schaffer* v. *Dumble*, 5 O. R. 716.

Necessity for Demand—*Denial after Action.*]—One of the defendants was the purchaser of a piano, which she had partly paid for, under a conditional sale by which until fully paid for it was to remain the property of the vendor, but, before paying the balance due on it, she allowed the other defendant, who had acted as the vendor's agent in the sale to her, secretly to remove and take possession of it, he paying her the cash payment she had made. After this transaction between the defendants the plaintiff purchased from the vendor the notes given for the purchase money of the instrument, and took an assignment under seal of the property in it. In an action against the defendants for the recovery of the piano, in which no demand was proved upon the defendant in possession of the instrument, it was objected by him that neither detinue nor trover would lie:—Held, that the plaintiff was entitled to recover damages against him for the conversion of the piano; for it was not necessary to impute the conversion to any particular period of time, and the defendant's denial after action of the plaintiff's right to the piano could be treated under the circumstances as evidence of a conversion before action by the said defendant of the plaintiff's interest in it; and as against technical objections raised by a wrongdoer the benefit of all possible presumptions should be allowed. Held, also, that it was not necessary that the vendor should be added as a party in order to entitle the plaintiff to succeed. *Blackley* v. *Dooley*, 18 O. R. 381.

——— *Owner Using Contractor's Building Material and Plant.*]—See *Ashfield* v. *Edgell*, 21 O. R. 195.

——— *Public Sale — Notice.*] — Semble, where a person purchases the goods of another at public sale, a notice by the owner at such sale dispenses with the necessity of a demand and refusal to maintain trover. *Haren* v. *Lyon*, Tay. 370.

Refusal—*What Amounts to.*]—Where a demand is necessary in trover to prove a con-

version, if it be oral, the answer must be positive; and where an oral demand was made on defendant while driving at a distance from his house, where the property demanded was, and no answer was returned:—Held, no evidence of a conversion. *McLean* v. *Graham*, 5 O. S. 741.

Where the solicitor of the plaintiff went to the Bank of Upper Canada and demanded from the president certain boats, and the president told him he had no answer to give, and referred him to the solicitor of the bank, who told him that he was not authorized to give any answer:—Held, sufficient evidence of a demand and refusal to support trover. *McDonell* v. *Bank of Upper Canada*, 7 U. C. R. 252.

The plaintiff had quitted possession of defendant's farm, of which he had been the tenant, though his term had not expired, and there had been no legal surrender of it, but he had given notice of his intention to go, and defendant, it appeared, was willing to get rid of him. Having removed a portion of his goods, he subsequently returned for some more of them, which were locked up in a barn on the place, or which he had the key, and, finding the outer gate of the farm locked, he went to defendant, who was close by, and requested him to open it, and allow him to enter and get his goods, but defendant refused either to open the gate or to allow plaintiff on the farm, and, although defendant did not in express terms refuse to give up possession of the goods, the jury found that such was his intention, and that the plaintiff so understood him:—Held, that this was not sufficient to constitute a conversion of the goods by the defendant so as to support an action of trover, and therefore replevin would not lie. *Smalley* v. *Gallagher*, 26 C. P. 531.

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

See Keith v. *McMurray*, 27 C. P. 428; *Moffatt* v. *Grand Trunk R. W. Co.*, 15 C. P. 392; *Winchester* v. *Busby*, 16 S. C. R. 336, *ante* 1; *Gauhan* v. *St. Lawrence and Ottawa R. W. Co.*, 29 C. P. 102, 3 A. R. 392, *post* 5; *Heffernan* v. *Berry*, 32 U. C. R. 518, *post* 3.

3. *Sale.*

Adoption of—*Interpleader.*]—Held, that where the claimant, under an interpleader order—after first directing a sale, and then countermanding it—accepted part of the proceeds of the sale of the goods, he thereby adopted the sale, and could not hold the execution creditor liable for a conversion. *Appleby* v. *Withal*, 8 C. P. 397.

——— *Receipt of Proceeds.*]—Defendant P., having a chattel mortgage, which did not cover the piano in question, authorized A., as his bailiff, to sell the goods mortgaged, and A. was also authorized by the landlord of the mortgagor to distrain for arrears of rent. Under the distress warrant A. seized and advertised the piano, but was directed by the landlord not to sell it. A. applied to P. as to the sale of the piano; P. referred him to his attorney; and A. afterwards sold it, and paid the proceeds to P., who had knowledge of all the facts, and who, A. said, had indemnified him:—Held, that P. was liable with A. in trover for the piano. *Stevens* v. *Pennock*, 30 U. C. R. 51.

Authority—*Price.*]—Where defendant received two horses from the plaintiff to sell at a certain price, and without his assent or authority sold them for a less price:—Held, that he was liable in trover for the difference, the unauthorized sale being a conversion. *Priestman* v. *Kendrick*, 3 O. S. 66.

Bill of Sale—*Interference—Receiver.*]—Held, that the defendant could not be made liable for a conversion of the goods in question, by reason of his having joined in a bill of sale of them, and having accepted and assigned a mortgage for the balance of purchase money thereof; no other act of interference on his part with the goods being shewn, they never having been in his possession or control, and he never having had the power to deliver up or retain them so as to make a demand upon and refusal by him evidence of a conversion; he having acted in such sale of the goods as the agent and by the authority of another only. The plaintiff J. I. D. could not maintain an action for the conversion of the property in question; for, assuming that it was the property of those under whom he claimed, which was one of the matters in controversy, it did not become vested in him until after the alleged conversion; neither could J. D. maintain the action, he never having had the actual possession of the property, but a mere right as receiver appointed by the court to obtain the custody if it belonged to those whom he represented, which would not support the action, though it might form the ground of a special application to the court for a mandamus or attachment or other appropriate relief. *Dickey* v. *McCaul*, 14 A. R. 166.

Distress for Rent—*Jus Tertii—Damages.*]—In an action for wrongful distress for rent before it was due, there was no allegation in the statement of claim that the action was brought upon 2 W. & M., sess. 1, c. 5, s. 5, nor that the goods distrained were "sold," but merely an allegation that the defendant "sold and carried away the same and converted and disposed thereof to his own use;" nor was a claim made for double the value of the goods distrained and sold, within the terms of the statute:—Held, that the action was the ordinary action for conversion, and that the value, and not the double value, of the goods distrained was recoverable. Held, also, that a wrongdoer taking goods out of the possession of another, cannot set up the jus tertii, but the person out of whose possession the goods are taken, may shew it, and in such case the wrongdoer may take advantage of it; and the plaintiff, having shewn a chattel mortgage subsisting upon a portion of the goods distrained, could not be allowed to recover the value of such portion without protecting the defendant against another action at the suit of the mortgagee. Held, also,

that the plaintiff was not entitled to recover from the defendant the amount received by him from the sale of the plaintiff's goods in addition to the value thereof; nor was the defendant obliged to deduct the amount so received by him from the rent which afterwards fell due. Hoare v. Lee, 5 C. B. 754, followed. *Williams* v. *Thomas*, 25 O. R. 536.

Interference in Sale—*Magistrate—Advice.*]—Cattle supposed to have been stolen are taken by A., a constable, to B., an innkeeper, to feed and take care of. After some time, B., wishing to be paid for their keep, applies to C., a magistrate, who had nothing to do with the original caption, for directions. C. tells him to sell the cattle and satisfy his claim, which B. does. D., the owner of the cattle, sues C., the magistrate, in trespass:—Held, that as against the magistrate, trover, and not trespass, should have been the form of action. Semble, that under the circumstances he would not be liable to the owner of the cattle in trespass. *Marsh* v. *Boulton*, 4 U. C. R. 354.

Promissory Notes—*Purchase Money of Land—Vendor's Lien—Damages.*]—C., on the 20th August, 1874, sold land to one G. for $8,500, and took a mortgage on the property for $6,000, and two joint notes of G. and M. for the balance. These notes were handed by C. to defendant to keep for him, defendant being aware that he was in pecuniary difficulty, and a writ of attachment in insolvency issued against him on the 1st September. The plaintiff, being appointed assignee, demanded the notes from defendant, who disposed of them for C.'s benefit, with knowledge of the plaintiff's claim, and the plaintiff brought trover. It appeared that the plaintiff had filed a bill to set aside the sale of the land by C. as fraudulent, and the suit was pending at the commencement of this action, and it was proved that the makers of the notes were worthless, unless they could be said to have a vendor's lien on the land for the amount unsecured:—Held, that defendant had been guilty of a conversion of the notes, and, shewing no right or authority therefor under the makers, he could not dispute the plaintiff's right to sue, notwithstanding that the plaintiff was disputing the sale out of which they arose; but that the insolvent, having taken a mortgage on the land for part of the purchase money, had waived his vendor's lien for the remainder. The defendant having brought into court one of the notes for $1,000, about the value of the lien if it had existed, it was ordered to be delivered to the plaintiff, and a verdict for $1,000 was reduced to nominal damages. *Driffill* v. *McFall*, 41 U. C. R. 313.

Resale by Vendor before Delivery—*Tender — Deposit.*] — The plaintiff, having negotiated with defendant for the purchase of a pair of horses and harness from defendant for $400, paid $154 in cash, and, after some correspondence as to the time and mode of paying the balance, defendant sold the property, whereupon the plaintiff sued, declaring in a special count for not delivering the horses sold to him, and on the common counts. A verdict on the common counts for the sum paid was sustained, on the ground that upon the evidence set out in the report it was not clear that any agreement was ever arrived at as to the terms and time of payment. Quære, as to the plaintiff's rights, if there had been a contract. Semble, that, on tender to him of the price after the conversion by resale, the defendant on non-delivery of the goods would be liable in trover, such non-delivery being a refusal which would vest the right of action by relation; but that, at all events, the plaintiff could in some form of action recover, though perhaps not the full amount paid by him. *Heffernan* v. *Berry*, 32 U. C. R. 518.

Responsibility for Act of Agent—*Scope of Duty.*]—To a count in trover for plaintiff's cattle killed by defendants' negligence while being carried on their railway, and afterwards sold by their station master, defendants paid into court $52, being the price for which they were sold by the station master after they had been killed:—Held, that such payment admitted only a cause of action, not the particular cause sued for; and that the evidence proved no conversion by defendants, the sale not being the ordinary duty of a station master. *O'Rorke* v. *Great Western R. W. Co.*, 23 U. C. R. 427.

Sheriff—*Attachment—Order of Court.*]—H., on the 25th May, 1872, issued a writ of attachment against a foreign company doing business in Ontario, under which the sheriff seized certain chattels, and, on the 12th November, 1872, pursuant to an order directing him to sell, sold the chattels as being of a perishable nature. On the 11th December, 1874, H. filed a discontinuance. On the 30th May, 1876, the plaintiff began this action against the sheriff for the conversion of the chattels, alleging that the company had sold them to him, and conveyed them by a memorandum dated the 5th July, 1867, signed by an agent on behalf of the company, and sealed, but not with the company's seal. The defendant, the sheriff, pleaded that he did not convert; that the goods were not plaintiff's; not possessed; and also a special plea of justification setting forth the proceedings by H. and the attachment and order for sale. The plaintiff replied the discontinuance. The defendant rejoined that the discontinuance was not filed till after the sale, and demurred because, being bound to obey the order of the court, he could not be affected by the discontinuance:—Held, that the plea of justification shewed a sufficient answer to the declaration; that the replication was bad; and that the defendant should have judgment on the demurrer. The sale, and not the seizure, was the conversion complained of, and the order of the court was a sufficient answer. *McLean* v. *Bradley*, 2 S. C. R. 535.

——— *Execution—Goods of Stranger—Notice.*]—A. having on hire for a term certain goods belonging to B., defendant, as sheriff, having notice that the goods were the property of B., sold them under an execution against A.:—Held, that B. could maintain trover against the sheriff, the sale by him and subsequent sale by the vendees being a complete conversion, although the goods were afterwards left in A.'s possession. *Morrison* v. *Carrall*, 1 C. P. 226.

Warehoused Grain—*Sale by Warehouseman.*]—The plaintiff, a farmer, left 552 bushels of barley with defendant, getting a writing from defendant, acknowledging his having received it from the plaintiff in store. The plaintiff intended to sell it to defendant, but, as the market price was low, it was left with him. The defendant mixed it with other barley and sold it, dealing with it as his own,

the plaintiff being at liberty, at any time, to accept the market price, or to call for the return, not of the identical barley, but of an equal quantity of the same quality, but no price was ever agreed upon, nor any barley returned. The defendant's premises were destroyed by fire, and he having refused either to pay for the barley, or to return a similar quantity, the plaintiff sued him in trover and on the common counts:—Held, that in any event the plaintiff must succeed, for that the defendant must be deemed either to have been guilty of a conversion in disposing of the plaintiff's barley as his own, or to have acquired the property in it. *Benedict* v. *Ker*, 29 C. P. 410.

See Rathwell v. *Rathwell*, 26 U. C. R. 179; *Keith* v. *McMurray*, 27 C. P. 428; *Rourke* v. *Union Fire Ins. Co.*, 23 S. C. R. 344; *McNeill* v. *Haines*, 17 O. R. 479.

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4. *Several Defendants—Joint Conversion.*

Evidence — *Sufficiency.*]—Held, that, under the evidence set out in this case, there was ample evidence of a joint conversion. *Mason* v. *Bickle*, 2 A. R. 291.

Insolvent—*Assignee—Conditional License to Creditor.*]—See *Francis* v. *Turner*, 25 S. C. R. 110.

Original Wrongdoers — *Person Put in Possession—Refusal to Give up.*] — In trespass and trover against five defendants, for taking and converting a steam boiler, it appeared that one defendant, P., had nothing to do with the original taking, but that the boiler had been placed in his yard by the others, or by some of them, not acting in concert with him, and that he had afterwards refused to give it up to the plaintiff. At the trial, the plaintiff's counsel declined to elect, but went to the jury against all the defendants, claiming exemplary damages, and a general verdict was rendered. The court ordered a new trial without costs, and refused to allow the verdict to stand against P. alone. *Menton* v. *Lee*, 30 U. C. R. 281.

Thief—*Purchaser from.*]—One A. having stolen a horse sold it to B., and was afterwards tried and convicted of the felony. Upon trover brought against them for the horse:—Held, that the facts did not constitute a joint conversion, so as to maintain trover against the purchaser. *Edwards* v. *Kerr*, 13 C. P. 24.

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5. *Other Cases.*

Animal—*Seizure in Execution—Sheriff—Bailiff.*]—A bank placed an execution against M., the plaintiff's son, and one C., in the hands of B., a division court bailiff, under which B. seized a stallion as belonging to M., which plaintiff claimed as her property, and which, pending interpleader proceedings instituted by her, was placed with an innkeeper. Subsequently an execution by P. against the same parties was placed in the sheriff's hands. P.'s solicitor informed the sheriff of all the circumstances, and he, on the 3rd October, obtained from the innkeeper a written undertaking to keep the horse—stated to be under seizure by the sheriff—until further orders from the sheriff. On 14th October the sheriff on notice of plaintiff's claim interpleaded. On 31st October the division court interpleader was decided in the plaintiff's favour; whereupon the sheriff at once notified the innkeeper that he did not claim any further right to hold the horse. Before being so notified, the plaintiff demanded the horse, but the innkeeper refused to deliver it up until his charges for keeping it were paid, but did not assert any right to hold for the sheriff. On 18th November part of the charges were paid, but it did not appear whether by the bank or P.; and the balance was subsequently paid by B. On the 3rd November an order was made barring P.'s claim and directing the sheriff to forthwith deliver the horse to plaintiff. On 14th November this action was commenced against the bank, P., the sheriff, and the bailiff, for conversion, and disobedience of the order of the court directing redelivery, claiming the value of the horse, loss of earnings, &c. About 3rd December, after the commencement of the action, the horse was tendered to plaintiff, who refused to accept it unless damages and costs were paid. No notice of action was given:—Held, that there could be no recovery against any of the parties, for the reasons: (1) that the bailiff should have had notice of action; (2) that there was nothing to connect the bank or P. with the seizure; (3) that, though there was what constituted a seizure by the sheriff, so as to entitle him to interplead and make the innkeeper liable if he had not kept the horse for him, the sheriff in no way interfered with the bailiff's possession or control over it, or in any way converted it to his own use, it being at the time in the custody of the law. *Pardee* v. *Glass*, 11 O. R. 275.

——— *User of.*]—A., having been arrested at the suit of R., placed a mare in B.'s possession, on an agreement that if R. proved a demand against A., by his own oath or that of others, B. was to pay it and keep the mare till repaid. B. did pay £10, but it was not shewn that he did so in consequence of its being sworn to; and the mare remaining with him, he used her once in the plough:—Held, that such use of the mare was not a conversion. *Forrester* v. *Spencer*, 3 O. S. 47.

Debenture — *Deposit of — Assent of Holder.*]—Plaintiffs held certain municipal debentures for sale in London. C., an agent of the municipality, procured one for £100 from the plaintiffs, and gave it to the defendant in their presence, in order that defendant might shew it to G. & Co., a firm who defendant thought might purchase. This firm afterwards advanced £20,000 upon a deposit of £40,000 of the debentures, and agreed to sell £60,000 of them, but the sale was not made, and the plaintiffs subsequently sold those deposited with G. & Co., in order to pay off their advance. This debenture, however, which had been left by the defendant with G. & Co., when he first went to them, was overlooked, and remained in their possession. The plaintiffs having brought trover, it appeared that G. & Co. retained it, claiming commission which would have arisen to them from the sale, and a lien on it for moneys due to them by defendant, but the plaintiffs knew nothing of this, and had never applied to them for it:—Held, that defendant was not liable, for he was guilty of no conversion in placing the debentures in the hands of G. & Co. with the plaintiffs' assent, and had not interfered since, and that the plaintiffs' remedy was against G. & Co. *Wilson* v. *MacNab*, 21 U. C. R. 493.

Effect of Judicature Act.] — The old learning on the subject of "conversion" need not be imported into the system introduced by the Judicature Act, which provides for redress in case the plaintiff's goods are wrongfully detained, or in case he is wrongfully deprived of them. In all such cases the real question is, whether there has been such an unauthorized dealing with the plaintiff's property as has caused him damage, and if so, to what extent he has sustained damage. *Stimson* v. *Block*, 11 O. R. 96.

Estoppel.]—Under the special facts of this case:—Held, that the plaintiff could sustain trover against defendants, and was not estopped by his assignment to the Bank of Upper Canada from treating these defendants, at least, as guilty of conversion of his property. *Cayley* v. *McDonell*, 8 U. C. R. 454.

Goods Carried for Hire—*Shipment beyond Destination—Offer.*]—The plaintiff, at Guelph, sold to B. & Co., at Ottawa, 65 barrels of pork, and shipped it by the Great Western Railway, the shipping receipt acknowledging the receipt of the same, addressed to the plaintiff's order at Prescott, and to notify B. & Co., Ottawa. The pork was carried by Great Western Railway and steamer Passport to Prescott, her manifest shewing a delivery there into the defendants' charge, and stating that the plaintiff was owner, and that B. & Co. were to be notified. B. & Co. were large dealers in Ottawa, and all goods for them or in which they appeared interested were, by arrangement with the defendants, sent on to Ottawa. This pork was accordingly sent on and inspected by B. & Co., who refused to accept it. The plaintiff, who was fully aware of all that had occurred, and that the pork was at Ottawa, swore that he demanded the pork from the defendants' agent at Prescott, but there was no evidence of a refusal; and it appeared that the plaintiff at the same time requested the agent to try and get B. & Co. to accept it. Before the action was brought, the defendants offered the plaintiff his pork at Prescott:—Held, affirming the judgment in 29 C. P. 102, that the asportation of the pork to Ottawa did not in itself constitute a conversion. Held, also, that there was no sufficient evidence of a demand and refusal; but semble, if there had been, trover could not be maintained after the subsequent offer to give up the pork. *Gauhan* v. *St. Lawrence and Ottawa R. W. Co.*, 3 A. R. 392.

Goods Destroyed by Fire—*Bailee—Interference.*]—The plaintiffs, living in Southampton, having purchased goods at Montreal, directed them to be forwarded to Kingston, to the care of the schooner Regina. They were so sent in one of the mail steamers, but the captain of the Regina, being unable to wait at Kingston, directed defendants, who were forwarders there, to send them on by the same steamer to Hamilton, and thence by the railway to Sarnia, where he would take them up on his way to Southampton. Defendants, however, shipped them from Kingston by a propeller, which was burned, with the goods on board, in the river St. Clair. They had been insured to go by the Regina, but having been shipped on a different vessel, the policy was cancelled. It was held in the Queen's bench, that, on the contract for not sending as directed, defendants were liable only for nominal damages, the loss by fire being too remote, and that they were not liable in trover. On appeal: — Held, reversing the judgment, that the defendants were liable on the contract for the value of the goods. *Wallace* v. *Swift*, 31 U. C. R. 523, 28 U. C. R. 563.

Grain—*Conversion into Flour—Waiver of Tort.*] — The insolvent, a miller, agreed to grind wheat for the claimants, and to deliver to them a barrel of flour of a specified quality for so many bushels of wheat, and he thus became liable to deliver to them 955 barrels of flour, as the equivalent for wheat received by him and made away with:—Held, that this was a bailment only of the wheat, which remained the claimants', to the insolvent; that such bailment was determined by the conversion of the wheat, so that the claimants might maintain trover for it either as wheat or as flour if ground; that they might waive the tort and sue for the value of the goods when they should have been delivered; and that the claim therefore was provable as being a debt within the Insolvent Act, not a claim for unliquidated damages. *In re Williams and Hope*, 31 U. C. R. 143.

Mortgaged Goods — *Jus Tertii.*] — The plaintiff mortgaged his goods to A., to whose estate the defendant was administratrix. The goods came into the possession of the defendant, but under what circumstances did not appear. The mortgage contained an agreement that on default the mortgagee might take possession, and a statement that a delivery of possession was given at the time of executing the mortgage. There was no evidence that the mortgage money had been paid. The plaintiff afterwards executed three other mortgages of the same goods to other persons, each containing a similar agreement upon default, and a similar statement as to delivery of possession: —Held, that under these circumstances the plaintiff could not recover either in trover or detinue, and that the defendant might, as against him, set up the right of the other mortgagees. *Ruttan* v. *Beamish*, 10 C. P. 90.

Patent for Land—*Receipt from Public Officer.*] — In trover for a Crown grant:—Quære, if the defendant obtained the grant without any direction or authority from the grantee, but from the direction of some public officer to the secretary to deliver to A. such grants as he should require, would possession obtained under such order be tortious, and afford evidence of a conversion at that time? *Hampson* v. *Boulton*, 5 O. S. 23.

Promissory Notes—*Receipt of by Maker —Notice of Assignment.*]—In trover for promissory notes against the maker, it appeared that the notes had been given by him on a purchase of land; that the payee afterwards agreed to deliver them up to him on a good consideration; that afterwards, and before their delivery, the payee assigned them by deed to the plaintiff, the notes themselves being in the possession of a third party; and that the defendant afterwards received them, having first had notice of the assignment—and no fraud having been shewn, the jury found for the defendant:—Held, that, as these facts would have constituted a good defence in an action by the payee on the notes, the verdict was right. *Small* v. *Bennett*, T. T. 3 & 4 Vict.

Relief over—*Third Party—Vendor.*]—In an action for the conversion of goods, the defendant may bring in the person who sold him

the goods as a third party, the words "any other relief over" in rule 209 being wide enough to include a claim made by the defendant against his vendor. *Confederation Life Association* v. *Labatt* (No. 2), 18 P. R. 266.

Timber — *Contract—Removal—Refusal of Leave.*]—Defendant, by deed dated 26th September, 1870, agreed to sell to the plaintiff all the merchantable timber, &c., on the defendant's land, which the plaintiff could make by the 1st May, 1871; any timber or logs left, standing or cut, after that date, to be the property of defendant. The plaintiff made a large quantity of timber, and drew away some of it. On the 27th March, 1871, defendant orally gave him leave to let the balance of timber made by him remain on the lot till fall, if the plaintiff would not strip the lot too much; and the plaintiff only cut for a day or two after that. Subsequently, and after the 1st May, the plaintiff was forbidden to take such made timber off, by one K., who said he had bought it, and by defendant, who, as one witness said, claimed it as his own; and the plaintiff thereupon brought trover:—Held, that the made timber, which vested in the plaintiff as made, might properly be the subject of a parol contract with defendant, independently of the deed, and that the desistance of the plaintiff from stripping said lot before the 1st May, was a sufficient consideration for the parol agreement. Held, also, that there was evidence from which a jury might infer conversion. *Hedley* v. *Scissons*, 33 U. C. R. 215.

——— *Payment for—Mistake.*]—M. had a contract to supply wood to a railway company, for which he was to be paid when it had been inspected and accepted. While 152 cords were lying in the company's yard for inspection, he assigned all the wood that belonged to him, with other property, to the plaintiff for the benefit of his creditors. He at the same time made over his interest in the contract to defendant, who completed it, and the company afterwards, by mistake, paid defendant for these 152 cords, as well as for what he had himself supplied:—Held, that the plaintiff could not maintain trover, there having been no conversion by defendant. *Scott* v. *Kelly*, 17 U. C. R. 306.

Trees — *Bailee — Interference—Preservation.*]—The plaintiff sent to his agent, J., two boxes of trees and roots, made up in bundles addressed to various purchasers. They went by steamer to defendant, a forwarder at Powell's Landing, where they arrived on Saturday the 5th May, and were taken from the boxes by defendant, and some of them delivered to the persons to whom they were addressed, who called for them. On Wednesday a person was sent by J. to take and deliver them, and on Thursday J. himself called. Many of the trees were injured, and the evidence was contradictory as to the state in which they arrived, and as to whether this injury was caused by defendant's treatment of them, or whether it was necessary, as he alleged, to open the boxes and deliver them without delay. The plaintiff having brought trover:—Held, that, whether defendant had been guilty of negligence as a bailee or not, he had done nothing which would in law amount to a conversion. *Lovekin* v. *Podger*, 26 U. C. R. 156.

See Spry v. *McKenzie*, 18 U. C. R. 161; *Stoeser* v. *Springer*, 7 A. R. 497; *Ross* v. *Edwards*, 11 R. 574.

III. Damages.

Measure of — *Bond—Penalty.*]—Trover may be maintained by the obligee against the obligor of a bond, who has wrongfully torn off his seal, and damages be recovered to the amount of the penalty. *Bank of Upper Canada* v. *Widmer*, 2 O. S. 222.

——— *Books—Materials—Literary Value.*]—Trover for pamphlets. Plea, not guilty. On the production of one of the pamphlets sued for at the trial, the Judge in the county court directed that the plaintiff was not entitled to maintain the action because the pamphlet was a scoffing and indecent attack on Christianity, and ordered a nonsuit. On appeal:—Held, that the plaintiff held property in the materials composing the pamphlets, independently of what was printed on them, and he would have a right to be indemnified therefor. Semble, that there was a legal wrong, for which the plaintiff should have recovered something; that the Judge should have directed the jury as to the nature of works which the law protects and what it prohibits; that if the pamphlets were not illegal, they should give damages for their value as a literary production; and if illegal, they should give damages to the value of the paper, &c., irrespective of the words upon it. *Boucher* v. *Shewan*, 14 C. P. 419.

——— *Carriers.*] — Damages against railway company, on a contract to carry certain goods on their railway and connecting lines, for failure to deliver and for conversion. *Worden* v. *Canadian Pacific R. W. Co.*, 13 O. R. 652.

——— *Deed—Detention.*]—Semble, that in detinue for a conveyance of land, where the plaintiff shews himself entitled to the deed, but defendant, intending to do right, has given it up to another, the damages should be left as a question for the jury under the circumstances, and should not as of course be the value of the land. *Reynolds* v. *Waddell*, 12 U. C. R. 9.

In detinue for a deed, quære, whether the plaintiff can recover damages for having been prevented by the want of it from obtaining horses to cultivate his farm. *Wood* v. *Bowden*, 23 U. C. R. 466.

——— *Deed—Value of Land.*]—In trover for a deed passing a fee simple, the jury can only give the full value of the land at or after the conversion, as damages. *Burr* v. *Munro*, 6 O. S. 57.

——— *Detention—Nominal Damages.*]—B. having possession of certain goods of S., S. demanded them of him on 23rd December. B. refused to allow the more bulky goods to be removed until after Christmas, on the ground that it would interfere with his own trade. On 24th December S. commenced this action for damages, on the ground of wrongful conversion and detention of the goods by B. On 26th December B. notified S. that he could remove the remainder of the goods. S. thereupon sent for them, but, finding that some of them had been seized under process of attachment out of a division court, removed the rest, and afterwards contested in the division court the ownership of those seized:—Held, that S. was entitled to damages for the detention of the goods on 23rd December, but

the measure of the damages was nominal, and not the value of the goods detained. S. acted on the letter of 26th December, and there did not appear to have been any disposal of the goods in the sense of their destruction or removal adverse to the plaintiff's property, but the plaintiff was ultimately prevented from getting the goods, not because of the defendant's misconduct, but because the claim of attaching creditors intervened. *Stimson* v. *Block*, 11 O. R. 96.

——— *Loss of Profits.*]—Semble, that in trover for a vessel, the loss of profits may be recovered. *Brown* v. *Beatty*, 35 U. C. R. 328.

——— *Loss of Profits—Timber.*]—Trees cut by locatee under the Free Grant and Homesteads Act, in the actual process of cultivation, were sold to the plaintiff, a mill owner, and were seized by the defendants, the timber licensees, who also had a mill, and were taken by them thereto and cut up into lumber. It was proved that the plaintiff could not get other logs at that season of the year:—Held, that the plaintiff was entitled to the loss of profits sustained by him by being deprived of cutting the logs into lumber at his mill. *Cockburn* v. *Muskoka Mill and Lumber Co.*, 13 O. R. 343.

——— *Value at Time of Conversion—Progeny of Animals.*]—In April, 1846, certain mares, plaintiff's property, strayed to defendant's farm, who advertised them, and no owner appearing, he began to use them about a year afterwards. In July, 1846, the same mares, being supposed to be on plaintiff's pasture, were sold by the sheriff, under an execution against plaintiff, to one Scott, who never obtained possession of them, but hearing, in 1852, that they had foaled, and were in defendant's possession, made a written demand on defendant for them and their progeny in September of that year. A year afterwards S. made over his interest to the plaintiff as a gift, without consideration or any delivery taking place. In 1855 the plaintiff made a demand on defendant for the mares and their colts, which was refused. Pleas, not guilty, not possessed, and Statute of Limitations:—Held, (1) that the conversion took place in 1847, and that the action was barred, and that the plaintiff took at the most from S. a mere right of action. (2) That the measure of damages in trover is the value of the property at the time of the conversion, and consequently that, even if the plaintiff had not been barred by the statute, he had no claim to be the owner of the animals subsequently bred from the mares. Held, also, that the gift from S. to the plaintiff in this case of certain mares, not being accompanied by delivery, did not vest the property of the mares in the plaintiff. *Scott* v. *McAlpine*, 6 C. P. 302.

——— *Value at Time of Conversion—Timber.*]—In trover the principle of law (though not an inflexible one) is, that the jury can give no more in damages than the value of the goods at the time of the conversion. Where, therefore, logs had been taken to defendant's mill and sawed there, and defendant, acting under a supposed claim of right, refused to deliver them to the plaintiffs:—Held, that the plaintiffs were not entitled to the value of the logs in the state of sawed lumber, or to expense incurred in sending a steamer and barges for the lumber. *Morton* v. *McDowell*, 7 U. C. R. 338.

——— *Value at Time of Demand—Subsequent Sale.*]—Defendant G. and two others, having executions against W. and K., directed the seizure of certain goods. The plaintiff, to whom the goods belonged, demanded them of the bailiff, who refused to give them up. G. afterwards directed the bailiff not to sell or do anything more on his execution, but it did not appear that he told the plaintiff of this, or ordered the goods to be returned to him. The plaintiff then brought trover against the bailiff and G., and the bailiff afterwards sold the goods under the other executions, paying over no portion of the proceeds to G.:—Held, that G. was liable for the full value of the goods, for the plaintiff's right of action accrued on the demand and refusal, and was not defeated by what took place afterwards. *Macklem* v. *Durrant*, 32 U. C. R. 98.

——— *Value at Time of Demand—Timber.*]—In an action for the conversion by the defendant of certain logs of the plaintiff which had been cut without permission on the plaintiff's land, and purchased by the defendant and hauled to his mill, and there cut into lumber, the measure of damages was held to be the value of the logs as they were in the defendant's yard at the time they were demanded by the plaintiff, without any deduction for cutting and hauling, it appearing that the defendant knew that he was buying logs taken from the plaintiff's land, or at least that he suspected that such was the fact, and wilfully abstained from inquiry. Semble, had the defendant been an innocent purchaser, a different measure of damages might have been applied. *Smith* v. *Baechler*, 18 O. R. 293.

——— *Value to Plaintiff—Solicitor's Books and Papers—Special Damage.*]—In trover, for the conversion of a solicitor's docket and papers, containing entries and evidences of certain bills of costs against different persons, the jury gave a verdict for $2,500. On motion to set this aside as excessive, the court made a rule that upon defendant delivering up to plaintiff the book and papers, if the plaintiff chose to accept them, the verdict should be reduced to 1s., and defendant pay all costs; but that, if plaintiff should prefer proceeding with the action, then he should proceed merely for such special damage as he might claim to have sustained, with liberty to amend his declaration accordingly, and to proceed at the risk of all costs. In such an action the measure of damage is not the value of the book, as a mere book, but what it is worth to the plaintiff irrespective of such value. *Doyle* v. *Eccles*, 17 C. P. 644.

Nominal Damages.]—See *Johnson* v. *Lamb*, 13 U. C. R. 508.

——— *Goods of Deceased—Payment of Debts.*]—In trover by an administrator, when it appeared that the defendant had appropriated goods of the intestate, but had paid debts of the intestate to the amount of the value of such goods, which, however, was not pleaded:—Held, after verdict for defendant, that the plaintiff was entitled to a verdict for nominal damages, as such payment was not admissible as a bar. *Shipman* v. *Shipman*, 5 C. P. 358.

——— *Note Brought into Court.*]—The defendant having brought into court one of the two promissory notes for which the plaintiff sued in trover for $1,000, about the value of

the lien claimed if it had existed, it was ordered to be delivered to the plaintiff, and the verdict, which had been rendered for $1,000, was reduced to nominal damages. *Driffill* v. *McFall*, 41 U. C. R. 313.

Special Damage—*Loss of Employment.*]—In trover, the plaintiff offered evidence to prove that in consequence of being deprived of the tools for which this action was brought, he had been prevented from undertaking work as a master carpenter; and this was laid in the declaration as special damage:—Held, that such evidence was rightly rejected. *Lott* v. *French*, 10 U. C. R. 385.

See Moffatt v. *Grand Trunk R. W. Co.*, 15 C. P. 392; *Leslie* v. *Canada Central R. W. Co.*, 44 U. C. R. 21; *Wallace* v. *Swift*, 28 U. C. R. 563, 31 U. C. R. 523; *Williams* v. *Thomas*, 25 O. R. 536; *Gilpin* v. *Royal Canadian Bank*, 27 U. C. R. 310.

IV. Evidence.

Admissibility—*Acts after Conversion—Insurance.*]—Evidence was rejected that the plaintiffs had insured the wheat sued for and had received the insurance money, the fire having taken place two days after the alleged conversion: — Semble, that such evidence should have been received, as shewing the plaintiffs' conduct and dealing with regard to the property after the alleged conversion, and thus being relevant to the issue. *Gilpin* v. *Royal Canadian Bank*, 27 U. C. R. 310.

Production of Lease—*Right to Crops.*]—In trover for wheat reaped and claimed by defendants as of right belonging to them, as an away-going crop after the expiration of a lease for seven years, the plaintiff's witnesses proved a new lease in writing of the same premises to a third party, from the expiration of the defendants' lease, but the new tenant swore that he had no right to the crop:—Held, not necessary for plaintiff to produce the new lease. *Burrowes* v. *Cairns*, 2 U. C. R. 288.

Sheriff's Sale—*Proof of Judgment—Execution.*]—In trover for goods:—Held, that, as against a party under an execution against whom the goods have been sold, the production of the writ of execution is sufficient, but that, as between a third party and the vendee under the execution, the judgment in support of it should be shewn. *Park* v. *Humphrey*, 14 C. P. 209.

Sufficiency — *Crown Patent — Entry in Book.*]—Quære, whether the evidence of the secretary of the Province, that it appears by an entry in his own handwriting, in a book kept for such entries, that a patent was delivered to A., and that he therefore felt sure that it was delivered to A. or his servant (but has no recollection of it), is sufficient to charge A. in trover with the possession of such patent. *Hampson* v. *Boulton*, 5 O. S. 23.

See Adams v. *Corcoran*, 25 C. P. 524, *ante* I. 1 (c); *Corbett* v. *Sheppard*, 4 C. P. 59, *post* V. 2.

V. Pleading.

1. *Declaration.*

Description of Goods.]—See *Richardson* v. *Gray*, 29 U. C. R. 360; *Mills* v. *King*, 14 C. P. 223.

Form of — *Omission.*]—See *Reid* v. *Carrall*, 8 U. C. R. 275.

——— *"Or."*]—See *Bain* v. *McKay*, 5 P. R. 471; *Taylor* v. *Adams*, 8 P. R. 66.

——— *Trespass or Trover.*]—See *Hatch* v. *Holland*, 28 U. C. R. 213.

See, also, *Mann* v. *English*, 38 U. C. R. 240.

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2. *Pleas*

Equitable Plea—*Lien—Estoppel.*]—To an action of trover by plaintiff as assignee in insolvency of H.—the first count alleging a conversion previous to, and the second count a like conversion subsequent to, H.'s insolvency, to which the common counts were added—the defendant pleaded, on equitable grounds, that H. purported to sell and convey to F. & C. all his stock-in-trade, and executed legal transfers thereof, and represented that he had so sold the same, whereby certain of his creditors were induced to accept F. & C.'s notes, given, as he alleged, for the purchase money, and to extend the time for the payment of H.'s indebtedness to them, and whereby also other persons were induced to supply F. & C. with goods on credit; that F. & C. were placed in insolvency by compulsory liquidation, and that such creditors and other persons were the creditors who filed claims against F. & C.'s estate; that defendant was appointed assignee, and as such took possession, of the goods in F. & C.'s store, consisting of those received from H., as well as goods subsequently supplied to F. & C. as aforesaid, as also of the books used by F. & C., and now claimed by plaintiff; that the goods and book debts as above would not more than pay F. & C.'s creditors; that, even if said goods and book debts were H.'s, he and his assignee are estopped from setting up any claim thereto as against defendant or to the prejudice of F. & C.'s creditors, who through defendant have a lien in equity upon said goods for the amounts respectively due them as aforesaid; and defendant prays that an account may be taken, and defendant declared a trustee for the amount found to be due to the said creditors:—Held, plea bad, for as to the goods alleged to be F. & C.'s, they could not be H.'s, of whom plaintiff was assignee; and as to the other goods, the plea averred a sale impeachable by the assignee, and probably in itself an act of bankruptcy; and the matters set up shewed no estoppel in pais. The statute authorizing equitable defences, does not authorize pleading matters which are merely evidence under a legal plea. *Mackenzie* v. *Davidson*, 27 C. P. 188.

Forgery—*Detention by Bank.*]—Detinue for a cheque. Plea, that defendants received the cheque from the plaintiff to present and collect it from the bank on which it was drawn; that they did present it, but payment was refused by the bank manager, who retained and kept the same, alleging that the

names of the drawers thereto were forged:—Held, a good defence; for if the cheque was forged the detention was rightful, and if genuine, defendants lost control over it by no wrongful act, and the plaintiff's remedy was against the bank. *Brown* v. *Livingstone*, 21 U. C. R. 438.

Lawful Taking of Possession.]—Trover for 3,000 feet of oak timber and 200 bushels of wheat. Plea, that defendant was seised in fee of a certain close, and being so seised he cut the said wheat and timber thereon growing, and afterwards, &c., delivered the same to one A., to be kept, who delivered them to the plaintiff, wherefore defendant took them out of his possession, &c.:—Held, plea good. *Millard* v. *Kirkpatrick*, 4 U. C. R. 248.

Leave and License.]—The word "detained" in a declaration means an adverse detention, and it is unnecessary, therefore, to plead leave and license specially. *Bain* v. *McDonald*, 32 U. C. R. 190.

Lien.]—See *Nicolls* v. *Duncan*, 11 U. C. R. 332.

A lien may be specially pleaded in an action of detinue. *Riorden* v. *Brown*, 1 C. P. 199.

——— *Replevin — Denial.*]—Where the goods have been replevied under 14 & 15 Vict. c. 64, and the declaration is for detaining merely, the pleadings should be as in detinue, and a lien cannot be given in evidence under a plea denying the plaintiff's property. *Stephens* v. *Cousins*, 16 U. C. R. 329.

"Not Guilty"—*Agreement.*]—In trover for a deed an agreement that the plaintiff should deliver the deed to defendant to be returned on certain conditions, need not be specially pleaded, but would be admissible either under "not guilty," or "license," as it negatives the alleged wrongful conversion. *Dowling* v. *Miller*, 9 U. C. R. 227.

——— *Illegality.*] — See *Boucher* v. *Shewan*, 14 C. P. 419, *post* VI.

——— *Justification.*]—See *Hatch* v. *Holland*, 28 U. C. R. 213.

Proof of a judgment and execution under which defendant justifies is admissible under the pleas of not guilty and not possessed. *Corbett* v. *Sheppard*, 4 C. P. 59.

It was formerly held otherwise. *Brent* v. *Perry*, 7 U. C. R. 24.

Purchase.]—A defence that the property was purchased from the plaintiff by defendant should be specially pleaded. *Gunn* v. *Gillespie*, 2 U. C. R. 124.

Redelivery of Goods.]—A redelivery of the goods to plaintiff pending the suit, or after plea, must be pleaded. *Johnson* v. *Lamb*, 13 U. C. R. 508.

Statute of Frauds.]—In trover for a deed:—Held, that an agreement that the plaintiff should deliver the deed to the defendant, to be returned on certain conditions, was not affected by the Statute of Frauds, at least when pleaded by defendant. *Dowling* v. *Miller*, 9 U. C. R. 227.

See McLean v. *Bradley*, 2 S. C. R. 535.

3. *Subsequent Pleadings.*

De Injuria.]—A replication of de injuriâ to a plea of lien in trover is proper. *Nicolls* v. *Duncan*, 11 U. C. R. 332.

Revocation of License—*Notice—Keys of House—Detention by Sheriff—New Assignment.*]—Detinue for the keys of plaintiff's dwelling house. Plea, leave and license. Second replication, that before the detention the plaintiff revoked the alleged leave, of which the defendant had notice. Rejoinder, that within a reasonable time after the revocation and notice of it, defendant redelivered the keys to the plaintiff, who accepted them:—Held, replication and rejoinder both good. Third replication, that defendant, as sheriff, entered the house with the plaintiff's consent, to levy under a fi. fa. against the plaintiff's goods, having first obtained the keys for that purpose; and that, in excess of his duty as sheriff, he detained the keys from the plaintiff, and locked him out of his house for several days, whereby the plaintiff suffered the injuries complained of in the declaration:—Held, good, as being in the nature of an informal new assignment. *Bain* v. *McDonald*, 32 U. C. R. 190.

Tender.]—Where in trover for bills of exchange the defendant pleaded a lien by agreement, and the plaintiff replied a tender, without averring that the sum tendered was sufficient, the replication was held bad on general demurrer. *Conger* v. *Hutchinson*, 6 O. S. 644.

See McLean v. *Bradley*, 2 S. C. R. 535.

VI. Property and Possession.

Books—*Property in Materials—Literary Value.*]—Trover for pamphlets. Plea, not guilty. At the trial the Judge directed that the plaintiff was not entitled to maintain the action, because the pamphlet was a scoffing and indecent attack on Christianity, and ordered a nonsuit:—Held, that defendant could not rely on the illegality of the publication under a plea of "not guilty," but should have pleaded it specially; that the plaintiff held property in the materials composing the pamphlets, independently of what was printed in them, and he would have a right to recover therefor. *Boucher* v. *Shewan*, 14 C. P. 419.

Collateral Securities—*Payment of Principal Debt—Necessity for Assignment.*]—Certain sale notes were deposited with defendants as collateral security for the payment of a note indorsed by the plaintiff, for the accommodation of one M., and discounted by defendants for M. The collaterals were of the same value as the principal note, and were to be paid into the bank, and applied on the note, so that when they were paid, the note also was to be paid, and the plaintiff's liability to cease. After the principal note became due, defendants denied that they held the sale notes as collaterals, and refused to give the plaintiff any information as to what had been paid on them, and the plaintiff then paid the note in full and demanded an assignment of the collaterals. The plaintiff's payment being made by a part payment in cash, and his note for the balance, which he paid at maturity:—Held, that the plaintiff

could not maintain trover against defendants for the collaterals; for, although, under 26 Vict. c. 45, s. 2, he was entitled to the immediate possession of them, he had not, until assignment, any property in them vested in him. Semble, that the plaintiff's remedy would be by a special action on the case for not assigning the notes to him after demand duly made. *Cornish* v. *Niagara District Bank*, 24 C. P. 262.

Crops—*Entry and Cutting—Property in.*]—The entry of a person on timber limits to cut hay, and his cutting and stacking it on the land, do not give him such property in the hay cut as to enable him to maintain trover for its removal against persons claiming by virtue of Crown licenses then in force. *McDonald* v. *Bonfield*, 20 C. P. 73.

Goods Carried—*Interest of Carrier—Admission—Lien.*]—The plaintiffs were owners of the Lady Bagot, in which wheat was brought down Lake Erie to defendant, to be stored for Messrs. Y. & Co. When it was brought to defendant, the master demanded £22 10s. for freight and £190 for demurrage, asserting a lien on the wheat to that amount. The defendant declined to pay, but he received the wheat upon giving the following undertaking in writing: "I will retain 750 bushels of wheat, the property of Messrs. Y. & Co. of Montreal, and part of the cargo of the Lady Bagot, until your claim for demurrage for detention of the schooner Lady Bagot at Sandusky is settled, also covering freight on the amount retained." The plaintiffs subsequently demanded the wheat from defendant, who declined to give it up, saying that he was indemnified by Messrs. Y. & Co., who refused to pay plaintiffs' claim. The plaintiffs then sued defendants in trover:—Held, that they could not recover, as the agreement admitted the property in the wheat to be in Y. & Co., and not in the plaintiffs. Held, also, that the plaintiffs had no lien for either freight or demurrage. *Land* v. *Woodward*, 5 U. C. R. 190.

Goods Distrained for Rent—*Purchase by Landlord—Subsequent Seizure under Execution.*]—The plaintiff caused the goods in question to be distrained for rent in arrear of a farm, and, after an unsuccessful attempt by the bailiff to sell them, they were sold with the tenants' consent to plaintiff, and one P. was put in charge. He, however, allowed the tenant to remain in possession as before. The goods were subsequently seized and sold by the sheriff under executions against the tenants, when the plaintiff brought trover:—Held, that the plaintiff could not recover; that he could not as landlord claim as a purchaser at the bailiff's sale; nor could he claim as vendee of the tenants, it appearing that there was no registered bill of sale, nor any actual and continued change of possession. *Burnham* v. *Waddell*, 28 C. P. 263, 3 A. R. 288.

Goods of Deceased—*Administrator of Widow.*]—Certain goods of testator were left in the house, where plaintiff (his daughter) and her mother continued to live and use them for about a year, until the mother died, when defendant, a son, who had been living elsewhere, took possession of the house with these things, and refused to deliver them up to the plaintiff as the mother's executrix:—Held, that the plaintiff had no such possession of these goods, either in her own right or through her mother, as to enable her to treat defendant as a wrongdoer; that as her mother's executrix she had no title; and that she therefore could not recover for them. *McCrary* v. *McCrary*, 22 U. C. R. 520.

——— *Transfer before Death—Delivery—Rights of Administrator.*]—A. agreed with B. to work a mill on shares—A., who owned the mill, to have two-thirds, and B., who worked, one-third of the toll. After some years, about an hour before B.'s death he sent for A. and told him (having first requested those about him to leave the room) that there were about 300 bushels of toll wheat in the mill undivided, 100 of which under the agreement would be his (B.'s); that, as he (B.) owed him (A.) for money lent, he begged he would accept the other 100 bushels and also a promissory note, which he sent for and handed him. Witnesses who overheard part of the conversation swore to the 100 bushels and the note being given by B., not as a gift, but, as they heard B. say, in payment of a debt:—Held, in trover by B.'s administratrix to recover from A. the wheat and note, that upon these facts the question of delivery as upon a donatio mortis causâ did not arise, the transaction being nothing more than an ordinary sale for a valuable consideration; that if it had, the wheat being in A.'s own mill, no further delivery could be required. Held, also, that the agreement being personal between A. and B., and the intestate having no term in the mill, his administratrix had no right of possession and could not support the action. *Ralph* v. *Link*, 5 U. C. R. 145.

Goods Purchased by Agent—*Absence of Appropriation.*]—M. received money from plaintiff and from others to buy grain on commission. He bought in his own name, and from time to time appropriated the warehouse receipts among his principals, without distinguishing in his books, or otherwise, from whom any particular grain had been bought:—Held, that, under the circumstances, the plaintiff could not maintain trover against M.'s assignee in insolvency for grain not specifically appropriated to him. *Wilson* v. *Bockus*, 20 C. P. 467.

——— *Appropriation — Right to Possession.*]—Plaintiff, through his agent, bought from A. & Co. a certain quantity of wheat, which was to be loaded on or before a day named, or as soon as bags and cars could be furnished by plaintiff for same. Plaintiff paid on account a portion of the price agreed upon and furnished bags to the vendor, who filled them, but no cars were sent by him to take the wheat away. Whilst the wheat was lying ready to be despatched, and after the day named for loading it, defendants, holders of a warehouse receipt, demanded of the vendors the wheat covered by it, when plaintiff's wheat, some of which, amounting to 250 bushels, had been weighed, was delivered to and received by them. There was no demand and refusal of plaintiff's wheat, nor did plaintiff notify the defendants that the wheat was his:—Held, that plaintiff was not entitled to possession of the wheat, and could not therefore maintain trover against defendants for it. *Butters* v. *Stanley*, 21 C. P. 402.

Goods Purchased by Husband—*Use on Property of Wife—Contract—Consideration—Parties.*]—See *Filschie* v. *Hogg*, 35 U. C. R. 94.

Goods Purchased by Insolvent—*Postponed Delivery—Assignee's Right of Possession—Lien of Warehouseman.*]—Action of trover charging the appellants with converting 250 barrels of mackerel, which were the property of W. M. R., the respondent's assignor. One of the branches of appellants' business was supplying merchants who were connected with the fishing business in the country, and who in return sent them fish, which was sold and the proceeds placed by appellants to credit of their customers. One S., who so dealt with appellants, in October, 1877, sent them seventy-seven barrels of herring and 236 barrels of mackerel. On 3rd November, 1877, S. sold all the fish he had, including those mackerel, to one R. at $8 a barrel, when some were delivered, leaving 236 barrels in the appellants' store, and in payment received $4,000 and a promissory note for $4,000 at four months. This note was given to appellants by S. on account of his general indebtedness. On the 4th March, 1878, R. became insolvent, and the respondent, who was subsequently appointed assignee, demanded the 236 barrels of mackerel, and brought an action to recover the same. After issue was joined the appellants proved against the estate of R. on the note and received a dividend on it. The Judge at the trial gave judgment for $1,888, less $46.10 for one month's insurance and six months' storage, and found that the appellants had knowledge that the fish sued for were included by the insolvent in the statement of his assets, and made no objection thereto known to the assignee or creditors at the meeting:—Held, that the appellants having failed to prove the right of property in themselves, upon which they relied at the trial, the respondent had, as against the appellants, a right to the immediate possession of the fish. (2) That S. had not stored the fish with appellants by way of security for a debt due by him, and, as the appellants had knowledge that the fish sued for were included by the insolvent in the statement of his assets, to which statement they made no objection, but proved against the estate for the whole amount of insolvent's note, and received a dividend thereon, they could not now claim the fish or set up a claim for lien thereon. *Troop* v. *Hart*, 7 S. C. R. 512.

Goods Seized under Attachment — *Bailiff.*]—A bailiff seized certain goods upon an attachment issued by a magistrate under 13 & 14 Vict. c. 53, s. 64, and removed them to the premises of N. He afterwards made a return of what he had done to C., the ordinary bailiff of the division court, and signed a paper relinquishing the possession of the goods, and transferring it to C. The goods having been taken from N.:—Held, that C. had not had such possession as would entitle him to maintain trover. *Cool* v. *Mulligan*, 13 U. C. R. 613.

Goods Seized under Execution—*Action against Sheriff.*]—In an action of trover or conversion against appellant, high sheriff of the county of Cumberland, N.S., to recover damages for an alleged conversion by the appellant of certain personal property found in the possession of the execution debtor, but claimed by the respondent, the pleas were a denial of the conversion, no property in plaintiff, no possession or right of possession in plaintiff, and justification under a writ of execution against the execution debtor. The Judge at the trial told the jury that he "thought it was incumbent on the defendant to have gone further than merely producing and proving his execution, and that if a transfer had taken place to the plaintiff, and the articles taken and sold, defendant should have shewn the judgment on which the execution issued to enable him to justify the taking and enable him to sustain his defence."—Held, that the sheriff was entitled under his pleas to have it left to the jury to say whether the plaintiff had shewn title or right of possession to the goods in question, and therefore there was misdirection. *McLean* v. *Hannon*, 3 S. C. R. 706.

Goods Sold by Insolvent — *Bill of Sale.*]—In trover for goods against an assignee in insolvency:—Held, following In re Barrett, 5 A. R. 206, that the assignee may object to the absence of a bill of sale on an alleged sale by the insolvent, just as an execution creditor or subsequent purchaser for value may do. *Snarr* v. *Smith*, 45 U. C. R. 156.

Goods Sold—*Conditional Sale— Right of Vendor—Innocent Purchaser — Estoppel.*] — The plaintiffs, makers of safes in Toronto, sold a safe to one H. of London, on a written order stipulating that he was to give his notes at four and six months for the price; that his name was to be painted on the front of the safe; and that no title to the safe was to pass to H. until full payment of the price agreed upon. The plaintiffs accordingly had H.'s name painted on the safe, and delivered it to him in August, 1876. In November of the same year defendant purchased the safe from H. after having first searched the office of the county court clerk for incumbrances against it, and believing it to belong to H.; whereupon the plaintiffs brought trover:—Held, that the plaintiffs were not estopped from proving their ownership of the safe, and right to recover. *Walker* v. *Hyman*, 1 A. R. 345.

——— *Delivery to Carriers — Stoppage in Transitu.*] — The plaintiffs, at Montreal, having sold goods on credit to H. & C., living in Meaford, on Lake Huron, shipped them by the Grand Trunk Railway to Toronto, and thence by defendants' railway to Collingwood. While they were at Collingwood defendants received notice of stoppage in transitu, but they delivered the goods to H. & Co., who were found by the jury to have been insolvent at the time of the notice; and the plaintiffs thereupon brought trover:—Held, that the action would not lie, for the goods by the sale and delivery to the carriers were at the purchasers' risk, and the stoppage in transitu did not give the plaintiffs the right of property and possession necessary to maintain trover. *Childs* v. *Northern R. W. Co.*, 25 U. C. R. 165.

——— *Right of Repurchase—Forfeiture.*] —The plaintiff and defendant made the following agreement: "I, S. (the defendant), give $20 to M. (the plaintiff) for the colt which I have in possession, but I promise to give back the colt to M. if he will pay the same sum with 12 per cent. interest, on or before the 1st May, 1866. If not paid, the colt will be the property of S., then he can do with it as he likes, or keep it for himself." The plaintiff paid defendant $15, but failed to pay the balance, and in September, 1867, defendant sold the colt; whereupon the plaintiff brought trover:—Held, that the transac-

tion was in effect a sale with a right of repurchase, not a mortgage; and that the plaintiff not having paid the money by the day, his right was gone. The defendant, therefore, was held not liable in trover; and the plaintiff was allowed to recover the $15 paid by him, as money had and received. *Moore* v. *Sibbald*, 29 U. C. R. 487.

Goods Stored—*Injury by Fire—Sale by Bailee—Damages.*]—Defendants undertook to carry for plaintiffs a quantity of oats to T., which they did, delivering them at an elevator there belonging to S., who received them to hold for plaintiffs. Of the quantity thus delivered the plaintiffs received part before the elevator was destroyed by fire, as it subsequently was. There was a very large amount of grain besides the plaintiffs' in the elevator at the time of its destruction, most of which settled down in a conical mass on the wharf on which the building stood, the remainder falling into the water. Plaintiffs desired to remove what remained of their grain, alleging that they could select it from the general mass, from their knowledge of the portion of the building in which it had been stored; but defendants, who were the bailees of the greater part, assumed charge of the whole for the benefit of all, and refused to allow plaintiffs to do so, stating that it would be sold for the general benefit, which it accordingly was, when the plaintiffs' share of the proceeds was found to amount to only about $28:—Held, that the plaintiffs could maintain trover against defendants in respect of their grain so disposed of by defendants, inasmuch as the latter had no control over it, and ought not to have prevented plaintiffs from removing it if they could find it. Held, also, that this was a case in which no greater than the actual damages sustained should have been assessed; and, the jury having awarded excessive damages, the court ordered a new trial, unless plaintiffs would reduce their verdict to a sum named. *Moffatt* v. *Grand Trunk R. W. Co.*, 15 C. P. 392.

Goods Transferred under Duress.]—Where, in trover, it was apparent that the goods sued for were transferred by plaintiff to defendant when under duress, and the jury found a verdict for defendant against the justice of the case, the court granted a new trial. *Stewart* v. *Byrne*, 6 O. S. 146.

Policy of Insurance.] — See *Buck* v. *Knowlton*, 21 S. C. R. 371.

Produce of Land — *Devise of Part.*] — Where a devise was made to the plaintiff of half the fruit which might grow on a certain farm devised to another person, and the latter gathered the whole of the fruit and disposed of it for his own use:—Held, that an action of trover could be maintained. *Taylor* v. *Nugent*, 6 O. S. 549.

Ship — *Doubtful Right — Non-user.*] — Where, in trover for a schooner, the evidence as to plaintiff's right to the vessel was unsatisfactory, and defendant was not proved to have used or employed it, but merely to have allowed the person who left it with him to take it away, and the jury found for defendant—the court refused a new trial. *Brown* v. *Allen*, 3 U. C. R. 57.

Timber—*Mortgagee of Freehold — Rights against Wrongdoer.*]—The first count of the declaration alleged that one B. was the owner in fee simple of certain land described, and mortgaged it to the plaintiffs in fee, subject to a proviso for redemption on payment of $1,350, and interest, by instalments, as specified; that it was provided in the mortgage that B. should not, without the plaintiffs' written consent, cut down or remove any of the standing timber until the first four instalments of principal, and interest up to a certain date, should have been paid; and that if default should be made in paying the interest the whole principal should become due. It then alleged a default in payment of principal and interest; and that defendants afterwards, without plaintiffs' leave, and against their will, entered on the land and cut down and removed timber and trees, thereby injuring the land, and making it an insufficient security to the plaintiffs for the mortgage debt. There was also a count in trover for the trees. It appeared that the mortgage was one under the Act respecting short forms, with the ordinary proviso for possession by the mortgagor until default, and a covenant not to cut timber, as alleged. The jury, in answer to questions, found that R. had cut down the timber, the other defendant, E., assisting him, in order to sell it and leave the place depreciated; that the damage thus done was $150; and that defendants did not purchase the timber from R. (as had been asserted) believing that he was entitled to sell it; but they said, after their verdict had been recorded against both defendants on these answers, that they did not intend to find E. guilty:—Held, that the action was maintainable, and the verdict properly entered against both defendants, the jury having found them to be joint wrongdoers; that the mortgagee was not restricted to his action on the covenant, but might certainly maintain trover; and semble, that, though not in actual possession, he might, under the circumstances, maintain trespass also. Quære, whether the first count was in case for injury to plaintiffs' reversionary interest, or in trespass. Semble, that it was in trespass; but held, that it disclosed a good cause of action. *Mann* v. *English*, 38 U. C. R. 240.

——— *Property of Crown—Possession of Purchaser — Jus Tertii.*] — In trespass and trover for saw logs it appeared that they were cut in 1868 by one F., and sold by him to the plaintiffs in 1869. The land on which they were cut had been sold in 1864 by the Crown to R., who made a payment then and took a receipt. In 1866 R. transferred his interest to defendant, who marked the logs with his mark, before they left the land. In March, 1869, defendant obtained a patent for the land, and in April he seized the logs which were in plaintiffs' possession:—Held, that the plaintiffs were entitled to recover, for, though the logs when cut were the property of the Crown, the plaintiffs were in possession when defendant took them, and defendant being a wrongdoer could not set up the jus tertii. *McDougall* v. *Smith*, 30 U. C. R. 607.

See Great Western R. W. Co. v. *McEwan*, 30 U. C. R. 559.

Treasury Notes — *Agreement—Lien.*] — Held, under the facts, that the written memoranda and the circumstances of the case shewed that no American currency was collected and set apart for plaintiff under the agreements, so as to pass to him the property in certain known treasury notes or "greenbacks," and give defendant a lien on them for the amount

he was to receive, and that therefore trover and detinue would not lie for the "greenbacks." And that the plaintiff could not recover back the deposit of $400 in "greenbacks," under the count in trover, as that had never been demanded, and there was no evidence of actual conversion of it. *Walsh* v. *Brown*, 18 C. P. 60.

See, also, SALE OF GOODS, II.

VII. STATUTE OF LIMITATIONS.

Date of Conversion—*User of Stray Animals.*]—In April, 1846, certain mares, the property of plaintiff, strayed to defendant's farm; defendant advertised them, but no owner appeared, and defendant began to use them about a year afterwards. In July, 1846, the same mares, being supposed to be on plaintiff's pasture, were sold by the sheriff, under an execution against plaintiff, to one S., who never obtained possession of them, but hearing, in the year 1852, they had foaled and were in defendant's possession, made a written demand on defendant for them and their progeny in September of that year. A year afterwards S. made over his interest to the plaintiff as a gift, without consideration or any delivery. In 1855 the plaintiff made a demand on the defendant for the mares and their colts, which was refused. Pleas, not guilty, not possessed, and Statute of Limitations:—Held, that the conversion took place in 1847, and that the action was barred by the statute. *Scott* v. *McAlpine*, 6 C. P. 302.

Previous Conversion — *Acts Amounting to.*]—About 1857 the plaintiff purchased from the owner of a certain steamer the copper sheeting, &c., thereon, it being understood that he was to get it when a suitable time arrived, as by drydocking or hauling out the vessel. A yacht club soon after bought the hull, which they used as a club ship, having the same understanding with the plaintiff. Shortly afterwards the plaintiff, with the consent of the club, took off the sheeting to the waterline, when the club, thinking that the vessel was being injured, but without disputing the plaintiff's ownership, refused to allow him to take off any more, and the plaintiff desisted. In 1863 the club sold the vessel to one C., who gave a chattel mortgage for the unpaid purchase money, and on his making default, judgment was recovered against him, and, under a fi. fa. goods thereon, C.'s interest was sold to defendant, the plaintiff being at the sale and informing defendant of his claim. It was proved that the vessel had become a total wreck, and useless as a ship. Defendant having refused to give up the copper after demand made, the plaintiff, in 1875, brought trover therefor, when defendant insisted that the plaintiff's right was barred under the Statute of Limitations, for that there was a conversion by the club's refusal to allow the copper to be taken off, or at all events by the sale to C.; and that six years had elapsed in either case before action brought:—Held, that the plaintiff was entitled to the copper, and to maintain trover for it, and that neither of the acts relied on by defendant amounted to a conversion or could be so set up by him. *Keith* v. *McMurray*, 27 C. P. 428.

TRUSTS AND TRUSTEES.

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I. BENEFICIARIES AND CESTUIS QUE TRUST.

1. *Dealings between Trustee and Cestui que Trust.*

Consent to Breach of Trust—*Married Woman.*]—Quere, whether a married woman consenting to a breach of trust can afterwards complain of it; and semble, that if she make a representation and encourage another to act upon it, she will be compelled to make it good. *Hope* v. *Beard*, 8 Gr. 380.

Purchase by Trustee — *Communication of Material Facts.*]—A trustee dealing with his cestui que trust is bound to communicate all facts at all material in the transaction. Therefore, where a trustee of lands for the payment of debts paid the debts, without exercising the power of sale for that purpose, and took a release from the cestui que trust to himself, without informing him that he had previously caused a large number of bricks to be manufactured upon the land, the profits of which might have paid a large part of the claim of the trustee against the estate, the release was held void. *Hope* v. *Beard*, 8 Gr. 380.

Sale to Cestui Que Trust.]— When it appeared that the sale, which had been effected with the consent of the cestuis que trust, was in reality a sale to one of themselves, the court dismissed a bill filed by the vendor seeking to enforce the contract for sale; but under the circumstances without costs. *Ridout* v. *Howland*, 10 Gr. 547.

See Beatty v. *North-West Transportation Co.*, 6 O. R. 300, 11 A. R. 205, 12 S. C. R. 598, 12 App. Cas. 589; *Trust and Guarantee Co.* v. *Hart*, 31 O. R. 414.

See post VII. 7.

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2. *Interest Taken under Particular Deeds.*

Infant — *Vested Interest — Maintenance.*]—By a deed of trust certain lands were conveyed to trustees for the benefit of an infant, to whom the trustees were to convey in fee on her attaining twenty-one:—Held, that the infant took a vested interest; and the court directed an inquiry as to her past and future maintenance. *Stewart* v. *Glasgow*, 15 Gr. 653.

Mortgage in Trust for Creditors — *Construction—Instalments.*]—A mortgagee executed a declaration that he held the security in trust to pay the first instalment payable thereon to two creditors named, and out of the balance secured by the said mortgage "remaining after the said first payment of $3,510, to pay over to each one of the parties hereinafter named . . . (naming eight creditors, whose claims amounted to the whole of the balance secured by the mortgage,) it being expressly understood and declared that each of the said instalments as they shall become due and paid . . . shall be assigned and distributed ratably amongst each of the said parties and in the just proportion that each of their debts bears to the aggregate of the sums and the amount of each instalment:"—Held, that none of the eight named creditors was entitled to share in the first instalment, and that the amount of each of the other instalments as received was to be ratably divided amongst them. *Wigle* v. *McLean*, 24 Gr. 237.

Power of Appointment—*Exercise of—Undue Influence.*]—Property stood limited in trust for such purposes or persons as the wife should appoint; and, in default of appointment, in trust for the wife and her heirs. The wife appointed part of the estate to her husband in fee, and the other part in trust for herself and children:—Held, that these appointments were authorized by the power, but it being suggested on affidavit that they were made under the exercise of undue influence on the part of the husband, further inquiry was directed. *Fenton* v. *Cross*, 7 Gr. 20.

Settlement of Estate—*Taking Effect at Death — Right to Sue Trustee — Personal Representative—Ademption — Declarations of Settlor.*]—J. M., by an informal instrument, purported to assign to W. M., his son-in-law, all his estate, real and personal, "with notes and accounts, on condition that he pay his heirs in the manner following," and the instrument then proceeded to direct the payment to certain of the assignor's children and grandchildren of the sum of $400 each. The instrument also contained an agreement on the part of the son-in-law in the following terms: "The said W. M. hereby becomes bound to pay the above mentioned sums to the parties therein named at the time of the decease of the said J. M., or as soon after as can conveniently be done:"—Held, that the effect of these stipulations in the instrument was to entitle each of the beneficiaries to file a bill in his own name, after the death of J. M., to enforce payment of the $400 coming to him; and that an objection taken at the hearing, that a personal representative of J. M. was a necessary party to the suit, was not sustainable. *Mulholland* v. *Merriam*, 19 Gr. 288.

Subsequently J. M. conveyed to one of his sons a house and premises, valued at $200:—Held, that the trustee could not set this up as part satisfaction of the $400 mentioned in the first deed; and that declarations of the father made subsequently to the assignment in trust and the conveyance, in the absence of the son, were inadmissible to shew that the conveyance was made and intended to be in

part satisfaction of the sum so secured to the son. The decree reported 19 Gr. 288 affirmed on rehearing. *S. C.*, 20 Gr. 152.

Voluntary Settlement — *Enforcement—Revocation.*]—The owner of land, "in consideration of natural love and affection and of one dollar," conveyed it to the defendants in fee, subject to a life estate in his own favour, and "subject to the payment thereout" by the defendants of certain sums to the plaintiffs, the deed being voluntary as to them. The deed contained a covenant by the defendants with the grantor to make the payments, and was executed by the grantor and the defendants. Seven months later the grantor conveyed the same land to the defendants in fee, for their own use absolutely, free from all incumbrances, but subject to his life estate:—Held, that an irrevocable trust was created by the first deed in favour of the plaintiffs, and was enforceable by them, and that this trust was not affected or released by the second deed. Gregory v. Williams, 3 Mer. 582, and Mulholland v. Merriam, 19 Gr. 288, applied. *Edmison* v. *Couch*, 26 A. R. 537.

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3. *Right to Conveyance or Possession of Trust Property.*

Mortgage—*Death of Mortgagee — Foreclosure—Infant Heir—Conveyance to Executor.*] — Where a mortgagee dies intestate, leaving an infant heir, after a decree for foreclosure, but before the final order, and his executor revives the suit and obtains such order, and the mortgage debt equals or exceeds the value of the mortgaged premises; the infant heir is a person seised upon trust, within the meaning of the English statutes 11 Geo. IV. and 1 Wm. IV. c. 10, s. 6, and may be ordered, on petition, without suit, to convey the estate to the executor, or to a purchaser from the executor. *Re Hodges*, 1 Gr. 285.

Prerequisites of Conveyance—*Proof of Right—Costs.*]—When a trustee is required by his cestui que trust to convey to him the trust lands, the cestui que trust must solve all reasonable doubts suggested by the trustee as to the course desired, and must also pay all costs properly incurred in relation to the trust, otherwise a decree for the conveyance will be made only on payment of the costs of the suit to the trustee. *Rowsell* v. *Hayden*, 2 Gr. 557.

Presumption of Right—*Vesting Order.*] —In a suit by a cestui que trust against his trustees, seeking, amongst other things, to obtain a conveyance of lands, it was alleged that three lots had been conveyed to trustees for the plaintiff and his sister, one of such lots having already been conveyed by the trustees to a purchaser at the request of the cestuis que trust. The conveyance to the trustees was not produced, and the memorial did not express any trust. The court, under the circumstances, presumed that a trust had been declared as to all the lots, and gave relief to the plaintiff as to the other two lots, which the court held might be vested in the plaintiff by the decree in the cause, under the statute. *McDougall* v. *Bell*, 10 Gr. 283.

Right to Rents and Profits — *Consequent Right to Possession.*]—The rule is, that when property is devised to a trustee in trust to pay the rents and profits to the cestui que trust, the cestui que trust is entitled to the possession. This rule applies though there are charges on the property; proper terms being in that case imposed by the court as the condition of giving possession. But the court will not give possession to the cestui que trust when it sees that doing so would be violence to the intention. *Whiteside* v. *Miller*, 14 Gr. 393.

See Life Association of Scotland v. *Walker*, 24 Gr. 293.

——— *Consequent Right to Possession—Interests of Others.*]—The rule is that when property is devised to a trustee to pay the rents and profits to any person, the cestui que trust is entitled to the possession; but where other persons have also a claim, it rests in the discretion of the court whether the actual possession shall remain with the cestui que trust or the trustee. J. O. by his will provided as follows: "4. Notwithstanding the directions hereinbefore contained, I desire that if my son W. O. returns to Toronto within five years from the date of my death, my said executors shall hold in trust for him from the time of his return to Toronto said lots Nos. . . subject to the existing life estate of my said wife in a portion thereof, during the term of his natural life, and shall pay over to him all rents, issues, and profits thereof, and after his death shall divide the same between his children in such manner as he shall in his last will and testament direct, and in default of such direction and appointment to divide said property equally between them, conveying to each child his or her share when, if a son, he attains the age of twenty-one years, or a daughter attains the age of twenty-one years or marries, and in the meantime to apply the proceeds of the same to the support and maintenance of said children." In an action by W. O. against the executors and trustees of the will, claiming the actual possession of the property of which he was entitled to the rents and profits:—Held, that he was not entitled to such possession, and his action was dismissed with costs. Whiteside v. Miller, 14 Gr. 393, commented on and followed. *Orford* v. *Orford*, 6 O. R. 6.

See Carradice v. *Scott*, 22 Gr. 426; *Crawford* v. *Lundy*, 23 Gr. 244; *Hefferman* v. *Taylor*, 15 O. R. 670; *Adamson* v. *Adamson*, 17 O. R. 407.

See post VII. 7.

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4. *Right to Follow Moneys or Securities.*

Assignment in Insolvency — *Trust Funds in Hands of Insolvent.*]—Where C., an insolvent, had assigned all his assets and stock-in-trade to S., as trustee for creditors, and the plaintiff claimed a specific lien on the same to the extent of certain trust moneys which had come into C.'s hands, as trustee and executor for the plaintiff, under the will of the plaintiff's father, but had been wrongfully converted by C. to his own use, and employed in his own business to pay his trading debts, but as to which there did not appear to be any identity or connection with the stock-in-trade assigned to S.:—Held, that the plaintiff as against S. was only entitled to a dividend with the other creditors, on the full amount, with interest

down to the time of assignment. *Culhane* v. *Stuart*, 6 O. R. 97.

Bank Deposit — *Transfer to Private Bank Account of Trustee.*]—Where the assignee of an insolvent estate transferred the money to the credit of the estate's account in a bank to his own private account and then used it for his own private purposes, the bank deriving no benefit from the transfer, and it not appearing that the assignee was indebted to the bank:—Held, that the bank was not liable to repay the amount to the estate. *Clench* v. *Consolidated Bank of Canada*, 31 C. P. 169.

See Galbraith v. *Duncombe*, 28 Gr. 27; *Bailey* v. *Jellett*, 9 A. R. 187; *Giraldi* v. *La Banque Jacques Cartier*, 9 S. C. R. 597; *In re Herr Piano Co.*, 17 A. R. 333; *Cumming* v. *Landed Banking and Loan Co.*, 19 O. R. 426, 20 O. R. 382, 19 A. R. 447, 22 S. C. R. 246.

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5. Other Rights and Liabilities.

Administration—*Priorities—Creditors—Repayment—Lien.*]—Trustees made payments to one class of creditors, over whom another class of creditors were entitled to priority, without first paying or retaining sufficient to pay the prior class; and a suit for the administration of the trust estate having been instituted, the creditors who had received such payments were ordered to repay what they had erroneously received, and the unpaid creditors were held entitled to a lien on the trust funds in court, in priority to the claims of the trustees, and all subsequent creditors, for debt and costs. *Wood* v. *Brett*, 14 Gr. 72.

Award—*Submission by Cestui que Trust.*]—Plaintiff leased to M. for twenty-one years, renewable upon certain terms. The lease was assigned by M. to defendant as trustee for one F. At the expiration of the first term arbitration bonds were entered into by F. and the plaintiff. Defendant appeared and acted for F. at the arbitration, and the arbitrators directed a renewal lease at an advanced rent, or that the lessor should pay a certain sum for improvements. The lessor elected to renew, and notified the lessee, who refused to accept at the new rent, and he then brought ejectment:—Held, that the defendant was not bound by the award, the submission being only by his cestui que trust. *McDonell* v. *Boulton*, 17 U. C. R. 14.

Execution against Trustees—*Sale of Lands under—Notice to Purchaser.*]—A judgment was recovered against trustees of land held under a conveyance absolute in form, of which no trust had been actually declared. Execution issued on the judgment, under which the sheriff sold the trust land, but the purchaser knew that the execution defendants were trustees only. Upon a bill filed by the cestui que trust against the trustees and the purchaser, the sale by the sheriff was declared void; the plaintiff decreed to be entitled to the land; and defendants were ordered to pay the costs. *Blackburn* v. *Gummerson*, 8 Gr. 331.

Money Improperly Lent by Trustee—*Authority—Notice.*] — M. was administrator of the estate of S., and was managing the real estate for the heirs; he was also one of the executors and trustees of E. There was a sum of $808.55 due for taxes on some property of the S. estate, and M. paid the same with money of the E. estate, directing the agent of that estate to charge the amount to the S. estate. M. did not enter the amount in his accounts with the S. estate as a loan, and, on the contrary, in the accounts which he rendered he took credit for the amount as a payment by himself. The heirs knew nothing of the loan until some time afterwards; they had not authorized M. to borrow money; and he was at the time indebted to them as agent in a sum exceeding the amount of the taxes. M. afterwards died insolvent, and indebted to both estates:—Held, that the E. estate could not hold the heirs of the S. estate liable for the $808.55, and was not entitled to a lien therefor on the property in respect of which the taxes were payable. *Ewart* v. *Steven*, 18 Gr. 35; *S. C.*, 16 Gr. 193.

Preference — *Claim against Trustee's Estate.*]—The fact that a claim against the estate of a deceased person arose in consequence or by means of a breach of duty as a trustee, affords no ground for giving such claim a preference over other creditors of the estate; as, under the Property and Trusts Act, R. S. O. 1877 c. 107, s. 30, the claimant can only rank pari passu with other creditors. *Brock* v. *Cameron*, 25 Gr. 369.

Sale of Land — *Assent — Application of Purchase Money.*]—Land was settled on a trustee, in trust for the use of H. till marriage, and then upon other trusts for the husband and wife as tenants for life, and ultimately providing for the issue; the assent of the tenant for life was necessary for a sale; and there was power in the deed to appoint H. as a trustee, on the original trustee refusing to act. The trustee had an absolute discretion as to forfeiting and applying the estate among or for the benefit of the parties to the deed in case of anticipation or attempted anticipation:—Held, that the consent of H. and his wife, as tenants for life satisfied the condition as to assent in case of a sale; that H., as trustee, was entitled to receive the purchase money; and that the purchaser was not bound to see to its application. *In re Treleven and Horner*, 28 Gr. 624.

Trust Fund—*Amount—Acquiescence.*] — A cestui que trust will not be estopped from objecting to the amount of the trust fund on the ground of acquiescence, merely because he did not dispute its correctness while his interest was reversionary; especially where, as in this case, he was not in possession of all the material facts, and his interest was not vested. *Inglis* v. *Beaty*, 2 A. R. 453.

See Re Curry, 23 Gr. 277; *Dougall* v. *Dougall*, 26 Gr. 401.

II. Creation of Trusts.

1. By Deed.

(a) Incomplete Execution.

Assignments in Trust for Creditors.]—See Bankruptcy and Insolvency, I.

Insurance Moneys—*Declaration of Trust—Incompleteness.*]—See *Kreh* v. *Moses*, 22 O. R. 307.

Object of Trust—*Crown Grant—Discretion to Divert.*]—In 1819 the Crown granted certain lands to trustees for different purposes; amongst the lands so granted was a block of six acres, being a reservation for a hospital for the town of York; upon the trust, amongst others, to observe such directions, and allow such appropriations of the said lands, as the governor and the executive council for the time being should make and order, pursuant to the purposes for which the said lands had been originally reserved; and also to convey to such persons and upon such trusts as the governor, &c., should by order in writing appoint:—Held, that the trust in this case was not complete, and that by the terms of the grant the executive government retained the power of diverting properties so reserved to other objects. *Attorney-General* v. *Grassett*, 6 Gr. 485, 8 Gr. 130.

Refusal of Trustees to Execute.]—Persons claiming as cestuis que trust under a deed of trust not completed by delivery, alleged in their bill filed to declare and for the enforcing of the trusts, that the deed creating the trust, if any, was not executed or assented to by the persons therein appointed trustees; that the contents of the deed were never communicated to them by the grantors; and that when the contents were afterwards communicated the trustees so appointed expressly renounced, and refused to execute the trusts therein contained. The plaintiffs were volunteers:—Held, on demurrer, that no interest passed by the deed, but that it was void. *Smith* v. *Stuart*, 12 Gr. 246.

(b) *Trusts Partly Illegal.*

Validity as to Legal Trusts.]—A debtor conveyed his real estate to trustees for the benefit of his creditors, to be disposed of by the trustees, first, by a lottery, and, failing that plan, then in trust to sell as they should deem best:—Held, that, although the deed was void as to the trust for a lottery, it was valid as to the other trusts. *Goodeve* v. *Manners*, 5 Gr. 114.

——— *Sale — Income — Corpus — Mortmain.*]—A deed may be good in part, though void in part. Where, therefore, a conveyance was made of lands, and the grantees contemporaneously executed a declaration of trusts in respect thereof, as follows:—To lease the lands until sold, and to sell them; to pay the annual proceeds to the settlor for life, and after the death of the settlor to pay the same, or in the discretion of the trustees a portion thereof, to M. during his life; and the trustees sold a portion of the estate, and at the death of the settlor a bill was filed impeaching the settlement as void under the Statute of Mortmain, which it admittedly was as respected the trusts declared of the corpus of the estate:—Held, that the trusts declared in favour of the settlor and M. were sufficient to support the sale which had been effected; and the bill, as against the trustees, the purchaser from them, and M., was dismissed with costs. *McIsaac* v. *Heneberry*, 20 Gr. 348.

See Kenrick v. *Dempsey*, 5 Gr. 584.

(c) *Other Cases.*

Building Contract—*Creation of Trusts in Favour of Sub-contractors.*]—See *Forhan* v. *Lalonde*, 27 Gr. 600.

Conveyance of Land — *Description of Grantor — Presumption.*] — In proceeding to quiet a title the evidence established that in 1850 L. made a conveyance to one of his brothers of certain land, not that in question, in which he described himself as surviving executor and trustee of his late father, as he was in fact:—Held, that this was not sufficient to render him liable as trustee for the contestants—his brothers and sisters, and those claiming under them—and that he could not, under the facts stated, in any view, be considered a trustee of the land for his brothers and sisters. *Re Curry*, 23 Gr. 277.

——— *Estate — Temperance Society—Locality—New Societies—Injunction.*]—A grantor, by deed, conveyed certain land to three trustees in trust for certain societies at a named place, and their successors, representatives of the aforesaid societies, or the representatives of the said societies (sic) of any temperance society by whatever name it or they might be known or designated. Together with all . . the estate, right, title . . of the grantor, his heirs or assigns, habendum, unto the said trustees and their successors in trust for said societies, or such of them as may continue to exist. . . The three temperance societies mentioned in the deed had all ceased to exist for many years:—Held, that the trustees took only a life estate for their joint lives and the life of the survivor of them, leaving the reversion in fee in the grantor. Held, also, looking at the situation of the premises and the uses for which they were intended, and that the temperance societies originally named were all formed in a certain place, that, although the trust was intended to be confined to temperance societies having the same local habitation, the words in the habendum were large enough to include any temperance society founded at that place while any of the original grantees were living. Held, also, that the plaintiff having been appointed a trustee for such a society, although no such appointment could extend or prolong the life estate granted, was entitled to restrain the defendant, his co-trustee and the sole surviving trustee under the deed, from pulling down a building on the premises, which he had commenced to do. *Armstrong* v. *Harrison*, 29 O. R. 174.

——— *Mortgage to Secure Purchase Money — Interval.*] — L. purchased from S., who conveyed to him, and immediately took back a mortgage to secure the purchase money, in which L.'s wife did not join. L. afterwards conveyed his equity of redemption to H., who subsequently conveyed to S., and S. then sold to another person. L. having died, his widow sued at law for dower. A bill was filed praying an injunction to stay the action:—Held, that L. had in him before his conveyance to H. the beneficial legal estate, being entitled to the value of the land beyond the mortgage debt, and any other incidental advantage; and that in the interval between the execution of the conveyance and mortgage, L. was a trustee for S., but not a bare trustee. *Heney* v. *Low*, 9 Gr. 265.

——— *Short Forms Act.*]—The operation of an ordinary deed of bargain and sale under the Short Forms Act—R. S. O. 1877 c. 102—conveying lands to trustees, considered and acted on. *Seaton* v. *Lunney*, 27 Gr. 169.

Covenant—*Education of Infant—Breach—Damages.*]—The defendants' mother having conveyed her farm to them, they mortgaged it to her in consideration of the conveyance and of $2,500, and covenanted in the mortgage, inter alia, to educate their younger brother. The latter was not a party to the covenant, nor was there anything in the mortgage giving him a right to maintain an action upon it, but there was a stipulation that if the defendants failed to educate him, the mother or her executors might distrain upon them for such sums as might be required from time to time to secure the due performance of the agreement. After the death of the mother, this action was brought by her executors and the younger brother for damages for breach of the covenant:—Held, that there was no trust in favour of the younger brother, and that the action was not maintainable by him. Held, however, that it was maintainable by the executors to the extent that they might recover such sum as would enable them to perform the covenant to educate their co-plaintiff. West v. Houghton, 4 C. P. D. 197, distinguished. *Faulkner* v. *Faulkner*, 23 O. R. 252.

Grant to Uses—*Intent—Mortgage—Subsequent Use.*]—In an indenture the granting words were, "grant, bargain, sell, alien, release, enfeoff, convey, and confirm unto the parties of the second part, their heirs and assigns, all and singular, &c.; habendum in fee, to the use and upon the trust following, that is to say, to and for the use of, &c., infant children of, &c., their heirs and assigns for ever." It appeared in evidence that upon the execution of this deed by the grantor, which was executed in completion of a sale of his equity of redemption to the grantees, in settlement of an overdue mortgage held by them as representing the deceased mortgagee, the grantees discharged the mortgage and then mortgaged the estate back to the grantor to secure the purchase money of his equity. In ejectment, by the infant children against the lessee of the grantees:—Held, that the use was not executed in them (the children); but that, notwithstanding the use of the word "grant" in the deed, and C. S. U. C. c. 90, s. 2, the old rule, that deeds "shall operate according to the intention of the parties, if by law they may," must govern; and that intention, to be gathered from the mortgage transaction, which would otherwise be defeated, clearly was, that the deed should operate as a bargain and sale, vesting the use in the bargainees, the subsequent use being a trust. *Mitchell* v. *Smellie*, 20 C. P. 389.

Mortgagees—*Taking Severally.*]—Mortgagees are not trustees under 4 Wm. IV. c. 1, s. 48, so as to take jointly, when the deed is silent as to the tenancy created. *Doe d. Shuter* v. *Carter*, H. T. 2 Vict.

Railway Company—*Municipal Bonus—Trust for Payment of Claims.*]—The municipality of B., being interested in the completion of a railway, by a by-law of the municipal council agreed to lend to the company, in municipal loan fund debentures, the sum of £100,000; for securing the repayment of which the company executed to the municipality a mortgage on all the property of the company. This mortgage by an Act of the legislature was declared to be valid and binding against all the property of the company, as well that already owned by them as that which they might afterwards acquire; and, by a subsequent agreement made for the settlement of certain suits pending between the parties, it was agreed that the money should be advanced to the company in certain proportions as the work progressed. In compliance with a requisition of the company for funds, "for work done, and material furnished, and right of way, &c., for the use of the railway," the municipal council directed their bankers to hand over to the company certain of the debentures, which, upon their being handed over, were immediately seized by the sheriff, under an execution at the suit of the bankers. Upon a bill filed for the delivery up of the debentures:—Held, that, so far as the debentures were required for the payment of the right of way, rolling stock ready to be delivered, and other materials not yet become the property of the company, they were impressed with a trust to be applied by the company to the payment of these demands. *Brockville* v. *Sherwood*, 7 Gr. 297.

Settlement—*Executed Trusts — Tenants in Common—Trustee of Legal Estate for.*]—By a settlement certain lands were conveyed to trustees, upon trust to hold the said land . . situated . . being lot No. 2 . . to G. A.; and also lot No. 1, situate . . to A. A., sons of (the settlor) . . to the use of them, their heirs and assigns, as joint tenants, and not as tenants in common . . and, lastly, upon trust, that the said trustees . . shall well and sufficiently convey and assure absolutely in fee to the said parties respectively, &c.:—Held, that this trust was an executed trust, in which the limitations were expressly declared, and that neither a difficulty in ascertaining the true construction and legal meaning of the words used, nor the final trust directing the trustees to make the conveyances of the legal estate, made any difference; and that the words must receive the same construction as if they were found in a common law conveyance. Held, also, that an estate in fee in lot 2 passed to G. A., and that the words "as joint tenants, and not as tenants in common," were used to prevent G. A. and A. A. from taking as tenants in common, as it was supposed they would have taken under 4 Wm. IV. c. 1, s. 48, and that they were needlessly used. Held, also, that as G. A. died intestate and unmarried, 1st January, 1852, the defendants, as the children of a deceased brother, took an equal share in the lands as co-tenants in common with the plaintiff (A. A.); that they were as much entitled to the possession of the lands as the plaintiff; and that the plaintiff having obtained the legal estate from the trustees should hold the same as a trustee for all the tenants in common. Held, also, that there being no proof of ouster of the plaintiff, he could not recover from the defendants any mesne profits in this action. *Adamson* v. *Adamson*, 17 O. R. 407.

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2. *By Parol.*

(a) *Statute of Frauds.*

Absolute Deed—*Subsequent Acknowledgment.*]—Though a deed to C. appear absolute

on its face, the Statute of Frauds, s. 7, will be satisfied by any subsequent acknowledgment in writing declaring the trust, and such acknowledgment given at any time will relate back to the creation of the trust. *Harper* v. *Paterson*, 14 C. P. 538.

——— *Trust not in Writing.*]—The plaintiff by his bill alleged that lands had been conveyed to defendant to hold in trust for the grantors, and that defendant had given no value or consideration therefor, the conveyance being made to prevent the grantor improvidently disposing of his estate; but did not allege any writing evidencing the trust. Defendant having suffered the bill to be taken pro confesso:—Held, that the facts, being undenied, were sufficient to enable the court to declare the defendant a trustee, and that it was not indispensable to allege that the trust was evidenced by writing. *McNabb* v. *Nicholl*, 3 C. L. J. 21.

An attorney took a conveyance of property in trust for a client, but did not sign any writing acknowledging the trust. A parol agreement was subsequently entered into, that the attorney should accept the property in discharge of two notes which he held against the client:—Held, that this agreement was binding on the attorney, though not in writing. *Fleming* v. *Duncan*, 17 Gr. 76.

——— *Trust not in Writing — Enforcement by Stranger.*]—In a suit to enforce a trust, s. 7 of the Statute of Frauds not being set up by the answer, it was held that the trust might be shewn by parol, and might be different from the trust stated in the answer. Land having been conveyed in consideration of the grantee agreeing to convey a certain portion to a third person, who was no party to the transaction, it was held that this person could maintain a suit in his own name for such portion. *Shaw* v. *Shaw*, 17 Gr. 282.

——— *Undisclosed Trust.*]—The property of M. having been advertised for sale under power in a mortgage, his wife arranged with the mortgagee, to redeem it by making a cash payment and giving another mortgage for the balance. To enable her to pay the amount, B. agreed to lend it for a year, taking an absolute deed of the property as security and holding it in trust for that time. A contract was drawn up by the mortgagee's solicitor for a purchase by B. of the property at the agreed price, which B. signed, and he told the solicitor that he would advise him by telephone whether the deed would be taken in his own name or his daughter's. The next day a telephone message came from B.'s house to the solicitor, instructing him to make the deed in the name of B.'s daughter, which was done, and the deed was executed by M. and his wife, and the arrangement with the mortgagee carried out. Subsequently B.'s daughter asserted that she had purchased the property absolutely and for her own benefit, and an action was brought by M.'s wife against her and B. to have the daughter declared a trustee of the property, subject to repayment of the loan from B., and for specific performance of the agreement. The plaintiff in the action charged collusion and conspiracy on the part of the defendants to deprive her of the property, and, in addition to denying that charge, the defendants pleaded the Statute of Frauds:—Held, affirming the decision in 19 A. R. 602, that the evidence proved that his daughter was aware of the agreement made with B., and the deed having been executed in pursuance of such agreement, she must be held to have taken the property in trust, as B. would have been if the deed had been taken in his name, and the Statute of Frauds did not prevent parol evidence being given of the agreement with the plaintiff. *Barton* v. *McMillan*, 20 S. C. R. 404.

Lease—*Benefit of Partner—Consideration—Performance.*]—The plaintiff agreed with J. to purchase a mining lease for their joint benefit, the consideration for which was to be the testing of the ore at the crushing mill of the plaintiff, and at his expense. In pursuance of this agreement, J. did arrange for the lease, but took the agreement therefor in his own name. The ore was, as agreed upon, tested at the crushing mill of the plaintiff, and at his expense, but J. attempted to exclude the plaintiff from any participation in the lease, asserting that he had obtained the same for his own benefit solely:—Held, that the true agreement could be shewn by parol; and that the plaintiff was entitled to the benefit of it. *Williams* v. *Jenkins*, 18 Gr. 536.

Purchase of Land—*Parent and Child—Absence of Writing—Possession.*]—A purchase was negotiated by M., the husband and father of the plaintiffs respectively, of a village building lot, and he obtained from the vendor a bond securing the conveyance thereof to his father. M. thereupon went into possession, built upon and otherwise improved the property, and died in possession thereof. Amongst his papers there was found, after his death, a receipt from the vendor, as follows: "Received from Mark McManus payment in full for a building lot of one hundred and four feet square, on which he has a store erected. The deed is to be given when demanded." But no evidence was forthcoming of this document ever having been shewn to the father, who, it was proved, was unable to read or write, in consequence of which he was in the habit of always having his business transacted by M. From the evidence of the vendor it was evident that the whole payment for the lot came from the father. After the death of M., his widow and infant daughter filed a bill seeking to declare the father, who had obtained a conveyance, a trustee of the property. The defendant denied the existence of any trust, and the only evidence against such denial was that given by the widow, who swore that the defendant had stated in answer to a question as to what would become of the property, that "it was all right and whatever was M.'s should be hers," meaning the infant plaintiff:—Held, that there was not sufficient shewn to take the case out of the Statute of Frauds, and the defence thereof was a bar to any relief being given. Quære, whether possession by a son, of property to which his father holds the legal title, is a circumstance of such force or significance as to deprive the father of the protection of the statute, and expose him to the danger of being made a trustee upon oral testimony. On the argument of an appeal in a suit seeking to have the defendant declared a trustee of lands, it appeared that the evidence, if implicitly relied on, tended to make defendant a mortgagee rather than a trustee. A motion was then made to amend the bill in order to make that case; the court, however, refused the application, it not being an exercise of sound discretion to permit the amendment at that stage of the suit. *McManus* v. *McManus*, 24 Gr. 118.

——— *Parent and Child—Joint Benefit—Absence of Writing—Pleading—Statute.*]—A party is entitled to set up the Statute of Frauds as a defence to a suit to enforce a parol agreement respecting an interest in land, although the statute has not been specially pleaded. A father and son lived together on the same farm, of which they obtained a lease in their joint names, the son having for several years, owing to the infirm state of his father's health, the entire management of the farm; and the moneys he received from the sale of the produce thereof, he was in the habit of handing over to his mother for safe-keeping, thus forming, as it were, a common fund. Subsequently he effected a purchase of the farm in his own name, when he paid $1,000 on account of the purchase money, derived partly from private funds and partly from the fund held by the mother, and gave a mortgage with the usual covenants for the residue of purchase money, on which he subsequently made a payment of $1,520; $1,000 of which he borrowed from his wife, the balance being made up partly of funds of his own—partly of funds obtained from the common purse. The father claimed that the purchase had been made for his benefit and the benefit of the son and his brother, and filed a bill to enforce such claim; the son answered denying having made the purchase in the manner alleged, and claiming to be the sole owner of the property, subject to the support of his father and mother out of the same:—Held, that, in the absence of any writing signed by the son, nothing was shewn to take the case out of the Statute of Frauds; and, even if the defence of the statute were not set up, sufficient was not shewn to entitle the father to a decree on the ground of contract, or on the ground of a resulting trust in his favour, by reason of his having paid a portion of the purchase money. *Wilde* v. *Wilde*, 20 Gr. 521.

Purchase of Land by Agent—*Absence of Writing.*]—Where it was shewn by evidence that the defendant had agreed to attend and buy in a property offered for sale by auction, as the agent of the plaintiff and for his benefit:—Held, notwithstanding that the Statute of Frauds had been set up as a defence, and there was not any writing evidencing the agreement, that the plaintiff was entitled to a decree to carry out the agreement. *Ross* v. *Scott*, 22 Gr. 29, 21 Gr. 391.

See, also, *Macaulay* v. *Proctor*, 2 Gr. 390; *Owen* v. *Kennedy*, 20 Gr. 163.

(b) *Sufficiency of Evidence to Establish Trust.*

Conveyance of Land—*Recitals—Proposed Settlement—Corroboration.*]—In April, 1853, the plaintiff and her husband joined in a deed conveying two building lots to her father, who paid to or advanced for the husband the full value thereof, intending and promising at the time to settle the same on the plaintiff, who with her husband continued in possession or in receipt of the rents and profits until May, 1864, when the father sold one of the lots to other members of his family; the plaintiff and her husband remaining in the full enjoyment of the other lot until after the death of the father in September, 1872. Meanwhile, and on the 4th April, 1864, the plaintiff and her husband had joined in another deed to her father, which recited the deed of April, 1853; the promise and proposal of the father to settle the lands on the plaintiff; that it was then considered inexpedient so to settle the same; the desire of the father to make further advances to the husband, and the request by him and the plaintiff that the father would sell the lands; the plaintiff and her husband thereby releasing to him all claim to or interest in those lands. The plaintiff alleged that shortly after the execution of the deed of April, 1853, the father, in pursuance of his promise, did execute and deliver to her a deed of the lands, which she held for several years, and until she gave it up to a messenger, another son-in-law, sent by her father, the father having stated that it would be safer for the plaintiff that the deed should be in his hands. No steps were ever taken to enforce a redelivery of such deed or a further conveyance of the lands to the plaintiff until February, 1874, when the present suit was instituted, seeking to obtain a reconveyance of the lot remaining unsold on payment of what should be found due in respect of advances made for the husband, and an account of the proceeds of the lot disposed of. The only evidence of the existence of such reconveyance was that of the plaintiff and her husband, and of a person resident in the United States, which latter, from its unsatisfactory character, the court refused to adopt:—Held, that the recitals contained in the deed of April, 1864, were not sufficient to create the father a trustee; and therefore the right to redeem, or trust, if any existed, could only be established by parol; and the husband not being a competent witness to corroborate his wife's testimony, which, under the Act, required corroboration after the death of the father, the evidence consequently failed to establish such right or trust. The court therefore reversed a decree enforcing the claim set up by the plaintiff, and dismissed the bill with costs. *Brown* v. *Capron*, 24 Gr. 91.

Deed—*Undisclosed Trust—Finding of Fact—Appeal.*]—Suit to enforce an alleged trust in a deed absolute on its face, or, in the alternative, to have the property reconveyed or sold according to the terms of the alleged agreement. Parol evidence was given at the trial to establish the trust, and its existence was found as a fact by the trial Judge, who made a decree ordering the property to be sold and the proceeds applied according to the agreement set up by the plaintiff:—Held, that the fact of the existence of the trust having been found by the trial Judge, and his finding affirmed by the full court, it should not be disturbed on a further appeal. *Bowker* v. *Laumeister*, 20 S. C. R. 175.

Deed to Two—*Payment by one.*]—A deed was taken in the name of two, as grantees. One of them, claiming to be sole purchaser, filed a bill to have his co-grantee declared a trustee of one moiety of the property for him. The evidence adduced shewed that the deed was intentionally drawn as it was; receipts for instalments of the purchase money were taken in the name of the two, and the mortgage for securing the balance of purchase money due was executed by both:—Held, that, if even the whole purchase money was advanced by the one, it was not sufficient to shew that the purchase was made solely for his benefit. *Hutchinson* v. *Hutchinson*, 6 Gr. 117.

Mortgage—*Interest in—Previous Sworn Admission.*]—The plaintiff claimed as belong-

ing to him a mortgage which was in defendant's name, and had been given for the purchase money of the mortgaged land; the plaintiff had been in the insolvent court at one time after the transaction, and had sworn that he had parted with his interest in the property to the defendant in satisfaction of a debt:—Held, that, though there was some (not satisfactory) evidence in favour of the plaintiff's present claim, it was not sufficient against this sworn statement of his own. *Ross* v. *Ross*, 16 Gr. 647.

Purchase of Land—*Joint Benefit—Denial — Inconsistency.*]—The father of the plaintiffs and the defendant were brothers, and the defendant obtained a deed in his own name of 100 acres of land, in which it was alleged his brother was jointly interested. It was shewn distinctly that the defendant had at one time made a deed to his brother of some land, although the defendant, after his brother's death, denied having given any deed, but on the hearing he admitted giving a deed of an adjoining property, for which no patent had issued, although the defendant's name had been entered in the books of the Crown lands department as an applicant for purchase. It was shewn that a box containing the deeds in reference to the property had been stolen, and the contents had never been seen since. The court, under the circumstances, notwithstanding the denial of the defendant, whose evidence was not consistent: — Held, that the plaintiffs were entitled to an account of the purchase money received by the defendant upon the sale of the property, and ordered the defendant to pay the costs to the hearing. *Curry* v. *Curry*, 26 Gr. 1.

——— *Option Procured by Plaintiff.*]—The plaintiff had procured a lease of a farm for two years, with the privilege of purchase, and had taken it in the names of two of the defendants, but without their knowledge, the plaintiff being the witness. The bill alleged that this course was adopted for plaintiff's benefit, who, it was shewn, had before then assigned all his effects for the benefit of his family, the plaintiff asserting that his intention was to pay the purchase money for the land out of moneys belonging to his wife, in the hands of trustees, in which, however, the plaintiff had no interest; but there was no writing to evidence the trust alleged by the plaintiff. One of the defendants, who was a trustee of the wife's money, subsequently bought the property and paid the price out of his own funds, and gave to trustees a lease of it for the use of the plaintiff's wife and children. Upon a bill filed to have it declared that the purchase had been made for the benefit of the plaintiff, and to have the lease to trustees cancelled, the court, under all the circumstances, refused the relief prayed, and dismissed the bill with costs, but with liberty to file a new bill if the plaintiff should be so advised. *Parsons* v. *Kendall*, 6 Gr. 408.

——— *Payment in Part—Possession.*]—A lot of land was purchased by defendant in his own name, and he gave a mortgage for the purchase money. The bill alleged that D., through whom the plaintiffs claimed, was the real purchaser, and that defendant was his agent and trustee in the matter. Part of the purchase price had been paid with D.'s money, and he had possession of the property for many years, and until his death. The trust, which was denied, was proved by parol; and the court decreed the plaintiffs entitled to the property, subject to a charge for any sum paid by the defendants on account of the purchase money, or for taxes. *Denny* v. *Lithgow*, 16 Gr. 619.

——— *Payment of Purchase Money—Possession—Notice.*]—In an action for the possession of lands under a mortgage by the defendant's brother W., and the foreclosure thereof, the defendant claimed under a trust of the lands by W. in his favour; and also a title by possession. The trust was a parol one, namely, that W. should procure a lease of the lands for defendant, who was then under age, from the Canada Company, the lease apparently containing a right of purchase, and should afterwards pay the purchase money, and take the deed in his, W.'s, name, and hold it until defendant became well, when he was to transfer it to defendant, he having been ill at the time. The defendant paid the money for the lease and the purchase money for the land:—Held, that the parol evidence was not sufficient to support the trust; but, in any event, as the trust was to be enforced against W. and his grantees, it could not prevail against plaintiffs' mortgage, it having been registered without notice of the trust. Held, also, that the evidence failed to establish a title by possession. *Bank of Montreal* v. *Stewart*, 14 O. R. 482.

See Cuthbert v. *Cuthbert*, 11 Gr. 88, *post* V. 1; *Kerr* v. *Read*, 23 Gr. 525.

(c) *Other Cases.*

Absolute Deed — *Cutting down to Mortgage—Constructive Trust — Foreign Lands.*] —See *Gunn* v. *Harper*, 30 O. R. 650.

Chattel Mortgage—*Debts Due to Mortgagee and Others—No Trust Declared—Validity under Bills of Sale Act.*]—See *Bank of Hamilton* v. *Tamblyn*, 16 O. R. 247.

Money Impressed with Trust—*Failure of Object.*] — Money was advanced by the plaintiff for the express purpose of being deposited in a bank in order to meet a cheque of L. and C., given by their agent J. H. C. This cheque never was paid or presented after such deposit, and the amount remained in the bank to the credit of L. and C., who were trustees, claiming no beneficial interest in the money. On a bill filed for that purpose the court declared that the estate of J. H. C., who had since died, had not any claim or interest in the fund, and ordered the amount, together with the interest allowed on the deposit, to be paid to the plaintiff. *Gamble* v. *Lee*, 25 Gr. 326.

Partnership Articles — *Assumption of Liabilities—Trust for Creditors.*]—See *Henderson* v. *Killey*, 14 O. R. 137, 17 A. R. 456; *Osborne* v. *Henderson*, 18 S. C. R. 698.

Purchase of Plaintiff's Goods at Sale under Distress — *Request—Agreement for Redemption.*] — The plaintiff's goods being about to be sold under a distress for rent, it was agreed between the plaintiff and defendant that if defendant would go to the sale and purchase the goods, the plaintiff would at a future day repay him the price and interest, when defendant was to give him the goods. The defendant went to the sale and purchased the

goods; but, although some months afterwards the plaintiff tendered the amount and interest, defendant did not deliver the goods:—Held, that there was no contract on which the defendant could be held liable for damages; and that the plaintiff's remedy, if any, was by an action for deceit, or by a proceeding in equity to have defendant declared a trustee for him. *Timmins* v. *Surples*, 26 C. P. 49.

Undertaking to Convey to Third Person—*Constructive Trustee—Statute of Limitations.*] — The defendant, in consideration that his father would convey to him certain lands in the township of Caledon, undertook and agreed to convey to the plaintiff, a younger brother, 100 acres of land in the township of Artemesia. The father conveyed the land to the defendant, but, instead of his conveying to the brother as he had agreed, he sold the property more than twelve years before bill filed, the plaintiff being then at least twenty-one years of age:—Held, that, under these circumstances, the defendant was merely a constructive trustee, and that the plaintiff's right to call for a conveyance was barred by the Statute of Limitations; but the defendant, having denied the agreement to convey, which, however, was clearly established by his own evidence, the court, on dismissing the bill, refused to give defendant his costs. *Ferguson* v. *Ferguson*, 28 Gr. 380.

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3. *By Will.*

Direction to Sell and Divide Proceeds—*Express Trust.*]—Where lands are devised to trustees to sell and divide the property among residuary legatees, this is not a charge upon land within the meaning of 22 Vict. c. 88, s. 24, so as to be barred by the lapse of twenty years, but it is the case of an express trust within s. 32 of the same Act. *Tiffany* v. *Thompson*, 9 Gr. 244.

Directory or Precatory — *Absolute Devise.*]—J. K., by his will, devised all his estate —real and personal—to his wife "for her own use and disposal, trusting that she will make such disposition thereof as shall be just and proper amoug my children:"—Held, that this operated as an absolute devise to the widow, who had the power of conveying such a title to the lands as a purchaser under her vendee was bound to accept; and that no trust was created. *Nelles* v. *Elliot*, 25 Gr. 329.

——— *Charge on Residue.*]—A testator, by his will, gave the residue of his real and personal property to his daughter, the lands to be held by her in fee tail; and in a subsequent part of the will added, "I wish and desire that my daughter shall make a competent provision for my niece, Mrs. B., at Hamilton." By a codicil, executed on the same day as the will, after making alterations in his will, he added, "And I do hereby devise to my niece, Mrs. B., of Hamilton, the lot containing one-fifth of an acre fronting on School street, in the town of Kingston:"—Held, that the words "I wish and desire" were not precatory merely but directory, and formed a charge upon the residuary estate. *Baby* v. *Miller*, 1 E. & A. 218.

——— *Distribution among Children.*]—A testator devised thus: "All the residue of my property, real and personal, I devise to my wife, requesting her to will the same to our children, as she shall think best." The widow devised the whole of the property to one child out of a number:—Held, that the words used were directory, not precatory only; and that the widow was bound to divide her property among all the children, although she might, in her discretion, give personalty to one and realty to another. *Finlay* v. *Fellowes*, 14 Gr. 66.

Discretionary Trust—*Death of Trustee —Reference for Distribution.*] — A testator, having disposed of one-third of the residue of his estate, real and personal, devised and bequeathed the remainder to J. C., to hold to him, his heirs, executors, administrators, or assigns, for ever, in trust for the benefit of the testator's two sisters, and with all responsible expedition to convert the same into money, and apply the same, or the proceeds thereof, for the benefit of the said two sisters as he should consider just. And he directed that his other trustees should not inquire into or interfere with such distribution as J. C. might choose to make between the said two sisters, except when their concurrence should be necessary for conformity. J. C. predeceased the testator:—Held, that the above was in substance an imperative declaration of a trust of the whole remainder for the equal benefit of the two sisters, with a discretionary power reposed in the trustee as to its mode of execution, and the court would undertake to discharge vicariously what could not otherwise be done, owing to J. C. predeceasing the testator, by referring it to the master to ascertain the proper mode of carrying out the directions of the will. Re Charteris, 25 Gr. 376, commented on. Order made referring it to the master to work out a scheme for the application and distribution of the fund. *Charteris* v. *Charteris*, 10 O. R. 738.

Maintenance of Infants—*Income—Setting apart Share.*]—Under a devise of land to a father "during his life, for the support and maintenance of himself and his (three) children, with remainder to the heirs of his body or to such of his children as he may devise the same to," there is no trust in favour of the children so as to give them a beneficial interest apart from and independently of their father, but the children, being in needy circumstances, will be entitled, as against the father's execution creditor, who has been appointed receiver of his interest, to have a share of the income set apart for their maintenance and support, and in arriving at the share it is reasonable to divide the income into aliquot parts, thus giving one-fourth to the receiver. *Allen* v. *Furness*, 20 A. R. 34.

Power of Appointment—*Coupled with Trust.*]—A will gave land to testator's heir-at-law for life, with power to appoint the same to one or more of his sons; and declared that the devisee (his heir) was not to alien or mortgage the lot; and that it was not to be attachable by his creditors:—Quære, whether this power was a naked power, or created a trust in favour of the devisee's sons. *McMaster* v. *Morrison*, 14 Gr. 138.

A testator devised certain property to his son A., and to the heirs of his body lawfully to be begotten, with power to appoint any one or more of such heirs to take the same:—Held,

that A. took an estate tail, and that there was no trust in favour of his children. *Trust and Loan Co.* v. *Fraser*, 18 Gr. 19.

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4. *Implied and Resulting Trusts.*

Conveyance of Land to Rectify Error—*Party Interested—Trustee for Others.*]—A married woman owning land, she and her husband sold it, but the husband only conveyed by the deed, and the wife barred dower. The error was not discovered until after the property had passed into other hands. The original owner and her husband then executed, for a nominal consideration, a deed conveying the property absolutely to one of the parties interested, but under the belief that its only effect was to remove the defect in the first deed, and to confirm the title of all parties claiming thereunder. On a bill by one of these parties and the grantor (the husband being dead) it was declared that the grantee in the second deed was a trustee for all the parties interested. *Grace* v. *MacDermott*, 13 Gr. 247.

Deposit of Money—*Notice of Trust.*]—Money was recovered by the administratrix of a person killed by a railway accident, and the shares allotted to her children were deposited by her with her brother, who was fully cognizant of the facts:—Held, that he was liable to account to the children as their trustee. *Secord* v. *Costello*, 17 Gr. 328.

Payment of Part of Purchase Money—*Husband and Wife.*]—A man, by arrangement with his wife and two daughters—by a former marriage—one of whom was a minor, purchased lands and built thereon, and paid for the property out of moneys produced by the joint labour of himself, his wife, and the daughters; the deed for the property was taken in the name of the wife, upon the understanding that she should hold the same for the benefit of herself and husband during their lives, and after their decease that it should go to the daughters. By his will the husband declared that he had no real estate, but desired the wife to direct her executors to sell the property so purchased, and divide the proceeds between his two daughters and a daughter of his wife by a former husband:—Held, that the purchase could not be treated as an advancement to the wife; that there was a resulting trust in favour of the testator; and that the trusts in favour of the daughters, if declared, having been so by parol only, were within the Statute of Frauds, and therefore void. *Owen* v. *Kennedy*, 20 Gr. 163.

——— *Lunatic—Devise—Ademption.*]—A. received $1,200 belonging to his son-in-law R., and invested it with other money of A.'s own in the purchase of a farm, which cost $3,200. R., with his family, went into possession of the farm, and A., the father-in-law, by his will devised the farm to R.'s wife and son jointly for the life of the wife, with remainder to the son in fee, subject to the payment of $200 to a daughter of R., and of $600 to another person. It was assumed in the cause that R. was, at the time of the purchase and thenceforward, of unsound mind and unable to give a valid assent to the transaction; and the court held that on that assumption he was entitled to the $1,200 as against A.'s estate, and that the devise to his wife and son was no satisfaction of the claim; and also that he was probably entitled to a charge on the land for the debt. But the court directed inquiries whether R. was at the date of the transaction of mental capacity to assent to the purchase; and if so, whether he did assent thereto; also, inquiry as to the occupation of the land by R. and his family before the death of A., and the value of such occupation. *Goodfellow* v. *Robertson*, 18 Gr. 572.

——— *Trust as to Part of Land—Evidence of Joint Purchase—Advances.*]—A resulting trust arises only in favour of a party paying the whole or any aliquot part of the purchase money; and in such case the trust is of a part of the purchased estate proportioned to the sum paid. No such trust arises from the circumstances of a man making advances on behalf of another who has agreed to buy the estate. The defendant, whose daughter had married a brother of the plaintiff, and who was an executor named in the will of S., the father of the plaintiff, took a more than common interest in the settlement of his testator's estate. In consequence he suggested to the plaintiff the desirability of his purchasing the estate of one G. situated near the S. homestead; as by so doing the plaintiff could retain the G. farm, leaving the homestead to be equally divided between his two brothers; saying, in answer to plaintiff's objection of want of means, that he, defendant, would assist him with his payments. The purchase was accordingly effected, and plaintiff and defendant paid up the purchase money, but not in any agreed proportions, some of defendant's advances being made partly in cash and partly in kind, and the conveyance was made to the plaintiff, the defendant subscribing as the witness and retaining possession of the deed. On an attempted settlement of their respective rights, the defendant under the circumstances insisted that he and the plaintiff had purchased on joint account and that there was a resulting trust in his favour as to the moiety of the land, and that he was entitled to the then value thereof, and, on proceedings taken by the plaintiff, the trial Judge gave judgment for the defendant. On appeal:—Held, that on the evidence there was not a resulting trust; that all defendant could claim was a lien for the amount advanced by him. A reference was directed to take the account, and it was ordered that if the amount found due should not be paid in six months, the estate should be sold, the amount due defendant paid to him, and the surplus, if any, paid to the plaintiff. *Sanderson* v. *McKercher*, 13 A. R. 561.

But held by the supreme court, reversing the judgment, that the evidence greatly preponderated in favour of the contention of defendant, that the purchase was a joint one by himself and the plaintiff. Held, also, that the plaintiff being liable for an ascertained portion of the purchase money, there was a resulting trust in his favour for his interest in the land. *S. C., sub nom. McKercher* v. *Sanderson*, 15 S. C. R. 296.

Payment of Purchase Money—*Cohabitation.*]—A man and woman lived together as husband and wife, the man having a wife living at the time; and land purchased in the man's name was paid for by the woman out of money of her own:—Held, that there was a resulting trust in favour of the woman. *Hoig* v. *Gordon*, 17 Gr. 599.

——— *Cohabitation — Advances.*]—A woman while living with a man to whom she be-

lieved herself to have been lawfully married, but who, it was afterwards discovered, was at the time of the pretended marriage with her a married man, advanced money for the purpose of buying certain real estate, the bond for the conveyance whereof was taken, with her knowledge, in his name:—Held, that there was not any resulting trust in favour of the woman. *Street* v. *Hallett*, 21 Gr. 255.

——— *Conveyance — Alteration — Divesting.*]—A suit for alimony having been instituted against the plaintiff, he, for the purpose of protecting his lands from process, conveyed the same to his solicitor for a money consideration, and the solicitor afterwards made a conveyance of the same lands back to him, but the solicitor retained this conveyance in his own possession, and subsequently, by desire of the plaintiff, struck out his name as the grantee, and inserted as such the name of the sister of the plaintiff, the consideration money being paid by the plaintiff. The court, being of opinion that this had not the effect of divesting the title which had been reconveyed to the plaintiff, and that, even if it had had that effect, there would have been a resulting trust in favour of the plaintiff, decreed relief accordingly, but, under the circumstances, without costs. And semble, that if, in the circumstances stated, no consideration money had passed between the parties, there would have been a trust by operation of law in favour of the plaintiff. *Wilson* v. *Owens*, 26 Gr. 27.

——— *Evidence Establishing Trust.*]—At a sale of lands under execution, the nephew of the execution plaintiff, a person without means, bid off the property; and, on a subsequent day, produced to the sheriff the receipt of the plaintiff for the amount bid, and paid the sheriff his fees, who conveyed the lands to the nephew, who was allowed by his uncle to retain the title. The uncle subsequently agreed to sell the land to a purchaser, who made default in the bargain, and the nephew wrote to his uncle pointing out the proper proceedings to compel the purchaser to complete the contract. The uncle then died, having devised the property. The nephew set up a claim to be entitled absolutely. On a bill filed by the devisee, the court declared the nephew to be a trustee, and ordered him to convey to the plaintiff. *McDonald* v. *McMillan*, 14 Gr. 99.

——— *Failure to Shew Parol Trust.*]—Where a party fails to establish a parol trust in favour of himself and another, which his own evidence supports, he cannot afterwards insist upon a resulting trust or trust by operation of law. A party claiming a resulting trust in his favour, arising out of a purchase of land, must shew that such purchase was made on his behalf, and that the money paid on account of it was his money. *Wilde* v. *Wilde*, 20 Gr. 521.

——— *Parent and Child—Advancement.*]—Where money is advanced by a father for the purchase of land, the conveyance of which is taken in the name of his son, the presumption is, that the transaction is by way of advancement to the son. In such a case, there is no resulting trust in favour of the father. *Knox* v. *Traver*, 24 Gr. 477.

Sale of Land by Promoter to Company.] — There is a distinction between a trust for a company of property acquired by promoters and afterwards sold to the company, and the fiduciary relationship engendered by the promoters, between themselves and the company, which exists as soon as the latter is formed. A promoter who purchases property with the intention of selling it to a company to be formed does not necessarily hold such property in trust for the prospective company, but he stands in a fiduciary relation to the latter, and if he sells to them must not violate any of the duties devolving upon him in respect of such relationship. If he sells, for instance, through the medium of a board of directors who are not independent of him, the contract may be rescinded, provided the property remains in such a position that the parties may be restored to their original status. There may be cases in which the property itself may be regarded as being bound by a trust, either ab initio or in consequence of ex post facto events; if a promoter purchases property for the company from a vendor who is to be paid by the company when formed, and, by a secret arrangement with the vendor, a part of the price, when the agreement is carried out, comes into the hands of the promoter, that is a secret profit which he cannot retain; and if any part of such secret profit consists of paid-up shares of the company issued as part of the purchase price of the property, such shares may, in winding-up proceedings, be treated, if held by the promoter, as unpaid shares for which the promoter may be made a contributory. Judgment in 21 A. R. 66 affirmed. *In re Hess Mfg. Co., Edgar* v. *Sloan*, 23 S. C. R. 644.

Sale of Wife's Property—*Retention of Proceeds by Husband — Lapse of Time.*]—Where a house and land, the separate property of a married woman, were sold, and the proceeds taken and retained by her husband, who had never accounted for them:—Held, in an action on a promissory note of the wife, twenty-six years after, that the husband remained a trustee for his wife of the proceeds, and the wife's claim constituted separate estate. *Briggs* v. *Willson*, 24 A. R. 521.

Sale under Execution — *Purchase by Party Liable—Executor—Benefit of Devisee.*]—The plaintiff and defendant were brothers, and their father, who died in the year 1846, appointed the plaintiff and two other sons of the testator his executors, and among other bequests devised the land in question to the defendant. The testator had indorsed a note for the accommodation of the plaintiff, and after the testator's death the holders of this note sued the plaintiff and the two brothers as executors and recovered judgment against them. The land in question was sold under that judgment at sheriff's sale and was bought in by the plaintiff. The will had been registered, but had not been proved. Subsequently the plaintiff mortgaged the land in question and sold it subject to the mortgage. The mortgagees afterwards sold, and the plaintiff again bought in the land:—Held, that it being the plaintiff's duty to pay the note, he had not acquired the title to the land for his own benefit at the sheriff's sale, but became a trustee for the devisee, the defendant, and that this trust revived when the plaintiff bought in the land for the second time. Held, further, that, assuming that the plaintiff was not a trustee for the defendant and had no paper title, there was not, upon the evidence, any possession of the land in question by the plaintiff sufficient to confer a title under the Statute of Limita-

tions. Held, lastly, that the situation of the parties not having changed, the defendant was not bound by laches. *McDonald* v. *McDonald*, 17 A. R. 192, 21 S. C. R. 201.

See Wilde v. *Wilde*, 20 Gr. 521, *ante* II. 2; *Hutchinson* v. *Hutchinson*, 6 Gr. 117, *ante* II. 2; *Ferguson* v. *Ferguson*, 28 Gr. 380; *Denny* v. *Lithgow*, 16 Gr. 639; *Bank of Montreal* v. *Stewart*, 14 O. R. 482; *Giraldi* v. *Banque Jacques Cartier*, 9 S. C. R. 597; *Coyne* v. *Broddy*, 13 O. R. 173; *Tupper* v. *Annand*, 16 S. C. R. 718; *Irvine* v. *Macaulay*, 24 A. R. 446.

See, also, *post* VII. 7.

III. NOTICE OF TRUST.

Bank Deposit — *Solicitor—Misappropriation—Notice to Bank—Charge on Deposit—Priorities.*]—The plaintiff placed in the hands of one J., a practising solicitor, a mortgage given to the plaintiff by one R., together with a discharge thereof duly executed, for the purpose of enabling J. to receive payment of the mortgage money, which R. was borrowing from a loan company, and which, it was arranged between the plaintiff and J., in the presence of the local manager of a bank of which J. was the solicitor, should be deposited by the solicitor in such bank to the credit of the plaintiff, and a deposit receipt obtained therefor. J. did receive the money by a cheque of the loan company, amounting with interest to $6,455, which he deposited in the bank to his private account. About ten days afterwards he drew upon his account for $3,000, which he deposited in the same bank to the credit of the plaintiff, obtained a deposit receipt therefor in favour of the plaintiff, and transmitted the same to the plaintiff on the 26th August, 1881, telling the plaintiff in his letter that "the balance will be sent next week." He drew upon the fund for his own purposes, and died, without rendering any account, on the 4th September following:—Held, that the bank was not affected with notice of the moneys so deposited being trust moneys, so as to render the bank liable for J.'s misappropriation thereof. After the deposit of the plaintiff's money J. recovered a sum of $1,182.95 for the defendant S. as her solicitor, which he also deposited in the same account on the 24th August, 1881. Up to the time of J.'s death the amount at his credit always exceeded this sum:—Held, that the moneys so deposited by J. had been held by him in a fiduciary character, and might be followed by the plaintiff and S.; but, as between the plaintiff and S., that S. had a first charge upon the sum at the credit of J. for the full amount of her deposit, and that the balance was applicable to the discharge of the plaintiff's demand. The bank claimed the right to charge against the account, in priority to the claims of the plaintiff and S., cheques and notes of J. presented or maturing after notice to the bank of J.'s death:—Held, that they could not do so, and, in consequence of having made such claim both in the court of appeal and the court below, they were refused their costs. *Bailey* v. *Jellett*, 9 A. R. 187.

See Clench v. *Consolidated Bank of Canada*, 31 C. P. 169.

Bank Directors — *Misappropriation of Funds—Assets of Company — Following.*]—Three persons occupying a fiduciary position towards a bank, became partners in a firm, agreeing to pay for their interests a certain sum of money in liquidation of creditors' claims. They did pay this sum but out of moneys of the bank wrongfully appropriated by them. Subsequently the firm was formed into a joint stock company, and the assets of the partnership were assigned by the partners to the company. The company soon afterwards failed, and a winding-up order was made, the original assets, upon which the bank claimed a lien, to a considerable extent coming into the possession of the liquidator:—Held, that the original partners were not affected with constructive notice of the means by which the incoming partners obtained the moneys brought in, and that, no actual notice to them or to the company being shewn, the bank had no lien. *In re Herr Piano Co.*, 17 A. R. 333.

Conveyance of Land by Trustees—*Breach of Trust—Crown Patent—Notice to Purchaser—Declaration of Cestui Que Trust—Estoppel—Restraint on Anticipation.*]—G. W. F., being the patentee of a certain lot described as of 200 acres, but in which there was a deficiency, conveyed half the lot to J. B. P., who conveyed it to trustees to hold in trust for E. F., wife of G. W. F., upon certain trusts declared in the deed, and without power to her to anticipate. The deficiency was subsequently discovered, and upon application to the government in the name of the trustees by G. W. F., whom they appointed their agent for that purpose, a grant of land, as compensation for the deficiency, was made to the trustees of E. F., describing them as such. Subsequently an instrument under seal, expressed to be made between J. B. P., of the first part, and E. F., wife of G. W. F., of the second part, and the trustees, of the third part, which recited the facts and also that the trustees had no real interest therein, but were named as grantees merely as being the legal owners of the original half lot, was executed by J. B. P. and E. F., whereby they declared that the parties of the first and second parts were not in any way interested in the lands granted as compensation, and that the trustees held them as trustees for G. W. F., the patentee of the original lot. After this the trustees, by the direction of G. W. F., conveyed to E., under whom the defendants claimed. E. F. now brought this action to recover the land:—Held, that E. and those claiming under him must be held to have had notice of the title of the trustees, who were described in the patent as trustees of E. F.; that this land was subject to the trusts of the previous conveyance to them; that E. F. was not estopped by the declaration executed by J. B. P. and herself, which did not divest her of her title; and that, therefore, she was entitled to recover. Held, also, that there should be a reference to the master to take an account of taxes paid and permanent improvements made upon the lands, further consideration being reserved. *Foott* v. *Rice*, 4 O. R. 94. See the next case.

The plaintiff, who was cestui que trust of certain lands held by B. and P. under a settlement which provided against anticipation, became a party to an instrument, in which B. and P. were named as parties, but did not execute, which amongst other things declared that B. and P. had no real interest in certain lands which had been allotted to and were subsequently granted to them by a patent from the Crown, in which they were described as

trustees for the plaintiff, for the purpose of making compensation for a deficiency in the settled estate, and that the person really entitled to such compensation was her husband, G. W. F. Subsequently B. and P. executed a similar declaration, and afterwards G. W. F. joined with them in a conveyance of these lands to a bonâ fide purchaser (E.), under whom the defendants claimed:—Held, (1) that the lands granted as compensation were subject to the terms of the settlement. (2) That the plaintiff's declaration in favour of her husband was inoperative in face of the restraint upon anticipation. (3) That the terms of the grant from the Crown were sufficient to put E. on inquiry, and that he and the defendants must be taken to have had notice of the settlement, and the plaintiff was therefore entitled to recover. Foott v. Rice, 4 O. R. 94, approved. *Foott* v. *McGeorge*, 12 A. R. 351.

Pledge of Shares—*Breach of Trust—Redemption—Following Moneys.*]—The curator to the substitution of W. Petry paid to the respondents the sum of $8,632, to redeem 34 shares of the capital stock of the Bank of Montreal entered in the books of the bank in name of W. G. P., in trust, and which the said W. G. P., one of the grevés and manager of the estate, had pledged to the respondents for advances made to him personally. J. H. P. et al., appellants, representing the substitution, by their action demanded to be refunded the money which they alleged H. J. P., one of them, had paid by error as curator to redeem shares belonging to the substitution. The shares in question were not mentioned in the will of W. Petry, and there was no inventory to shew they formed part of the estate, and no acte d' emploi or remploi to shew that they were acquired with the assets of the estate:—Held, that the debt of W. G. P. having been paid by the curator with full knowledge of the facts, the appellants could not recover: arts. 1047, 1048, C. C. Bank stock cannot be held, as regards third parties in good faith, to form part of substituted property, on the ground that it has been purchased with the moneys belonging to the substitution, without an act of investment in the name of the substitution and a due registration thereof: arts. 931, 938, 939, C. C. *Petry* v. *Caisse d'Economie de Notre Dame de Québec*, 19 S. C. R. 713.

Pledge of Securities—*Breach of Trust—Following Securities.*]—After all the debts of an estate are paid, and after the lapse of years from the testator's death, there is a sufficient presumption that one of the several executors and trustees dealing with assets is so dealing quâ trustee and not as executor, to shift the burden of proof. Ewart v. Gordon, 13 Gr. 40, discussed. W. and C. were executors and trustees of an estate, under a will. W., without the concurrence of C., lent money of the estate on mortgage, and afterwards assigned the mortgages, which were executed in favour of himself, described as "trustee of the estate and effects of" (the testator). In the assignment of the mortgages he was described in the same way. W. was afterwards removed from the trusteeship, and an action was brought by the new trustees against the assignees of the mortgages to recover the proceeds of the same:—Held, reversing the judgment in 19 A. R. 447, that in taking and assigning the mortgages W. acted as a trustee and not as an executor; that he was guilty of a breach of trust in taking and assigning them in his own name; that his being described on the face of the instruments as a trustee was constructive notice to the assignees of the trusts, which put them on inquiry; and that the assignees were not relieved as persons rightfully and innocently dealing with trustees, inasmuch as the breach of trust consisted in the dealing with the securities themselves and not in the use made of the proceeds. Judgments in 19 O. R. 426, and 20 O. R. 382, restored. *Cumming* v. *Landed Banking and Loan Co.*, 22 S. C. R. 246.

Shares Held "in Trust."]—A holder of shares "in trust" is not a mandataire prête-nom and holds subject to a prior title on the part of some person undisclosed. Such holding not being forbidden by the law of the colony, a transferee from such holder is bound to inquire whether the transfer is authorized by the nature of the trust. *Bank of Montreal* v. *Sweeny*, 12 App. Cas. 617, 12 S. C. R. 661.

Where a father, acting generally in the interest of his minor child, but without having been appointed tutor, and being indebted to the estate of his deceased wife, of whom the minor was sole heir, subscribed for certain shares in a commercial or joint stock company on behalf of the minor, and caused the shares to be entered in the books of the company as held "in trust," this created a valid trust in favour of the minor without any acceptance by or on behalf of the minor being necessary. Such shares could not be sold or disposed of without complying with the requirements of arts. 297, 298, and 299 of the civil code; and a purchaser of the shares having full knowledge of the trust upon which the shares were held, although paying valuable consideration, was bound to account to the tutor subsequently appointed for the value of such shares. The fact of the shares being entered in the books of the company and in the transfer as held "in trust" was sufficient of itself to shew that the title of the seller was not absolute and to put the purchaser on inquiry as to the right to sell the shares. Sweeny v. Bank of Montreal, 12 S. C. R. 661, 12 App. Cas. 617, referred to and followed. *Raphael* v. *McFarlane*, 18 S. C. R. 183.

Transfer of Bank Shares—*Trust—Provisions of Will—Bank Charter.*]—Where the respondent bank (incorporated by 18 Vict. c. 202) registered an absolute transfer of its shares, which had been executed by trustees and executors under a will to one of the residuary legatees, regardless of a provision in the will directing the substitution of the legatee's lawful issue at his death, and the transferee disposed of the shares so as to defeat the rights of the issue:—Held, that such registration, unless with actual knowledge of a breach of trust, was not wrongful, having regard to s. 36 of the Act, which enacts that the bank is not bound to see to the execution of any trusts, express, implied, or constructive, to which any of its shares may be subject. Notice that the shares were held by the trustees and executors in trust; possession by the bank of a copy of the will; the facts that transfers of others of its shares by the same trustees to other residuary legatees contained notice of substitution, that the president of the bank was also an executor of the will, and that the law agent of the bank was also law agent of the executors:—Held, to be insufficient to affect the bank with knowledge of the particular trusts sought to be enforced. *Simpson* v. *Molsons Bank*, [1895] A. C. 270.

Transfer of Shares—"*In Trust.*"]—Where the respondent had transferred shares as security for a loan:—Held, that the appellants, as derivative transferees from the lender, were not affected by a trust in favour of the respondent, unless such trust was clearly disclosed on the face of their author's title, or was otherwise notified to them. The words "manager in trust," appended to the signature of a bank manager, import that he held and transferred the shares in trust for his employers, the bank; and are not calculated to suggest that he stood in a fiduciary relation to some third person, so as to affect a transferee for value with constructive notice of such relationship. Judgment in 20 S. C. R. 481 reversed, and judgment in 18 A. R. 305 restored. See, also, 19 O. R. 272. *London and Canadian L. and A. Co.* v. *Duggan*, [1893] A. C. 506.

See Blackburn v. *Gummerson*, 8 Gr. 331, *ante* 1.; *Wright* v. *Leys*, 8 O. R. 88; *Bank of Montreal* v. *Stewart*, 14 O. R. 482; *Barton* v. *McMillan*, 20 S. C. R. 404; *Ryckman* v. *Canada Life Assurance Co.*, 17 Gr. 550.

IV. Revocation of Trust.

Conditions — *Failure to Perform.*]—By deed between B., grantor of the first part, certain named persons, trustees, of the second part, and P., grantee, of the third part, B. conveyed his property to the trustees, the trusts declared being that if P. survived B. and performed certain conditions intended for the support or advantage and security of B., which by the deed he covenanted to perform, the trustees should convey the property to P., and it should be reconveyed to B. in case he survived. No trust was declared in the event of P. surviving and failing to perform the conditions or of failure in the lifetime of both parties. In an action by B. to have this deed set aside:—Held, that the conditions to be performed by P. were conditions precedent to his right to a conveyance of the property; that by failure to perform them the trust in his favour lapsed; and B., the grantor, being the only person to be benefited by the trust, could revoke it at any time, and demand a reconveyance of the property. *Poirier* v. *Brulé*, 20 S. C. R. 97.

See Re Mackenzie Trusts, 28 O. R. 312; *Edmison* v. *Couch*, 26 A. R. 537.

V. Suits and Proceedings by and against Trustees.

1. *Account—Suits for.*

Consent Decree—*Trustee Declared Mortgagee.*]—A bill was filed against a trustee for an account and reconveyance. At the hearing a decree was drawn up by consent, treating the defendant in all respects as a mortgagee:—Held, upon appeal from the master's report, that from the time of the decree the rights of the parties respectively must be determined by the rules ordinarily applicable to cases of mortgage. *Kerby* v. *Kerby*, 5 Gr. 587.

Delay in Suing — *Poverty—Limitations Act—Dormant Equities Act.*]—In 1832 a person who held a bond for the conveyance of land, on which he had erected a steam saw mill and other buildings, having become involved, assigned his property to certain creditors as trustees, to work the mill and sell the lumber, and apply the proceeds in payment of his debts, &c., and then went to the United States, where he remained for some years. One of the trustees took the sole management of the trust estate and went into possession. Subsequently, under an execution against the goods of the owner, the sheriff sold the steam engine set up in the mill, which the managing trustee, who was agent only for one of the creditors, purchased for his principal, at a great undervalue, and removed the same from the mill, and afterwards procured a deed of the property in his own name from the proprietor, which he also transferred to his principal. In 1855 the assignor filed a bill for an account of the trust property, alleging that his poverty in the meantime had prevented him from enforcing his rights. It was held, in the court below, that he was entitled to the relief sought, notwithstanding the Statute of Limitations and the Dormant Equities Act. But on appeal the decree was reversed, and the bill in the court below was dismissed with costs. *Beckit* v. *Wragg*, 6 Gr. 454, 7 Gr. 220.

Jurisdiction of Probate Court.]—A court of probate has no jurisdiction over accounts of trustees under a will, and the passing of accounts containing items relating to the duties of both executors and trustees is not, so far as the latter are concerned, binding on any other court, and a court of equity, in a suit to remove the executors and trustees, may investigate such accounts again and disallow charges of the trustees which were passed by the probate court. *Grant* v. *MacLaren*, 23 S. C. R. 310.

Payment out of Court—*Expenses in Suit.*]—In a suit against trustees under a voluntary assignment, a decree having been made by consent for taking the accounts, which reserved further directions and costs, an application by the trustees afterwards, and before the accountant was ready to report, for the payment out of court of money to pay certain expenses they had incurred in the suit, was refused with costs. *City Bank* v. *Maulson*, 1 Ch. Ch. 382.

Reddition de Comptes.]—An action en reddition de comptes does not lie against a trustee invested with the administration of a fund until such administration is complete and has terminated. *Township of Ascot* v. *County of Compton, Village of Lennoxville* v. *County of Compton*, 29 S. C. R. 228.

Reference—*Scope of*—*Report—Special Circumstances.*]—A decree was made against a trustee for an account, with a direction to allow him any moneys expended by him on certain specified accounts to the extent of such moneys as had been received by him in respect of the trust estate. In taking the accounts, the trustee desired the master to report, as a special circumstance, the fact that he had properly expended, in respect of taxes and otherwise, moneys exceeding the amount received:—Held, that the master had acted properly in refusing to enter into such items of account. *Braun* v. *Aumond*, 19 Gr. 172.

Submitting to Account—*Decree.*]—Defendant, by answer, having submitted to account as trustee, the court decreed an account and partition, although without such submis-

sion in the answer there was no evidence of defendant holding the property in trust. *Cuthbert* v. *Cuthbert*, 11 Gr. 88.

Summary Reference—*Charge of Misconduct.*]—Where a bill was filed against a trustee and executor for an account, and the bill also sought to have the trustee removed for misconduct, the court refused an order for a summary reference to the master, under the 77th order of May, 1850. *Christie* v. *Saunders*, 2 Gr. 395.

See Kenrick v. *Dempsey*, 5 Gr. 584.

See, also, *post* VII. 4 (a).

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2. *Application by Trustees for Advice or Protection of Court.*

Bill for Administration.] — Trustees and executors stand in a different position from creditors or cestuis que trust as to the right to have the estate administered in court, and cannot, without experiencing some difficulty in carrying out the trusts or administering the estate, file a bill for that purpose. *Cole* v. *Glover*, 16 Gr. 392.

See, also, *McGill* v. *Courtice*, 17 Gr. 271.

Bill for Execution of Trusts—*Costs.*]—Where trustees filed a bill to have the trusts of the deed appointing them executed, without suggesting any difficulty in the way of their winding up the affairs of the estate, the court refused them their costs of the suit. *Cummings* v. *McFarlane*, 2 Gr. 151.

Bill to Confirm Title—*Sale—Parties.*]—Executors sold and conveyed land under a supposed power in the will. This construction of the will being disputed, they filed a bill to confirm the purchaser's title, the defendants being the purchaser and one of the devisees:—Held, that the question could not be decided on a record so constituted. *Grummet* v. *Grummet*, 14 Gr. 648.

Petition for Advice — *Construction of Will.*]—The court cannot, on a petition under the 31st section of the Act to amend the law of property and trusts (29 Vict. c. 28), make a declaration as to the construction of a will. *In re Williams*, 1 Ch. Ch. 372.

——— *Litigation.*]—Where it is plain that a dispute can be settled only by litigation, it is not necessary for a trustee to ask the advice of the court before defending. *In re Williams*, 22 A. R. 196.

Sale of Land — *Approval of Court.*] — Trustees, having unsuccessfully offered for sale estate property, viz., a block consisting of hotel and stores and a dock together, and subsequently the hotel and stores together, received an offer for the hotel by itself:—Held, on an application to the court to approve and confirm the sale under R. S. O. 1897 c. 129, s. 39, and con. rule 938, s.-s. (f), that the court had jurisdiction to express its approval, and under the circumstances it was a case in which the jurisdiction ought to be exercised. *Nelson* v. *Bell*, 32 O. R. 118.

Trustee Relief Act — *Payment into Court—Mortgage Surplus.*]—Where trustees, having had a certain mortgage assigned to them to secure a debt due to the trust estate, realized the security, and, after satisfying the claim, still had a surplus remaining:—Held, that they were entitled to pay the surplus into court under the Imperial Trustee Relief Act, 10 & 11 Vict. c. 96, R. S. O. 1877 c. 40, s. 36. *Re Kingsland*, 15 C. L. J. 85.

Where a mortgagee proceeds to a sale of the mortgaged premises under the power contained in his security, and a surplus of the proceeds remains in his hands after payment of his own claim, and there are adverse claimants to such surplus, he cannot apply under the Trustee Relief Act to pay such surplus into court; his proper course is to file a bill of interpleader. *Western Canada L. and S. Co.* v. *Court*, 25 Gr. 151.

——— *Payment into Court — Insurance Moneys.*]—On an application by a benevolent society for leave to pay into court insurance money claimed by different parties: — Held, that s.-s. 5 of s. 53 of the Judicature Act extends the benefit of the Act for the relief of trustees to such cases, and that the society was entitled to pay the money in. *Re Bajus*, 24 O. R. 397. See *Re Coutts*, 15 P. R. 162.

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3. *Costs.*

Administration Suit—*Breach of Trust.*]—An executor or trustee will sometimes be entitled to his costs in a suit for administration, notwithstanding that he may have committed a breach of trust, if no loss is sustained by the estate by reason of such breach. *Wiard* v. *Gable*, 8 Gr. 458.

Ejectment by Trustee.] — Where the widow of a settlor, who had a claim for dower, had obtained possession of the trust estate, the costs of an action of ejectment to recover possession were allowed out of the estate. *Edinburgh Life Assurance Co.* v. *Allen*, 23 Gr. 230.

Establishment of Trust — *Heirs of Owner.*] — Where a person claimed, on the ground of a parol trust, to be entitled to a conveyance of land from the heirs of the legal owner, and they required him to establish the trust by a suit, which he did:—Held, that he was not entitled to the costs of the suit. *English* v. *English*, 15 Gr. 330.

Improper Claim by Trustee.]—Where a trustee set up an improper claim to the property, the subject of the trust, and a bill was filed to compel him to deliver up possession and account, the court charged him with the costs of suit up to the hearing, reserving the consideration of interest and subsequent costs. *Fisher* v. *Wilson*, 2 Gr. 260.

Injunction Restraining Sale of Trust Estate.]—In a suit by a cestui que trust against a trustee and another, to prevent the trustee from selling the land to his co-defendant, an injunction was obtained restraining the defendants from alienating or incumbering the property or committing waste. The plaintiff, without the knowledge of his solicitor, entered into an agreement with the co-defendant to compromise the suit. On an application by the plaintiff's solicitor for an order directing that his costs should be paid by the co-defendant:—Held, that the property

had been recovered or preserved by the injunction, and that the co-defendant was liable for the solicitor's costs. *Morgan* v. *Holland*, 7 P. R. 74.

Position of Trustee in Litigation.]—A trustee or executor stands in the same position as any other litigant with respect to costs. *Smith* v. *Williamson*, 13 P. R. 126.

Reference — *Accounting — Absence of Fraud.*]—A trustee of lands for payment of debts paid the debts without selling for that purpose, and took a release from the cestui que trust to himself, which release was held void, and an account directed. Under the circumstances, neither fraud nor neglect to account having been established against the trustee, who had accounted as such in the master's office, and the property or produce thereof being forthcoming for the benefit of the estate, the court directed the trustee to receive his subsequent costs as in ordinary cases, as between solicitor and client. *Hope* v. *Beard*, 10 Gr. 212.

Refusal by Trustee of Use of Name.]—A trustee, having refused to allow his name to be used as plaintiff, was refused his costs of defence, although no blame attached to him in other respects. *Ellis* v. *Ellis*, 7 Gr. 102.

Severing in Defence.]—A trustee who severed in his defence, because his co-trustee had refused to act in conjunction with him in the management of the estate, was, under the circumstances, refused his costs. *Gibson* v. *Annis*, 11 Gr. 481.

Where trustees sever in their defence, only one set of costs will be allowed except on special grounds, and these where they exist ought to be set up in their answers. Mere distance of residence does not in all cases justify severing. *Lavin* v. *O'Neill*, 13 Gr. 179.

A surviving trustee and the representatives of a deceased trustee are not within the rule which prevents trustees severing in their defence at the risk of having but one set of costs between them. *Reid* v. *Stephens*, 3 Ch. Ch. 372.

Solicitor-Trustee — *Profit Costs.*]—On rehearing the order as reported 24 Gr. 503, disallowing to a solicitor-trustee costs other than costs out of pocket in suits to which he was a party, was reversed. *Meighen* v. *Buell* 25 Gr. 604.

See Re Mimico Sewer Pipe and Brick Mfg. Co., Pearson's Case, 26 O. R. 289; *Colonial Trusts Co.* v. *Cameron*, 24 Gr. 548; *Taylor* v. *Magrath*, 10 O. R. 689; *City Bank* v. *Maulson*, 1 Ch. Ch. 382; *Cummings* v. *McFarlane*, 2 Gr. 151; *Randall* v. *Burrowes*, 11 Gr. 364; *Kenrick* v. *Dempsey*, 5 Gr. 584; *Bailey* v. *Jellett*, 9 A. R. 187; *In re Helliwell's Trusts*, 21 Gr. 346; *Spratt* v. *Wilson*, 19 O. R. 28; *Lucas* v. *Hamilton Real Estate Association*, 26 Gr. 384; *Nash* v. *McKay*, 15 Gr. 247.

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4. *Limitation of Actions.*

Mortgage Sale—*Account.*]—When a sale is effected under a mortgage made pursuant to the Manitoba Short Forms of Mortgages Act, which, like the Ontario Short Forms of Mortgages Act, provides that the mortgagee shall be possessed of and interested in the moneys to arise from any sale, upon trust to pay costs and charges and the principal and interest of the debt, and upon further trust to pay the surplus, if any, to the mortgagor, the mortgagee becomes an express trustee of the proceeds of sale, and the mortgagor is entitled to bring an action against him for an account notwithstanding the expiration of six years from the time of sale. Section 32 of the Trustee Act, R. S. O. 1897 c. 129, does not apply in such a case, because, if there is a surplus, it is trust money still retained by the trustee. *Biggs* v. *Freehold L. and S. Co.*, 26 A. R. 232.

Notice Disputing Claim — *Time for Bringing Action.*]—Before the commencement of an action against purchasers of land for indemnity against a mortgage, one of them died, and on the plaintiff notifying the administrator of his claim, he was served with a notice under s. 35 of R. S. O. 1897 c. 129, the Trustee Act, disputing it. An action was afterwards brought against such administrator, but, on it appearing that he was then dead, and that an administrator de bonis non had been appointed, an order was obtained amending the writ by substituting as defendant such last named administrator, upon whom the writ was served more than six months after the service of the notice:—Held, that the proceedings against the defendant must be deemed to have commenced only on the service of the writ on him, and this being more than six months from the service of the notice, the plaintiff's action was barred. *Gooderham* v. *Moore*, 31 O. R. 86.

Notice to Claimants — *Trustee Limitation Act — Reversionary Interest — Relief of Trustees — Acting "Reasonably."*] — A notice by executors that "all parties indebted to the estate of the late (testator) are required to settle their indebtedness" by a named date, and that "parties having claims against said estate are also required to file same by said date," is not a sufficient notice within s. 38 of R. S. O. 1897 c. 129 to protect the executors from liability for claims not brought to their knowledge until after the estate has been distributed by them. Their liability in this respect extends to claims against their testator for money lost owing to a breach of duty by him as trustee. Persons having a reversionary interest in a trust fund may bring an action to compel the trustee to make good money lost owing to his negligence, and the Trustee Limitation Act, R. S. O. 1897 c. 119, s. 32, does not run against them from the time of the loss, but only from the time their reversionary interest becomes an interest in possession. Judgment in 30 O. R. 110 affirmed. After judgment had been given in the court below against the executors in this case, the Act for the Relief of Trustees, 62 Vict. c. 15 (O.), was passed:—Held, that, assuming the Act to apply to such a case, it did not relieve the executors, for they could not be held to have acted reasonably when they failed to follow the plain statutory directions as to notice to creditors and claimants. *Stewart* v. *Snyder*, 27 A. R. 423.

See Stephens v. *Beatty*, 27 O. R. 75; *Irvine* v. *Macaulay*, 24 A. R. 446.

5. *Pleading.*

Enforcement of Trust — *Writing.*]—A bill to enforce a trust need not allege that there is any evidence in writing of the trust. *Smith* v. *Ross*, 15 Gr. 374.

Establishment of Trust—*Necessary Allegations.*]—Where a bill alleged with sufficient certainty to shew, if true, the relation of trustee and cestui que trust to exist between the plaintiff and defendants, the court, although portions of the bill did not come up to the requirements in this respect, overruled a demurrer for want of equity. The order allowing a demurrer for want of jurisdiction (21 Gr. 451), affirmed on rehearing. *Grant* v. *Eddy*, 21 Gr. 568.

Waste—*General Charge—Injunction.*]—A general charge in a bill that the defendant, an executor and trustee, is committing waste on the testator's property, without specifying any act of waste, is not sufficient to sustain an injunction or receiver. *Sanders* v. *Christie*, 1 Gr. 137.

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6. *Other Cases.*

Action at Law—*Equitable Defence—Account.*]—One D. held a mortgage with a power to sell upon default, the mortgagor still to be responsible for any balance. Upon default he sold and repurchased some of the goods, which he subsequently exchanged for land. Upon an action for the balance over the amount realized by the original sale, the defendant contended that the plaintiff must be considered a trustee for him in the repurchase, and having sold at an advance must account for the balance:—Held, that to obtain relief application must be made to equity. *Annes* v. *Dornan*, 10 C. P. 299.

——— *Dividend on Insolvent Estate — Transfer to Equity.*]—The declaration alleged, in substance, that the plaintiff was assignee of a mortgage made by one G. W. M. for $2,015, on which default had been made, by which the whole principal became due; that G. W. M. was in business in partnership with H. W. M., and becoming embarrassed they assigned all their estate, real and personal, to defendants, in trust to sell the same and distribute the proceeds ratably among their creditors, including the plaintiff; that the defendants had sold the estate, and held the proceeds in trust for the plaintiff and other creditors, and held moneys applicable to the amount due to the plaintiff, and were aware and had notice of the plaintiff's claim, but refused to pay the plaintiff any part of such proceeds; that defendants had realized all the estate, and had long been in a position to divide and pay the same among the creditors, and had in fact paid some of them; and that the greatest portion of the estate so assigned was the sole property of G. W. M.:—Held, not a proper case in which to proceed at law under the Administration of Justice Act, 1873, 36 Vict. c. 8, s. 2 (O.), it being impossible in a court of law to administer the trust and do complete justice without having all the parties interested in the trust before the court; and the suit was therefore transferred, under s. 9, to the court of chancery. *Leys* v. *Withrow*, 38 U. C. R. 601.

——— *Defence of Accord and Satisfaction — Equitable Replication—Fraud—Repudiation.*]—Declaration on an agreement to pay $450 by a promissory note; breach, non-payment. Sixth plea, set-off on two notes made by plaintiff and indorsed by defendant; seventh plea, in substance, that the same set-off was pleaded by the defendant in a former action by plaintiff against him for the same causes of action as in this suit, and the plaintiff not having replied thereto, and the defendant being in a position to sign judgment of non pros., it was agreed that the plaintiff should pay defendant $20 and costs in full settlement, and in case of non-payment that defendant should be at liberty to proceed for the recovery thereof in said suit; and that the plaintiff accepted said agreement in full satisfaction and discharge of plaintiff's claim. The plaintiff replied, equitably, that defendant was indebted to the plaintiff as executor for goods of the testator purchased on credit, and before the credit had expired or defendant had acquired the notes pleaded as a set-off, the plaintiff and his co-executors assigned the testator's estate for the benefit of creditors; and plaintiff sued in the former action and sues in this only as a trustee for the estate:—Held, replication no answer, for the accord and satisfaction were not said to have been in fraud, or to the disadvantage of the trust, or to have been repudiated by the trustees. *Parsons* v. *Crabb*, 34 U. C. R. 136.

Distribution of Estate — *Preferential Claim—Parties.*]—Where a bill was filed by one of two creditors, both of whom claimed to be paid in priority to the other creditors of the estate, against the representatives of the trustee and one of several creditors, who claimed that all should share pro ratâ:—Held, that all parties interested were sufficiently represented. *Wigle* v. *Wigle*, 24 Gr. 237.

Establishment of Trust—*Estoppel.*]—A. took a conveyance as trustee for B. B., in answer to a bill by a person who claimed the property against both, was induced by A. to swear that he, B., had not any interest in the property:—Held, in a subsequent suit by B. against A., that he, B., was not precluded from shewing the trust. *Washburn* v. *Ferris*, 16 Gr. 76.

Extension of Time for Payment.]—An extension of time for payment of money found due by trustees and executors, appears to be granted only in cases where a forfeiture would result from its non-payment. *Lawson* v. *Crookshank*, 2 Ch. Ch. 373.

Foreclosure or Sale — *Mortgage in Trust.*]—A person holding mortgages in trust for sale to indemnify him against loss on account of the mortgagor, is not entitled to foreclose in case of default, but only to a decree to sell. *Paton* v. *Wilkes*, 8 Gr. 252.

Foreign Lands — *Execution of Trust.*]—Where a trustee of lands situated in a foreign country is resident here, the court will decree an execution of the trust. *Smith* v. *Henderson*, 17 Gr. 6.

Injunction— *Receiver — Fraud.*] — The court will grant an order for an injunction to restrain a trustee from interfering with the trust estate where fraud is charged, and by the same order direct the appointment of a receiver. *Vernon* v. *Kinzie*, 2 O. S. 40.

——— *Waste—Tenant in Common.*]—No injunction will be granted between tenants in common, except in cases of actual destruction. But where a tenant in common of one moiety was trustee of the other under a will, and was felling timber for his own benefit in breach of his trust, he was enjoined from doing so, it being considered that his right of ownership on his own moiety was to be exercised in subordination to his duty as trustee of the other moiety. *Christie* v. *Saunders*, 2 Gr. 670.

See Armstrong v. *Harrison*, 29 O. R. 174, *ante* II. 1.

Injunction to Restrain from Selling.]—Held, that the court has jurisdiction to prevent trustees about to sell property under a power or trust for sale, from selling in an imprudent and improper manner; and thus in this case, where it appeared that, although cestuis que trust representing five-sixths of the property desired a sale without reserve, the interests of the remainder would be prejudiced by so selling, an injunction was granted to restrain such trustees from selling without a reserve bid. *Downey* v. *Dennis*, 14 O. R. 219.

See, also, *Morgan* v. *Holland*, 7 P. R. 74, *ante* 3.

Judgment against Trustee—*Following Securities—Bar.*]—Held, that the recovery of judgment by the plaintiffs against a defaulting trustee for the amount of trust moneys advanced by him upon certain mortgages did not bar the plaintiff's right of action against the defendants, to whom the trustee had, in breach of trust, assigned the mortgages, to compel a reassignment thereof, or an account of the moneys paid thereon. *Cumming* v. *Landed Banking and Loan Co.*, 19 O. R. 426, 20 O. R. 382. See *S. C.*, 19 A. R. 447, 22 S. C. R. 246.

Question between Co-defendants — *Title to Land.*] — The title to land conveyed upon trust being in dispute between the person creating the trust, being a defendant to the suit, and one of the other defendants, and the plaintiffs being entitled to have the land sold if it really belonged to the author of the trust, the question between him and his co-defendant must be decided in the suit. *Gillespie* v. *Grover*, 3 Gr. 558.

Specific Performance — *Trustees for Purchaser—Decree—Offer to Repurchase.*]—Where at the hearing of a suit to enforce a purchase made by a testator against the trustees under his will, it was made to appear that there were not funds of the estate wherewith to pay the amount of the purchase money due, and the widow of the testator offered to purchase, in her own name, the property at a price which was considered beneficial for the estate, a direction to that effect was inserted in the decree, in order to avoid the necessity of a petition being presented to the court for that purpose, after the usual decree should have been made. *Delisle* v. *McCaw*, 22 Gr. 254.

Unnecessary Suits.]—The court discountenances unnecessary or useless suits against trustees. *Liddell* v. *Deacon*, 20 Gr. 70.

See Porteous v. *Reynar*, 13 App. Cas. 120.

VI. TRUSTS IN COURTS OF COMMON LAW.

Joint Trust—*Severance — Legal Estate.*]—In 1824 the Crown granted to O. S., G. M., and J. M., in fee, certain land in Kingston, which had formerly been set apart for a rectory, and on which a church had been erected, in trust, among other things, that whenever the governor should erect a parsonage or rectory in Kingston, and duly present an incumbent thereto, the trustees should convey the land to such incumbent and his successors forever, upon the same trusts thereinbefore expressed. On the 21st January, 1836, letters patent issued erecting a rectory in Kingston. Before the 30th May, 1837, the trusts of the patent of 1824 had been fulfilled, and on that day by deed poll, after reciting the two patents above mentioned, and the induction of the said O. S. into the said rectory, the said G. M. and J. M., the two other grantees in the first patent mentioned, in fulfilment of the trust, conveyed the land to said O. S. as rector and incumbent, to hold to him and his successors, subject to and under the uses and trusts set forth in the letters patent to them:—Held, on the authority of Denne d. Bowyer v. Judge, 11 East 288, that the conveyance of 1837 passed two-thirds to the plaintiff, and that he was entitled to recover for that; for semble, in a court of law the ground that the trust to convey, being joint, was incapable of severance, could not arise, the legal estate only being in question. *Lyster* v. *Kirkpatrick*, 26 U. C. R. 217.

Unexpressed Trust—*Illegality—Validity of Conveyance.*]—Held, that a conveyance of certain pews in a church belonging to the Church of England to the plaintiff, a member of that church, even if clothed with an unexpressed trust in favour of a corporation, incapacitated under the Church Temporalities Act from being pewholders, by reason of their not belonging to the church, was nevertheless in a court of law binding between the parties to it. Semble, that a court of equity would set it aside, but that a court of law could not recognize such trust, even if it were set out. *Ridout* v. *Harris*, 17 C. P. 88.

See Leys v. *Withrow*, 38 U. C. R. 601; *Annes* v. *Dornan*, 10 C. P. 299; *Parsons* v. *Crabb*, 34 U. C. R. 136, *ante* V. 6.

VII. TRUSTEES.

1. *Appointment and Removal of.*

(a) *Appointment of New Trustees by the Court.*

Application for — *Forum.*] — An application by petition (without suit) for the appointment of a new trustee under Imperial Act 13 & 14 Vict. c. 60, should be made in court and not in chambers. *In re Lash*, 1 Ch. Ch. 226.

Death of Acting Executor and Trustee—*Probate.*]—L. appointed M. and K. executors and trustees of his will for the management of his property thereby bequeathed (which was personalty) and the payment of the legacies; and he afterwards added and signed a memorandum as follows: "If anything should happen to the trustees, I appoint R. to be one of the trustees." M. proved

the will; after his death, K. renounced:—Held, that M.'s executor did not represent the testator, L.; and that R. was entitled to probate. *In re DeLaronde*, 19 Gr. 119.

Death of Sole Trustee—*Appointment of Two—Cestui que Trust.*]—Where the court appoints a new trustee, it will be satisfied with one. Where the trustee appointed by a will had died, and he who was named by the testator to succeed him was out of the jurisdiction, and shewn to be an unsuitable person, the court appointed in his place a cestui que trust under the will, whom the testator had named as a trustee thereof under certain contingencies which had not occurred; but directed another to be associated with him, although the will provided for one trustee only acting in the trust at one time. *In re Dillon's Trusts*, 3 C. L. J. 126.

Death of Surviving Trustee.]—A testator, by a codicil, directed that the trustees named in his will, or the survivor of them, or the heirs, &c., of such survivor, should, during the minority of his children, have power to appoint some person whom they might think fit and competent to take charge of and carry on his business as it had been carried on during his lifetime, and to pay the person so appointed a salary. The surviving trustee died intestate, leaving his widow, who administered to his estate, but declined acting as a trustee under the will; and his eldest son being an infant, and therefore incapable of acting as such trustee, the persons interested under the will filed a bill for the appointment of a new trustee:—Held, that, under the circumstances, the parties were entitled to have a new trustee appointed. *Lyon* v. *Radenhurst*, 5 Gr. 544.

——— *Executors — Creator of Trust.*]—There is nothing anomalous, nor is there any incompatibility, in the creator of a trust being a trustee thereof and seeing to the due execution of the trust. A trust was created in favour of two trustees and the survivor, and the executors and administrators of such survivor. The executors of the survivor, one of whom was the creator of the trust, proved his will. A petition, verified by affidavit, was afterwards presented by the executors, setting forth that at the time of proving the will they were not aware that they thereby became trustees of the trust estate, and one of them, the creator of the trust, swore that had he been aware that such would be the effect of proving the will, he would not have done so. The court thought this a sufficient reason for appointing new trustees, and, under the circumstances, the adult cestui que trust consenting, ordered the trustees to be paid their costs of the application out of the estate. *In re Hellicell's Trusts*, 21 Gr. 346.

Number of Trustees.]—It is contrary to the course of the court, without some very special reason, to sanction the appointment of one trustee in place of three. *Kingsmill* v. *Miller*, 15 Gr. 171.

Personal Trust not Transferable to New Trustees.] — A testator by a codicil directed that the trustees named in his will, or the survivor of them, or the heirs, &c., of such survivor, should during the minority of his children have power to appoint some person whom they might think fit and competent to take charge of and carry on his business as it had been carried on during his lifetime, and to pay the person so appointed a salary. The surviving trustee died intestate, leaving his widow, who administered to his estate, but declined acting as a trustee under the will, and his eldest son being an infant and therefore incapable of acting as such trustee, the persons interested under the will filed a bill for the appointment of a new trustee:—Held, that the powers given by the codicil were personal to the trustee named in the will, or the survivor, or the heirs, &c., of the survivor, and could not be exercised by any trustee appointed by the court. *Lyon* v. *Radenhurst*, 5 Gr. 544.

By a clause in a marriage settlement, it was stipulated that trustees should at their option, during the life of the intended husband, permit him or the intended wife to take and use the rents, issues, and profits of the trust estate to their own use; and a subsequent clause provided that new trustees should be appointed in certain contingencies. Upon a bill filed by the wife to appoint a new trustee by reason of the residence of one out of the jurisdiction:—Held, that this trust was one of personal confidence, and could not be executed by a trustee appointed by the court. And the husband not having been heard of for upwards of four years, the court appointed a new trustee, and directed him to pay one-half of the rents to the plaintiff, and the other half to be invested for the benefit of the husband. *Tripp* v. *Martin*, 9 Gr. 20.

Land was vested in trustees by a deed, which provided, "that all or any part thereof should or might be absolutely sold by the said trustees, or the survivor of them, his executors or administrators, with the consent in writing of the cestuis qui trust, or the survivor of them, and after the decease of the said parties of the first and second parts, then, in the discretion of the trustees, for any price which they, the trustees or trustee, should think reasonable; and the money to arise from the sale to be paid to the said trustees or the survivors, &c., without any obligation on the purchaser to see to the application thereof, so as he shall take the receipt of the trustees or the survivors of them, &c., or other only acting trustee or trustees for the time being, for the same money." One of the trustees died, and the other was released from the trust, and two others were appointed by the court in their stead:—Held, on objections taken to an attempted sale of the trust estate vested in the new trustees, with the consent of the cestuis que trust, that the power to sell was a personal trust and not transferable to the new trustees. *Ridout* v. *Howland*, 10 Gr. 547.

Removal of Former Trustees — *Reduction in Number — Cestui Que Trust.*] — One trustee filed a bill against his co-trustees and his cestuis que trust, to be relieved from the trust, on the grounds set forth in the bill. The other trustees, by answer, asked for the same relief on the same grounds, which were applicable to all, and the cestuis que trust, most of whom were adults, submitted to the relief. The court granted a reference to the master for the approval of new trustees in place of all the existing trustees. In such a case the court, at the instance of the cestuis que trust, in granting the usual reference, added a direction that if the master, on taking

the evidence, found sufficient reason for reducing the number of trustees, or for the appointment of one of the cestuis que trust, as one of the trustees or as sole trustee, he should report the facts and reasons to the court. *Proudfoot* v. *Tiffany*, 11 Gr. 461.

Trustees to Receive Life Insurance Moneys for Infants.]—*See* INSURANCE, V.

See McLean v. *Bruce*, 29 Gr. 507; *In re Curry*, 23 Gr. 277; *In re Treleven and Horner*, 28 Gr. 624; *Re Gilmour and White*, 14 O. R. 694, *post* (e).

(b) *Appointment of New Trustees by Persons Named in Instruments or under Statute.*

Invalid Appointment under Instrument—*Validity under Statute—Retroactivity—Sole Trustee.*]—A testator devised certain properties to H. F. M., J. H. M., and D. M., as tenants in common, and charged the same with $100,000 to be paid by them to his son, and two daughters, married women, share and share alike, through his wife M. M., as trustee as therein mentioned; and directed that at the death of M. M. the said $100,000 should be held by the said devisees and their survivors on the trusts of the will, "unless my said wife shall have previously appointed, by will or otherwise, any other person or persons to be a trustee in her place, which I hereby authorize and give her power to do." On 5th November, 1873, M. M., by deed, professed to nominate and appoint L. R. and J. U. to be trustees in her place under the will, and afterwards, by another deed of 6th October, 1877, again appointed L. R. and J. U. to be such trustees:—Held, that the will only authorized M. M. to appoint a trustee to be such after her death, and neither of the appointments of L. R. and J. U. was authorized by the will. Held, however, that although R. S. O. 1877 c. 107, s. 30, could not be invoked to authorize either appointment, since it did not come into force till 31st December, 1877, yet under 40 Vict. c. 8, s. 30 (O.), assented to on 2nd March, 1877, the latter appointment was a good and valid one, for that Act applies to the case of a trustee appointed before the passing of it, who desires to be discharged from the trust, and consequently money paid to M. M. as such trustee, after the appointment of 6th October, 1877, did not discharge the debt. Held, also, that the fact that L. R. and J. U. were the husbands of the female cestuis que trust, although it appeared from the will that the testator intended that the legacies should be free from the control of any present or future husband, did not make the appointment bad, although it might be that if the court were appointing trustees, the husbands of the cestuis que trust would not be appointed. 40 Vict. c. 8, s. 30 (O.) is very broad in its language, and a trustee who has from the beginning been a sole trustee has, under it, the same position and power as a last retiring trustee, or a sole surviving trustee. Semble, that 40 Vict. c. 8, s. 30 (O.) is prospective and not retrospective in this sense, that it would not make valid the appointment of trustees made prior to its passing without authority. *McLachlin* v. *Usborne*, *Magee* v. *Usborne*, 7 O. R. 297.

Personal Disqualification—*Conflict of Interest and Duty.*]—It having been suggested by the court that the appointment (as authorized by the settlement) of H. as trustee, was not one which the court would have made, the matter again came on for argument, when it was held that H. was placed in a position in which his interest as one of the parties to the deed upon forfeiture might conflict with his duty as trustee, and that the court would not have made and could not sanction his appointment. *In re Treleven and Horner*, 28 Gr. 624.

Power of Appointment—*Successor in Trust—Title.*] — A testator, amongst other things, devised certain lands to his daughter M., upon certain trusts as to the application of the rents and profits in favour of his daughters so long as they remained single, and on the marriage of any the whole benefit of the trust to such of them as remained single, and the survivor of them till her death; and the testator further declared, "that in case my said trustee or her successor, with the concurrence of my said daughters in said trust mentioned, and then surviving, may deem it prudent and expedient, they may sell and dispose of all said lands," and he further declared that none of his "married daughters, or any that may get married, shall, from time of said marriage, be participant, or have a control or claim on said trust estate or in the disposal thereof. . . . And I declare that in case of the death or marriage of my said daughter M., either before me or before the termination of the said trusts, then that my then unmarried daughters may and shall be, or those appointed under their hands and seals may and shall be, the trustees and executrices or executors of this my will, and so on in like manner in case of the death of any such subsequently appointed trustees and executors, till the termination and completion of said trusts and final disposal of my said estate, it being my desire that no married daughter, on account of the influence that her husband might exercise over her, shall continue to act as my trustee or executrix." M. married, and the plaintiff, who was the only surviving unmarried sister, had contracted with defendant for the sale of a portion of the devised estate. On a bill filed by the vendor to enforce such contract:—Held, that the plaintiff had under the will power, as successor of M., to make a good title, and that it was not necessary for M. to join in the conveyance. *Pegley* v. *Atkinson*, 20 Gr. 383.

——— *Trust—Incorporation by Reference—Title.*]—T. C. K., by a deed of 7th April, 1870, conveyed lands to two trustees to and for the sole and absolute use of his wife, C. E. K., for and during the term of her natural life, to and for her own separate use and benefit, or for the use of such person or persons, and for such estates and interests as she, notwithstanding her coverture, should by any deed or writing under her hand and seal, or by her last will, appoint. By a deed made two years afterwards, T. C. K. conveyed other lands to the same trustees, upon the same trusts as were set forth in the former deed. One of the trustees having died, and the other having removed from this Province, C. E. K., professing to be acting in pursuance of the power contained in the first mentioned deed, by a deed made in 1877 appointed the plaintiffs trustees of the lands, to hold upon the

trusts of the deed of 1870. By a deed poll made in July, 1878, C. E. K., after reciting these several conveyances, appointed the several premises upon trust to permit C. E. K. to use, &c., the said lands for life, or until she should require the trustees to sell, and after her death, without such requisition to sell, to permit T. C. K. to use and enjoy the same premises for his life, and on his request to sell, &c., and upon the death of T. C. K. and C. E. K. upon trust for their children in such proportions as C.E.K. should appoint, &c. T. C. K. died:—Held, that the power in the deed of 1870 to appoint new trustees was a trust, and as such incorporated by reference in the deed of 1872; and that under these conveyances the plaintiffs could, on the request of C. E. K., make a good title to the lands in question, in fee. The manner in which deeds had been drawn was such as to invite inquiry as to the power of trustees to convey; and, therefore, although the court had not any doubt of the effect and operation of the conveyances, no costs were given to either party, on an investigation of title under the Vendor and Purchasers Act. *Lucas* v. *Hamilton Real Estate Association*, 26 Gr. 384.

Religious Institutions — *Appointment under 36 Viet. c. 135 (O.)*] — See *Lage* v. *Mackenson*, 40 U. C. R. 388. See CHURCH.

Vesting of Estate — *New Trustees.*] — Where an appointment of new trustees is duly made under R. S. O. 1887 c. 110, the legal estate, by virtue of s. 4, vests in the new trustees so appointed, even though it was not vested in the parties making the appointment. *In re Hunter* v. *Patterson*, 22 O. R. 571.

(c) *Removal or Discharge.*

Absconding Trustee—*Ex Parte Order.*] —Order made on petition for the removal of a trustee who had absconded from the Province, and for the appointment of a new trustee without service of the petition on the absconding trustee. *In re Martin Trust*, 8 C. L. T. Occ. N. 303.

Action for—*Parties—Infants—Tutor ad Hoc.*]—In an action to account and for removal from trusteeship, instituted by the party who had appointed the defendant trustee and curator to a substitution created by marriage contract, a tutor ad hoc to the minor children and appelés to the substitution, has not sufficient quality to intervene in said suit to represent the minors. Art. 269, C. C., provides for the only case where a tutor ad hoc can be appointed to minors. *Rattray* v. *Larue*, 15 S. C. R. 102.

Effect of Release of Trustee—*Covenant—Novation — Discharge.*] — See *Canada Permanent L. and S. Co.* v. *Ball*, 30 O. R. 557.

Insolvency—*Assignee—Sale of Interest.*] —The insolvency of a trustee, or his leaving in debt to reside abroad, is a sufficient ground to remove him from the trust. An insolvent's reversionary interest in an estate passes to his assignee, and entitles the assignee to maintain a suit in a proper case for the appointment of new trustees, and for an account of the estate; but the court refused to make an order for the sale of such reversionary interest. *Gray* v. *Hatch*, 18 Gr. 72.

Misconduct.]—A letter written by a trustee under a will to the cestuis que trust, threatening, in case proceedings were taken against him, to make disclosures as to malpractices by the testator, which might result in heavy penalties being exacted from the estate, is such an improper act as to call for his immediate removal from the trusteeship. *Grant* v. *MacLaren*, 23 S. C. R. 310.

——— *Action — Parties — Attorney-General.*]—In an action by an incorporated educational institute for the removal of one of the trustees, who also acted as secretary, for alleged improper dealing with the corporate funds, judgment was given, but without any finding of wilful misconduct, directing such trustee's removal, on the ground that so much doubt was cast upon his dealings with the trust funds that it would not be proper to allow him to remain a member of the board. Such an action is maintainable without making the attorney-general a party. *Wilberforce Educational Institute* v. *Holden*, 17 O. R. 439.

Removal of Co-trustees.] — When one of the trustees was dead and another was removed for misconduct, the remaining trustee was held entitled to be discharged from the trust. *Mitchell* v. *Richey*, 13 Gr. 445.

Summary Application.]—The court will not upon a summary petition, or otherwise than in an action, remove a trustee or an executor in invitum. *Re Davis's Trust*, 17 P. R. 187.

See Proudfoot v. *Tiffany*, 11 Gr. 461; *Baldwin* v. *Crawford*, 1 Gr. 202, *post* (e).

(d) *Security.*

Insurance Moneys.] — See INSURANCE, V. 3, 4.

New Trustees.]—Where this court appoints new trustees under a will (the former ones being dead or insolvent), it has no authority to require the new trustees to give security. *O'Hara* v. *Cuthbert*, 1 Ch. Ch. 304.

A new trustee appointed by the court in the place of one appointed by will is not required to give security for the due performance of the trusts. O'Hara v. Cuthbert, 1 Ch. Ch. 304, followed. *Re Helps Estate*, 15 P. R. 7.

(e) *Other Cases.*

Decree Relieving Trustees—*Provisions of, Varying Trust.*] — By a marriage settlement certain property was conveyed to trustees for the benefit of the husband and wife during their lives—remainder to their issue (infants). After managing the estate for several years, the trustees filed a bill to be relieved, and a decree to that effect was made, which, however, contained other directions, and under these and subsequent orders the expenditure of a part of the corpus of the estate in improving the trust property, and furnishing the dwelling house of the parents,

and some other variations of the trusts, were authorized. One solicitor acted for all the cestuis que trust. On the cause coming on for further directions, the court refused to carry out the decree and orders which had been so obtained. *Baldwin* v. *Crawford*, 1 Gr. 202.

Executor—*Release.*]—A release by an executor who is also a trustee does not amount to a relinquishing of the trust. *Doe d. Berringer* v. *Hiscote*, 6 O. S. 23; *Doe d. Boyer* v. *Claus*, 4 O. S. 146.

Powers of New Trustees — *Mortgage — Assignment — Power of Sale.*] — R. S. O. 1877 c. 107, s. 3, provides that every new trustee shall have the same powers, authorities, and discretions, and shall in all respects act as if he had originally been nominated a trustee by the deed, will, or other instrument creating the trust. Where a mortgage made in favour of two trustees of a marriage settlement, and which contained a power of sale exercisable by them, but not by an assignee of the mortgage, not being in conformity with the Short Forms Act, was, together with the lands therein, on the resignation of the trustees, assigned to a new trustee appointed in their place:—Held, that the new trustee stood in the place of the former trustees, and could exercise the power of sale, not as an assignee of the estate, but as if appointed a trustee by the deed creating the trust. *Re Gilmour and White*, 14 O. R. 694.

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2. *Compensation and Allowance.*

(a) *Care and Management.*

Absence of Agreement.] — A trustee appointed by a deed is, without express agreement, entitled to compensation for his services as such trustee. *Deedes* v. *Graham*, 20 Gr. 258.

Absence of Provision in Deed.]—In the Province of Nova Scotia prior to the passing of 51 Vict. c. 11, s. 69, the rule of English law relating to commission to trustees was in force, and no such commission could be allowed unless provided by the trust. *Power* v. *Meagher*, 17 S. C. R. 287.

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

——— *Provisions of Deed.*]—Where the compensation is fixed by the deed, the master cannot reduce the amount. *Heron* v. *Moffatt*, 7 P. R. 438.

——— *Services—Appeal.*]—The master has power to allow a lump sum to a trustee as his remuneration for the care and management of real estate, but to entitle him to such sum there ought to be evidence to enable the court reasonably to see that the services for which such sum is asked have been rendered, and to make a proper allowance therefor. Where a master fixed a sum, on evidence not sufficiently particular, the case, on appeal, was referred back to him, with leave to the trustee to give proper evidence. The trustee to pay the costs of the appeal and the additional costs in the master's office. *Stinson* v. *Stinson*, 8 P. R. 560.

——— *Sum in Lieu of Commission—Appeal.*]—Trustees under a marriage settlement exchanged an investment of the estate in Manitoba lands into the stock of a land company. Nothing by way of income had ever been realized from either land or stock, and it was stated that both were valueless. The responsibility of making the exchange was taken away by the consent of those interested:—Held, that a percentage upon the nominal value of the stock was not the way to arrive at the trustees' remuneration, but that they should be allowed a sum to cover their trouble in making the exchange; and the allowance made by a referee was reduced from $162.50 to $50. *Re Prittie Trusts*, 13 P. R. 19.

——— *Value of Work.*]—Where compensation was given to trustees by the trust deed, not in a lump sum, and they had failed in some points of their duty, the master did not consider that he could deprive them of compensation, but held that he could determine on the value of the work done, and make a corresponding allowance. *City Bank* v. *Maulson*, 3 Ch. Ch. 334.

Commission — *Collection of Rents — Agent.*]—Certain rents were collected by the trustees through an agent, whom they paid by commission:—Held, that they were justified in employing an agent to make the actual collections for them, but were bound to look after the agent, and for their care, trouble, and responsibility were entitled to an allowance of two and a-half per cent. upon the rents collected. *Re Prittie Trusts*, 13 P. R. 19.

——— *Income—Corpus—Extra Services.*] —Trustees on assuming the trust estate are not to be allowed a commission for merely taking the same over; but trustees, properly dealing with the estate, and handing it over on the determination of the trust, are entitled to one commission, for the receipt and proper application of the estate, payable out of the corpus. Trustees are not entitled to a commission for the investment or reinvestment of the funds of the estate. They are entitled to a commission on the receipt and payment of the income of the estate, payable out of the income, and to a compensation for looking after the estate, payable out of the corpus. Trustees may not unreasonably be allowed something for services not covered by the commission awarded. *Re Berkeley's Trusts*, 8 P. R. 193.

——— *Money not Received—Wilful Default.*]—A commission should not in general be allowed to an executor or a trustee in respect of sums which he did not receive, but is charged with on the ground of wilful default. *Bald* v. *Thompson*, 17 Gr. 154.

Effect of—*Surrogate Act.*]—The old rule as to compensation of trustees has only been abrogated by the Surrogate Act as regards trusts under wills. *Wilson* v. *Proudfoot*, 15 Gr. 103.

Municipal Debentures—*Lien.*]—A person to whom municipal debentures in aid of a railway company are delivered in trust to be handed over to the company upon the completion of the railway is a trustee within s. 38 of R. S. O. 1887 c. 110, and entitled to a lien on the debentures until that compensation is paid. Judgment in 28 O. R. 106 (sub nom. In re Ermatinger) affirmed, but the amount of compensation reduced. *In re Tilsonburgh, Lake Erie, and Pacific R. W. Co.*, 24 A. R. 378.

Payment of Allowance—*Condition of Conveyance—Ascertainment of Amount—Report.*]—The rule of decision in equity which requires that the expenses incurred by a trustee in the execution of his office shall be satisfied before the cestui que trust or his assignee can compel a conveyance of the trust estate, applies to the commission or allowance to a trustee for his care, pains, and trouble under 37 Vict. c. 9 (O.) Where on a reference to a master to take an account of a trustee's dealings with an estate, that officer omitted to ascertain the amount of the trustee's charges, costs, &c., a reference back to ascertain it was directed at the hearing on further directions; and the fact of the master having reported that the trustee had omitted to keep any regular set of books shewing a debtor and creditor account of his dealings with the estate, but not stating that for that reason he had been unable to ascertain the amount, was not considered a sufficient reason for his having omitted to find the amount of such claim. *Life Association of Scotland* v. *Walker*, 24 Gr. 293.

Provisions of Will.]—Where a testator provides by his will for the payment to executors for their services, any presumption that any undisposed of residue of personalty is intended for them beneficially is effectually rebutted; and the fact that by law they are entitled to be paid a compensation without any provision made therefor by the will, is immaterial. *Loveless* v. *Clarke*, 24 Gr. 14.

——— *New Trustee—Amount Allowed.*]—Semble, that the limitation of a will as to the amount to be paid for the services of the original trustees under it, does not apply to a trustee afterwards appointed by the court, at the instance of the cestui que trust. Williams v. Roy, 9 O. R. 534, distinguished. *Freeborn* v. *Vandusen*, 15 P. R. 264.

Public Trust—*Town Commissioners.*]—Trustees of a municipality are entitled, under the general provisions of the Act of 1874 (37 Vict. c. 9 (O.)), to a commission on moneys passing through their hands as compensation for their care and trouble in the management of the trust. The commissioners of the Cobourg town trust were, therefore, held so entitled. *In re Commissioners of Cobourg Town Trust*, 22 Gr. 377.

——— *Harbour Commissioners — Amount Allowed—Private Interest of Commissioner.*]—Held, following In re Commissioners of Cobourg Town Trust, 22 Gr. 377, that the commissioners of the Toronto harbour were entitled to compensation for their services; and this whether the harbour belonged to the Dominion or the provincial government, as, in the event of it being found to belong to the Dominion, it must be assumed that the Dominion government intended the commissioners to be subject to the law of the Province in which the trust was to be administered. The sum to be allowed should be such as would be a reasonable compensation for the services rendered, and at the same time such a moderate amount as would not be an inducement to members of the city council, or of the board of trade, or others, to seek the office for the sake of the emolument. The duties of the office being shewn to be not at all onerous, an allowance of $50 a year was named as sufficient to obtain the services of the right class of men to discharge them. The rule that a trustee must not have a personal interest in conflict with his duty as such trustee, applies as well to public as to private trusts. Therefore, where one of the commissioners of a harbour had large landed interests adjacent to and upon one part of it, and was interested in having that portion of the harbour improved, the court, on directing an allowance to be made to the commissioners for their services, expressly excepted the commissioner so interested from participating therein, and this although he had not applied for any compensation, and had at the board of commissioners opposed any such allowance being made. *Re Toronto Harbour Commissioners*, 28 Gr. 195.

Retention out of Estate.]—A trustee is entitled to retain his commission from time to time out of moneys received, without waiting for the completion of his trust duties. *Heron* v. *Moffatt*, 7 P. R. 438.

Trustees under Will—*Executors.*]—The rule of the court is to allow compensation to trustees of real estate under a will, as well as to executors. *Bald* v. *Thompson*, 17 Gr. 154.

See Christie v. *Saunders*, 2 Gr. 395; *Heron* v. *Moffatt*, 22 Gr. 370; *Hayes* v. *Hayes*, 29 Gr. 90; *Burn* v. *Gifford*, 8 P. R. 44; *Burn* v. *Burn*, 8 O. R. 237; *Taylor* v. *Magrath*, 10 O. R. 669; *Re Bolt and Iron Co., Livingstone's Case*, 14 O. R. 211, 16 A. R. 397.

See, also, EXECUTORS AND ADMINISTRATORS, VII. 2.

(b) *Expenditure.*

Capital—*Maintenance and Education—Infant.*]—Trustees may be allowed payments made for maintenance and education out of their capital. Under a general administration decree, the master may, without any special direction, take evidence as to such payments by executors, out of the infant's shares of capital, and report the facts. *Stewart* v. *Fletcher*, 16 Gr. 235.

Improvements — *Infant Cestui que Trust.*] — The principal that when a trustee expends his money upon the estate, and thereby increases its value, the property will not be wrested from him without repaying him the expenditure by which the estate has been substantially improved, acted upon in the case of an infant cestui que trust. *Bevis* v. *Boulton*, 7 Gr. 39.

Invalid Trust—*Expenses of Executing.*]—It is incident to the office of a trustee that the trust property shall reimburse him for his expenses in administering the trust; and a clause so indemnifying a trustee is infused

into every trust deed: and the statute R. S. O. 1877 c. 107, s. 3, does little more than what courts of equity had been accustomed to do without any statutory direction. Therefore, a trustee who has been induced by a settlor to accept a trust under an instrument void by the law of the settlor's domicile, is entitled to be reimbursed by such settlor for all his expenses incurred in the execution of the trust. *Hughes* v. *Rees*, 10 P. R. 301.

Semble, that, though the trust deed in question was invalid, and notwithstanding Smith v. Dresser, L. R. 1 Eq. 651, 35 Beav. 378, yet, as against one who himself assisted in creating the trust, a trustee acting under it would have been entitled to expenses incurred in respect of it; but upon the facts stated in the report, it was held that the sums claimed were not shewn to have been incurred in respect of the trust deed. *S. C.*, 9 O. R. 198.

See EXECUTORS AND ADMINISTRATORS, VII. 3.

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3. *Costs and Expenses.*

Costs of Action for Account.]—Where a creditor brought an action for an account against the assignee for the benefit of creditors of his debtor, after demanding copies of the assignee's accounts, but without expressing any desire or making any attempt to inspect the accounts, and without waiting a reasonable time for preparation of copies, the assignee was allowed his costs as between solicitor and client out of the balance of the estate in his hands, and in case of deficiency the plaintiff was ordered personally to pay it. The mere fact that a trustee in rendering an account to his cestui que trust, claims that he has in his hands a smaller sum than is found to be due by him when his accounts are taken in court, does not disentitle him to the costs of an action against him for an account. *Sandford* v. *Porter*, 16 A. R. 565.

Counsel Fee for Advice.]—Held, that the master had properly allowed to defendant, in his accounts, a fee of $10 paid by him to a counsel for advice as to his action in respect of two assignments of a policy of insurance. *Hayes* v. *Hayes*, 29 Gr. 90.

Expenses of Prosecuting Speculative Undertaking.]—Where certain persons, including G., advanced money to complete the building of a yacht at Cobourg, in order to sail for prizes at New York and Philadelphia, and scrip under seal was executed, declaring that G. was to hold the yacht in trust as security for the advances; and G. incurred certain running expenses in taking the yacht to the race:—Held, that G. was entitled to a first charge on the proceeds of the sale of the yacht, for these expenses, as they had been incurred in prosecuting the enterprise for which the trust was created. *Burn* v. *Gifford*, 8 P. R. 44.

Fire Insurance Premiums.]—A trustee, unlike a mortgagee, is entitled to insure the trust property, and charge the premiums paid against it, without any express stipulation to that effect in the instrument creating the trust. *Heron* v. *Moffatt*, 22 Gr. 370.

Preparing Accounts—*Costs of Action—Commission—Sum Paid to Agent.*]—Held, by the master in ordinary, that the amounts paid by C. M. to a professional land agent in connection with the sale of the property, and a certain sum paid by C. M. to a professional accountant for making up an account, should be allowed to him in his accounts. But that sums paid by C. M.'s executors to a professional accountant for making up the account brought in by them into the master's office, and a certain sum paid to C. M.'s solicitors on account of their costs in the action, should not be allowed to C. M. in his accounts. Held, also, by the master in ordinary, that C. M. as trustee-solicitor, was not entitled to profit costs, but, nevertheless, he was entitled to a commission of five per cent. on the amounts coming to A. M. and T., less a certain sum paid as commission to a land agent for effecting the sale of the property, since double commissions cannot be allowed. *Taylor* v. *Magrath*, 10 O. R. 669.

Solicitor for Trustee—*Proceedings—Liability—Advice.*]—It is the duty of a solicitor to inform his client, when a trustee, as to the advisability of taking proceedings and incurring costs, when it may become a question whether the costs will have to be paid out of his private funds or out of the trust fund or estate. *Butterfield* v. *Wells*, 4 O. R. 168.

——— *Taxation of Bill—Cestui que Trust.*]—Any one cestui que trust may, in the discretion of the court, obtain an order under the third party clauses of the Solicitors Act for the taxation of a bill of costs for business connected with the trust estate of a solicitor employed by the trustee. *Sandford* v. *Porter*, 16 A. R. 565.

Solicitor-Trustee — *Profit Costs.*]—The rule that a trustee acting as a solicitor of the trust is entitled to costs out of pocket merely, applies only when the costs are payable out of the trust funds, not when payable by an adverse party. Meighen v. Buell, 24 Gr. 503, distinguished. *Colonial Trust Co.* v. *Cameron*, 24 Gr. 548.

On rehearing the order as reported 24 Gr. 503, disallowing to a solicitor-trustee costs other than costs out of pocket in suits to which he was a party, reversed. *Meighen* v. *Buell*, 25 Gr. 604.

See Re Mimico Sewer Pipe and Brick Mfg. Co., Pearson's Case, 26 O. R. 289; *Taylor* v. *Magrath*, 10 O. R. 669.

See ante V. 3.

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4. *Duties and Liabilities of Trustees.*

(a) *Accounts.*

Abandonment of Item by Cestui Que Trust—*Evidence of—Interest.*]—The holder of two insurance policies, on which actions were pending, assigned the same to M. as security for advances and authorized him to proceed with the said actions and collect the moneys paid by the insurance companies therein. By a subsequent assignment J. became entitled to the balance of said insurance moneys after M.'s claim was paid. The actions resulted in the amount of one policy being paid in full to the solicitor of M., and for a defect in

the other policy the plaintiff in the action thereon was nonsuited. In 1886 M. wrote to J. informing him that a suit had been instituted for reformation of the latter policy and payment of the sum insured, and requesting him to give security for costs in said suit, pursuant to a Judge's order therefor. J. replied that, as he had not been consulted in the matter, and considered the success of the suit problematical, he would not give security, and forbade M. employing the trust funds in its prosecution. M. wrote again, saying: "As I understand it, as far as you are concerned, you are satisfied to abide by the judgment in the suit at law, and decline any responsibility and abandon any interest in the equity proceedings:" to which J. made no reply. The solicitor of M. provided the security, and proceeded with the suit, which was eventually compromised by the company paying somewhat less than half the amount of the policy. Before the letters were written J. had brought suit against M. for an account of the funds received under the assignment, and in 1887, more than a year after they were written, a decree was made referring it to a referee to take an account of trust funds received by M., or which might have been received with reasonable diligence, and of all claims and charges thereon prior to the assignment to J., and the acceptance thereof. On the taking of the account M. contended that all claim on the policy had been abandoned by the above correspondence, and objected to any evidence relating thereto. The referee took the evidence, and charged M. with the amount received, but on exceptions by M. to his report the same was disallowed:—Held, that the sum paid by the company was properly allowed by the referee; that the alleged abandonment took place before the making of the decree which it would have affected and should have been so urged; that M. not having taken steps to have it dealt with by the decree could not raise it on the taking of the account; and that, if open to him, the abandonment was not established, as the proceedings against the company were carried on after it exactly as before, and the money paid by the company must be held to have been received by the solicitor as solicitor of M., and not of the original holder. Held, further, that the referee, in charging M. with interest on money received from the date of receipt of each sum to a fixed date before the suit began, and allowing him the like interest on each disbursement from date of payment to same fixed date, had not proceeded upon a wrong principle. *Jones* v. *McKean*, 27 S. C. R. 249.

Appropriation of Receipts—*Claim of Trustee—Interest — Principal.*]—It appeared that in 1880, on T.'s solicitors demanding an account from C. M. of his dealings with a certain trust estate, C. M. employed S., a professional accountant, to make out from his books a detailed account, and S., in so doing, applied receipts from time to time in liquidation of the principal moneys due to C. M. under the trust deed, instead of applying them in the first instance in liquidation of the interest accruing due thereon, and the account so drawn up was delivered to the solicitors of T. An affidavit of C. M., moreover, was produced in the master's office, wherein he stated that this account was correct, and made out under his supervision, and he spoke to the same effect in an examination taken de bene esse in this action. After judgment in this action, which referred it to the master in ordinary to take account of C. M.'s dealings as trustee, and before the same was taken into the master's office, C. M. died, and on return of the master's warrant to bring in the account, C. M.'s executors brought in a new account, differing from that rendered as aforesaid to T.'s solicitors, in that they applied receipts in liquidation in the first instance of the interest accruing on C. M.'s claim, which method made a difference in the result of many thousand dollars. No account had been rendered to A. M.:—Held, that as against T., C. M. and his executors were bound by the account previously rendered to T.'s solicitors and by the method of appropriation of receipts to principal contained therein, but were not so bound as against A. M., as against whom the account brought in by C. M.'s executors could stand. In the account thus delivered in 1880, after the principal moneys were satisfied by application as aforesaid of receipts, interest was charged at ten per cent. on all subsequent receipts against C. M.:—Held, that this was an error in the account, and the executors of C. M. were not bound by it, and to this extent the account might be rectified. McGregor v. Gaulin, 4 U. C. R. 378, considered and distinguished. *Taylor* v. *Magrath*, 10 O. R. 669.

Inspection by Cestui Que Trust—*Furnishing Copies.*]—It is the duty of a trustee, or other accounting party, at all times to have his accounts ready, to afford all facilities for their inspection and examination, and to give full information whenever required. As a general rule he is not obliged to prepare copies of his accounts for the parties interested, though if, for example, the cestui que trust or principal lives at a distance from where the trust affairs are being carried on, or in a foreign country, it would be the duty of a trustee to give all reasonable information and explanations by letter; and even, if requested, but at the expense of the cestui que trust, to prepare and transmit accounts and statements. *Sandford* v. *Porter*, 16 A. R. 565.

Rendering Accounts to Cestui Que Trust—*Inspection—Costs.*]—A trustee must use reasonable diligence to have the accounts of the trust ready, and to render them within a reasonable time after demand on behalf of the cestui que trust; and where a trustee wholly neglected this duty, though he offered his books for inspection by the parties interested, he was charged with the costs of the suit up to the hearing. *Randall* v. *Burrowes*, 11 Gr. 364.

See Burn v. *Burn*, 8 O. R. 237; *Nash* v. *McKay*, 15 Gr. 247.

See ante V. 1.

(b) *Acts of Agent or Co-trustee.*

Co-executor—*Sale and Assignment of Security—Effect of.*]—A. and B., executors and trustees under a will with power of sale, sold and took a mortgage to secure purchase money, they being in the recital named as executors. B., without the knowledge or consent of A., assigned the mortgage and appropriated the consideration money to his own use:—Held, that no estate passed under the assignment, except so far as the trust estate might be found debtor to B.; and also that, as between the contending equities of the trust estate and the assignee, the maxim qui prior est in tempore potior est in jure, would apply in favour

of the trust estate. *Henderson* v. *Woods*, 9 Gr. 539.

——— *Security in Name of—Payments — Validity.*] — Five executors and trustees took an assignment of a mortgage to two of their number, described therein as executors and trustees under the will of the testator, the assignment containing no further reference to the will. The agent for the five thereupon gave notice to the mortgagor that the assignment had been made to the executors, and it did not appear that the mortgagor had any other notice of the assignment:—Held, that he was justified in assuming that the assignment was made to the executors as such; and payments to one of them, made bonâ fide, were held valid. *Ewart* v. *Dryden*, 13 Gr. 50.

Confidential Clerk—*Embezzlement.*] — Where a trustee, a solicitor, allowed a confidential clerk and cashier of the firm of which he was a member, to receive occasionally in his (the trustee's) absence moneys payable to the estate, and issue his (the trustee's) receipt for the same, and the cashier, after receiving a payment, embezzled the same:—Held, that the trustee was not liable to make good the loss to the estate. *Re McM. Trust*, 28 C. L. J. 502.

Co-trustees — *Agreement for Lease — Specific Performance.*] — Where two of four trustees entered into an agreement for the lease of certain trust property to the plaintiff, but without the knowledge or assent of the other two, to whom under the circumstances notice of the agreement could not be imputed, specific performance of the agreement was refused. *McKelvey* v. *Rourke*, 15 Gr. 380.

——— *Fraud — Cheque — Forging Indorsement.*]—L., a trustee under a will, relying upon the report of his co-trustee, a solicitor, in investing moneys of the estate, that he had made a loan on satisfactory security, joined him in signing a cheque on the estate bank account payable to the order of the alleged borrower. The solicitor-trustee indorsed the cheque by forging the payee's name, obtained the money, and absconded:—Held, that L. was not chargeable with the loss. *Re McLatchie, Preston* v. *Leslie*, 30 O. R. 179.

Managing Trustee—*Co-trustee abroad.*] —The circumstance that one trustee resides in a foreign country justifies his delegating to his co-trustee the right to receive payment of mortgage moneys due to the trust, and this notwithstanding that the instrument creating the trust directs that none of the powers given thereby shall be exercised while there is only one trustee. *In re Huntly*, 7 C. L. T. Occ. N. 251.

——— *Misappropriation by — Representations to Co-trustee.*] — Trust funds which stood in the name of two trustees (A. and B.) and were paid out on the cheques of the two, got into the hands of one A., who was the acting trustee, and were misapplied by him without the knowledge of the other, B. The primary cestui que trust was a married woman; the trust deed contained a clause in restraint of anticipation; and there was a trust over with a limited power of appointment. B. insisted that he was not liable, as he had become a trustee at the request of the lady and her husband, and it had been represented to him that his name only was wanted; that his co-trustee, A., was to do the business part of the trust; and that he, B., was to have no trouble about it:—Held, that these representations did not exempt B. from the duty of seeing that the trust money was properly applied. *Mickleburgh* v. *Parker*, 17 Gr. 503.

——— *Moneys not Entered on Books.*]—A trustee is bound to exercise a prudent supervision over the acts of an agent, or a co-trustee appointed or acting as agent or manager, for his co-trustee; and where he neglects this duty, he makes himself liable for losses occurring through the acts of such agent or manager. But a trustee in this position was not held liable for moneys received by the agent or co-trustee acting as manager, which were not entered on the books (to which the trustee charged had access) and which he could not have discovered by any vigilance he might have used. A trustee is liable for the acts of an agent in whose appointment he has concurred, and whose defalcations would have been discovered by an ordinary inspection of the books kept by him. *City Bank* v. *Maulson*, 3 Ch. Ch. 334.

Trustee for Sale of Lands—*Authority of Solicitor for—Solicitor's Clerk.*]—Defendant was a trustee under the will of P. for the sale of the property in question. In 1854 a friendly suit was instituted in England (where the trustees and all the parties interested under the will resided) for the execution of the trusts of the will, and a decree was made for the appointment of a receiver, and the sale by him of the testator's lands in Upper Canada. A receiver appointed in this suit having died, a considerable period elapsed before another was appointed. During this interval the Canadian solicitors for the estate continued to sell the lands, and manage the property as theretofore, under the authority of the trustee. While so acting, the plaintiff applied to them to purchase this land. The clerk who attended to the business of the estate had been authorized to buy a few lots for himself at the prices at which they were for sale to others; and, acting upon the strength of this general authority, he, without their knowledge, contracted in his own name and behalf, with the plaintiff, for the sale of the lot at £250, and gave the plaintiff his own bond for a deed, and received from him the purchase money. The plaintiff supposed the clerk was acting for the defendant, and was authorized to act for him. The clerk some time afterwards entered in the solicitors' book of sales, and subsequently in an account transmitted to the defendant, a sale of the lot to another person at £150, and charged the plaintiff with that amount as assignee of the pretended purchaser. A deed of conveyance to the plaintiff, reciting a sale to him at £150, was prepared by and under the directions of the clerk, and was transmitted by the solicitors with other deeds to the trustee for execution, and retained by the latter for some time, but was not executed:—Held, that there was not any contract which the court could enforce against the trustee, but, as a suit was to some extent necessary to ascertain the truth satisfactorily, and the same was rendered unnecessarily expensive by the unqualified denial of the defendant that the solicitors had any power to sell lands, the court, in dismissing the bill, refused the defendant his costs. *Ratz* v. *Tylee*, 11 Gr. 342.

Trustee under Voluntary Settlement —*Arrangement with Settlor.*]—At and before making a voluntary settlement of real estate, the settlor stipulated orally with the trustee that the settlor's son should receive all moneys receivable under it, and should accumulate and dispose of the same by investment or otherwise, and that the trustee himself should have no trouble or concern in the matter. The son accordingly received the rents for several years, and, without the knowledge of the trustee, misappropriated them:—Held, that the trustee was not liable. *Mitchell* v. *Ritchey*, 12 Gr. 88, 11 Gr. 511.

See post 5.

See, also, EXECUTORS AND ADMINISTRATORS, VI. 2.

(c) *Improper Alienation of Trust Property.*

Alienation of Land Conveyed in Trust or Dedicated for Public Purposes.]—See MUNICIPAL CORPORATIONS, XI.—WAY, III. 4.

Assignment by Insolvent to Creditors —*Composition — Distribution.*]—A trader, in insolvent circumstances, made an assignment of his property to several of his principal creditors, in trust, for the benefit of his creditors generally. Afterwards it was agreed that the creditors should accept 20 per cent. of their demand, and discharge the debtor, whereupon the plaintiffs and other creditors executed a deed to carry out this agreement. Before payment of the composition, however, the trustees reassigned the property to the debtor, on his undertaking to pay the several creditors the amount of their claims, which he did pay to the trustees but failed to pay to the plaintiffs:—Held, that the trustees were liable to make good to the plaintiffs the sum coming to them, if the property which had been assigned to them by the debtor was sufficient to realize the amount of the composition agreed on; and as to this, if desired by the trustees, an inquiry by the master was directed. *National Bank of Albany* v. *Moore*, 21 Gr. 269.

Mortgage — *Quit Claim—Consideration.*]—A cestui que trust of land created a mortgage by an assignment absolute in form, for a nominal consideration, but neglected to intimate to the trustee that the transfer was intended to operate as security only. In fact the land purported to be conveyed to the trustee had already been sold and conveyed to the purchaser. The trustee, without calling for the production of the assignment by his cestui que trust, executed a conveyance by way of quit claim to the original vendor, who conveyed other lots in their stead, absolutely, to the assignee of the cestui que trust:—Held, reversing the decree below, 6 Gr. 485, that the trustee was not, under the circumstances, answerable for any loss that had been sustained by the party beneficially interested. *Ford* v. *Chandler*, 8 Gr. 85.

——— *Release by Mortgagee—Representations.*]—The owner of real estate mortgaged it, and afterwards sold and conveyed a portion by a deed containing absolute covenants for title, taking from the purchaser a bond for the payment of a proportionate amount of the mortgage debt:—Held, that the fact of the purchaser holding such absolute conveyance was not such a representation to the holders of the mortgage as warranted them in executing to the purchaser a release of his portion of the estate from the mortgage, and afterwards looking to the mortgagor for payment thereof. *Bank of Montreal* v. *Hopkins*, 2 E. & A. 458, 9 Gr. 495.

——— *Sale by Trustee—Notice to Purchaser—Parties.*]—The trustee of a mortgage sold it to a third person without authority:—Held, that a bill impeaching the transfer was not demurrable for not charging that the purchaser had taken the transfer with notice of the trust. A bill having been filed on behalf of cestuis que trust impeaching the conduct of a trustee, a demurrer thereto because the cestuis que trust were not parties was overruled. *Ryckman* v. *Canada Life Assurance Co.*, 17 Gr. 550.

See Howland v. *McLaren*, 22 Gr. 231; *Major* v. *McCraney*, 29 S. C. R. 182.

See post 6.

(d) *Interest.*

Breach of Trust—*Annual Rests.*] — Where an executor had committed a breach of trust in selling lands to pay debts, for which the personal estate come to his hands had proved more than sufficient, and had also applied trust funds to his own use, the court ordered the account to be taken against him with annual rests. *Wiard* v. *Gable*, 8 Gr. 458.

Improper Retention of Funds—*Increased Rate—Annual Rests.*]—The estate of a trustee who had retained money in his hands for six years after he should have paid it over, and had rendered an account claiming a balance in his favour, was held chargeable with interest at six per cent. with annual rests. *Small* v. *Eccles*, 12 Gr. 37.

The principle on which trustees are liable to be charged with an increased rate of interest, or interest with annual rests, considered and acted on. Where a trustee had retained moneys instead of paying off debts, and had improperly mixed these moneys with his own at his bank, the court charged him with interest at 8 per cent. on all balances in his hands. *Wightman* v. *Hollwell*, 13 Gr. 330.

Retention of Funds—*Employment of.*]—Where the defendant, a trustee, had retained moneys, and did not shew that he had deposited them for safe keeping or kept them in his hands unemployed, he was held to be properly charged with interest. *Beaton* v. *Boomer*, 2 Ch. Ch. 89.

——— *Mistake—Simple Interest.*] — The principle upon which the court acts in charging executors with interest, is not that of punishment, but of compensating the cestui que trust, and depriving the trustee of the advantage he has wrongfully obtained. An executor will not necessarily be charged with compound interest in all cases except those in which there is a mere neglect to invest. Where an executor retained a portion of the trust money under the belief that it was his own, and had acted on that supposition for many

years, without objection from those interested under the will, and it did not appear that he had used the money in trade:—Held, that, under the circumstances, he was chargeable only with simple interest. *Inglis* v. *Beaty*, 2 A. R. 453.

See Jones v. *McKean*, 27 S. C. R. 249; *Cudney* v. *Cudney*, 21 Gr. 153; *Smith* v. *Roe*, 11 Gr. 311; *Cameron* v. *Bethune*, 15 Gr. 486.

(e) *Other Cases.*

Assignment of Mortgage in Trust—*Discharge by Trustee—Liability for Moneys not Actually Received.*]—A mortgage was created by D., in favour of two brothers, who executed an agreement appropriating the amount secured between them, and afterwards joined in an assignment of the security to M., in trust, as to the first instalment, to pay the same equally to the mortgagees, one of whom, J., subsequently conveyed his interest in the mortgage to H. (the plaintiff) for the benefit of creditors. The other mortgagee subsequently acquired the equity of redemption, went into possession of the premises, and succeeded in satisfying the amount of mortgage money other than the first instalment thereof. M. executed a discharge of the mortgage under the statute, declaring that D. had paid all moneys secured by the mortgage. In fact D. never paid any portion of the money, and the first instalment never was paid by any one, and J. was indebted to his co-mortgagee to a greater amount than his share of the first instalment would come to. M. died, and a bill was filed against his personal representatives by H., calling upon him to pay the share of the first instalment coming to J.:—Held, that the estate of M. was bound to make good the amount to which J. was proved to have been entitled, although no want of bona fides could be imputed to M. *Howland* v. *McLaren*, 22 Gr. 231.

Collection of Debts—*Property of Estate.*]—While the court will not exact from trustees more careful conduct than a prudent man would bestow in the management of his property, still it requires full explanation of all their dealings and the causes which may have led to outstanding debts not having been collected, or to the disappearance of property belonging to the estate. *Chisholm* v. *Barnard*, 10 Gr. 479.

Compromising Debt.]—Trustees accepted $250 in discharge of a debt of $300:—Held, that, in the absence of evidence to explain the reason of this, the master was right in charging them with the loss. *Baldwin* v. *Thomas*, 15 Gr. 119.

Covenant of Trustees—*Retirement of One—Novation—Surety—Discharge.*]—See *Canada Permanent L. and S. Co.* v. *Ball*, 30 O. R. 557.

Joint Stock Company—*C. S. C. c. 63—Liability of Trustees for Neglecting to Make Report Required by Act.*]—See *Osler* v. *Bowell*, 43 U. C. R. 40.

Lease by Tenant in Common—*Account as Trustee—Rents and Profits.*]—Where the plaintiff, being one of the heirs of an intestate, took upon herself to lease the lands in question, she was held liable to account for all the rents she had, and for all that but for her wilful neglect she might have, received, and in case it should appear that she had so dealt with the property as to make her properly liable both for rents and profits, the master was to report specially or separately. The costs of the account as to rents to fall upon the estate, or be borne by the plaintiff, according to whether what was done by her was or was not beneficial to the estate. *Nash* v. *McKay*, 15 Gr. 247.

Lease by Trustees—*Claim of Lessee—Submission to Arbitration.*]—Trustees of real estate created a lease thereof, and orally agreed to make certain improvements on the property, without which agreement the lessee would not have accepted the lease, but the improvements never were made. During the currency of the term two of the trustees (who were also executors under the will) resigned, and others were appointed in their stead. Subsequently the lessee advanced a claim for damages by reason of the nonfulfilment of the covenant as to improvements, when an arrangement was made, between the trustees and the tenant, for a surrender to them of the remainder of the term, which was done, and a reference was agreed upon for determining the value of such surrender, the claim for damages by the lessee, and all other matters in difference, by arbitration:—Held, that by such submission the trustees became personally bound to pay the sum awarded against them, and that, having submitted to arbitration without saving the question of assets, they were precluded from afterwards asserting that they had not assets. Held, also, affirming the order pronounced, 21 Gr. 166, that the stipulation as to improvements, upon which the lease was accepted, could be proved by parol. Under such circumstances the question would still remain open whether the trustees could, on passing their accounts, claim the sum so awarded against the estate which they represented. *In re Mason and Scott*, 21 Gr. 629.

Loss on Investments.]—See *post* 5.

Misappropriation—*Surety — Knowledge by Cestui Que Trust—Estoppel—Parties.*]—See *Bayne* v. *Eastern Trust Co.*, 28 S. C. R. 606.

Negligence—*Building—Want of Repair—Personal Liability.*]—See *Ferrier* v. *Trépanier*, 24 S. C. R. 86.

Proof of Payment—*Discharge.*]—In a suit against a trustee to carry out the trusts of a deed for the benefit of creditors, a payment to the plaintiff was proved by the evidence of the trustee only. Although this was considered sufficient to discharge the estate from liability in respect of this sum, still he could not thus discharge himself from liability to the plaintiff. *Wightman* v. *Helliwell*, 13 Gr. 330.

Taking Chattels at Appraised Value—*Interest.*]—The goods of the testator were, by arrangement between the executors, allowed to be taken by one of themselves at the price of $515, after the same had been valued by appraisers at $733.69. On an appeal from the master's report charging the executors with the lesser sum, it was shewn that the appraised value was reasonable, and the court ordered the executors to be charged with that amount, and with interest from the time of

the appraisement in 1857; the lapse of time not being considered sufficient to bar the right to interest. *Cudney* v. *Cudney*, 21 Gr. 153.

Trustee for Sale—*Deterioration in Property.*]—A trustee for sale having made several agreements for sales, which were rendered abortive by the refusal of the widow of the settlor to bar her dower:—Held, that the trustee was not liable for deterioration of the property, the decrease in value not having occurred through any default of his. *Edinburgh Life Assurance Co.* v. *Allen*, 23 Gr. 230.

——— *Neglect — Delay—Acquiescence.*]—C. M., a solicitor, invested money of T. in a third mortgage of the E. property. Afterwards, in 1862, the property was put up for auction under a decree for sale at the suit of the first mortgagor. A. M. held the mortgage on the property next after the first mortgage. Finding that, owing to the great depreciation of the value of the E. property, it would, if sold then, scarcely fetch enough to pay off the first mortgage, it was agreed between C. M. and A. M. that C. M. should, out of his own moneys, buy in the property by paying off the first mortgage, and then hold the same in trust to sell, and out of the proceeds to first repay himself the amount so advanced by him, with interest from the date of the sale, then to pay A. M. his claim on the property, with interest, and then to pay T. his claim, with interest. C. M. accordingly advanced sufficient to buy in the property as agreed. In 1864 a formal deed of trust was drawn up and executed by the first mortgagee, and by C. M., A. M., and T., whereby the property was conveyed to C. M. on trust to sell "without delay," and apply the proceeds as aforesaid, and giving him power to lease in the meanwhile, and making him answerable only for loss resulting from his own "wilful neglect and default." C. M. leased the property from time to time, but he did not sell it until 1883, when T.'s executrix brought an action charging him with default and breach of trust, and claiming an account and damages. The evidence shewed that the property had all through been of a very unsaleable kind, consisting of a farm, very stumpy and badly fenced, and an old mill, which had quite lost its value. It also appeared that C. M. had never advertised the property for sale, but at the same time that it was well known in the neighbourhood that it was for sale, and that it was not the sort of property that was likely to be bought by a stranger. There was, also, no positive evidence that at any time C. M. could have effected a more advantageous sale than that he effected in 1883; and it appeared that up to 1880 neither A. M. nor T. had complained of the delay, but, if anything, acquiesced in it:—Held, that C. M. was not proved to have been guilty of neglect and default as trustee, nor did the evidence afford any basis for assessing damages against him. *Taylor* v. *Magrath*, 10 O. R. 669.

——— *Power Coupled with Trust—Discretion—Breach.*] — Where a power is coupled with a trust or duty, the court will enforce the proper exercise of the power, although it will not interfere with the discretion of the trustees as to the particular time or manner of their bonâ fide exercise of it. Lands were devised to trustees upon trust, in their discretion to sell, as soon as they might deem it proper to do so, for the most money that could reasonably be obtained therefor; and by a later clause it was declared that the trustees were not to be answerable for the exercise or non-exercise of the powers therein contained, or as to the manner or exercise thereof, but were to have an absolute discretion as to the same:—Held, that the power of sale was coupled with a trust to sell for the most money, and that the trustees were answerable for a proper exercise of the power, the powers of the court being in no way affected by the clause exonerating the trustees, which related merely to the time and manner of exercising the trust. *Clark* v. *Keefer*, 29 O. R. 557.

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5. *Investments by Trustees.*

Guardian ad Litem — *Authority to Invest.*]—The guardian ad litem to an infant has no authority, after the object of the suit has been accomplished, to act for the infant in investing any funds for the infant. *Dix* v. *Jarman*, 1 Ch. Ch. 38.

Omission to Invest — *Interest.*] — An executor or trustee who has been guilty of negligence merely in omitting to invest moneys, will be charged with interest at six per cent. *Wiard* v. *Gable*, 8 Gr. 458.

Purchase of Land — *Building.*]—Trustees, being empowered to invest the moneys of the trust in the purchase of real estate, may in their discretion do so in the erection of a new building, when an increased income can be obtained thereby. It is, however, for the trustees to determine for themselves whether the circumstances are such as to justify such expenditure, and that the amount is proper. *Re Henderson's Trusts*, 23 Gr. 45.

——— *Building — Benefit of Children—Breach of Trust—Estoppel.*]—A testator directed that until the period of distribution the rents and profits accruing from certain property devised to the children of his son should be given and applied by his executors towards the support and maintenance of the said children if his executors should think proper; and, if not, to be by his said executors invested or otherwise disposed of by them to the best advantage for the said children, at the discretion of the said executors:—Held, that, under this direction, the executors were justified in applying the money to the purchase of a piece of land adjoining other land which went to the children, in order to the preservation of a mill site or privilege situate on the lands so going to the children; and also in building a house upon the lands devised, intended for the residence of the son and his children; and the fact that on a resale of the land, the same, owing to the great depreciation in the value of real estate, sold for about one-fifth of the sum paid by the executors for it, did not constitute the purchase a breach of trust, or render the executors liable to make good the loss. The same testator gave power to his executors to sell and dispose of any of his land, and to invest the proceeds of such sale for the use and benefit of the said children, provided the said executors should consider it to be to the advantage of the children aforesaid to do so:—Held, (1) that this fund also might properly be invested by the executors in buying the land and in the construction of the dwelling; and (2) that any question as to the part of the purchase money which they had received being used in such building had been put an end to in consequence of such children, after

they had come of age, having, as found by the master, precluded themselves by their acts from charging the expenditure to have been a breach of trust. *Smith* v. *Smith*, 23 Gr. 114.

——— *Excessive Price—Collusion—Credit for Actual Value.*]—The duties and responsibilities of trustees and executors considered and acted on. Trustees, with a power of investing in real estate, purchased, at the instance of one of their number, a lot of land for £1,200, which was found to be worth not more than £900. The master by his report charged the trustees with the full sum of £1,200, refusing to give them credit for the £900, on the ground of collusion on the part of the trustees. The court, on appeal, considered that, under the circumstances, credit should be given for the value of the land, and referred the report back. *Larkin* v. *Armstrong*, 9 Gr. 390.

——— *Lunatic's Money — Charge—Devise —Occupation.*]—A. received $1,200 belonging to his son-in-law, R., and invested it with other money of A.'s own in the purchase of a farm, which cost $3,200. R., with his family, went into possession of the farm, and A., the father-in-law, by his will devised the farm to R.'s wife and son jointly for the life of the wife, with remainder to the son in fee, subject to the payment of $200 to a daughter of R., and of $600 to another person. It was assumed in the cause that R. was, at the time of the purchase, and thenceforward, of unsound mind, and unable to give a valid assent to the transaction; and the court held that on that assumption he was entitled to the $1,200 as against A.'s estate, and that the devise to his wife and son were no satisfaction of the claim; and also that he was probably entitled to a charge on the land for the debt. But the court directed inquiries whether R. was at the date of the transaction of mental capacity to assent to the purchase; and if so, whether he did assent thereto; also, inquiry as to the occupation of the land by R. and his family before the death of A., and the value of such occupation. *Goodfellow* v. *Robertson*, 18 Gr. 572.

——— *Power under Settlement—Sale—Exchange.*] — A., on his marriage, having conveyed a certain farm (which was then under contract of sale) to the trustee of his marriage settlement, provided that the purchase money, if the sale was carried out, and the land itself, if the sale was not carried out, was to be held subject to the trusts of the settlement, as follows: "And it is hereby agreed by and between the parties hereto, that on the payments of principal being made from time to time by the said J. J. V. (purchaser), the said S. B. H. (trustee), or any other trustee or trustees to be appointed as hereinafter mentioned, shall invest the same in such estate or securities, whether real or personal, and of what nature or kind soever, as to him or them shall seem best, and most advantageous to the interest of the trust hereby created, and on such investments being from time to time realized the same to reinvest in like manner." The settlement also provided that if the said J. J. V. forfeited any right he had to the said real estate it should vest in the trustee for the purposes and uses of the said trusts thereinbefore mentioned as regards the purchase money, with full power to lease or sell the same, &c. The purchaser, J. J. V., having failed to carry out his purchase, and having relinquished any claim he had to the farm, the trustee subsequently exchanged the farm for a city lot. On an agreement for a sale of the city lot, the purchaser declined to carry out the purchase, on the ground that the trustee had no power under the settlement to sell and convey. On an application by the trustee under the Vendor and Purchaser Act, R. S. O. 1877 c. 109:— Held, that there was a direction to invest in real estate, and, following Joint Stock Discount Co. v. Brown, L. R. 3 Eq. 139, that "investing in" means the "actual purchase:" and the purchaser's objections were overruled with costs. *Re Barwick*, 5 O. R. 710.

Rate of Interest—*Duty of Trustees.*]—Mortgages, reserving six per cent. interest, were taken by trustees before the abolition of the usury laws, and were not called in for several years after the change of the law, but, as it did not appear that they were aware of an opportunity of investment at a higher rate, the court refused to charge them with more than was reserved by the mortgage. *Cameron* v. *Bethune*, 15 Gr. 486.

——— *Duty of Trustees—Loan to Themselves.*]—Although the rule is, that executors or trustees will be charged with what they ought to have made, what they actually did make, or with what they must be presumed to have made, out of the moneys of the testator come to their hands, still, where such moneys had, before the repeal of the usury laws, been invested in first-class security at the rate of six per cent. per annum, the court, on appeal from the master's report, considered that the executors were not called upon, at the risk of being charged with the extra amount of interest, to call in those moneys and reinvest the same at the rates, as the evidence shewed, at which moneys could have been lent. It also appearing that part of the money of the estate had been lent by the executors to themselves, they were charged with the higher rate of interest thereon. *Smith* v. *Roe*, 11 Gr. 311.

Unauthorized Investment—*Bank Stock —Consent of Beneficiary.*]—A trustee or agent has no right to invest in bank stock without authority; but that rule does not apply where the cestui que trust or principal is of full age, and competent in law to act for himself, and gives his sanction to such an investment. *Harrison* v. *Harrison*, 14 Gr. 586.

——— *Deposit in Savings Bank—Discretion—Acquiescence of Guardian—Costs.*]—Where moneys are left by will to be invested at the discretion of the executor or trustee, the discretion so given can not be exercised otherwise than according to law, and does not warrant an investment in personal securities or securities not sanctioned by the court. Held, that an executor and trustee who deposited funds so left in trust for infants, at three and a-half or four per cent. interest, in a savings bank, did not conform to his duty; and his failure to do so exposed him to pay the legal rate of interest for the money, although he acted innocently and honestly; and the acquiescence of the statutory guardian of the infants, not being for their benefit, did not relieve him. Held, also, that the defendant was not entitled to costs out of the fund, but that he should be relieved from paying costs. *Spratt* v. *Wilson*, 19 O. R. 28.

——— *Measure of Liability.*]— Where a trustee is authorized to invest in either of two specified modes, and by mistake invests in neither, the measure of his liability is the loss arising from his not having invested in the less beneficial of the two modes. Two years before the passing of the Act relaxing the usury laws (22 Vict. c. 85), a trustee, who was authorized to invest on mortgage or in government securities, invested in Upper Canada Bank stock, believing it within his authority. The stock ultimately turned out worthless; and the trustee submitted to account for the principal with compound interest at six per cent.:— Held, that this was the extent of his liability, though eight per cent. might have been obtained on mortgages. *Paterson* v. *Lailey*, 18 Gr. 13.

——— *Municipal Debentures.*]—Where a testator authorized his executor to invest the surplus of his estate in public securities:— Held, that municipal debentures were not thereby authorized. *Ewart* v. *Gordon*, 13 Gr. 40.

——— *Profit.*]—Where a receiver had made an investment unauthorized by the court, by which a profit had been made, the amount realized was directed to be added to the principal. *Baldwin* v. *Crawford*, 2 Ch. Ch. 9.

——— *Stock in Loan Company—Direction of Settlor—Defective Execution of Power.*]— A settlement in which the trustee was authorized to invest the funds in "Dominion, provincial, and municipal bonds and debentures, or first mortgages upon real estate," contained a power of revocation by deed in favour of the settlor, with the consent of the trustee. The latter invested some of the trust moneys in the stock of a loan company, under instructions by letter from the settlor:—Held, that there was no breach of trust, and that what was done amounted to a defective execution of the power, which the court would aid. The principal on which In re Mackenzie Trusts, 23 Ch. D. 750, was decided, applied. *Re Mackenzie Trusts*, 28 O. R. 312.

——— *Stock in Trading Company — Reserve of Profits—Income.*]—A testator, by his will, devised all his property to trustees upon trust, after providing for certain annuities, to accumulate the income of the residue for ten years, and then to hold the estate for the benefit of his sons and daughters as therein mentioned, or in the case of a son or daughter who might be dead, to hold the share of such son or daughter according to the provisions of his or her will, and in default of any such will, for any children, him or her surviving, and if no such child, then over. He also empowered his trustees to make advances to his sons and daughters, or any children of his sons and daughters, as they might deem advisable, out of the income of the share of such son or daughter or child, and authorized them to invest the moneys of the estate in such securities as they should think proper, and to continue any business he might be engaged in at the time of his decease, for one year after his death. At the time of his decease the testator was a partner in a firm of distillers. A few months after his death, the surviving partner and the representatives of his estate turned the business into a joint stock company, the testator's share of the assets of the partnership, with the assent of all his children, being valued and put in as so much stock. According to the fundamental agreement entered into by the corporators, a large share of the profits of the company were annually accumulated as a reserve fund. After a period of seven years, the interest of the estate of the testator in the company was bought out by the surviving partner at a large advance, based upon the amount of profits so accumulated in the reserve fund, with an allowance for the prospective amount of such profits in future years:— Held, that the above employment of the funds of the estate was technically a breach of trust, and an improper investment under the terms of the will. "Investment" is not a proper term as to moneys in trade; and "security" means such security as binds lands or something to be answerable for it. Held, however, that the reserve of profits derived from the user and increase of the capital, was properly regarded as income, out of which or out of that part of the purchase money which represented the same, advances might be made by the trustees, under the will. Distinction between this case, and one between tenants for life and remaindermen, pointed out. *Worts* v. *Worts*, 18 O. R. 332.

See Burritt v. *Burritt*, 27 Gr. 143; *Beaty* v. *Shaw*, 13 O. R. 21, 14 A. R. 600; *Re Gabourie, Casey* v. *Gabourie*, 13 O. R. 635; *Re J. T. Smith's Trusts*, No. 2, 18 O. R. 327; *Cumming* v. *Landed Banking and Loan Co.*, 19 O. R. 426, 20 O. R. 382, 19 A. R. 447, 22 S. C. R. 246; *Re McLatchie, Preston* v. *Leslie*, 30 O. R. 179; *Ewart* v. *Dryden*, 13 Gr. 50; *Re J. T. Smith's Trusts*, 18 O. R. 327; *In re Plumb*, 27 O. R. 601.

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6. *Lease, Mortgage, Pledge, or Sale of Trust Property.*

Lease of Land — *Acting Trustee—Covenant — Possession—Improvements—Trespass —Injunction.*]—The trustees of M., deceased, who held the legal estate in land in trust for sale for the purpose of a reservoir, sold to one Z., in 1854, a portion of lot 10, Niagara Falls survey, for the purpose of a reservoir, the intention being to run a line of pipes over the residue of said lot to Niagara Falls, where a pump-house was to be constructed for the purpose of forcing water to the reservoir, and thence it was to be distributed by pipes over the town of Niagara Falls. T. B., as well as E. B. M., the acting trustee, agreed to extend his lease for ever at a rental to be fixed every twenty-one years. The trustees subsequently sold the land in question to S. B., son of T. B., whose place, it was understood, S. B. was to take, T. B. having the right of purchase under his lease, and having expended large sums in improving the property. S. B. subsequently mortgaged to a certain company, who sold under foreclosure proceedings to the plaintiff. The land through which such pipes were to run had been devised by one M. to E. B. M., his wife, and three others, as trustees. In 1854 E. B. M. alone leased it to T. B. for fourteen years. In 1854 T. B. leased a strip eight feet wide by 650 feet long to Z., for the purpose of laying his pipes therein, for ten years, at a nominal rent, and both T. B. and E. B. M., in that year, by separate instruments, covenanted with S. B. that she or T. B., if he should purchase the land under a provision in his lease for that purpose, would continue the lease to Z. for twenty-one years, perpetually renewable, at a rent to be fixed by arbitration. Z. constructed the reservoir, &c.,

and laid down the pipes in 1854, and the town had been supplied by them ever since. In 1864 E. B. M. gave a further lease to T. B. for seven years, and in 1868 she conveyed to S. B., the appointee of T. B., his father. S. B. mortgaged to a loan company, who sold under a decree for sale to the plaintiff, stating in the advertisement that it was subject to the right of the defendants, who represented Z., to lay their waterpipes, under the lease from T. B. to Z. After the expiration of that lease no further lease had been executed, but $12 a year was by agreement paid as rent to T. B. and to S. B. until the title became vested in the plaintiff, who refused to accept rent or to recognize defendants' rights, and brought trespass against them:—Held, (1) that the lease of 1854 by E. B. M. alone was not binding on her co-trustees unless they could be shewn to have agreed to it. (2) That the right of Z. to get a lease from T. B., under the covenant of 1854, continued as against T. B. under the second lease of 1864. (3) That the defendants having, under the covenants of T. B. and E. B. M., taken possession and constructed the works, which were of a permanent and expensive character, and for the public benefit, and having paid rent up to the time of the plaintiffs acquiring title, and all parties having had notice, and having made no objection, they were entitled to an injunction staying the action, and to a lease for twenty-one years, renewable at a rent to be fixed by arbitration or by the registrar of the court. *Davis* v. *Lewis*, 8 O. R. 1.

Mortgage—*Covenant for Payment—Personal Liability of Trustee.*]—Where a person holding land as a trustee, at the request of the beneficial owners, and without any consideration to him therefor, or intention to become personally liable for the benefit of such owners, executed a mortgage on the land, the mortgage, without his knowledge, containing a covenant to pay the mortgage debt:—Held, that the covenant was not enforceable against the mortgagor personally, by the assignee of the mortgage for value without notice; and that his remedy was restricted to foreclosure proceedings against the lands. *Patterson* v. *McLean*, 21 O. R. 221.

Mortgage of Interest of Trustee—*Further Charge—Benefit of Mortgagee.*]—A trustee of lands authorized to sell, and, amongst other things, to retain and pay sums due and owing to himself by the settlor, and to pay the balance to the settlor, mortgaged his interest to the plaintiff, giving covenants for title and further assurance; and then, by arrangement with the settlor, the trustee was to be entitled to pay himself and his partners for goods and advances made after the mortgage; and afterwards becoming entitled to the whole partnership estate:—Held, that the further charge enured to the benefit of the mortgagee. *Edinburgh Life Assurance Co.* v. *Allen*, 23 Gr. 230.

Pledge of Assets—*Managing Trustee—Acquiescence of Others — Repayment of Advances.*]—Where advances were made by way of loan to the managing executor, as such, and subsequently security was taken therefor from him on part of the assets of the estate, such advances being made and security taken in good faith on the part of the lender; and it appeared that some of the advances were duly entered in the books of the estate, and the name of the lender, who had no other transactions with the estate, appeared as a creditor in several annual balance sheets sent to the other executors by their agent, and no objection on their part was ever made; the court refused, at the instance of such executors, to order the securities to be delivered back to them, without payment of such advances. *Ewart* v. *Gordon*, 13 Gr. 40.

Power to Lease — *Implication—Reasonable Provisions.*]—The plaintiffs were trustees under a will, holding the legal estate in the property devised and bequeathed, in trust to maintain themselves and their children, with remainder over to the children upon the death of themselves; with power to absolutely convey the property and to exclude any child from participating in the remainder:—Held, that the plaintiffs had implied power to make all reasonable leases. The plaintiffs made an agreement for a building lease to the defendant of part of the trust estate for twenty-one years, with a provision for compensation to the defendant at the end of the term for his improvements, and the draft lease settled provided that the plaintiffs should at the end of the term pay for such improvements or renew the lease for a further term of twenty-one years:—Held, that the provisions of the agreement and lease were reasonable, and bound the trust estate, and that the plaintiffs were entitled to specific performance. *Brooke* v. *Brown*, 19 O. R. 124.

——— *Tenancy for Life.*]—A testator gave all his estate, real and personal, to trustees upon trust to allow and give the use thereof to his wife during her life for her support and maintenance, and after her death to sell and divide the proceeds among his children equally:—Held, that the wife had the right to leave the farm and deal herself directly with the tenant during her life. In this case those entitled in remainder were the adult children of the life tenant, and no active duties were cast by the will upon the trustees during the continuance of the life estate, and such being the case, the court would give effect to the usual incidents of an estate for life by which the tenant can occupy it or let it, or otherwise dispose of it as seems best to that tenant. Held, therefore, that a lease theretofore made by the trustees without the sanction of the widow, though there was no evidence of mala fides on their part, must nevertheless be set aside, and possession of the property given to the widow or her nominee. *Hefferman* v. *Taylor*, 15 O. R. 670.

Power to Mortgage—*Direction of Cestui que Trust—Application of Mortgage Money.*]—The owner of real estate conveyed the same to trustees for his daughter E. S., one of them being her husband, to dispose thereof "in such manner as the said E. S., her heirs and assigns, may at any time advise or direct, and to make such leases, and further, to make such conveyances in fee simple of the said lands, &c., as the said E. S., her heirs, &c., may at any time advise or direct." The trustees created a mortgage, in which E. S. joined:—Held, that the conveyance to the trustees effected a settlement to the separate use of E. S.; that her joining in the mortgage was a sufficient direction to the trustees; that the mortgagee was not, under the circumstances, bound to see to the application of the money; and that, in default of payment, he was entitled to the usual decree of foreclosure. *Place* v. *Spawn*, 7 Gr. 406.

——— *Expenses of Carrying on Testator's Business — Terms of Will—Notice to Mortgagee.*]—A testator charged his real estate with payment of his debts, which he directed to be paid thereout as soon as possible, and then devised it to his executors and trustees on trust to sell as soon as they should think prudent, and invest the proceeds, and pay an annuity to his widow until sale, and, after the sale, invest a sum named from which to give her a specific annuity, and distribute the proceeds among his family; and proceeded: "Until sold as aforesaid I direct that my trustees keep my schooners employed for freight and hire as far as possible, and for such purpose to engage all necessary assistants, and keep the said vessels in repair; and may store grain and other goods and merchandise in my warehouse for hire or storage, and may take such action as they think advisable to work and develop my interest in the B. gold mine, but the outlay by them shall not at any time exceed $1,000." The trustees became indebted to a bank for certain expenses incurred in connection with the schooners and repairs to them, and in connection with the warehouse; and, to meet this indebtedness, executed a mortgage of the real estate to the plaintiffs, who now brought this action for foreclosure. The testator's debts had all been paid before the execution of the mortgage, but there was no evidence that the plaintiffs know more as to the purpose for which the money was required, than that it was to pay a debt due at the bank by the estate:—Held, that the plaintiffs were entitled to the usual mortgage judgment, for there was no sufficient evidence of notice to them that the money was not to be expended in conformity with the will. *London and Canadian L. and A. Co.* v. *Wallace*, 8 O. R. 539.

——— *Payment of Incumbrance — Benefit of Estate.*]—The testatrix, by her will, devised and bequeathed all the rest and residue of her real and personal estate unto R. G., "upon trust to sell my real estate and to call in and convert into money the remainder of my personal estate, with power to demise or lease . . any portion thereof for any term or terms of years. . . And I declare that the said trustees shall out of the moneys arising from such sale, calling in, and conversion . . pay off the incumbrance, if any, existing on the F. property, and shall divide the balance of the said moneys among my four children." The remaining property, not included in the residuary estate, was specifically devised by the will among the children of the testator in certain shares. R. G. mortgaged a certain portion of the residuary real estate to one T., and applied the proceeds of the loan in part in liquidation of the outstanding mortgage on the F. property, and in part otherwise for the benefit of the estate. The property comprised in this mortgage was sold by the court in proceedings by T., but did not bring enough to pay off the whole mortgage debt:—Held, on administration of the estate by the court, that the trust of the residue was a mere trust for conversion out and out, and R. G. had no power to make the mortgage in question; nevertheless, to the extent to which the estate got the benefit of the loan, the executors of T. were entitled to rank against the estate for the balance of their mortgage debt, but only subsequent to certain mortgages placed by specific devisees since the death of the testatrix on portions of the estate devised to them, including the F. property, without knowledge, so far as appeared, of the source from which the money discharging the F. mortgage came. Held, also, that the mortgage to T. being invalid, it could only carry interest at six per cent., although it provided for interest at twelve per cent. London and Canadian L. and A. Co. v. Wallace, 8 O. R. 539, distinguished. *Gordon* v. *Gordon*, 11 O. R. 611, 12 O. R. 593.

——— *Payment of Incumbrances—Rents and Profits.*]—A testator possessed of several freehold properties, each of which was subject to an incumbrance, devised to a trustee all and singular his real estate, and the rents, issues, &c., due or to become due and payable to him, upon trust to receive the same and therewith pay all his personal debts, funeral and testamentary expenses; and also thereafter from time to time to pay and discharge therewith all debts, dues, and incumbrances upon his estate. And after providing for payment of all his just debts and the incumbrances on his estate, he made specific devises of his lands:—Held, that the devise in each case was not of the equity of redemption merely, but that all of the lands were bound to contribute to the paying off of all the mortgages; not that each parcel should bear its own burthen; and that, in order to avert a sale of one of the parcels in a proceeding upon the mortgage, the trustees should raise by mortgage of all the lands a sum sufficient to pay off all the incumbrances thereon; the rents and profits of the whole to constitute a fund wherewith to pay the interest and ultimately liquidate the principal. The powers of a trustee, who is directed to raise or to pay money out of rents and profits, to sell the trust estate, considered and acted on. *Sproatt* v. *Robertson*, 26 Gr. 333.

——— *Promise to Exercise.*]—See *Connor* v. *Vroom*, 24 S. C. R. 701, *post* IX.

——— *Trust for Sale.*]—A. conveyed his property to B. in trust, to convert the same into money:—Held, that the mortgage was not authorized by the trust for sale, and was only valid to the extent of B.'s beneficial interest, if any, in the premises. *Edinburgh Life Assurance Co.* v. *Allen*, 18 Gr. 425.

——— *Trust for Sale—Acquiescence of Beneficiary.*]—Lands were held in trust for the separate use of a married woman, and upon her death, in trust for her surviving children, and also to sell or lease any portion with the consent in writing of the cestuis que trust, and re-invest the proceeds of such sales. In pursuance of a request to that effect, the trustees created a mortgage to a person for the purpose of negotiating it, in order to evade the usury law:—Held, that the trust for sale did not authorize the execution of this mortgage, and that the same was void as against the children. But, it being alleged that the married woman had participated in the misappropriation of the trust fund, further inquiry was directed or that point with a view to making her life interest liable for the money advanced. *Nowlan* v. *Logie*, 7 Gr. 88.

Power to Sell—*Executors eo Nomine—Joint Receipts.*]—Devisees in trust for sale of real estate must jointly receive or unite in receipts for the purchase money, unless the will provides otherwise, and the case is not affected by the property being charged with debts, and the power of sale being to the executors eo nomine. *Ewart* v. *Snyder*, 13 Gr. 55.

——— *Implication—Executors — Administratrix with Will Annexed.*]—B., by his will, bequeathed to his wife A. the land in question, "to be at her disposal, if agreeable to the executors," of whom she was not one, "so long as she remains a widow," adding, "I wish and desire the aforementioned farm to be sold for the discharge of my lawful debts, and the residue accruing therefrom to be laid out in the payment or part payment of another for the support of my family." He then directed that his two eldest sons should have the property when they came of age, after his wife's death, if she should remain a widow, and if she should marry they were to come into possession when of age, and that these two sons were to pay to the other children a proportion equal to their part of the property, adding, "all the above to be done to the wishes of the aforementioned executors." None of the executors proved or acted, and in 1851 letters of administration with the will annexed were granted to the widow, who in the same year conveyed to defendant, describing herself in the deed as "sole devisee (with power of sale for purposes set forth) under the will of," &c. She married again about 1853. This sale she swore was made in order to pay the testator's debts, and the purchase money so applied:—Held, that the sale directed by the will being for the payment of debts, the power to sell was vested by implication in the executors; that she did not take it as administratrix; that on her marriage her own interest was at an end; and that the sons could, therefore, eject defendant without any notice to quit or demand of possession. *Banting* v. *Gummerson*, 24 U. C. R. 287.

——— *Implication — Residue.*] — Trustees were empowered by settlement "to lay out and invest the whole or any part or parts of the residue and remainder of the fortune of the said G. H., the settlor, so limited in trust as aforesaid, in the purchase or purchases of land in fee (free from incumbrances) or such other good security as they shall think fit, in England or elsewhere," and a power of sale was given to resell lands so purchased:—Held, to give a sufficient power to the trustees to sell lands of the residue of the estate generally. *In re Evans*, 4 Ch. Ch. 102.

——— *Payment of Prior Incumbrance.*]—Held, that trustees of real estate, with a power of sale, had power to mortgage for the purpose of paying a part of a prior incumbrance thereon with a view to saving the property from foreclosure. *Re Vansickle and Moore*, 22 O. R. 560.

——— *Proviso—Repugnancy.*]—Executors sold and conveyed premises to certain trustees in trust for the infant children of M. G. in fee, but with a proviso that the grantees might absolutely dispose of the premises with the consent in writing of a majority of such of the children as had attained twenty-one, and a further proviso that in case any of the grantees, or of the children on attaining twenty-one, should desire to part with their interest in the premises, the same should be first offered to the other members of the family. Three of the children had attained twenty-one years and were willing to consent to the sale:—Held, that the deed to the trustees, containing apt words, might be treated as a deed of bargain and sale, vesting the legal estate in them upon the trusts mentioned, and that the right to sell existed. Held, also, that the subsequent provision as to the children buying from one another on attaining twenty-one, was not inconsistent with or repugnant to the exercise of the power of sale at present, but would still be operative if no previous sale were made. *Re Graham Contract*, 17 O. R. 570.

Sale of Assets of Insolvent Estate—*Insolvent—Status to Attack.*]—The court, under the circumstances of the case, refused, upon the application of a debtor who had assigned all his property in trust for his creditors, to set aside a sale made by the trustees, on the ground of inadequacy of price. *Linton* v. *Michie*, 7 Gr. 182.

Sale of Land—*Covenant for Payment—Action on—Quebec Law.*]—Article 19, C. C. P., is applicable to mere agents or mandatories. It is not applicable to trustees in whom the subject of the trust has been vested in property and in possession for the benefit of third parties, and who have duties to perform in the protection or realization of the trust estate. Where trustees sold property over which they had possession and title:—Held, that they were entitled to sue the purchaser, to whom they had delivered possession, upon his covenant to pay the balance of the purchase money. Browne v. Pinsonneault, 3 S. C. R. 102, and Burland v. Moffatt, 11 S. C. R. 76, overruled. *Porteous* v. *Reynar*, 13 App. Cas. 120.

——— *Discretion.*]—If under a will a trustee has a discretion to sell or not to sell real estate, the court will not interfere by its advice or direction, but will leave the trustee to the exercise of his discretion. *In re Parker*, 20 Gr. 389.

See, also, *Coy* v. *Coy*, 25 Gr. 267.

——— *Improvements by Cestui que Trust—Allowance for.*] — Trustees with power of sale, in good faith, but erroneously, conveyed part of the trust estate to one of the cestuis que trust, for the collateral advantage to the whole property to be derived from certain buildings and improvements to be made on the part conveyed, thus committing a technical breach of trust. Upon discovering this, the grantee joined with the trustees in a conveyance of the whole estate for value, upon an agreement entered into between the parties that he should be paid such sum in respect of his improvements as the court might consider him entitled to, and thereupon filed a bill for that purpose. The court, under the circumstances, directed the grantee to be allowed the sum by which the improvements had enhanced the value of the whole property, or the price of the buildings and other improvements made thereon, whichever should be the lesser, although the rule is that in such cases payments for improvements will not be allowed at the instance of the party making them. *Pegley* v. *Woods*, 14 Gr. 47.

——— *Inadequacy of Price.*]—It is the duty of a trustee for sale to use all diligence to obtain the best price; and where a trustee sold property at private sale, without previous advertisement, at a price lower than other persons were willing to give, and did not first communicate with these persons, though informed of offers of the higher price made by them to one of the cestuis que trust, the trustee was held responsible for the loss. In such a case the absence of any fraudulent motive in

the trustee is no defence; nor is evidence of witnesses that the property was worth no more than the trustee obtained for it. The trustee deposed that he had disbelieved the statement of the cestuis que trust:—Held, no excuse for not testing the truth of the statement by reference to the persons named. *Graham* v. *Yeomans*, 18 Gr. 238.

——— *Payment of Debts—Excessive Quantity of Land.*]—Executors were authorized by the will to sell such portion of the real estate as they in their discretion should think necessary to pay off a mortgage and such debts as the personal estate would not discharge. They offered for sale at auction a lot described as sixty acres (more or less) section 7S, Loch End Farm, Victoria District, giving the boundaries on three sides. The lot was unsurveyed, and was offered for sale by the acre, an upset price of $35 being fixed. By the conditions of sale a survey was to be made after the sale at the joint expense of vendors and purchasers. S. purchased the lot for $36 an acre, and on being surveyed it was found to contain 117 acres. The executors refused to convey that quantity, alleging that only some $2,000 was required to pay the debts of the estate, and refused to execute a deed of the 117 acres, tendered by S. In a suit by S. for specific performance of the contract for sale of the whole lot:—Held, that S. was entitled to a conveyance of the 117 acres, and that the executors would not be guilty of a breach of trust in conveying that quantity. *Sea* v. *McLean*, 14 S. C. R. 632.

——— *Will — Execution against Beneficiary — Application of Purchase Money.*]—Trustees under the will of F. S., holding certain lands by virtue thereof on trust to sell as soon as conveniently might be after her decease, and to distribute the proceeds among her children, one of whom was D. V. L., contracted to sell the said lands to one H. T. There were at the time writs of fieri facias in the sheriff's hands against the lands of D. V. L., some of which had been placed therein before the date of the contract:—Held, nevertheless, that the writs did not form any incumbrance on the lands in the hands of the trustees so as to prevent them conveying the same to a purchaser indefectibly, and that any share of the purchase money which D. V. L. was entitled to, he would get as personal, not as real, estate. Held, also, that the purchaser was not bound to see to the application of the purchase money. *Re Lewis and Thorne*, 14 O. R. 133.

Sale of Mortgage—*Executor—Misappropriation—Assignment.*]—A. and B., executors and trustees under a will with power of sale, sell and take a mortgage to secure purchase money, they being in the recital named as executors. B., without this knowledge, assigns the mortgage and appropriates the consideration money to his own use:—Held, that no estate passed under the assignment except so far as the trust estate might be found debtor to B.; and also, that as between the contending equities of the trust estate and the assignee, the maxim qui prior est in tempore potior est in jure would apply in favour of the trust estate. *Henderson* v. *Woods*, 9 Gr. 539.

Sale of Timber Limits — *Pledge to Bank—Inadequacy of Price — Damages.*] — The plaintiff, being indebted to the defendants as indorser in the sum of about $7,000, and being pressed for payment, which he was unable to make, transferred to the defendants certain timber limits which he stated had cost him $25,000, to hold as security for his indebtedness, and for the purpose of enabling them to sell it and realize their debt. The regulations of the Crown lands department, however, forbade the recognition of any conditional transfer, and therefore the assignment was in terms absolute. The defendants, without adopting any means of ascertaining the probable value of the limits, offered them for sale by public auction, with the assent of the plaintiff, when, no sufficient offer having been made, they were withdrawn, and, without having made any further inquiry as to value, the defendants sold them by private sale, without consulting the plaintiff, for $6,000. The limits were subsequently sold by the purchaser for a very large sum. Previous to the attempted sale by auction the defendants had received several offers of sums more than sufficient to pay off their claim. In an action brought by the plaintiff against the defendants for selling at a grossly inadequate price, judgment was given in favour of the plaintiff, with $19,654.38 damages, which was affirmed on appeal. *Prentice* v. *Consolidated Bank*, 13 A. R. 69.

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7. *Purchase or Lease of Trust Property by Trustees.*

(a) *Generally.*

Administrator—*Benefit of.*]—Under no circumstances can an administrator be allowed to purchase for his own benefit the lands of the intestate. *Lamont* v. *Lamont*, 7 Gr. 258.

Beneficiary—*Benefit of — Completion of Purchase — Exception to General Rule.*]—The rule in equity is, that the trustee buying the trust estate will be compelled to complete the purchase if considered for the advantage of those beneficially interested; but a trustee who had procured the estate to be bid in at auction, so as to prevent its being, as he considered, sacrificed, was held not bound to perfect the purchase, as it is the duty of a trustee to take steps to prevent the estate being sold at an undervalue; and this although he erred in his judgment as to the value of the property offered for sale, as also as to the means adopted to protect it. *Heron* v. *Moffatt*, 22 Gr. 370.

See, also, *McKnight* v. *McKnight*, 12 Gr. 363, *post* (b).

The fact that a trustee, when offering some of the trust lands for sale by auction, at the same time offered some of his own property, and employed the same person to bid for it that he authorized to buy in the trust property, with a view of saving it from being sold at an undervalue, will not warrant the cestuis que trust in calling upon the trustee to perfect the purchase made by his agent of the trust estate. *Heron* v. *Moffatt*, 23 Gr. 196.

Executor not Clothed with Probate.]—If an executor does not renounce, or make known his intention not to act, he is in general disqualified to engage in any transaction for his own benefit, to the prejudice of those interested in the estate, quite as much as if he

had taken out probate. *Robinson* v. *Coyne*, 14 Gr. 561.

Purchase for Cestui que Trust—*Non-disclosure.*]—It is a settled rule that a trustee or agent, authorized to make a purchase for his cestui que trust or principal, cannot make the purchase for himself without disclosing the fact. Such transactions are so dangerous that they are wholly forbidden, and are not merely declared void where damage has arisen from them or fraud was mixed up with them. Accordingly, where an agent, authorized to invest in bank stock, appropriated to his principal some shares of his own, and rendered an account as if he had purchased so many shares for her; his principal, years afterwards, on the fact coming to her knowledge, was held entitled to repudiate the transaction, without any inquiry as to the fairness of the rate which had been charged for the shares. *Harrison* v. *Harrison*, 14 Gr. 586.

Purchase from Cestui que Trust.]—Where a trustee deals with his cestui que trust for the trust property, it rests with the trustee to shew that everything in connection with the transfer was fair and just. *Blain* v. *Terryberry*, 11 Gr. 286.

(b) *Particular Cases.*

Administrator—*Conveyance of Land to — Purchaser from Intestate.*] — Where A., having only a bond for a deed, and not having paid all the purchase money, made a conveyance in fee to B. and died, and B. went into possession of the land and continued in possession for several years, when A.'s administrator obtained a conveyance in fee to himself from the person who had given A. the bond: —Held, that the administrator by making use of the deed was guilty of a fraud, and that his title under it could not prevail against B. *Doe d. Dobie* v. *Vanderlip*, 5 O. S. 85.

——— *Crown Grant—Heir of Intestate.*]—An administrator purchased from government in his own name, and with his own funds, land in which the intestate as occupant had a pre-emptive right, at the same price as it had been agreed to sell to the intestate; but being administrator, the government did not require him to pay the value of improvements made by the intestate:—Held, that he was a trustee for the heir-at-law of the intestate, and could not purchase for his own benefit. *Foster* v. *McKinnon*, 5 Gr. 510.

The purchaser of land from the Crown died intestate, without having procured a patent or paid the purchase money. A younger brother, without the knowledge of the heir-at-law, administered to the intestate, and upon payment of the arrears obtained a patent to himself, on the ground that the greater portion of the improvements on the land had been made by him, and that he had maintained his father and mother while residing on it. Upon a bill filed by the heir-at-law against the grantee of the Crown, and others claiming under him, it was shewn that the deceased alone had cultivated the land, and supported the parents; and that the grantee had never made the property his settled place of residence. The court declared the heir-at-law entitled to the estate, notwithstanding the patent, and decreed him relief in accordance with such declaration. *Lamont* v. *Lamont*, 7 Gr. 258.

Agent — *Purchase of Bank Stock for Principal — Appropriation of Shares of Agent.*]—See *Harrison* v. *Harrison*, 14 Gr. 586, *ante* (a).

Agent of Administratrix — *Purchaser of Mortgage.*]—The widow of an intestate administered, and her brother, a lawyer, acted for her as a friend, not professionally, in the management of the estate. While so employed, the brother, with his own moneys, purchased a mortgage which had been created by the intestate:—Held, that he was entitled to hold the mortgage for his own benefit. *Paul* v. *Johnson*, 12 Gr. 474.

Assignee or Inspector of Insolvent Estate.]—A purchase by the assignee for the benefit of creditors of the assets of the estate, made by him at the request of the inspectors of the estate after futile efforts to sell at auction and by private tender, and after a circular letter had been sent by the inspectors to each creditor stating that the sale would be made unless objection were taken, was set aside, there being evidence that at the time of the purchase the assignee knew of and was negotiating with a possible purchaser, to whom he afterwards resold at a large profit, and had not disclosed this information to the inspectors. The inspectors of an insolvent estate have no power, unless specially authorized by the creditors, to bind the latter by anything they do in disposing of the estate. The disposal of it is in the hands of the creditors, and, in default of directions by them, in the hands of the Judge of the county court. *Morrison* v. *Watts*, 19 A. R. 622.

An inspector of an insolvent estate is a person having duties of a fiduciary nature to perform in respect thereto and he cannot be allowed to become a purchaser, on his own account, of any of the estate of the insolvent. Davis v. Kerr, 17 S. C. R. 235, followed. *Gastonguay* v. *Savoie*, 29 S. C. R. 613.

See, also, *Segsworth* v. *Anderson*, 23 O. R. 573, 21 A. R. 242, 24 S. C. R. 699; *Thompson* v. *Clarkson*, 21 O. R. 421.

Attorney Purchasing from Client.]—See SOLICITOR, VII. 2.

Bank Director — *Purchase of Bank's Property—Defective Title.*]—In 1856 certain lands were purchased from one W., and a mortgage given back for the greater portion of the purchase money, the purchaser intending to lay the property out into building lots for sale; which was accordingly done, and roads laid out through it. Several years afterwards the purchaser of one of the lots objected to complete his purchase on the ground that W., at the time he acquired his title from his vendors, the Bank of Upper Canada, was a director and the vice-president of the institution, and as such one of those intrusted to sell the real estate of the bank—which objection was sustained. W.'s vendee thereupon filed a bill to have the transaction set aside, his mortgage delivered up and discharged, and the money paid by him on account and expended for taxes and improvements, repaid to him with interest. There being no evidence of any act of the vendee confirmatory of the purchase after he became aware of this defect in the

title, the court decreed the relief asked with costs. *Brunskill* v. *Clarke*, 9 Gr. 430.

See Chatham National Bank v. *McKeen*, 24 S. C. R. 348.

Company Director — *Mortgage to — Validity.*]—Where a vote of the shareholders of an incorporated company had authorized the directors to raise money on the security of the company's lands, and one of the directors afterwards, by arrangement with the other directors, advanced money for the use of the company and took a mortgage on their lands, it was held that a third party who subsequently became the purchaser of the mortgaged estate, could not resist the claim of the mortgagee, on the ground that a mortgage to a director was invalid. *Greenstreet* v. *Paris*, 21 Gr. 229.

——— *Purchase at Mortgage Sale — Profits.*]—A director of a joint stock company, having a judgment and execution of his own against the property of the company, acting in good faith, purchased the same at a sale by the mortgagees, under a power of sale for $8,400, and sold it in the following year for $23,000:—Held, in winding-up proceedings, that he could not purchase for his own benefit, but held the land as trustee for the company and was accountable for any profit received on a resale, and by reason of his refusing to pay over or account for such profits, and in fact by his appearing as a bidder at the sale and so damping the bidding, was guilty of a breach of trust, within R. S. C. c. 129, s. 83. *Re Iron Clay Brick Manufacturing Co., Turner's Case*, 19 O. R. 113.

Executor—*Purchase of Land of Testator —Benefit of Infant.*]—Although the rule is, that an executor or trustee will not be permitted to deal on his own account with the trust estate, still, where one of two executors empowered to sell, with the concurrence of the widow and the eldest son of the testator, aged eighteen or nineteeen years, purchased part of the testator's property, the court refused to set aside the transaction—the master having found that at the time the sale was concluded it was beneficial to the infants. *McKnight* v. *McKnight*, 12 Gr. 363.

——— *Purchase of Land of Testator—Life Estate—Fraud.*]—A. died, leaving all she had to her sister, B., the plaintiff, an old, feeble, and ignorant woman, and appointed C. her executor. C. did not prove the will, but acted as executor; he also removed the plaintiff to his house, and intimated that he meant to take care of her during the rest of her life. The testatrix had a life estate in some cottages, and after her death the remainderman was induced by C. and others, for the purpose of benefiting the plaintiff, to sell them for less than half their value, and to convey them to C.'s wife, it being supposed that C. would have to advance the money out of his own funds, but the fact being that he had money in his hands, as trustee for the plaintiff, sufficient to pay the price:—Held, that C. and his wife could not retain the benefit of the purchase, and that the plaintiff was entitled to a conveyance. *Robinson* v. *Coyne*, 14 Gr. 561.

——— *Purchase of Land of Testator—Tender—Prête-nom—Parties.*] — In an administration suit a sale by tender was ordered. The defendant J., who was the executor of the person whose estate was being administered, and also trustee for the sale of a portion of the land sold, procured four tenders of different amounts to be put in for the property, in the names of different persons, but really for his own benefit. Every tender was for an amount less than the real value of the land. One of these tenders was accepted by the master, and the person in whose name it was made was declared the purchaser, and the sale to him confirmed. Subsequently he made a formal transfer to the defendant J. Upon the application of the plaintiff the sale was set aside. Held, also, that plaintiff was entitled to apply to set aside the sale without requiring any others of the parties interested to join. *Re Follis, Kilbourn* v. *Coulter*, 6 P. R. 160.

——— *Purchase of Land Devised — Sale under Execution—Debt of Executor.*]—Judgment was recovered against executors in an action on a note made by one of them, and indorsed by the testator for his accommodation. Property devised to a son of the testator was sold under execution issued on said judgment, and purchased by the executor who had made the note and conveyed by him to another son of the testator. The property was again sold under execution against the last mentioned grantee, and again purchased by the said executor. The original devisee having taken forcible possession of the property, the executor brought an action to recover it:—Held, affirming the judgment in 17 A. R. 193, that the first sale being for his own debt, the executor on purchasing did not acquire title for his own benefit, but became a trustee for the devisee, and the trust continued when he purchased the second time. *McDonald* v. *McDonald*, 21 S. C. R. 201.

Lease—*Inadequacy—Trusteeship —Knowledge of Trustee.*]—L. and S. were appointed by the court trustees for the plaintiff, a married woman, upon a written consent, purporting to be signed by them agreeing to act. Subsequently L. obtained from the plaintiff a lease of the trust estate to himself, at what was alleged to be an inadequate rental. Some years afterwards, and after the death of her husband, the plaintiff instituted proceedings to have the lease cancelled, alleging as grounds of relief, inadequacy of rent, want of proper advice by the plaintiff in the execution thereof, and the fiduciary relation towards herself which L. had assumed. Under the circumstances the court granted the relief asked, notwithstanding that L. swore that he was not aware that he had been appointed trustee; that he never signed the consent to act as such; and that his conduct throughout had been bonâ fide; it being shewn that he had effected an insurance upon the buildings situate upon the premises, the application for which he had signed as trustee, and there being reason to believe that, if he had not signed the consent himself, he had authorized the husband of the plaintiff to affix his signature thereto; but gave L. the option of accepting a new lease of the property to be settled by the master; which decree was affirmed by the full court on rehearing. *Seaton* v. *Lunney*, 27 Gr. 169.

Mayor of City—*Purchase of Debentures —Trustee of Profits.*]—The mayor of Toronto secretly contracted to purchase at a discount, from persons to whom the debentures were to be assigned by the railway company in whose favour they were to be issued, a large amount

of the debentures of the city, which were expected to be issued under a future by-law of the city council; and was himself an active party afterwards in procuring and giving effect to the by-law, which was subsequently passed:—Held, that he was a trustee for the city of the profit he derived from the transaction. *City of Toronto* v. *Bowes*, 4 Gr. 489; *Bowes* v. *City of Toronto*, 6 Gr. 1, 11 Moore P. C. 463.

Mayor of Town—*Purchase at Tax Sale.*]—Semble, that the mayor of a town or city cannot purchase at a tax sale of lands in his municipality. *Greenstreet* v. *Paris*, 21 Gr. 229.

Mortgagee — *Trustee — Judicial Sale — Leave to Bid—Profits.*] — The plaintiff was mortgagee of certain lands, and by the will of the mortgagor was devisee thereof in trust to pay certain legacies charged thereon—amongst others one to the defendant, an infant about ten years old. Having instituted proceedings against the defendant to enforce payment of the mortgage, the conduct of the sale was given to the guardian of the infant, and the plaintiff had liberty to bid at the sale under the decree, as mentioned in 27 Gr. 576:—Held, reversing the order then made, that the liberty to bid accorded the plaintiff, who occupied the two-fold character of mortgagee and trustee, was given him for the purpose of protecting his interests as mortgagee, but did not absolve him from the duty which, as trustee, he owed to the infant; and that the conduct of the plaintiff prior to and at and about the sale, as set out in the case, by means of which he had been enabled to make a profit at the expense of the infant cestui que trust, was such as would have rendered the sale invalid if the land had remained in his hands; but, as it had passed into those of an innocent purchaser, the plaintiff should be charged with the outside selling value of the estate at the time of the sale, or should pay to the defendant the amount due to him under the will, with interest thereon from the date of the sale, together with the costs of the court below subsequent to the petition, and also the costs of appeal. *Ricker* v. *Ricker*, 7 A. R. 282.

Partner of Intestate—*Purchase of Interest.*]—Under the statute to amend the law of property and trusts, the court made an order approving of a proposed sale to a partner of an intestate's interest in the partnership assets. *Ex parte Sessions*, 2 Ch. Ch. 360.

Solicitor—*Purchase of Client's Property.*]—See SOLICITOR, VII. 2.

Trustee — *Purchase of Life Estate — Sheriff's Sale.*]—A. holding property in trust for B., for life, and then for B.'s wife and children, purchased B.'s life estate at sheriff's sale:—Held, that he was trustee thereof for B. only, and not for the other cestui que trust. *King* v. *Keating*, 12 Gr. 29.

Trustee for Devisees—*Purchase of Life Estate — Benefit of Remainderman.*] — By virtue of a will A. had a life interest in certain lands, with remainder to the plaintiff in fee. The land was afterwards sold at sheriff's sale under circumstances which made the sale void in equity, and the purchaser a trustee for the devisees. A. (the life tenant) for valuable consideration conveyed his life interest to the purchaser:—Held, that the plaintiff could not claim the benefit of that transaction. *Gilpin* v. *West*, 18 Gr. 228.

Trustee for Sale—*Purchase of Judgment—Profits—Assignee.*]—The title of a trustee for sale being liable to be impeached by creditors of a former owner, the former owner being also entitled to the residue under the trust, the trustee bought at a discount a judgment recovered against such former owner. The trustee then owed the trust more than the amount paid for the judgment:—Held, that he could not retain the profit on the purchase, and that his cestuis que trust were entitled to it. After his purchase the trustee assigned the judgment:—Held, that his assignee took subject to the same equities as affected himself. *Hewson* v. *Smith*, 17 Gr. 407.

Trustee for Sale of Lands—*Collusive Sale.*]—In 1851 the plaintiff, who had gone to reside in California, empowered his brother in Canada to sell certain lands. In 1853 the brother agreed to sell the property to W., and in 1856 executed a conveyance of the property to W. for the alleged consideration of $1,000, and W. immediately reconveyed to the brother one-half of the estate for an alleged consideration of $200. In October, 1873, the plaintiff returned to Canada, and in January following filed a bill impeaching the transactions between his brother and W., and seeking to have them declared trustees of the estate for him. At the hearing the plaintiff and his brother compromised their difficulties by each taking one-half of the property conveyed to the brother. The court, in view of all the circumstances and of the time that had elapsed since the transaction was completed, refused to set aside the conveyance to W., and dismissed the plaintiff's bill with costs. *Taylor* v. *Taylor*, 23 Gr. 496.

See Hope v. *Beard*, 8 Gr. 380; *S. C.*, 10 Gr. 212; *Cudney* v. *Cudney*, 21 Gr. 153.

See, also, PRINCIPAL AND AGENT.

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8. *Other Cases.*

Acceptance of Trust—*Pleading—Status of Plaintiffs.*]—The plaintiffs, A. and J., filed a bill for the purpose of having a deed made to the defendant by J. declared void, as having been obtained by fraud and misrepresentation. The bill alleged that J. had subsequently made a deed of the same property to A., for the purpose of remedying, as far as he could, the wrong he had done by conveying to the defendant—the bill alleging that such deed to A. was made to him "as trustee for the heirs of A. M.," who had died seised. The bill in no place alleged that A. was trustee, but in the following paragraph it was stated that "before the execution of such last mentioned deed the heirs of the said A. M., who are the rightful owners of the said land," &c.:—Held, that, notwithstanding the absence of any express allegation of A. being such trustee, sufficient was stated to shew that he had accepted the office of trustee, and as such was entitled to litigate the subject matters of the bill, and a demurrer for want of equity was overruled with costs. A demurrer ore tenus for misjoinder of plaintiffs, it appearing by the will that J. had no interest in the questions raised, was allowed, without costs. Roche v.

Jordan, 20 Gr. 573, followed. *McLean* v. *Bruce*, 29 Gr. 507.

Breach of Trust—*Voluntary Conveyance—Party Wall—Tenants in Common.*]—M., owner of two warehouses, Nos. 5 and 7 (the dividing wall being necessary for the support of both), executed a deed with power of sale of No. 5, by way of marriage settlement on his daughter. M. having died, his executors executed a deed of confirmation to the purchaser of No. 5 from the trustees of the marriage settlement by a description which, it was contended by the purchaser, conveyed absolutely the freehold estate in the party wall and the land covered by it. An action being brought by the executors of M., to have it declared that the wall in question was a party wall:—Held, that the trustees of the will and the marriage settlement were bound by the trust declared in the instruments under which they derived their powers; and, even if it could be shewn that the confirmation deed had the effect of conveying a greater quantity of land than the deed from the trustees of the marriage settlement, such a voluntary conveyance in favour of one beneficiary, which would operate prejudicially to the interests of the other beneficiaries, would be a breach of trust and consequently void. *Lewis* v. *Allison*, 30 S. C. R. 173.

Delegation of Power by Trustee.]—See *Smith* v. *McLellan*, 11 O. R. 191.

Distribution of Trust Fund—*Notice of Claim—Exoneration.*]—A trustee is not exonerated by the Act respecting trustees and executors and the administration of estates, R. S. O. 1877 c. 107, if he had actual notice of a claim before distribution, even though he may have sent the notice prescribed and received no response to it. *Carling Brewing and Malting Co.* v. *Black*, 6 O. R. 441.

Improvements on Land.]—See *Re Bender*, 8 P. R. 399; *Foot* v. *Rice*, 4 O. R. 94.

Infants' Funds—*Deposit of—Creation of Trust—Award.*]—Money was recovered by the administratrix of a person killed by a railway accident, and the shares allotted to her children were deposited by her with her brother, who was fully cognizant where the money came from and to whom it belonged:—Held, that he was liable to account to the children as their trustee. The administratrix was afterwards sued by her brother for a debt, alleged to have been due by her husband, the intestate, and judgment was recovered by him in the action, and subsequently a reference was made to arbitration in respect of other moneys come to the hands of the administratrix for the benefit of her children, and by her deposited with her brother; and this judgment and the amount due thereon were, at the arbitration, mixed up with questions as to these trust moneys, and the award was in respect of all. The parties all acted as if these trust moneys and the debts of the estate were to be considered and dealt with together, but the infants were not represented before the arbitrators:—Held, that the infants were not bound by the award made under such circumstances. *Secord* v. *Costello*, 17 Gr. 328.

———*Payment out of Court—Investment by Trusts Company.*]—On an application by a trustee company, and a party who was entitled for life to the income of a fund in court, which was the proceeds of the sale of certain settled estates, for the payment out of the fund for the purpose of investment by the company as trustees (they having been appointed trustees under the will which devised the settled estates), which application was opposed by the official guardian on behalf of the remainderman:—Held, that the practice and current of authority were against what was asked by the petitioners, and they were not entitled to it as a matter of right, and that the application must be dismissed. *Re J. T. Smith's Trusts (No. 2)*, 18 O. R. 327.

———*Retention in Court — Trustee abroad.*]—Where the trustee for infants resided out of the jurisdiction, and a person resident within it had a contingent interest in the trust fund, the fund was ordered to be secured in court instead of being paid over to the trustee. *Stileman* v. *Campbell*, 13 Gr. 454.

Misappropriation of Trust Funds—*Stifling Prosecution—Restoration of Funds—Express Trust.*]—The Imperial Act 20 & 21 Vict. c. 54, s. 12, provides that "nothing in this Act contained, nor any proceeding, conviction, or judgment to be had or taken thereon against any person under this Act, shall prevent, lessen, or impeach any remedy at law or in equity, which any party aggrieved by any offence against this Act might have had if this Act had not been passed . . . . ; and nothing in this Act contained shall affect or prejudice any agreement entered into or security given by any trustee, having for its object the restoration or repayment of any trust property misappropriated:"—Held, affirming the judgment in 5 B. C. Rep. 571, that the class of trustees referred to in said Act were those guilty of misappropriation of property held upon express trusts. Semble, that the section only covered agreements or securities given by the defaulting trustee himself. Quære, is the said Imperial Act in force in British Columbia? If in force it would not apply to a prosecution for an offence under R. S. C. c. 164 (the Larceny Act), s. 58. An action was brought on a covenant given for the purpose of stifling a prosecution for the embezzlement of partnership property under R. S. C. c. 164, s. 58, which was not re-enacted by the criminal code, 1892:—Held, that the alleged criminal act, having been committed before the code came into force, was not affected by its provisions, and the covenant could not be enforced. Further, the partnership property not having been held on an express trust, the civil remedy was not preserved by the Imperial Act. *Major* v. *McCraney*, 29 S. C. R. 182.

Municipal Councillors — *Liability as Trustees.*]—See *Morrow* v. *Connor*, 11 P. R. 423.

Partition—*Right to.*] — The plaintiff in this case being a trustee for sale was held not to be in a position to ask for partition. *Keefer* v. *McKay*, 29 Gr. 162.

Qualification of Trustees as Voters.]—See *South Grenville Election (Prov.)*, *Ellis* v. *Fraser*, H. E. C. 163.

Relief of Trustees—*Notice to Creditors—Acting Reasonably—Act for Relief of Trustees — Limitation Act.*] — See *Stewart* v. *Snyder*, 27 A. R. 423.

Trustee's Interest in Conflict with that of Trust Estate.]—See *In re Toronto Harbour Commissioners*, 28 Gr. 195.

VIII. Uses and Trusts.

[*See* R. S. O. 1877 c. 95, s. 2; R. S. O. 1897 c. 119, s. 28.]

Distinction.]—As to the distinction between a trust and a use, see *Gamble* v. *Rees*, 6 U. C. R. 397.

Grant — *Beneficial Interest—Statute of Uses.*]—Certain owners of the equity of redemption in lands, by deed granted the same to "A., his heirs and assigns, to have and to hold the same to A., his heirs and assigns, unto and to the use of B., his heirs and assigns." This was dated 17th July, 1875, and registered 21st July, 1875:—Held, that, whether this deed operated under the Statute of Uses or not, B. took under it the beneficial interest in fee, and it had the same effect as if it were a conveyance to A. upon trust for the benefit of B. *Imperial Bank of Canada* v. *Metcalfe*, 11 O. R. 467.

——— *Intention — Mortgage—Subsequent Use.*]—In an indenture the granting words were, "grant, bargain, sell, alien, release, enfeoff, convey, and confirm unto the parties of the second part, their heirs and assigns, all and singular, &c.: habendum unto the said parties of the second part, their heirs and assigns forever, to the use and upon the trust following, that is to say, to and for the use of, &c., infant children of, &c., their heirs and assigns forever." It appeared in evidence that upon the execution of this deed by the grantor, it having been executed in completion of a sale of his equity of redemption to the grantees, in settlement of an overdue mortgage held by them as representing the deceased mortgagee, the grantees discharged this mortgage, and then mortgaged the estate back to the grantor to secure the purchase money of his equity. In ejectment, brought by the infant children against the lessee of the grantees:—Held, that the use was not executed in them (the children), but that, notwithstanding the use of the word "grant" in the deed, and C. S. U. C. c. 90, s. 2, the old rule, that deeds shall operate according to the intention of the parties, if by law they may, must govern, and that the intention to be gathered from the mortgage transaction, which would otherwise be defeated, clearly was that the deed should operate as a bargain and sale, vesting the use in the bargainees, the subsequent use being a trust. *Mitchell* v. *Smellie*, 20 C. P. 389.

Husband and Wife—*Grant to—Statute of Uses.*]—A husband and wife were the parties of the third part in a conveyance, whereby the wife's father did "grant unto the said party of the third part, his heirs and assigns forever," &c., habendum "unto the said party of the third part, his heirs and assigns, to and for his and their sole and only use forever:"—Held, that, by the operation of the Statute of Uses, the husband took an estate in fee simple. *Re Young*, 9 P. R. 521.

Lunatic—*Heir of—Statute of Uses.*]—The Crown granted land by letters patent to J. S. "in trust for his son I. S., a lunatic, his heirs and assigns forever, habendum to him, the said J. S., his heirs and assigns forever:"—Held, that this patent coming, as any other mode of assurance, under the operation of the Statute of Uses, 27 Hen. VIII. c. 10, if it did not, from particular considerations applying to the lunatic only, vest the real estate in him, yet it nevertheless created a use which, on the death of the lunatic, was executed in his heir; and that therefore a deed made by the heir after his death would be valid as against a deed executed by the grantee of the Crown. *Doe Snyder* v. *Masters*, 8 U. C. R. 55.

Operation of Bargain and Sale.]—The operation of an ordinary deed of bargain and sale under the Short Forms Act, R. S. O. 1877 c. 102, conveying lands to trustees, considered and acted on. *Seaton* v. *Lunney*, 27 Gr. 169.

Security—*Covenant to Stand Seised—Consideration — Legal Estate — Statute of Uses.*]—In ejectment, the plaintiff claimed under a sealed instrument executed in his favour by one M., and witnessing that, in consideration of prior indebtedness for professional services, and to secure plaintiff for future services of the same kind, and of the sum of £25 already paid and advanced by plaintiff to him, &c., he, M., covenanted, granted, and agreed that he would stand seised and possessed of the land in question, to the use of plaintiff, his heirs and assigns, by the way of charge, security, and mortgage on the land for said moneys and costs, and when plaintiff's costs were taxed he was to be at liberty to hold the instrument as and by way of a charge, mortgage, and security upon the land for the amount so to be ascertained, or M. would, and he covenanted that he, or his heirs, would, on demand, execute a good and sufficient mortgage in law, with bar of dower, if necessary, and usual covenants, &c.:—Held, that it could only operate under the Statute of Uses, as being granted on a money consideration, which appeared from the express recitals contained in it. Quære, whether the plaintiff took the legal estate, so as to enable him to maintain ejectment. *Miller* v. *Stitt*, 17 C. P. 559.

Will—*Devise — Statute of Uses — Legal Estate.*]—To an action for rent defendant pleaded, on equitable grounds, that W., by his will, devised all his lands to the plaintiffs in trust for the sole benefit of J. during her life, under which she claimed and received from them the rent:—Held, that by the devise, as thus stated, the legal estate was vested in J. under the Statute of Uses. *Fair* v. *McCrow*, 31 U. C. R. 599.

IX. Miscellaneous Cases.

Attaching Trust Moneys.]—See *Lloyd* v. *Wallace*, 9 P. R. 335.

Charitable Trust.]—See *Attorney-General for Nova Scotia* v. *Axford*, 13 S. C. R. 294.

Church—*Secession—Right to Property—Enforcement of Trust.*]—See *Brewster* v. *Hendershot*, 27 A. R. 232. See also CHURCH.

Clergy Commutation Trust.] — See *Wright* v. *Incorporated Synod of the Diocese of Huron*, 11 S. C. R. 95.

Criminal Breach of Trust—*Larceny.*] —See *McIntosh* v. *The Queen*, 23 S. C. R. 180.

Enforcement of Contract for Benefit of Third Party—*Absence of Trust.*]—See *Henderson* v. *Killey*, 17 A. R. 456; *Osborne* v. *Henderson*, 18 S. C. R. 698; *Re McMillan*, 17 O. R. 344; *Burris* v. *Rhind*, 29 S. C. R. 498; *Edmison* v. *Couch*, 26 A. R. 537.

Enforcement of Immoral Trust.]—See *Byron* v. *Tremaine*, 31 N. S. Rep. 425, 29 S. C. R. 445.

Escheat of Trust Estates.]—See *Re Adams*, 4 Ch. Ch. 29.

Insolvent Firm—*Trustees of — Indorsement to.*]—An indorsement to pay to the trustees of an insolvent firm, without naming them, is sufficiently certain. *Auldjo* v. *McDougall*, 3 O. S. 199.

Insurance Moneys — *Account of.*]—B. having insured a mill erected on lands conveyed to him in trust to sell and after paying his own debt to pay over the surplus to A., and having received the insurance money:—Quære, whether he was accountable to A. therefor. Semble, he was not. *McPherson* v. *Proudfoot*, 2 C. P. 57.

Loss on Investment—*Apportionment between Life Tenant and Remainderman.*]—Where a loss occurs under a mortgage of trust funds, the income of which is payable to a life tenant, the loss should be apportioned between the tenant for life and the remainderman by adding the amount actually realized from the security to the amount of interest theretofore received by the tenant for life and dividing the whole sum between the latter and the remainderman in the proportion in which they would have been entitled to share if the security had been paid in full, the tenant for life giving credit for the amounts already received. In re Foster, Lloyd v. Carr, 45 Ch. D. 629, followed. *In re Plumb*, 27 O. R. 601.

Misapplication of Moneys Assessed under Drainage By-law—*Trust Created.*] —See *Smith* v. *Township of Raleigh*, 3 O. R. 405.

Money Lent to Trustee—*Liability of Trust Estate.*]—Action against the trustee of an estate to recover money lent to a former trustee. The trust deed gave the trustee power to borrow money on mortgage. The trustee represented to the plaintiff that the money lent was for the use of the estate, and gave him a promissory note signed "G. H. L., trustee of E. I. S." and indorsed by G. H. L. The trial Judge held that the trustee was acting within his powers, or, if not, that he got the money on the promise that he would exercise the power, and that the trust estate was liable:—Held, reversing this judgment, that there was no evidence of such a promise, and, the estate not having had the benefit of the money, the trustee would not have been entitled to indemnity, and the plaintiff's right was only to be placed in the same position as the trustee. *Connor* v. *Vroom*, 24 S. C. R. 701.

——— *Remedy of Lender.*]—A party making advances to trustees for the benefit of a trust estate, which advances are applied to the purposes of the trust, is entitled to stand pro tanto in the place of the trustees as against the trust estate. *Mills* v. *Cottle*, 17 Gr. 335.

See, also, *Ewart* v. *Steven*, 16 Gr. 193.

Money Paid for First Claim—*Legal Estate — Distribution — Title.*]—J. R. died leaving his estate to his widow and children. The estate having become involved, an absolute deed of all the realty was executed in favour of one of the testator's children, by the widow and other children, the grantee undertaking to pay off the liabilities and reconvey the lands on repayment of the amounts advanced to her. A portion of the land was sold for taxes, and the purchaser, to perfect his title, obtained quit claim deeds from all the heirs of the testator. Similar deeds had previously been given for other portions of the estate, and the moneys paid for the same equally distributed among the children and grandchildren of the testator. Before the distribution of the money paid by the purchaser at the tax sale in the last case, as the consideration for the quit claim deeds, the trust deed, which had been mislaid, was discovered, and the grantee having died, her children claimed the whole of the money. The other heirs of the testator brought this action for their respective shares:—Held, that the purchaser at the tax sale paid the money to obtain a perfect title, and, as the defendants, the children of the trustee, were the only persons who could give such title, the legal estate being in them, the plaintiffs could not claim any part of the money, and that no agreement to apportion the money was proved, any agreement made by the plaintiffs with the purchaser not binding the defendants. *Draper* v. *Radenhurst*, 21 S. C. R. 714.

Perpetuities—*Rule against—Receipt of Rents—Account—Costs.*]—The owner of real estate conveyed the same absolutely, receiving back a bond declaring the conveyance to be in trust to receive the rents, &c., and account therefor to the grantor; and in the bond was reserved a right to the obligor and his heirs to purchase the property. Upon a bill filed to set aside this agreement as infringing the rule against perpetuities, and for an account of the rents and profits received:—Held, that, even if the agreement were within the rule, it was good for the life of the grantee; and an account of rents was directed, reserving the question of costs until after report, the bill not alleging any application for an account. *Kenrick* v. *Dempsey*, 5 Gr. 584.

Preferred Claim of Trustee—*Mistake in Decree—Assignment.*]—Where a decree by mistake gave a trustee priority, in respect of a debt due to him by the estate, over other claims:—Held, on application to correct the error, that an assignment for value executed by the trustee after the decree, was no answer to the application, and that the assignee took subject to all equities to which the trustee himself was subject. *Wood* v. *Brett*, 14 Gr. 72.

Reconveyance of Trust Property—*Right of Equitable Tenant in Fee Simple.*] —See *Farrell* v. *Cameron*, 29 Gr. 313.

Release—*Rescission—Breach of Trust—Laches—Account.*]—E. M. died intestate in 1871, and his brother and business partner, H. M., obtained from his widow and his father, as next of kin, a release of their respective interests in all real and personal property of the deceased. In getting this, he represented that the estate would be sacrificed if sold at auction and that the most could be made out of it by letting him have full control. He then took out letters of administration, but took no further proceedings in the probate court, and managed the property as his own until he died in 1888. During that time he wrote several letters to the widow, in most of which he stated that he was dealing with the property for her benefit, and would see that she lost nothing by giving him control of it. After his death, the widow brought an action against his executors for an account of the partnership and of his dealings with the property since her husband's death; also to obtain payment of her share; and to set aside the release. The defendants relied on the release as valid, and also pleaded the plaintiff's laches:—Held, that the release should be set aside; that it was given in ignorance of the state of the partnership business and E. M.'s affairs, and the plaintiff was dominated by the stronger will of H. M.; that the latter had divested himself of his legal title by admitting in his letters a liability to the plaintiff, and must be treated as a trustee; that, as a trustee, lapse of time would not bar the plaintiff from proceeding against him for breach of trust; and that the delay in pressing the plaintiff's claim was due to H. M. himself, who postponed from time to time the giving of a statement of the business, when demanded by the plaintiff. *Mack* v. *Mack*, 23 S. C. R. 146.

Statute Vesting Lands in Trustee—*Effect of Title.*]—The provincial statute 1 Wm. IV. c. 26, vesting in a trustee certain lands belonging to the estate of the late Laurent St. George, has not the effect of raising a presumption of title in the particular lands enumerated in the schedule, so as to relieve his trustee from the necessity of shewing title in the first instance. *Doe d. Baldwin* v. *Stone*, 5 U. C. R. 388.

Stock Subscription by Trustee.]—A bonâ fide subscription for stock in a corporate company by one person in his own name, but really as trustee and agent for another, who has requested such stock to be subscribed for, is valid. *Davidson* v. *Grange*, 4 Gr. 377.

Transfer of Estate—*Transfer of Trusts.*]—A transfer of the estate does not necessarily involve the transfer of trusts or powers as inseparable incidents of the estate. *Re Gilchrist and Island*, 11 O. R. 537.

Vendor and Purchaser—*Purchaser in Possession—Implied Trust—Tenant at Will.*]—Sub-section 8 of s. 5 of R. S. O. 1887 c. 111 (R. S. O. 1897 c. 133) applies to the case of an implied trust, and a purchaser in possession with the assent of his vendor, and not in default, is, therefore, not to be deemed to be a tenant at will to his vendor within the meaning of s.-s. 7 of that section. Warren v. Murray, [1894] 2 Q. B. 648, applied. Judgment in 28 O. R. 92 affirmed. *Irvine* v. *Macaulay*, 24 A. R. 446.

See BANKS AND BANKING, IV. V.—CHURCH, IV. 2, 3—CRIMINAL LAW, IX. 13—EVIDENCE, XIII.—EXECUTORS AND ADMINISTRATORS — IMPROVEMENTS, II.—LIMITATION OF ACTIONS, II. 17, IV. 5, VII.—MONEY, II. 12—PARTIES, II. 14—RAILWAY, IV. 4—RECEIVER, I. 2 (a)—SCHOOLS, COLLEGES, AND UNIVERSITIES, III., IV. 8.—WILL.

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